

30 MAY 2008

**CHAMBER OF MINES
OF SOUTH AFRICA**

**COMMENTS TO THE
PORTFOLIO
COMMITTEE ON MINERALS
AND ENERGY**

**ON CERTAIN OF THE
AMENDMENTS PROPOSED IN
THE MINERAL AND
PETROLEUM RESOURCES
DEVELOPMENT
AMENDMENT BILL
[B10D-2007]**

INTRODUCTION

The Chamber is most grateful for the opportunity to submit comments to the Portfolio Committee on Minerals and Energy on the Mineral and Petroleum Resources Development Amendment Bill [B10D-2007].

THE FOCUS OF OUR COMMENTS

The Chamber's comments are confined to clauses which will amend sections of the Mineral and Petroleum Resources Development Act, 2002 ("**the Act**") that were not tabled for amendment in the Mineral and Petroleum Resources Development Amendment Bill [B10-2007] as introduced in the National Assembly and on which the Chamber, therefore, did not previously have an opportunity to comment.

Our comments are in two parts.

Part A deals with substantive issues.

Part B deals with drafting issues which, if not corrected, would have important adverse consequences.

(We have identified various other drafting and typographical errors, but will not burden this document with them.)

PART A: SUBSTANTIVE ISSUES

1. CLAUSES 1(t) AND (u) : AMENDED DEFINITIONS OF “RESIDUE DEPOSIT” AND “RESIDUE STOCKPILE”

Existing provision in the Act

The existing definition of “*residue stockpile*” covers residues that are stockpiled, stored, accumulated or disposed of by the holder of mining rights, mining permits or production rights granted in terms of the Act. The Chamber has consistently been advised, and the court in *De Beers Consolidated Mines Ltd v Ataquia Mining (Pty) Ltd & Others* (unreported OPD Case 3215/2006, 13 December 2007, in respect of which the Minister has applied for leave to appeal) has now held, that the definition does not encompass residues produced under old forms of rights or titles granted in terms of legislation that preceded the Act.

As a result, and since the definition of “*residue deposit*” uses the term “*residue stockpile*”, old dumps or residues are also not encompassed within the definition of “*residue deposit*”.

Provision in the Bill as Introduced

The Bill as introduced did not deal with this topic.

Proposed in Bill B10D

Clauses 1(t) and (u) provide for the definitions of “*residue deposit*” and “*residue stockpile*” to be amended by the addition of the underlined words set forth below:

“residue deposit’ means any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit, exploration right, production right, or an old order right.”

“residue stockpile’ means any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit, production right or an old order right.”

The Issue

On the assumption that these definitions in the amended Bill include residues that were produced under mining titles that have lapsed, the amendments will result in an expropriation of the residues in much the same way as if a quantity of gold, diamonds or other minerals separated from the land from which they originated had been expropriated. This will expose the State to significant potential claims for compensation.

In their current form, the definitions do not include residues that were produced in terms of old forms of rights or titles. Such residues are the movable property of the entity that lawfully mined them having expended labour and cost or subsequently acquired them, in the same way as if a sack of minerals (e.g. coal, gold or diamonds) were lying on the ground. In ordinary meaning, working of residues constitutes processing not mining, the concept “*mining*” having for the first time in the Minerals Act, 1991 been artificially attributed not only to actual mining in the earth, but also to working in tailings.

If the old residues are held in terms of an **unused** old order right or an old order **prospecting** right, then:

- The time periods in Schedule II to the Act for the owners to apply for new rights will have expired (items 8(1) and (2) and 6(1) and (2), respectively of Schedule II)
- The residues would fall with the definition of “*residue deposit*”
- The State would become the custodian of the residues (by section 3(1) of the Act)
- Nobody could lawfully mine the residues without a mining right (by section 5(4) of the Act)
- Anybody would be at liberty to apply for a mining right in relation to the residues (under section 22 of the Act)
- These effects of the amendments to the definitions of “*residue deposit*” and “*residue stockpile*” will constitute expropriation of the old residues since the most important rights of ownership over them will have been removed by the State

If the old residues are held in terms of an old order **mining** right, then:

- The holder may apply for conversion (under item 7(2) of Schedule II to the Act)
- The residues would fall within the definition of “*residue stockpile*” having been produced by the holder of an old order right
- When the old order mining right ceases to exist, the residues will fall within the definition of “*residue deposit*”
- The State would become the custodian of the residues (by section 3(1) of the Act)
- Nobody would be able to mine the residues without a mining right (by section 5(4) of the Act)
- Any person would be at liberty to apply for a mining right in relation to the residues (under section 22 of the Act)

- This will amount to an expropriation of the residues

The Chamber submits that the existing definitions in the Act correctly reflect that old residues were not intended to be expropriated.

What Needs To Be Done

The proposed insertion of the words “*or old order right*” in the definitions of “*residue deposit*” and “*residue stockpile*” should be deleted.

2. **CLAUSES 13(f) (s17(4A)), 19(c) (s23(2A)) and 83(d) (item 7(3C) in SCHEDULE II) : COMMUNITY PARTICIPATION**

Existing provisions in the Act

Community participation in mining is currently facilitated by way of the empowerment requirements in the Mining Charter. The provisions in the Act governing the conditions applicable to the granting of prospecting rights (s17), mining rights (s23) and the conversion of old order mining rights (Item 7 of Schedule II) do not deal with community participation.

Provisions in the Bill as introduced

The Bill as introduced did not deal with the above topic.

Proposed in the amended Bill [B10D-2007]

The above clauses propose empowering the Minister to impose conditions requiring the participation of the community if an application relates to land occupied by a community.

The Issue

A company may have already concluded an agreement as envisaged in the Mining Charter, whereby it has achieved empowerment of 26%, and then lodges an application for conversion, as part of the grant of which the Minister in addition requires community participation. The imposition of a requirement for community participation over and above the 26% ownership requirement in the Mining Charter would result in a potential duplication.

What Needs To Be Done

- Since community participation is not a requirement in the Mining Charter, which was the product of the Minister's consultative process, it is suggested that these new provisions be deleted
- If the new provisions are retained, the Chamber urges that at the end of the proposed s17(4A), s23(2A) and Item 7(3C) of Schedule II the following proviso be inserted:

“provided however that:

- (a) *compliance with any such conditions shall rank towards fulfilment of the applicant's compliance with requirements to further the objects in sections 2(d) and (f) in accordance with the Charter contemplated in section 100 and any prescribed social and labour plan;*

- (b) *in contemplating the imposition of any such conditions, the Minister shall take into account arrangements already concluded by the applicant in furtherance of the objects in sections 2(d) and (f) in accordance with the Charter contemplated in section 100 and any prescribed social and labour plan, prior to the date on which the Minister considers imposing such conditions;*
- (c) *any such conditions shall not, when considered together with arrangements already concluded by the applicant in furtherance of the objects in sections 2(d) and (f) in accordance with the Charter contemplated in section 100 and any prescribed social and labour plan, exceed the requirements of sections 2(d) and (f) in accordance with the said Charter and any prescribed social and labour plan.”*

3. **CLAUSES 31(s38) AND 33 (SS39, 40, 41 AND 42) READ WITH THE NATIONAL ENVIRONMENTAL MANAGEMENT AMENDMENT Bill B36B – 2007**

To improve alignment of the environmental functions of the DME with the National Environmental Management Bill B36B-2007, it is proposed that the portfolio committee on minerals and energy should recommend the following refinement to Bill36B-2007:

The National Environmental Management Amendment Bill B36B – 2007

- (i) Clause 1(k), definition of Minister: this should be amplified by the insertion at the end thereof by the words “and in the case of the aforementioned excepted environmental matters means the Minister of Minerals and Energy”.
- (ii) Clause 2 (s24):
 - proposed s24(5)(b)(vi) to (x): it needs to be made clear that these procedures will be laid down by the Minister of Minerals and Energy not by the Minister of the Environment: consider the definitions of “Minister” and “Minister of Minerals and Energy”, which, unless as amended as suggested above, leave the position unclear.
 - proposed s24(5)(b)(viii): mine closure remains governed by s43 of the MPRDA, so that paragraph (viii) should be deleted.
- (iii) Clause 2(s24N(6))
 - the reference to “an amended Environmental Management Programme should be amplified by the words “or an amendment to an environmental management programme”.
- (iv) Clause 2 (s24R)(4) and (5))
 - these powers should be accorded to the Minister of Minerals and Energy
- (v) Clause 9 (s42B)
 - it would be preferable if delegations by the Minister of Minerals and Energy were to occur in terms of s103 of the MPRDA rather than in terms of s42B of NEMA. If s42B is retained, it would be preferable if it were to be worded identical to s103 of the MPRDA so as to harmonise delegations under NEMA with delegations under the MPRDA.
- (vi) Clause 10(s43(1A) and (1B)):
 - The concept of an appeal from one Minister to another Minister is fundamentally abhorrent. The proposed s43(1A) should therefore be

deleted and replaced by a provision indicating that no appeal lies from a decision of the Minister of Minerals and Energy, so that anyone detrimentally affected by decision of the Minister of Minerals and Energy would be able to take the matter on judicial review directly in terms of the Promotion of Administrative Justice Act, 2000.

- Appeals from delegates of the Minister of Minerals and Energy should be stated to be governed by s96 of the MPRDA instead of the proposed provision in s43(1)(B) of NEMA.
 - Generally, the prospect of differing appeal and review proceedings relating to the grant of the right and to the issue of the environmental authorisation is undesirable, since the timing and procedures will be out of line.
- (vii) Clause 12(1): this should refer additionally to provisions repealed or amended by the Mineral and Petroleum Resources Development Amendment Act, 2008.
- (viii) Clause 12(2): should refer additionally to any applications made in terms of provisions repealed or amended by the Mineral and Petroleum Resources Development Amendment Act, 2008.
- (ix) Clause 12 should contain a further sub-clause indicating that regulations made in terms of provisions repealed by the Mineral and Petroleum Resources Development Amendment Act, 2008 will remain in force until amended or repealed in terms of NEMA: compare s68(2) of the Minerals Act, 1991, which in part read:
- “any regulation made under the Mines and Works Act, 1956 and in force immediately prior to the commencement of this Act, shall, notwithstanding the repeal of the first mentioned Act by sub-section (1) remain in force until amended or repealed under section 63 ...”.
- (x) Clause 12(4) should go further and provide that plans and programmes approved in terms of s39 or which remained in force in terms of item 10 in Schedule II, of the MPRDA, are deemed to constitute environmental authorisations.
- (xi) Clause 13: N.B.: This seems to be contrary to the agreement reached between the two Ministers in that it would remove all jurisdiction of the Minister of Minerals and Energy after 36 months and vest jurisdiction solely in the Minister of the Environment. Clause 13 and the schedule therefore fall to be deleted, so that the powers accorded to the Minister of Minerals and Energy would continue to apply even after 36 months.
- (xii) Chapter 7 of NEMA should be stated not to apply to matters which fall under the jurisdiction of the Minister of Minerals and Energy and it should be stated that chapter 7 of the MPRDA will apply also to matters governed by NEMA

Existing provisions in the Act

The existing provisions in the Act are ss38, 39, 40, 41 and 42

Provisions in Bill B10D

Clauses 31 and 33 propose to repeal ss38, 39, 40, 41 and 42 so that the matters currently regulated in terms of those sections will henceforth be regulated in terms of the National Environmental Management Act, 1998 as proposed to be amended by the National Environmental Amendment Bill B36B – 2007.

The Issue

In terms of clause 94 of Bill B10D, the Amendment Act will come into operation on a date fixed by the President by proclamation in the Gazette. However, in terms of clause 14(2) of Bill B36B, the corresponding new provisions take effect 18 months after the later of the commencement of s2 of the National Environmental Management Amendment Act, 2008 and the Mineral and Petroleum Resources Development Amendment Act, 2008. The two commencing provisions do therefore not accord.

What Needs To Be Done

Clause 94 of Bill B10D needs to provide that sections 31, 32 and 33 take effect 18 months after the later of the date in clause 94(1) and the date of commencement of the National Environmental Management Amendment Act, 2008, so that the repeals in Bill B10D and the taking effect of the corresponding new provisions in Bill B36B, occur simultaneously. See also the comments on clause 94 below.

4. **CLAUSE 32(SS 38A AND 38B) : ENVIRONMENTAL AUTHORISATIONS**

Existing Provisions In The Act

The existing provisions are those proposed to be repealed in terms of clauses 31 and 33 in Bill B10D.

Provisions In The Bill As Introduced

The Bill in itself proposed to provide for environmental authorisations.

Provisions In Bill B10B

Clause 4 of Bill B10B proposed to insert a new s4(3) which would have rendered the National Environmental Management Act, 1998 inapplicable to matters governed by the Mineral and Petroleum Resources Development Act, 2002.

Provisions In Bill B10D

The proposed ss38A and 38B as contained in clause 32 of the Bill now cross-refer to the corresponding new provisions in the National Environmental Management Amendment Bill B36B.

The Issues and what falls to be done

- (a) As mentioned above, the commencement date of clause 32 read with clause 94 of Bill B10D needs to be aligned with the corresponding commencement date in clause 14(2) of Bill B36B.
- (b) The proposed s38A in Bill B10D endures in perpetuity whereas the corresponding clause 13 in Bill 36B has the effect that the jurisdiction of the Minister of Minerals and Energy endures for only 18 months. The Chamber submits that the proposed s38A correctly gives effect to the agreement between the Ministers and the Deputy President, and that clause 13 of and the Schedule to Bill 36B fall to be deleted.
- (c) The wording of the proposed s38B(1) should be clarified to provide that an environmental management plan or programme approved or which remains in force in terms of s39, or item 10 in Schedule II, in the Mineral and Petroleum Resources Development Act, 2002 is deemed to constitute an environmental authorisation. The proposed s38B(1) should thus read:

“38B(1) An environmental management plan or environmental management programme approved in terms of this Act before and at the time of the coming into effect of the National Environmental Management Amendment Act, 2008 shall be deemed to be an environmental authorisation issued in terms of the National Environmental Management Act, 1998.”.

- (d) The wording of the proposed s38B(2) should accord with that in item 10(2) in Schedule II to the Mineral and Petroleum Resources Development Act, 2002, so that it should read as follows:

“(2) Subsection (1) does not prevent the Minister from directing the amendment of an environmental management plan or environmental management programme contemplated therein in order to bring it into line with the requirements of the National Environmental Management Act, 1998.”.

- (e) As stated above, it would be preferable if an environmental management plan or programme were deemed to constitute an environmental authorisation, thus rendering the proposed s38B(3) unnecessary and capable of deletion.
- (f) The proposed s38B needs to go considerably further than it currently does, and should reflect some of the concepts in clause 12 of Bill B36B. Thus the following new sub clauses should be added to clause 38B:

“(4) Anything done or deemed to have been done under a provision repealed or amended by the Mineral and Petroleum Resources Development Amendment Act, 2008 is considered to be an action under the corresponding provision of the National Environmental Management Act, 1998.

(5) An application submitted under a provision repealed or amended by the Mineral and Petroleum Resources Development Amendment Act, 2008 and that is pending when the latter Act takes effect must, despite the latter Act, be processed to finality as if the latter Act had not been passed, and shall thereafter be regarded as an application granted before the latter Act took effect.

(6) Any regulation made under this Act and in force immediately prior to the commencement of the Mineral and Petroleum Resources Development Amendment Act, 2008 shall, notwithstanding the repeal or amendment of provisions by the latter Act, remain in force until amended or repealed under this Act or under the corresponding provisions of the National Environmental Management Act, 1998.”.

5. **CLAUSE 72 CONCERNING AMENDMENTS OF RIGHTS, PERMITS, PROGRAMMES AND PLANS**

Existing provision in the Act

Section 102 currently provides that, subject to the written consent of the Minister, rights and permits may be amended in various ways and, in particular, by extending their area or by adding minerals or a share or shares or seams, mineralised bodies, or strata.

Provision in Bill as introduced

Clause 73 in the Bill as introduced proposed necessary unrelated amendments to s102 but did not contain the undermentioned s102(2) which now appears in Bill B10D.

Proposed in the Bill B10D

Clause 72 of B10D-2007 would amend section 102 so as to preclude any amendment under that section that would:

- Extend an area or portion of an area
- Add a share or shares of the mineralized body

(unless the omission of the relevant area or share resulted from an administrative error).

The Issue

The facility for extending an area or adding shares is a necessary mechanism in practice. If a new right has to be acquired for such extended areas or added shares, the consequence is that the extended area or added share is regarded as a separate operation. Thus for example in terms of the Act itself, an extended area would for purposes of the obligations of the holder be regarded separately thus obliging the holder, for example, in terms of ss19(2)(b) and (c) and 25(2)(b) and (c) to commence operations within 120 days or one year of the effective date of the separate right and thereupon to conduct operations continuously, notwithstanding that the extending area is in effect part of the same operation and that operations in such extended area will logically occur only in accordance with the progression plan in regard to the entire unitary operation. There would also be consequences in terms of other legislation such as in terms of s36(7F) of the Income Tax Act, 1962 in regard to ring fencing of the extended area or added share for income tax purposes, or in terms of the definition of “mine” in s102 of the Mine Health and Safety Act, 1996 in regard to the extended area or added share being regarded as a separate mine.

Should the problem be that an application for Ministerial consent in terms of s102 cuts across the comprehensive procedure in regard to applications for new rights (including in regard to the order of processing thereof) then it is suggested that the applicant be obliged to follow the normal procedure for applications for the relevant type of permit, permission or right, but that effect be given thereto by way of an amendment or variation should the applicant so request.

What Needs To Be Done

- (a) It is submitted that the proposed amendment to section 102 is wrong in absolutely precluding extensions of areas and the addition of minerals. Provision should be made to retain the possibility of reasonable extensions or additions such as those referred to above.
- (b) It is suggested that the proposed s102(2) be deleted and that the existing wording in parenthesis in section 102, i.e. “*including by extension of the area covered by it or by the addition of minerals or a share or shares or seams, mineralised bodies, or strata, which are not at the time the subject thereof*” be retained, but that a proviso be inserted at the end of section 102 to the effect that if the amendment or variation relates to such extension of area or to such addition of minerals or share or shares or seams, mineralised bodies or strata, the applicant for such Ministerial consent must lodge an application in terms of sections 13, 16, 22, 27, 31, 76, 74, 78 or 83 as the case may be, read with section 102, and that should such application be granted, it will, should the applicant so request, be given effect to by way of an amendment of or variation to the existing permission, permit or right concerned.

6. **CLAUSE 83(d): SUBITEMS 7(3A) AND 7(3B) OF SCHEDULE II CONCERNING THE CONVERSION OF OLD ORDER MINING RIGHTS**

Existing provision in the Act

A major object of the Act as stated in section 2(g) and in Item 2 of Schedule II is to ensure security of tenure for lawfully operating mines and a smooth transition from old order to new order mining rights. For this reason, Item 7 of Schedule II to the Act does not currently empower the Minister to refuse a conversion.

Provisions in Bill as Introduced

The above topic was not addressed in the Bill as introduced.

Proposed in Bill B10D

The amended Bill proposes inserting new subitems 7(3A) and 7(3B) into Schedule II which would oblige the Regional Manager to request an applicant for conversion to comply with the remaining requirements for conversion, failing which the Minister would be obliged to refuse the conversion. (For example, a company may lodge papers for conversion which, on the interpretation of the Regional Manager, do not comply with the requirements of the Mining Charter, resulting in compulsory refusal by the Minister of the conversion before all reasonable avenues for discussion and compliance have been exhausted.)

The Issue

The new subitems 7(3A) and 7(3B) will oblige a Regional Manager to request an applicant for the conversion of an old order mining right to comply, within 60 days, with all the requirements for conversion, failing which compliance the Minister will be obliged to refuse the conversion. In its current form, Item 7 is attuned to the international mining investor requirement of security of tenure. Item 7 was framed in such a way that conversion would be granted and would not be refused or subjected to a rigid time limit. The Chamber believes that the investor community has always regarded this as an important feature of the Act. The proposed power and potential obligation to refuse a conversion severely detracts from this.

The proposed new subitems do not take into account the dire consequences that any such premature refusal would visit not only upon the applicant mining company but also upon the workforce, investor confidence and share prices.

The Regional Manager's request that an applicant for conversion must, within 60 days, remedy what the Regional Manager considers to be deficiencies in the documents lodged for the conversion may well be too short.

What Needs To Be Done

In the interests of achieving the Act's object of providing security of tenure in respect of mining operations, clause 83(d) insofar as it proposes to insert new subitems 7(3A) and 7(3B) should be deleted.

7. **THE DRAFT MINERAL AND PETROLEUM RESOURCES ROYALTY BILL, 2007 AND ITEM 11 IN SCHEDULE II TO THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT ACT : SUGGESTED NEW CLAUSE 87 bis**

Existing Provision in Act

Item 11 in Schedule II to the Act provides that notwithstanding the cessation of existence of old order mining rights by virtue of item 7 in Schedule II to the Act, contractual royalties and consideration that were payable to communities continue to accrue to them.

Provision in Bill as introduced

This topic was not addressed in Bill B10 as introduced.

Provision in Draft Royalty Bill, 2007

Since the Chamber submitted comments to the Portfolio Committee on the Bill as introduced, it has emerged that the above topic is unlikely to be addressed in the draft Mineral and Petroleum Resources Royalty Bill, 2007.

The Issue

The result of the co-existence of item 11 in Schedule II to the Act, and of the obligation to pay State royalties in terms of the draft Royalty Bill, 2007 once enacted without set-off or deduction of amounts payable to communities in terms of item 11, is a duplication of royalty payments by the holder of the mining right, namely once to the communities and again to the State. As in so many other instances, in order to understand the problem of double royalties, it is necessary to go back to the origin of the matter. This therefore is described in what follows, and is also depicted diagrammatically on the annexure hereto.

(a) **Origin of royalties payable to communities**

The origin of the royalties payable to communities is that the communities were the holders of the mineral rights in respect of their land. As such they conferred on mining companies the right to mine for minerals on their land in return for a royalty, this being achieved in various ways such as mineral leases or cessions of mining leases.

(b) **Effect of the Mineral And Petroleum Resources Development Act, 2002 generally**

The primary effect of the Mineral and Petroleum Resources Development Act, 2002 was to take away from mineral right holders, including thus communities which were mineral right holders, their mineral rights, and to render the State the custodian of the mineral resources which were previously the subject of such mineral rights. The secondary effect was therefore to take away from such mineral right holders who had conferred the right to mine (whether in mineral leases or otherwise) their ability to continue conferring the right to mine and hence their right to continue to receive the royalty stream. The State therefore by such taking away, owes the mineral right holders the amount of the lost royalty stream. Conversely however, the State as custodian of the mineral resources is entitled to receive a royalty from the mining companies.

(c) **Effect of the Act on communities**

The Act in item 11 in Schedule II however made a special arrangement insofar as communities were concerned, namely to provide that royalties payable to communities continued to be payable notwithstanding that the communities' mineral rights had been taken away and notwithstanding that the mineral resources which previously vested in the communities now fall under the custodianship of the State. In essence therefore, the State stipulated that the mining companies should instead of paying the State as custodian of the mineral rights, pay the State's creditors, namely the communities, the royalty stream of which the State had deprived the communities and which thus the State now owes to the communities. Colloquially thus, the State said to the mining companies : "*Don't pay me, pay my creditor, the community*".

(d) **Effect of the draft Royalty Bill, 2007 once enacted**

The draft Royalty Bill does not contain any provision whereby royalties paid by mining companies to communities in terms of item 11 in Schedule II to the Act are deductible from the royalties payable to the State, so that the anomaly results that the State, having obliged the mining companies to continue paying the State's creditors, the communities, and notwithstanding that the mining companies give effect to that requirement, then additionally requires the mining companies to pay what are really the self-same royalties for the self-same right to mine, to the State. That is not logical, arithmetical, or equitable, and in fact in a private law context would be unconscionable.

(e) **Conversion of community royalties into equity**

National Treasury has suggested that to alleviate the above problem, mining companies should convert the royalties into equity in the mining companies. The Chamber continues to submit that this does not remove or even alleviate the problem. All that it achieves is a present-valuing of the total royalty stream over the life of mine, into a commuted lump sum payable now, which is then used by the community to purchase equity in the mining company. That however does not have the effect of removing the royalty but simply of converting it into a lump sum payable now. The duplication of community royalties and of State royalties

thus persists, albeit in a different guise. Moreover, as conceded in National Treasury's response document dated 13 May 2008 to the Parliamentary Portfolio Committee on Finance, there is nothing compelling communities to convert the royalties in this way, and, in the words of that document, paragraph 2.1.3, "... *if communities prefer to continue to receive royalty payments they are free to choose so*". National Treasury's suggestion of such conversion therefore simply deflects the issue and does not solve it.

What Needs To Be Done

The Chamber suggests that a new clause 87 *bis* be inserted into Bill B10D to the following effect:

"Amendment of Item 11 to Schedule II to Act 28 of 2002

87 BIS. *Item 11 of Schedule II to the principal Act is hereby amended by the insertion of the following new subitem (8):*

- (8) *Without detracting from, but in partial satisfaction of any compensation which might otherwise be payable by the State in terms of, item 12:*
 - (a) *the State shall pay to the recipients contemplated in subitems (1) and (3) an amount equivalent to the consideration or royalties contemplated in subitems (1) and (3) as does not exceed the amount of State royalties received by the State from the person or persons who would otherwise be liable to pay such consideration or royalties contemplated in subitems (1) and (3); and*
 - (b) *the person or persons who would otherwise be liable to pay the consideration or royalties contemplated in subitems (1) and (3) shall pay the balance thereof (after deduction of the amount payable by the State in terms of subitem (8)(a)) to the recipients contemplated in subitems (1) and (3)."*

8. **CLAUSE 88(b) (ITEM 12(5)(c) IN SCHEDULE II) : PRESCRIPTION OF CLAIM TO COMPENSATION**

Existing provision in Act

Item 12 as currently formulated did not deal with commencement of running of prescription in respect of a claim for compensation.

Provision in the Bill as introduced

Clause 86(b) of the Bill as introduced provided for the addition to Item 12 of Schedule II to the Act of a subitem (5) to govern when prescription in respect of a claim for compensation shall commence to run in the following situations:

- (a) Where the Director-General has determined that the claim is invalid and the claimant has not appealed against that determination (proposed subitem (5)(a))
- (b) Where the Director-General has determined that the claim is invalid, the claimant has appealed against that decision to the Minister and the Minister has confirmed the Director-General's decision (proposed subitem (5)(b))
- (c) Where the Director-General has admitted the validity of the claim or the Minister has upheld an appeal against the Director-General's decision that the claim is invalid but no agreement on the amount of compensation has been reached within 180 days after the claimant has been informed of the Director-General's acceptance of the claim or the successful appeal to the Minister (proposed subitem (5)(c))

Provision as amended in B10B-2007

Clause 85(b) of B10B-2007 corresponded to clause 86(b) of B10-2007 as introduced in the National Assembly except that the proposed sub-item (5)(c) of Item 12 of Schedule II to the Act was omitted.

Provision in Bill B10D

Clause 88(b) has reinstated subitem (5)(c) but in slightly different wording, namely:

- "(c) where there is no agreement within 180 between the claimant and the Director-General on the amount of compensation or terms of payment thereof",*

which wording does not indicate when the 180 days (and incidentally the word "days" has also been omitted in error) mentioned therein begin to run.

The Issue

The proposed subitem (5)(c) performs an essential function in providing when prescription shall commence running if the validity of the claim has been admitted but the amount of compensation has not been agreed upon.

What Needs To Be Done

Clause 88(b) should be amended so as to clarify the date of commencement of the 180 day period therein contemplated, so as to read:

"(c) where no agreement is reached, within 180 days of the date on which the claimant has been informed in writing of the determination of the Director-General that the claim is valid or of the upholding by the Minister of the validity of the claim on appeal, between the claimant and the Director-General on the amount of compensation or the time and manner of payment thereof."

The above wording accords with that in regulation 82A(6A)(c) read with regulation 82A(6)(b).

9. **NEW CLAUSE 93 BIS : VALIDATION OF RIGHTS INVALIDLY GRANTED BY SUB-DELEGATES : THE MEEPO YA SECHABA JUDGMENT**

The Issue

The Chamber has raised with the Minister the possibility of a Validation Provision to remedy the problems identified below.

(a) **Findings of the court**

In *Meepo v Kotze & Others* 2008 (1) SA 104 (NC) the court found (at paragraph 47 read with paragraph 45.2 of the judgement) that the Regional Manager (of the DME) had acted *ultra vires* in executing Meepo's prospecting right, because the delegation by the Minister of Minerals and Energy to the Deputy Director-General prohibited further delegation to any other person, such as the Regional Manager, without the Minister's consent, which consent had not been granted. The prospecting right granted to Meepo was therefore found to be void. The court further held that in determining the terms and conditions of the right, the Regional Manager had again acted *ultra vires*.

(b) **Consequences of the Meepo judgement**

The finding of the court in the *Meepo* case has a bearing on the validity of all prospecting, exploration, mining and production rights executed notarily under power of attorney granted to Regional Managers and others by a delegate (such as the Director-General or the Deputy Director-General) of the Minister of Minerals and Energy. Such rights are now vulnerable should a third party institute proceedings for judicial review for setting aside of such rights or otherwise raise the invalidity of such rights.

The State did apply for leave to appeal against the judgement, but the application for leave to appeal and a subsequent petition to the President of the Supreme Court of Appeal for leave to appeal, was refused.

What Needs To Be Done

The Chamber proposes that the best way to protect existing rights would be in terms of a Parliamentary legislative validation by way of what is often referred to as a "*Validation Provision*". Such a remedy, unlike a subsequent conferral of power by the Minister in terms of s97(2) of the Act, would have the advantage that it is universal, i.e. does not rely on a case by case solution. The Chamber thus requests that a validation provision be inserted into Bill B10D as a new clause 93 *bis* as follows:

Validation Provision

93 bis. *"No prospecting right, exploration right, mining right or production right granted, or acquired on conversion, from the commencement date of the principal Act to date of commencement of this Act shall be invalid merely because of lack of authority of the person who determined and approved the terms and conditions thereof or granted or executed it on behalf of the Minister of Minerals and Energy, and all such rights be and are hereby ratified and validated."*

10. CLAUSE 94(1): COMMENCEMENT

Provision in Bill as Introduced

Clause 89(1) in the Bill as introduced has been carried forward into clause 94(1) of Bill B10D.

The Issue

- (a) As mentioned in relation to clauses 31, 32, and 33 in paragraph 3 (on page 10) above, clauses 31, 32 and 33 and indeed all related environmental provisions need to come into operation on the same date as is contemplated in clause 14(2) of the National Environmental Management Amendment Bill B36B.
- (b) Furthermore, it would provide greater flexibility if different dates could be fixed for the coming into operation of different provisions, as was done in s111(2) of the Mineral and Petroleum Resources Development Act itself.

What Needs To Be Done

The Chamber proposes that clause 94(1) be deleted and the following new clause 94(1) substituted therefor:

- "94 (1)** *This Act is called the Mineral and Petroleum Resources Development Amendment Act, 2008, and shall come into operation on a date fixed by the President by proclamation in the Gazette: provided however that notwithstanding the foregoing:*
- (a) *different dates may be so fixed in respect of different provisions of this Act; and*
 - (b) *Sections 1(g), (h) and (i), 4(d), 5, 12(a) and (d), 13(b), 14(a) and (c), 15(b), 18(a), (e) and (f), 19(a), 20(a) and (b), 21(b), 23(b), (e) and (f), 27, 29(a), 31, 32, 33, 34, 36, 37, 38(b), 39, 51, 53(d), 54, 57(d), 58(a), 59, 61(d), 64(b), 67, 69(a), 72, 75, and 76, come into operation on a date 18 months after the date of commencement of –*
 - (i) *Section 2 of the National Environmental Management Amendment Act, 2008; or*
 - (ii) *the said Sections in terms of this Act,**whichever is the later."*

11. CLAUSE 94(2) : COMMENCEMENT

Provision in the Bill as introduced

B10-2007 as introduced provided (in clause 89(2)) that “.... *section 87 is deemed to have come into operation on 1 May 2004*”. The reference to “*section 87*” was incorrect and should have referred to “*section 86*” being the compensation-related amendments to Item 12 of Schedule II to the Act set forth in clause 86 of that Bill.

Provision as amended in B10D-2007

The corresponding clause 94(2) in B10D-2007 has been amended to provide that “.... *Schedule II is deemed to have come into operation on 1 May 2004*”.

The Issue

The amendment in clause 94(2) appears to have been made by mistake because Schedule II came into operation, along with the other parts of the Act, on 1 May 2004 which is the date on which the Act came into operation by Presidential Proclamation in the Government Gazette. If this error is not corrected, the amendments to Item 12 of Schedule II provided for in clause 88 of Bill B10D will come into operation on a future date when the Bill becomes law and is brought into operation. This would defeat the purpose of those amendments, which should be deemed to have come into operation on 1 May 2004.

What Needs To Be Done

The error in clause 94(2) needs to be corrected by amending clause 94(2) to refer to the relevant part of the Bill (currently clause 88) to read:

“Despite subsection (1), section 88 is deemed to have come into operation on 1 May 2004.”

Alternatively, clause 94(2) could be amended to read:

“Despite subsection (1), the amendment to Item 12 of Schedule II set forth in section 88 is deemed to have come into operation on 1 May 2004.”

(Naturally, the reference to “*section 88*” in the amendments proposed above would need to be adjusted should the numbering of the clauses in the Bill change in the light of other amendments so that the reference will be to the number (currently 88) allocated to the clause containing the amendments to Item 12 of Schedule II to the Act.)

PART B: DRAFTING ISSUES

12. CLAUSE 1: DEFINITION OF BENEFICIATION

Provision in the Bill as Introduced

The Bill as introduced did not contain a definition of beneficiation.

Provision in Bill B10D

A definition of “*beneficiation*” appears in clause 1 of the Bill.

The Issue

Clause 22 of Bill B10D proposes to insert a new s26 (2A) whereby the Minister may prescribe the levels required for beneficiation. It is not possible for the Chamber meaningfully to comment on the proposed definition of “*beneficiation*” in clause 1 of Bill B10D in the absence of seeing the proposed regulations to be prescribed in terms of s26(2A). The Chamber therefore suggests that the definition of beneficiation in clause 1 be deleted and that such definition form part of the proposed regulations, on which the Chamber will then be able to comment holistically.

What Needs To Be Done

The definition of beneficiation in clause 1 should be deleted from Bill B10D and inserted into the draft regulations to be made in terms of s26(2A).

13. **CLAUSES 4 (s5) AND 5 (s5A): PROHIBITION AGAINST PROSPECTING ETC WITHOUT SPECIFIED ITEMS**

Existing Provision in the Act

Section 5(4) provides that no person may prospect etc without certain specified items.

Provision in the Bill as Introduced

Clause 4(d) proposed to amend s5(4) in certain respects.

Provision in Bill B10D

Clause 5 in Bill B10D proposes to insert a new s5A but without repealing the old s5(4).

The Issue

Clause 4 of Bill B10D by mistake omits what was clause 5(c) in Bill B10B whereby s5(4) is deleted, thus resulting in an inadvertent duplication of ss5(4) and 5A.

What Needs To Be Done

A new clause 4(d) needs to be inserted into Bill B10D which reinstates the wording of clause 5(c) in Bill B10B, namely reading:

“(d) by the deletion of subsection (4).”.

The reference in clause 69(s98(a)(i)) to s5(4) would need to be amended to delete reference thereto.

14. **CLAUSE 11(s15): RIGHTS AND OBLIGATIONS OF HOLDER OF RECONNAISSANCE PERMISSION**

Existing provision in Act

Section 15(1) entitles the holder of a reconnaissance permission after consulting the owner or lawful occupier, to enter the land.

Provision in Bill as Introduced

Clause 10(a) proposed to delete the reference to consultation.

Provision in Bill B10D

Clause 11 proposes to amend s15(1) to require the holder to give at least 14 days written notice to the owner or occupier.

The Issue

The amended s15(1) in clause 10 in its reference to 14 days notice conflicts with the proposed new s5A(c) in clause 5, which refers to 21 days notice.

What Needs To Be Done

The reference to 14 days in the amended s15(1) in clause 11 of the Bill needs to be replaced by a reference to 21 days.

15. CLAUSE 12(b) (s16(2)(c)): ACCEPTANCE OF APPLICATION FOR PROSPECTING RIGHT IF NO PRIOR ACCEPTED APPLICATION EXISTS

Existing Provision in Act

No similar provision currently exists in the Act.

Provision in Bill as Introduced

No similar provision was embodied in the Bill as introduced.

Provision in Bill B10D

Clause 12(b) proposes to amend s16(2) by inserting a new s16(2)(c) to the effect that an application for a prospecting right must be accepted if no prior application for a right or permit has been accepted for “*any*” mineral on the same land.

The Issue

- (a) The word “*any*” has been embodied in error in that all the equivalent clauses in the Bill (e.g. clause 18(c) whereby a new s22(2)(c) is to be inserted) refer to prior accepted applications for the “*same*” mineral.
- (b) A similar clause should also appear in clause 9(s13(2)(c)) dealing with applications for reconnaissance permissions.

What Needs To Be Done

- (a) In the proposed new s16(2)(c) in clause 12(b), the word “*any*” should be replaced by the word “*same*”.
- (b) A new clause 9(b) should be inserted whereby a new s13(2)(c) is inserted reading:

“(c) no prior application for a prospecting right, mining right, mining permit or retention permit has been accepted for the same mineral on the same land and which remains to be granted or refused.”.

16. CLAUSES 13(b), (s17(1)(c)), 19(a)(s23(1)(d)) AND 54(s75(1)(a)) : GRANT OF PROSPECTING OR MINING RIGHT OR RECONNAISSANCE PERMIT IF NO UNACCEPTABLE POLLUTION

Existing provision in Act

Sections 17(1)(c), 23(1)(d) and 75(1)(c) provide that the Minister must grant a prospecting right, mining right or reconnaissance permit if the prospecting, mining or reconnaissance will not result in unacceptable pollution, ecological degradation or damage to the environment.

Provision in Bill as introduced

Clauses 12(b) (s17(1)(c)) and 18(a) (s23(1)(d)) proposed to delete the existing provisions and to replace them with a requirement that an environment authorisation be issued.

Provision in Bill B10D

Clauses 13(b), 19(a) and 54 in Bill B10D propose to provide that a prospecting or mining right or reconnaissance permit be granted both if the prospecting, mining or reconnaissance will not result in unacceptable pollution, ecological degradation or damage to the environment, and if an environmental authorisation has been issued.

The Issue

The insertion of both above requirements constitutes a duplication (and double jeopardy for the applicant) since if an environmental authorisation has been issued it follows that the Minister has already decided that the operation will not result in unacceptable pollution, environmental degradation or damage to the environment.

What Needs To Be Done

In the proposed s17(1)(c) in clause 13(b), the words "*the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and*", in the proposed s23(1)(d) in clause 19 (a) the words "*the mining will not result in unacceptable pollution, ecological degradation or damage to the environment, and*", and in the proposed s75(1) (c) the words "*the reconnaissance will not result in unacceptable pollution, environmental degradation or damage to the environment and that*", should be deleted.

17. **CLAUSE 14(b) (s18(2)(e)) : RENEWAL OF PROSPECTING RIGHT : REQUIREMENT OF CERTIFICATE BY COUNCIL FOR GEOSCIENCE**

Existing Provision in Act

There is no existing provision in the Act which deals with the above topic.

Provision in Bill as introduced

Clause 13(b) in the Bill as introduced contained a similar provision but on which the Chamber commented adversely (see paragraph 8 of its slide presentation to the Portfolio Committee) on the basis that the requirement for a certificate to be issued by an outside party would frustrate the ability to apply timeously for renewal, and that the requirement for such certificate should be before grant of, rather than on application for, renewal, i.e. the Chamber supported the concept, but raised a timing issue. Presumably as a result, Bill B10B no longer contained the proposed provision.

Provision in Bill B10D

Notwithstanding that the Portfolio Committee had thus in Bill B10B deleted the above proposed provision, it has again found its way into clause 14(b) of Bill B10D.

The Issue

The issue remains as raised in the Chamber's previous submission, i.e. that the furnishing of a certificate from the Council for Geoscience should not be a requirement to be lodged with the application for renewal since this may make it impossible for the holder to apply timeously for renewal and hence to enjoy the benefit of s18(5) that a prospecting right in respect of which an application for renewal has been lodged remains in force until the application for renewal has been granted or refused, but rather should be a requirement for the grant of the certificate, so that the certificate could be lodged after the application for renewal but before the grant.

What needs to be done

Clause 14(b) of the Bill should be deleted and replaced by a new clause 14(d) reading:

'(d) by the insertion in subsection (3) of the following new paragraph (d):

“(d) submission of all prospecting information as prescribed, and as evidenced by a certificate issued by the Council for Geoscience to that effect.”’.

18. CLAUSE 57(a) (s79(2)): APPLICATION FOR EXPLORATION RIGHT

The Chamber simply points out that the wording of clause 57(a) seems in error to have omitted the wording of the existing s79(2)(a).

19. CLAUSE 68(a) (S96(1)(a) AND (b)) : APPEALS FROM DECISIONS OF DELEGATES

Although the Chamber persists in its previous comments which unfortunately were not accepted by the Portfolio Committee, the Chamber wishes at this juncture simply to note that the proposed s96(1)(a) should refer to an officer "*other than the Director-General,*" and that correspondingly s96(1)(b) should be amplified by the insertion at the end thereof of the words "*or the Director-General to whom the power has been delegated or a duty has been assigned by or under this Act*".

20. CLAUSE 75(s105(1)): OWNER OR OCCUPIER CANNOT BE TRACED

In the light of the new s5A(c) as proposed in clause 5 of the Bill, the Chamber suggests that after the word "*Act*" in the second line of the amended s105(1) be added the words "*or who is obliged to give notice in terms of s5A(c) or any other relevant provision of this Act*".

21. **CLAUSE 78(c) (ITEM 1 IN SCHEDULE II) : DEFINITION OF OP26
SUBLEASE**

The Chamber points out that in the first line of the proposed new definition of "*OP26 sublease*", the word "*mining*" should be "*prospecting*".

22. CLAUSE 93 (CATEGORY 10, TABLE 3, SCHEDULE II) : UNUSED OLD ORDER RIGHTS : RIGHTS TO DIG OR MINE

Existing Provision in Act

A typographical error occurred in categories 9 and 10 in Table 3 in Schedule II in that category 9 repeated category 8 instead of dealing with rights to dig or mine referred to in s47 of the Minerals Act, 1991 together with the mining authorisation, and in that category 10 dealt with such rights to dig or mine with, rather than without, a mining authorisation.

The Issue

Clause 88 in the Bill as introduced contained the wording which is now in clause 93 of Bill B10D, but neither of which clauses rectifies the error and in fact exacerbates it in referring only to s47(5) of the Minerals Act, 1991 rather than to the whole of s47 (including thus both ss47(1) and (5)).

What Needs To Be Done

Clause 93 should be deleted and replaced with the following new clause 93:

'Amendment of Table 3 of Schedule II to Act 28 of 2002

- 93.** *Table 3 of Schedule II to the principal Act is hereby amended by the substitution for categories 9 and 10 of the following:*

"Category 9

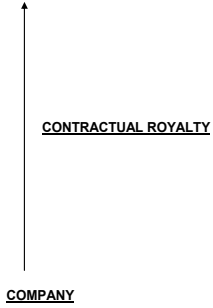
A right to dig or mine referred to in section 47 of the Minerals Act or any right to dig or mine acquired under a tributing agreement as defined in the Mining Titles Registration Act, 1967 (Act No. 16 of 1967), or any sub-grant acquired by virtue of the first mentioned right and the common law mineral right attached thereto, together with a mining authorisation obtained in connection therewith by virtue of section 47(1)(e) of the Minerals Act and in terms of section 9(1) of the Minerals Act.

Category 10

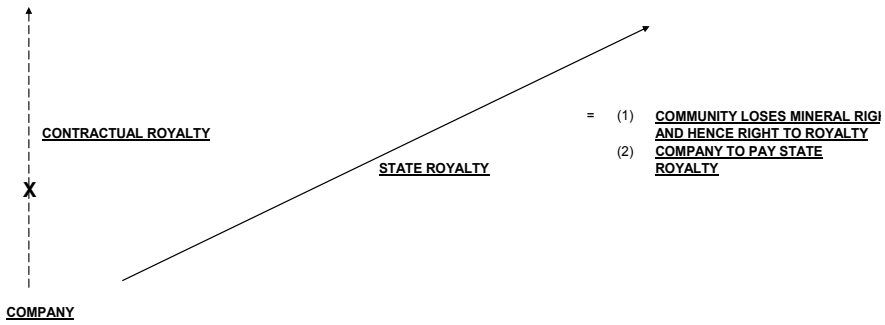
A right to dig or mine referred to in section 47 of the Minerals Act or any right to dig or mine acquired under a tributing agreement as defined in the Mining Titles Registration Act, 1967 (Act No. 16 of 1967), or any sub-grant acquired by virtue of the first mentioned right and the common law mineral right attached thereto, without a mining authorisation obtained in connection therewith by virtue of section 47(1)(e) of the Minerals Act and in terms of section 9(1) of the Minerals Act."

COMMUNITY ROYALTIES

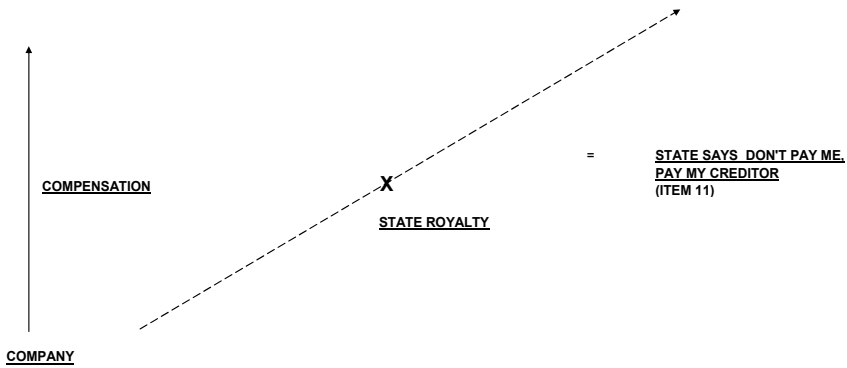
A. COMMUNITY (MINERAL RIGHT HOLDER)



B. COMMUNITY (MINERAL RIGHT HOLDER) $\xleftrightarrow{\text{Mineral Rights}}$ STATE (CUSTODIAN)
 $\xleftarrow{\text{Compensation for lost royalty}}$



C. COMMUNITY $\xleftarrow{\text{X}}$ STATE



D. COMMUNITY $\xrightarrow{\text{STATE ROYALTY}}$ STATE

