

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]

4 June 2008

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1. RESIDUE DEPOSITS AND RESIDUE STOCKPILES

Clauses 1(t) and (u): s1, definitions of residue deposit and residue stockpile

- **EXISTING PROVISIONS**

Do not govern pre-MPRDA dumps

- **PROPOSED IN BILL**

Pre-MPRDA dumps also to be governed by MPRDA

- **EXAMPLE**

Old and not so old gold, diamonds, platinum, chrome (etc.) dumps

○ THE ISSUE

- Origin: when mined from the ground, dump material becomes movable owned by person mining or by subsequent acquirer
- Labour and costs expended in mining such material from the ground
- Dump material is like sacks of gold, diamonds, etc lying on the ground
- No longer mineral resources in the ground
- Work in dumps is processing not mining
- Dumps are worth hundreds of billions of rand
- If pre-MPRDA dumps are to be governed by MPRDA, this would constitute expropriation
- State would be exposed to significant claims for compensation



- No transitional periods for most old dumps
 - Immediate expropriation
 - Removal of security of tenure for dumps being processed or to be processed in future
 - Dire consequences : financial loss, workforce, investor confidence, share price
 - Even applies to dumps at operating mines because on conversion of old order mining right ceases to exist, thus converting the residue stock piles to residue deposits

- For dumps covered by converted rights (e.g. at operating mines), on lapse of converted mining rights, dumps fall to the State
 - Ultimate expropriation
 - State exposed to claims for compensation

- Even if not governed by MPRDA, old dumps are not unregulated
 - NEMA
 - MHSA/OHSA
 - Precious Metals Act, Diamonds Act

○ **CHAMBER SUBMISSION**

- Intention of legislature in 2002 was correctly not to govern pre-MPRDA dumps in MPRDA
- Deletion of clauses 1(t) and (u) in Bill



2. **COMMUNITY PARTICIPATION**

Clauses 13(f), 19(c) and 83(d) : ss17(4A), 23(2A), item 7(3C) in Schedule II

○ **EXISTING PROVISIONS**

No special provisions other than normal BEE in terms of Mining Charter and Social and Labour Plan

○ **PROPOSED IN BILL**

Ministerial conditions requiring Community participation

○ **EXAMPLE**

- Company already complies with Mining Charter and Social and Labour Plan
- Thereafter, additional Ministerial condition requiring Community participation of 10%



○ THE ISSUE

- Mining Charter was developed by Minister after extensive consultative process with industry
- Proposed clauses are duplication beyond Mining Charter requirement of 26%
- Additionally, timing issue: company already compliant at time of application, thereafter additional Ministerial requirement

○ CHAMBER SUBMISSION

- To avoid duplication with requirements of Mining Charter and Social and Labour Plan deletion of clauses 13(f), 19(c) and 83(d) in Bill
- If retained, add proviso to clauses 13(f), 19(c) and 83(d) that
 - Community participation fulfils requirements regarding empowerment, social and economic welfare, Mining Charter, and SLP
 - before imposing conditions, Minister to take account of existing arrangements regarding empowerment, social and economic welfare, Mining Charter, SLP, and perpetuated royalties in item 11 (see 7 below)
 - Community participation and existing arrangements not to exceed requirements regarding empowerment, social and economic welfare, Mining Charter and SLP



3. **SHIFT OF ENVIRONMENTAL MATTERS TO NEMA**

Clauses 31 and 33 and NEMA Bill B36B – 2007 ss 38, 39, 40, 41 and 42 of MPRDA

- **EXISTING PROVISIONS**

MPRDA regulates environmental management

- **PROPOSED IN BILL**

Environmental provisions in MPRDA to be repealed and re-enacted in NEMA

- **EXAMPLE**

MPRDA regulation of EMPs, financial provision, and enforcement, shifted to NEMA



○ THE ISSUES

- Non-alignment of NEMA Bill with MPRDA
- Non-coinciding of coming into operation of repeals in MPRDA (immediate) and insertions in NEMA (18 months)

○ CHAMBER SUBMISSIONS

- Minerals and Energy Portfolio Committee please to recommend refinements to NEMA Bill to Environmental Affairs Portfolio Committee, being:
 - *Definition of Minister* to mean Minister of Minerals and Energy in respect of all environmental matters pertaining to prospecting etc (clause 1(k), s1, definition of Minister)



- *Environmental procedures* in respect of prospecting etc to be laid down by Minister of Minerals not Minister of Environment (clause 2, s24(5)(b)(vi) – (x))
- References to *mine closure* which is still dealt with in the MPRDA, to be deleted (e.g. clause 2, ss24(5)(b)(viii) and 24R(4) and (5))
- Facility for *amendment to EMPs* (additionally to amended EMPs) (clause 2, s24N(6))
- *Delegations* by Minister of Minerals to occur in terms of s103 MPRDA and not S42B NEMA (or s42B to reflect wording of s103 MPRDA) (clause 9 s42B)



- *No appeal from Minister of Minerals to Minister of Environment (clause 10, ss43(1A))*
- *Appeals to Minister of Minerals to be governed by s96 MPRDA not s43 (1B) NEMA (clause 10, s43(1B))*
- *Differing appeal and review procedures and timing for grant of rights and issue of environmental authorisations to be removed (clause 10, s43(1A) and (1B))*
- *Transitional provisions should apply also to actions and applications under MPRDA (clause 12(1) and (2))*
- *Transitional provisions should provide that MPRDA environmental regulations remain in force until amended or repealed in terms of NEMA (clause 12)*



- *Approved EMPs* should be deemed to be environmental authorisations (clause 12(4))
 - Jurisdiction of Minister of Minerals to be *in perpetuity* and not limited to 18 months (clause 13): clause 13 and the schedule to be deleted
 - *Miscellaneous matters* to be governed by chapter 7 of MPRDA not chapter 7 NEMA
- Align clause 94 of MPRDA Bill with clause 14 of NEMA Bill so that operation of repeals in MPRDA and insertions in NEMA coincide



4. ENVIRONMENTAL AUTHORISATIONS

Clause 32: ss38A and 38B

○ **EXISTING PROVISIONS**

Minister of Minerals and Energy implements environmental matters and approves EMPs

○ **PROPOSED IN BILL**

- Minister of Minerals and Energy to be responsible authority under NEMA
- Existing EMPs to be aligned to enable additional issuing of environmental authorisations under NEMA

○ **EXAMPLE**

- Minister of Minerals and Energy will now implement NEMA
- Holders of approved EMPs now additionally require environmental authorisations



○ THE ISSUES

- MPRDA Bill : Minister of Minerals and Energy's authority endures in perpetuity # NEMA Bill : Minister of Mineral and Energy's authority lapses after 18 months
- Erosion of security of tenure due to additional requirement for environmental authorisation
- Actions done, applications and regulations made, under MPRDA not covered by transitional arrangements

○ CHAMBER SUBMISSIONS

- Minister of Minerals and Energy's authority to endure in perpetuity
- Existing EMPs to be deemed to be environmental authorisations
- Insertion of additional transitional provisions that:
 - actions taken under MPRDA deemed to be taken under NEMA
 - pending applications under MPRDA to be processed under MPRDA
 - environmental regulations under MPRDA to remain until amended or repealed under NEMA

5. AMENDMENTS OF RIGHTS, PERMITS, PROGRAMMES AND PLANS

Clause 72: s102

- **EXISTING PROVISIONS**

Amendments to extend area or add minerals, shares, seams, mineralised bodies or strata

- **PROPOSED IN BILL**

Delete power to extend area or add shares etc

- **EXAMPLE**

Converted mining right area extended by addition of unused or new neighbouring areas which are part of the same unitary project

- Artificially separated by different provisions in MPRDA

○ THE ISSUE

- Separate additional rights for such extensions or additions would be detrimental since
 - Regarded as separate operation and not progression of existing unitary operation, e.g. commencement, continuous mining
 - Might be ring-fenced for income tax
 - Might be separate mine for MHSA 1996

- DME could be concerned that application procedure for new rights is circumvented



○ CHAMBER SUBMISSION

- Deletion of existing clause 72
- Insertion of new clause 72 adding proviso to s102 that in case of extensions or additions, application procedure for new rights be followed but be implemented by amendment in terms of s102

6. **REFUSALS OF CONVERSIONS OF OLD ORDER MINING RIGHTS**

Clause 83(d) : items 7(3A) and 7(3B) in Schedule II

○ **EXISTING PROVISIONS**

In the interests of security of tenure (s2(g) and item 2 in Schedule II) conversions cannot be refused

○ **PROPOSED IN BILL**

Conversions must be refused if holder does not comply within 60 days

○ **EXAMPLE**

Mining company has lodged conversion, is requested to comply with empowerment requirements in 60 days, but not able to comply within that period.



- Minister must refuse conversion and mine must close.

○ **THE ISSUE**

- Refusal is contrary to the international mining investor requirement of security of tenure
- Dire consequences of mine closure
 - Financial loss, workforce, investor confidence, share price, applicability of s52
- 60 days could be too short

○ **CHAMBER SUBMISSION**

- Intention of legislature in 2002 was correctly not to permit conversions to be refused
- Deletion of that part of clause 83(d) which relates to items 7(3A) and 7(3B)



7. **DOUBLE ROYALTIES**

No clause (proposed new clause 83 bis) : item 11 in Schedule II of MPRDA, and draft Mineral and Petroleum Resources Royalty Bill, 2007

○ **EXISTING PROVISIONS**

Community royalties continue to be payable after conversion

○ **PROPOSED IN BILL**

No clause dealing with duplication of Community royalties and State royalties

○ **EXAMPLE**

- Community holds mineral rights and granted mining company a mineral lease in consideration for a royalty
- Per item 11, mining company must still pay royalties to the Community
- Per Royalty Bill, mining company must additionally pay royalties to the State



○ THE ISSUE

Duplication of royalties payable to Community and to State:

- Community was entitled to mineral rights and mineral lease royalties
- MPRDA took away mineral rights and hence royalty stream from Community
- State owes Community compensation in the amount of the royalty stream
- Per item 11, the State required the mining company to pay the State's creditor (the Community) the royalty
 - Don't pay me, pay my creditor



- Notwithstanding that the mining company pays the State's creditor (the Community), the State in the Royalty Bill requires the Mining Company again to pay royalty to the State
 - Duplication
 - Not logical, arithmetical, equitable or just

- Conversion of Community Royalties into equity is not a solution since
 - it perpetuates the royalties in a different guise
 - nothing compelling Community to convert

○ CHAMBER SUBMISSION

- Insertion of new clause 83 bis inserting new item 11(8)providing for:
 - Payment over by State of State royalties to Community as part compensation otherwise payable in terms of item 12
 - Payment by mining company of balance of Community royalty to Community



- The above an equitable arrangement since
 - Community continues to receive full royalties
 - Mining company continues to pay the same amount as it previously did (partly as State royalties and partly as balance of Community royalties)
 - State receives royalty but pays it to Community as compensation to Community for having taken away Community's mineral rights and royalty stream



8. PRESCRIPTION OF CLAIMS TO COMPENSATION

Clause 88(b): item 12(5)(c) in Schedule II

- **EXISTING PROVISION**

Existing item 12 did not deal with prescription

- **PROPOSED IN BILL**

Provides in item 12(5)(c) for commencement of running of prescription where claim to compensation is upheld but no agreement between claimant and State on amount or terms of payment of compensation

- **EXAMPLE**

Community mentioned in previous slide claims compensation, State accepts the claim, but Community and State cannot agree on amount of compensation



- **THE ISSUE**

The wording does not indicate when the 180 day period of no agreement begins to run

- **CHAMBER'S SUBMISSION**

Amendment of clause 88(b) so as to provide for the 180 days to begin to run from notice of determination of validity of the claim either directly by Director-General or after appeal to Minister

9. VALIDATION OF INVALID RIGHTS: THE MEEPO CASE

No clause (proposed new clause 93 bis) : no section

○ THE ISSUE

- Meepo judgment
 - Prospecting right granted by sub-delegate, or granted by delegate without determining terms and conditions, invalid
- Almost all prospecting, mining, exploration and production rights are granted in similar fashion to Meepo prospecting right
- All rights vulnerable to being declared invalid
 - Huge threat to governance
 - Huge threat to security of tenure



○ CHAMBER SUBMISSION

- Bill to contain a validation provision validating all rights which are vulnerable for the above reasons
- Advantage of legislative validation : universal solution # ministerial ratification per s97(2) : case by case solution

10. COMMENCEMENT

Clauses 94(1) and (2) : no section

○ THE ISSUES

- Clause 94(1) :
 - Commencement of environmental provisions in MPRDA Bill do not accord with commencement of corresponding environmental provisions in NEMA Bill
 - Gap
- Clause 94(2) : refers to commencement of whole of Schedule II, rather than only to clause 88 and to the amendment of item 12 therein contained

○ CHAMBER'S SUBMISSIONS

- Clause 94(1) :
 - Alignment of commencement of environmental provisions in MPRDA Bill with commencement of environmental provisions in NEMA Bill
- Clause 94(2) : amendment to refer to section 88 in the Bill rather than to item 12 of Schedule II in the Act.

11. **OTHER ISSUES IN BRIEF**
(See detailed submissions)

11.1 **Clause 1: Definition of Beneficiation**

- Regulations not available

➤ Definition to appear in regulations not in Bill

11.2 **Clauses 4 (s5(4)) and 5 (s5A): Prohibition against Prospecting etc Without Specified Items**

- Duplication of s5(4) and new s5A

➤ Delete s5(4)

11.3 **Clause 11 (s15): Rights and Obligations of Holder of Reconnaissance Permission**

- Conflict of 14 days in s15(1) with 21 days in s5A(c)

➤ Amend 14 to 21

11.4 **Clause 12(b) (s16(2)(c)): Acceptance of Application for Prospecting Right if No Prior Accepted Application Exists**

- Applications for *any* # *same* mineral
 - change “*any*” to “*same*”

11.5 **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**

- Grant of rights *both* if no unacceptable pollution etc *and* environmental authorisation issued
 - duplication and double jeopardy
 - Delete reference to unacceptable pollution etc

11.6 **Clause 14(b) (s18(2)(e)) : Renewal of Prospecting Right: Requirement of Certificate By Council for Geoscience**

- application for renewal requires certificate by Geoscience
 - Impossibility of renewal
 - Certificate to be requirement for grant not for application

11.7 **Clause 57(a) (s79(2)): Application for Exploration Right**

- erroneous omission of wording in existing s79(2)(a)
 - To be reinstated

11.8 **Clause 68(a) (S96(1)(a) and (b)) : Appeals from Decisions of Delegates**

- Appeal from Director-General as delegate, to Director-General
 - Change to appeal from Director-General as delegate, to Minister

11.9 **Clause 75(s105(1)): Owner or Occupier Cannot Be Traced**

- No reference to notice in terms of new s5A(c)
 - Amend to refer to notice in terms of s5A(c) or other provisions

11.10 Clause 78(c) (Item 1 In Schedule II) : Definition of OP26 Sublease

- Incorrectly refers to OP26 *Mining* Lease instead of OP26 *Prospecting* Lease

Amend to refer to OP26 *Prospecting* Lease

11.11 Clause 93 (Category 10, Table 3, Schedule II) : Unused Old Order Rights : Rights To Dig Or Mine

- does not deal with mining rights in respect whereof no mining licence was held

Amend to refer to mining rights both in respect of which a mining licence was or was not held

