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MPRDAB 14

24 May 2007

Shanaaz Isaacs
Committee Secretary
Portfolio Committee on Minerals and Energy
3rd Floor
90 Plein Street
Cape Town

By e-mail to: shisaacs@parliament.gov.za

Dear Shanaaz,

MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL [B10-2007]

The Chamber has pleasure in providing you with the attached copy of its comments on the Mineral and Petroleum Resources Development Amendment Bill [B10-2007] for circulation to the Portfolio Committee on Minerals and Energy.

We hope that these comments will be of assistance to the Portfolio Committee in its deliberations on the Bill.

I wish to thank you for including the Chamber in the schedule for the hearings on the Bill that the Portfolio Committee is to hold on 29 May 2007.

Yours sincerely,

M G DILIZA
CHIEF EXECUTIVE

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CHAMBER OF MINES OF SOUTH AFRICA

COMMENTS TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON MINERALS AND ENERGY

ON THE

MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL B10-2007

INTRODUCTION

The Chamber of Mines of South Africa thanks the Parliamentary Portfolio Committee on Minerals and Energy for affording it the opportunity to comment on the above Bill.

The Chamber would at the outset also like to thank the Minister and the Department of Minerals and Energy most sincerely for the numerous beneficial amendments which are contained in the Bill – notably in connection with the treatment of rights in the transition from the old order into the new. It apologises for the extent of its comments, which were however necessitated by the fact that when compared with the Draft Bill which was published in 2005 the Bill now before Parliament contains new issues.

The Chamber's comments are divided into two parts, Part A contains general comments on issues arising from the Chamber's study of the Bill which the Chamber wishes to draw to the attention of the Portfolio Committee because they may be of assistance in improving the Bill. Part B contains more detailed comments – several of which focus on technical drafting points – which the Chamber hopes the Portfolio Committee, and the Department of Minerals and Energy in advising the Portfolio Committee, will find constructive in attaining the objects of the Bill and securing its approval by Parliament.

PART A: ISSUES

1. General issues

1.1 *Changes in interest, not merely a controlling interest, in a company or close corporation:*

Clause 7(a): s11

At present s11(1) of the Act provides that a controlling interest in a company or close corporation which is the holder of a prospecting right or mining right cannot be disposed of without the consent of the Minister, except in the case of a change of controlling interest in a listed company.

Clause 7(a) of the Bill proposes to delete the word "controlling" from s11(1) with the result that the disposal of any interest (i.e. not only a controlling interest) in such a company or close corporation would require ministerial

consent. Accordingly, disposal of an interest of, say, 15% or 26% to an empowerment company would require ministerial consent. Introduction of the need for ministerial consent to the disposal of any interest in the company that holds a right could result in great administrative burdens and delays. The Chamber therefore wishes to raise, for consideration in the Portfolio Committee, the question whether one might not get closer to achieving the objects in ss2(c) and (d) of the Act (i.e. of promoting equitable access to South Africa's mineral and petroleum resources and of substantially and meaningfully expanding opportunities for historically disadvantaged persons to enter the mineral and petroleum industries and to benefit from the exploitation of South Africa's mineral and petroleum resources) by introducing a threshold for ministerial consent that lies perhaps somewhere below disposal of a controlling interest but above disposal of just any interest in the company. Quite where the line should be drawn no doubt involves some complex considerations. We believe that this is something that should be carefully weighed in the Portfolio Committee.

1.2 *Non-acceptance of applications if another person holds a right, permit or permission for any mineral*:

Clauses 11(a), 17(a), 22(b), 59(c) & 63(a) as applied to ss16(2)(b), 22(2)(b), 27(3)(b), 79(2)(b) & 83(2) respectively

All the provisions in the Act (such as ss16(2)(b) and 22(2)(b)) which deal with acceptance of applications for rights, permits and permissions currently provide that the application must be accepted if no other person holds a right, permit or permission for the same mineral and land. In the case of applications relating to petroleum, reference is made to no other person holding a right, permit or permission for petroleum.

Clause 11(a) and corresponding clauses in the Bill propose that the above provision be amended to refer to acceptance if no other person holds a right, permit or permission for any mineral on that land.

It is submitted that the existing wording in the Act be retained in that it is only if an application is made for the same mineral that the application should be rejected. Should an application be made for any other mineral on land in respect of which rights or permits for other minerals are held, whether such applications should be granted should not be resolved at the stage of acceptance of the application. It ought to be the subject of consideration at the stage of grant, after objections by the holders of existing rights or permits have been considered. At that stage it will become clear whether or not there will be a conflict between the existing operations and the proposed operations that are the subject of the application.

1.3 *Request to applicant to comply prior to rejection of and decision on applications:*

Clauses 11(b), 17(b), 22(d), 59(c) & 63(c) as applied to ss16(3), 22(3), 27(4), 79(3) & 83(3) respectively

Section 6(1) of the Act provides that subject to the Promotion of Administrative Justice Act, 2000 ("PAJA") any administrative process or decision taken in terms of the MPRDA must be conducted or taken within a reasonable time and in accordance with the principles of lawfulness, reasonableness and procedural fairness. Section 3 of PAJA similarly provides

for such procedural fairness; that in order to give effect to the right to procedurally fair administrative action, an administrator must give the affected person adequate notice of the nature and purpose of the proposed administrative action and a reasonable opportunity to make representations; that an administrator may in his or her discretion give the person the opportunity to present and dispute information and arguments and to appear in person; and that it is only in exceptional circumstances that an administrator may depart from these requirements. PAJA was enacted to give effect to the entitlement in s33 of the Constitution to administrative action that is lawful, reasonable and procedurally fair.

Clause 55(c) of the Bill proposes to amend s74(3) (which deals with rejections of applications for reconnaissance permits for petroleum) to oblige the designated agency before rejecting an application, first to request the applicant to comply within seven days of a notice, with any outstanding requirements. The Chamber suggests that clause 55(c) correctly gives effect to the abovementioned principles of lawfulness, reasonableness and procedural fairness, and that it should accordingly be adopted universally throughout the Act in respect not only of proposed rejections, but also in regard to proposed refusals of applications in terms of the Act.

This would take account of the fact that rejections and refusals have a dramatic effect on the ranking of an application for the purposes of s9 in that upon rejection or refusal the next application then moves up to be first for consideration.

In regard to refusals, it also frequently happens that although the grant of the application may have been recommended by the Regional Manager, nevertheless the Minister or the Minister's delegate does not follow the recommendation and refuses the application on grounds that have not been put to the applicant. Very frequently, applications are rejected or refused for reasons that could be remedied if the applicant were given the opportunity to do so.

The Chamber therefore recommends that in order more fully to give effect to the right to just administrative action in s33 of the Constitution, s3 of PAJA and s6(1) of the Act, the principle in clause 55(c) of the Bill should be extended to apply to all proposed rejections or proposed refusals of applications.

1.4 *Acceptance of applications if there is a prior application:*

Clauses 11(c), 17(c) & (d), 22(c), 59(d) & 63(d) as applied to ss16(4), 22(4), 27(5), 79(4) and 83(4) respectively

Section 16(4) of the Act and similar provisions provide that if the Regional Manager (or designated agency) accepts an application, the Regional Manager (or designated agency) must, within 14 days from the date of acceptance, notify the applicant in writing (as proposed to be amended in the Bill) to apply for an environmental authorisation, lodge an environmental assessment report and an environmental management plan, notify in writing and consult with the land owner or lawful occupier and include the result of the consultation in the assessment report.

Clause 11(c) and similar clauses in the Bill propose to amend all these provisions to reflect the new requirement of an environmental authorisation.

It is suggested that clause 11(c) and similar clauses in the Bill be amplified to insert a proviso that – if prior applications have been lodged – the applicant not be required so to apply, lodge or notify until such prior applications have been refused.

At present, all applicants are immediately required to lodge an environmental plan or programme and to notify and consult with land owners, lawful occupiers or other affected persons. This results in unnecessary administration on the part of the Department and unnecessary effort and cost by successive applicants whose applications (because they rank subsequent to a prior application) are never considered at all if the prior application is granted.

1.5 *Notification and consultation in respect of applications for prospecting rights and mining permits:*

Clauses 11(c) & 22(e) as applied to ss16(4)(b) & 27(5)(b) respectively

Section 16(4)(b) and similar provisions in the Act currently provide that an applicant must notify in writing and consult with land owners, lawful occupiers and other affected parties. Clauses 11(c) and 22(e) (concerning applications for prospecting rights and mining permits) propose to remove the requirement to notify and consult with other affected parties. As a consequence, the obligation to notify and consult holders of existing rights (whether old order or new order) would also be removed. It is submitted that the proposed omission of notice to and consultation with such affected parties does not give effect to the principle of audi alteram partem, or hearing the other side which is a principle of just administrative action as envisaged in s6(1) of the Act, in s3 of PAJA and s33 of the Constitution (as discussed in paragraph 1.3 above) and as enshrined in the common law. It is therefore submitted that s16(4)(b) and s27(5)(b) should retain a requirement to notify and consult with holders of rights, permits or permissions granted or which continue in force in terms of the Act and which may be affected should the application be granted.

1.6 *Empowerment requirement for prospecting rights for prescribed minerals:*

Clause 12(c): new s17(1)(f)

Clause 12(c) of the Bill proposes to add a new paragraph (f) to s17(1) which will introduce an additional requirement for the grant of a prospecting right – namely that "in respect of prescribed minerals, the applicant has given effect to the objects referred to in s2(d)" (i.e. the object of substantially and meaningfully expanding opportunities for historical disadvantaged persons, including women, to enter the mining industry and to benefit from the exploitation of the nation's mineral resources).

At present, s17(4) of the Act provides that the Minister may "having regard to the type of mineral concerned and the extent of the proposed project" request the applicant for a prospecting right to give effect to the objects set forth in s2(d).

Unlike in s17(4), the new s17(1)(f) does not refer to the extent of the proposed prospecting project but focuses only on the type of mineral, being the proposed prescribed minerals. It is submitted that a degree of flexibility should be allowed in the proposed new s17(1)(f) by introducing a provision that would permit the Minister, having regard to the proposed prospecting project, to grant the applicant exemption from the need to have given effect to the objects referred to in s2(d). (For example, the grant of such an exemption may be appropriate in circumstances where those objects can be achieved more amply or more readily at a later stage.)

Without knowing what minerals are intended to be prescribed, it is difficult to comment on the concept of prescribed minerals. For this reason, the Chamber suggests that the minerals should not be left to prescription by regulation but should be listed in the proposed s17(1)(f) itself.

1.7 *Exclusionary acts and concentration of rights to the relevant mineral:*

1.7.1 We have noted from clause 1(h) that it is proposed to refine the definition of "exclusionary act" that appears in s1 of the Act and is relevant to ss17(2)(b) and 33(c).

In previous submissions to the Department the Chamber drew attention to provisions in s17(2)(b) which had been identified by Senior Counsel as being contrary to the Constitution. By sub-section 17(2)(b) (and s33(c)) the Minister must refuse to grant a prospecting right (or retention permit) if granting the right will result in an exclusionary act, prevent fair competition or result in the concentration of the mineral or mineral resources in the hands of the applicant. Senior Counsel pointed out that any grant of a right will, be exclusionary and result in concentration. They also explained that the reference to the prevention of fair competition confers a discretion so broad as to be contrary to the rule of law.

In view of this concern, the Chamber submits that:

(a) s1 of the Act should be amended by the deletion of the definition of "exclusionary act";

(b) ss17(2)(b) and 33(c) should be amended to provide that the Minister's obligation to refuse to grant a prospecting right or issue a retention permit, as the case may be, will apply if the grant of the right or issuing of the permit will impede or prevent any person from entering the mineral and mining industry, or from entering any market connected with that industry, and thereby unduly impede the attainment of the objects set out in s2 (as opposed to the current arrangement under which the Minister must refuse the grant if the grant will result in an exclusionary act; prevent fair competition; or result in the concentration of the mineral resources in question under the control of the applicant).

The Chamber suggests the deletion of the concept of concentration in s17(2)(b)(iii) since that concept is vague and results in conferral of a discretion

so broad as to be contrary to the rule of law principle in s1(c) of the Constitution.

1.7.2 Insofar as the proposed change in clauses 12(d) and 27 from concentration of mineral resources to concentration of rights granted is concerned, it is pointed out that the number of rights granted is not a suitable criterion since often in order to constitute a workable proposition, it is necessary to acquire numerous prospecting rights. The holding of numerous rights also in part results from the previous mineral right system and from the transitional arrangements in Schedule II to the Act, which perpetuated the separate holding of rights following geographic rather than geological boundaries.

If the proposed substitute clauses are retained, they should be amplified to refer to concentration of rights "*in respect of the mineral in question*", since the holding of rights in respect of other minerals is clearly irrelevant to the issue.

1.8 *Confirmation from Council for Geoscience on renewals:*

Clause 13(b): new s18(2)(c)

Section 18(2)(a), (b), (c) and (d) of the Act currently provides that an application for renewal of a prospecting right must state the reasons and period for which the renewal is required; be accompanied by a detailed report reflecting the prospecting results, the interpretation thereof and the prospecting expenditure incurred; be accompanied by a report reflecting the extent of compliance with the requirements of the approved environmental management programme, the rehabilitation to be completed and the estimated cost thereof; and include a detailed prospecting work programme for the renewal period. Compliance with all these requirements is solely within the control of the applicant.

Clause 13(b) of the Bill, however, proposes to insert a new s18(2)(e) whereby the application must also be accompanied by a written confirmation issued by the Council for Geoscience that all prospecting information as prescribed has been submitted. The issuing of such a confirmation, and any delays in so doing, are therefore outside the control of the applicant.

An application for renewal can be submitted only during the then current period of validity of the prospecting right, although in terms of s18(5) once an application for renewal has been lodged, the prospecting right then remains in force until the application has been granted or refused. It is therefore essential that an applicant for renewal be able to lodge its application before the expiry of the then current period of the right, without the risk of relying on a third party timeously to issue a written confirmation. The proposed requirement in clause 13(b) therefore detracts from the international investment requirement of assured continuity of tenure.

It is therefore submitted that the obligation to obtain such confirmation should not be made a requirement for an application but should become a requirement for the grant of the renewal.

1.9 *Ministerial permission to recover and dispose of diamonds found during prospecting:* Clause 15: s20(2)

Section 20(2) of the Act requires the holder of a prospecting permit to obtain the Minister's written permission to remove and dispose, for the holder's own account, of bulk samples of minerals found by the holder in the course of the prospecting operations. Clause 15 of the Bill will render s20(2) applicable also to the removal and disposal of diamonds found by the prospector.

In the light of the uncertainty brought about by the fact that neither the Act, nor the Bill, nor the regulations elaborate on when and the manner in which the Minister's written permission must be sought by the holder of a prospecting right in respect of diamonds to remove and dispose of any diamonds recovered during the course of the prospecting operations, the Chamber suggests an amendment to the standard form "Prospecting Right", at paragraph 2 thereof, to specifically refer to the simultaneous granting of ministerial permission to dispose of diamonds recovered from prospecting operations, subject thereto that such a permission does not extend beyond a permission to dispose of bulk samples of diamonds.

1.10 *Beneficiation:*

While the mining sector does have competence in the mining, concentrating, smelting and in some cases refining of ores, it does not have competence in the manufacturing beneficiation arena (or in what is encompassed in the "final stage" of beneficiation in the definition of "beneficiation" that is proposed to be inserted in the Act by clause 1(a) of the Bill).

Clause 21(b) of the Bill seeks to expand s26 of the Act by permitting the Minister, in promoting beneficiation, to "prescribe the levels required for beneficiation".

The Chamber is greatly concerned that such capacity to prescribe, by regulation under the Act, a required level of beneficiation would confer an overly broad discretion to impose upon mining companies beneficiation obligations that may be beyond their capacity to discharge and beyond their intended purpose.

In addition, in the interests of promoting local beneficiation, certain industries, such as the diamond industry are already in the process of being heavily regulated. The Portfolio Committee is referred to the Diamonds Second Amendment Act, 2005 and the recently published Diamond Export Levy Bill.

There is a related concern that s23(2) of the Act (which occurs in the section governing the grant and duration of a mining right) permits the exercise of a bare discretion to take into consideration the provisions of s26 "having regard to the nature of the mineral in question" and possibly to

make the grant of the right conditional on beneficiation obligations determined under s26.

The Chamber believes that the notion that the mining sector has control over manufacturing beneficiation outcomes and may be appropriately forced into higher levels of beneficiation is misconceived and could actually harm the mining sector with little or no benefit to the manufacturing beneficiation sector. In the current model of global competition, companies have to specialise in order to progress and survive. An investigation of the top 40 mining companies demonstrates that they are focused on their core business of mining with none of them being materially involved in downstream manufacturing beneficiation.

The Chamber therefore submits that:

1.10.1 in clause 1(a), in the definition of "beneficiation", paragraph (d), referring to a final stage; and

1.10.2 clause 21(b),

should be deleted from the Bill.

1.11 *Prohibition or restriction of grant of rights in respect of strategic minerals and invitations for applications:*

Clause 41(a): s49(1) & clause 41(b): new s49(4)

By s49(1) of the Act the Minister may, after inviting representations from relevant stakeholders, prohibit or restrict, by notice in the Government Gazette, the grant of rights, permits or permissions in respect of land identified by the Minister.

It is proposed in clause 41(a) of the Bill to delete the requirement that such a prohibition must be preceded by an invitation for representations from relevant stakeholders. The Chamber submits that, in accordance with the principles of lawfulness, reasonableness and procedural fairness espoused in s6(1) of the Act, the requirement to invite representations from relevant stakeholders should be retained.

The Chamber notes that clause 41(a) would introduce into s49(1) a requirement that the Minister should have regard to the "strategic nature of the mineral in question" before making a prohibition or restriction under s49(1). It is not clear to the Chamber what might be encompassed by the concept of a mineral's "strategic nature".

Section 49(1) confers extremely wide discretionary powers which clause 41(a) would broaden still further. Similarly, clause 41(b) (which is discussed below in relation to the Constitution) would confer, or delegate the power to legislate for the grant of rights. The Chamber therefore submits that if these proposed amendments are to be pursued, then – in addition to the need for thorough consultation before any such powers are exercised – provision should be made

for Parliamentary supervision, or oversight. This could perhaps be achieved by adapting from the State of Emergency Act, 1997 an arrangement under which any notice intended to be issued in the Government Gazette for the purpose of s49 shall be submitted to Parliament and be subject to approval by the National Assembly.

Clause 41(b) of the Bill proposes to insert in s49 of the Act a provision empowering the Minister, by notice in the Government Gazette, to invite applications for rights or permits in respect of any mineral or land, specify the period within which an application may be lodged and determine the terms and conditions subject to which such rights or permits may be granted. Sections 16(6) and 22(5) (concerning applications for prospecting rights and applications for mining rights, respectively) at present contain such a provision which clause 41(b) of the Bill will remove from those sections and place in s49.

The Chamber has previously drawn to the attention of the Department the concern that s16(6) and s22(5) are probably unconstitutional in affording the Minister an unfettered overriding discretion to open tenders for prospecting or mining rights in respect of any land. Such a provision may allow the Minister to determine the terms and conditions subject to which such rights will be granted (thus overriding other provisions of the Act governing the grant of such rights). On advice received from Senior Counsel, this is contrary to the constitutional doctrine of the separation of powers in that it gives the Minister the discretion and authority to legislate for the grant of rights. If the Minister may impose terms and conditions completely different to those applicable to rights and permits applied for and acquired in terms of ss16, 17, 22, 23 and 27, then the executive in the form of the Minister would be clothed with legislative powers.

The Chamber similarly submits that the proposed s49(4) is unconstitutional and should be deleted, or at the very least that the reference therein to terms and conditions should be deleted.

Any prohibition by the Minister in terms of s49(1) and any invitation in terms of what is proposed in clause 41(b) of the Bill may adversely affect the security and continuity of tenure of the holders of rights, permits and permissions. For example, a holder of a prospecting right or a retention permit has, in terms of s19(1)(b) and s35(1) the exclusive right to apply for and be granted a mining right. In terms of ss19(1)(a), 25(1) and 34, holders of prospecting rights, mining rights and retention permits are entitled to renewals thereof. In order to avoid such an adverse effect it is suggested that s49(2) be amended by the insertion of words indicating that a Ministerial notice under s49(1) prohibiting or restricting prospecting or mining shall not affect the rights of the holder of any reconnaissance permission, prospecting right, mining right, retention permit or mining permit.

1.12 *Curtailment affecting employment:*

Clause 42: s52

Section 52 of the Act obliges the holder of a mining right to give notice to the Minerals and Mining Development Board (a) where prevailing economic conditions cause the profit to revenue ratio of the relevant mine to be less than 6% on average for a continuous period of 12 months; or (b) if any mining operation is to be scaled down or to cease with the possible effect that 10% or more of the labour force or more than 500 employees, whichever is the lesser, are likely to be retrenched in any 12 month period.

Clause 42 of the Bill seeks to amend s52 by reducing from 12 to 3 months the period over which the profit to revenue ratio of the relevant mine has been less than 6%.

Practically this would mean that the obligation to give notice would be triggered much sooner than is currently the case. It would also mean that more holders would probably have to give notice than would at present be the case. This provision might cause a flood of notices which both the Minister's office and the secretariat of the Minerals Board would find difficult to manage.

In addition, the financial welfare of a mine is determined by a range of external factors, some of which are by their nature, fairly volatile. (Consider factors such as the commodity price at a given time, the strength of the Rand, the Rand/Dollar exchange rate, administered pricing, interest rates etc.) A mine's fortunes could go through various "ups and downs" during a relatively short period of time. Because of all the variables that impact upon the fortunes of a mine, a better sense of the longer term viability of a mine would be obtained over a longer term such as 12 months.

The Chamber proposes that the current "monitoring" period of a mine's financial situation should remain at 12 months. The proposed reduction of the period to three months should thus be scrapped.

Clause 42 also proposes that the size of the labour force to be retrenched in a 12-month period should no longer be a trigger for the obligation to give notice in terms of s52 of the Act. In terms of the proposed amendment, the obligation to give notice would be triggered "if any mining operation is to be scaled down or to cease with the possible effect that the labour force is likely to be retrenched".

This proposed amendment is extremely onerous. In practice, it would mean that every time a mine foresees the need to retrench (irrespective of the number of retrenchees) because it intends to scale down (irrespective of the period over which it intends to scale down) it will have to notify the Minister. It would also significantly increase the work of the Board because s52(2) requires the Board to consult the relevant holder and investigate and make recommendations to the Minister. The possibility exists that this amendment would actually lead to the Board being unable to exercise its duties in respect of such notices and thus cause the provision to become impracticable.

The Chamber thus proposes that this proposed amendment be scrapped and that the current provisions thus be retained.

1.13 *Internal appeals from decisions of delegates:*

1.13.1 By s96 of the Act any person whose rights or legitimate expectations have been materially and adversely affected or who is aggrieved by any administrative decision in terms of the Act may appeal in the prescribed manner to the Director-General if it is an administrative decision by the Regional Manager or an officer of the Department (as provided for in s96(1)(a)); or to the Minister, if it is an administrative decision by the Director-General or the designated agency (as provided for in s96(1)(b)).

Clause 69(a): s96(1)

Clause 69(a) of the Bill proposes to change the arrangement under s96(1)(a) to one in which the appeal to the Director-General will lie from an administrative decision taken by a Regional Manager or "any officer to whom the power has been delegated or a duty has been assigned by or under this Act". In practice, such an amendment will render a decision of the Minister's delegate, which would otherwise not be subject to internal appeal to the Minister (because it is effectively a decision of the Minister) subject to the internal appeal procedure set forth in s96.

The notion that the decision of the Minister's delegate should be subject to internal appeal is inconsistent with good law-making. The delegate's decision is in law the decision of the Minister, from whose decision no internal appeal, to any other official such as the Director-General, can lie (see South African Mineral and Petroleum Law by Dale, Becker, Bashall, Chaskalson, Dixon, Grobler and Loxton at pages 577 (para 467.5) and 601 (paras 482.4 and 482.5)). In practice the appeal procedure has been found to be unsatisfactory, with many appeals awaiting decision.

As a consequence of the proposed compulsory internal appeal from the decision of a delegate, the appellant will be constrained to apply to Court in terms of the Promotion of Administrative Justice Act, 2000, to compel the taking of a decision by the appeal authority on the appeal. Moreover, in terms of ss96(1)(a) and (b), an appeal would first, save in the case of decisions taken by the Director-General as delegate, have to be lodged with the Director-General, and on receipt of an unacceptable decision from him as appeal authority, a further appeal would then have to be lodged with the Minister. Only on receipt of an unacceptable decision from the Minister as appeal authority, would the aggrieved person at last be entitled to apply to court in terms of the Promotion of Administrative Justice Act for judicial review of the unacceptable decision. That would be a hopelessly protracted and costly procedure, with consequent unacceptably long delays. In addition, it would be contrary to the object in s2(e) of the MPRDA of promotion of

economic growth and mineral resource development. The objects in ss2(d), (f) and (i) (i.e. of expanding opportunities for historically disadvantaged persons, promoting employment and advancing the social and economic welfare of all South Africans, and of contributing towards socio-economic development of mining and production areas) would also be detrimentally affected.

In the result, aggrieved persons would continually be applying to court in terms of the Promotion of Administrative Justice Act to be exempted from the obligation to exhaust the internal remedies in s96 of the MPRDA on the ground that such exemption would be in the interests of justice. Relevant to this concern is the fact that by virtue of extensive delegations of powers by the Minister in terms of s103 of the MPRDA, the Minister has delegated her powers under almost all the provisions of the MPRDA which deal with the taking of decisions on applications for rights in terms of the MPRDA, to the Deputy Director-General, from whom an appeal would first lie to the Director-General, thence to the Minister, and only then could an application for judicial review be instituted.

The Chamber therefore urges that the proposed amendment to s96(1)(a), whereby an internal appeal would lie from the decision of a delegate, not be proceeded with, and indeed that the opposite be provided, namely that for purposes of s96 a decision of a delegate shall be deemed to be the decision of the delegans.

1.13.2 The Chamber welcomes the proposal in clause 69(b) to insert a new sub-section (2)(b) in s96(2) of the Act whereby any subsequent application in terms of the Act must be suspended pending the finalisation of an appeal in terms of s96. The Chamber submits that the opportunity should be taken to expand the ambit of the proposed sub-section 2(b) so that it will apply to any judicial review of administrative decisions taken in terms of the Act in respect of an application. It is submitted that this will ensure a fairer arrangement under which any subsequent application will be suspended pending the finalisation of such a review.

Clause 69(b): s96(2)

1.14 *Alignment of definition:*

S1 of the Act & para 2 of the Mining Charter

It is submitted that, in order to ensure uniformity, the opportunity should be taken to amend the definition of "historically disadvantaged person" in s1 of the Act so that it mirrors the definition of "Historically Disadvantaged South Africans (HDSA)" (and the related definition of "HDSA Companies") used in para 2 of the Mining Charter developed in accordance with s100(2) of the Act.

1.15 *Proposed new transitional provision:*

In view of the extensive procedural and other changes contained in the Bill it is submitted that, as was the case when the Act was introduced, an equitable arrangement should be introduced in the Bill governing the transition from the procedural and other provisions that apply at present to those that will become operative when the Bill is enacted. This is relevant to the stability and certainty needed by prospectors and miners.

Additionally, it is suggested that the Bill should provide that applications which have been lodged in terms of the wording of the Act prior to its proposed amendment in terms of the Bill should be adjudicated in accordance with the wording in operation prior to such amendment. Compare Item 3 in Schedule II to the Act.

2. Environmental issues

2.1 *Harmonization with NEMA EIA regulation:*

The Chamber welcomes the alignment of the Act with the terminology and processes of the draft Environmental Impact Assessment Regulations under the National Environmental Management Act, 1998. However, it should be noted with concern that mining is still a listed activity in terms of these draft regulations with the result that another environmental authorisation will be required from the Department of Environmental Affairs and Tourism.

In order to address this duplication of requirements a clause should be introduced in the Bill so that compliance with the environmental provisions of the Mineral and Petroleum Resources Development Act, 2002 will be deemed to constitute compliance with the requirements of the National Environmental Management Act, 1998.

2.2 *New environmental authorisation required for renewal of rights or permits:* Clause 31: s39

The Chamber is of the view that the proposed s39 set forth in clause 31 of the Bill conflicts with other relevant sections of the Act that deal with renewal of rights or permits. Furthermore, since the environmental management programme, now called the environmental management plan – which is the basis of the environmental authorisation – is required by law to be reviewed on an annual basis, it is the Chamber's view that on renewal of the rights or permits only an updated version of the plan should be required.

2.3 *Financial provision:*

Clauses 1(i), 33 and 34: ss1, 41 & proposed 41A

The Chamber is concerned that the proposed amendments to the definition and implementation of the financial provision requirements in the Bill severely restrict the options available to make financial provision for mine closure and rehabilitation compared to those at present available under the Act.

The deletion of the word "insurance" preceding "guarantee" in the definition of "financial provision" in clause (i) is of concern to the Chamber, as, together with the insertion of the word "financial" before "guarantee", the proposed