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'Re-imagining the mining industry'

The Department of Mineral Resources (DMR) says it wants to 're-imagine the mining industry' and turn it into 'a sunrise one for 100 years to come'. It hopes to achieve this, in part at least, via the draft reviewed mining charter it unexpectedly unveiled in April 2016. However, the draft charter is more likely to turn mining into a sunset industry instead. It demands that black ownership be kept at 26%, even if BEE investors sell out, which will be hugely costly and could soon put an end to existing majority control. It also threatens mining companies with the cancellation of their mining rights if they fail to achieve 100% compliance on ownership, human resources development, and housing targets over a 30-year period. In this it goes far beyond what the BEE generic codes require. The DMR may see the draft charter as a key means of overcoming inequality (as it told the IRR and the other organisations present at a recent public consultation on the document), but its actual impact is likely to be precisely the opposite. The draft charter should thus be scrapped and replaced by more practical and effective measures to empower the disadvantaged.

The Department of Mineral Resources (DMR) says it is seeking to 're-imagine the mining industry' via the draft reviewed mining charter it unexpectedly unveiled in April 2016. To explain the thinking behind the draft charter and show how it will help turn the mining industry into a 'sunrise one for 100 years to come', the department is busy holding public consultations on the document – one of which the IRR recently attended.

According to the DMR, the draft charter incorporates 'the wisdom of hindsight' and reflects all the lessons it has learnt since 2002, when an initial mining charter was drawn up. The draft charter, it says, is needed to speed up transformation, encourage economic growth, and ensure that 'growth and

transformation become symbiotically reinforcing'. The document is also necessary to reduce inequality in South Africa, which it says is the worst in the world. In addition, the draft charter is supposed to align the mining industry's black economic empowerment (BEE) obligations with those set out in the generic codes of good BEE practice which took effect in May 2015.

The draft mining charter is supposed to align with the BEE generic codes, but it goes far beyond what they require.

However, the draft mining charter goes well beyond what the BEE codes require – and especially so in its insistence on 100% compliance at all times with three 'ring-fenced' elements: ownership, human resources development, and housing for mineworkers. In practice, it will burden mining companies with heavy additional compliance costs, while threatening the security of mining titles and promoting disinvestment. Yet the DMR seems unwilling to acknowledge just how much the draft charter is likely to damage an essential industry already confronting a storm of adverse conditions.

Importance of the mining industry

South Africa's mineral resources are valued at $2.5 trillion, giving it arguably the richest non-oil reserves in the world. In 2015 the mining sector contributed 8% to gross domestic product (GDP). However, the sector's large appetite for electricity, infrastructure, manufactured goods and a host of other products and services makes it far more important to the economy than the 8% figure might suggest. That the mining industry in 2015 alone spent some R405bn on goods and services gives some measure of its contribution to the wider economy.

Mining also generates some 35% of South Africa's merchandise exports, while helping to attract much-needed foreign direct and portfolio investment. This in turn helps finance the country's significant budget and current account deficits. It also helps buttress the value of the rand and hold inflation in check. Mining also contributes significantly to tax revenues. The sector has long been a major employer of mainly unskilled labour and currently sustains more than 1 million direct and indirect jobs. The mining sector thus remains a central pillar of South Africa's struggling economy.

The mining sector contributes to investment, growth, jobs, and exports, and remains a central pillar of South Africa's struggling economy.

However, the mining sector now faces a storm of adverse conditions. Since peaking in August 2011, the prices of South Africa's major mineral exports have dropped sharply as demand from China, in particular, has diminished. Over the past five years, the price of iron ore has dropped by about 70%, while the gold price (despite recent rallies) has decreased by some 25% and the platinum price by around 35%. At the same time, input prices have continued to rise, often sharply. Wage increases in the mining industry have averaged 12% annually for the past five years (which is double the inflation rate), but have not been matched by rising productivity. The cost of electricity went up by some 240% between 2007 and 2012 and has continued to rise at rates significantly higher than the consumer price index.

In addition, electricity supply remains inadequate, while transport logistics are inefficient

and costly. Declining ore grades are a further constraint on profitability, as is the deep-level mining often required. Trade union rivalry, unrealistic wage demands, and the risk of prolonged and often violent strikes pose further major risks to mining operations and the profitability of the industry. The net profits of mining companies have fallen sharply in recent years, as has the market capitalisation of mining companies listed on the JSE. Much of the mining industry in South Africa is struggling to overcome these daunting challenges, while many major international mining companies are seeking to disinvest, rather than expand their operations here.

South Africa scores badly on many of the factors relevant to mining investment, as assessed by the Fraser Institute each year.

Also worrying is how badly South Africa scores on many of the factors relevant to mining investment. Comparative performance on these indicators is regularly tracked by the Fraser Institute of Canada, in its annual assessment of the attractiveness to investors of different mining jurisdictions. For many years, South Africa – despite its enormous mineral wealth – has fared poorly on the Fraser Index compared to many other countries, including ten African ones. It also does badly in comparison with its Botswana neighbour, while the differences in scores between the two countries on issues vital to mining are particularly telling.

In the Fraser Index for 2015, for instance, South Africa came 105th out of 109 countries (that is, 4th last) on labour issues, whereas Botswana ranked 46th. On community development conditions, South Africa ranked 91st, while Botswana ranked 35th. Even on its legal system, as relevant to mining, South Africa ranked far worse than Botswana, coming in at 70th position compared to Botswana's 20th place. On its tax regime relevant to mining, South Africa ranked 69th, whereas Botswana ranked 2nd. On uncertainty about disputed land claims, South Africa – having recently re-opened its land claims process – ranked 62nd, whereas Botswana came 4th out of 109 countries. South Africa also fared poorly on policy issues, as further described in due course. Overall, the Fraser Institute ranked South Africa 66th out of 109 countries, while Botswana ranked 39th (see table on p24).

In the 2015 Fraser Index, South Africa came fourth last on labour issues, whereas neighbouring Botswana did much better.

As these comparisons show, the travails of the South African mining sector cannot solely be blamed on the current global commodities downturn. Even during the boom years of soaring Chinese demand for minerals from 2001 to 2008, moreover, South Africa's mining industry shrank by 1% a year. By contrast, the top mining exporting countries experienced average growth of 5% a year in the same period.

If the South African mining sector could match this performance, it would help the economy to grow at the rapid rates (ideally 6% or 7% of GDP) needed to overcome the unemployment crisis. Increased mining revenues are also badly needed to help the government finance its twin deficits and reduce the growing burden of public debt, which has doubled since 2009. Interest payments on this debt are already expected to total roughly R150bn this year (almost as much as spending on health care), while interest is the fastest rising line item in the annual budget. Growing doubts about South Africa's capacity to manage its debt burden

could well prompt international ratings agencies to downgrade the country's credit rating to below investment grade. Any such decline to 'junk' status will add to the country's financial woes and increase the already high burden of interest payments on public debt.

In these circumstances, the government urgently needs to do all it can to help the mining industry overcome its current challenges and start growing strongly once again. To this end, it needs to reduce the regulatory burden on the sector, which is a key factor contributing to its current malaise. The government must certainly not increase the regulatory burden, which is precisely what the draft charter aims to do.

The growing regulatory burden on the mining sector

Much of the regulatory burden comes from the Mineral and Petroleum Resources Development Act (MPRDA) of 2002, which came into effect in 2004. Many of the Act's requirements for the granting of mining rights are vaguely worded and inherently uncertain, making them difficult to understand and open to varying interpretation. Applicants must, among other things, draw up 'social and labour plans' satisfactory to DMR officials, fulfil broad socio-economic objectives (such as 'advancing the social and economic welfare of all South Africans'), and comply with the empowerment provisions set out in the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry (the original charter), which was drawn up in 2002 and entered into force (with the MPRDA itself) in May 2004.

The government needs to reduce the regulatory burden on mining, but the draft charter inceases it instead.

The original charter effectively required mining companies to transfer 26% of their equity or assets to 'historically disadvantaged South Africans' (HDSAs) within ten years, or by the end of 2014. It also said that this 26% in equity or assets was to be transferred at 'fair market value on a willing seller/willing buyer basis' and that 'the continuing consequences of all previous deals' must be taken into account in measuring the extent of HDSA ownership. Under the original charter, mining companies also agreed to 'aspire to a baseline' of 40% black participation in management within five years, co-operate in the formulation of development plans for mining communities and major labour-sending areas, improve housing standards for mineworkers, and increase procurement from HDSA companies over three to five years, while encouraging their existing suppliers to partner with HDSA firms.

The MPRDA itself has made for 'a very unpredictable mining environment' since it took effect in May 2004.

According to mining law expert Peter Leon, the vague provisions of the Act have made for 'a very unpredictable regulatory environment' ever since the MPRDA took effect. In 2007 the government seemed to recognise this problem and pledged to reform the MPRDA by reducing discretionary powers and making the relevant rules more certain. Instead, a number of regulatory changes since then have made the initial problem even worse.

In April 2009 the then mining minister, Buyelwa Sonjica, unexpectedly gazetted a code of good practice under the MPRDA, under which mining shares transferred to HDSA partners would have to be free of debt within two years. This suggested that mining companies would

virtually have to give their assets away. Following strong objections, the code was put on hold for a number of years. However, under the MPRDA Amendment Bill of 2013 – which has been adopted by Parliament but is currently under review because of doubts as to its constitutionality – the code has been incorporated into the Act. Unless this is changed, the code of good practice will automatically come into effect when the 2013 Amendment Bill is enacted. In combination with the draft charter provision requiring mining companies to re-do ownership deals whenever their BEE investors sell out, this could cripple many mining companies.

The regulatory burden was also increased in 2010, when a new mining minister, Susan Shabangu, insisted that mining companies were lagging in implementing the original charter and had to do more to advance transformation. She then gazetted a revised mining charter in which previously aspirational goals were turned into specific targets to be attained by the end of 2014. By that time, mining companies were expected, among other things, to achieve 'a minimum target' of 26% ownership by HDSAs; attain 'a minimum' of 40% black representation at board and management levels; increase annual procurement from BEE suppliers (those with 25% black ownership in most instances) to 40% for capital goods, 50% for consumer goods, and 70% for services; allocate an increasing proportion of their annual payrolls (3% in 2010, rising to 5% by 2014) to skills development; implement community development projects; and improve housing for mineworkers in various ways. Mining companies undertook to report annually on their compliance with these revised requirements, while the DMR in turn promised to help 'promote the sustainable development and growth of the mining industry'.

In 2010 the minister gazetted a revised mining charter, which turned previously aspirational goals into a number of specific targets.

The revised charter also changed the empowerment goal posts in other fundamental ways. First, Ms Shabangu declared an end to the 'once-empowered, always-empowered' principle contained in the original charter, saying that if BEE shareholders sold out their stakes, mining companies would have to enter into new BEE ownership deals. However, as Mr Leon pointed out, this was contrary to the original charter and unfair to the industry for 'it was not the company's fault...if the BEE investor sold out'. Second, the revised charter expressly stated that 'non-compliance' with its provisions, or those of the MPRDA, 'shall render the mining company in breach of the Act and subject to the provisions of Section 47, [providing for the suspension or cancellation of mining rights] read in conjunction with Sections 98 and 99 of the Act' (laying down penalties for contraventions of the statute).

The revised charter also stated that non-compliance could be punished by the cancellation of mining rights under the MPRDA.

The revised charter thus purported to give the minister the power to cancel the mining rights of companies that failed to comply either with the revised charter or the Act itself. Wrote journalist Tim Cohen in *Business Day*: 'Suddenly, all the soft targets of the charter have been turned into black letter law. Suddenly, not achieving procurement targets means your competitors can insist your licence is revoked.' Moreover, nothing had been done to cure the ambiguities in wording that made for great uncertainty about the Act's requirements and

opened the way to the unequal and often arbitrary enforcement of the relevant rules.

Next came the MPRDA Amendment Bill of 2013, which again sought to increase the regulatory burden in numerous ways. Under the Bill, the mining minister is empowered to 'designate' various minerals as necessary for local beneficiation and then stipulate 'the prescribed quantities, qualities and timelines' in which these minerals must be supplied. Prices must be either 'mine-gate' or 'agreed', while no designated mineral may be exported without ministerial consent until the stipulated percentages have been locally supplied. Both price and export controls are also likely to be imposed on all minerals identified by the minister as 'strategic'. These export controls are clearly in conflict with international agreements binding on South Africa, which bar the introduction of such measures. This is partly why President Jacob Zuma declined to sign the Bill into law, and why the measure is now under parliamentary review.

The MPRDA Amendment Bill of 2013 increases the regulatory burden and gives the minister many more discretionary powers.

Unless the 2013 Bill is greatly changed in the review process, its enactment into law will not only increase the regulatory burden on mining companies but also greatly expand the mining minister's discretionary powers. This will add to policy uncertainty and increase the already wide scope for arbitrary interpretation and uneven enforcement by DMR officials.

The growing regulatory burden and vague provisions of our mining law have already triggered a sharp decline in South Africa's ranking on the policy-related elements of the Fraser Index. In 2015 South Africa thus ranked 78th out of 109 countries on the 'policy perceptions' element, which measures the extent to which mining policy helps attract investors. Botswana, by contrast, with its clear and certain mining legislation – which has remained largely unchanged since 1999 – came 14th out of 109. On uncertainty in administering existing regulations, South Africa fared even worse, ranking in 84th place out of 109 countries. By contrast, Botswana, with its unambiguous rules, was rated the 2nd best in the world (see table on p24).

On policy issues, South Africa does far worse than Botswana – especially on uncertainty in its existing regulations.

Since 2014, the mounting regulatory burden on the mining sector has also been accompanied by various other policy shifts. These changes have further undermined property rights and deterred investment both in mining and the wider economy. Key interventions include:

- the re-opening of the land claims process in 2014 (which has recently been placed on hold by the Constitutional Court because of procedural irregularities in the adoption of the relevant legislation), but which could still in time result in many new claims on land used for mining;
- the cancellation of bilateral investment treaties (BITs) entered into after 1994 with the United Kingdom and 12 European countries, many of which have long been South Africa's most important investment partners;
- the replacement of these BITs with the misleadingly named Protection of Investment Act of 2015, which provides almost no protection against nationalisation or expropriation for

either foreign or domestic investors; and

- the pending enactment of the Expropriation Bill of 2015, which further undermines property rights and is likely to encourage, among other things, a number of indirect or regulatory expropriations for which no compensation will be paid.

Conflicting audits of mining charter compliance

Under the revised mining charter, mining companies were expected to raise HDSA ownership to 26% and meet various other targets by the end of 2014. As this deadline approached, the DMR commissioned an audit of their compliance, while the chamber of mines conducted its own review. These assessments highlighted sharp differences between the department and the mining industry on the extent to which the various targets had been fulfilled. Among other things, the DMR insisted that 'the once-empowered, always-empowered' principle no longer applied, whereas the chamber strongly disagreed. In March 2015 the then mining minister, Ngoako Ramatlhodi, announced that he and the chamber had agreed to apply jointly for a declaratory court order on the status of the 'once-empowered, always-empowered' principle.

The DMR's audit of compliance with the mining charter shows very different results from those obtained by the Chamber of Mines in its review.

However, instead of waiting for the court to give its ruling, the minister followed up in May 2015 by unexpectedly releasing the DMR's audit report. According to this report, only 20% of the industry had reached the 26% target for HDSA ownership in 2014. The chamber disagreed, saying all its members had at least 26% black ownership and that the average was 38%. The discrepancy was largely based on conflicting views of the changes introduced by the 2010 revised charter and whether these should have retrospective effect.

If the original targets in the 2002 charter were applied, the DMR agreed that 90% of the mines it had measured had not only met the target of 26% black ownership but had in fact exceeded it by bringing such ownership up to 32.5% on average. However, the 2010 charter had inserted a requirement that black ownership deals should include an employee share-ownership programme and a community group of some sort, in addition to one or more BEE entrepreneurs, and most ownership deals lacked the correct beneficiary mix. In addition, the DMR had not counted deals from which BEE partners had sold out, or which had otherwise come to an end. Whether the BEE ownership attained under these deals should still be counted was, of course, the very issue the minister and the chamber had jointly agreed to refer to the courts.

The DMR said 90% of companies had met the initial ownership target, but only 20% had met the revised one.

The chamber responded that it had been 'blind-sided' by the DMR's report, especially as it had earlier been agreed that the ownership issue would be put to one side pending clarification by the courts. It stressed that the mining industry had transferred more than R159bn in value to black South Africans and that the ownership target had been met or exceeded in all spheres, including diamonds (26%), platinum (38%), manganese (42%) and coal (47%).

On the procurement element, the DMR report agreed that most companies had met the

relevant targets. Some 82% of companies had met the 40% target for capital goods, while 65% had met the 50% target for consumer goods, and 83% had met the 70% target for services. (The chamber's figures were somewhat different, at 72%, 72%, and 63%, respectively.) However, the DMR report criticised multinational suppliers of capital and other goods for failing to contribute sufficiently to a social development fund. 'This aspect had largely fallen through the cracks', it said, and so a new mechanism would be needed to address it. By contrast, the chamber noted that these multinational suppliers, which were supposed to contribute 0.5% of the annual income they generated from local mining companies, had in fact contributed some 20% of such income, thus greatly exceeding the target.

The DMR agreed that companies had generally exceeded the 40% target for black representation in management.

On employment equity, the DMR report agreed that the mining industry had generally exceeded the target of 40% black representation in 'all functional categories'. However, it complained that 'white males still dominated... senior and middle management', and that 'African females were still under-represented at all levels'. Again, the chamber disagreed, putting black representation at 50% at the top management level, at 42% among senior managers, at 51% among middle management, and at 54% at the junior management level.

On human resources development, the DMR report found that 'most companies had met the target of spending 5% of their annual payroll', as required. The chamber said such spending had in fact gone beyond the agreed target, having risen to 5.5% of annual payroll in 2014. This meant that charter targets had again been exceeded.

On the housing element, the DMR report said that only 55% of mining companies with hostels had met the target for upgrading these buildings. It acknowledged that many companies had sought to improve living conditions in other ways – through living out allowances and the provision of housing – but claimed that the charter dealt only with the conversion and upgrading of hostels. This is not true, however, for the 2010 revised charter speaks also of measures to 'facilitate home ownership options for all mine employees'.

Without any evaluation of these other housing options, the DMR report concluded that 'the objective of improving the living conditions of mine workers had not been fully realised'. On community development, the DMR report found that only 36% of mining companies had met the community development target for 2014. But the chamber again disagreed, putting average compliance with hostel upgrading requirements at some 68% and compliance with community development obligations at 71%.

The minister concluded that 'only 70% of companies had done everything the charter required' on all the targets set.

Despite the high levels of compliance reflected even in the DMR report, Mr Ramatlhodi concluded that 'only about 70% of mining rights holders had done everything the charter required for meaningful economic participation'. He failed to acknowledge that many of the targets had been met, even on the DMR's assessment, and omitted to explain why the DMR report should be accepted as correct when the data assembled by the chamber was so different. Instead, the minister warned that the department was talking to companies

that had not met the charter requirements and 'would have to take steps to cancel mining licences under Section 47 of the MPRDA'.

This was a major threat to the security of mining titles. In response, the president of the chamber, Mike Teke, said that the DMR was not 'fairly reflecting' all the work the mines had done. He also stressed the current difficulties facing the industry, which was characterised by 'depressed commodity prices, rapidly escalating costs, electricity supply challenges, and continued uncertainty regarding some parts of South Africa's mining and transformation laws'. The CEO of Harmony Gold, Graham Briggs, added that the threat to revoke mining rights was a threat to the very existence of many companies and put 'a dark cloud' over the industry.

The minister also warned that the DMR 'would have to take steps to cancel the mining licences' of non-compliant companies.

It was against this background, as Mr Leon notes, that the chamber felt obliged to apply on its own for a court ruling on the crucial 'once-empowered, always-empowered principle' the DMR's audit had discounted. That action remains pending.

This disagreement over compliance echoes a similar dispute in 2010, when the DMR's audit of mining sector compliance with the original charter in its first five years was also disputed by the chamber. The DMR's criticisms were then used to justify the sweeping changes to the mining charter made that year. The same story seems to be playing out in 2016, with the DMR's criticism again being used to justify yet more changes to already onerous empowerment requirements. This became evident in April 2016, when current mining minister Mosebenzi Zwane unexpectedly gazetted the draft charter. This proposes a number of major changes to empowerment obligations. If adopted in its current form, it will add significantly to the regulatory burden on mining companies and greatly damage a crucial but struggling sector.

Content of the draft charter

Preamble

According to the preamble to the draft charter, the DMR's 2015 report on compliance found 'an extremely varied performance that seemed to suggest a compliance-driven mode of operation, designed only to protect the "social license (sic) to operate"'. In addition, many mining communities were still living 'in abject poverty', while progress on BEE ownership remained 'limited'. So too did 'cash-flow directly to BEE partners'. A review was also needed to bring the mining charter into line with the Broad-Based Black Economic Empowerment Act of 2003, as amended in 2013, and its revised generic codes of good practice.

The new charter is supposedly needed to address poverty and to bring BEE obligations in mining into line with the revised generic codes of good practice.

This preamble ignores the extent to which mining companies have in fact met their charter obligations, as described above. It blames mining companies for the poverty and unemployment which many of the government's own policies, including its labour laws, have made worse. It criticises mining companies for making only limited dividend payments to BEE inves-

tors, but overlooks the sharp declines in commodity prices since 2011 which have helped to place all mining companies under enormous financial pressure.

The supposed obligation on the DMR to align the draft charter with the generic codes stems from the BEE Amendment Act of 2013, which includes a trumping clause giving its provisions precedence over any prior and conflicting empowerment law. The Amendment Act came into force in October 2014, and the trumping clause a year later. At the end of that month, the mining industry was granted a year's exemption from the trumping clause, during which time the necessary alignment was to be carried out. However, the BEE Amendment Act also gives organs of state, including the DMR, considerable scope to raise or lower the BEE requirements set out in the generic codes, provided they have the consent of the minister of trade and industry. The DMR could have used the flexibility thus authorised to avoid many of the damaging changes evident in the draft charter.

The BEE Amendment Act of 2013 has a trumping clause, from which the mining sector has been exempted until October 2016.

Instead, the department seems to have allowed itself to be captured by the black business lobby, which has long been demanding an end to the mining charter and a uniform set of ever-escalating BEE rules. Moreover, in agreeing to insert key aspects of the generic codes into the draft charter, the DMR is reneging on commitments long made to the mining industry. It is also fundamentally changing the empowerment goal-posts and generating great uncertainty as to what additional changes might lie ahead.

Worse still, the DMR's demand for 100% compliance with three elements in the draft charter goes far beyond what the generic codes require. This suggests that the DMR is not truly attempting to align the mining charter with the general rules, but is instead seeking to give itself the capacity to cancel mining rights in wide-ranging circumstances. In doing so, the DMR is adding to the uncertainty of mining titles and exacerbating a regulatory burden which is already too heavy.

Definitions

'Black people'

The draft charter is intended to benefit 'black people', rather than the HDSAs previously targeted. In defining 'black people', it says that this is 'a generic term which means Black Africans, Coloureds, and Indians'. However, benefits are confined to blacks who are South African citizens by birth (or by naturalisation prior to 1994).

The draft charter is intended to benefit 'black people', rather than the historically disadvantaged South Africans previously targeted.

The new definition implicitly requires some system of racial classification. However, there is no law providing how this should be done, for the Population Registration Act of 1950 was repealed by the National Party government in 1991 (after decades of public outrage at its provisions) and has not been replaced. In addition, identifying people by race and treating them differently on the basis of their race is contrary to the principle of non-racialism on which the Constitution is founded.

It is also contrary to Section 9 of the Bill of Rights, which bars any form of racial discrimina-

tion by either the state or private persons. As an exception to these general rules, the equality clause authorises the taking of 'legislative and other measures designed to protect or advance persons....disadvantaged by unfair discrimination'. However, this sub-section makes no mention of racial targets and provides no constitutional authority for their use. In addition, any affirmative action measure which is 'designed to protect or advance' the disadvantaged must be rationally and reasonably connected to this objective. Measures which are instead likely to hurt the great majority of black South Africans do not satisfy this test.

The charter requires 'a minimum target of 26% ownership per mining right' for black people, with deals to be structured in specified ways.

Elements of the Mining Charter

Ownership

The charter requires 'a minimum target of 26% ownership per mining right' for black people. It also requires that this 26% stake should be structured in a particular way, with at least 5% going to employee share ownership schemes (ESOPs), 5% to a community having rights in the land being mined, and 5% to black entrepreneurs. Trusts must be established to hold these community and employee shareholdings, and must be structured so as to include traditional authorities and unions respectively. In addition, as the draft charter puts it, 'there must be a BEE transaction for each mining right granted and one Special Purpose Vehicle (SPV) for each such empowerment transaction'.

According to the draft charter, 'all existing mining rights holders must align BEE transaction(s) concluded prior to the coming into operation of the amended mining charter 2010 with the reviewed mining charter 2016.' Moreover, where a BEE partner has 'exited' in some way, 'the mining right holder must within three years...review its empowerment credentials consistent with the amended 2016 Mining Charter'.

The obligations thus placed on mining companies – though poorly worded and open to varying interpretation – are likely to be highly damaging. A mining company with more than one mining right will now have to do a separate BEE deal for each such right. In addition, if existing deals do not include sufficient representation for employees and communities – and the National Union of Mineworkers (NUM) estimates that only 9% of mining companies have deals that meet these criteria – then most of the costly ownership transactions already concluded will have to be redone. Retrospective rule-making of this kind is contrary to the rule of law. It also conflicts with the Constitution, which stresses the 'supremacy' of the rule of law and makes it clear that its principles cannot simply be ignored.

BEE ownership must be kept at 26% for 30 years (the normal duration of a mining right), even if BEE investors exit.

Worse still, if BEE investors 'exit' an ownership deal, a mining company must do whatever additional deals might be needed to keep BEE ownership at 26% overall (and at 5% for each of the three categories of BEE beneficiaries identified in the draft charter). These obligations will require mining companies to keep diverting scarce capital into ever more ownership deals, which will undermine both the sustainability and the development of many mines. In addition, if a mining company has to do successive BEE ownership deals, at 26% of equity each

time, it could soon lose the majority control with which it began its operations.

Each new BEE deal will also dilute the shareholdings of other investors. Yet many of these investors are institutions such as pension funds and unit trusts, in which small savers and pensioners, both black and white, have substantial interests. This means that every new BEE deal done at a discount by a mining company needing to keep its BEE stake at 26% will reduce the value of these institutional shareholdings. This in turn will curtail the funds available to these investors to pay out in the form of pensions or dividends. Hence, much of the cost of enriching a relatively small group of BEE mining beneficiaries will be borne by ordinary savers and pensioners, many of them black.

Successive ownership deals will be costly. They will also erode initial majority control and dilute the value of other shares.

In addition, it may not in any way be the fault of a mining company if a BEE investor decides to exit. Deals may end up under water because global commodity prices have fallen, or BEE investors want to sell out at a profit and invest elsewhere. The new rules will put pressure on mining companies to lock in their BEE partners for the duration of their ownership deals which (according to the draft charter) must remain in place for as long as their mining rights – and hence for some 30 years. Yet any such restriction would negate most of the benefits of their BEE ownership stakes and could not realistically be imposed. At the same time, however, mining companies cannot be expected simply to keep coughing up for new BEE deals over a 30-year period.

New requirements for trusts to house mandatory employee and community stakes will have significant tax implications and add to compliance costs. The obligation to establish an SPV to manage the BEE ownership deal required for every mining right will also be complex and impractical, especially for companies holding a number of such rights. Already, the financing of a BEE deal costs around 30% of the value of the transaction – and the further complexities arising from the draft charter are likely to add greatly to these costs.

In addition, the mining industry has already transferred more than R159bn of value to black South Africans. It could nevertheless be expected to transfer the same amount again (if not more) under the new rules. According to a report by Stanley Morgan, an accounting firm, the net present value of the mining industry could be reduced by a quarter under these requirements.

Overall, these ownership requirements will deter new mining ventures, hamper the expansion of existing mines, encourage disinvestment from South Africa, and make it far harder to maintain or expand mining jobs. Their retrospective operation is unreasonable, irrational, and inconsistent with the Constitution. So too is the vague content of the new rules, which contradicts the certainty required by the rule of law.

The ownership requirements will deter new mining ventures, hamper the expansion of existing mines, and put mining jobs at risk.

Procurement, supplier and enterprise development

Capital goods

Under the draft charter, the target for the procurement of capital goods – which range from

drilling and hoisting equipment to crushing mills and furnaces – is to rise from 40% to 60%, while local suppliers must be manufacturing companies which are 'BEE compliant'. Whether they must also be 'empowering suppliers', as defined in the revised generic codes, is not explained. In addition, '30% of the 60% must preferably be given to small business development which are BEE compliant' (sic), while 'a minimum of 10% of the 30% must be reserved for BEE compliant enterprise development'.

The increase from 40% to 60% is a major shift, which may not be realistic. It could add significantly to input costs, especially as many local manufacturers are less competitive than global ones. Yet mining companies cannot reasonably be expected to base their procurement decisions on criteria other than price, efficiency, and reliability of supply.

The BEE procurement target for capital goods goes up from 40% to 60%, which may not be realistic and could add greatly to input costs.

The expectation that 30% of this 60% should come from small businesses is particularly unrealistic when there are so few small firms with the capacity to meet this demand. Equally impractical is the demand that 10% of this 30% be set aside for the development of new enterprises capable of supplying capital goods. Mining companies, which face major problems in sustaining their own profitability, cannot be expected to incubate new enterprises in this way. It will also be difficult for these new enterprises to succeed when the mining sector is itself in such difficulty and the economy as a whole stands on the cusp of recession.

Consumables

Under the draft charter, the targets here will also rise steeply, from 50% to 70%. Again, the draft charter expects 30% of this 70% to 'be given to small business development which are BEE compliant' (sic) and adds that 10% of this 30% must go to enterprise development. Again, these increased targets are unrealistic and are likely to add significantly to procurement costs.

Services

The target here goes up from 70% to 80%, while 40% of the 80% must go to small businesses which are BEE compliant. In addition, 10% of this 40% must be reserved for the development of new enterprises. Again, these increased targets are likely to prove costly and impractical.

Mining companies cannot reasonably be expected to base their procurement decisions on criteria other than price, efficiency, and reliability.

Verification

Mining rights holders will also have to 'verify local content for capital and consumer goods...with the South African Bureau of Standards (SABS)' before sending in their annual reports on compliance with the charter. This will add to compliance costs and is likely to generate a major bureaucratic burden for both mining companies and the SABS.

The aim of this provision, says the DMR, is to eliminate the use of BEE middlemen who import the necessary goods and then sell them on to mining companies at a mark-up. Such rent-seeking behaviour, which the DMR describes as widespread, needs to be eliminated. But this is best achieved by terminating unrealistic racial targets in procurement and replacing

these with more effective ways to empower the disadvantaged and promote the growth of small businesses.

Multinational suppliers of goods

Under the draft charter, multinational suppliers of goods must every year contribute 'a minimum of 1% of annual turnover generated from local mining companies' to a 'social development trust fund' to be established by the mining minister. This fund is intended to promote the socio-economic development of local communities and help build capacity for BEE suppliers of goods and services.

Mining turns mineral deposits into marketable products: itself a vital form of beneficiation.

The draft charter doubles the relevant target from 0.5% (under the 2010 version) to 1%. However, the DMR should be wary of imposing additional financial burdens on multinational companies, which can readily decide to end their exposure to South Africa's stagnant economy and growing regulatory burden and turn instead to a host of other countries. The international trade law implications of the revised obligation are also significant and seem to have been overlooked.

Beneficiation

The draft charter, like its predecessors, allows mining companies to offset 11% of their BEE ownership obligations via the local beneficiation of mineral products. However, as the National Planning Commission, the Industrial Development Corporation, and others have warned, the beneficiation of minerals into intermediate or final products is difficult to achieve when the necessary skills are often not available and South Africa's electricity supply remains inadequate and increasingly costly. Hence, few mining companies will be able to take advantage of these provisions.

The DMR's emphasis on this particular type of beneficiation also overlooks the extent of the beneficiation intrinsic in the mining process. What mining does, in essence, is to convert unsevered mineral deposits in the ground into mineral products with a realisable market value. This in itself should be seen as a vital form of beneficiation, for which mining companies should be given credit. Given the value they have already added to the country's mineral resources, they should not be pressurised to take on the costs of additional beneficiation via further industrial processes.

Employment equity targets are sharply increased under the draft charter: to 60% at senior management level and 75% for middle managers, for example.

Employment equity

Employment equity targets are increased particularly sharply under the draft charter. The previous target of 40% black representation at all management levels is now to be raised to 50% at board level, 50% at executive level, 60% at senior management level, 75% at middle management level, and 88% at junior management level. In all but one sphere, black women are expected to make up half the relevant targets. (The exception is at board level, where black female representation is expected to rise to 15%.)

These targets, like the Employment Equity Act of 1998 (the EE Act) on which they are based, assume that, because black South Africans make up 77% of the economically active population (EAP), they should make up 77% of executive, senior, and middle managers too. But the EAP (by definition) includes all those people between the ages of 15 and 64 who either work or wish to be employed. Given the youthfulness of the black population – more than half of black people are under the age of 25 – the EAP includes many black teenagers who have never obtained a matric or worked at any job at all.

More than half of blacks are under the age of 25, while those aged 35 to 65 make up only 40% of the national economically active population.

By contrast, those appointed to executive, senior, and middle management posts, in particular, must have appropriate experience and skills. Yet in 2015 blacks falling within the 35-64 age cohort that would generally be considered eligible for management posts made up only 40% of the national EAP. In addition, though degrees or diplomas are often necessary or advisable for jobs of this kind, only 5% of the black population held any kind of tertiary (post Grade 12) qualification. This means that the pool of black people from which such managers can realistically be drawn is far smaller than the draft charter assumes.

It is also impractical and irrational to raise targets for black female representation in management posts from 10% to the high targets (25%, 30%, 38%, and 44%) laid down in the draft charter. The pool of black women with the requisite skills and years of experience in the mining industry is simply not big enough.

Core and critical skills

The draft charter adds that mining rights holders 'must ensure that a minimum of 40% black people are represented in the mining company's core and critical skills by diversifying their existing pools'. To this end, it says, the rights holder must 'identify and fast track their existing pools', while 'the abovementioned fast tracking of pools must be a proportional representation of the workforce'. These requirements, particularly the last one, are so badly phrased as to be virtually unintelligible.

Human resource development

The draft charter requires the mining industry to 'invest 5% of annual payroll' in essential skills development activities, 'such as artisanal, bursaries, literacy and numeracy' (sic). It indicates that this allocation must be 'reflective of the proportional representation' (sic).

The skills development target (5% of annual payroll) is costly for a labour-intensive industry – especially at times of low profitability.

Again, this provision is poorly drafted and open to varying interpretations. Though the overall target is the same as that in the 2010 charter, it fails to take into account the major financial challenges now confronting the mining industry. For most companies in what is still a labour-intensive industry, 5% of annual payroll is a significant sum (especially as mining companies must also pay the statutory skills levy, currently set at 1% of annual payroll). Payments of this magnitude pose a substantial burden, especially during periods of limited profitability. Hence, they could fuel many job losses over and above the roughly 35 000 already recorded in the past year.

Under the charter, some 15% of the 5% levy will also have to go to a 'ministerial skills development trust fund' to be established by the mining minister. There can be no certainty that this fund will be efficiently administered, or that its contribution to training will be well conceived or executed. Mining companies should instead be allowed to allocate the full amount of the levy either to in-house training, or to relevant academic education, both of which are likely to be more effective in meeting their skills development needs.

Mine community development

The community development target is 1% of annual turnover (not 1% of net profit after tax), and could be very costly for mining companies.

According to the draft charter, mining companies must contribute 1% of annual turnover towards local community development and labour sending areas.

This target should be based on net profit after tax, as it is in the generic codes. For many companies, 1% of annual turnover will be a substantial sum, for if a mining company has annual turnover of R10bn, it will be expected to contribute R100m to community development each year.

This obligation is unduly onerous – and especially at times when profits are down. In addition, all holders of mining rights are already obliged to contribute substantial amounts to their 'social and labour' plans, much of which also goes to the benefit of mine communities. At the same time, costly contributions of this kind can do little to overcome the main obstacles to upward mobility among the poor, which include low rates of economic growth, accelerating unemployment, and a public schooling system which is virtually the worst in the world, despite the large amounts of tax revenue (more than 6% of GDP) allocated to it each year.

However, the DMR seems to have little sympathy for such concerns, saying: 'Is 1% of annual turnover too costly? What is the cost of not doing community development in monetary terms? The cost of inaction might be not having a mining operation at all. A company could end up with serious problems. So we should be careful of saying that this is too costly. In addition, the charter must be able to deal with both the highs and the lows in the mining cycle, without having to be amended.' However, the department may also be willing to consider 'whether this is the right time to do this, when the industry is at its lowest ebb'.

The DMR seems unconcerned, suggesting that community protests might cost even more by putting an end to mining operations.

Housing and living conditions

Mining companies are expected to improve 'the standards of housing and living conditions for mine workers in line with the Housing and Living Conditions Standards' compiled by the DMR. They are expected to 'maintain the occupancy rate of one person one unit and maintain family units', in hostels presumably. They are also expected to 'contribute to home ownership options for interested mine employees in consultation with organised labour'. This they may do by 'offering different building packages' to interested employees, 'subsidising such workers to buy houses', or 'partnering with finance institutions to issue guarantees for home ownership on behalf of mine employees'.

The draft charter fails to recognise the difficulties that mining companies may have, in

practice, in helping to provide employee housing where the necessary land, infrastructure, or legal title has not been made available by municipalities or other organs of state. In the Rustenburg area, for example, the available water supply is too limited to meet the needs of an expanding platinum mining community, which constrains new housing developments. The draft charter needs to take account of practical obstacles of this kind. It also needs to recognise the financial difficulties now confronting the industry. Hence, it should not impose such costly housing obligations on struggling companies, nor threaten them with the loss of their mining rights if they are unable to maintain a 100% score irrespective of the challenges they face.

Ownership, housing, and human resources development are 'ring-fenced' elements that 'require 100% compliance at all times'.

100% compliance on certain elements over 30 years

The DMR says that all charter targets will apply for the duration of the relevant mining right (rather than 'throughout the life of the mine', as stated in the draft). In addition, 'ownership, housing and living conditions, and human resource elements are ring fenced and require 100% compliance at all times'.

These provisions are likely to be particularly damaging to the mining industry. The original charter was supposed to apply for ten years, but the draft charter will apply for the full duration of a mining right, which could be 30 years or more. Throughout this time, BEE ownership will have to be maintained at 26%, irrespective of how often BEE beneficiaries sell out or deals come to an end for other reasons. Sub-targets for community and employee stakes will also have to be maintained over all these years, even if the relevant communities or employees would also prefer to sell out.

If the overall BEE ownership target or any of the sub-targets is not met at any time, the relevant mining right, on the current wording of the draft charter, could be cancelled for this failure to maintain a 100% score on the ownership element. Few mining companies will be able to borrow working capital or commit their own resources to mining operations when their security of tenure is so fragile.

The BEE generic codes would give companies credit for partial implementation, and for indirect black ownership via pension funds.

Even if BEE ownership in the stipulated proportions can be maintained at all times, mining companies will still be vulnerable to the loss of their mining rights if they fall behind on their housing obligations because of factors beyond their control. It is also unreasonable to expect companies to maintain 100% compliance with costly housing and human resources development obligations during periods of limited or no profitability.

The draft charter also goes well beyond the BEE generic codes in demanding 100% compliance on these 'ring-fenced' elements. On ownership, for example, the BEE codes would give mining companies credit for partial performance, sanction them comparatively lightly (by reducing their level of BEE contribution by one level) if they fail to reach a 40% minimum score, and take account of indirect black ownership via pension funds and unit trusts. By contrast, the draft charter recognises only direct ownership, gives no credit for BEE ownership at any level below 26%,

and threatens companies with a devastating penalty – the loss of their mining rights – if they fail to fulfil this target at any point over a period of 30 years or more.

In explaining this discrepancy, the DMR stresses that its intention is 'not to duplicate the DTI codes but rather to align with them on various issues'. The draft charter's ring-fenced elements are the equivalent of the three 'priority' elements in the generic codes. On ownership, however, the draft charter 'takes its mandate from the MPRDA', which aims, in particular, to transform the ownership of mining companies. Explains the DMR: 'Compliance with the mining charter is the condition on which you hold your mining right. The mining charter is that serious, whereas the generic codes are a licence to trade with the government and are aspirational... The genesis of the mining charter is distinctly different from that of the codes, and we want to emphasise this point.'

The DMR stresses it 'wants 100% compliance all the time' on ownership and 'cannot be satisfied with 90% or 95% of the target'.

The department adds: 'We want 100% compliance all the time on this and cannot be satisfied with 90% or 95% of the target. Hence, the draft charter does not include pro rata ownership points, but asks a simple question: is the holder of a mining right 100% compliant with the 26% ownership target: yes or no? However, if a mining company is not compliant, the MPRDA does not insist on immediate cancellation [of a mining right]. Rather, the company will be given the chance to rectify.'

The DMR acknowledges that the ownership requirements in the draft charter cannot easily be finalised while litigation on the 'once-empowered, always-empowered' principle in the original mining charter remains pending. Its preference for 100% compliance with the ownership target at all times is nevertheless very clear. The department sees this as essential for transformation, failing which the industry cannot prosper, it says. However, the DMR fails to acknowledge how much the draft charter will damage the sector by eroding the certainty of mining titles.

It also overlooks the extent to which black South Africans have in fact been disempowered by the MPRDA, which:

- bars them from acquiring ownership of the mineral resources lying below any land which they might buy;
- deprives traditional communities of much of the control over mining on customary land which they previously enjoyed;
- leaves black farmers unable to resist the start of mining operations on their land, once the necessary mining rights have been granted (often to the politically well connected); and
- damages the poor and unemployed by curtailing investment in a crucial sector and adding to the economic stagnation and unemployment plaguing the country.

Black South Africans have been disempowered by the MPRDA, which bars them from owning or controlling the mineral resources beneath their land.

Transitional arrangements

Effectively, mining rights holders will be given three years to comply with the new requirements in the draft charter. However, the relevant wording is again vague and difficult to interpret. For example, the draft charter says that 'in all elements, mining rights holders must align

existing targets cumulatively from the mining charter 2014 targets within a three-year period to meet the revised targets'.

What does this mean? Take the employment equity targets, which rise from 40% black representation at senior management level to 60%. How exactly must this 20 percentage-point gap be bridged over three years? The same question applies to the 20 percentage-point gap between the current capital procurement target (40%) and the new one (60%). Moreover, given the magnitude of the increases in many of the targets, a three-year transitional period is too short.

Non-compliance

According to the draft charter, 'mining rights holders who have not complied with the ownership, housing and living conditions, and human resource development elements... will be regarded as non-compliant with the provisions of the Charter and the MPRDA shall render the mining right holder in breach of the MPRDA and subject to sanctions provided for in the Act'. The same penalty will apply to any mining rights holder that 'falls between level 6 and 8 of the Mining Charter scored-card' (sic).

Mining companies will battle to sustain their operations if their mining rights are constantly under threat of cancellation.

Though the draft charter does not spell this out in so many words, what this provision signals is that mining companies are likely to have their mining rights suspended or cancelled if they fail to maintain a 100% score on their ownership, housing, and training obligations. Few mining companies will be able to sustain their operations under such a threat.

Companies which do manage to score 100% on these elements, but then fall down on others – particularly the unrealistic employment equity and procurement obligations – could also have their mining rights suspended or cancelled. This too is a major threat to all mining companies.

Since the draft charter was released, the ANC has reportedly agreed that 'the charter should not be part of the MPRDA, but form part of regulations in terms of law'. However, if this change is indeed made, it will make little difference in practice, as the MPRDA is already defined as 'including the regulations issued' under its terms. Hence, any breach of the draft charter will still constitute a breach of the statute itself, for which the penalty may include the suspension or cancellation of a mining right.

In addition, as earlier noted, the DMR seems determined that a mining company that fails to score 100% on its BEE ownership obligation should not be allowed (if it fails to rectify this situation within a specified time) to retain its mining right. The department may perhaps be willing to compromise on its demand for 100% compliance on skills development and housing, but it shows no signs of relenting on the ownership element.

Yet the DMR seems determined that a company scoring less than 100% on ownership should not be allowed to retain its mining right.

The scorecard included in the draft charter is also blank in key respects, leaving mining companies with little guidance as to how compliance points are to be awarded. Though a

total score of 100 points will be available, the scorecard is silent on the points attainable on each element. It identifies 26% as the 'minimum target for HDSA (sic) ownership', but it omits to state how many points out of 100 mining companies will score for meeting this target. Likewise, though it lists new targets for procurement on capital goods, consumables and services, it does not say how many points will be available for full (or partial?) compliance in these spheres. This makes it impossible to see how points will be allocated or total scores computed.

The draft charter no longer identifies 'the sustainable development and growth' of the mining industry as a key goal.

Two telling omissions

One of the key goals included in the 2010 mining charter was to 'promote the sustainable development and growth of the mining industry'. This objective has been removed in the draft charter. In addition, the 2010 charter said that the target of having BEE partners receive cash and take full ownership of their shares within an agreed time frame was 'subject to market conditions'. The new version removes this important practical safeguard.

Time-scale and process for finalising the draft charter

The mining sector's year-long exemption from the trumping clause in the BEE Amendment Act ends in late October 2016. The DMR thus aims to finalise the draft charter by that time. To this end, it will hold further consultative workshops on the text. It is also in discussions with the National Treasury on the tax implications of its proposals.

In addition, the DMR is aware that, under new rules adopted in 2015, no legislation or significant regulation may be adopted without a socio-economic impact assessment (SEIA). The SEIA process, it says, is already well in train. Hence, when the final version of the charter is published, it will be accompanied by a final SEIA report setting out its likely impact on inclusive growth, jobs, social cohesion, and other national priorities.

The draft charter and the Constitution

The draft charter is inconsistent with the Constitution in various ways. As noted above, it implicitly requires racial classification and mandates racial preferences, which is inconsistent with the Constitution's commitment to non-racialism, its prohibition of racial discrimination, and the limited authorisation for affirmative action which it provides.

The draft charter's insistence on retrospective operation is contrary to the rule of law and in breach of the Constitution.

The draft charter's attempt to give its new rules retrospective operation is also inconsistent with the Constitution's founding provisions and their emphasis on 'the supremacy of the Constitution and the rule of law'. Similarly flawed are the vague and uncertain provisions of the draft charter, which contradict the constitutional requirement for clear and unambiguous laws and regulations.

The draft charter also conflicts with the doctrine of the separation of powers, which is a fundamental principle underpinning both the Constitution and the country's democratic order. Under the Constitution, the authority to legislate is reserved for Parliament alone, while the authority to enforce the statutes enacted by the legislature is entrusted to the executive.

Ministers may adopt regulations to clarify and give effect to existing statutory rules, but they cannot simply rewrite those rules as they see fit. Hence, the MPRDA does not – and constitutionally cannot – empower the mining minister to usurp Parliament's function and legislate. In purporting to do so in this draft charter, Mr Zwane has undermined Parliament's authority and breached his own constitutional obligation to 'act in accordance with the Constitution' at all times.

The vague provisions of the draft charter also give the minister a large measure of discretion to interpret its requirements in different ways at different times. This in itself flies in the fact of a Constitutional Court warning against excessive ministerial discretion. Said the court in 2002, in the case of *Janse van Rensburg* v *Minister of Trade and Industry*, 'it is inappropriate that the minister should be able to exercise an unfettered and unguided discretion in situations so fraught with potentially irreversible and prejudicial consequences for business people and others who may be affected'.

The MPRDA cannot empower the mining minister to usurp Parliament's function and legislate.

'Re-imagining the mining industry'

The government has a responsibility to expand opportunities, both in mining and elsewhere, for the 8.9 million South Africans who are now unemployed and the millions more who continue to live in poverty. However, this can be achieved only in the context of a rapidly growing economy which attracts investment, encourages entrepreneurship, and generates millions of new jobs. Hence, a key part of the government's role is to develop and implement policies which promote these outcomes.

Particular care must be taken in crafting policies for the mining industry, where the fixed investment required is enormous, lead times are long, and prices are particularly volatile. Mining legislation must thus provide certainty, stability, and predictability to mining investors.

To do so, South Africa's mining law must meet various internationally recognised principles. It must comply with the principle of equality before the law, so as to limit the scope for bias and corruption. It must state all relevant rules clearly and unambiguously, so that mining companies know what is expected of them and officials have little scope to demand something different. Above all, it must protect property rights, ensure the security of mining titles, and provide policy certainty. Mining companies must be confident that the rules that apply when they invest will not be changed in the future so as to undermine their security of tenure and put their investments at risk.

South Africa's mining law needs to be certain, stable, predictable – and consistent with internationally recognised principles.

The draft charter breaches all of these requirements. Far from helping to expand opportunities in mining, it will encourage retrenchments, deter fresh investment, undermine the sustainability of existing operations, and promote disinvestment. As ever, the impact will fall most heavily on the poor, while inequality between the employed and the jobless will widen even further.

According to the DMR, it is the inequality already evident within the country which ex-

plains why the draft charter is necessary. States the department: 'People speak of growth at 0.1% of GDP in 2016, but for many years we had 3.5% GDP growth. But this growth was not inclusive. It has landed us as the most unequal nation in the world. Hence, the question to look at is why we grew well and why that growth perpetuated our inequality...

'We reached that point when GDP was growing fast, particularly compared to what we had experienced before 1994. For us, inequality threatens democracy – and we have a responsibility to pursue every initiative we can, within the Constitution, to address this. Between 60% and 70% of the population are young, and we have very high rates of unemployment among the youth. Two out of every five South Africans live in abject poverty – and this 22 years into our democracy...

The DMR says average annual growth at 3.5% of GDP since 1994 was not inclusive enough and has 'landed us as the most unequal nation in the world'.

'We need to understand that absolute inequality cannot persist, as it threatens our social cohesion. Our intention is to re-imagine the mining industry going forward, and the draft charter is part of that.'

The DMR also speaks of the need to 'grow our economy' and 'give investors confidence', but much of its analysis is contradictory and unconvincing. South Africa is not the most unequal country in the world, while inter-racial inequality has been steadily diminishing since the 1970s. Inequality is now greatest within the black population: partly because BEE has helped turn a small black elite into millionaires (and even billionaires), even as some 7.9 million black South Africans have remained unemployed.

The main reason for persistent inequality is the accelerating unemployment crisis. On the expanded (and more accurate) definition, which includes those too discouraged to keep looking for jobs, the unemployment rate now stands at 36% in general and at 67% among young people. A growth rate of 3.5% of GDP is simply not high enough to overcome joblessness on this enormous scale. By contrast, when South Africa managed to bring its growth rate up to 5% of GDP – which it did in the three years from 2005 to 2007, when the global commodities' boom was at its height – unemployment fell significantly for the first (and only) time since 1994.

The main reason for persistent inequality is high unemployment, which a growth rate of 3.5% of GDP is not fast enough to overcome.

The message from these figures is clear. If South Africa wants to reduce inequality, it must push the growth rate up from the 0% of GDP now projected for 2016 by the South African Reserve Bank to 6% or 7% of GDP each year. On this basis, the size of the economy would double every decade and millions more jobs would be generated. This would help bring South Africa into line with its BRIC partners, which generally have much lower jobless rates: 7.6% in Brazil, 5.2% in Russia, 4.9% in India, and 4.1% in China. With millions more earning income from employment, the Gini coefficient would decline sharply, while racial goodwill and social stability would expand in equal measure.

However, growth will not accelerate and employment will not grow while the government

remains intent on *dirigiste* policy interventions that erode business autonomy and jeopardise mining titles and other property rights. Any real attempt to 're-imagine the mining industry' and unleash its vast potential must thus start with a fundamental rethink of flawed policies such as the MPRDA and the draft charter.

Botswana's clear and simple mining law – which makes the country far more attractive to investors than South Africa, despite the latter's extraordinary mineral wealth – provides an example of what could be achieved. In addition, the draft charter should be scrapped and replaced by an alternative policy of 'economic empowerment for the disadvantaged' ('EED'), which would be far more effective in helping the poor.

Botswana's mining law is clear and simple, and points to the reforms that South Africa needs.

EED differs from BEE in two key ways. First, instead of using race as a proxy for disadvantage, EED cuts to the heart of the matter by focusing directly on socio-economic status. This allows racial classification to fall away, so helping South Africa to fulfil the principle of 'non-racialism' embedded in the Constitution.

Second, EED focuses not on outputs in the form of racial targets, but rather on the inputs necessary to empower poor people. Instead of overlooking the most important barriers to upward mobility, it seeks to overcome these by promoting investment, growth, and jobs. It also aims to liberate the poor by freeing up labour markets, expanding property ownership, and giving people access to quality education, health care, and housing.

EED policies aimed at achieving these objectives should be accompanied by a new EED mining scorecard, to replace both the current charter and the proposed draft. Under this revised scorecard, mining companies would earn (voluntary) EED points for:

- all direct investment within the country;
- maintaining and, in particular, expanding jobs;
- contributing to tax revenues;
- generating export earnings;
- appointing staff on a 'wide' definition of merit (which takes account of how people have had to cope with poor schooling and the like);
- providing additional training and mentoring for people appointed on this basis;
- entering into employee share ownership programmes with all staff; and
- topping up the state-funded vouchers the government should provide, so as to help poor households in mining communities gain better education, health care, and housing than is currently available to them.

We need a new mining scorecard that allows mining companies to earn 'EED' points for attracting investment, generating jobs, and contributing to exports and tax revenues, among other things.

After years of damage to the mining industry, it is time to call a halt to bad policies. South Africa cannot hope to expand opportunities for the disadvantaged, whether in mining or elsewhere, unless it raises the annual growth rate to 5% of GDP or more. A shift to EED in the mining sector, coupled with other reforms to mining legislation, would help achieve this.

By contrast, the introduction of the draft charter in anything like its present form will further hobble the mining sector and help push the faltering economy into recession and credit downgrades. Any such outcome will be enormously harmful to all South Africans, while the damage could take decades to reverse.

— Anthea Jeffery
Dr Jeffery is Head of Policy Research at the IRR

Fraser Institute Mining Index 2015 (Botswana and South Africa)		
Rank (out of 109 countries)	***Botswana***	***South Africa***
Overall ranking	39th	66th
On labour issues	46th	105th
On community development	35th	91st
On legal system (for mining)	20th	70th
On tax regime (for mining)	2nd	69th
On uncertainty about land claims	4th	62nd
On policy perceptions (attractiveness to investors)	14th	78th
On uncertainty in administering existing regulations	2nd	84th

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