South African Institute of Race Relations NPC
Submission to the
Parliamentary Portfolio Committee on Mineral Resources
(National Assembly)
regarding the

Mineral and Petroleum Resources Development Amendment Bill of 2013

Johannesburg, 6th September 2013

Mining's potential and present problems

South Africa's mineral resources are valued at $2.5 trillion, giving it arguably the richest non-oil reserves in the world. In 2011 the mining sector contributed 9.7% to gross domestic product (GDP), generated more than 40% of South Africa's merchandise exports, and contributed significantly to corporate tax revenues. The mining industry has long been a major employer of mainly unskilled labour and has helped the country bring in much-needed foreign direct investment.

In 2012, however, it became apparent that the platinum sector, in particular, was facing a perfect storm of adverse conditions as platinum prices dropped and input costs continued their sharp rise. The sector also faced mounting inter-union rivalry and a series of illegal stoppages, along with threats to make the mines 'ungovernable' after the police shot dead 34 striking miners and other demonstrators near Lonmin's Marikana platinum mine in Rustenburg (North West) in August 2012.

Strikes before and after the Marikana massacre cost mining companies some R10bn in lost production, reducing the sector's contribution to GDP to 9.3% in 2012. The industry's travails have also contributed to three recent sovereign credit rating downgrades, the widening of the current account deficit to close on 6% of GDP, a dramatic weakening of the rand, and a meagre rate of economic growth (0.9%) in the first three months of 2013. [*Mail & Guardian* 19 July 2013]

In the second quarter of 2013, though GDP grew by 3% overall, the mining sector's contribution to GDP decreased by 5.6%, mostly because of a decline in the production of gold, platinum and other minerals. [*The Citizen* 4 September 2013] On the gold mines, where labour costs per kilogram of gold produced have more than quadrupled in the past decade, mining companies now face demands for wage increases of between 60% and 150%, coupled with the prospect of prolonged and damaging strikes if these demands are not met. [Chamber of Mines, 'Impasse reached in gold mining wage negotiations', 29 August 2013] In addition, most mining companies face further major obstacles in the form of electricity rationing, high input prices, warring

unions, and inadequate transport logistics, along with the regulatory uncertainty flowing from the often vague wording of the Mineral and Petroleum Resources Development Act (MPRDA) of 2002.

Since the Marikana killings, the Government has tried in various ways to strengthen the beleaguered mining industry. In September 2012 it concluded a peace accord to help resolve labour unrest at the Marikana mine. In June 2013 it established a ministerial task team, headed by the deputy president, to help resolve looming disputes over wages. In July 2013 it signed a wider stakeholder agreement (the Framework for a Sustainable Mining Industry), which aims at restoring law and order and boosting investor confidence. Under this agreement, the Government also pledged to provide 'legislative and regulatory predictability and certainty' and to ensure 'consistency and certainty' in the application of laws and regulations. [*Business Day* 3 June, *Mail & Guardian* 19 July 2013]

However, these attempts to assist the mining industry have been undermined by the tabling in Parliament in June 2013 of the Mineral and Petroleum Resources Development Amendment Bill of 2013 (the Bill). Despite some 80 submissions calling for major change, the Bill remains substantially the same as the draft mining bill initially gazetted for public comment on 27th December 2012. Some improvements have been made, but for the most part the warnings sounded against the earlier bill have been disregarded, adding to industry concerns that the Department of Mineral Resources (DMR) has little interest in its views. [*Business Day* 6, 28 August 2013]

Positive clauses in the 2013 Mining Bill

Two important changes have been made in the 2013 version of the Bill. First, the consent of the minister of mineral resources (the minister) is now needed only for the sale of a 'controlling' interest in a listed mining company, rather than a single share (as the 2012 bill would have required).

Second, owners of mine tailings in mine dumps or 'residue stockpiles' will have two years to apply for the conversion of their old-order rights into new-order ones, failing which their rights will cease to exist. The earlier bill provided no opportunity for conversion and could have given rise to uncompensated expropriations, contrary to the Constitution.

In another positive clause, the Bill makes provision for the mining of 'associated' minerals: those minerals so closely linked to one another in a given ore body that all must perforce be extracted in the same mining operation. The current terms of the MPRDA do not clearly state whether the granting of a right to mine platinum, for example, also extends to associated minerals such as nickel, copper, and chromium. The Bill ends this uncertainty by expressly allowing the holder of a mining right to mine and dispose of associated minerals. However, the holder must declare

these associated minerals and apply within 60 days for them to be included in his mining right. If he fails to do so, a third party may then apply for the right to prospect or mine for them instead. [Section 72, 2013 Bill, Section 102 (3) and (4), amended MPRDA]

These changes are welcome. In other respects, however, many aspects of the Bill remain as damaging to the mining industry as before.

Damaging provisions in the 2013 Mining Bill

Compulsory beneficiation

The Bill defines beneficiation as 'the transformation, value addition or downstream beneficiation of a mineral and petroleum resource….to a higher value product, over baselines to be determined by the minister'. [Section 1, 2013 Bill; Section 1, amended MPRDA] It jettisons the current MPRDA requirement that local beneficiation should take place 'economically', instead obliging the minister to 'initiate or promote' the beneficiation of minerals within the country without regard to this important factor. [Section 21 (a) and (b), Bill, Section 26, amended MPRDA]

The Bill also empowers the minister 'from time to time by notice in the *Gazette*, to determine such percentage per mineral commodity…as may be required for local beneficiation, after taking into consideration the national interest'. It further allows her to determine 'the developmental pricing conditions' which are to apply 'in respect of such percentage' after considering 'the national interest'. [Section 21 (c), Section 26 (2B), amended MPRDA] In addition, 'every producer will have to offer local beneficiators a certain percentage of its raw mineral production, as prescribed by the minister'. [Section 21, (c), Bill; Section 26 (2), amended MPRDA] The Bill also gives the minister similar powers to require the local beneficiation of petroleum products.

The Bill's provisions on beneficiation are substantially the same as those in its 2012 predecessor, indicating that the DMR has paid scant attention to submissions from the mining industry warning against compulsory beneficiation where this cannot be achieved economically. According to the minister, Susan Shabangu, the Government has earmarked beneficiation as a growth engine for the economy and a source of new jobs. 'We want to ensure we don't just pay lip service to beneficiation, but we can identify what we need for new industries in South Africa,' she says. [*Business Day* 6 February 2013]

However, the National Development Plan (NDP) – which was approved by the Cabinet in August 2012 and endorsed by the ruling African National Congress (ANC) at its national conference at Mangaung (Bloemfontein) four months later – has warned that downstream beneficiation is not a fix-all solution to South Africa's growth and employment problems. [*Business Day* 6 February 2013] According to the NDP, South Africa lacks the electricity needed for the primary and secondary stages of beneficiation, which require smelting and the like. It also lacks the technical skills and direct investment required for the third and fourth stages of

beneficiation, which include the making of end products for consumers. [*Finweek* 23 February 2012]

The Industrial Development Corporation (IDC), a parastatal which helps fund and mentor qualifying businesses, already has a mandate to promote beneficiation but warns that this is difficult to achieve. A key factor impeding progress, the IDC says, is 'the uncompetitive pricing of inputs', including wages and salaries, along with high energy, transport, and logistics costs. Other constraints include 'the excessive volatility of the currency…[and a shortage of] managerial and technical skills to drive… downstream beneficiation'. [*Business Day* 31 July 2012]

In July 2013, the governor of the South African Reserve Bank, Gill Marcus, also warned against an insistence on local beneficiation, saying 'the idea that mines should ensure beneficiation was akin to making families who own cattle manufacture leather handbags'. She cautioned that South Africa could not compete in skilled activities because of its skills shortage, while it also could not compete in unskilled sectors because of its high labour and other input costs. [*City Press* 3 August 2013]

As Ms Marcus and the IDC have cautioned, South Africa's labour and overall production costs are significantly higher than those of other nations. South Africa thus cannot compete, for example, in the cutting and polishing of diamonds with India, where input costs are roughly a tenth of those found here. [Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, South African Institute of Race Relations, Johannesburg, 2010, p287] Nor, despite its significant reserves of chromium, can South Africa compete with China in the production of ferrochrome. Though China lacks raw chromium, its production costs for ferrochrome are lower than South Africa's even after transport costs have been taken into account. [*Finweek* 23 February 2012]

Said Cynthia Carroll, outgoing chief executive of Anglo American plc, in February 2013: 'The country has a world-class mining industry that can compete with the best. But it does not follow that South Africa is well placed to compete in all the industries that make use of the minerals the country mines. Beneficiation must always be based on a sound business case. It is vital that the benefits of mining should help to create a broad-based and robust economy beyond mining itself. But this can be done only by allowing the market to focus on sectors in which South Africa has a genuine competitive advantage.' [*Business Day* 6 February 2013]

New export licensing system

The Bill requires any person who intends to export 'designated' minerals to obtain the minister's written consent, the granting of which may be made 'subject to such conditions as the minister may determine'. [Section 21(d), 2013 Bill; Section 26(3), amended MPRDA] 'Designated

minerals' are defined in the Bill as 'such minerals as the minister may designate [in the *Gazette*] for beneficiation purposes, as and when the need arises'. [Section 1, 2013 Bill; Section 1, amended Act] This wording provides no guidance as to what minerals might be designated in the future, leaving the decision entirely to the minister's discretion.

According to Peter Leon, a specialist in mining law, the provision is 'presumably aimed at the compulsory domestic beneficiation' of coal, iron ore, and various other minerals. However, it demonstrates scant regard for the importance of mining exports – and for the need to reduce South Africa's current account deficit from the 5.8% of GDP at which it stood in the first quarter of 2013. [*Fast Facts*, August 2013, p20]

The proposed restriction also seems to overlook South Africa's international trade law obligations. Writes Mr Leon: 'Both article XI.I of the General Agreement on Tariffs and Trade, 1994, and Article 19 of the European Union and South Africa Trade, Development and Co-operation Agreement of 1994, prohibit quantitative restrictions on exports or imports or, in the case of the European Union, measures having an "equivalent effect".' [*Business Day* 6 February, *Mail & Guardian* 19 July 2013]

'Strategic' minerals

The Bill defines 'strategic minerals' as 'such minerals as the minister may declare to be strategic minerals from time to time in the *Gazette*'. [Section 1, 2013 Bill, amending Section 1, MPRDA] Again, this definition has little content and provides no guidelines. It does, however, give the minister vast powers.

Here, the Bill seems to echo the ANC's report on 'State Intervention in the Minerals Sector' (the SIMS report), which was released in February 2012 to help guide the ruling party's deliberations on mining policy. The SIMS report rejected wholesale nationalisation of the country's mines as costly and impractical, but urged the State to take further steps to ensure that South Africa benefited more fully from 'the developmental impact' of its mineral wealth. It thus recommended, among other things, that certain minerals should be designated as 'strategic' and then exploited 'in an orderly and optimal manner to satisfy national requirements'. [*The New Age* 4 February 2013]

The present Bill, like its 2012 predecessor, provides no guidelines as to which minerals may be declared strategic. However, some indication can be found in the SIMS report, which identifies coal, iron ore, and platinum group metals as falling within this category. [Peter Leon, 'Marikana, Mangaung and the South African Mining Industry', Address to the South African Institute of International Affairs, Cape Town, 30 August 2012] The SIMS document also defines strategic minerals as those which: [*The New Age* 4 February 2013]

- should not be exported until domestic requirements have been adequately met; and

- need to be supplied within South Africa either at export parity prices or on a cost-plus basis, as determined by the Government.

In its final policy resolutions at Mangaung, the ANC listed the minerals it regards as 'strategic and important assets'. These include iron ore, coal, oil, and platinum group metals, along with copper, chromium, manganese, nickel, and vanadium. Also on the organisation's list are uranium, natural gas and shale gas, together with phosphates and potassium (important in agriculture) and limestone and gypsum (needed for infrastructure development). [*Mail & Guardian* 8 February 2013] The length of the Mangaung list suggests that the Bill may lead to even more state controls on key minerals than the SIMS report foreshadowed.

If this approach is adopted, both coal and a host of other minerals are likely to be designated as 'strategic' under the Bill and then made subject to export restrictions and price controls. The aim, says Professor Gavin Keeton of Rhodes University, is for the State to use the country's mineral wealth to 'drive rapid…industrialisation'. However, warns Professor Keeton, there are 'numerous flaws in this vision', including the 'false belief that lowering raw material prices will be enough to achieve international competitiveness [when] mineral and metals inputs are…only a small part of overall production costs and are less important than other factors such as transport and energy costs and the costs of labour and capital'. The proposed controls are likely to prove 'unworkable and potentially economically destructive', he warns. [*Business Day* 27 February 2012]

Already, the threat of price controls being applied to coal under the Bill has stalled investment in the new coal mines needed for power generation from 2018 and beyond. By 2022, if not before, Eskom (a parastatal responsible for generating 95% of South Africa's electricity) will need an additional 76m metric tonnes of coal to supply its existing and new power stations. Increasing supply in this way requires some R60bn in investment in new coal mines, but mining companies do not want to risk this outlay when the mining minister can decide to whom, and at what price, coal is to be sold. Said Mike Roussouw, chairman of the Intensive Energy Users Group, in August 2013: 'The supply gap will develop not because of the unavailability of coal in the ground but the failure to bring it to market. This is because older mines are ageing, while new investments have effectively been frozen…with the threat that Government will soon intervene to set a price for coal.' [*Business Day* 5 August 2013]

Open-ended obligations to communities

Under the Mineral and Petroleum Resources Development Amendment Act of 2008 (the 2008 Mining Act), most of which was brought into force in June 2013, the minister may already 'impose such conditions' as she considers necessary 'to promote the right and interest' of a community occupying mining land. [Section 13, 2008 Act, Section 17, amended MPRDA; Section 19, 2008 Act, Section 23, amended MPRDA] Under the Bill, the minister will also be

empowered, 'after taking into consideration the socio-economic challenges or needs of a particular area or community, [to] direct the holder of a mining right to address those challenges or needs'. [Section 18, 2013 Bill; Section 23, amended Act]

In addition, the Bill indicates that social and labour plans will have to 'be reviewed every five years for the duration of the mining right'. This will make for yet more uncertainty as to the obligations to communities that mining companies may be expected to shoulder over time. It may also be difficult for mining companies to fulfil wide-ranging community obligations – which should in any event be the responsibility of the State – at times of faltering commodity prices and rapidly rising input costs.

'First-in, first-assessed' principle

Under the Bill, the present 'first-in, first-assessed' rules will be repealed, which means that applications received on different dates will no longer be dealt with 'in their order of receipt'. Instead, the minister will be empowered to 'invite' applications for prospecting or mining rights by notice in the *Gazette*. In doing so, she may 'prescribe the period within which any application may be lodged….and the terms and conditions subject to which such rights…may be granted'. [Section 5, 2013 Bill; Section 9, amended MPRDA]

The Bill does also provide that an application for a mining right cannot be accepted by a DMR regional manager if a prior application for the same right has already been accepted in this manner and still remains to be decided by the minister. But the date on which an application is lodged is (or should be) clear to all, whereas the question whether or not an application has been 'accepted' depends on decisions by officials which may not be apparent or well-founded.

According to Mr Leon, the 'first-in, first-assessed' principle for licensing applications has been part of South African mining law for over a century. Yet the Bill 'bizarrely jettisons it' in favour of a system which includes no objective criteria, increases regulatory uncertainty, and could well 'create a statutory windfall for rent seekers'. [*Mail & Guardian* 19 July 2013] As the Democratic Alliance adds, this new provision could make the granting of mining rights still more susceptible to 'corruption and patronage'. [*Business Day* 28 August 2013]

Free carried interest

The Bill gives the State a 'free carried interest' in all new oil and gas exploration and production rights. It defines a 'free carried interest' as 'a share in the annual profits derived from the exercise of an exploration right or production right…despite the State not contributing to the capital expenditure'. [Section 1, 2013 Bill' Section 1, amended MPRDA]

According to the Bill, the State will have the 'right to a free carried interest in all new exploration rights, with an option to acquire a further interest on specified terms through a

designated organ of state or a state-owned entity, as determined by the minister in the *Gazette*'. The State is also to have 'a right to a free carried interest in all new production rights', again with 'an option to acquire a further interest on specified terms through a designated organ of state or state-owned entity'. Where the State exercises this second option, it will also have the right 'to be issued with special shares' carrying 'the right to appoint up to two directors to the management board of the production operation'. [Section 54, 2013 Mining Bill, Section 80, amended MPRDA; Section 59, 2013 Mining Bill, Section 84, amended MPRDA]

In May 2013 the DMR published a notice in the *Government Gazette* in which it stressed that such state participation is 'not a new concept and is practised in other jurisdictions in various forms'. State participation thus varied from 51% in Algeria to 50% in Angola and 30% in Brazil. Ghana had instituted a '10% free carry + 15% state participation', the notice went on. The South African Government was thus seeking to 'optimise its participation in petroleum exploitation,…in line with national developmental priorities'. Details of the extent of its free carried interests are to be gazetted in due course, it said, [Department of Mineral Resources, Notice of Introduction of a Bill into Parliament, Notice 567 of 2013, Government Gazette No 36523, 31 May 2013, p7]

Potential investors in oil and gas have little certainty as to the extent of the free-carried interest the State may claim, while there is nothing in the Bill to limit this. Yet the capital expenditure needed for off-shore oil or gas exploration and production is vast. The Bill jeopardises that investment, even though the benefits of finding substantial oil or gas reserves off South Africa's coastline would be immense. Says Greg Nott, a director of Werksmans Attorneys: 'Strident changes to legislation before there is a proven hydrocarbon basin in South Africa are simply premature.' [*Financial Mail* 9 August 2013]

Permanent environmental liability

Under current legislation, the holder of a mining right remains responsible for any environmental liability (including the pumping and treatment of extraneous water) until the minister has issued it with a closure certificate. Under the Bill, by contrast, the holder will remain responsible for any environmental liability 'notwithstanding the issue of a closure certificate'. This responsibility has no time limit. [Section 30, 2013 Bill; Section 43(1), amended MPRDA] The Bill makes mining companies perpetually liable for old mines, even after they have met all the onerous environmental requirements for the issuing of a closure certificates. [*Business Day* 6 August 2013]

Under the current terms of the MPRDA, every holder of a mining right must make financial provision for the rehabilitation or management of adverse environmental impacts resulting from mining. This obligation remains in force until the minister has issued a closure certificate, while the minister may retain a portion of the financial provision to remedy 'latent and residual

environmental impact'. The Bill gives her an additional power to keep as much of the financial provision as she deems necessary to remedy latent environmental damage 'for a period of 20 years after issuing a closure certificate'. [Section 30, 2013 Bill; Section 43(14), amended MPRDA]

Such environmental obligations are unduly onerous and could provide a further impediment to investment.

Original and new penalties

Under the MPRDA as enacted in 2002, it was an offence punishable by a fine of R100 000 or imprisonment for up to two years to mine without: [Sections 98 and 99, MPRDA]

- a mining right;
- an approved environmental management programme; and/or
- prior consultation with the owner of the land.

It was also an offence punishable by a fine of R500 000 or a jail term of up to ten years not to meet all environmental responsibilities under an approved environmental management programme. [Sections 98, 99, MPRDA]

The new penalties laid down in the Bill repeals are much more severe and apply far more widely. Under the Bill, offenders face maximum fines amounting to 10% of annual turnover plus 10% of the value of exports in the previous year, or prison terms for up to four years, or both, for:

- exporting designated minerals without the minister's permission; [Section 26, amended MPRDA]
- infringing the 'developmental pricing conditions' or other requirements laid down by the minister regarding local beneficiation; [Section 26, amended MPRDA]
- failing 'substantially and meaningfully' to expand opportunities for historically disadvantaged South Africans to enter the mining industry; [Section 2(d), amended MPRDA]
- failing to 'promote economic growth…[and the] development of downstream beneficiation industries'; [Section 2(e), amended MPRDA]
- omitting to implement approved social and labour plans; [Section 25, amended MPRDA] and/or
- failing to comply with the requirements of the revised mining charter. [Section 25, amended MPRDA]

However, the targets laid down in the revised mining charter may not be easy for mining companies to achieve. The need for 26% BEE ownership by 2014 is challenging in itself, while the employment equity and preferential procurement targets are ambitious and could also prove

difficult to meet. Yet failure to achieve them could expose mining companies not only to the loss of their mining rights but also to massive fines and/or substantial prison terms for their directors.

Similar penalties could also be applied to mining companies that find themselves reluctant to comply with state-determined 'developmental pricing conditions' too low to cover mounting costs. The same punishment could also follow if they fail to meet all the terms of their social and labour plans. This risk was exemplified in 2011, when Central Rand Gold (CRG) had its gold mining right suspended for allegedly failing to spend all of the R33m it had promised to allocate to its social and labour plan. Yet CRG's financial circumstances had changed dramatically by then (as rising acid water had decimated its recoverable reserves), while the company had in fact spent more than R33m if its expenditure on pumps to keep acid water at bay – spending which benefited all mining companies in the area – was taken into account as well. [Section 25, amended MPRDA]

In addition, the Bill lays down a maximum fine of 5% of annual turnover plus 5% of the value of exports in the previous year, or imprisonment for up to ten years, or both, for prospecting companies that fail to keep and submit proper records to the DMR and the Council for Geoscience. Similar penalties will apply to mining companies that fail to keep records or report to the DMR on, among other things, their compliance with their approved social and labour plans and the mining charter. [Sections 98 and 99, read with Sections 21 and 21, 2013 Mining Bill] Though these 'technical' offences will be easier for mining companies to avoid, the proposed penalties for such reporting failures are out of all proportion to the wrongdoing in issue.

Increased ministerial discretion in many spheres

According to the preamble to the Bill, the measure aims to 'remove ambiguities,…streamline administrative processes,…[and] improve the regulatory system'. But the Bill in fact significantly increases the discretionary authority of the minister by empowering her to:

- demand the compulsory local beneficiation of mineral resources under pricing and other conditions determined by her;
- declare certain minerals as 'designated' or 'strategic' and thus as subject to export and/or price controls;
- lay down additional terms and conditions for the granting of prospecting and mining rights;
- decide the extent of the State's free carried interest in oil or gas exploration and production; and
- require mining companies to fulfil any number of additional obligations towards mining communities.

In addition, the Bill deletes most of the compulsory time periods for decision-making by DMR officials at present contained either in the MPRDA or in the 2008 Mining Act. Instead, the Bill

leaves it to the minister to prescribe the relevant periods by means of regulation. Though Ms Shabangu says this will help to align and speed up administrative processes, this outcome seems unlikely – especially in the light of the DMR's limited capacity and its failure to meet its own internal licensing deadlines in 82% of cases in 2011/12. [*Mining Weekly* 1 February, *Business Day*, *The Citizen* 6 February, *Mail & Guardian* 19 July 2013]

As Mr Leon comments, the Bill might claim to reduce the discretionary authority of the minister and her officials but in fact it makes the existing problem even worse. It also overlooks various Constitutional Court judgments which have condemned 'broad and unbound administrative discretion' as contrary to the rule of law, which is a foundational value of the Constitution. [*Business Day* 6 February 2013]

Speaking at a 'mining lekgotla' in Sandton in August 2013, Chris Griffith, chief executive of Anglo American Platinum, said the mining industry was particularly concerned about the minister's discretionary powers to declare minerals strategic, curtail exports, and 'compel…sales to domestic users at prices the department determines'. Said Mr Griffith: 'The regulation of the mining industry must embrace development codes that are clear and consistent, as well as governance structures…which are not open to manipulation by ministerial whim'. [*Business Day* 30 August 2013]

Conclusion

Since the global financial crisis began in 2008, mining production in South Africa has often faltered in response to reduced demand for resources, increased input costs, and accelerating labour unrest. In August 2013, Mark Cutifani, chief executive of Anglo American plc, said: 'In the last seven years we've actually gone backwards in production. The industry is in crisis and we need to start making changes that turn that…around. .. We've got to act in good faith on both sides to make sure we are creating an industry that is viable. We have to bring stability to the industry so that investors feel comfortable investing.' [*Business Day* 28 August 2013]

However, making investors comfortable will not be easy to achieve. For many years, South Africa (despite a brief uptick in 2011) has been slipping down the policy potential index of the Fraser Institute in Canada, which measures the attractiveness to investors of mining jurisdictions across the world. According to Fred McMahon, a resident fellow at the Fraser Institute, there is 'no magic bullet' that will quickly restore South Africa's credibility as a mining investment destination, but 'there are also things that can be done to move South Africa up the ratings in the short term'. Says Mr McMahon: 'If regulations are put in place to end the gambling nature of investment in South Africa, they won't be immediately believed… But clarifying regulations, clarifying the process, putting in timelines, and making sure there's no corruption, would help.' [*Business Day* 28 August 2013]

Essentially the same message has been put forward in South Africa's National Development Plan (NDP). Though the NDP's formula for increasing growth and jobs is fundamentally flawed, its diagnosis of the problems needing to be overcome is often well-founded. This is certainly the case as regards the mining sector.

According to the NDP, the mining industry has lagged behind its global competitors in the past decade for various reasons, including poor rail, water, and energy infrastructure. However, a further key factor has been a 'regulatory and policy framework that hinders investment'. The NDP thus calls for 'certainty in respect of property rights', and urges that the MPRDA be amended to ensure a 'predictable, competitive and stable minerals regulatory framework'. [*Business Day* 6 February 2013]

The NDP has repeatedly been held up by the President Jacob Zuma and various cabinet ministers as the benchmark against which all policy proposals must be measured. As Collins Chabane, Minister in the Presidency responsible for Performance Monitoring and Evaluation, has stressed, the NDP is the ANC's official policy blueprint from now until 2030. Hence, where the NDP conflicts with policy, 'the national plan will have overriding effect'. [*Sunday Times* 9 September 2012, *Business Day* 6 February, 4 September 2013] The Bill, however, contradicts the NDP's call for 'regulatory reforms that provide policy certainty'. This alone provides good reason for the portfolio committee on mineral resources to reject the measure.

The present crisis within the mining industry provides yet further reason for Parliament to reject the Bill. As the minister of finance, Pravin Gordhan, told the mining lekgotla last month, potential investors in South African mines already have major concerns about currency stability, labour unrest, and proposed changes to the tax regime. Against this background, increasing their concerns about regulatory instability is likely to be particularly damaging. Said Mr Gordhan: 'Investors want certainty when it comes to making the multi-decade financial commitments needed in the mining sector… As a young democracy in South Africa, there is nothing to indicate that those investments are not safe. However, we need to confront the reality that many perceptions have been created about our country, about the mining sector, and the economy more generally. Our collective effort should be directed at minimising those risk perceptions and where possible eliminating them. We must collectively contribute to ensuring that those who want to invest and are investing in South Africa are reassured those are not serious risks they face, certainly not more than they would face anywhere else.' [*Business Day* 28 August 2013]

However, such reassurance will be difficult to provide for as long as the Bill remains on the policy agenda. Ms Carroll put the matter well at the Mining Indaba in February 2013 when she said (of the 2012 bill, but in words that remain equally apposite to the 2013 measure): [*The New Age* 4 February, *Business Day* 6 February 2013]

> There are glaring shortcomings in the Bill that could hamper South Africa's ability to attract and retain investment in mining… None of us can defy economic reality. Modern businesses operate in global markets. The laws of supply and demand determine what they can afford. Businesses that cannot generate adequate returns ultimately collapse and die. Companies that want a future have to remain economically competitive…
>
> No country is an economic island. Like any other nation, South Africa will succeed only if it fosters an environment that is conducive to business and attractive to international investors. Creating that environment starts with the need for stable labour relations and the maintenance of law and order. But these are not the only requirements. Regulatory stability is also the key to competitiveness. And nowhere is this truer than in the mining industry. Mining is an industry with long-term horizons. When making investments, mining companies have to think decades ahead. They need certainty as to the rules under which they will operate. They will not invest if there is a fear of onerous and unpredictable regulatory change. Nor will they invest if there is a threat that existing regulatory requirements will be enforced in an arbitrary and unequal manner.

Ms Shabangu's attempts to reassure the mining industry that the Bill will 'improve security of tenure' for the holders of mineral rights and 'herald a significant improvement in service delivery' are unfounded and unconvincing. In addition, tinkering with the wording of the Bill is unlikely to remove its many problematic provisions or prevent it from doing great harm to the mining sector and the wider South African economy. Instead, the Bill needs to be scrapped in its entirety.

Once this has been done, effective ways must be found to:

- cure the ambiguities in the MPRDA,
- ensure a transparent, timely, and objective adjudications process for mineral-rights applications;
- prevent corruption and abuse of power in the implementation of the MPRDA;
- put an end to threats of further onerous and unpredictable regulatory change;
- give the holders of mineral rights the security of tenure needed to restore confidence in South Africa's minerals regime; and
- encourage the additional mining investment vital to increased employment, growth, and prosperity.

South African Institute of Race Relations NPC **6th September 2013**