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## **Comment on the Mineral and Petroleum Resources Development Amendment Bill**

### **Amendments to the Mineral and Petroleum Resources Development Act, 2002, as amended by the Mineral and Petroleum Resources Development Act, 2008 (Act No. 49 of 2008)**

#### **1. The Free Market Foundation**

The Free Market Foundation (FMF) is an independent non-profit public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships.

Most of the work of the FMF is devoted to promoting economic freedom as the empirically best policy for bringing about economic growth, wealth creation, employment, poverty reduction and human welfare (including better healthcare, increased life expectancy, literacy and educational quality). The foremost question the FMF asks in addressing any policy question, including the contents of the above mentioned Bill is, will this policy be to the long term benefit of the people of South Africa and especially those who are the poorest and most vulnerable? Satisfaction of the fundamental needs and wants of the people are generally achieved by an absence of barriers to entry into the provision of goods and services, allowing the people a choice between the offerings of freely competing providers, including the providers of employment. The Bill and the proposed amendments will therefore be assessed to ascertain whether it is likely to result in the most beneficial conditions for the country's people.

#### **2. The approach followed in commenting on the Bill**

This comment deals fundamentally with the nature of the Bill and the extent to which it is inconsistent with the requirements of South Africa's Constitution. It therefore does not contain a section by section comment on the detail of the Bill except to demonstrate the extent to which aspects of the Bill do not comply with the Constitution.

An important Founding Provision of the Constitution, described in section 1(c) is "Supremacy of the constitution and the rule of law". Note that the constitution *and the rule of law* are coupled in describing

the values upon which the Republic of South Africa is founded. Section 2 of the Constitution states that, “This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled”. Among those obligations is to ensure that laws that are adopted are not in conflict with the rule of law.

### 3. What is the rule of law?

President Nelson Mandela described the rule of law as follows:

*The rule of law, as I (admittedly a long retired old lawyer) understand it, refers to a structural exercise of rule as opposed to the idiosyncratic will of kings and princes. Even where the latter may express itself benevolently the former is morally and politically superior. Where the rule of law does not apply, rulers assume entitlement to rule; the rule of law, on the other hand, places the emphasis upon structured responsibility and obligation.*

What follows is an excerpt from a 2007 paper by Leon Louw, Executive Director of the Free Market Foundation, titled *What is the Rule of Law?* It provides a comprehensive and detailed list of specific elements of the rule of law, explanations as to why they constitute the rule of law and what their practical implications are:

- i) *Legality*: The doctrine of legality is that all laws must be lawful in terms of the constitution and adopted according to prescribed procedure.
- ii) *Rationality*: The rationality principle is that there must be a rational connection between the law and its objective, which must be clear. South Africa recently passed a *National Credit Act* which has two stated objectives: to increase ‘access’ to credit and to increase ‘protection’ for credit-receivers. What might violate the rationality principle is that a measure which raises the cost and risk of granting credit necessarily *reduces* access. These two objectives in a single bill are inherently contradictory and therefore irrational.
- iii) *Non-discretion*: The most elementary aspect of the rule of law is that there should be little or no administrative discretion. People should be ruled by laws, not by men.
- iv) *Clear objectives*: Where, for whatever reason, there is discretion, as in judicial proceedings and staff appointments, there should be two distinct and easily confused qualifications. Firstly, the purpose for which the power is conferred must be articulated clearly – to what end is the power created? What outcome does the legislature want?
- v) *Objective criteria*: Secondly, there must be objective criteria according to which the power is to be exercised. If an immigration law, for instance, confers the power to grant immigration rights, it should state that its purpose is to attract technical skills or protect people with skills from foreign competition. It should then specify criteria such as the procedure to be followed, ideal qualifications to attract or exclude, and so on.
- vi) *Certainty*: Laws should prescribe clearly and unambiguously that with which citizens must comply, rather than leave them at the mercy of arbitrary or discretionary officialdom. It should be as easy as possible for everyone to know what the law is, and when they are complying with or transgressing it. Uncertainty in law creates real or suspected injustice.
- vii) *Precedent (res judicata)*: Certainty implies that rulings for comparable facts will be consistent, to which end there must be access to court records and subsequent judgements must follow preceding judgements. The lack of precedent amounts to the rule of person in that presiding officers are not bound by law, which includes precedent – because earlier judgements purported to be manifestations of the law.

- viii) *Prospectivity (nullum crimen, nulla poena sine praevia lege poenali)*: The requirement that the law should be clear and objective implies that laws should not be retroactive. Retrospectivity should be considered only in extreme circumstances such as the need to correct the unintended consequences of erroneous drafting where the original intent can be presumed to have been unclear to all concerned.
- ix) *Division of powers*: For sound, tried and tested reasons (examples above) a democratic order requires a genuine separation of powers: legislative, executive and judicial. The legislature alone should legislate, the executive alone execute, and the judiciary alone adjudicate. Almost every judgment and publication on the rule of law has judges and writers asserting axiomatically and erroneously that there can be no ‘rigid’ separation of powers, never giving sound reasons why not.
- x) *Due process and natural justice*: The concept of ‘due process’ is also sophisticated concept. The purpose of due process is to ensure that ‘justice is not only done, but seen to be done’. Due process is part of the rule of law to the extent that it increases the likelihood of proper decisions according to law, that is, people being ruled by laws not discretion. For there to be due process various factors must be present, some of which are prescribed in many constitutions. Here is an illustrative list of elements of due process, each of which lends itself to elaboration, but provided without comment because book-length analysis would be necessary to do justice to all items:
- administrative justice (in that all administrative action must comply with the rule of law, regardless of the legislation under which it falls);
  - the right to be heard (*audi alteram partem*);
  - the right to be aware of evidence being considered;
  - the right to be present and cross-examine witnesses;
  - no trial or quasi-trial without formal charge;
  - the right to written reasons for administrative and judicial decisions;
  - the right of appeal *on the merits* to a truly independent tribunal (ultimately to an independent judiciary);
  - the right to judicial review of judicial and administrative decisions;
  - access to relevant information particularly that in the hands of the state;
  - recusal or dismissal of officials with conflicts of interest, or who are otherwise compromised.
- xi) *Craftsmanship*: All laws and guidelines should be carefully, professionally and skilfully drafted. Legal drafting is a distinctive skill seldom taught in law courses. For laws to be clear, objective and unambiguous considerable care and skill is needed. To this end, all people responsible for drafting laws should not only be conversant with the principles of good law but also with the precise meanings of words used and the general craft of legislative drafting. Draft legislation should be reviewed and edited by independent experts.
- xii) *Stability*: For society to be stable its laws, as far as possible, need to be stable. Laws changing constantly promote instability and uncertainty. They discourage long-term planning and investment. They discourage the attainment of enduring institutions and values. Laws should be formulated for the long term and not on the premise that they can be revisited, repealed or replaced endlessly. Lack of stability is particularly deleterious for the economy. Frequent changes to the law result in costly and time-consuming changes to the nature of business.
- xiii) *Presumption of innocence*: Everyone is presumed innocent ‘until proven guilty’.
- xiv) *Double jeopardy*: No one should face more than one procedure for one alleged offence or tort/delict. Additional proceedings or retrials only on the basis of substantial new evidence not previously available to accusers and prosecutors. .

- xv) *Equality at law*: Everyone to have the same rights and obligations without *unfair* discrimination on such grounds as status, religion, sexual orientation, political affiliation, gender, race, age and so on. According to Montesquieu ‘law should be like death, which spares no one.’
- xvi) *Habeas corpus (ad subjiciendum)*: This translates as ‘have the body to be subjected (to examination)’. It also means that everyone is entitled to be free until convicted unless, on examination, there are exceptional grounds for detaining a supposedly innocent person. It implies ‘no detention without trial’, and not necessarily detention even if there is a proper charge.
- xvii) *Information*: Everyone arrested, charged or accused has a right to know of what wrongdoing they are suspected, and the right to all relevant documentation and other information.

The principal derivatives from the central concept are:

1. Separation of powers
2. General application (equality at law)
3. Due process
4. Prospectivity
5. Objective criteria (for discretionary power)
6. Specified objectives (for discretionary power)

Given that the rule of law is a Founding Provision of the Constitution, it is imperative that all laws that are enacted should be carefully scrutinised in order to ensure that they comply with its requirements. The Mineral and Petroleum Resources Development Amendment Bill is in conflict with the rule, and therefore with the Constitution, in respect of the extent to which it fails to comply with the separation of powers requirement, the general application requirement (equality at law), and the extent to which it lacks specified objective criteria according to which discretionary powers are to be exercised.

#### 4. **Administrative discretion**

It is a recognised principle of good law, and a requirement of the Constitution and the rule of law, that legislation should provide for a minimum of discretionary power, and when it does so, it should be subject to the Guidance Principle (Dawood and Another v minister of Home Affairs and Others 2000 (3) SA 936 (CC), and Janse van Rensburg NO and Another v Minister of Trade and Industry NNO 2001 (1) SA 29 (CC)). In other words, the legislature should make laws as objective as possible and, when it creates discretionary power, it is obliged to prescribe objective criteria according to which the power is to be exercised.

The doctrine of the Separation of Powers, also part of our Constitution, requires that it is the legislature (by way of statutes) and not the Executives (by way of regulation) that must prescribe those criteria.

There are sound jurisprudential reasons for these provisions being in our Constitution. Were there a better understanding and appreciation of the logic that informs them, there would be less propensity to undermine or ignore them in draft legislation. Firstly, if people do not know their rights and obligations, there will be wasteful confusion, uncertainty and conflict. Secondly, and more importantly, unconstrained discretionary power is the primary cause of corruption and the abuse of power. Corruption is one of South Africa’s most disturbing and debilitating problems.

The problems of corruption and abuse should be addressed at two levels: by avoiding discretion and by ensuring that whatever discretion is retained is exercised according to maximally objective criteria, and subject to procedural checks and balances. Appropriate checks and balances include established and proven mechanisms such as mandatory transparency, accountability, due process, rights of appeal (to truly independent courts or tribunals), non-discrimination, and the like.

For these and other reasons, wherever the Mineral and Petroleum Resources Development Amendment Bill creates executive discretion, it should specify the criteria according to which that discretion must or may be exercised, and it should provide for appropriate checks and balances.

The rule of law requires that government should enact only such laws as are general in nature, are applicable to everyone including itself, and which do not attempt to bring about particular outcomes. The rule of law was described by Nobel Laureate Friedrich Hayek in his book *The Constitution of Liberty*:

*The conception of freedom under the law ... rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free. It is because the lawgiver does not know the particular cases to which the rule will apply, and the judge who will apply them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule. Because the rule is laid down in ignorance of the particular case and no man's will decides the coercion used to enforce it, the law is not arbitrary. This, however, is true only if by "law" we mean the general rules that apply equally to everybody.*

Matters in the Mineral and Petroleum Resources Act, requiring discretionary decision-making on the part of the Department should be reduced to a minimum by preferably setting out objective criteria in the legislation, with which firms and individuals can comply in conducting their affairs, removing the necessity for prior regulatory approval or administrative consent. Setting of objective criteria for the commencement and conduct of business in the mineral and petroleum field would considerably reduce the need for permit applications and approvals.

Where formal prior approval is considered to be necessary, objective criteria should be set in legislation to guide the administrative process and ensure that the exercise of discretion is carried out uniformly and impartially. The purpose in all cases is to make the law as clear and objective as possible, which facilitates economic activity, the provision of goods and services, and economic growth. Uncertainty resulting from a lack of clarity in laws and regulations, and lack of consistency in official decision-making, imposes unnecessary costs on entrepreneurs and diminishes economic activity.

## 5. Discretionary powers without objective criteria

The most significant aspect of this Bill is the massive, excessive, and unconstrained power it seeks to place in the hands of the Minister, and to a lesser extent in the hands of the Regional Managers, who are appointed by the Minister in regions designated by the Minister.

Examples of these powers are:

Section 1 (b) ‘Beneficiation’ means the transformation, value addition or downstream beneficiation of a mineral and petroleum resource (or a combination of minerals) to a higher value product, over **baselines to be determined by the Minister**, which can either be consumed locally or exported;”

Section 1 (i) by the insertion after the definition of “Department” of the following definitions:

“ **‘designated minerals’** means such minerals **as the Minister may designate for beneficiation purposes** as and when the need arises in the *Gazette*;  
**‘developmental pricing conditions’** refers to a pricing methodology of mineral/s, petroleum or mineral products, **reserved for domestic beneficiation, as**

**determined by the Minister;**’;

Section 1 (y) by the insertion after the definition of “State royalties” of the following definition:

“ **‘strategic minerals’ means such minerals as the Minister may declare to be strategic minerals** as and when the need arises in the *Gazette*;”;

Section 4 The following section is hereby substituted for section 7 of the principal Act:

**“Division of Republic, territorial waters, continental shelf and exclusive economic zone into regions**

7. **For the purposes of this Act the Minister must, by notice in the *Gazette*, divide the Republic [,] including the sea [as defined in section 1 of the Sea-shore Act, 1935 (Act No. 21 of 1935), and the exclusive economic zone and continental shelf referred to in sections 7 and 8 respectively, of the Maritime Zones Act, 1994 (Act No. 15 of 1994),] into regions.”.**

Section 5. 9 (1) **The Minister may** by notice in the *Gazette* invite applications for reconnaissance permission, prospecting rights, exploration rights, mining rights, production rights and mining permits in respect of any area of land, block or blocks, and may subject to the provisions of the Act, **prescribe in such notice the period within which any application may be lodged with the Regional Manager and the terms and conditions subject to which such rights and permits may be granted.**

(2) **Any acreage relinquished or abandoned, or any right or permit that has been cancelled, relinquished, abandoned or has lapsed, will not be available for application until the Minister invites applications as contemplated in subsection (1).”**

Section 8. Section 11 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following section:

“(1) A prospecting right or a part of a prospecting right, mining right or a part of a mining right or an interest in any such right **[,or any interest]** in **[a close corporation or] an** unlisted company or any controlling interest in a listed company (which **[corporations or]** companies hold a prospecting right or mining right or an interest in any such right), may not be ceded, transferred, encumbered, let, sublet, assigned, or alienated **[or otherwise disposed of]** without the prior written consent of the Minister, and subject to such conditions as the Minister may determine.”;

Section 15. Section 20 of the principal Act is hereby amended—

(b) by the substitution for subsection (2) of the following subsection:

“(2) The holder of a prospecting right **[must obtain the Minister’s written permission to remove and dispose for such holder’s own account of diamonds and bulk samples of any other minerals found by such holder in the course of prospecting operations]** shall not without the prior written permission of the Minister remove bulk samples of any mineral from a prospecting area for any purpose subject to such conditions as the Minister may determine.”; and

Section 18. Section 23 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (e), (g) and (h) of the following paragraphs, respectively:

“(e) the applicant has **[provided for]** complied with the requirements of the prescribed social and labour plan which shall be reviewed every five years for the duration of the mining right;

(g) the applicant is not in contravention of any provision of this Act; **[and]**

(h) the granting of such right will further the objects referred to in section 2(d) and (f) and **[in accordance]** complies with the **[charter contemplated] Amended Broad Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry provided for in section 100 and the prescribed social and labour plan[.]**;and”;

(b) by the addition after paragraph (h) of the following paragraph:

- “(i) the applicant has the ability to comply with the relevant provisions of the National Water Act, 1998 (Act No. 36 of 1998).”;
- (c) by the substitution for subsection (2) of the following subsection:  
 “(2) The Minister **[may] must [,]**—  
 (a) **[having regard to the nature of the mineral in question,]** take into consideration the provisions of section 26; and  
 (b) **after taking into consideration the socio-economic challenges or needs of a particular area or community, direct the holder of a mining right to address those challenges or needs.**”;
- (d) by the substitution for subsection (2A) of the following subsection:  
 “(2A) **If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community [including conditions requiring the participation of the community].**”;
- (e) by the substitution for subsection (3) of the following subsection:  
 “(3) The Minister must, within **[60 days]** the prescribed period of receipt of the application from the Regional Manager, refuse to grant a mining right if—  
 (a) the application does not meet all the requirements referred to in subsection (1); and

Section 21. Section 26 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:  
 “(1) **The Minister [may] must initiate or promote the beneficiation of minerals and petroleum resources in the Republic.**”;
- (b) by the substitution for subsection (2) of the following subsection:  
 “(2) **If the Minister, [acting on advice of the Board and] after consultation with the] consulting a Minister of [Trade and Industry,] the relevant State department finds that a particular mineral, mineral product or form of petroleum can be beneficiated [economically] in the Republic, the Minister may promote such beneficiation subject to such**  
 terms and conditions as the Minister may determine.”;
- (c) by the insertion after subsection (2A) of the following subsections:  
 “(2B) **The Minister shall from time to time by notice in the Gazette determine such percentage per mineral commodity or form of petroleum and the developmental pricing conditions in respect of such percentage of raw minerals, form of petroleum or mineral products as may be required for local beneficiation, after taking into consideration the national interest.**  
 (2C) **Every producer shall offer to local beneficiators a certain percentage of its raw mineral or mineral products as prescribed by the Minister.**”;
- (d) by the substitution for subsection (3) of the following subsection:  
 “(3) **Any person who intends to [beneficiate] export any designated [mineral] minerals mined or form of petroleum extracted in the Republic [outside the Republic] may only do so [after written notice and in consultation with] with the [Minister] Minister’s written consent. 40 subject to such conditions as the Minister may determine.**”.

Section 36. Section 49 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:  
 “(1) **Subject to subsection (2), the Minister may [after inviting representations from relevant stakeholders, from time to time] after consulting a Minister of a relevant state department as and when the need arises by notice in the Gazette, having regard to the national interest, the strategic nature of the mineral in question and the need to promote sustainable development of the nation’s mineral resources—**  
 (a) **prohibit or restrict the granting of any reconnaissance permission, prospecting right, mining right or mining permit in respect of land identified by the Minister for such period and on such terms and conditions as the Minister may determine; or**  
 (b) **restrict the granting of any reconnaissance permission, reconnaissance permit, prospecting right, mining right or mining permit in respect of a specific mineral [or mining permit in respect of a specific**

mineral or], minerals or class of minerals identified by the Minister for such period and on such terms and conditions as the Minister may determine.”;

Section 38. Section 51 of the principal Act is hereby amended—

(a) by the substitution for subsections (1), (2) and (3) of the following subsections, respectively:

“(1) Subject to subsection (2), the [Board] Regional Manager may recommend to the Minister to direct the holder of a mining right to take corrective measures if the [Board] Regional Manager establishes that the minerals are not being mined optimally in accordance with the mining work programme or that a continuation of such practice will detrimentally affect the objects referred to in section 2(f).

(2) Before making the recommendation, the [Board] Regional Manager must consider whether the technical and financial resources of the holder of a mining right in question and the prevailing market conditions justify such recommendation.

(3) (a) If the Minister agrees with the recommendation, he or she must, within 30 days from the date of receipt of the recommendation of the [Board] Regional Manager, in writing notify the holder that he or she must take such corrective measures as may be set out in the notice and must remedy the position within the period [mentioned] specified in the notice.

(b) The Minister must afford the holder the opportunity to make representations in relation to the [Board’s] Regional Manager’s findings within 60 days from the date of the notice and must point out that non-compliance with the notice might result in suspension or cancellation of the mining right.”;

and

(b) by the substitution in subsections (4) and (5) of the words preceding paragraph

(a) of the following words, respectively:

“(4) The Minister may, on the recommendation of the [Board] Regional Manager, suspend or cancel the mining right if—;

(5) The Minister may, on the recommendation of the [Board] Regional Manager, lift the suspension of a mining right if the holder in question—”.

Section 39. Section 52 of the principal Act is hereby amended—

(a) by the substitution in subsection (2) for the words preceding paragraph (a) of 30 the following words:

“The [Board] Regional Manager must, after consultation with the relevant holder, investigate—”;

and

(b) by the substitution in subsection (3) for paragraph (a) of the following paragraph:

“(a) The Minister may, [on the recommendation of the Board and] after consultation with the Minister of Labour and any registered trade union or affected persons or their nominated representatives where there is no such trade union, direct in writing that the holder of the mining right in question take such corrective measures subject to such terms and conditions as the Minister may determine.”.

Section 40. Section 53 of the principal Act is hereby amended—

(a) by the substitution for subsection (3) of the following subsection:

“(3) Despite subsection (1), the Minister may [cause] direct that an investigation [to] be conducted if it is alleged that a person intends to use the surface of any land in a way that could result in the mining of mineral resources being detrimentally affected.”; and

(b) by the substitution in subsection (4) for paragraph (c) of the following paragraph:

“(c) offer that person the opportunity to respond within [30 days] the prescribed period.”.

Section 54. Section 80 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (g) of the following paragraph:

(f) by the addition after subsection (6) of the following subsection:

“(7) The State has a 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 state-owned entity as determined by the Minister in the *Gazette*.”

Section 56. Section 82 of the principal Act is hereby amended—

(c) by the addition after subsection (2) of the following subsection:

“(3) If a discovery is made in the exploration area, the holder of an exploration right must—

(a) notify the Minister of such discovery;

(b) submit an appraisal programme; and

(c) apply for an environmental authorisation and submit relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act, 1998.”

The sections from the Bill high-lighted above provide examples of the discretionary powers that it would grant to the Minister, a situation that creates a great deal of uncertainty for investors and the managements of South African mining companies. Apart from creating conditions that are not conducive to a well-functioning mining industry, this high level of discretion (not accompanied by objective criteria according to which the powers are to be exercised) is inconsistent with the rule of law and therefore in conflict with the Founding Provisions of the Constitution.

## 8. Conclusion

This comment deliberately concentrates on the nature of the provisions contained in the law. The reason is that a sound legal system, and particularly adherence to the rule of law, constitute the bedrock upon which the highest and most enduring economic growth and improvement in the living standards of nations have been built. Disrespect for the principles of good law and the rule of law, on the other hand, have led nations to a slide into greater lawlessness, erosion of economies, and a decline in living standards. Such developments should be guarded against and the Mineral and Petroleum Resources Development Amendment Bill unfortunately contains many of the elements that should be avoided.

While the executive branch of government prepares proposed legislation, the legislature has the responsibility to ensure that the Bills that are presented to Parliament are consistent with the rule of law, Constitutional in every respect, and consistent with the principles of good law. This Bill does not meet those requirements and should be returned to the drafters for reconsideration.

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