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## THE 2017 MINING CHARTER

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In April 2016, the Minister of Mineral Resources (the **Minister**) published the draft Reviewed Broad Based Black Economic Empowerment Charter (the **2016 Mining Charter**) for public comment.

The 2016 Mining Charter led to an industry wide outcry as it was produced without consultation. The Minister then undertook to consult with role players in the formulation of a new mining charter.

The new mining charter was published on 15 June 2017 (the **2017 Mining Charter**).

The 2017 Mining Charter is not a draft document. The notice accompanying the 2017 Mining Charter stipulates that it comes into effect on the date of publication.

The 2017 Mining Charter has received a hostile reception. The Chamber of Mines contends that it was given minimum input, despite representing 90% of the mining industry. It has indicated that it will obtain an interdict against its implementation.

The 2017 Mining Charter has been described as “radical” and has raised concerns about wide spread job losses within the industry. It has led to a devaluation in the Rand and rating agents have indicated that its introduction will result in a downgrade in the investment rating of major mining companies.

Arguably, the document contravenes the Companies Act.

It is questionable whether the Minister has the power to change the charter under Section 100 of the Mineral and Petroleum Resources Development Act 28 of 2002 (**MPRDA**). It is also questionable whether the ownership targets for existing mining rights can be changed. The new procurement provisions appear to contravene World Trade Organisation agreements.

Set out below is a summary of the provisions of the 2017 Mining Charter.

## BACKGROUND

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Section 100(2) of the MPRDA provides as follows:

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*“(a) To ensure the attainment of the Government’s objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the framework for targets and time table for effecting the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources.*

*(b) The Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f) and (i) can be achieved.”*

Some commentators argue that Section 100(2) does not grant the Minister the opportunity to amend the Charter.

The preamble to the 2017 Mining Charter records the legislative history. A mining charter in terms of section 100(2) of the MPRDA was first published in 2002. In 2009, an assessment by the Department of Mineral Resources found shortcomings in the manner in which the mining and minerals industry has implemented the various elements of the 2002 mining charter which prevented it from achieving its goals regarding transformation in the mining sector. An amended mining charter was then published in 2010 to address these inadequacies.

In 2014, a further assessment was conducted concerning the levels of compliance by mining companies with the 2010 mining charter. This assessment revealed that the stated objectives of the 2010 mining charter were still not being achieved despite some improvements in compliance.

Another comprehensive review process was subsequently undertaken in 2015. This process was stated as taking into account *“the need to integrate Government policies to remove ambiguities in respect of interpretation and create regulatory certainty”*.

## **NEW PROSPECTING AND MINING RIGHT HOLDERS**

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The holder of a new prospecting right must have a minimum of 50 per cent plus one Black Person shareholding.

The holder of a new mining right must have a minimum of 30 per cent Black Person shareholding.

The 30 per cent Black Person shareholding must be distributed as follows:

1. A minimum of 8 per cent of the total issued shares of the mining rights holder shall be issued to ESOPS (that is, black employee share ownership plans);

2. A minimum of 8 per cent of the total issued shares of the mining rights holder shall be issued to mine communities in the form of a community trust; and
3. A minimum of 4 per cent of the total issued shares of the mining rights holder shall be issued to BEE entrepreneurs.

The mining rights holder must pay a minimum of 1 per cent of its annual turnover in any given financial year to the Black Person shareholders. This is prior to, and over and above, any distributions to the shareholders of the company that holds the mining right. Presumably what is contemplated is that the Black Person shareholders will hold shares with a preferent right to a dividend equal to at least 1 per cent of annual turnover. Unless black person hold a different class of share to other shareholders, this would be impossible to achieve under Company law.

### **EXISTING PROSPECTING AND MINING RIGHT HOLDERS**

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With respect to existing prospecting and mining right holders, certain transitional periods are applicable. "Historical BEE Transactions" are defined as those BEE transactions that were concluded prior to the coming into operation of the 2017 Mining Charter that achieved a minimum 26 per cent Black shareholding or more.

Clause 2.1.2.3 provides that a mining rights holder who claims the recognition of Historical BEE transactions is required to "*Top Up its Black Person shareholding from the existing level to a minimum 30 per cent Black Person shareholding, at the Holder level*". This must be done within a transitional period of 12 months. Such "Top Up" need not be in proportion to the shareholding distribution as described above.

This is a rejection of the "once empowered, always empowered" principle, which takes into account circumstances where Black Persons chose to transfer their shareholding. It is also an amendment to the basis upon which old order rights were converted to new order rights and arguably, the Minister has no power to amend the terms attaching to existing mining rights.

The 2017 Mining Charter goes as far as to prescribe the means of the Top Up – this is to be done by reducing the numbers of remaining shareholders who are not Black Persons in proportion to their respective shareholding in the company.

It is noted that the recognition of Historical BEE Transactions will not apply to transactions which did not achieve a minimum of 26 per cent empowerment by 15 June 2017, and will not apply to application for new mining or prospecting rights made after this date.

## **PROCUREMENT, SUPPLIER AND ENTERPRISE DEVELOPMENT**

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Another controversial aspect of the Mining Charter pertains to the mining rights holder's acquisition of mining goods and services.

Regarding goods, at Clause 2.2, the 2017 Mining Charter provides that the mining rights holder must spend a minimum of 70 per cent of its total mining goods procurement spend on goods that are manufactured in South Africa. This must be apportioned in a prescribed manner, as follows:

1. At least 21 per cent must be set aside for sourcing goods from Black Owned Companies;
2. At least 5 per cent must be set aside for sourcing goods from Black Owned Companies with a minimum of 50 per cent plus one vote female Black Person owned and/or 50 per cent plus one vote youth owned and controlled; and
3. At least 44 per cent must be set aside for sourcing goods from BEE Compliant manufacturing companies.

In respect of services, a minimum of 80 per cent of the total spend on services must be sourced from South African-based companies. This spend will be apportioned as follows:

1. At least 65 per cent must be sourced from Black Owned Companies;
2. At least 10 per cent must be sourced from Black Owned Companies with a minimum of 50 per cent plus one vote female black person-owned and controlled companies; and
3. At least 5 per cent must be sourced from Black-Owned companies with a minimum of 50 per cent plus one vote youth-owned and controlled companies.

All mineral samples will be required to be analysed in South African-based companies. This excludes those instances where samples are analysed for the purpose of verifying the accuracy of local laboratories.

## **EMPLOYMENT EQUITY**

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The 2017 Mining Charter prescribes minimum thresholds of Black persons which must be employed. This includes, for instance, a minimum of 50 per cent Black Persons with exercisable voting rights on the Board, 25 per cent of which must be female Black Persons. This extends all the way to junior management level and makes provision for employees with disabilities.

## **MINE COMMUNITY DEVELOPMENT, SUSTAINABLE DEVELOPMENT, HOUSING AND LIVING CONDITIONS**

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The 2017 Mining Charter makes various provisions in respect of mine community development, sustainable development and growth of the mine and minerals industry, and housing and living conditions. This relates to, *inter alia*, infrastructure projects, enterprise development, the improvement of environmental management and performance in respect of health and safety and the setting of principles of housing and working conditions.

## **TRANSITIONAL ARRANGEMENTS AND APPLICABILITY**

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The 2017 Mining Charter provides that existing mining rights holders have a maximum of 12 months from 15 June 2017 to comply with the revised ownership targets with one exception – the 12-month period in relation to distribution of shareholding to mine communities in the form of a community trust will commence on a date to be published by the Minister of Mineral Resources.

The holder has 3 years to comply with the new procurement targets. The procurement target may upon request be extended for a further 2 years. The procurement goals must be reached 15 per cent of the 70 per cent in the first year, 45 per cent of the 70 per cent in the second year with the 70 per cent being reached in the third year.

## **CONCLUSION**

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The 2017 Mining Charter is unworkable in its current form. Clearly, its validity will be challenged in the courts. Mining companies are placed in a difficult position until clarity is reached as to its legal status.

The 2017 Mining Charter is one of the many recent new policy changes that have been put in place to advance “radical economic transformation”. The 2017 Mining Charter is therefore a product of the current political and economic climate, which is characterised by uncertainty. It is difficult to predict what further steps will be taken, and in which direction.

## **FURTHER ADVICE**

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Should you require advice or assistance on the new Mining Charter, please contact Michael Jackson on 031 – 536 8512 email : [miackson@coxveats.co.za](mailto:miackson@coxveats.co.za), Keren Watson on 031 - 536 5818, email : [kwatson@coxveats.co.za](mailto:kwatson@coxveats.co.za) or Simon Watson on 031 - 536 8530, email : [swatson@coxveats.co.za](mailto:swatson@coxveats.co.za) or Jason Goodison on 031 - 536 8517, email : [jgoodison@coxveats.co.za](mailto:jgoodison@coxveats.co.za) or Jenna Padoa on 031 - 536 8529, email : [jpadoa@coxveats.co.za](mailto:jpadoa@coxveats.co.za), Cherese Thakur (031 – 536 8529, [cthakur@coxveats.co.za](mailto:cthakur@coxveats.co.za)), Spencer Cason on 031 – 536 8596, email : [scason@coxveats.co.za](mailto:scason@coxveats.co.za)