Strategic Considerations for the MPRDA Amendment Bill
Preparing for impact
Since South Africa became a democracy in 1994, one of Government’s important mandates was to develop policies which would lead to socio-economic growth in the mining sector. Government has endeavoured to create a legal framework which supports this mandate and the MPRDA Bill is the next step in the process. There is a trend across the African continent for Governments of resource-rich countries to strike a balance between the state and private entities benefit of the country’s mineral assets. Governments are driving this agenda through amending legislation, with many countries opting for higher state participation and ownership rights.

The purpose of the MPRDA as outlined in the Bill is to “provide for the regulation of associated minerals, partitioning of rights and enhance provisions relating to beneficiation of minerals; to promote national energy security; to streamline administrative processes; to align the MPRDA with the Geoscience Act, 1993 (Act No. 100 of 1993), as amended by the Geoscience Amendment Act, 2010 (Act No. 16 of 2010); to provide for enhanced sanctions; to improve the regulatory system; and to provide for matters connected therewith.” (Mineral and Petroleum Resources Development Act Bill, 2013).

One can conclude that government is making these amendments to curb potential dominance of certain players in the sector in order to open the industry up to a wider net of local shareholders. There is also a strong focus to promote black ownership to reverse the inequalities of Apartheid. However necessary these objective are, the MPRDA Bill also creates several potential new issues as some of the provisions may be impractical to implement as well as being open to Constitutional challenge; and the wide ambit of discretionary power granted to the Minister of Mineral Resources could result in inefficiencies that severely impact the industry. One of the problems is that a Prospecting or Mining Right is defined as a “limited real right” and that is because whilst the Minister’s approval may not be unreasonably withheld it frequently has been and this brings into question whether these rights have any value.
Opportunities
There are a number of opportunities opened up by the proposed amendments. For example, it will promote wider access to mineral rights and create an environment that requires innovative thinking that could transform the mining industry of today. Creating a stable operating environment is the underpinning factor for success of the South African mining industry. Foreign investors require stability in order to reduce the risk it takes to make the necessary long-term commitments to the country and the industry. Local operators require stability of labour, policy and economic environment in order to make meaningful impacts on the communities in which they operate.

Risks
In a sector that requires stability in order to attract investment, especially after the events of Marikana in 2012, the Bill as it stands may not promote and create the required levels of certainty to attract the required level of investment to grow the industry. The three areas which may pose the biggest risk to the industry are outlined in Table 1.

Table 1

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<tr>
<th>Risks associated with the new amendments</th>
<th>Consequences for stakeholders</th>
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<td>Strategic implication of beneficiation</td>
<td>The proposed amendments could make it more difficult to attract private capital as the risk to return on investment may increase. Dominant players in the South African mining sector will find it difficult to grow if the decision to issue new mining permits is based on creating a more diverse market of operators.</td>
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<td>No strong focus on skills development</td>
<td>In an industry that has an ageing population of skilled, senior management, there is a threat to business continuity. With many mining companies looking to innovate processes through technology, it is a little surprising there is no mention of formal skills development in the MPRDA.</td>
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<td>Discretionary power of the Minister</td>
<td>The broad discretionary power of the minister will make it difficult for mining companies to plan and be sure of securing a mineral right. Scenario planning and looking at each potential outcome will be a key factor for the future successful mining companies in South Africa.</td>
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Foreign investors require stability in order to reduce the risk it takes to make the necessary long-term commitments to the country and the industry.
Top six strategic considerations for the MPRDA Amendment Bill

Overall, the new Bill has the potential to increase uncertainty, drive up costs, and threaten investor returns, whilst increasing dependency on healthy stakeholder relationships.

There are several strategic considerations listed below which may help mining companies address some of the challenges the new Bill presents:

1. Considering a wide set of future scenarios, and developing strategies that are robust in the face of uncertainty
2. Developing strategies that demonstrate how returns will be equitably created not only for investors, but for the country and its citizens
3. Developing superior mineral economics and resource evaluation skills, be laser focused on the highest value resources and rigorously optimize their portfolios
4. Developing actionable stakeholder engagement strategies and engaging proactively with all stakeholders
5. Developing partnerships in all aspects of the broader industry cluster
6. Aggressively reducing costs through innovating aggressively in order to remain competitive, whilst complying with legislation

1. Applications for mineral rights

The Bill adjusts the ‘first come first served’ application procedure. It deleted the section in its entirety from the Bill and has replaced it with a process similar to the tender process. Under this new process the Minister must invite applications for rights. In addition, any person may apply to the Minister to issue them an invitation although a request does not necessarily result in an invitation. Applications received by the Minister will be processed in accordance with the Act.

Strategic considerations

The risk here is that being the first to find a mineral deposit doesn’t necessarily give you an advantage as the concept of “first come, first served” no longer applies. Given that the Bill has an express intent to broaden access to mineral resources and to promote black owned junior miners, this is a big risk for the current dominant players in the sector. There are a couple of considerations for this stakeholder group:

1. This change puts the industry at the whim of its stakeholder set making an effective stakeholder engagement strategy even more important. Not only do mines need to engage at a macro level with government and the regulator, but even more importantly at the micro level with affected parties right outside the mine gate and the specific individuals who are important to your mineral right application.

2. Within this stakeholder strategy mining companies need to have a credible story to tell about how they are helping stakeholders meet their objectives. Considerations as to where you are going to play in the value chain and project lifecycle in order to create broader benefits to others in the spaces you don’t operate in will be important.

A vision and strategy need to be created around how to partner in building the industry; how to effectively harness and use your procurement power; how your collective corporate social investment and enterprise development spend will create jobs and uplift communities.
2. Beneficiation

Resource nationalism is not unique to South Africa. All governments of resource rich countries are looking for ways to ensure they derive as much domestic benefit as possible before products are exported.

The Minister of Mineral Resources is required to initiate the beneficiation of minerals and petroleum in South Africa. Beneficiation is defined in the Bill as, “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”.

The MPRDA Bill grants the Minister broad discretionary powers to set the terms and conditions related to the beneficiation of mineral resources. With regard to the designation of a mineral for beneficiation and all other pervasive issues the Minister must now be guided by the national development imperatives described in the amended Act as “macro-economic stability, energy security, industrialisation, food security and infrastructure development”.

Guidance and support will be given to the Minister by an advisory council provided for by the MPRDA Amendment Bill, however the Minister is not obliged to heed the council’s advice on designating a mineral for beneficiation but must take it into account in the decision making process. The Minister’s decision to designate minerals for the purpose of beneficiation must be published in the Government Gazette to give all relevant stakeholders sufficient notice.

The price of minerals designated for beneficiation will not be set by the Minister but will be determined by the “mine gate price or agreed price”. The mine gate price is the value of the mineral when it leaves the mine’s gates before VAT, transport, delivery or other costs are added on. The Minister holds broad discretionary powers to prescribe the percentages, quantities, qualities and timelines for minerals regulated under beneficiation.

Furthermore, any person who wishes to export minerals must comply with the beneficiation regulations set out in the MPRDA as well as receive written approval from the Minister. Whether this amendment will be able to be enforced remains to be seen as it could be unconstitutional due to its potential contravention of the World Trade Organization’s General Agreement on Trade and Tariffs.

Beneficiation is a good idea in theory as it may result in job creation and a more inclusive mining sector. There are, however, several factors at play within the industry which result in barriers to beneficiation:

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<th>Implication for the industry</th>
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<td>Labour and skills</td>
<td>Pressure from the high cost of labour is compounded by poor labour-employer relations. The strong position from which trade unions negotiate also results in labour inflexibility and a general inability to forecast the cost of labour over an extended period of time. When one adds these factors to the general skills shortage in South Africa, potential investors are likely to seek investment opportunities in an environment less complicated by labour issues.</td>
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<td>Energy and security</td>
<td>Operators in the South African mining industry were recently compelled to operate at ten percent reduced capacity due to power shortages. With severe delays to major power projects, mining companies may need to consider investing in alternative energy sources in order to minimise their dependency on traditional sources.</td>
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<td>Lack of infrastructure</td>
<td>Government is investing R827 billion over the next three years. This is good news for mining companies who currently face supply-chain challenges due to low capacity on current rail systems. However, the question remains as to whether this is sufficient investment to drive growth.</td>
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It appears the reality is that it is currently uneconomic to beneficiate in South Africa. Steps are however being taken by government to remedy some of the issues described above. Over time government investment and policy, with regard to industrial action, skills development and infrastructure, may reduce some of the barriers to beneficiation.
Strategic Considerations

The ability of mining companies to beneficiate is limited. In our bulk commodities such as coal and iron ore, most miners’ beneficiation abilities are limited to washing and screening. The precious and base metals producers’ beneficiation capability lies in smelting and refining.

When it comes to downstream manufacturing in South Africa, there are currently other parties better equipped to do this.

In order to remain compliant with the new legislation, mining companies should consider the following:

1. You do not have to develop a beneficiation value chain on your own. Doing so has the potential to drive up costs and reduce shareholder value. Consider working with others who have the requisite capabilities. For example the SAIMM reported that in 2012, 19% of all autocatalysts are produced in South Africa, but not by the platinum miners. Similarly a large proportion – approximately 72% – of our coal is beneficiated locally by Eskom and Sasol.

2. Work with government to attract investment into the sector. Successful beneficiation requires all stakeholders to work together which drives the argument that mining companies need to have a credible story to tell as well as a stakeholder engagement plan in place that shows how they are helping stakeholders meet their objectives.

3. Environment

All prospecting and mining operations currently require an environmental authorisation under the National Environmental Management Act. The Act manages all other activities with significant environmental impacts but usually environmental authorisations are undertaken by the Department of Environmental Affairs. Under the MPRDA Bill, authorisations would be processed and issued by the Department of Mineral Resources. Appeals against these authorisations would lie against the Minister of Environmental Affairs which could prove fairly problematic as the level of insight into the broader context of the application may not be known by the Minister. This provision also seems to fail to recognise the inherent conflict of the mandate for the Department of Mineral Resources (where the chief promoter of mining also has to make tough decisions to refuse to authorise or curtail mining activities in the interest of the environment). In addition, it does not take into account that the Department of Mineral Resources has a lack of expertise or capacity to adequately assess environmental impacts, issue appropriate and lawful environmental authorisations, monitor compliance and take enforcement action in the case of violations.

Previously, mines were indemnified from liability once a closure certificate had been issued and this shall no longer be the case.

It is also difficult to ignore the potential consequences of that unlimited liability when one considers, for example, the cost of acid mine water drainage. In an already water-scarce country, any potential threats to water security (potable, industrial, and agricultural alike) should not be taken lightly. It is imperative that the needs and the potential for acid mine water drainage in each region are well understood and mitigated against. Indeed, the various committees and bodies which have been formed, and solutions proposed, indicate an intimate understanding of the issue, and insightful solutions. However this will be driven not only by technological solutions, but active engagement from all stakeholders.
Strategic considerations
There are two main considerations for mining companies:

1. Due to the impact on the environment of poor compliance and the potential for reckless behaviour, mines need to be doubly sure they are compliant with legislation. They need to set high standards for themselves and proactively work to those standards. Mines need to be rehabilitated proactively and in real time to minimise the potential open ended costs at the end of the life of the mine.

2. A robust stakeholder engagement plan needs to accompany the mine closure plan to reduce the possibility of closure disputes that could be dragged out indefinitely.

4. Residue stockpiles
The definition of “residue stockpile” has been amended to now include historic mines and old dumps created before the implementation of the MPRDA in 2004. Under the MPRDA mines will have to apply for a reclamation permit to manage stockpiles and residue deposits if they are not seen to fall within the mine’s property boundary.

Under the Bill, mining companies are granted an exclusive right to apply for the amendment of their mine work programme under Section 102 of the MPRDA to include such historic tailings in the event they fall within the mining area under a pre-existing mining right. If the historic tailings fall outside the mining area, its owner holds an exclusive right to apply for a mining right over such historic tailings. However, they will waive their exclusive right if they do not apply within a set time-frame.

Under the MPRDA mines will have to apply for a reclamation permit to manage stockpiles and residue deposits if they are not seen to fall within the mine’s property boundary.

Mining companies granted the right to mine dumps or residue stockpiles will be responsible for all rehabilitation, safety and health aspects relating to historic or old mines in the area covered by the prospecting right or mining right application. This will also apply to abandoned underground operations. Mine operators could face having to deal with severe environmental impacts such as acid mine water drainage, caused by previous mineral right owners, negating any potential profits.

Strategic considerations
Mining companies will need to be selective about which assets are worth keeping in their portfolios going forward, particularly around whether to apply for an extension of their mineral right to include the residue stockpile and tailings. It could prove problematic for a mine if they do not secure the rights for these historic assets as third party rights owners could start operations in their mining area. Environmental and geological specialist skills will become even more critical to mitigate some of these risks.
5. State participation
The MPRDA Bill introduces state participation in exploration and production rights where the State is automatically entitled to 20% free carried interest in all petroleum rights. In addition, the state is entitled to further participation in the form of acquisition at an agreed price or production sharing agreement. “Further participation” is not capped by the MPRDA Bill and thus it remains to be seen what will occur in the instance where the state would like to participate further but a price cannot be agreed upon.

The Minister shall appoint two representatives to speak for the state in a joint exploration / production project committee. Therefore all future projects of this nature will have state participation. This is not an uncommon trend globally.

Strategic considerations
There are three strategic impacts:
1. State participation will increase the cost to the investor, which means petroleum companies will need to work harder to make a return on their investment.

2. Board members and the executives they work with are under tremendous pressure to identify, fund and implement all new opportunities that lead to short-term success, long-term sustainable operations and an increased return on capital. The challenge for an executive board arises when one considers the trade-offs between competing strategic objectives, especially when funding requests exceed available capital. This will have an impact on decisions around mineral economics and resource evaluation will become very important to ensure mineral assets that have enough value in them to make a decent return for stakeholders are developed. It also creates the imperative for innovation and cost reduction to improve returns.

3. It is not clear how the state’s rights to further participation will be exercised. This creates uncertainty and risk which will increase the hurdle rates that investors apply. To reduce the number of dominant mineral rights owners and open up the market, the new legislation will force mining companies to take an even harder look at the resource portfolio and make it even more important to be selective about the resources they develop. It may be prudent for mining companies to continue to build and engage a positive relationship with all stakeholders.

6. Penalties for non-compliance
The amendment concerning new offences and penalties for mining without a mining right or an approved safety and environmental management programme may result in a fine of R100,000, two years in jail, or both. Under the Bill, mining companies will face maximum fines of ten percent of annual turnover (capped at R800,000) plus the value of the previous year’s exports or prison terms for directors of up to four years. Financial penalties in the form of a fine imposed by the Director General may now be given the effect of a civil judgment in the magistrates’ courts. Offences range from the relatively minor, such as failure to submit an annual report to failure to promote economic growth.

Strategic considerations
The proposed penalties have given the DMR real power to deal with non-compliance. Shareholders will not take big fines lightly, and not many CEO’s look forward to time in jail. It makes it critically important for mining companies to have a clear strategy for where they are going to play, how they are going to win, and a credible story about how to share the benefits with other stakeholders. In addition, mining companies need to be seen to take an active role in building an industry, working proactively with stakeholders and proactively complying with legislation.

Given the uncertainty that the broad discretion given to the Minister creates, companies need to consider a wide set of divergent future scenarios and make strategic choices that are robust in the face of these divergent future scenarios.

A clear Stakeholder strategy should be developed to curtail some of these issues.
Summary of strategic considerations

To maximise the opportunities the MPRDA Bill presents, mining companies should prepare now and start to consider divergent future scenarios of the business of tomorrow then develop strategies that are robust in times of uncertainty, and that give government and all stakeholders a clear story as to how mining companies are creating value for the country and its citizens.

It will be important for mines to focus on ruthlessly optimising their portfolio and developing the required skills-set to build the industry, either through forging partnerships with upstream and downstream manufacturers, or playing a more active role in developing the requisite technical skills to sustain and grow the industry. There is a burning imperative to innovate aggressively in order to remain competitive, whilst complying with legislation.

Perhaps the most important consideration is that mining companies should start developing their stakeholder engagement frameworks to ensure employees, communities, government, shareholders and other stakeholders’ needs are appropriately considered.

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Notes
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