Hogan Lovells

Mining Industry Newsletter

JANUARY 2014

Contents

South African Mining Industry at a Crossroads 1

The Mineral and Petroleum Resources Development Amendment Bill: More Challenges Ahead? 4

Proposed Amendments to the Mine Health Safety Act, No. 29 of 1996 — Will the Proposed Amendments Achieve the Goal of Improving Health and Safety in the South African Mining Industry? 6

Indonesia's Ore Export Ban Takes Effect, with Exceptions 7

Brazil Anti-Corruption Law Goes Into Effect 8

Contacts 11

Welcome

Hogan Lovells' Mining Industry Team is excited to announce a new service for its valued clients: Hogan Lovells Mining Industry Newsletter. This periodic newsletter will inform legal, regulatory, and compliance staff to the most recent mining laws and news and examine their potential impact on how companies conduct business.

If you will be attending the Mining Indaba in Cape Town, South Africa from 3-6 February 2014, please stop by Hogan Lovells booth (stand number 3702) at the conference to visit. We look forward to seeing you there!

Adrian Walker
Partner, London
adrian.walker@hoganlovells.com
T +44 20 7296 5566

Paul Hilton
Partner, Denver
paul.hilton@hoganlovells.com
T +1 303 454 2414

South African Mining Industry at a Crossroads

The South African mining industry has faced an unprecedented and complex range of challenges in 2012 and 2013, including the effect of global economic downturn, industrial action, and the ever-increasing costs of production. The uncertainty regarding the regulatory regime has impacted even further. In this article, we touch on the proposed amendments to the Mineral and Petroleum Resources Development Act (MPRDA), compliance with empowerment requirements, and the proposed amendments to the Mine Health and Safety Act (MHSA).

Proposed Amendments to the MPRDA

While the coming into force and effect of certain provisions of the 2008 Mineral and Petroleum Resources Development Act (the MPRD Amendment Act) aimed to address concerns raised by industry stakeholders, this has not necessarily been the case.

The situation has been impacted further by the Cabinet approval of the Mineral and Petroleum Resources Development Amendment Bill (the Bill) at the end of May 2013, for tabling in Parliament.

The stated purpose of the Bill is to, amongst others, amend the MPRDA as amended by the MPRD Amendment Act, so as to remove ambiguities, to provide for the regulation of associated minerals, partitioning of rights, and enhance provisions relating to the beneficiation of minerals and to provide for enhanced sanctions.

There has been extensive comment and criticism by industry stakeholders, with the majority of the focus being on the negative aspects of the proposed amendments in the Bill.

Not all of the proposed amendments should however be viewed in a negative light — several of the proposed amendments are likely to positively impact the mining industry.

One of the proposed amendments aims to improve the situation regarding associated minerals. Currently, rights are granted to mine for a specified mineral only, and if the holder of the right has not been granted the right to mine a particular mineral, even if this mineral is in "mineralogical association" with the mineral in respect of which the right has been granted, the holder may not mine that mineral, lawfully. The Bill proposes to include a definition of "associated mineral," namely any mineral which occurs in mineralogical association with and in the same core deposit as the primary mineral being mined where it is physically impossible to mine the primary mineral without also mining the mineral associated therewith.

The ability to lawfully mine associated minerals is, however, subject to compliance with the proposed section 102(3), which provides that any right holder mining any mineral under a mining right may also mine and dispose of any other mineral in respect of which the holder is not the right holder, but which must, of necessity, be mined with the first (primary) mineral, provided that the right holder declares such associated mineral or any other mineral discovered in the mining process.

Another proposed amendment relates to partitioning of rights. The Bill proposes the substitution of section 11(1) of the MPRDA with a new subsection, which provides that a right or a part of a right may be ceded, transferred, encumbered, let, sublet, assigned, or alienated with Ministerial consent and subject to such conditions as the Minister may determine. The current provisions of section 11(1) of the MPRDA do not make provision for partitioning of rights.

The ability to partition rights is likely to assist several stakeholders, including entities such as joint ventures.

There has been far-reaching criticism in relation to several of the proposed amendments, including the inclusion of historical mine dumps within the cumbersome parameters of the MPRDA, the repeal of the "first come first serve" principle in relation to applications, Ministerial discretion in relation to beneficiation and the requirements associated with beneficiation, increased sanctions in the form of administrative fines based on the right holder's annual turnover, and Ministerial discretion regarding timeframes within which applications and related aspects are required to be addressed.

The Bill is the subject of the Parliamentary processes and it is hoped that the comments submitted by industry stakeholders when the Bill was published for comment in December 2012, are properly considered and, where appropriate, incorporated in the MPRD Amendment Act, in

support of the overwhelming desire to ensure that South Africa is an investment destination of choice, and South Africa's mining industry continues to play a significant role in the development of South Africa.

Compliance with Empowerment Requirements

There has been a mounting sense of frustration in the Department of Mineral Resources (DMR) about what it perceives as a lack of transformation in the mining sector. At the same time, many mining companies express bewilderment as to what more they can do to satisfy the DMR's requirements. Meeting the transformation expectations may not be as difficult as some mining companies may think, but often, mining companies only face the difficult question of compliance shortcomings, during compliance audits carried out by the DMR. These random audits started approximately two years ago, and look at all aspects of the mining operations compliance record, from how it is implementing its social labor plan to its environmental management and reporting obligations.

Typically, a mining company will only receive about two weeks' notice of an audit. The DMR is extremely thorough and leaves no stone unturned during these visits. If the company claims that it is running a community development project in the vicinity, the DMR delegation will want to see it. Where the DMR finds that the operations fall short, it will issue a Section 93(1) notice (in terms of Section 93(1) of the MPRDA) which is essentially a directive requiring the company to take rectifying steps within a certain time frame. If the company does not respond adequately, the DMR can then issue a Section 93(2) notice, suspending the operations until the shortcomings have been remedied. In the worst case scenario, the license of the non-compliance company can be suspended or cancelled altogether.

There are usually three areas where companies tend to fall short, namely employment equity, procurement, and community development. Often the shortcomings are a question of differences in interpretation between the DMR and the mining company, rather than a lack of effort or commitment to empowerment. For example, companies often believe that they are doing well on employment equity because their top leadership meets the recommended threshold for race and gender. The DMR might identify the problem as being in senior management or middle management.

In terms of procurement, many companies fall short on local procurement because buying from suppliers in local communities or labor-sending areas is limited.

Because noncompliance is often perceived as a result of differences in interpretation, it is often not as difficult as persons may think to achieve compliance.

For example, while there are challenges to local procurement, one of the ways of overcoming these challenges is to focus on small- and medium-sized enterprise development, concentrating on equipping people from local communities with portable skills, such as plumbing, auto mechanics, or business skills, which can be used in any sector and not just in mining. The mining company can then assist in registering the beneficiaries as a legal entity, such as a co-operative, using the services of the Small Enterprise Development Agency.

Community development initiatives can also be effectively and affordably implemented by concentrating on projects that do not pose unnecessary obstacles. The most difficult projects tend to be in agriculture, where land use often has to be negotiated with authorities, and may never come to fruition. It is much simpler, quicker, and more cost-effective to focus on establishing or supporting schools and clinics in communities.

Proposed Amendments to the Mine Health and Safety Act

Prevention is always better than cure, and being proactive is preferable to reacting to outside pressure. The Mine Health and Safety Amendment Bill, which has been published for comment, aims to amend the MHSA so as to streamline administrative processes, strengthen enforcement provisions, reinforce offenses and penalties, amend certain definitions, and provide for related matters. There is little doubt that all role players in the mining industry need to be committed to the health and safety of employees, and other persons who may be affected by the mining activities. It is hoped that the concerns raised by the industry in response to the proposed amendments are carefully considered and taken into account, to ensure that the objects of the Mine Health and Safety Amendment Bill are achieved.

For more information on this subject, contact:

Warren Beech
Partner, Johannesburg
warren.beech@hoganlovells.com
T +27 11 523 6076

Debbie Ntombela
Partner, Johannesburg
debbie.ntombela@hoganlovells.com
T +27 11 523 6159

The Mineral and Petroleum Resources Development Amendment Bill: More Challenges Ahead?

Introduction

Following the commencement of certain provisions of the Mineral and Petroleum Resources Development Amendment Act, No. 49 of 2008 (the 2008 MPRDA Amendment Act), the South African Cabinet approved the Mineral and Petroleum Resources Development Amendment Bill (the Bill) at the end of May 2013, for tabling in Parliament. The draft Bill was published for comment in December 2012.

The stated purpose of the Bill is to amend the Mineral and Petroleum Resources Development Act as amended by the 2008 MPRDA Amendment Act; remove ambiguities that exist within the Act; provide for the regulation of associated minerals; partitioning of rights and enhancing provisions relating to beneficiation of minerals; promote national energy security; streamline administrative processes; align the MPRDA with the Geoscience Act, 1993; provide for enhanced sanctions; improve the regulatory system; and provide for matters connected therewith.

Associated Minerals

The proposed amendments aim to improve the situation regarding associated minerals. The proposed definition of "associated mineral," includes any mineral that occurs in mineralogical association with, and in the same core deposit as, the primary mineral being mined in terms of the mining right, where it is physically impossible to mine the primary mineral without also mining the mineral associated therewith.

However the ability to lawfully mine associated minerals is subject to compliance with the proposed requirements set out in the proposed amendments to section 102 of the MPRDA. The proposed amendments include the insertion of section 102(3), which provides that any right holder mining any mineral under a mining right may, while mining such mineral, also mine and dispose of any other mineral in respect of which such holder is not the right holder, but which must of necessity be mined with the first mentioned mineral provided that the right holder declares such associated mineral or any other mineral discovered in the mining process.

Inclusion of Historical "Dumps," Residue Stockpiles, and Residue Deposits

The proposed amendments also include residue stockpiles and residue deposits, under the ambit of the MPRDA, together with historic "dumps."

The proposed amendments include changes to the definition of "land" which will include residue deposits and residue stockpiles. The proposed amendments to the term "mine" also include specific reference to residue deposits and residue stockpiles.

It is also proposed that the term "residue stockpiles" be included in the definition of "mining operation."

In addition to specifically incorporating residue stockpiles and residue deposits in the various definitions, the proposed amendments include a new right that must be applied for namely a "reclamation permit," which must be applied for and obtained in terms of proposed section 42A of the MPRDA.

To ensure that historic "dumps" are included, the term "residue stockpile" will be amended to include historic mines and dumps created before the implementation of the MPRDA.

Beneficiation

The term "beneficiation" is to be amended to mean the transformation, value addition, or downstream beneficiation of a mineral to a higher value product, over baselines to be determined by the Minister, which can either be consumed locally or exported.

The proposed amendments to section 26 of the MPRDA include that the Minister must initiate or promote beneficiation of minerals in the Republic, and that the Minister shall, from time to time, by notice in the Gazette determine such percentage per mineral commodity and the developmental pricing conditions in respect of such percentage of raw minerals, as may be required for local beneficiation, after taking into consideration the national interest. It also places an obligation on producers to offer a percentage of minerals to local beneficiators, and to empower the Minister to determine both the percentage of production and the development of pricing conditions at which it should be disposed of after taking into account national interest. Regulations and guidelines will be

developed setting out the criteria to be used by the Minister to determine the levels of beneficiation, relevant percentages, and developmental pricing conditions.

The Principle "First Come First Served" Will No Longer Apply
The Bill proposes the deletion of section 9 of the MPRDA, which provides for the "first come first served" principle in relation to applications for rights, and its substitution with a provision that the Minister may by notice invite applications for rights. The Minister will be granted the right to periodically invite applications by notice in the Gazette. The stated purpose is that the invitation process will ensure coordinated quality approvals by the department that meaningfully contribute towards the fulfilment of the objects of the MPRDA.

Partitioning of Rights and Ministerial Consent — Section 11 and 102 of the MPRDA
The Bill proposes a new subsection, which provides that a right or a part of a right (prospecting right or mining right), may be ceded, transferred, encumbered, let, sublet, assigned, or alienated with Ministerial Consent, and subject to such conditions as the Minister may determine. The current provisions of section 11(1) of the MPRDA do not make provision for partitioning of rights.

Increased Sanctions
The Bill proposes amendments to section 99 of the MPRDA, and proposes a change from specified fines, to fines based on a percentage of the right holder's annual turnover in the Republic and its exports from the Republic during the preceding financial year. The percentages are between five and 10 percent, depending on the nature of the offence. Where it is not possible to establish the recent annual turnover of any offender, maximum fines are specified.

Time Frames
Relevant time frames in the MPRDA will be amended, to reflect time frames as prescribed by the Minster, from time to time. The Bill states that the time frames will be prescribed and fixed in the Regulations. It also states that the time frames will not detract from the standard practice of 30, 60, and 90 days, where applicable.

Conclusion
The 2008 MPRDA Amendment Act introduced significant changes. The Bill proposes to implement further, far reaching changes, which must be carefully considered by stakeholders.

For more information on this subject, contact:

Warren Beech
Partner, Johannesburg
warren.beech@hoganlovells.com
T +27 11 523 6076

Proposed Amendments to the Mine Health Safety Act, No. 29 of 1996 — Will the Proposed Amendments Achieve the Goal of Improving Health and Safety in the South African Mining Industry?

The draft Mine Health and Safety Bill, 2013 (the Bill) was published for comment in General Notice 1103 of 2013.

Essentially, the objects of the Bill can be categorized into two broad categories: administrative and related amendments, and enforcement and related amendments. The administrative and related amendments include, for example, defined appeal procedures, timelines for decision making on appeals, and amendments to definitions. The amendments in relation to enforcement and penalties, are wide-reaching, and are clearly aimed at giving the Mine Health and Safety Inspectorate additional mechanisms to enforce compliance with the provisions of the Mine Health and Safety Act (MHSA).

The key proposed amendments to the MHSA are:

- the insertion of Section 2B, which will require the employer of every mine that is being worked, to appoint a Chief Executive Officer, if the employer is a company, and which requires the Chief Executive Officer to personally perform all the functions of the employer, including making any appointments in terms of the Act;
- the proposed amendment to Section 10, which will place an absolute duty on the employer to provide health and safety training which is effective and assessable;
- the proposed amendments to Sections 75, 76, 78, and 80, which remove the obligation on the Minister to consult with the Mine Health and Safety Council, before issuing notices, impacting on health and safety amending schedules to the MHSA, and extending the provisions of other law relating to health and safety, to mines. The removal of this obligation effectively removes an important component of the consultation process with interested and affected parties, who are represented on the Mine Health and Safety Council; and
- the proposed amendment to Section 92, which provides that an employer which is a company, and which is convicted of an offence in terms of any section of the MHSA may be sentenced to a fine not exceeding 10 percent of the company's annual turnover for the period during which the company has failed to comply with the relevant provision or to imprisonment not exceeding 10 years.

Narrowing down the proposed amendments to the three primary areas of concern would be firstly, to "transfer" the responsibilities of the mining company to its Chief Executive Officer, who would be required personally to carry out the duties and functions; secondly, the proposed amendment of the maximum criminal fine that can be imposed on an employer that is a company, namely a fine not exceeding 10 percent of turnover,;and thirdly, the removal of the requirement of the Minister to consult the Mine Health and Safety Council before issuing notices affecting health and safety, amending or replacing schedules to the MHSA, and extending the provisions of legislation.

Some of the proposed amendments are likely to improve the situation of mine workers. For example, the proposed amendment to Section 6 will require the employer to ensure that personal protective equipment is suitable, taking into account size, fit, type of workplace hazards, and the purpose and nature of the work to be undertaken. Similarly, the proposed amendments to Section 10, will increase the responsibilities regarding health and safety training.

Having said this, the most significant potential consequences will be on the mining companies, particularly in relation to the position of the Chief Executive Officer, and the potential consequences (criminal fines), namely the imposition of a criminal fine related to a percentage of turnover.

For more information on this subject, contact:

Warren Beech
Partner, Johannesburg
warren.beech@hoganlovells.com
T +27 11 523 6076

Indonesia's Ore Export Ban Takes Effect, with Exceptions

On 12 January 2014 Indonesia's ban on the export of ore and other unprocessed minerals took effect, subject to temporary exceptions. These exceptions — for copper, manganese, iron, lead and zinc concentrates — were established by regulations signed by President Susilo Bambang Yudhoyono and Minister of Energy and Mineral Resources (MEMR) Jero Wacik on 11 January 2014. The controversial export ban has been anticipated since issuance of Indonesia's 2009 Mining Law, which stipulates that mining products must be processed and purified domestically.

The MEMR regulation provides details on the implementation of the export ban and its exceptions. Among other things, the MEMR regulation specifies the level of processing or purification required for certain minerals prior to export and the basic procedures for obtaining approval to export these minerals. Further details regarding the export approval process have been stipulated by Indonesia's Ministry of Trade.

Temporary exceptions from the ban for copper, manganese, iron ore, lead, and zinc concentrates (which meet specified purity levels) will be available until 11 January 2017. In order to benefit from these temporary exceptions, the relevant company must commit to developing smelter facilities within Indonesia (either independently or in collaboration with other parties) and meet various other requirements. Authorized exports of concentrates will be subject to a special export tax, set at 20 percent (excepting copper concentrate, for which the tax is initially set at 25 percent) for the first half of 2014, increasing every six months until reaching 60 percent in the second half of 2016.

Nickel, tin, gold, silver, and chromium are not eligible for exception from the export ban.

Indonesian industry groups have expressed intention to challenge the legality of the ban. Indonesia's Mineral Entrepreneurs Association reportedly filed suit at the Constitutional Court regarding the legality of the new regulations on 16 January 2014. Others may enter the fray; in 2012, the Indonesian Nickel Association and the Association of Indonesian City and Regional Governments successfully challenged aspects of a predecessor regulation regarding domestic processing and refining.

For further information on the background of this recent development, the predecessor regulations and considerations relating to smelter project development in Indonesia, please see the Hogan Lovells' 2012 bulletin "Investment in Indonesia's mineral refining and processing sector: value-added regulations and industrial policy" (1 August 2012).

For more information on this subject, contact:

James Harris
Partner, Singapore
james.harris@hoganlovells.com
T +65 63022 552

Justin Patrick
Foreign Legal Advisor, Jakarta
justin.patrick@hoganlovells.com
T +62 21 2902 6441

Brazil Anti-Corruption Law Goes Into Effect

Brazil’s new anti-corruption law, Law No. 12,846/2013, went into effect on 29 January 2014. The law had been proposed by former President Luiz Inácio Lula da Silva in 2010, but has only recently become effective.

The law implements the Organization for Economic Co-operation and Development (OECD) Anti-Bribery Convention, and applies to Brazilian companies and companies doing business in Brazil. Like the Foreign Corrupt Practices Act in the United States and the Anti-Bribery Act in the United Kingdom, the Brazilian law has extra-territorial applicability.

If the company benefits from a corrupt act, it can face fines ranging from 0.1 percent to 20 percent of gross revenues. The fines are meant to reflect the financial advantage received by the company from its corrupt act. A company might also lose its opportunity to participate in governmental incentives or to take leases from the Brazilian government. The penalties might apply to affiliated companies, as well as joint venturers or members of a consortium.

A company can mitigate potential fines by showing that it had internal controls and policies designed to prevent improper activities, as well as through self-disclosure.

For more information on this subject, contact:

Scot Anderson
Partner, Denver
scot.anderson@hoganlovells.com
T +1 303 454 2452

Contacts

For questions, reach out to our Hogan Lovells Mining Industry Team:

Adrian Walker
Partner, London
adrian.walker@hoganlovells.com
T +44 20 7296 5566

Paul Hilton
Partner, Denver
paul.hilton@hoganlovells.com
T +1 303 454 2414

Scot Anderson
Partner, Denver
scot.anderson@hoganlovells.com
T +1 303 454 2452

Colin Graham
Of Counsel, London
colin.graham@hoganlovells.com
T +44 20 7296 2347

James Harris
Partner, Singapore
james.harris@hoganlovells.com
T +65 63022 552

Warren Beech
Partner, Johannesburg
warren.beech@hoganlovells.com
T +27 11 523 6076

Michael Aldrich
Partner, Ulaanbaatar
michael.aldrich@hoganlovells.com
T +976 7012 1020

Adam Hastings
Of Counsel, London
adam.hastings@hoganlovells.com
T +44 20 7296 5442

www.hoganlovells.com

Hogan Lovells has offices in:

Alicante
Amsterdam
Baltimore
Beijing
Brussels
Budapest*
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta*
Jeddah*
Johannesburg
London
Los Angeles
Luxembourg
Madrid
Miami
Milan
Moscow
Munich
New York
Northern Virginia
Paris
Philadelphia
Prague
Rio de Janeiro
Riyadh*
Rome
San Francisco
São Paulo
Shanghai
Silicon Valley
Singapore
Tokyo
Ulaanbaatar
Warsaw
Washington, DC
Zagreb*

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells US LLP and Hogan Lovells International LLP.

The word "partner" is used to refer to a member of Hogan Lovells International LLP or a partner of Hogan Lovells US LLP, or an employee, or consultant with equivalent standing and qualifications, and to a partner, member, employee or consultant in any of their affiliated businesses who has equivalent standing. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising.

For more information, see www.hoganlovells.com

© Hogan Lovells 2014. All rights reserved. P01332

* Associated offices