

## Six things you need to know about Mining Charter III

### Introduction

On 27 September 2018, the Minister of Mineral Resources (Minister) published the long-awaited Mining Charter III<sup>1</sup> for implementation. Therefore, Mining Charter III is now applicable to the minerals industry and has replaced/repealed both the Mining Charter II<sup>2</sup> and the ill-fated 2017 Mining Charter<sup>3</sup> which was never implemented. The publication of Mining Charter III is an important milestone in government's attempts to bring some certainty on the empowerment legal framework applicable to the minerals industry in South Africa.

Below, we highlight six key takeaways from the final Mining Charter III and their practical implications for the South African minerals industry. Before doing so, we briefly reflect on the market's attitude to the publication of Mining Charter III.

Mining Charter III has been welcomed by the industry. Most industry players have called for it to be supported and some have described it as 'a product they can live with, [even if] it doesn't make everybody happy' or as a 'give-and-take charter'. The Minerals Council South Africa says 'this new Charter is the product of substantial engagement between key stakeholders and is a compromise that reflects different difficult choices that have been made.'

There are however areas of uncertainty remaining following publication and it is understood that the Mining Charter will be supplemented with an implementation guide which will be published in November 2018.

### The six key takeaways

1. Existing mining rights and the black ownership requirements	
<b>Previous position:</b>	The Mining Charter II required that by 2014 mining companies should be 26% owned by black people. The controversial 2017 Mining Charter proposed a top-up to 30% within one year, while the first draft of Mining Charter III proposed a five-year transition to implement any top-up that may be required.
<b>What has changed?</b>	Subject to various exceptions (e.g. renewal, transfer and new mining rights), the minimum black ownership target of 26% is retained for the duration of an existing mining right.
<b>Practical application:</b>	No top-up requirements for operating mining companies who, at any stage during the existence of the mining right, achieved a minimum of 26% black shareholding but the black shareholders exited <u>prior</u> to 27 September 2018 (commencement of Mining Charter III).
2. Ownership requirement applicable to new mining rights and renewal of mining rights	
<b>Previous position:</b>	Mining Charter II did not distinguish between black ownership applicable to existing and new rights. It simply provided for 26% black ownership by 2014 and/or during the licensing stage. Mining Charter II also did not prescribe how the black ownership should be distributed.

<sup>1</sup> Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, published in Government Notice No 1002 in Government Gazette No. 41934 dated 27 September 2018 (**Mining Charter III**).

<sup>2</sup> Amendment of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining and Minerals Industry published in Government Notice no. 838 in Government Gazette 33573 of 20 September 2010 (**Mining Charter II**).

<sup>3</sup> Broad Based Socio-Economic Empowerment Charter for the Mining and Minerals Industry, 2018, published in Government Notice No 581 in Government Gazette No. 40923 dated 15 June 2017 (**2017 Mining Charter**).

	It however required that the black ownership should be split between passive and active shareholders.
<b>What has changed?</b>	Both the draft Mining Charter III and the final Mining Charter III require that a new mining right or renewed mining right has a minimum 30% black ownership and is prescriptive about the distribution of this black ownership. The draft Mining Charter III provided for a period of five years to establish the community or employee ownership structures. Mining Charter III does not have such a transitional provision.
<b>Practical application:</b>	A company wishing to apply for a new mining right or renew an existing mining right will have to be 30% black owned at the licensing stage and the relevant community and employee ownership structures must be established at that stage.
<b>3. The recognition and application of the “once empowered, always empowered principle”</b>	
<b>Previous position:</b>	Mining Charter II did not provide for the recognition of the black ownership after a black shareholder exited. This resulted in a High Court challenge where the court by a split decision found that “ <i>once the 26% black ownership has been achieved, neither the Original Mining Charter nor the 2010 Mining Charter required the holder of a mining right to continue to enter into further empowerment transactions to address losses of the black ownership.</i> ” The decision was appealed; the appeal remains pending.
<b>What has changed?</b>	Mining companies will now be able to place reliance on continuing consequences of empowerment transactions undertaken before September 2018.  Post-September 2018, the Mining Charter allows black shareholders to exit and realise value provided specified criteria regarding value and duration of holding are met.
<b>Practical application:</b>	A mining company that meets the criteria for recognition of continuing consequences will not have to conclude a new empowerment transaction to address loss of the black ownership, thereby avoiding dilution of the existing shareholders.  The recognition of continuing consequences does not apply to “transfer” of mining rights and renewal of the rights. For any mining company which has any of its mining rights coming up for renewal, it will have to ensure that at the time of applying for the renewal, 30% black ownership with community and employee structures is in place.
<b>4. The ‘carried interest’ principle</b>	
<b>Previous position</b>	The first draft of Mining Charter III required ‘free-carried interest’ of 5% each for workers and community groups, which meant the respective groups would not have to buy their shares or pay their way.
<b>What has changed?</b>	The language in the final Mining Charter III has now changed to ‘carried interest’. Mining Charter III goes on to say that the cost of this holding will be recovered by a right holder from profits arising from development of the asset. Mining Charter III further provides that the

	mining companies have an option to pay an 'equity-equivalent' benefit to communities instead of shareholding in the mining company.
<b>Practical application:</b>	This is one of the provisions of Mining Charter III that needs further clarity. The definition of "carried interest" requires that the shares are free and prohibits encumbrance of the shareholding. It is unclear how the costs of the shares could be recovered and whether mechanisms such as different share classes will possibly be allowed to cater for this.
<b>5. Payment of trickle dividends to black shareholders</b>	
<b>Previous position:</b>	As part of meaningful economic participation requirements, Mining Charter II required some cash to flow to the "BEE partners".  The draft Mining Charter III had a very clear trickle dividend requirement which was controversial as it exposed a company to a payment in a scenario where the company made no profit or made a loss. The draft Mining Charter III required holders of the new mining rights to pay a minimum 1% of EBITDA to qualifying employees and host communities. The 1% of EBITDA was to be payable in two instances: (i) from the sixth year of a mining right until dividends are declared, or (ii) at any point within a period of 12 months where dividends are not declared.
<b>What has changed?</b>	The final Mining Charter III does not specifically provide for the payment of trickle dividends. This is however retained in the definition of "meaningful economic participation", which provides that <i>"percentage of dividends declared, or other monetary distributions or trickle dividends paid to BEE shareholders, subject to the provisions of relevant legislation"</i> .
<b>Practical application:</b>	The payment of dividends follows normal corporate principles and requires that the company has a profit before any dividend can be paid. A trickle dividend is likely to be required which means that it is not possible for all dividend flows to go to servicing debt.
<b>6. Section 11 transfers and change of control</b>	
<b>Previous position:</b>	Both Mining Charter II and the first draft of Mining Charter III did not clearly deal with empowerment requirements that apply to an application for section 11 consent in terms of the MPRDA. Previously it was assumed that the 30% with community and employee shareholding would be a requirement for any new section 11 consent.
<b>What has changed?</b>	The final Mining Charter III remains unclear. It simply speaks of: <ul style="list-style-type: none"> <li>• "holder's empowerment" in an "existing mining right" and</li> <li>• The fact that there are no continuing consequences on "transfer".</li> </ul> <p>There is no mention of "change of control" or other section 11 issues.</p>
<b>Practical application:</b>	The assumption is that at the section 11 application stage, a mining company will have to comply with the 30% black ownership requirement that is applicable to the new mining rights. Indirect

	change of control transactions are likely to become more controversial.
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*Conclusion*

The publication of the final Mining Charter III is an important step towards achieving regulatory certainty in this key sector. Consistent application of its principles by the authorities, timely decision-making on applications and completion of other regulatory tasks will complete the journey towards bringing about regulatory certainty and improving the competitiveness of the industry.

For more information on the practical implications of the Mining Charter III, contact partners; [Charles Young](#), [Claire Tucker](#) or [Wandisile Mandlana](#).