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The National Treasury hereby releases the 4th and final draft of the Mineral and Petroleum Resources Royalty Bill, for comment. Public comments should be restricted to **technical comments** only as the policy framework has been finalised after extensive public consultation and deliberation by Parliament's Portfolio Committees on Finance and Minerals and Energy. The deadline for public comment is **Wednesday 11 June 2008**.

Comments must be sent to sharon.payne@treasury.gov.za and mmule.majola@treasury.gov.za.

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REPUBLIC OF SOUTH AFRICA

MINERAL AND PETROLEUM RESOURCES ROYALTY BILL

(As introduced in the National Assembly (proposed money Bill))
(The English text is the official text of the Bill)

(Minister of Finance)

[B ?—2008]

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BILL

To impose a royalty on the transfer of mineral resources and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Definitions

1. (1) In this Act, unless the context indicates otherwise—

“Administration Act” means the Mineral and Petroleum Resources Royalty (Administration) Act, 2008;

“earnings before interest and taxes” means earnings before interest and taxes as contemplated in section 4;

“extractor” means a person mentioned in section 2;

“gross sales” means gross sales as contemplated in section 6;

“Income Tax Act” means the Income Tax Act, 1962 (Act No. 58 of 1962);

“Mineral and Petroleum Resources Development Act” means the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002);

“mineral resource” means a mineral or petroleum as defined in section 1 of the Mineral and Petroleum Resources Development Act or any derivative thereof;

“person” includes an insolvent estate, the estate of a deceased person and a trust;

“refined mineral resource” means a mineral resource listed in Schedule 1, or a mineral resource listed in Schedule 1 and Schedule 2 that has been refined to or beyond a condition specified in Schedule 1 for that mineral resource;

“Republic” means the Republic of South Africa and, when used in a geographical sense, includes the territorial sea thereof as well as any area outside the territorial sea which has been or may be designated, under international law and the laws of South Africa, as areas within which South Africa

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may exercise sovereign rights or jurisdiction with regard to the exploration or exploitation of natural resources;

“royalty” means the royalty imposed by this Act;

“transfer” means—

- (a) the disposal of a mineral resource;
- (b) the export of a mineral resource; or
- (c) the theft, destruction or loss of a mineral resource,

excluding the transfer of a mineral resource that was previously disposed of, exported, stolen, destroyed or lost;

“unrefined mineral resource” means a mineral resource other than a refined mineral resource.

(2) Unless the context indicates otherwise, a word or expression to which a meaning has been assigned in the Administration Act bears that meaning for purposes of this Act.

Imposition of royalty

2. A person that wins or recovers a mineral resource from within the Republic must in respect of each year of assessment pay a royalty for the benefit of the National Revenue Fund in respect of the transfer of that mineral resource by that person.

Determination of royalty

3. (1) The royalty mentioned in section 2 in respect of the transfer of a refined mineral resource is determined by multiplying the gross sales of the extractor in respect of that mineral resource during the year of assessment by the percentage determined in accordance with the formula in section (4)(1).

(2) The royalty mentioned in section 2 in respect of the transfer of an unrefined mineral resource is determined by multiplying the gross sales of the

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extractor in respect of that mineral resource during the year of assessment by the percentage determined in accordance with the formula in section (4)(2).

Royalty formulae

4. (1) The percentage mentioned in section 3(1) is—

$0.5 + [\text{earnings before interest and taxes}/(\text{gross sales in respect of refined mineral resources} \times 12.5)] \times 100.$

(2) The percentage mentioned in section 3(2) is—

$0.5 + [\text{earnings before interest and taxes}/(\text{gross sales in respect of unrefined mineral resources} \times 9)] \times 100.$

(3) (a) The percentage determined in terms of subsection (1) must not exceed 5 per cent.

(b) The percentage determined in terms of subsection (2) must not exceed 7 per cent.

Earnings before interest and taxes

5. (1) For purposes of the formula in section 4(1), “earnings before interest and taxes” in respect of a year of assessment means the aggregate of—

- (a) the gross sales of the extractor during that year in respect of refined mineral resources; and
- (b) so much of the amount allowed to be deducted from income in terms of the Income Tax Act (whether in that year or a previous year of assessment) in respect of assets used or expenditure incurred directly to win, recover or develop a refined mineral resource, as is included in

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the income of the extractor during that year of assessment in terms of section 8(4) of that Act (disregarding the exception in respect of section 15(a) of that Act),

less any amount which in terms of that Act is allowed to be deducted from the income of the extractor during that year of assessment in respect of assets used or expenditure incurred directly to win, recover or develop a refined mineral resource to the condition specified in Schedule 1 for that mineral resource.

(2) For purposes of the formula in section 4(2), “earnings before interest and taxes” in respect of a year of assessment means the aggregate of—

- (a) the gross sales of the extractor during that year in respect of unrefined mineral resources; and
- (b) so much of the amount allowed to be deducted from income in terms of the Income Tax Act (whether in that year or a previous year of assessment) in respect of assets used or expenditure incurred directly to win, recover or develop an unrefined mineral resource, as is included in the income of the extractor during that year of assessment in terms of section 8(4) of that Act (disregarding the exception in respect of section 15(a) of that Act),

less any amount which in terms of that Act is allowed to be deducted from the income of the extractor during that year in respect of assets used or expenditure incurred directly to win, recover or develop an unrefined mineral resource to the condition specified in Schedule 2 for that mineral resource.

(3) For purposes of subsections (1) and (2), “earnings before interest and taxes” is determined without regard to—

- (a) any deduction mentioned in this section in respect of a financial instrument as defined in section 1 of the Income Tax Act (other than an instrument that is an option contract, forward contract or other instrument the value of which is derived directly or indirectly with reference to a mineral resource);
- (b) any deduction allowed in terms of section 11(a) of the Income Tax Act in respect of the royalty;

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- (c) (i) in the case of a mineral resource refined to the condition specified in Schedule 1 for that mineral resource, any deduction mentioned in this section for expenditure incurred in respect of transport, insurance and handling of a refined mineral resource after that mineral resource has been refined to that condition; or
- (ii) in the case of a mineral resource refined to the condition specified in Schedule 2 for that mineral resource, any deduction mentioned in this section for expenditure incurred in respect of transport, insurance and handling of an unrefined mineral resource after that mineral resource has been refined to that condition;
- (d) any balance of assessed loss mentioned in section 20(1)(a) of the Income Tax Act;
- (e) any determination in respect of an impermissible tax avoidance arrangement contemplated in Part IIA of the Income Tax Act;
- (f) any deductions contemplated in paragraph 5 of the Tenth Schedule to the Income Tax Act.

(4) For purposes of this section, if “earnings before interest and taxes” is a negative amount that amount is deemed to be nil.

Gross sales

6. (1) Gross sales in respect of a refined mineral resource transferred—

- (a) as mentioned in paragraph (a) of the definition of “transfer” in section 1 in the condition specified for that mineral resource in Schedule 1 is the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource;
- (b) as mentioned in paragraph (a) of the definition of “transfer” in section 1 in a condition other than that specified for that mineral resource in Schedule 1 is the amount that would have been received or accrued during the year of assessment in respect of the transfer of that mineral resource had that

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- mineral resource been transferred in the condition specified in Schedule 1 for that mineral resource in terms of a transaction entered into at arm's length; and
- (c) as mentioned in paragraph (b) or (c) of the definition of "transfer" in section 1 the amount that would have been received or accrued during the year of assessment in respect of the transfer of that mineral resource if that mineral resource had been transferred in the condition specified in Schedule 1 for that mineral resource in terms of a transaction entered into at arm's length.
- (2) Gross sales in respect of an unrefined mineral resource transferred—
- (a) as mentioned in paragraph (a) of the definition of "transfer" in section 1 in the condition specified in Schedule 2 for that mineral resource is the amount received or accrued during the year of assessment in respect of the transfer of that mineral resource;
 - (b) as mentioned in paragraph (a) of the definition of "transfer" in section 1 in a condition other than that specified for that mineral resource in Schedule 2 is the amount that would have been received or accrued during the year of assessment in respect of the transfer of that mineral resource if that mineral resource had been transferred in the condition specified in Schedule 2 for that mineral resource in terms of a transaction entered into at arm's length; and
 - (c) as mentioned in paragraph (b) or (c) of the definition of "transfer" in section 1 the amount that would have been received or accrued during the year of assessment in respect of the transfer of that mineral resource if that mineral resource had been transferred in the condition specified in Schedule 2 for that mineral resource in terms of a transaction entered into at arm's length.
- (3) (a) For purposes of subsection (1), gross sales is determined without regard to any amount received or accrued in respect of transport, insurance and

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handling of a refined mineral resource after that mineral resource was refined to the condition specified in Schedule 1 for that mineral resource.

(b) For purposes of subsection (2), gross sales is determined without regard to any amount received or accrued for the transport, insurance and handling of an unrefined mineral resource if that transport, insurance and handling was effected after the date on which that mineral resource was refined to the condition specified in Schedule 2 for that mineral resource.

Small business exemption

7. (1) An extractor is exempt from the royalty in respect of a year of assessment if—

- (a) the extractor does not have gross sales in respect of all mineral resources transferred that exceed R10 million during that year;
- (b) the royalty in respect of all mineral resources transferred that would be imposed on the extractor for that year does not exceed R100 000;
- (c) the extractor is a resident as defined in section 1 of the Income Tax Act throughout that year; and
- (d) the extractor is registered for that year pursuant to Part 2 of the Administration Act.

(2) An extractor is not exempt from the royalty as mentioned in subsection (1) if—

- (a) the extractor at any time during that year holds the right to participate (directly or indirectly) in more than 50 per cent of the share capital, share premium, current or accumulated profits or reserves, or is entitled to exercise more than 50 per cent of the voting rights, in any other extractor;
- (b) any other extractor at any time during that year holds the right to participate (directly or indirectly) in more than 50 per cent of the current or accumulated profits of the extractor;

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- (c) any other person at any time during that year holds the right to participate (directly or indirectly) in more than 50 per cent of the profits of the extractor and more than 50 per cent of the current or accumulated profits of any other extractor; or
- (d) the extractor is a registered person contemplated in section 4 of the Administration Act.

Exemption for sampling

8. An extractor is exempt from the royalty imposed in respect of mineral resources won or recovered by the extractor for sampling purposes pursuant to a prospecting right as defined in section 1 of the Mineral and Petroleum Resources Development Act if the gross sales in respect of those mineral resources do not exceed R100 000 during a year of assessment.

Rollover relief for disposals involving going concerns

9. (1) For purposes of this Act a disposal of a mineral resource by an extractor is deemed not to be a disposal if the disposal forms part of the disposal of a going concern by that extractor to any other extractor.

(2) For purposes of this Act the extractor that acquires a mineral resource in terms of a disposal contemplated in subsection (1) is deemed to be one and the same person as the extractor that disposed of the mineral resource.

Transfer involving body of unincorporated persons

10. (1) A registered person contemplated in section 4 of the Administration Act is a registered person in respect of—

- (a) all the mineral resource rights registered under its name granted pursuant to the Minerals and Petroleum Resources Development Act;

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- (b) the—
 - (i) winning or recovery of all mineral resources; and
 - (ii) transfer of all mineral resources transferred on and after the date on which that person's registration takes effect as contemplated in section 4(2) of the Administration Act,
arising from the mineral resource rights contemplated in paragraph (a);
- (c) the "earnings before interest and taxes" contemplated in section 4 arising from the mineral resource rights contemplated in paragraph (a); and
- (d) the royalty contemplated in section 2 arising from the mineral resource rights contemplated in paragraph (a).

(2) For purposes of this section, if a member of the registered person contemplated in subsection (1) is an extractor and that extractor—

- (a) disposes of a mineral resource to that registered person; or
- (b) exports a mineral resource without disposing of the mineral resource to the registered person,

the extractor is deemed to have transferred that mineral resource.

(3) Election date triggers deemed transfer on disposal of mineral resource by a member (under their respective mineral resource rights) of the body of unincorporated persons that is an extractor before the body of unincorporated persons became a registered person.

(4) Dissolution date (member withdraws from unincorporated body as registered person) also triggers deemed transfer of mineral resources from registered body to member.

Arm's length transactions

11. (1) To the extent that the earnings before interest and taxes determined in terms of section 5 differ from the earnings that an extractor would have taken into account if those earnings had derived from transactions entered into at arm's

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length, the Commissioner may adjust the earnings to reflect the earnings that should have been taken into account.

(2) To the extent that the gross sales determined in terms of section 6(1)(a) or section 6(2)(a) differ from the gross sales that an extractor would have taken into account if the gross sales had been derived from transactions entered into at arm's length, the Commissioner may adjust the gross sales to reflect the gross sales that should have been taken into account.

General anti-avoidance rule

12. (1) Notwithstanding anything to the contrary in this Act, if the Commissioner is satisfied that a disposal, transfer, operation, scheme or understanding (whether entered into or carried out before or after the commencement of this Act)—

- (a) has been entered into or carried out, which has the effect of avoiding or postponing liability for the royalty, or of reducing the amount thereof;
- (b) having regard to the circumstances under which the disposal, transfer, operation, scheme or understanding was entered into or carried out—
 - (i) was entered into or carried out—
 - (aa) in the case of a disposal, transfer, operation, scheme or understanding in the context of business, in a manner which would not normally be employed for *bona fide* business purposes, other than the obtaining of a royalty benefit; and
 - (bb) in the case of any other disposal, transfer, operation, scheme or understanding not falling within the provisions of item (aa), by means or in a manner which would not normally be employed in the entering into or carrying out of a disposal, transfer, operation, scheme or understanding of the nature of the disposal, transfer, operation, scheme or understanding in question; or

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- (ii) has created rights or obligations which would not normally be created between persons dealing at arm's length under a disposal, transfer, operation, scheme or understanding of the nature of the disposal, transfer, operation, scheme or understanding in question; and
- (c) was entered into or carried out solely or mainly for the purposes of obtaining a royalty benefit,

the Commissioner must determine the liability for the royalty, and the amount thereof, as if the disposal, transfer, operation, scheme, or understanding had not been entered into or carried out, or in such manner that the Commissioner in the circumstances deems appropriate for the prevention or diminution of avoidance, postponement or reduction.

(2) A decision of the Commissioner under subsection (1) is subject to objection and appeal as contemplated in section 16(1)(d) of the Administration Act, and whenever in proceedings relating thereto it is proved that the disposal, transfer, operation, scheme or understanding in question would result in the avoidance or postponement of the liability for the royalty, or in the reduction of the amount thereof, it is presumed, until the contrary is proved, in the case of any such disposal, transfer, operation, scheme or understanding, that it was entered into or carried out solely or mainly for the purposes of the avoidance or the postponement of such liability, or the reduction of the amount of such liability.

(3) For the purposes of this section, “**royalty benefit**” includes any avoidance, postponement or reduction of the liability for payment of the royalty contemplated in section 2.

Conclusion of fiscal stability agreements

13. (1) The Minister of Finance may conclude a binding agreement with an extractor—

- (a) in respect of the extractor's mineral resource right; or
- (b) in anticipation of the extractor acquiring a mineral resource right,

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that guarantees that the terms and conditions contemplated in section 14 apply in respect of the right for as long as the extractor holds the right (and for all participating interests subsequently held by the extractor in respect of the right).

(2) A binding agreement relating to the anticipated acquisition of a mineral resource right contemplated in subsection (1)(b) has no force and effect unless the mineral resource right is granted within one year after the date on which the Minister of Finance concludes the binding agreement.

(3) If an extractor disposes of a prospecting right or an exploration right granted under the Mineral and Petroleum Resources Development Act to another person, and the right is subject to a binding agreement contemplated in subsection (1) on the date of the disposal, the extractor may assign all the rights held by the extractor under the agreement to the other person.

(4) If an extractor disposes of a mining right or a production right granted under the Mineral and Petroleum Resources Development Act to another person, and the right is subject to a binding agreement contemplated in subsection (1) on the date of the disposal, the extractor may assign all the rights held by the extractor under the agreement to the other person, if both the extractor and the other person form part of the same group of companies (as defined in section 1 of the Income Tax Act) on the date of the disposal.

(5) An extractor that concludes a binding agreement contemplated in subsection (1) may unilaterally terminate the agreement at any time with effect from the day after the last day of the year of assessment during which the extractor terminated the agreement.

(6) For purposes of this section—

- (a) a prospecting right, a renewal of the prospecting right and an initial mining right converted from a prospecting right or renewal thereof held by an extractor are all deemed to be one and the same mineral resource right in the hands of the extractor; and
- (b) an exploration right, a renewal of the exploration right and an initial production right converted from an exploration right or renewal thereof held

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by an extractor are all deemed to be one and the same mineral resource right in the hands of the extractor,
to the extent that those rights relate to the same geographical area.

(7) The powers conferred and the duties imposed upon the Minister of Finance by the provisions of this section may be exercised or performed by the Minister personally or delegated by the Minister to the Director-General of the National Treasury and the Director-General may in turn delegate the powers and duties so delegated to him or her to any officer or person under his or her control, direction or supervision.

(8) For purposes of this section “**mineral resource right**” means a prospecting right, exploration right, mining right or production right granted pursuant to the Mineral and Petroleum Resources Development Act.

Terms and conditions of fiscal stability agreements

14. (1) An amendment of section 4 has no force and effect in respect of an extractor that is party to an agreement contemplated in section 13(1) if the amendment has the effect that the extractor becomes subject to a royalty which is greater than the royalty to which the extractor would otherwise have been subject.

(2) If the State fails to comply with the terms of an agreement contemplated in section 13(1) and the failure has a material adverse economic impact on the determination of the royalty payable by the extractor that is party to that agreement, the extractor is entitled to compensation in respect of the increase in the royalty caused by the failure (and interest at the prescribed rate calculated on the compensation from the date of the failure) or to an alternative remedy that eliminates the full impact of the failure.

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Composite mineral resources

15. A mineral resource that constitutes less than 5 per cent of the value of a composite of mineral resources is deemed for purposes of this Act to form part of the mineral resource that constitutes the majority of the value of the composite mineral resource.

Act binding on State and application of other laws

16. This Act binds the State, and no provision in any other law is construed as applying or referring to this royalty unless the royalty is specifically mentioned in that provision.

Short title and commencement

17. (1) This Act is called the Mineral and Petroleum Resources Royalty Act, 2008.

(2) This Act comes into operation on 1 May 2009 and applies in respect of a mineral resource transferred on or after that date.