

**LEGAL OVERVIEW**



**DISTRIBUTION**

**OF MINING EQUITY**

**TO COMMUNITY TRUST**



# INTRODUCTION



- An opening exists for the **Minister of Mineral Resources and Energy** to publish further detailed guidelines on host community trusts in the mining sector. This policy brief details the legislative overview of community trusts and highlights mechanisms available to ensure that the benefits of mining, in particular equity, reach the communities most affected and in most need of such benefits.
- Corruption Watch (CW) submits that consideration should be given to the setting out, **in one place**, of all appropriate stipulations in regard to trusts (or equivalent legal vehicles) that are recipients of equity and/or compensation, so that communities that need information on the law relating to mining host community trusts are empowered to access it easily.
- Further, instead of mining rights holders reporting annually to the Department of Mineral Resources and Energy (DMRE) on community trusts as required in the Mining Charter's Implementation Guidelines, the trustees should have that obligation. This provides a layer of **oversight** of trustees.
- Funds must be allocated to **educate** communities on these trusts.
- It should be a requirement that trust deeds contain **dispute resolution mechanisms** to deal with disputes arising over the distribution of equity, or other key issues.
- This brief makes proposals focused on improvement of the current legislative framework in order for communities most affected are in a position to leverage **legally enforceable mechanisms** and thereby enjoy improved access to equity.

## Mining Charter (2018)

- Section 100(2)(a) of the Minerals and Petroleum Resources Act (**MPRDA**) empowers the minister to develop the B-BBEE Charter for the mining and minerals industry and the 2018 Mining Charter is the mining industry's B-BBEE Code.
- The Mining Charter recognises that the majority of mining communities continue to live in abject poverty. In the preamble, the charter acknowledges that due to inefficient administration, trusts holding the interest of mine communities constrained the flow of benefits to their intended beneficiaries.
- The aim of the charter is to transform the mining sector to enable meaningful participation of black persons and ensure the Mining Charter is harmonised with the **B-BBEE Act** and **DTI Codes**.
- To this end the Mining Charter requires right holders to be structured with a minimum **30% BEE shareholding**.

## The Share That Goes to Mining Host Communities

- The 30% must be distributed so that a minimum of 5% non-transferable carried interest (carried interest means shares issued to host communities at no cost to them and free from any encumbrance; and the cost of the carried interest is recovered by a right holder from development of the asset) or a minimum 5% equity equivalent benefit (this refers to a percentage equivalent to the issued share capital of the mining right holder at no cost to a **trust or similar vehicle**, set up for the benefit of the host community) is distributed to host communities.

## Trusts or Similar Vehicles

- The Mining Charter refers to trusts or similar vehicles as potential recipients of the equity benefits that host communities **must** receive as a consequence of mining.
- Benefits can therefore flow via companies or trusts, and it is possible to use other legal vehicles available in our law, if desired.

## Table (C) of Implementation Guidelines

Table (C) must be completed by **mining right holders**. The table requires information on:

- Type of benefit: Shares of equity.
- Value in Rands (5%).
- Dividends declared.
- Dividend paid to host community trust or equivalent vehicle.
- Benefiting host community/ies.
- Duration of project (start and end date).
- Work done to date against planned projects.
- Total budget amount for year.
- Total amount spent for year.
- Capped project management and consultancy fee.

- For the purpose of this policy brief, the focus is on **community trusts**, although all recommendations made can apply to other legal vehicles.

## Stipulations on Trusts in Mining Charter

- Trusts (or similar vehicles) must be established for the duration of the **mining right**.
- Trusts must comprise representatives of **affected communities**, (including community-based organisations), **traditional authorities** and **mining companies**.
- Community development needs must be identified. An approved host development programme must be published in at least **two languages** commonly used within the host community.
- An approved host community development programme **does not replace the social and labour plan (SLP)**.
- The trust (or similar vehicle) is then responsible for the host **community development programme**, fund distribution and **the governance** of the equity equivalent benefit.
- Administrative costs, project management and consultation fees of the trust (or similar vehicle) may not exceed 8% of the total budget.

## Mining Charter Implementation Guidelines on Host Community Equity (Dec 2018)

**Mining rights holders** must submit the following documents to the DMRE annually:

- Copy of host community trust deed or other appropriate vehicle founding document.
- Host community development programme.
- Implementation and progress report.
- Consultation report with host community/ies and related parties.

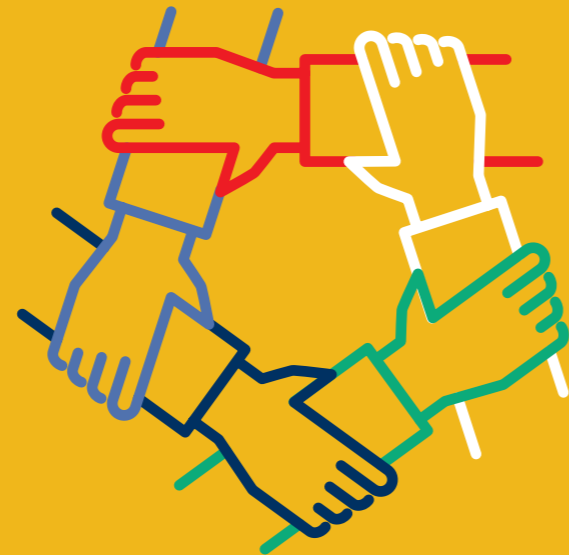
# DTI STIPULATIONS ON COMMUNITY TRUSTS

Prescribed stipulations regarding trusts related to B-BBEE compliance are set out in General Notice 1019, of 11 October 2013 issued by the **Department of Trade and Industry (DTI Notice)**. The notice is titled “**Broad-Based Black Economic Empowerment Act: Issue of Codes of Good Practice**”.

The Mining Charter stipulations and guidelines on trusts apply to the mining industry, but the **good practice code** in the DTI Notice on trusts are **informative** and **complement** the Mining Charter provisions on trusts.

## DTI Notice Provisions on Trusts

- A trust deed must **define** the beneficiaries and the proportion of their entitlement to receive distributions.
- A **written record** of the names of the beneficiaries or the use of a defined class of natural persons satisfies the requirement for identification.
- A written record of fixed percentages of entitlement or the use of a formula for calculating entitlement satisfies the need for defining proportion of **benefit**.
- On winding up or **termination of the trust**, the accumulated economic interest must be transferred to the beneficiaries or an entity representing the interest of the participants or class of beneficiaries.



# BROAD-BASED OWNERSHIP SCHEMES AND TRUSTS



The rules for Broad-Based Ownership Schemes contained in the DTI Notice apply to trusts **if** the Broad-Based Ownership Schemes are structured as trusts.

These rules, which also **complement** the Mining Charter stipulations on trusts, state that:

- Management fees must not exceed 15%.
- The constitution (i.e. trust deed) must record the rules governing any portion of economic interest received and reserved for future distribution or application.
- The constitution must define participants and the proportion of their claim to receive distributions.
- A written record of the name of participants or the use of a defined class of natural persons satisfies the requirements of identification.
- A written record of fixed percentages of claim or the use of a formula for calculating claims satisfies the need to define proportion of benefit.
- The fiduciaries (i.e. the trustees) have no discretion in regard to the above terms.

## Further Stipulations for Broad-Based Ownership Schemes

- At least 85% of the value of the benefits allocated must accrue to black people.
- At least 50% of the fiduciaries (trustees) must be independent persons with no employment with or direct or indirect beneficial interest in the scheme.
- At least 50% of the fiduciaries must be black people and at least 25% of these must be women.
- The constitution or other statutory documents must be available on request to any participant in a language with which they are familiar.
- Operational capacity must be evidenced by suitably qualified and experienced staff, advisors, operating premises, and other requirements to run a business.

## THE TRUST PROPERTY

## CONTROL ACT OF 1988

## OFFERS BROAD PROTECTION

- Trust deeds must be in writing and lodged with the **Master of the High Court**.
- **Amendments** must be submitted to the Master's office.
- **Letters of Authority** must be issued by the Master to trustees before they may act in that capacity.
- Trustees must perform duties with **care, diligence** and **skill**.
- Money received must be kept in the **trust account** and trust assets or property must be **distinguishable**.
- A trustee can apply to court if the trust deed has provisions that hamper the achievement of the objects, prejudices beneficiaries, or is in conflict with **public interest**. The court can alter or terminate a trust.
- **Irregularities** in administration can be reported to the Master who can request trustees to account, and who can carry out an investigation. The Master can direct trustees to comply.
- The Master or interested party can apply to a court to direct trustees to comply, should they fail.
- Trustees can be **removed** from office on application to a court by the Master or interested person.

# MINING SECTOR

## COMMUNITY TRUSTS

### – WHAT FURTHER IS NEEDED?

- Does adherence to the provisions on trusts in the Mining Charter, the Implementation Guidelines, the DTI Notice and the Trust Property Control Act protect mining communities sufficiently?

## BENEFICIARIES

The clear **definition of beneficiaries** of a community trust is a prerequisite. Too broad a definition of beneficiaries has been a problem in the past, and the concept “host community” is not clear enough.

- For example: Sedibelo Community Development Trust states that the Bakgatla and Bakgatla ba Kgafela (two huge traditional communities) are the beneficiaries.
- LARC’s submission on the Mining Charter argued that households and groups directly impacted by mining should be the beneficiaries.
- The beneficiaries should be named, or where possible a defined class of natural persons should be referred to. For example, people living in clearly defined areas where mining operations will be taking place, or who will be affected by mining operations.
- The trust deed must set out clear criteria as to who beneficiaries are so that its performance can be objectively measured. **Who qualifies, and who does not, needs to be clear.**



# CLEAR DEFINITION OF ENTITLEMENT

- The **DTI Notice** requires a written record of fixed percentages of entitlement or the use of a formula for calculating entitlement.
- In mining community trusts **this should include the stipulation that of the 30% BEE shareholding, a minimum of 5% non-transferable carried interest or a minimum 5% equity equivalent benefit must be distributed to host communities.**
- Any payments that are to be made must be **identified** as far as possible.
- The trust deed must stipulate that trustees **do not have any discretion** in regard to entitlement, and that it cannot be amended.

## CLEARLY STATED OBJECTS

- As the **directly affected households** and **people** in **clearly defined geographical areas near the mine**, the community that has the **right to benefit** from the equity from the mine must decide on the objects of the trust.
- For this reason, **prior to a trust being set up**, a process needs to be embarked on with this community, to establish what it would like the trust objects to be. These should be broad enough not to require repeated amendment, but specific enough to satisfy particular needs of the community.

## TRUSTEES

- The DTI Notice stipulates that 50% of trustees must be **independent**.
- The Mining Charter requires representation of traditional authorities. This must be carefully managed and with consideration of community context. A suggestion is that a trustee should only be drawn from a traditional authority when there has been **no conflict** between the traditional authority and affected community.
- It might be preferable in the mining context that 50% of trustees are drawn from the **community** and that a proportion of the remaining trustees are independent, some from the founder (the **rights holder**) and possibly one from the **traditional authority**.
- The number of trustees should not be more than **13**, but seven is considered to be enough.
- The trust deed needs to stipulate that community trustees must be appointed in a manner that ensures they are **true representatives**, and could spell out a process.
- Community trustees should only serve for **two years**.

# MANAGEMENT OF TRUSTS

- The DTI Notice requires that trusts have **operational capacity**.
- This capacity must be in the form of **skilled staff** and/or part-time advisors if the trust is small.
- If the trust does not have major assets, an office and premises may not be **practical**.
- But **separation of the role of trustee from role of staff is key** to good governance and the trust deed should provide for this.

# TRANSPARENCY AND INFORMATION

- The DTI Notice requires that in regard to a Broad-Based Ownership Scheme, the statutory document must be **available** on request to any participant in the **language** with which they are familiar.
- The **financial reports** of the scheme must be presented **annually** at an AGM to the participants.
- These could be supplemented by further requirements to ensure that beneficiaries are fully apprised at all times of the affairs of the trust, particularly the financial situation.

# OTHER ELEMENTS TO INCLUDE

# IN THE TRUST DEED

- Provisions stating that proper books of account should be kept and that there be **independent auditors** that report annually.
- Provision regarding remuneration of trustees. It is **good practice to not remunerate trustees**, but to pay a set stipend to cover their costs.
- A requirement that the trustees prepare the host community development programme within a **set time frame** and that it has time frames for implementation.
- The trust powers should include the **power to invest and broaden the trust's financial interests**.



# DISTRIBUTION AND EXPENDITURE

- The trust should **distribute a minimum value every year**.
- The trust deed should **attempt to define the minimum contributions** that beneficiaries must receive annually.
- The trust deed should be **very clear** as to what projects will qualify for benefits.
- The trust deed must enable the trust to **diversify income streams so as not to be restricted only to mining equity**.



# CONCLUSION

- Community trusts must be designed to benefit those most affected by mining operations. The law requires much improvement anchored on **transparency** and **accountability** aims in order to guarantee effectiveness of community trusts.
- Bodies such as the Master of the High Court, Special Investigating Unit, and Auditor-General are **key public bodies** that must begin to prioritise oversight over community trusts concluded by mining communities.
- The complexity and **extent of corruption** in this space is continuous and vast. Community trusts are being used as tools to aid corrupt conduct, to the detriment of local communities. **Advocacy for an ombud** in this area of the sector must seriously be considered in order to ensure accountability and have a reporting institution which is independent.

