The One Environmental System: Did we get it right?

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ABSTRACT

The report discusses the recently enforced mining environmental management system the One Environment System, which was introduced to deal with issues such as duplication of environmental impact assessment processes, cross-departmental turf wars, and general inefficiencies of the permitting system in South Africa. It delves into the mechanics of the current regime, highlighting the unconstitutionality of provisions in the enabling legislation, considering the different spheres of government principle, the Bill of Rights and constitutionally enshrined principles of governance. The report discusses a similar environmental management system used in Australia and how South Africa can improve on the One Environment System to combat its inefficiencies.

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1 Introduction

Throughout history, humans have witnessed the development of their societies and economies, from basic hunting and gathering for survival, to the rise of mechanisation and specialisation which have led to growth of the world economy. A product of specialisation was the development of iron tools and weapons, forged from metals that were sourced from the rocks that make up our very earth. Mines such as the Ngwenya Mine or 'Lion Cavern' in Swaziland, which is at least 43,000 years old, is evidence that mining has always been a part of human society.[1]

The late 18th and 19th centuries saw the rise and peak of the industrial revolution, and with it a spike in the demand for basic metals such as iron and copper, necessary for production. The increased demand led to the annexation of African land to create a stable source of resources. A result of this push was the discovery of the South African goldfields in 1886, which has since then been the backbone of the local economy and a leading source of environmental degradation.[2]

Mining activities are invasive, destructive and polluting.[3] Various mining practices such as mineral extraction, transportation and disposal of tailings, cause several impacts which include soil erosion and contamination of water sources.[4] The Romans for example, utilised Hydraulic mining,[5] which involves the use high pressured water to crack ore bearing rocks and to transport the resultant rubble for processing. It is a very destructive method that causes acid mine drainage.

Over time, technological developments have led to an increase in not only harmful mining practices, but also harm mitigating methods and policies such as environmental impact assessments (EIAs). EIAs are a decision-making tool introduced globally to assist in the field of environmental management.[6] It is a technique whereby all probable environmental impacts from a proposed project are evaluated considering all known knowledge and a decision to

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[1] UNESCO World Heritage Website <whc.unesco.org/en/tentativelists/5421/>.

[2] Mining and Minerals in South Africa <https://www.brandsouthafrica.com/investments-imigration/business/economy/mining-and-minerals-in-south-africa#.WDMgnNDF5DE>.

[3] 'ZERO HOUR: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga' Centre for Environmental rights (2016), 16.

[4] M Kidd 'Minerals' in E Morgera & K Kulovesi (eds) *Research Handbook on International and Natural Resources* (2016) 327, 328. Also see Effects of Mining on the Environmental and Human health <https://www.environment.co.za/mining-2/effects-of-mining-.html>.

[5] D Bird 'Pliny's Arrugia Water Power in Roman Gold-Mining' (2004) 15 *The Bulletin of the Peak District Mines Historical Society* 58.

[6] T-L Humby 'The black sheep comes home – incorporating mining into the Environmental Impact Assessment Regime under the National Environmental Management Act, 1998' (2009) 24 *SAPR/PL* 1, 1.

pursue the project is made based on the projected results.[7] International Law recognises its significance in aiding sustainable development.[8]

The paper discusses how the EIA has been adopted into South Africa and evaluates the extent to which the tool has been successfully implemented considering the effect of the Constitution of the Republic of South Africa, 1996. It looks at the environmental management approach that has been taken to manage the mining industry,[9] beginning the discussion of the system from the late 1980s up to date. The paper deliberates how parliament has moved from a complicit attitude towards control of the mining industry to its attempts at commanding better compliance by employing various management systems. It also discusses the effect of the National Environmental Management Act 107 of 1998 (NEMA), the overarching environmental legislation. Furthermore, the mining legislative framework from the early 1990s to date, shall be chronicled leading up to the promulgation and amendment of the Minerals and Petroleum Development Act 28 of 2002 (MPRDA), the primary legislative instrument for all mining activities industry.

The aforementioned legislative instruments are considered with attention to the effect of constitutional provisions of co-operative governance and legislative competency.[10] The two concepts play a crucial role in understanding matters such as fragmentation of the mining regulatory framework,[11] which has been regulated both horizontally and vertically by numerous spheres of government, ministerial departments,[12] and different legislative instruments.[13] The fragmented regulatory framework would eventually become confusing, repetitive and costly to maintain for government, the mining industry and ultimately the environment. It would also create a power struggle within the national government between the Department of Mineral Resources (DMR) and Department of Environmental Affairs (DEA) jostled for control. [14]

[7] P Birnie & A Boyle *International Law & the Environment* 2 ed (2002) 130.
[8] M Kidd (note 4 above) 334.
[9] T-L Humby 'One environmental system': aligning the laws on the environmental management of mining in South Africa' (2015) 33 *Journal of Energy & Natural Resources Law* 110, 111.
[10] C Bosman, L Kotzé et al 'The failure of the Constitution to ensure integrated environmental management from a co-operative governance perspective' (2004) 19 *SAPR/PL* 411, 411.
[11] Ibid.
[12] R Adler, M Claasen et al 'Water, Mining, and waste: an historical and economic perspective on conflict management in South Africa' (2007) 2 *The Economics of Peace and Security Journal* 33, 37.
[13] Such as NEMA, the MPRDA, Specific Environmental Management Acts (SEMA), and provincial and local government legislation and bylaws respectively.
[14] The legislative period traversed in this paper involved a series of cabinet reshuffles by the Zuma administration, and as a result several Cabinet Departments also had name changes. To avoid confusion, reference to DMR will include all other former names. This will apply to DEA and DWS as well.

The paper also features a discussion of how the issues mentioned were addressed by a political agreement between the Minister of Mineral Resources (Minister of Minerals) and the Minister of Environmental Affairs (Minister of Environment), which enabled parliament to adopt legislative amendments that would bring environmental management under the umbrella of an arrangement called the "The One Environment System" (OES) discussed later.[15] The paper proceeds to chronicle changes made to this regime to include authorisations required under the National Water Act 39 of 1998 (NWA), up until its coming into operation on 8 December 2014.[16]

The paper aims to ultimately highlight the problems that are faced by the OES, and make suggestions as to how they can be resolved after engaging in a comparative assessment of the OES against the One Stop Shop (OSS) system in Australia and the country's Constitutional and governance structures. The OSS balances policy and administrative issues of fragmentation, over-regulation and legislative overlap faced by the OES, without violating co-operative governance principles.

Australia is the chosen country for this analysis also because it has a similar constitutional and governance structure as post-Apartheid South Africa,[17] stratified into three distinct levels namely; the National,[18] Provincial and Local government.[19] Australia has six partially self-governing states and ten territories,[20] while South Africa has nine provinces.[21] Australia is also a favoured jurisdiction by South African courts, which look towards Australian legal jurisprudence to find solutions to domestic matters.[22] It is ideal to analyse how Australia has dealt with issues currently facing the OES, highlighted in this paper.

[15] See T-L Humby (note 9 above) 116.
[16] 'Implementation of the One Environment system in respect of mining activities' Portfolio Committee on Environmental Affairs Report (2017).
[17] F Venter *Constitutional Comparison: Japan, Germany, Canada & South Africa as Constitutional States* (2004) 244.
[18] In Australia, the Federal government is also called the Commonwealth government.
[19] I Currie and J De Waal *The New constitutional & Administrative Law* 1 vol (2001) 19.
[20] Part V of the Commonwealth of Australia Constitution Act. Only two Territories have a limited right of self-government, namely the Australian Capital Territory and the Northern Territory (NT).
[21] Chapter 6 of the Constitution, 1996.
[22] I Currie & J De Waal (note 19 above) 24.

2 Constitutional Framework

Parliamentary supremacy was the constitutional order of the pre-1994 era dating back all the way to the early 1900s.[23] Under this model of government, legislation could only be challenged based on the procedures followed in its promulgation.[24] This allowed the white-minority governments to systematically dehumanise and strip other citizens, primarily black people, of their human dignity by creating racially oppressive and discriminatory laws which curtailed their socio-economic development. In the background, it facilitated the development of laws that were tainted by economic and political considerations that left the environment vulnerable to unscrupulous business practices by mines.[25]

Post-Apartheid, Constitutional supremacy was introduced by the Interim Constitution,[26] and then became a part of the Constitution. This model of government introduced universal suffrage and human rights, which are the guiding principles for all in South Africa.[27] Under this model, not only can you challenge legislation based on its promulgation procedures, but also based on its substance in relation to the Bill of Rights contained in Chapter 2 of the Constitution.

Rights contained in the Bill of Rights are for everyone's enjoyment,[28] and they may not be violated by anyone.[29] However, enjoyment may be restricted, if the restriction can be vindicated in terms of s 33 of the Constitution.[30] The state is obligated to safeguard and adequately support these rights,[31] through promulgation of legislation like the NEMA which enhance and equip the environmental right in s 24 of the Constitution.

2.1 The Environmental Right

The Constitution grants everyone the right to an environment that is not harmful and to have it protected.[32] NEMA and the Specific Environmental Management Acts (SEMA) flesh

[23] I Currie & J De Waal (note 19 above) 47.
[24] Ibid.
[25] See T-L Humby (note 9 above) 112, where she discusses the language and attitude of the courts and legislature in the 60s.
[26] Constitution of the Republic of South Africa, Act 200 of 1993 (Interim Constitution). The Interim Constitution has been repealed.
[27] Section 7 of the Constitution.
[28] ibid.
[29] Section 8 of the Constitution. This includes both private and government actors.
[30] Section 36 of the Constitution, the limitation clause.
[31] Section 7 (2) of the Constitution.
[32] Section 24 of the Constitution.

out this right, and the latter's status in the regime is confirmed by their preambles, which contain similar wording to the section 24 right.

The environment right cannot be applied to a legal matter directly, because of the operation of the principle of subsidiarity, which states that one must look to empowering legislation first before invoking constitutional rights, this is according to the Constitutional Court in *Minister of Health v New Clicks South Africa (Pty) Ltd.*[33] Therefore, one must rely on NEMA and/or a SEMA first, and if inadequate then you may apply the right directly to an action. It is important to address this principle with regards to the OES, before engaging in other matters.

The OES, NEMA and the Environmental Impact Assessment (EIAs) regulations,[34] have significantly reduced the timeframe for EIA considerations to just 300-days from the long and uncertain timeframes experienced under the previous regime. This new timeframe is arguably too short to allow quality outcomes.[35] Since the legislation itself creates the deficiency, this may be grounds to disregard subsidiarity and challenge a decision and the OES against the right itself. This challenge should be dismissed, because when properly implemented, the policy yields the desired results and it is in line with international practices.[36]

Sustainable development is a concept developed from the s 24 right, the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*, held it to mean conservation that does not block development, even when there is detriment to the environment, so long as it is done to achieve socio-economic development in line with s 24 *(*b)*(iii)* of the Constitution.[37] Civil society frequently employs the concept of conservation to challenge developments, stating that it is detrimental to the environment, this is countered by the sustainable development concept.[38] To balance these concepts, decisionmakers turn to EIAs when looking at development projects.

[33] *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) para 96.
[34] Regulations GNR982 published in *Government Gazette* 38282 of 4 December (2014 EIA Regulations).
[35] T-L Humby (note 9 above) 128. Also see Centre for Environmental Rights' written comments on the draft EIA regulations <http://cer.org.za/news/time-is-of-the-essence-proposed-new-rules-slash-timeframes-for-eia>.
[36] Australian timelines range from 120-300 days depending on complexity.
[37] *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and others* 2007 (6) SA 4 (CC) 41 paras 44-45.
[38] T-L Humby (note 9 above) 128.

2.2 Principles of Co-operative Government.

Chapter 3 of the Constitution lays out the guiding principles of co-operative governance,[39] whose objective is to create a unified and transparent government.[40] They are there to assist the spheres of government to effectively administer the country with minimal conflict among them.[41] The chapter guides how government can provision rational, transparent and efficient leadership to the benefit of all the people of South Africa.[42] They also encourage horizontal and vertical state partnership, whilst facilitating dispute resolution. This section highlights how the OES inherently violates these principles and in effect the Constitution in its attempt to align the permitting process.

The OES itself is a result of the drastic implementation of these principles in reaction to the rampant lack of co-operation between DMR and DEA.[43] It is drastic because the legislature could have opted for less drastic measures such as restructuring of the institutions to encourage quality engagement, communication, or the removal of legislated bureaucratic hurdles in legislation.[44] Generally, the regime is inadequate in the broader context of environmental management, because it is limited to mining only, while there is various legislation that has not been included in the OES which require mines need to obtain authorisations. Furthermore, the regime does not include other relevant government departments and industries, in violation of s 41 (1)*(e)* of the Constitution.

The OES harmonises relations within the top sphere of government, while ignoring the legislative competencies of the lower spheres. The OES principally infringes s 41 (1)*(g)* of the Constitution, by giving the DMR, a national sphere organ, exclusive competency to consider and issue permits in terms of environmental laws at the expense of the lower spheres, which would ordinarily substitute DEA. This is dealt with in a dedicated section later.

Section 41 (2) of the Constitution, requires legislation to promote intergovernmental relations. This is not achievable under the current design of the OES, which fails to include other key departments, which are indirectly relevant.[45] Furthermore, it also excludes provincial

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[39] Section 40 of the Constitution.
[40] I Govender 'Imperatives for Co-operative Governance: A case Study of Local Municipalities in KwaZulu-Natal, South Africa' (2016) 49 *Journal of Social Sciences* 123, 123.
[41] Ibid, 124.
[42] I Govender (note 40 above) 124.
[43] L Kotzé 'Environmental governance' in A Paterson, L Kotzé et al (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) 103, 125.
[44] Ibid, 118.
[45] DEA, DMR and DWS. The OES excludes the Department of Agriculture, Forestry and Fisheries for example.

and local municipal governmental structures from mining regulation.[46] Woolman views this as the National Assembly (NA) adopting an attitude that the National Council of Provinces (NCOP), limits its attempts to achieve national objectives, and must therefore be side-lined.[47] A result of such an attitude is the blatant violation of s 41 (1)*(h)* of the Constitution, which requires the spheres to operate in unison and in good faith.

To lay the blame squarely on the NA only is unfair because the lower spheres themselves have been known to be lax when it comes to parliamentary debates.[48] The laidback approach of the NCOP is undoubtedly the reason why OES amendments increased the national sphere's legislative footprint at the expense of the lower spheres. The NCOP is reduced to a passenger when the NA pursues national initiatives.[49]

The language of s 40 of the Constitution, indicates that the principles of co-operative governance must be adhered to. This is certainly not the case under the OES, which is designed to usurp and centre power at one level of government to the exclusion of others. When challenged on the constitutional grounds of co-operation, the regime is doomed to fail, producing a legislative gap and leaving the environment vulnerable.

2.3 Legislative Competencies

South Africa's government structure is what is termed a composite state,[50] which allows the provinces and municipalities to practice legislative autonomy to the extent restricted only by the Constitution.[51] These restrictions are found in Schedule 4 and 5 of the Constitution, the former is a list of areas where the provinces can exercise their autonomy in conjunction with the national legislature, while the latter lists areas left exclusively to provincial and municipal autonomy. All areas not mentioned in the schedules fall in to a group termed 'residual' competencies.[52]

With this understanding it is apparent that Mining is an exclusive area of the National government to legislate since it is not mentioned,[53] and the Environment is an area of

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[46] C Bosman, L Kotzé (note 10 above) 418.
[47] S Woolman & M Bishop (eds) (2004) *Constitutional Law of South Africa* (2nd ed) Juta, Chapter 14, 32.
[48] Ibid, 25.
[49] Ibid, 26.
[50] F Venter (note 17 above) 244. This type of government is a pseudo-Federal state.
[51] V Bronstein 'Legislative Competence' in S Woolman & M Bishop (note 47 above) chapter 15-1. See also I Currie & J De Waal (note 19 above) 19.
[52] Ibid chapter15-1 and 15-9.
[53] J de Visser 'Concurrent Powers in South Africa' in N Steytler (ed) *Concurrent Powers in Federal Systems* (2017) 222, 224.

concurrent legislation for both National and Provincial spheres, while the Local governments legislate over areas which also form part of both Mining and the Environment.[54]

Mining however, poses a classification problem depending on the perspective it is viewed. From an economic perspective it is acceptable to say mining is an exclusive National competency, however, from an environmental perspective it is an area of concurrency. The latter is further strengthened by the wording of the MPRDA's preamble which affirms its goal to protect the environment and section 2 (h) of the Act which make delivering on the Constitutional right to the environment an explicit object of the Act.[55]

Using the environmental interpretation, it follows that the Provinces should be capable of legislating and regulating environmental aspects of mining, but not Mining as an Economic activity.[56] This would respect the schedules and concurrency. This was the case under the old system where DEA exercised it policy and monitoring over the Provincial Executive Cabinet portfolios and departments responsible for the environment,[57] in line with the *dictum* in the *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* case.[58] Under the OES such relationships between the spheres do not exist because mining has never been a competency of the lower spheres, as it is interpreted from a n economic perspective. It therefore follows that under the OES only DMR (national) has power over the economic and environmental aspects of mining to the exclusion of all the other spheres. The implications of the OES will be further discussed herein, as they also apply to waste management. The water use management regime maintains its old regime setup.

Another facet of this infringement is demonstrated by how Environmental Management Inspectors (EMIs) are no longer mandated to monitor and enforce environmental legislation over mining areas. Their mandate has been transferred to Environmental Management Resource Inspectors (EMRIs), under the directive of the Minister of Minerals.[59] They have exclusive mandate over mining areas, and DEA and provincial EMI inspectors cannot execute

[54] Ibid 225-226
[55] Schedule 4 Part A of the Constitution.
[56] Essentially the mining should be split in to two branches.
[57] For example, the MEC of Environmental Affairs & Development Planning and the Department of Environmental Affairs & Development Planning, for the Western Cape Government (DPWC).
[58] *Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v The Habitat Council and Others; Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v City of Cape Town and Others* 2014 (4) SA 437 (CC), 21-22.
[59] Section 31BB of NEMA.

NEMA and SEMA mandates in these areas.[60] This mandate was confirmed by the judgement of the *Mineral Sands Resources (Pty) Ltd v Magistrate for The District of Vredendal, Kroutz NO* court.[61] The court denied an interpretation which would give DEA and DPWC's inspectors competency over the Mineral Sands' mine.[62]

The OES infringes the Constitution based on a legislative competency argument, this can be remedied by applying section 146 (2) of the Constitution, which deals with conflicts in legislation.[63] However, such approaches lend favour to a general behaviour of the National government of drawing competency from the provinces by simply triggering the conflict clause, observed by de Visser to be clear if we look at the substance of the division of power not the form (the Schedules and Conflict clause).[64]

When it comes to the lowest sphere, the local government, there seems to be great legislative space thanks to a number of hard-fought court victories such as the *Habitat II* case, which have vindicated their position.[65] It is because of this that national government simply has a regulatory role over them, however in practice they are barely active in their competencies (Schedules 4b and 5b) as most of the significant areas such as Pollution control, land use planning etc, are legislated and regulated at National level with them implementing.[66] This is ideal in a co-operative governance perspective, however under the OES their role is totally wiped out in favour of the DMR, which is manifestation of what de Visser observes as a consistent overstepping by National government in the execution of its framework formulation duties.[67]

The OES hosts several weaknesses that need to be dealt with. To fully understand why the move to the OES was miscalculated the ensuing segments discuss the mining and environmental management regime prior to and after the OES, in greater detail.

[60] Ibid, s 31D (4).
[61] *Mineral Sands Resources (Pty) Ltd v Magistrate for The District of Vredendal, Kroutz NO and others* (18701/16) [2017] ZAWCHC 25 (20 March 2017).
[62] Ibid, 29-30.
[63] This would allow National Government to justify why NEMA and the MPRDA should prevail as they are at the expense of the Provinces capabilities to legislate within their competency.
[64] J de Visser (note 53 above) 227. de Visser observes that the conflict clause is very wide and allows the National government to easily remove any legislation from lower government. Furthermore, he observes that because of this the provinces lack sufficient space to fully assert themselves in the shared legislative space.
[65] J de Visser (note 53 above) 234.
[66] Ibid 236-237.
[67] Ibid 239.

3 An account of Mining-Environmental Management law

This section provides an overview of the legislative journey of the mining and environmental management, with special attention to environmental impact assessments in the South African legal framework, before the establishment of the OES.

3.1 The Environmental law regime

The Environmental Conservation Act 73 of 1989 (ECA), was the first legislative attempt at environmental management. It set up the first system of EIAs which applied to a set of listed activities. The assessments were mandatory for every listed activity considered as having a significant effect on the environment.[68] The ECA listings however did not include mining and prospecting associated activities, creating a loophole for the industry and leaving it to self-regulate.[69] This exhibited lack of sufficient government dynamism towards the regulation of the largest environmental damage contributor. It further demonstrated a unique bond between the state and the mining industry, which no other industry has ever enjoyed.

In 1999 the legislature finally took a hard stance, repealing the majority of the ECA and replacing it with the NEMA, an act created to ensure the fulfilment of s 24 of the Constitution. The NEMA became the core legislative instrument when dealing with environmental issues, and s 2 of NEMA sets out the binding principles which should be accounted for when the state takes any action that may have considerable negative effect on the environment,[70] for example awarding mining authorisations.

Section 2 (4)*(a)*(vi) of NEMA sets out the sustainable development principle, which advocates for socio-economic development characterised by risk conscious decision-making. This principle echoes similar principles of international law such as Principle 17 of The Rio Declaration on Environment and Development (adopted 14 June 1992). The court in the *Fuel Retailers* case discussed and gave meaning to this concept,[71] stating that the principle requires decision-makers to consider all known human knowledge, before deciding on a matter affecting the environment. It is abundantly clear that EIAs are an expression of the principle and are a necessary tool to assist DMR when assessing proposed mining activities.[72]

[68] Section 21 (1) of the ECA.
[69] T-L Humby (note 9 above) 114.
[70] *Fuel Retailers* (note 37 above) 59.
[71] *Fuel Retailers* (note 37 above) 81.
[72] P Birnie, A Boyle & C Redgwell *International Law and the Environment* (2009) 164.

EIAs are Mandatory in terms of Chapter 5, s 24 of NEMA and must be submitted and approved before any listed activity is commenced.[73] Listed activities are found in the government gazette published by the Minister of Environment.[74] It must be noted that when NEMA was gazetted, its EIA provisions were temporarily suspended from operating over activities relating to mining.[75] The first list of activities was gazetted in 2006, close to 7 years after NEMA had come into effect,[76] and the suspension was lifted when an updated list of activities was gazetted in 2010.[77] The EIA regulations instructing how to conduct an assessment would be eventually published for the first time in 2014.[78] This whole scenario reveals the lack of serious commitment to the regulation of environmental damage by mining activities.

As of 2010, mines were now officially required to submit and receive approval of both their MPRDA mandated Environmental Management Programmes (EMP) and their NEMA mandated EIAs.[79] This legal position was accepted in *Maccsand (Pty) Ltd v City of Cape Town*.[80] The result of this was the creation of two comparable systems of authorisation, administered by the DMR and another by DEA.[81]

Unlike the ECA, NEMA applies homogeneously to all industries that trigger the EIA or basic assessment and scoping report provisions.[82] At this point the environmental regulatory regime was setup and in conflict with the mining regime, the latter is discussed to shed light on this conflict.

3.2 The Mineral law regime

As already discussed above the mining industry lacked sufficient environmental management regulation and policy. Before 1991, the industry relied on mines to exercise good cooperate

[73] Section 24(1) of NEMA.
[74] Section 24(2) of NEMA. The MEC may also compile the lists for their provinces, but only with the concurrence of the national minister.
[75] M Kidd *Environmental Law* 2 ed (2011) 228.
[76] T-L Humby (note 9 above) 114.
[77] Regulations GNR543-547 published in *Government Gazette* 33306 of 18 June (2010 EIA Regulations).
[78] Section 24(5) and s 44 powers granted to minister in the NEMA. Regulations GNR982 published in *Government Gazette* 38282 of 4 December (2014 EIA Regulations).
[79] T-L Humby (note 9 above) 115.
[80] *Maccsand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC), 29. The court a quo had refused deal with the issue of NEMA stating that the matter was a theoretical issue that could not be justified under the rule of s 19(1)*(a)*(ii) of the Supreme Court Act, however the *ratio* of the court can be inferred on NEMA.
[81] The mention of DEA will be construed to include the Provincial Departments responsible for environmental issues, unless the context appears otherwise.
[82] Regulations GNR 385, 386 and 387 published in *Government Gazette* 28753 of 21 April 2006 (2006 EIA regulations).

citizenry and engage in self-management of the environment. The obvious outcome of this was a lack of uniformity and a deliberate disregard of the environment to increase profit margins.

The Minerals Act 50 of 1991, was the first-time environmental management directly formed part of mining regulation. The act required a mine to submit an EMP, which would detail their long-term operation plans from construction to the ultimate closure of the mine.[83] It was an offence to commence mining without an approved EMP.[84] The Act displayed the legislature's acknowledgement of the need to deal with mining related environmental damage.

The Minerals Act was drafted in such a way that it only dealt with impacts that would manifest primarily on the surface and not underground.[85] Section 39 (2), allowed the Director-General of Mineral Development (DG) to exempt an applicant from submitting their EMP and commence mining. This clause effectively weakened the regime under the Minerals Act. The DG could also issue a temporary permit, before conclusion of an EMP assessment virtually making it a useless exercise.[86] The Supreme Court case of *Director: Mineral Development, Gauteng Region v Save the Vaal Environment*,[87] reasoned that s 39 (4) of the Minerals Act, empowered a mine to commence without tendering an EMP.[88] Essentially sidestepping the purpose of EIAs altogether.

To further exacerbate its weaknesses, the Minerals Act lacked a coherent set of EMP compilation guidelines/regulations.[89] Actors did not know how and what to compile and the department assessing did not know what to look out for. To deal with this policy gap, the government and the mining industry came up with an agreed guide document for EMPs.[90] Unfortunately this was a voluntary guide and failed to fully deal with any rogue mines.[91]

The Minerals Act, was a piece of Apartheid era legislation which required modification and/or repeal for it to fall in line with the new democratic dispensation. To this end, the Act was repealed and replaced by the MPRDA in 2002. This would insure that the regulatory framework aligned with the Bill of Rights and more specifically s 24 of the Constitution. The MPRDA's preamble, places a duty on the government to ensure the socio-economic

[83] Section 39 (1) of the Minerals Act.
[84] Ibid.
[85] T-L Humby (note 6 above) 3.
[86] Section 39 (4) of the Minerals Act.
[87] *Director: Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 2 SA 709 (SCA).
[88] Ibid,17- 19.
[89] T-L Humby (note 9 above) 113.
[90] Ibid. The document was called the '*Aide-Memoire* for the Preparation of Environmental Management Programme Reports for Prospecting and Mining'.
[91] Ibid.

development of the country's resources is done in an ecologically sustainable manner which ensures that the environment is protected.[92]

The MPRDA made it mandatory for mines to obtain both MPRDA EMPs and NEMA EIA authorisations, for them to legally exercise their mining rights. The MPRDA and its regulations would operate together with those found under the NEMA and SEMAs.[93] This disjointed system was a result of the government's silo-based approach to environmental management.[94]

The MPRDA and NEMA would be administered separately by DMR and DEA respectively, and as a result this nurtured a power struggle between them. DMR argued that the MPRDA was the supreme piece of legislation where it conflicted with other legislation, in a mining area. This argument would be settled by the Constitutional Court in the *Maccsand* case, holding that s 25 (2) of the MPRDA prescribed that all other legislative instruments remained operational and mines would have to obtain all authorisations necessary for them to operate lawfully.[95] This judgement also effectively rejected the secondary argument of the DMR in the matter, that NEMA had been suspended by the MPRDA.[96]

Mining environmental management was contained in Chapter 4 of the MPRDA, and it applied to a set of listed activities which would require EMPs or EIAs to be considered before a licence to engage in the activity was granted.[97] The chapter was accompanied by a set of binding regulations, which dealt with the practical aspects of the EMPs. [98]

Unlike its predecessor the Minerals Act, the MPRDA removed the EMP discretionary exemption clauses. This was a clear indication that the legislature was aiming to deal with environmental issues seriously and moving towards fulfilment of its constitutional duty to protect the environment. The validity of a mining right now hinged on the applicant successfully receiving all their mandated approvals among other provisions.[99]

Adherence to the approved EMP was compulsory, from the date of commencement to the day of closure.[100] The Minister of Mineral Resources was the appeal authority for any

[92] MPRDA Preamble.
[93] The MPRDA provisions were modelled after the NEMA and its regulations.
[94] L Kotzé (note 43 above) 112.
[95] *Maccsand* (note 80) 51.
[96] M Kidd (note 75 above) 228.
[97] Ibid, 221. Like the NEMA.
[98] T-L Humby (note 9 above) 113.
[99] Ibid.
[100] Ibid. Section 38 of MPRDA prior to amendment.

decisions of the DMR.[101] To strengthen the MPRDA, DMR could hold mines liable for any degradation caused, regardless of its proximity to their operational zone.[102]

Together, the MPRDA and NEMA created a robust system of regulation, which ensured that the mining industry would pursue environmentally sound socio-economic development. All the NEMA principles, contained in s 2 of NEMA would apply to the mining industry, and they would also act as the lens by which the MPRDA's provisions were understood. However, due to them being administered by different cabinet offices/departments, they also created a fragmented and costly regulation structure, plagued by over-regulation, bureaucracy and corruption. The situation would be worsened by the varying levels of stringency of the assessments and the conditions placed on the approvals given to the applicant.[103]

3.3 National Water Act

Southern Africa is a water-starved region which necessitates strict control over how water is used. This is especially true for the water intensive mining uses such as cooling of drilling equipment, shaft ventilation, to name a few. Water regulation is an integral part of the OES and it is important to understand the development of the law surrounding it, especially in relation to mining, which cannot occur without water or affecting water bodies.

The Water Act 54 of 1956 was promulgated with the goal of regulating water supply to agricultural and mining activities.[104] It maintained a distinction between private and public water sources. A private water source was a water body that commenced or terminated on an individual's land, allowing an owner to use water as they pleased. Public water sources were divided into three categories by use.[105] The first and relevant use is industrial use, which required a permit issued by the Minister or the Water Court. If the water was being provided by a municipality or a private landowner, the Water Court lacked jurisdiction and could not invalidate such use.[106]

Just like most Apartheid era legislation, water regulation in South Africa was characterised by racial policy and required an overhaul informed by the post-1994 democratic values of the Bill of Rights and primarily the right to water.[107] The new framework established

[101] Section 96 of MPRDA prior to amendment.
[102] T-L Humby (note 9 above) 114.
[103] The MPRDA assessments were limited to the cumulative impacts, concentrating on mining, unlike DEA which would have insight on other industrial activities.
[104] M Kidd (note 75 above) 70.
[105] Namely Agricultural, Urban and Industrial purposes.
[106] M Kidd (note 75 above).
[107] Section 27 of Constitution.

by the National Water Act 39 of 1998 (NWA) no longer recognises private ownership of water and instead recognises state custodianship of water to advance equal access.[108] The NWA also brings water regulation under the umbrella of NEMA framework as a SEMA.[109]

Like the NEMA, the NWA requires a water use licence to be issued to a person intending to use water in a way or for an activity listed as requiring one in terms of s 22 (1)*(b)*, prior to commencement of use.[110] Lack of a water use licence is an offence and the NWA is equipped with a number of compliance mechanisms in Chapter 16 of the Act.[111] The NWA is administered by the Minister of Water and Sanitation, which also acts as the licensing authority through the Department of Water and Sanitation (DWS).

3.4 The Specific Environmental Management Acts (SEMAs)

Discussing the matter of mining environmental management is incomplete without mentioning the relevant ancillary regulatory mechanisms in the SEMAs. There are several Acts which fall under this group which place their own mandatory permitting and licensing obligations on mines. A few of these Acts are dealt with briefly in the discussion that follows.

The first of these Acts is the National Environmental Management Air Quality Act 39 of 2004 (NEM:AQA). In s 21, it prescribes that an atmospheric emission licence must be obtained for any activities identified as causing atmospheric emissions by the Minister before they are commenced.[112] Mining is an industry with a well-documented history of atmospheric emissions, particularly Particulate Matter and Nitrous Oxides.[113] This obligation is even more important in areas like the Vaal Triangle Airshed Priority Area,[114] which have been identified as requiring specialised management of activities and compliance mechanisms.[115] This licenses are not applied for at DMR under the OES, and mines must approach municipal and provincial structures.

National Environmental Management: Waste Act 59 of 2008 (NEM:WA), is a SEMA that deals with waste management. It requires the issuance of a waste management license for

[108] D Tewari 'A detailed analysis of evolution of water rights in South Africa: An account of three and a half centuries from 1652 AD to present' (2009) 35 *Water SA* 693, 702.
[109] M Kidd (note 75 above) 75. Section 3 of the NWA.
[110] Uses may include the proper pumping/draining of mine water, control of storm water runoff and coal slurries.
[111] E.g. non-compliance is an offence, attracting fines or other sanctions.
[112] E.g. mining operations causing dust and exhaust emissions.
[113] Ibukun Oluwoye 'Atmospheric emission of NO*x* from mining explosives: A critical review' *Science Direct* <http://www.sciencedirect.com/science/article/pii/S1352231017305113>.
[114] R Garland, M Naidoo et al 'Air quality indicators from the Environmental Performance Index: potential use and limitations in South Africa' (2017) 27 *Clean Air Journal* 33, 39-41.
[115] Section 18 of the NEM: AQA.

activities listed in terms of s 19 of the act. As with all Acts lack of a licence is an offence. Mining is an industry involved in a lot of storage, transfer, recycling and treatment of waste, which are all activities requiring a waste management licence.[116] This Act does not form part of the OES.

The SEMA are usually administered by the provincial departments or municipalities. The legislature failed to integrate the permitting process and dealt with environmental issues following a media specific management means. This failure would become apparent after the *Maccsand* judgement which stated that all SEMA, provincial legislation, and municipal ordinances to be adhered to.

The SEMA discussed above are the most relevant with regards to general forms of mining. Other SEMA exist which apply based on the unique circumstances of the mine, for example if mining activities involve removal of plants, the National Environmental Management: Biodiversity Act 10 of 2004 (NEM:BA) applies.

3.5 Conclusion

It is clear from the preceding discussion that the stage was set for a breakdown in co-operative management of mining.[117] Environmental management under the old regime was disorganised. It raises several issues which the state needed to address. To do this the state began the process that led to the OES.

[116] Schedule 1 of the NEM: WA.
[117] C Bosman, L Kotzé (note 10 above) 419.

4 Road to the One Environmental System

From the preceding discussion of how the legislative landscape has been modified to conform with the requirements of the Constitution, the haphazard nature of the process resulted in the duplication of regulatory measures, such as environmental management.[118] The fact that the primary mining legislation would be administered by two departments, with opposing mandates,[119] would create the problems the old regime faced. This situation fostered internal conflicts and incoherent application of the legislation.

The old regime wasted precious resources such as time and manpower, skilled and unskilled, in executing repetitive exercises under the varying instruments such as the permitting and the actual enforcement of authorisations. Another flaw of the old regime was the possibility of differing values placed on aspects such as conservation during the consideration of applications by the deciding body.[120] While all this confusion was going on, the people and the environment would continue to suffer from this confusion in the law, an example being the situation that played out in Potchefstroom, in 2002.[121]

NEMA under the old regime had a dedicated corps of Environmental Management Inspectors (EMIs), who assist DEA to ensure compliance with authorisations.[122] DMR did not enjoy such luxury, and its own staff had to do the work, exacerbating the lack of manpower issue mentioned above.

From a business perspective, the procedures under all the relevant legislation, created a winding bureaucratic process, which had negative financial implications.[123] The situation was also marred in confusion caused by the lack of certainty that an application over the same activity would yield the same result from the different permitting departments.[124] To add on, it was difficult to ascertain the correct office an application was to be lodged.[125] Civil Society

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[118] Both the NEMA and the MPRDA had similar EIA procedures.
[119] Sahndya Naidoo 'The Struggle to Achieve Cooperative Governance Continues' (2014) *Werksmans Legal Brief*. DMR would look to get as much Economic gains from minerals, while DEA aims for conservation and sustainable development.
[120] For example, the lower sphere of government makes decisions based on consideration of conservation and development objectives of the area, whereas DMR will not place value area specific conservation needs but emphasise national development goals.
[121] C Bosman, L Kotzé (note 10 above) 419. In 2002 the Potchefstroom City Council had to sue the DWS, to force it to ensure that the mines would repair a dam it sourced city water from. Legal action was necessitated by the confusing water regulations at the time.
[122] Section 31A-31Q of NEMA.
[123] Costs incurred range from Consultancy fees, application fees among several fees paid to prepare the applications. Time wasted from the varying processing times also had financial implications.
[124] T-L Humby (note 9 above) 115.
[125] Committee report (note 8 above) point 2.1.

Organisations (CSOs) would also encounter similar financial and human resource issues, meaning they would fail to adequately protect communities affected by mining.[126] This situation would prompt the government to action.

4.1 Government intervention

The national government through the Ministries of Environment and Mineral Resources, initiated dialogue which would lead to the signing of the document that would start the process of harmonising the regulatory regime for mining.[127] This agreement led parliament to pass the National Environmental Management Amendment Act 62 of 2008 and the Mineral and Petroleum Resources Development Amendment Act 62 of 2008, which would remove the environmental management sections of the MPRDA and replace them with a clause stating that management would now occur in terms of NEMA.[128] The amendments also made DMR the temporary EIA permitting authority for the initial 18 months of the regime, before permanently returning authority to DEA.[129]

During this period, the *Maccsand* matter was in court and DMR wished to delay implementation of the new law until the court had handed down its judgement. DMR hoped that the court would pronounce the MPRDA as the only legislation operational in a mining area. This did not happen and DMR had to re-engage DEA in the implantation of the preceding agreement. The NEMA amendments were already operational at this point, while the MPRDA sections were suspended to allow DMR to consult its stakeholders over administrative issues.[130]

DMR then attempted to have a bill passed by the President amending the suspended MPRDA amendments.[131] DMR was advised of the impracticality of amending legislation not yet enforce,[132] and it was forced to implement the suspended amendments.[133]

Before the full implementation, the Minister for Minerals realised that water use licenses would need to be included in the OES, prompting further amendments to be drafted by a steering committee comprising of DMR officials and the Department of Water and Environmental Affairs officials, as it was then known.[134] The committee came up with the

[126] T-L Humby (note 9 above) 116.
[127] M Kidd (note 75 above) 228.
[128] Section 38A of the MPRDA.
[129] T-L Humby (note 9 above) 117.
[130] T-L Humby (note 9 above) 119.
[131] The Bill was tagged as B 15B-2013.
[132] T-L Humby (note 9 above) 119.
[133] Proclamation No 14 of 2013 *GG36512* of 31 May 2013.
[134] T-L Humby (note 9 above) 121.

National Environmental Management Laws Amendment Act 25 of 2014 which amended the NEMA,[135] and the National Water Amendment Act 27 of 2014, which amended the NWA.

At this point the OES was ready to commence with the changes made by the latest amendments to the initial agreement examined in the next section. The OES was set to commence on 8 December 2014.

[135] It also amended the NEM:WA and the NEMA Amendment Act 62 of 2008.

5 Architecture of the One Environment System

The term 'One Environment System' is used to designate a assortment of rules and regulations contained in the NEMA, the NWA, the NEM:WA, and the MPRDA which form the environmental management and regulatory structure of the mining industry.[136] As already discussed in the previous sections of this paper, the OES is aimed at creating a single regulatory structure that fosters co-operative governance, and establishes legal certainty in environmental impact assessments and authorisations.

The system is given authority in both NEMA and NWA,[137] and it is protected from arbitrary amendment by any Minister part of the tripartite relationship,[138] a mechanism that serves to strengthen the integrity of the system. This section discusses the structure of the OES and how it is intended to work.

5.1 Authorisations

The Minister of Mineral Affairs through the DMR, handles all authorisation applications made by mines.[139] He is also the competent authority when mines apply for waste management licenses under NEM:WA.[140] Activities that require assessment and approval by DMR are listed in the government gazette after being identified by the Minister of the Environment, or provincially by the Member of Executive Council (MEC) charged with environmental matters.[141]

The Minister of Water and Sanitation through the DWS handles all water use license applications, regardless of industry.[142] The Minister of Environment has the authority to prevent or restrict DMR from issuing authorisations for specific activities or areas, if it is in the interests of conservation,[143] this power withdraws all pending applications and prevents new ones from being lodged.[144] Similar authority is contained in the NWA.[145]

[136] Centre for Environmental Rights 'Mining companies launch their first attacks on the One Environmental System' <https://cer.org.za/news/mining-companies-launch-their-first-attacks-on-the-one-environmental-system>.
[137] Section 50A of NEMA and s 163A of NWA. The MPRDA makes no mention of the system but refers all environmental issues to NEMA.
[138] Section 50A (1)*(a)* of NEMA and s 163A (1)*(a)* of the NWA require that the Minister wishing to make changes to the OES, consult and obtain agreement of the other Ministers before tabling the changes before parliament.
[139] Section 24 (1) of NEMA.
[140] Section 43 (1A) of NEM:WA.
[141] Section 24 (2) of NEMA.
[142] Section 41 (5) of NWA.
[143] Section 24 (2A) of NEMA.
[144] Section 24 (2A)*(b)* of NEMA.
[145] Section 20A (2) of NWA.

All application processes are synchronised to have a 300-day turnaround time, commencing from the day the application is lodged to the day a decision is announced.

5.2 Appeals

The Minister of Environment is the competent authority to handle appeals against the decisions of the DMR.[146] Appeals must be lodged within 30-days of the decision.[147] Once an appeal has been lodged, the authorisation is automatically suspended until the matter is resolved.[148]

Only an applicant for a water use license can appeal against the decisions of the DWS, this application is made to the Minister of Water and Sanitation.[149] Any other aggrieved party must appeal to the Water Tribunal within 30-days,[150] this also automatically suspends the granted license until the matter is resolved.[151] An applicant can however, ask the Minister to exercise their discretionary power to lift the suspension, allowing them to exercise their rights pending finalisation of the hearing.[152]

5.3 Inspectors

NEMA, establishes a dedicated corps of Environmental Management Inspectors (EMIs), tasked with ensuring compliance and enforcement of the NEMA and the SEMA.[153] The OES introduces a parallel body called Environmental Mineral Resource Inspectors (EMRIs), tasked with enforcing and ensuring mines comply with NEMA and the SEMA.[154]

This new body of inspectors is staffed by individuals chosen by the Minister of Minerals and have exclusive jurisdiction over mining areas.[155] The Western Cape High Court confirmed this position in the *Mineral Sands* case. They have the same mandate and powers as ordinary EMIs under NEMA and the SEMAs.[156] The Minister of Environment can provide capacity and other resources to the DMR, if the Minister of Minerals consents.[157]

[146] Section 43 (1A). See One Environmental System for mines *Inside Mining* 2015 5.
[147] Section 47CB (2) of NEMA.
[148] Section 43 (7) of NEMA.
[149] Section 41 (6) of NWA.
[150] Section 148 (1)*(f)* and 148 (2) of NWA.
[151] Section 148 (2) and 148(2)*(b)* of NWA.
[152] Section 148 (2)*(b)* of NWA.
[153] Part 2 of NEMA.
[154] Section 31BB of NEMA.
[155] Section 31BB (1) of NEMA.
[156] Their powers include investigation of environmental contraventions, issuance of compliance notices and fines, confiscation of items from premises and taking samples.
[157] Section 31D (4) of NEMA.

5.4 *Role of Environmental Regulators*

The sections discussed above show that DEA and the Minister of the Environment no longer have implementation/enforcement capabilities in the new regime. This loss has been compensated by giving them the power to create the policy instructing DMR on how to use their authority and adding more protection to the environmental management arsenal.[158]

The authorities, retain the power to prohibit DMR's activities as outlined in Point 5.1. above. This authority is awarded so that the environmental authorities can ensure the precautionary principle is at the core of environmental decision-making.[159] This power cannot be used when an authorisation has already been awarded, to prevent uncertainty in the legal regime.[160]

5.5 *Conclusion*

The OES is designed to operate in such a manner that the warring DMR and DEA, can come together and provide public service that is efficient and transparent. It fosters the development of amicable relationships between the departments in line with the principles of co-operative governance.[161] The mining sector is the biggest beneficiary of the system, gaining legal certainty and clarity on timeframes which consequentially leads to financial gains.[162]

DMR is equipped with EMRIs, which assist its regular staff with the proper implementation of environmental management in the mines. On the ground it is questionable whether DMR has the skilled manpower to manage applications, let alone adequately staff a whole corps of inspectors.[163] The *Mineral Sands* case casts doubt on the DMR's ability to be an effective regulator, as it exposed the DMR to be very lax when it comes to requiring strict adherence to the conditions of granted authorisations.[164]

It is difficult to appreciate that the legislature intended to streamline the authorisations process, when it has not harmonised the various appeal options available to interested and affected parties. If the legislature intended to have an efficient system, it should have created a single appeal body or procedure. The time saved in obtaining authorisations is lost in appeals,

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[158] T-L Humby (note 9 above) 123. An example of these added protections is the s 24P of NEMA, Financial provision for remediation of environmental damage requirements.
[159] T-L Humby (note 9 above) 124.
[160] Section 24 (2A)*(c)* of NEMA.
[161] T-L Humby (note 9 above) 127.
[162] 'One Environmental System' To Stamp Out Over-Regulation <http://businessmediamags.co.za/one-environmental-system-to-stamp-out-over-regulation/>.
[163] 'Mining for sustainable development research report' Corruption Watch (2017), 43-44.
[164] Centre for Environmental Rights (note 136 above).

especially when they are directed to the Water Tribunal, which is notorious for taking long to settle matters. [165]

The automatic suspension of authorisations during appeals is a welcome addition to the environmental management arsenal. It prevents irreversible damage from occurring while an appeal is being heard,[166] this would often occur under the old MPRDA regime where you were required to obtain an interdict suspending mining pending the appeal.[167]

The outright flaw of the system is its failure to incorporate all environmental legislation under the banner of the OES. It has instead isolate mining, while ring-fencing regulatory authority to the national government's favour. The system is not unique to South Africa and the next segment canvases the Australian management regime.

[165] The minister's discretion to lift suspensions, opens ups up the system to abuse and collusion. Also see Parliament asked to probe Mokonyane about mine's water-use licence for wetland <https://mg.co.za/article/2017-11-02-00-parliament-asked-to-probe-mokonyane-about-mines-water-use-licence-for-wetland>.
[166] T-L Humby (note 9 above) 126.
[167] See *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC) para 39.

6 Case Study: Australia[168]

6.1 The One Stop Shop (OSS)

It was implemented in October 2013, to streamline permitting and environmental management legislation.[169] The system is structured to avoid over regulation, infringement and usurpation of the autonomy of State governments. This section discusses the mechanics of the OSS.[170]

An assessment is triggered when a Notice of Intent is lodged with the Commonwealth Minister responsible for the activity (for example the Minister of Mines, for mining activity). The Minister uses what is called the Matters of National Environmental Significance (MNES) criterion,[171] to find applications which fall into one of the identified category of matters, prompting assessment under the Federal government's Environment Protection and Biodiversity Conservation Act of 1999 (EPBCA).[172] The Minister must refer an application that does not fall into any category to the relevant State (Northern Territory in this case) and its state Environmental Protection Authority (EPA),[173] in terms of a Bilateral Agreement.[174]

The referral triggers an assessment under to the State's Environmental Assessment Act of 2013 (EAA). This Act mandates the EPA to decide the type of assessment to conduct, based on a set of considerations which include the potential severity of damage caused by the project.[175] The two possible assessment procedures are, the Public Environmental Report

[168] An in-depth analysis of Australian co-governance principles will not be undertaken due to the length restraints of the paper, only the key aspects of the OSS will be dealt with to highlight the solutions for the OES.
[169] Australian Government Department of Environment and Energy <http://www.environment.gov.au/epbc/one-stop-shop>.
[170] When discussing State legislation, the paper will employ the Northern Territory, an autonomous territory as its source of legislation. What is discussed herein applies to the states and territories.
[171] There are nine matters identified in the EPBC are:

- Ramsar wetlands of international importance;
- Great Barrier Reef Marine Park;
- World Heritage properties;
- Nationally threatened animal and plant species and ecological communities;
- National Heritage places;
- Internationally protected migratory species;
- Commonwealth marine areas;
- Nuclear actions (including uranium mines); and
- a water resource, in relation to coal seam gas development and large coal mining development.

[172] State laws the default EIA regulations, unless the activity triggers the MNES. If they trigger, assessments are conducted at both the Federal and the State level, and the Commonwealth Minister will make the final decision.
[173] Environment Protection Authority Act of 2012 (EPA). This is the operational Act for the territory.
[174] This an agreement between the State and the Federal government, concluded in terms of section 45 of the EPBCA.
[175] EPA (note 173 above) 4. The route to take is decided after consideration of factors such as the biophysical effects, statutes, water quality and resource management impacts, to list a few.

(PER) and the Environmental Impact Statement (EIS), the latter being the most onerous and reserved for damaging projects.[176]

The EPA must inform the applicant of its decision,[177] and draft a document called the Terms of Reference, which instructs the applicant on what matters to submit assessments on.[178] The draft is published for 14 days, to allow the public to comment before publishing the finalised document on the EPA website.[179]

When the applicant completes their assessments, they must draft an Impact Statement, and publish it for public review and comment for at least 28 days.[180] After this period, a finalised document is submitted to the Environmental Assessments Unit, a specialised branch of the EPA, to assess and produce a draft report that gives their recommendations and approval conditions. The report is reviewed and finalised by the EPA, which then forwards a verdict to the State Minister and the applicant.[181] The Federal Minister is given a copy of the report and may place their own conditions.[182] An approved assessment report is kept in the Public Register, on the NT EPA website to enable public access.[183]

6.2 Key Features

The Australian system avoids duplication of EIAs, by ensuring there is always a legislative instrument that diverts an application to either the Federal or the State procedures, regardless of industry. Bilateral agreements in terms of s 45 of the EPBCA, are a key part of the OSS in ensuring that States conducted assessments will always be sufficient to meet a Federal test. This allows the Federal government to respect devolution of power, leaving it with enough resources to conduct the more complex national and cross-state assessments. Bilateral agreements provide guidance for the coordination of environmental legislation in the country and bind the Federal government to work in good faith with the State, fostering co-operative governance.[184]

The Environmental Assessments Unit is very important because it is staffed by highly skilled personnel, entrusted with the technical aspects of the EIA process.[185] These individuals

[176] Reference to the Environmental Impact Statement (EIS) will also refer to Public Environmental Report (PER), unless explicitly stated otherwise.
[177] EPA (note 173 above) 4.
[178] EPA (note 173 above) 6.
[179] Ibid.
[180] Ibid. The PER requires 28 days, and the draft EIS more than 28 days.
[181] EPA (note 173 above) 7.
[182] Ibid.
[183] EPA (note 173 above) 11.
[184] Objectives Clause of the agreement.
[185] EPA (note 173 above) 2.

are sourced from various departments including the provincial Department of Lands, Planning and the Environment. This guarantees that authorisations are diligently made by people, who understand their work, and are not over worked or distracted by other duties.

The EPA as an independent body tasked with environmental management, assures independence and transparency. Their accountability is to the State Minister of Environment, ensuring that economic benefits of a project do not override the need to pursue sustainable development. Corruption and the influence of political agendas can be greatly reduced by a self-budgeting and hiring organisation of this nature. The organisation conducts all the assessments regardless of their industry of origin, allowing decision-making that considering the cumulative impacts effects of other projects in an area.

Features discussed above are very important in a developing country context as they are designed to deal with issues of corruption and bureaucracy. The model can be easily implemented, given the parallels in the governance structure of South Africa and Australia. The organs required to sustain the system generate their own revenue, making them easier to fund compared to regular government departments. The next segment discusses a hypothetical application of lessons from the OSS in South Africa.

7 Solutions for South Africa

Environmental management is a tool that many countries have grappled with and its problems are not unique to South Africa. Australia for example, has managed to deal with many of these problems. This section outlines two main solutions to the issues of the OES and third one that may be pursued to supplement either of the solutions. The solutions can be applied in isolation or in combination.

7.1 Solution 1: Aligned policy and devolution of assessment authority

A hierarchy of coordinated legislative instruments is necessary to reduce the clutter of environmental legislation, especially those dealing with EIAs in this instance. The framework applies indiscriminately to all industries, allowing knowledge gathering and comprehensive decision making. This framework deals with the current policy shortcomings of South Africa where uncoordinated decision-making has led to a failure to achieve policy objectives, such as in the Air Quality Priority Areas.

Just like the Australian system, the framework includes a National EIA system, which operates as the default assessment structure for the country. The Provinces have the option to either use the national system or design their own system to substitute it. The substitute system obtains its authority from NEMA. This model ensures that all legislation dealing with EIAs are housed and assessed by one organ doing away with the silo-based approach to assessments are by various organs.

Overall, the system ensures that all spheres of government are involved. The national sphere as the appeal authority, the provincial level as the technical branch conducting and issuing authorisations, and the municipal sphere as the enforcement arm of the entire structure.[186] Apart from appeal powers, the Minister of the Environment also ensures that national and international standards of assessment are maintained.

This structure ensures co-operative governance principles are applied as required by the Constitution, while also eliminating instances of a power struggle between the spheres of government and the Cabinet Departments.

[186] The system will create a single corps of inspectors, permanently designated by the Minister and dispatched at municipal level.

7.2 Solution 2: Environmental Authorisation Agency

The legislature can go the route of establishing an independent regulator, which will become a central authority for all environmental protection matters under all related legislation including the SEMAs. The regulator usurps DMR, DEA and any other department[187] or sphere of government's competency to deal with authorisations over environmental media (mineral resource, terrestrial, air etc). It is answerable to the Minister of Environment, who is also the appeal authority.

When dealing with an application, the regulator will engage with the relevant government departments during the public participation leg of assessments. The same procedure will apply when dealing with different spheres of government. This ensures that projects that require the public and government input, will be properly and transparently conducted, preventing cases such as the *Bengwenyama* matter from reaching the courts.[188]

The regulator is staffed to ensure efficient and balanced decision making, that produces decisions inspired by sustainable economic growth. To guarantee this occurs, it will be staffed by individuals seconded from all relevant departments including DEA, DMR, the Department of Trade and Industry, the Department of Science and Technology, and the provinces. It will be managed in a business-like manner, where remuneration, skills development and staff retention are at the core of operations.[189] This guarantees a reduction of corruption and an increase in quality assessment decisions.[190]

As part of her supervisory role, the Minister will publish the list of activities which require assessment, prescribe the minimum assessment criterion among other duties placed on her by legislation. The EMIs and EMRIs are merged to create one inspectorate, whose officers are designated by the Minister of Environment and deployed at all levels of government in terms of NEMA, while the departments are tasked with policy formulation duties.

In the interests of remaining true to the Constitution, co-operative governance and legislative competencies established by the Schedules, the provinces may establish their own subordinate regulators. An example of this design is demonstrated in Australia, where the Northern Territory has its own agency. The Provincial regulator takes over duties of the

[187] The Department of Agriculture, Forestry and Fisheries for example.
[188] *Bengwenyama* (note 167 above). The public participation process was held to be insufficient and amounted to a tick-box exercise.
[189] J Armstrong 'Executive Agencies and Good Governance' (2015) 33 *The Governance Network* 1, 1 (Draft Discussion Paper).
[190] L Kotzé (note 43 above) 118.

national regulator within the province, while the latter is tasked with complex or cross-provincial applications. This model will ensure that there is less vertical friction between the spheres of government.[191]

7.3 Optional Solution: The Local Government

This solution, although not popular amongst most post-apartheid legal scholars and a number of Constitutional Court rulings such as the *Habitat II* case, may alleviate a lot of the issues that arise when the state instead of creating and monitoring Municipal policy activity, it micro-manages the lower sphere. It will release the state to legally adopt micro-management and govern the state centrally, in the process clearing out to eradicate problems such as political mandates that are incompatible with sustainable development goals.[192]

To follow this supplementary solution, South Africa must remove the political nature of municipal offices. To do this the legislature must amend the Constitution and return the municipalities to their pre-democracy administrative and service delivery roles.[193]

This will also mean removing the legislative capabilities of the local governments. The advantage of this will be the, prevention of fragmentation of environmental management laws, caused when municipalities make their own conflicting by-laws, which may easily prevail in a court of law judging on the legal jurisprudence from the Constitutional court.[194]

A less drastic route would be to simply amend the Schedules to the Constitution to add exceptions under the environmentally related competencies, stating that the Provinces and/or Local government do not have competency over mining issues as far as they relate to each other.

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[191] Provinces like the Western Cape would thrive under this regime, due to their assertive opposition party government.
[192] The ANC has been on a trend of losing its grip within the lower spheres of government, meaning the bottom has been becoming less and less aligned to the top. Making the lower sphere purely a state civil service may better align the structures to deliver on the reigning government's policy initiatives.
[193] A Taylor, H Davies, et al 'Urban Adaption' in T-L Humby, L Kotzé et al (eds) *Climate Change Law and Governance in South Africa* (2016) 11-1, 11-27.
[194] J de Visser (note 53 above) 234. Also see *Habitat case*.

8 Conclusion

The question this paper asks is whether the OES was the right way to deal with issues that plagued mining environmental management. After analysis of the legislative environments that prevailed before and after the OES came into effect, it is difficult to accept that this was the correct way or whether it was done correctly. Harmonising the regulatory framework by creating the OES was drastic given that the legislature had options at its disposal, such as improving the communication structures between departments.[195]

Creating the OES and then limiting its operation to mining only, undermines the whole purpose of creating it to begin with. The system simply deals with the headache of permitting mines but leaves other industries such as commercial agriculture or the steel industry haphazardly regulated and in need of the same treatment given to mining. To further highlight how illogical the system is, the OES does not include all the relevant permits under the various SEMA and other legislation, meaning mines still have the same headache they began with. The state needs to return to the drawing board and redraft the OES to fully embrace the SEMAs and the entirety of South African industry.

The regime prior to the OES was without a doubt chaotic, however, it was constitutional for as long as all spheres of government and their departments behaved in a professional manner. The OES on the other hand deals with the chaos, but at the cost of being unconstitutional. It needs to be reworked to produce a system that effectively meets its purpose, while also decentralising authority to allow other spheres of the government to participate

Australia demonstrates how the OES, if drafted properly, can be the answer to many of the problems which the OES was created to solve and those it itself has created. One such problem the OES exposes is the potential to be abused by DMR in its quest to ensure as much economic development is gained from the mineral wealth. DMR cannot be trusted to effectively police the mines and the *Mineral Sands* matter is one such example of that. DEA found numerous violations at the mine, which DMR had ignored during its inspections. DMR's reluctance to assist DEA enforce the law, is also evidence of how they cannot be relied on.[196] Whether or not there was collusion is unknown, but what is clear is that environmental issues must fall under the control of DEA.

[195] L Kotzé (note 43 above). A few methods are suggested in section six.
[196] Centre for Environmental Rights (note 136 above).

The OES is not a complete failure nor is it a success, it requires that the issues in this paper be addressed to create a clear management policy backed by the proper functionaries to achieve its purpose and respect the Constitution.

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