

**Background:**

On Friday 27<sup>th</sup> May 2010, Parliament passed amendments to the Environment Act 2000 (Principal Act). In particular Sections 69A and B plus Section 87A, B, C and D were added to the existing law.

This briefing paper focuses on the general implications of the Environment (Amendment) Act 2010.

Sections 60 to 69 respectively in the Principal Act set out the process for permitting activities by extractive industries. The Environment (Prescribed Activities) Regulation 2002 categorize activities into levels 1, 2 and 3 activities.

The Director must be satisfied that an application for a permit contains an adequate description of the nature and extent of physical, social and environmental impacts which are likely to result from the carrying out of the proposed activity, before he may accept the application.

The Director may issue such permits subject to such conditions as he deems necessary.

Section 68 is of particular importance in order to understand the current changes, as this section allows for checks and balances. It gives any person who is dissatisfied with the Director's decision in relation to either application process or the activities carried to apply for a review to the Environment Council. This section also provides for an option to suspend any operation of the decision of the Director that is subject of the review, until the review is determined.

However, if the operation of the decision is NOT suspended pending a review, the applicant can, by virtue of Section 69, to apply to the National Court for a stay of operation of the decision. Any such National Court stay order shall remain for the duration the Environment Council reviews the decision.

**What amendments have been made to the Environment Act 2000?**

The Principal Act has now been amended by insertion of the following new sections:

***New Section 69A- Directors May Authorize Associated Acts***

This section gives the Director the absolute power, despite what any other law states, to authorize permit holders to carry out specific works or acts associated with an activity that has already been permitted (which activity may also be subject to review – this section may also apply despite any such review pending, thus making the review process irrelevant). The specific acts or works authorized by the director by virtue of this amendment may even be an act or works associated with Level 3 activities under the Environment (Prescribed



Activities) Regulation 2002 which can cause material harm to the people and the natural environment.

Such authorization granted by the Director is, by Subsection (2) of Section 69A, deemed a permit granted under the Act “and applies despite any non-compliance with any procedural or other requirements for the grant of such permits under the principal act

It is also important to note that compliance with any conditions set in a Environmental Permit, already issued is made redundant by the authorization issued for associated acts if this is made retrospective under Subsection (1) of Section 69A;

***New Section 69B- Activity Does Not Constitute A Civil Cause Of Action***

The changes also mean the authorization granted under Subsection (3) of Section 69A, “is final and may not be challenged or reviewed in any court or tribunal and by operation of the new Section 69B, any act, work or activity carried out under an authorization granted under Section 69A “does not constitute a civil cause of action, whether in tort or otherwise, or an offence and is not unlawful”

**Potential Implications of new sections 69A and 69B**

- There is a non-challengeable discretion bestowed upon a single officer, which is dangerous as it gives rise to absolute power, which can be subject to abuse.
- If the State is negligent in permitting specific works or acts that eventually results in harm to people and the environment, they can easily escape liability, while companies who initially were permitted to only carry out certain acts, but are eventually allowed to carry out associated acts, at the discretion of a single officer, can escape liability to the government and the people affected.
- The fact that affected parties including landowners cannot seek review or challenge the decision of the Director in a court of law or tribunal amounts to the stripping of common law rights as well as customary rights to seek protection of the law or compensation for harm done.
- Parliament and state agencies have a duty imposed by section 25 (2) of the Constitution to uphold the National Goals and Directive Principles, in this case, Goal 4 , which calls for protection and conservation of the environment.



***New Section 87A- Director May Grant Exemption Certificate***

Where permit holders carry out works not included in the permit or omit to carry out works included in the permit, the Director has, once again an absolute discretion, either on application by the permit holder or on his own volition to grant a certificate of exemption, making lawful, the work (not included in the initial permit) or omission (included in the permit but not adhered to)

It must also be noted that the Director, in issuing an Exemption Certificate, by Subsection (2) of Section 87A “is not bound by any provisions of any law requiring or permitting any authority, consent, approval, report, recommendation, appeal, procedure or formality, or by any similar provisions”;

Once again, the Director’s decision to grant an exemption certificate is not challengeable in any court or tribunal and he is not bound by any law requiring or permitting any authority, consent, approval, report, recommendation, appeal, procedure or formality.

***New Section 87B- Best Practice Certificate***

Section 87B now gives the Director, the absolute power, which is not subject to review, to issue a Best Practice Certificate to a company carrying on extraction activity, in order to declare and make lawful, any activity or work done or omission made, or a conduct employed, or a proposed course of conduct that was or is in breach of a Environmental Permit.

The permit holder can simply apply to the Director for this certificate, which is a confirmation that he has applied best practices according to the terms of the permit or best available standard. The Director then issues the certificate. This certificate becomes conclusive evidence that the permit holder has applied the best practice standards in its operations.

The decision of the Director is once again final and cannot be challenged in any court or tribunal.

***New section 89C- Director May Issue A Certificate of Necessary Consequence***

Section 87C of the Act yet again vests in the Director, the absolute power , which is a power that is made final and not subject to review, to issue a Certificate of Necessary Consequence to a company carrying on a mining or petroleum extraction activity. This Certificate is purposed to declare and make lawful, any activity or work done or omission made or a conduct employed or a proposed course of conduct that was or is in breach of a Environmental Permit



Once it is issued, the Certificate of Necessary Consequence is, by operation of Subsection (3) of Section 87C, conclusive evidence that the undertaking of a conduct or proposed conduct, certified by this document was or will be necessary and inevitable and any consequences following from such certified conduct or proposed conduct were or will be necessary or inevitable.

By the operation of Subsection (4) of Section 87C of the Act, the Directors decision to issue the Certificate of Necessary Consequence is final and may not be challenged or reviewed in any court or tribunal except at the instance of the company concerned, and any act or omission made in matters covered by a Certificate of Necessary Consequence “do not constitute an offence, wholly or partly a civil cause of action, whether in torts or otherwise, and certainly are not unlawful”

***New section 89D- Director May Issue a Certificate of Compliance***

The new Section 87D of the Act vests in the Director, the absolute power which is made final and not subject to review, to issue a Certificate of Compliance to a company carrying on a mining or petroleum extraction activity. This certificate declares and makes lawful subsequently any activity or work done or omission made that was or is in breach of a Environmental Permit. The Certificate of Compliance, under Subsection (2) of Section 87D, has the effect that any act, work or activity not conducted in compliance with a Permit, and that the carrying out of any act, work or activity “does not constitute a civil cause of action, whether in torts or otherwise, or an offence and is not unlawful”.

The Director is further empowered to:

- (a) decide finally and without further appeal or review that conditions in an Environmental Permit have been fulfilled; and
- (b) extinguish the right of any person to maintain a claim for injury caused by an act, work or activity; and
- (c) determine that an act, etc., that may otherwise be an offence is not an offence;

A Certificate of Compliance issued “is conclusive evidence that an act, work or activity was conducted has been conducted in compliance with” an Environmental Permit (or other Authorization Instrument) “and no action may be brought or maintained in relation to that conduct”.



## Potential implications of new sections 87A to 87D

- There is a non-challengeable discretion bestowed upon a single officer, which is dangerous as it gives rise to absolute power, which can be subject to abuse.
- The fact that affected parties including landowners cannot seek review or challenge the decision of the Director in a court of law or tribunal amounts to the stripping of common law rights as well as customary rights to seek protection of the law or compensation for harm done.
- Parliament and state agencies have a duty imposed by section 25 (2) of the Constitution to uphold the National Goals and Directive Principles, in this case, Goal 4, which calls for protection and conservation of the environment.
- There is no opportunity given to an aggrieved party to be involved or consulted. Any harm or loss arising out of the exempted activities relieves permit holders of all forms of liability.

Who can therefore be held responsible for any act or omission, giving rise to the loss or harm?

### Conclusion:

Environmental Permit issued under Part V of the *Environment Act 2000* is subject to compliance with detailed requirements set out therein (including the specific obligation to submit an environmental impact assessment and all steps associated with this, e.g.. those required by Section 51, public review under Section 55, its proper assessment by the Director under Section 54 and 56 and subsequent consideration by the Council under Section 58).

The latest changes:

- make all these process of checks and balance under the *Environment Act 2000* irrelevant.
- the provisions of the Act empowering a single person (the Director) absolute and unfettered discretion, by administrative act, to authorize various activities that would otherwise be unlawful and illegal, issue various certificates and issue edicts by declaration; all of which have the effect of protecting a mining company from civil liability for otherwise unlawful conduct resulting in injury is inconsistent and is



in breach of the landowners' rights under Section 53 of the *Constitution* in that –

- the rights affected by the Act are not done for a public purpose;
  - the reason(s) for empowering the Director to extinguish the landowners rights is/are not reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind;
  - opportunity for just compensation within the meaning of Subsection (2) of Section 53 are liable to be extinguished by the administrative decision of a single official – the Director;
- the provisions of the Act empowering a single official (the Director) absolute discretion, by administrative act, to authorize various activities that would otherwise be unlawful and illegal, issue various certificates and issue edicts by declaration, all of which are prohibited from being challenged in any Court or tribunal including abolishing civil actions in tort or otherwise for resulting damage will have the consequence of preventing the landowners from enforcing their constitutional rights including protection of customary rights over rivers, the sea, etc.;
  - the extinction of landowner right to make claim, file suit and make claim for compensation in any Court in the National Judicial System is a breach of their right to compensation under Section 58 of the *Constitution* in that, by providing that authorizations, declarations and issuing of certificates is final and may not be challenged or reviewed in any court or that no civil cause of action (whether in tort or otherwise) can be maintained with respect to matters covered by such administrative decision of a single official, impinge on the right to compensation where their customary rights are damaged causing them loss.

End...



## BRIEFING PAPER

# ENVIRONMENT (AMENDMENT) ACT 2010

