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PBO No. 930003292
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LRC
Legal Resources Centre

Your Ref: bill 15B of 2013
Our Ref: WW/HS

The Honourable Speaker of the National Assembly
Honourable Baleka Mbete
National Assembly
Parliament
Parliament Street
Cape Town
Per fax: 021 461 9462
Per email: speaker@parliament.gov.za

And to:
The Honourable Chairperson of the National Council of Provinces
Honourable T R Modise
Per fax: 021 461 9640
Per email: ljiyane@parliament.gov.za

Copy to:
The Honourable Chair
Committee on Mineral Resources
Honourable S Luzipho
Per address: Liezel Webb
lwebb@parliament.gov.za

17 February 2015

Dear Madams

Referral in terms of s79 of the Mining and Petroleum Resources Development Amendment Bill 15B of 2013

1. We refer to the statement released by the Presidency dated 23 January 2015 which announced that President Zuma has sent back the "Mining [sic] and Petroleum Resources Development Amendment Bill (MPRDAB) to the National Assembly for reconsideration in terms of section 79(1) of the Constitution".

2. The Legal Resources Centre is a non-profit public interest law firm. We write to you on behalf of a coalition of civil society, labour and community organisations[1] ('the

[1] Members include Mining Affected Communities United in Action (MACUA); Women Affected by Mining United in Action (WAMUA); Mining and Environmental Justice Community Network (MEJCON-SA); Vaal Environmental Justice Alliance (VEJA); Govan Mbeki Joint Communities; ActionAid South Africa; Benchmarks Foundation (BMF); GroundWorks; NUMSA; Oxfam; Federation for a Sustainable

Coalition') concerned with public participation in the legislative passage of this bill and a number of whom had made submissions on the bill to your select committee. The LRC in its own name also made submissions.

3. On 19 March 2014, the LRC addressed a letter on behalf of some of the rural communities who are members of the Coalition to the Chairperson of the Select Committee on Economic Development responsible for the bill indicating the communities' concerns with the process. On 25 March 2014, a letter in a similar vein was addressed to the Chairperson of the National Council of Provinces (NCOP).

4. On 2 April 2014, the LRC wrote on behalf of members of the Coalition to President Zuma to request him to use his powers under section 79 to refer the bill back to parliament because of the failure of the NCOP and the provincial legislatures to facilitate public involvement when passing the bill. The letter also raised the substantive concerns of the Coalition members with the bill. All three letters are attached for your ease of reference.

5. The President has now indeed used his powers in terms of the Constitution to send the bill back on the grounds of both procedural and substantive constitutional flaws. In the meantime, however, the Minister of Mineral Resources, the person responsible for the bill in terms of the Joint Rules of Parliament, has publicly voiced his intention to divide the current version of the Minerals and Petroleum Resources Development Act into separate pieces of legislation regulating the industries of oil and gas on the one hand and minerals on the other.[2]

6. In the circumstances, the Coalition wishes to point out that:
    a. These proposals by the Minister cannot be dealt with in the referral process. The Assembly is bound, in terms of Rule 203,[3] to limit its enquiry to the specific deficiencies raised by the President. It couldn't accommodate the proposals of the Minister.
    b. On the other hand, the referral considered the *entire process* of public participation of the NCOP and the provincial legislatures as deficient.[4] In order to correct these unconstitutional procedures, both the NCOP and the legislatures will have to embark on public participation into the *entire* amendment bill and not just the areas of deficiencies – otherwise the public will be prejudiced.

Environment (FSE). Legal Advisors: Centre for Applied Legal Studies (CALS); Lawyers for Human Rights; Centre for Environmental Rights (CER).

[2] 'Ramatlhodi wants 'urgent' certainty in laws governing mineral resources' Bday Live 2 February 2015.

[3] Joint Rules of Parliament.

[4] The referral states: "The NCOP and the Provincial Legislature did not sufficiently facilitate public participation when passing the Amendment Act as required by Section 72 and 118 of the Constitution in that the consultation period was highly compressed and there appears to have been insufficient notice of the public hearings held by the provincial legislatures".

c. Assuming that those consultations will be meaningful, there is a high likelihood that the NCOP will propose amendments to the bill that go beyond the points of referral of President Zuma. These amendments could in turn not be considered by the Assembly which is bound by the President's referral and the legislature will thus be in a deadlock.

7. For these reasons, the Coalition concludes that **the only reasonable option available to the Assembly, both legally and practically, is to exercise its powers in terms of Rule 208 to reject the bill and start the process afresh.**

8. Should the Assembly decide to attempt to cure the procedural and substantive defects of the bill and pursue a narrow referral route, it will have to enquire into:

   a. The nature and content of the Codes of Good Practice for the South African Minerals Industry, the Housing and Living Condition Standards for the Minerals Industry and the Amended Broad-Based Socio-Economic Empowerment Charter to establish the appropriate status of these documents under the MPRDA and the legislative procedure for their adoption;
   b. The lack of public participation in the NCOP and the provincial legislatures; and
   c. The impact of the MPRDAB on living customary law, in particular the principle of consent and the definition of community, and
   d. The consistency of the bill with South Africa's international trade obligations.

9. The Coalition is of the view that in particular the first and third areas of concern require further meaningful consultation from the National Assembly before reaching a decision. This, the Coalition suggests, would include public hearings on the nature, content and statutory status of the cited Codes and Standards.

10. With regards to the concerns raised about the impact of the bill on living customary law, the Coalition supports this objection from the President. However, it is incorrect to limit consultation on the issue of living customary law to the House of Traditional Leaders. In fact, it is not in line with the Constitution to do so. The Constitutional Court has found definitively that the content of living customary law must be sought in the past and the present practices of the people who live the law – the community – and that they have the constitutional right to change those laws.[5] Traditional leaders are a part of that system of law, but it cannot speak on its behalf. In order to satisfy the President's concern about the impact of the MPRDAB on living customary law, the Assembly must allow the participation of customary communities affected by mining.

11. With regards to the Assembly, the NCOP and the provincial legislatures' duty to ensure that their public participation processes pass constitutional muster, the Constitutional

[5] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 44-48

Court has found that the test for the constitutionality of public participation by the legislature is whether the process is *reasonable.*[6]

12. The nature and importance of the bill in question and the intensity of its impact on the affected communities – in this case mining communities - raises the bar of what is required of the legislature[7] in ensuring that the process is indeed reasonable:

    a. it requires of the legislature to ensure that those most severely affected by the bill has an *effective opportunity* to impact upon the contents of the proposed legislation. This entails two separate duties: to "duty to provide meaningful opportunities for public participation" and "to take measures to ensure that people have the ability to take advantage of the opportunities provided".[8] These findings speak directly to those who had "been denied the right to influence those who ruled over them".
    b. in the circumstances and in order to act reasonably, the NCOP and provincial legislatures will have at a minimum to ensure that all affected communities, including the far-flung and under-resourced ones, are able to attend and give meaningful input at the hearings;[9]
    c. the peculiar timing of any proposed further hearings by the NCOP or the provincial legislatures – that is, after the bill has already been passed by the Council once before – may not prejudice the impact of these hearings. The Constitutional Court has held that[10]

    Legislatures must facilitate participation at a point in the legislative process where involvement by interested members of the public would be meaningful. It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made.

    d. moreover, the Constitutional Court has held that the purpose of public participation includes the strengthening of "the legitimacy of legislation in the eyes of the people [...] because of its open and public character it acts as a counterweight to secret lobbying and influence peddling".[11] In the letter dated 19 March 2014 to the Chairperson of the Select Committee, communities raised their concerns with how it came about that the bill as introduced in parliament was changed by the Portfolio Committee to their detriment. The communities point out that no-one asked for these changes at the public hearings. They also pointed out that they were startled by the announcement

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[6] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 126
[7] Ibid at para 128.
[8] Ibid at para 129.
[9] The Constitutional Court emphasizes that there is a duty upon the legislature to *"take steps"* to ensure that the public can effectively participate. Ibid at para 120.
[10] Ibid at para 171.
[11] Ibid at para 115

of one of the major mining houses on the fourth day of the public hearings, that they "acknowledge the constructive engagements that the Chamber and DMR has had in recent days to address the concerns" with the bill. This was done outside of and with no regard for parliament and its processes. It amounted to precisely the kind of 'lobbying and influence peddling' that public hearings should neutralise.

13. Finally, the Coalition must anticipate the possibility of the referral process, on the one hand, and the Minister's effort at splitting the legislation into two on the other, running parallel. In other words, it is possible that the intention is for the referral process to run its course while the Department continues to embark on an entirely new amendment route in a parallel process, drafting a new bill. If this is the case, the Coalition stresses in the strongest terms that simultaneous development of legislation on two fronts may in no way result in the detraction of public participation in either Parliament's or the Department's process.

14. In fact, the Department's questionable record in ensuring the participation of affected mining communities has been commented on by the Portfolio Committee themselves. In October last year, the Committee instructed the Department to ensure that its processes "resonate[s] with the realities of communities in the minerals sector. The Department needs to be more effective in reaching out to all affected parties as it formulates and implements minerals policy".[12]

15. In the circumstances, the Coalition demands that:
    a. The Assembly rejects the bill in terms of Rule 208(1); alternatively
    b. That the NCOP and the provincial legislatures, when the bill is referred to them, embark upon a public participation process that ensures that sufficient steps be taken to ensure that affected mining communities have an effective opportunity to participate in the process of public consultation. This would include, at a minimum, the translation and timely dissemination of the bill; provision of sufficient resources to affected communities to attend hearings; sufficient time for input; and creating an environment at the hearings that is conducive to the effective participation of communities, some of whom may be engaging in the process for the first time; alternatively
    c. If the referral and departmental processes continue to run in parallel, both processes abide by the highest standards of public participation; and
    d. That the Speaker responds to this letter within 10 days of receipt indicating the position of the Assembly on the matter.

We look forward to hearing from you within 10 days of receipt of this letter.

Yours sincerely

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[12] Mineral Resources Budget Review and Recommendations Report 24 October 2014. Available at www.pmg.co.za.

LEGAL RESOURCES CENTRE
Per:

HENK SMITH AND WILMIEN WICOMB

LRC

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Your Ref:
Our Ref:

19 March 2014

The Chairperson Mr F Adams
Select Committee on Economic Development
National Council of Provinces, Parliament

By e-mail: fadams@parliament.gov.za; swalaza@parliament.gov.za

Att: Ms S Walaza

Dear Sir/Madam

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL 15B-2013

1 The Legal Resources Centre is an independent non-profit public interest law firm and we represent a number of rural communities whose communal land is being mined by mining companies with new order mining rights issued in terms of the Minerals and Petroleum Resources Development Act (MPRDA). We made submissions to the Department of Mineral Resources (DMR) on the draft bill that was published by the Minister in December 2012, to the Portfolio Committee of the National Assembly[1] and we addressed the Portfolio Committee on the Bill as it was introduced in Parliament.[2]

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1 http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013%2009%2006%20MPRDB[smallpdf.com].pdf
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013_11_04_pc_mineral_resources.pdf
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013_02_08_andreas.pdf
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013_02_08_mprd_bill_2012.pdf

2 http://www.pmg.org.za/report/20130918-mineral-and-petroleum-resources-development-amendment-bill-b15-2013-public-hearings-day-4

2 We are concerned that the Bill as amended by the Portfolio Committee and now being considered by your committee, is leaving communities worse off. We say this for the following reasons:

a) the Bill removes the possibility that communities can participate in mining. We ask that you leave section 23(2A) as it is;
b) the B version of the Bill removes the clause which would have allowed the Minister to require a mining company to address social and economic needs and challenges facing a community. We ask that you bring back the clause and section 23(2)(b) that was in Bill 15 -2013 as approved by Cabinet and introduced in Parliament; and
c) the B version of the Bill gives an applicant mining company and the regional manager of the DMR the discretion to decide whether there must be a simultaneous application for a water use license under the National Water Act. We ask that you leave the Bill as it was approved by the Cabinet and introduced into Parliament.

Background:

3 section 23(2A) :the subsection in the Act as it stands reads as follows: "(2A) If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community." The Bill will remove ~~"including conditions requiring the participation of the community."~~ This means that communities no longer have the possibility of becoming shareholders in mining companies on their own land.

4 section 23(2)(b): this is a new clause proposed by the bill as introduced but the B version of the bill drops the clause. It reads: "(b) after taking into consideration the socio-economic challenges or needs of a particular area or community, direct the holder of a mining right to address those challenges or needs."

5. water use licences "where necessary": bill 15B inserts "where necessary" in 16 (sixteen) places in the act. It means that parallel applications for water use licences become discretionary according to the views of the DMR or the mining company. The authority of the Department of Water Affairs is undermined.

The answer and our proposal:

6 section 23(2A): delete clause 18(d) of Bill 15B

7 section 23(2)(b): retain clause 18(c) as it was in Bill 15

8 "where necessary": remove the offending words where it appears in Bill 15B [in the 16 (sixteen) places relating to sections 16, 17, 18, 22, 23, 24, 27, 75, 80, 83 and 84] and retain the relevant wording as it was in Bill 15.

How did this happen?

9 We do not know for certain how it happened that Bill 15 as introduced in Parliament was changed by the Portfolio Committee to the detriment of communities. The changes were not asked for by communities at the public hearings. The changes were not asked for or motivated by the Portfolio Committee. The DMR responded to the inputs at the public hearings on 23 October 2013 and on that occasion no mention was made of changes to section 23(2)(b) or making water use licences discretionary.

10 Instead, on 29 October 2013 the DMR produced a highlighted version of the bill with these proposed changes... apparently at its own initiative. We wonder whether it has something to do with the startling announcement made by one of the major industry players on day 4 of the public hearings the previous month. The company announced, on its power point presentation, that "BHP Billiton Energy Coal SA (BECSA) acknowledges the constructive engagements that the Chamber and DMR has had in recent days to address concerns with the Amendment Bill." This is our problem. The changes to the detriment of communities were made by DMR and the Chamber of Mines outside of Parliament and without regard to Parliament. Perhaps the announcement of the Chamber of Mines last week that it supports the MPRDA Amendment Bill (Bill 15B) must be seen in this light.[3]

The inferred arguments of the DMR:

11 If the DMR believes that:

a) Water use licences (WULs) are not necessary if the mine gets water from a municipality's waste plant, and a WUL is only necessary if groundwater is going to be used;

b) Section 23(2)(b) is superfluous because community benefit or redress for suffering from mining will be covered by social and labour plans,

we say this:

a) as far as WULs are concerned, it is not for the applicant or the regional manager to decide on the need for an application. The Department of Water Affairs should consider all applications and the

[3] http://www.bullion.org.za/content/?pid=88&pagename=Media+Releases?pid=9&pagename=Media+Room

need for applications cannot be screened by another department. In any event, WULs are necessary for extraction from both rivers and the ground and any interference with a watercourse. The provision is internally contradictory. If legislation requires a WUL then applications must of necessity be made for such licences. The necessity for an application has already been determined. The insertion of the words "where necessary" creates confusion as to the legislative intent, and it is in conflict with the requirements of regulatory certainty and rule of law contained in Section 1(c) of the Constitution;

b) with regard to community benefit and redress, we record once again that the record speaks for itself Parliament accepted that Social and Labour Plan mitigation measures have not worked. The Portfolio Committee itself said as much in its report on the hearings concerning the Mining Charter tabled before it on 5 June 2013:

> *"When we conduct oversights, we come back depressed. Because before you enter into a mine, you walk through a sea of poverty. ... In our own experience these Social and Labour Plans are indeed not implemented...Mining communities lament that here, within our area we extract the wealth of the country but there is no drop that comes back to us as the mining community."*

The changes are counter to the policy statements of Cabinet Ministers

12 At the Mining Indaba at the beginning of last year the Minister undertook to address the legacy of the 1913 Land Act and the community conditions that lead to the Marikana tragedy. She said that this was the context for reviewing the MPRDA:

> *This year also marks a hundred years since the enactment of the Native Land Act, which created a system of land tenure that deprived the majority of South Africans of the right to own land, and eventually compelled Africans who had lost their land to join the mining industry as migrant labourers... It is the remnants of this historical legacy of the migrant labour system, poor housing and living conditions, high levels of illiteracy, and low skills level that inevitably contributed to Marikana.*[4]

13 We do not believe that reversing the above changes now brought in by Bill 15B will be enough to begin to address the plight of mining communities. We have said in our submission that the principle of community consent for new mining, is in line with:

[4] http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=34052&tid=97820

a) the action plan of the African Mining Vision [January 2012][5], and
b) the State Land Disposal policy of the Minister of Rural Development [July 2013] requiring Interim Protection of Informal Land Rights Act, 1996 procedures and a 20% community share before any mining happens on communal land,

both of which require community consent before new mining can happen on communal land, could begin to recognise the transformation challenges facing mining and rural development in our country.[6]

14 But to remove the little provided for in Bill 15 as introduced, at the instance of the DMR and the Chamber of Mines, and without real and meaningful public involvement for such changes on WULs and socio-economic needs of communities, is not justifiable. We ask you to do the right thing and to vote for the reversal of these anti community changes, in the terms as we set out in paragraphs 6 – 8 above.

Your faithfully,

LEGAL RESOURCES CENTRE
Per:

_____signed HJ Smith_____

[5] "Develop instruments to domesticate the Protocol of Free Prior Informed Consent with respect to communities affected by mining" "Develop programmes to strengthen the capacity of local governments, communities, CSOs and mining companies to make informed decisions on mining projects" p. 25
http://www.africaminingvision.org/amv_resources/AMV/Action%20Plan%20Final%20Version%20Jan%202012.pdf

[6] our submission to the DMR and the Portfolio Committee motivated for and included specific wording for amendments dealing with community consent, reparation for historic mining on communal land, promotion of artisanal mining on communal land in certain circumstances and stamping out dangerous illegal mining with enforceable statutory measures.

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Your Ref:
Our Ref:

25 March 2014

The Chairperson
The Honourable Mr Mninwa Johannes Mahlangu MP
National Council of Provinces
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Fax number: (021) 403-8219

The Chairperson
The Honourable Mr F Adams MP
Select Committee on Economic Development
National Council of Provinces, Parliament
By e-mail: fadams@parliament.gov.za; swalaza@parliament.gov.za

Dear Sirs

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL 15B-2013

1 The Legal Resources Centre is an independent non-profit public interest law firm and we represent a number of rural communities whose communal land is being mined by mining companies with new order mining rights issued in terms of the Minerals and Petroleum Resources Development Act (MPRDA). We refer to our written submission on 19 March 2013 to the Select Committee (attached for ease of reference), the committee's consideration today of the negotiating mandates filed by seven Provincial Legislatures (listed in the schedule below and annexed for ease of reference) and our conversation with you, Mr Adams, earlier today.

2 With reference to section 72 of the Constitution we request to be heard by the Select Committee on our written submission and this letter. We say this for the following reasons:

a) Bill 15B as amended by the Portfolio Committee of the National Assembly includes new amendments to the Bill as introduced in the National Assembly which amendments were not motivated for in or considered by the Portfolio Committee, and there was no public involvement in respect of such amendments. The aforesaid amendments are set out in our written submission.

b) The amendments are to the detriment of communities whose communal land is being mined and who receive no reparation or benefit for their loss of rights. The Select Committee and the NCOP must hear and consider their plight as impacted upon by the said amendments.

c) A number of the negotiating mandates filed by the Provincial Legislatures contain recommendations for amendments to Bill 15B. Five of the seven recommendations for amendments call for the retention of section 23(2A) which empowers the minister to set conditions for community participation in mining. This illustrates that it is a matter of concern for the legislatures and the public.

d) At the meeting of the Select Committee today the responses of representatives of the State Law Advisor's office and the Department of Mineral Resources were demonstrably inaccurate and/or inadequate.

e) A hearing can clarify the above and put the Select Committee in a position to fulfill its constitutional mandate.

3 Further to our statement in 2(d) above:

a) The representative of the State Law Advisor's office stated that the deletion of the empowering provision (that the minister may set conditions for community participation) can be cured by the consultation requirements elsewhere in the act and by way of regulations. We submit that he missed the point and that subordinate legislation cannot regulate subject matter without a commensurate empowering statutory provision.

b) The representative of the DMR explained that communities are covered by the Empowerment Charter for the South African Mining and Minerals Industry provided for in section 100 of the Act. In the Charter's latest Amended Broad Based Socio-Economic version mining companies are required to structure BEE shareholding in three tiers which may include "community". But the charter guidelines cannot act as a substitute for the statutory ministerial power to set pre- conditions for a mining right and conditions for community participation in mining which may include shareholding and a range of other participation activities.

c) No explanation or no consistent explanation was given for the removal of the minister's power to set conditions requiring community participation in mining which go beyond protection and promotion of rights and interests.

4 We record that we do not concede that sections 59 and 118 had been or is being complied with by the respective legislative institutions.

5 We look forward to hearing from you regarding our urgent request to address the Select Committee and answer questions relating to our written summarised submissions.

Your faithfully,

LEGAL RESOURCES CENTRE
Per:

_____signed HJ Smith_____

Annexures:
1 our submission of 19 March 2014
2 the seven negotiating mandates of the provincial legislatures

schedule: list of provincial mandates

		23(2)(b)	23(2A) Conditions to participate in mining	WULs Where necessary	Interested party Section 16	hearing
1	Mpumalanga	retain	Retain			
2	Northern Cape					19/3
3	North West	Retain	retain	Remove	Retain	
4	Free State		retain			
5	Gauteng		retain		Retain	20/3
6	Western Cape					
7	Eastern Cape	retain	retain	Remove		
8	Kwa Zulu Natal					
9	Limpopo					

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Your Ref:

Our Ref: HS

THE PRESIDENCY
2014 -04- 03
PRIVATE BAG X1000
CAPE TOWN 8000

2 April 2014

The President
The Honourable Zuma

Office of the President
Tuynhuis
Parliament
Cape Town

Dear President

RE: MINERALS AND PETROLEUM RESOURCES AMENDMENT BILL B15B-2013 RESTITUTION OF LAND RIGHTS AMENDMENT BILL B35B-2013

1 We write to you on behalf of our clients, MACUA (Mining Affected Communities United in Action), LAMOSA (Land Access Movement of South Africa) and ARD (Association for Rural Development) about the constitutionality of the bills, the Minerals and Petroleum Resources Amendment Bill B15B-2013 ("**MPRDA Bill**") and the Restitution of Land Rights Amendment Bill B35B-2013 ("**Restitution Bill**").

2 Our clients request that you refer the bills back to Parliament in terms of your powers under section 79(1) and (3) of the Constitution because the National Council of Provinces and the Provincial Legislatures failed to take reasonable steps to facilitate public involvement when passing the bills. As a result, they failed to comply with their duties under ss 72 and 118 of the Constitution.

3 As a result of the rushed manner in which both the bills were processed, the provincial legislatures and the NCOP had insufficient time to organise and hold public hearings on the bills. This happened despite the NCOP having been requested to call public hearings on the bills (and amendments to bill 15 and bill 35 by the National Assembly). The bills impact directly on our clients, their member community organisations and rural communities generally. The MPRDA bill restricts community participation in mining, and eliminates the requirement that socio economic conditions of host communities be addressed and the requirement for public participation in the granting of prospecting rights, while the Restitution Bill re-opens restitution claims without adequate protection for those who have

already lodged their claims. The NCOP's failure to consider or comply with the provisions of section 72, denied them the opportunity to meaningfully participate in the legislative process.

Our clients and their participation in the legislative process of the bills:

1. Our clients are involved and have long been involved in representing poor rural communities in law reform by the Legislature and representations to the executive.

2. MACUA (Mining Affected Communities United in Action) was formed in 2012 following a dialogue among mining affected communities from eight provinces. It aims to present the voice of communities who have not been consulted in the process of allocating mining rights, do not receive benefits from mining on their own land and who bear the brunt of the health and environmental degradation and impact of mining.

3. The Land Access Movement of South Africa (LAMOSA) is an independent community based organisation advocating for land and agrarian rights, and substantive democracy. LAMOSA was formed by 48 dispossessed communities in 1991. In 1991 most of the LAMOSA affiliates who were forcefully removed from their ancestral lands returned to their lands in defiance. Now LAMOSA works with government and civil society organisations to support community development and land reform in four provinces.

4. The Alliance for Rural Democracy and its member organisations have been at the forefront of supporting rural communities and rural women in making representation to Parliament about, for example, the Traditional Courts Bill ("TCB") of 2008, later reintroduced in 2012. Our clients made submissions relating to the TCB's constitutionality, legality and potential impact on human rights and community agency. The TCB lapsed when the Fourth Parliament did not reinstate it this year.

5. Our clients participate in the legislative processes of our Parliament in a constructive manner, supporting new laws and provisions that promote the social and economic rights of rural communities, and engaging in a constructive manner on legislative matter that would undermine the rights and interests of communities. In addition our clients attempt where possible to support members of rural communities to themselves attend at the legislatures to participate in proceedings.

6. Our clients or their member organisations, and we on behalf of our clients, made written inputs to the National Assembly, the NCOP and the provincial legislatures with regard to both the MPRDA Bill and the Restitution Bill. We and a number of the member organisations of our clients participated in the public hearings of the Portfolio Committees of the National Assembly and the relevant committees of the

provincial legislatures where possible. The deliberations of the NCOP Portfolio Committees were also attended.

7. Our clients hold the view that both bills, as they were introduced and amended,
   (a) undermine the socio economic position of many rural communities; and
   (b) fail to promote the rights and interests of rural communities.

   The substantive merits or limitations of the bills is not the subject matter of this submission.

8. We requested the NCOP and the relevant select committees to consider and hold hearings in terms of section 72. The requests were denied and the bills were passed by the NCOP in plenary on 27 March 2013.

9. The bills were and remain of intense public interest and have far-reaching consequences for rural communities in respect of matters that are of substantial concern to them.

The process in the NCOP

<u>The MPRDA Bill</u>

10. The MPRDA Bill was on the agenda of the Select Committee on Economic Development of the NCOP on two occasions: 25 March 2013 on negotiating mandates and on 26 March for final mandates and adoption. The committee did not have a briefing session with the department beforehand. The committee did not consider holding public hearings on the MPRDA, and it did nothing else to involve public involvement in the legislative process.

11. With regard to public hearings held by the provincial legislatures, our instructions are that the Northwest Province Legislature held a public hearing on 24 March at the Madibeng Town Hall. The negotiating mandate report of the Northern Cape states that it held a hearing on 19 March. The Gauteng Economic Development Portfolio Committee reported that on 20 March its committee invited written comment from the public through the media. It deliberated on its negotiating mandate on 25 March. The Western Cape reported that "provinces had four working days to attempt to engage with the public in order to formulate negotiating mandates" and that "it is not possible for the Province to fulfill its constitutional duty to facilitate public involvement..."

12. On 25 March the committee considered the seven negotiating mandates received from the provincial legislatures. At least two provinces formally expressed concern about the timeframe to consider the Bill.

13. On 25 March 2013 after seeing the negotiating mandates we wrote to the NCOP Chair and the Select Committee Chairperson requesting that in terms of section 72 a public hearing be held to address concerns.

14. On 26 March, in the afternoon, the committee considered the final mandates before it. Limpopo Legislature's final mandate form reflects that it "was very much concerned with the fast tracking of the Bill" and recommended that the bill "be deferred to the Fifth Parliament." Nonetheless, it instructed its permanent delegates in the NCOP to vote in favour of the bill. North West instructed its delegates to vote in favour with proposed amendments.

15. On 27 March 2013 the NCOP adopted the MPRDA Bill.

The Restitution Bill

16. The Restitution Bill was on the agenda of the NCOP's Select Committee on Land and Environmental Affairs on three occasions: 28 February 2013 when the committee was briefed by the Land Claims Commission, 18 March when it considered the negotiating mandates and 25 March when it dealt with the final mandates. The committee did not consider holding public hearings on the Restitution Bill, and it did nothing else to involve public involvement in the legislative process.

17. The commission in its presentation to the select committee on 28 February emphasised the broad reach of the public consultation process by the department on the draft bill and the portfolio committee on the Bill. WE wrote a letter to the chairperson of the Select Committee on 6 March 2014 where we pointed out that the select committee itself and the provincial legislatures are required to independently consider their obligation to facilitate public involvement in their legislative processes under section 72 and section 118 of the constitution. We contended that public hearings on the Restitution Bill were appropriate for the following reasons:

    (a) The version of the Bill differed in material from the draft bill and Bill 35 that were the subject of earlier rounds of consultation;

    (b) The portfolio committee in its report on the public hearings concluded that it faced three options regarding the treatment of prior claims in relation to later claims namely, a) ring-fencing, b) prioritisation of prior claims or c) leaving the issue open. The amendment to section 6(1) and the insertion of sub-clause (g) fails to effectively prioritise or ring-fence. The select committee and provincial legislatures should therefore, with public input, consider the merits of clear and unambiguous statutory ring-fencing of prior claims;

(c) The fact that the legislative timeframe of the select committee and the provincial legislatures is truncated due to the imminent rise of the fourth parliament, should not have stood in the way of public hearings.

18. On 18 March at the time of the consideration of the negotiating mandates, the Parliamentary Legal Advisor stated that the public hearings by the provincial legislatures may be relevant to the NCOP when it considered its own role in facilitating public participation. However the select committee itself failed to consider or decide on the facilitation of public involvement as required in terms of section 72 despite it having received written inputs with regard to the Restitution Bill and the legislative process followed in respect of it.

19. The NCOP and the Select Committees did not invite submissions, oral or written, from the public nor did they hold any public hearings in respect of either the MPRDA Bill or the Restitution Bill. Nor was there any considered discussion by the Select Committee in terms of section 72(1)(a) about whether public participation was appropriate in the circumstances.

20. The only input received by the Select Committees were:

(a) a briefing by the Land Claims Commission in the case of the Restitution Bill; and

(b) a single contribution in the negotiating mandate meeting by the Department of Mineral Resources.

21. Without suggesting that this would in any way have been adequate, the meetings of the Select Committees reflect no attempt to place before them or to discuss or debate either the written or the oral submissions made to the Portfolio Committees or the content of any of those Committees' deliberations. All that was provided was a very brief summary of the preceding consultation processes in the presentation by the Commission in relation to the Restitution Bill on 28 February 2014.

22. The legislative timetable in the NCOP was about 2 weeks in the case of the MPRDA Bill. The Bill was adopted by the Portfolio Committee on Mining of the National Assembly on 6 March 2014. Reportedly, the Bill was referred to the provinces on 14 March, and negotiating mandates were required by 20 March.

23. In respect of the Restitution Bill the time available was about 6 weeks. The Bill was adopted by the Portfolio Committee on Rural Development and Land Reform on 5 February 2014.

24. By contrast the National Assembly dealt with the bills over periods of months. The Portfolio Committee was briefed on Bill 35 on 15 October 2013. Bill 15 was presented to the Portfolio Committee on Mining on 30 July 2013.

25. The draft Minerals and Petroleum Resources Amendment Bill was published by the Minister of Mineral Resources for public comment on 23 December 2012. The draft restitution amendment bill was published for comment by the department on 23 May 2013. We submit that the executive and Parliament had adequate time to ensure that each of the legislatures had adequate time for public participation and hearings by each legislature.

The importance of public participation

26. In *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) the Constitutional Court held that legislation that was passed without reasonable efforts to facilitate public involvement in the legislative process was invalid. Ours is not a purely representative democracy, but a fusion of representative, participatory and deliberative democracy. Participation is not a detraction from the democratic process, but an essential element of it. In the Court's words:

> *"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, ... It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."* (para 115)

27. The Court stressed that there must be public involvement before both the National Assembly and the National Council of Provinces. In some instances the NCOP could fulfil its duty by relying on public participation in the provincial legislatures.

28. The Constitutional Court held that the NCOP and/or the provincial legislatures must act reasonably and must *"provide meaningful opportunities for public participation in the law-making process."* What is reasonable will depend on the nature of the legislation at issue and the intensity of its impact on the public.

29. Vitally, the Court held that legislative timetables are not an excuse for truncating the process of participation. It wrote: *"When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted.*

Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable." (para 194) The desire to pass the Bills before the end of the Fourth Parliament is not a reason for reducing the degree of public participation.

30. The process followed with regard to both bills fell far short of the standard set in *Doctors for Life*. The steps taken in the NCOP and the provincial legislatures failed to afford people a meaningful opportunity to participate in the legislative process. The timetable made adequate participation impossible.

31. Accordingly, both bills were unconstitutionally passed.

32. Please let us know when you will refer the Bills back to the National Assembly for it to deal, with the participation of the Council as required in terms of section 79(3)(b), with the Council's non-compliance with the provisions of section 72(1)(a). Please note that we do not necessarily concede that there was compliance with the provisions of ss 59(1)(a) and 118(1)(a).

We look forward to hearing from you.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:

Pp **HENK SMITH**

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