CALS
Centre for Applied Legal Studies

Preliminary, draft comments by the Centre for Applied Legal Studies on:

The Mineral and Petroleum Resources Development Amendment Bill as introduced in the National Assembly and published in the Government Gazette No. 36523 of 31 May 2013

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Introduction

1. The Centre for Applied Legal Studies (CALS) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALS' vision is a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice.

2. CALS' mission is:
   2.1. to challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations;
   2.2. to provide professional legal representation to victims and survivors of human rights abuses;
   2.3. to actualise a politically, socially and economically just society;
   2.4. through a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable; and
   2.5. to act with courage against impunity for non-compliance with human rights standards.

3. CALS operates across a range of areas of human rights including environmental justice. Our Environment Programme focuses on issues such as public participation in environmental decision-making processes, local economic development, governance issues and the role of the private sector, particularly in the mining industry. Due to this focus on governance of the mining industry, CALS welcomes the opportunity to provide comments on the Mineral and Petroleum Resources Development Amendment Bill of 2013 (the Bill).

The approach of the Bill to historical redress and distributive issues

4. There are four key participants in the mining industry, each indispensible to the process. Firstly, there is government which is the custodian of mineral resources, which has the power to issue or refuse licenses and ensures mining activities are conducted in accordance with the law. Secondly, there are the mining companies that conduct the exploration, prospecting and extraction of the minerals. Thirdly, there are the investors that provide the necessary financing for operations that involve extensive capital outlay before the proceeds of minerals are realised. Fourthly, there are the labourers who conduct the physical work of mining, often at great risk to their lives, health and well-being. In addition to the direct participants, there are the communities residing in close proximity to the mining operations and who are exposed directly to the environmental and social impacts brought by the arrival of mines. Fairness would dictate that all essential participants and core stakeholders enjoy the benefits of an activity that generates immense wealth. However the benefits of the South African mining industry, and the broader economy of which a core part is mining, have always preponderantly flowed to government, mining companies and investors to the exclusion of mine workers and communities who have had to endure cramped living quarters, poor service delivery and mining related ailments. Any reforms to the law regulating the mining industry must address this disparity in order to advance the Constitutional vision of a "society based on democratic values, social justice and fundamental human rights."[1]

8. A central object of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) - the piece of legislation which stands to be amended by the Bill - is to transform the minerals sector, control and ownership of which has historically been concentrated in the hands of the white elite. The MPRDA pursues this goal principally through, among other things, decoupling mineral rights from land ownership and appointing the State as custodian of South Africa's mineral resources. The Department of Mineral resources (DMR) now exercises the power to issue all mineral licenses and can thus ensure that mining rights are no longer concentrated in the hands of the white minority.

9. Rather, the MPRDA actively seeks to increase the access of historically disadvantaged individuals to mineral resources. Provisions along these lines include the requirement that preference be given to applications by previously disadvantaged individuals, or companies with ownership by previously disadvantaged individuals, where more than one application is received on the same day,[2] the Minister's powers to take measures to assist historically disadvantaged persons to conduct mining or prospecting activities,[3] and the duty on the Minister to establish a broad-based black economic

[1] The Constitution of the Republic of South Africa, Preamble.
[2] Section 9(2) of the MPRDA.
[3] Section 12 of the MPRDA.

empowerment charter for the mining industry.[4] In addition, the preamble to the MPRDA puts the state's commitment to reform to bring about equitable access to mineral and petroleum resources front and centre. Other key objects of the MPRDA include the promotion of socio-economic development goals including economic and sectoral growth, the creation of employment and investment opportunities as well as social upliftment of mine-affected communities.

10. Beneficiation of mineral resources has the potential to advance many of these goals as it promotes local industry taking part in the beneficiation process, and creates opportunities for new participants in the economy, including previously disadvantaged individuals, and ensures that South Africa's retention of mining-derived revenue is optimised. It is important to locate the mining industry within the larger picture and acknowledge its potential to contribute to growing the economy and therefore to furthering the realisation of state obligations to provide basic services, including housing, healthcare and education. These goals are crucial to the realisation of the constitutional vision of substantive equality which entails the empowerment of those disadvantaged by factors such as race, gender, class and disability and finds expression in the Bill of Rights.

11. However, while local beneficiation is a necessary condition for a fairer distribution of mineral wealth, it is not a sufficient one as it does not by itself ensure that the most disadvantaged South Africans will enjoy an equitable share of the benefits and not be forced to shoulder the costs, financial and otherwise.

12. In our previous comments (previous comments) on the Draft MPRDA Amendment Bill of 2012 (draft Bill) CALS expressed its concern about the altered definition of historically disadvantaged which, using the exclusion from the pre-1994 franchise as the criterion, embodied a solely race focused understanding. We are therefore pleased to see that the bill before parliament replaces this definition with a clause embracing all citizens, categories of persons and communities disadvantaged by unfair discrimination before the Constitution of the Republic of South Africa, 1993.

13. Another concern pertaining to redress and redistribution, raised in our previous comments, was the narrowing of the objects of the Act. The current MPRDA expressly singles out women as a category of persons for whom opportunities to enter the industry should be expanded and who should benefit from the exploitation of mineral resources. The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (the 2008 Act) added a reference to communities in this context. However the draft Bill deleted the reference to both women and communities. While CALS and a number of civil society and community-based organisations raised this issue in our comments and at the Ministerial hearings, we note with regret that the version contained in the Bill still makes no mention of women and communities.

14. An essential part of transformation in South Africa is the facilitation of participation in decision-making by those who stand to be affected by such decisions. Typically the communities living in

[4] Section 100(2) of the MPRDA.

close proximity to planned mining developments struggle to gain access to decision-making processes and must overcome a number of challenges to do so. It is thus vital that these communities are given an opportunity to be heard on every decision on the exploitation of minerals that has the potential to affect their rights and legitimate expectations. One of the most acute clashes of the interests of communities and extractive industries occurs where an application to mine involves land on which a community resides. The 2008 Act recognised the need to protect communities in such circumstances and consequently inserted 2A into section 23 which empowered the Minister to impose conditions in order to protect the rights and interests of communities "including conditions requiring the participation of the community." The Bill would remove this reference to participation requirements which is most unfortunate given South Africa's commitment to transparent and accountable governance and a participatory form of democracy. We therefore call on parliament to make use of this opportunity to empower women and communities by inserting the words "women and communities."

Amendments to the regulation of social and labour plans

15. Social and labour plans (SLPs) are a fundamental component of our mineral licensing regime. There are a number of provisions of the Bill impacting on the regulation of SLPs which merit attention.

Clause 2: Amendment of section 2 of the MPRDA ("objects of act"), as amended by section 2 of the 2008 Act

16. Section 2(i) has been amended to clarify that the objects include requiring that rights-holders contribute to "labour sending areas" in addition to the area in which the mine is actually situated. While this is not currently an express object of either the MPRDA or the regulations, this amendment is welcomed as it brings the legislation as a whole more in line with the regulations dealing with SLPs which make express reference to infrastructure and poverty eradication projects in line with the Integrated Development Plans for "labour sending areas" as well as areas in which the mine operates.[5]

Clause 18: Amendment of section 23 of MPRDA ("granting and duration of mining right"), as amended by section 19 of the 2008 Act

17. The Bill introduces a requirement of periodic review (every five years) of SLPs. Periodic review is an important addition to the legislation and can be viewed as a response to current failures in monitoring and enforcing such plans. For oversight to be effective it will have to go beyond box

[5] Mineral and Petroleum Resources Development Act Regulations (MPRDA regulations), No.R 527 in GG No. 7479 , 46 (c) (iii).

ticking and engage thoroughly with the soundness of both the design and the implementation of the SLP.

18. A major omission, raised in our previous comments, is the absence of a requirement to consult with mine-affected communities in the review process. One cannot have an accurate picture of whether a SLP is responding to community needs and achieving its goals without obtaining the perspectives of the intended beneficiaries of an SLP. The Bill should require notice to communities of the review and the opportunity to make both written and oral comments on the existing SLP and the ways it should be improved. We hope that parliament can facilitate a SLP process more responsive to the needs of communities by adding a consultation requirement for SLP amendments.

19. The amendments to section 23 of the MPRDA now empower the Minister to "after having taken 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". Thus in addition to the new monitoring power the Minister can now issue directives to compel the meeting of socio-economic needs as well as the remedying of contraventions of environmental management obligations. This also seems to allow directives to improve SLPs if they do not adequately address the socio-economic needs of the area or community. This is a welcome development. As stated in our previous comments, its shortcoming is that such pro-active measures are entirely at the discretion of the Minister, and that further, no guidance is provided as to the circumstances and manner in which such discretion can and should be exercised.

20. The 2008 Act had inserted 2A which provided that:

> *"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."*

21. The draft Bill retained 2A but deleted the reference to participation of the community. We highlighted this in our previous comments. There we point out that this regression on the public participation front was worrying for the reason that it is critical that community voices be heard when decisions are made about programmes, such as those contained in SLPS, designed to benefit them. Unfortunately, this omission was carried through into the current version of the bill. We hope that parliament will make use of the opportunity to empower communities whose homes and land are threatened by mining.

Clause 71: Amendment of section 102 of the MPRDA ("Amendment of rights, permits, programmes and plans) as amended by section 72 of the 2008 Act

22. The Bill adds SLPs to the tally of conditions and authorisations that can only be amended with the Minister's consent. In reality, however, this is nothing new since consent is already required by the MPRDA regulations.[6]

23. However, as stated in our previous comments, a serious problem not addressed by the Bill is the absence of an opportunity for public participation in relation to the amendment process. This is at odds with the emphasis on public participation in South Africa's environmental governance regime and risks becoming a mechanism by which conditions addressing the concerns of members of the public, especially members of the mine-affected community, are removed or diluted. We discuss this issue in relation to amendments beyond amendments to SLPs in more detail elsewhere.

Regional Mining and Development and Environmental Committee

Clause 7: Insertion of 10A-G (Establishment of Regional Mining Development and Environmental Committee)

24. It is widely acknowledged that the function of the Regional Mining and Development and Environmental Committee (REMDEC) under the MPRDA has been problematic. It is therefore encouraging to see evidence of re-consideration of this structure.

25. In our previous comments we noted that the draft Bill outlined that the members appointed to REMDEC must possess expertise in "mineral and mining development, mine environmental management and petroleum exploration and production". We proposed that expertise in sustainable development and community engagement be added to this list for the reason that the body's activities are only triggered in instances of objection to an application (and hence typically of community dissatisfaction). The provision for the appointment of consultants in the new clause 10C would make gathering this kind of expertise on REMDEC possible. We call on parliament to use this opportunity to enhance the mix of skills on REMDEC for the benefit of communities and the broader public.

26. The inclusion of reporting requirements in clause 10G will enhance good governance. It should be made explicit that these reports will be public documents in line with the constitutional commitment to transparent and accountable governance.

Consultation requirements

27. Below are some preliminary thoughts on some of the clauses in the Bill which deal with consultation requirements and public participation processes.

[6] MPRDA Regulations, regulation 44.

Clause 6: Substitution of Section 10 of MPRDA as amended by section 7 of the 2008 Act

28. We note that the obligation to consult with interested and affected parties has been expanded, in particular to place obligations on the applicant as well as just the state. Any acknowledgement of the seminal importance of meaningful consultation is a progressive step. Further consideration of the specifics of consultation mechanisms, as well as how state obligations to facilitate public participation in decision-making relate to obligations on the private sector (license applicants), is required.

Clause 11: Amendment of section 16 of MPRDA ("Application for prospecting right") as amended by section 8 of the 2008 Act

29. One of the changes to section 16 of the MPRDA (in relation to the 2008 amendments) that was addressed in our previous comments was the removal of the words "any interested and" with the upshot that the applicant would now only be required to consult with "affected" parties, not merely "interested ones".[7] As the insertion of "interested" was to have occurred in terms of the 2008 amendments which have not come into effect, the status quo would remain.

30. As the Supreme Court of Appeal (SCA) noted in *SA Soutwerke v Saamwerk Soutwerke*[8] any differences between the two concepts are not statutorily defined.[9] The SCA were of the opinion that an "interested party" is one with a lawful interest in land on which a mining right is sought, such as the landowner or lawful occupier"[10] and that "Affected parties" refers to persons whose socio-economic conditions might be directly affected by the mining operation.[11] These would, for example, include persons who earn a livelihood in the immediate environment where mining operations are to be conducted. *Soutwerke* is therefore authority for the proposition that "affected parties" is the broader category, hence the Bill does not necessarily narrow the range of people who will need to be consulted. To clarify this issue we suggested in our previous comments that definitions of "interested" and "affected persons" be inserted into the definitions section. We therefore appeal to parliament to take this opportunity to cure this lack of clarity. We therefore welcome this improvement to the SLP system.

Clause 17: Amendment of section 22 of MPRDA (application for mining right), as amended by section 18 of Act 49 of 2008

[7] In addition to the land owner or lawful occupier.
[8] *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd and Others* [2011] ZASCA 109.
[9] Ibid at para 30.
[10] Ibid.
[11] Ibid at para 31.

31. An important change brought by the Bill is the insertion of subsection (d) which imposes an express obligation "to consult with the community and relevant structures regarding the prescribed social and labour plan within 180 days of the notice..." Currently there is no express requirement to consult the community in drawing up the SLP. This contrasts with the participatory nature of our constitutional democracy, environmental management framework and of the MPRDA itself. It is impossible to know what needs are most keenly felt by members of the public without asking them. Neither is a social and labour plan that is conceived without the benefit of the local and particular knowledge of communities likely to enjoy the kind of legitimacy necessary in order that it may achieve its objectives. Most crucially, it is impossible to establish which needs are most pressing without consulting the very people who are in need.

<u>Continued failure to provide for consultation in the context of amendments to licenses and authorisations</u>

32. One of the issues we flagged in our previous comments was the continuing anomaly of, on the one hand, requiring participation in the various licensing processes while, on the other hand, leaving this to the discretion of the Minister in the context of amendments to licenses and other sources of obligation.

33. This is anomalous because the underlying principle behind public participation requirements, namely that people and communities should have a say in decisions affecting their rights and interests pertains in the context of amendments as well as the original licensing process. Amendments to the EMPR, can significantly alter the targets and plans for mitigating environmental harm. Such amendments may increase the environmental impact that the mine will have which may also, in turn, have a negative impact on the living conditions of affected communities. Amendments to social and labour plans may, for example, reduce the number of houses which the mine is obliged to build or reduce the scale of road construction in an area where mine-related traffic has led to a disruption of the transport networks used by the community.

34. Participation would also allow assist government regulators in making better, more informed evaluations of licenses that benefit from the knowledge and perspectives of all key stakeholders. This is especially true in relation to social and labour plans which exist to meet the needs of communities.

35. There is a risk that the amendment process will be seen by applicants as a way to dilute the more onerous conditions without consulting the communities whom these conditions may protect. Given that only government and the mine will be involved in the process, there is an inherent bias against affected communities whose concerns and perspectives will not be heard.

36. Crucially, the National Environmental Management Act (NEMA) EIA regulations require a public participation process as set out in regulation 54 or any appropriate alternative process in the

context of an amendment to EMPs/EMPRs. The only exception is for when the amendment sought is a non-substantive one.

Establishment of Ministerial Advisory Council

Clause 56: Insertion of section 56A-F (Establishment of Ministerial Advisory Council); Repeal of sections 57-68 of MPRDA (Establishment of Minerals and Mining Development Board)

37. The Bill replaces the Minerals and Mining Development Board (the Board) with a Ministerial Advisory Council (the Council). Like the Board, Council members will include a chairperson (now identified as the Director General), the Chief Inspector, three representatives of relevant state departments, three representatives of organised business and three representatives of organised labour. In our previous comments we expressed concern about the absence of a requirement that representatives of non-governmental organisations (NGOs) or community-based organisations (CBOs) be included. We further raised a concern that it was not mandatory to experts or people with relevant experience to enhance the functioning of the Board.

38. This absence of these 3 crucial stakeholders undermines key principles of our environmental management system including participation by all interested and affected parties including by "vulnerable and disadvantaged" sectors of the population,[12] decisions that "take into account the interests, needs and values of affected and interested parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge."

39. More specifically their absence limits the ability of the Council to realise its purpose of enabling the Minister to make informed decisions and sound policy so as to advance the twin goals of sustainable development and growth and transformation of the extractives industry. On both of these subjects the absence of these three stakeholders will be keenly felt. Decisions on sustainability involve evaluating highly specialised and technical information. The input of experts is essential for informed decision-making. NGOs offer vital input in conveying different perspectives to those offered by government, business and organised labour. It is vital that the perspective of communities' impact by mining activity be integrated into the highest levels of decision making regarding the sector. Transformation, it must be stressed, entails the empowerment of vulnerable and disadvantaged members of society and mine-affected communities typically include a large proportion of people in vulnerable groups.

40. Unfortunately the absence of required representation of the NGO sector, CBOs and mining and environmental experts persists in the Bill. We strongly urge the legislature to use the opportunity to cure this significant omission by adjusting 56A to require representation of each of the identified groups.

[12] NEMA Section 2 (4) (f).

The Regulation of Bulk Sampling

Clause 15: Amendment of section 20 of MPRDA (Permission to remove and dispose of minerals), as amended by section 16 of Act 49 of 2008

41. In our previous comments, we flagged the issue of bulk sampling as an issue we would address in subsequent submissions. In the course of a study on the impact of coal mining on communities, the Centre for Applied Legal studies uncovered evidence that mining was being conducted under the guise of bulk sampling. This is not only unlawful but highly detrimental to the environmental rights of communities since the environmental controls on prospecting, of which bulk sampling is a form, do require that applicants put in place the same degree of environmental safeguards that are required for mining licenses. Neither does a mine need to draw up a social and labour plan, the key mechanism for ensuring communities also benefit from mining.

42. We would therefore wish to see greater clarity in the provisions that regulate bulk sampling. Clarity assists mines in knowing what licenses they need to carry out their planned activities (a prospecting license, a prospecting license plus bulk sampling permission, or a mining right). Clarity would also enable the Department to effectively regulate bulk sampling and to close the loopholes allowing some to abuse this preliminary testing phase.

43. We welcome the changes in the bill that help tighten the regulations governing bulk sampling. We note the removal of the subjective element of bulk sampling ("for holders own account") and the change to a focus on what is being sampled.

44. However, we are concerned about the absence of any definition of bulk sampling itself. It will make it far easier for a mine to comply with the law if they have access to clear parameters for determining what activity is permitted under a prospecting licence, what is permitted under a prospecting license plus permission to bulk sample and what requires a mining license.

45. We are aware of the concerns raised by representatives of the geology profession, in the Ministerial consultations on the draft bill, that a single quantum wouldn't be practical given the differences between the sampling needs for different minerals. We are of the view, however, that it is both possible and necessary, to arrive at parameters for calculating what constitutes a non-bulk sample, a bulk sample and what should be regulated as mining.

46. If the legislature deems regulations to be a more appropriate mechanism for providing this guidance, there should be an indication in the bill that definitions of non-bulk sampling/ordinary prospecting, bulk sampling, and full-scale mining are to be provided in revised regulations.

Issuing of closure certificates

Clause 30: Amendment of section 43 of MPRDA as amended by section 34 of Act 49 of 2008

47. Ensuring full and thorough post-closure rehabilitation of the mine site has been a longstanding challenge. Since the commencement of GN 192 of 26 June 1970 in terms of the Mining and Works Act 27 of 1956 (Mining and Works Act regulations), mines have had obligations to rehabilitate the mine site. A major difficulty has been the inadequacy of funds set aside for rehabilitation which is typically very costly. The MPRDA addressed this by providing for a financial provision to be retained by the Minister until the issuing of a closure certificate.

48. In practice, few mines have ever been issued with closure certificates.

49. The draft Bill decoupled the return of the financial provision from the issuing of the closure certificate – the Minister was given the discretion to retain any portion of the financial provision needed to address 'latent and residual safety, health or environmental impact which may become known in the future" for another 20 years.

50. In our oral submissions, we, along with other civil society organisations, pointed out the inadequacy of the 20 year period when many environmental impacts, or the seriousness thereof, only become apparent far later. This is vividly illustrated by the current problem of acid mine drainage (AMD), which has only been acknowledged decades after it first developed. We note that the bill still retains this 20 year cap.

51. Another issue flagged in our previous comments relates to closure certificates. Section 43 of the MPRDA imposes an obligation on the holder of a right or permit to apply for a closure certificate in the context of mine closure (the precise circumstances triggering this obligation are set out in the bill). However, the draft inserted the subsection (13) which provided for the exemption of those holders of rights or permits who formally abandoned the right from the obligation to apply for a closure certificate where they had "caused no environmental damage." Exemptions from regulatory provisions can have the positive effect of easing the regulatory burden on government, leaving it to concentrate on more serious instances. However, and particularly when there are no clear yardstick for determining whether one falls within an exemption, they run the risk of allowing the regulated to determine whether they fall within the regime, thereby leading to information about a lesser proportion of mines to be placed for scrutiny by government decision makers. In addition there is not a single mining operation that has resulted in no environmental damage. Rather, the section should be read as exempting those responsible for environmental degradation below a certain threshold. Unfortunately, the draft Bill provided no guidance for determining this threshold.

52. Fortunately the Bill offers more clarity on when the exemption will apply. Under the revised provision the exemption applies to holders who prior to abandonment of the right had "not conducted any invasive operations." This formulation carries the benefit of referring to a particular class of activity, namely, invasive operations. Further clarity would, however, be provided by a definition of invasive activity. This should embody a broad conception that extends beyond mining activity to impactful activities associated with mining.

<u>The relative roles and responsibilities of the Departments of Mineral Resources and Environmental Affairs</u>

Multiple Clauses

53. In our previous comments we flagged the issue of the relative roles and responsibilities of the Departments of Mineral Resources and Environmental Affairs (DEA), more specifically in relation to environmental management.

54. The present system under the MPRDA gives DEA the responsibility for environmental authorisations for NEMA listed activities and the DMR the responsibility of managing the EIA process for mining and prospecting rights under the MPRDA. The inefficiencies and confusion created by this fragmented system are common cause.

55. In essence the solution proposed in the Bill is the following: All environmental impacts are now regulated by NEMA but overseen by the DMR.

56. The Centre for Applied Legal Studies is not of the opinion that the DMR should be the competent authority for processing environmental authorisations and licenses and for overseeing compliance with the terms and conditions they contain for three reasons. Firstly, there is a conflict of mandate between its role of promoting mining and that of ensuring compliance with NEMA. Secondly, the DMR presently lacks the specific skills set for environmental management functions. These skills lie instead in DEA, which has built up a bank of skills and institutional knowledge that cannot be quickly replicated. Finally, the new arrangement will perpetuate the present situation of two systems of environmental regulation – one for development in general and another for mining. It is crucial that the same level of scrutiny is applied to mining as to other high impact forms of development – especially given the scale of the environmental degradation that has been associated with mining in South Africa.

57. As a consequence we strongly urge parliament to amend all clauses pertaining to environmental authorisations, including 11, 13, 17 and 19, to require the applicant for mining and prospecting rights to apply to the Minister of Environmental and Water Affairs for environmental authorisations.

Conclusion

58. We thank you for this opportunity to comment on the Bill and look forward to participating further in this national dialogue. For queries or further information please contact Lisa Chamberlain (Deputy Director) at lisa.chamberlain@wits.ac.za or 011 717 8624 or Robert Krause (Researcher) at Robert.krause@wits.ac.za or 011 717 8615.