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Your Ref:
Our Ref: HS/SJ/mprdb

6 September 2013

Ms FC Bikani, MP
Acting Chairperson of the Portfolio Committee on Mineral Resources
National Assembly
Parliament

care of
The Committee Secretary,
PO Box 15, Cape Town, 8000,
for attention of Ms Ayanda Boss

Fax: 086 6914093
email: aboss@parliament.gov.za

Dear Madam

SUBMISSIONS ON THE MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL B15-2013

Your call for submissions on the above draft bill published for comment to be received by you before 12h00 on 6 September has reference.

We write this submission on behalf of our client rural communities who are occupying communal land or claiming land under the land reform programme of our government. The Legal Resources Centre is a non-profit public interest law firm. Much of the work of our organisation is devoted to representing poor rural communities.

The LRC has been consistently involved with making submissions to the Department of Mineral Resources on the development of the principal Act of 2002, the Royalties Act and the 2009 amendment act. Our earlier submissions remain relevant to the extent that the amendment bill does not address a number of key concerns that we raised over the past decade and longer, including:

1. The failure to recognise the historical impact **mining** has had on rural communities in South Africa, which creates a need for the legislature to make special consideration and measures to advance directly affected communities on communal land in respect of historic, current and future mining on their land;

2. The failure to address the **status of customary tenure and the rights of customary communities** to consent as provided for in the Constitution and the Interim Protection of Informal Land Rights Act. The mining laws as they currently stand purports to override the limited protection afforded by land tenure law;

3. The failure of the Bill to recognise the tension of opposing development paradigms and **community participatio**n in this regard as provided for in regional and international law.

In our submissions to the department on the draft bill in February this year and in the light of our instructions and the lack of any evidence of a consultation process with rural communities about the content, merits or adequacy of the reform proposals, we submitted that the draft be withdrawn and redrafted to address the plight of mining affected communities, after a thorough but urgent consultation process with affected rural communities. We urged the department to announce its intention to advance from the the following three positions:

a) A programme of urgent consultation with affected rural communities on communal land to have them heard and address their concerns about the impact on mining on their livelihoods and landscapes also in relation to the imbalances caused by the 1913 Native Land Act;

b) Law reform to recognise, protect and promote the consent standard for any taking of communal land under customary law and the prior and continuous participation of affected communities in mining development projects affecting them;

c) Law reform including mining and spatial and land use planning law, to promote integrated rural development planning and implementation and address, by way of reparation and participation measures, the dislocation of rural economies and communities as a result of discriminatory land and mining law over a period of a century and longer.

The department did not respond to our submission. We now turn to your committee with specific proposals for significant amendments to the bill prepared by the department. We do so without the benefit of extensive consultations with rural communities. We had opportunity to consult with some of the communities whom we work with in Limpopo, Northwest, Gauteng, Mpumalanga, KZN and Northern Cape. We also consulted with the representative community based association of mining communities, Mining Affected Communities United in Action. MACUA is propagating and proposing that communities must be involved in all matters that affect them directly and the proposed programme below of public participation. It also supports the proposal for community representation on the Council proposed in the Bill.

We are currently compiling the list of members so I cannot provide it to you at this moment but it includes Communities from Gauteng, Limpopo, Mpumalanga, Free State and North West.We readily agree that much further engagement is necessary.

We urge your committee to urgently engage in a thorough and comprehensive public participation programme to ensure that the voices of rural communities on communal land directly affected by mining are heard and that they participate in your evaluation of the bill placed before you. Such a programme could include:

- Information and exchange workshops involving affected communities in mining districts of each of the mining provinces;
- Public hearings in the mining districts where you are joined by the relevant committees of the provincial legislatures and their SCOPAs;
- Opportunities for community leaders of mining communities to address your committee in Parliament.

The memo below covers the following areas which motivate more fully for the above three conceptual approaches:

1	The LRC and its interest
2	Five good reasons why community consent is the appropriate standard for mining development on communal land
2.1	The legacy of the 1813 land law and the 1913 Natives Land Act
2.2	The constitution, discrimination and equality
2.3	Customary law and consent
2.4	International treaty law: the African Charter
2.5	The NDP, the mining charter and the state land lease policy
3	Specific proposals including proposals for amendments to • section 5A: dealing with prohibition of mining on communal land

without community consent,

- section 10: dealing with negotiations with communities on community land to reach agreement,
- section 100: dealing with a minimum of 26% equity to directly affected communities in respect of mining on their community land,
- section 28: dealing with the mining company's liability to prevent unsafe and insecure closed and abandoned mines, illegal mining and promotion of legitimate mining;
- enforceability of SLPs and BEE undertakings, and
- consequential amendments including amendments to definitions.

We summarise the shortcomings of the current regime and B15 as follows:

1) The 1913 legacy of dispossession was and is not addressed: Limited black economic empowerment introduced through the MPRDA and the Mining Charter may have changed prospects for certain city dwellers, but rural communities have not benefited. Full restitution and tenure security of both surface and mineral rights to rural communities would give empowered African communities a real stake in the mining industry. In 2002 in our submissions on the principal act, we proposed that landholding communities should be afforded 10 years to use or lose their mineral rights. Section 104 of the principal act as amended by the 2008 amendment, does not address past discrimination. Instead it requires land owning communities to compete with commercial competitors for prospecting and mineral rights. Section 12 authorises the minister to assist HD persons, but there is no evidence in the reports of the department of assistance to dispossessed rural communities.

   The most recent proposed amendments to section 23 of the MPRDA allows the Minister to direct the holder of a mining right to 'address' the socio-economic challenges and needs of a community. But this power remains in the unfettered discretion of the Minister and any particular mining company could object to being singled out to bear the burden of structural discrimination.

   There is a range of possibilities for community participation:

   a) At the one end of the spectrum BEE, worker equity and "broad based BEE" share equity could have trickled benefits to rural communities. But this has not happened in practice.

   b) SLP social and environmental mitigation measures have not worked and are not enforceable. Little is known about SLP undertakings and compliance with them, because they are kept confidential by companies, the department and local authorities. The proposal in the bill to allow communities to be consulted in the preparation of SLPs should give communities access to the

final versions and their monitoring. Recently the SLP undertakings of the prominent mining company Lonmin came to light in Marikana Commission judicial inquiry proceedings. In 2006, as part of its rights conversion application, the company undertook to build 5500 houses for employees. The record shows that only 3 show houses had been built in the intervening period.

c) Local economic development can be supported by ring fencing local mining taxes and royalties. This idea was mooted 15 years ago in the mining policy papers by organized labour, mentioned in the white paper.

d) More direct local community participation through community royalties, rentals and participation in planning, management, implementation and monitoring holds much promise. But it is doubtful that such standards can be implemented, maintained and supervised by the department in a transparent, fair and equitable manner, as illustrated by the current controversy about the auditing and supervision of the "D" accounts in the Northwest Province.

e) Most promising is the proposal that the local negotiation may produce creative outcomes that incorporate any of the above and appropriate instruments for ongoing community involvement. If community consent, subject to reasonableness, is recognised as the legal standard for use of community land, it will give communities the bargaining power to negotiate on an equal footing with mining companies.

2) Failure to provide for participation in development decisions: the National Development Plan, the African Charter and the instruments interpreting the Charter emphasise meaningful participation in decision making. It requires national plans and policies, periodically reviewed on the basis of a participatory and transparent processes. The special needs of members of vulnerable and disadvantaged groups must be met. The process around the review of the principal act, the formulation of the draft amendment bill of 2012 prepared by the department and the lack of any programme by the department to encourage and elicit community comment and rural voice in the finalization of the current amendment bill, exemplifies this failure. The bill now allows for community consultation in the preparation of social and labour plans, and the principal act allows for comment in the environmental assessment process. But there is no opportunity for community participation in decisions about the merits, pace, planning and ongoing implementation of development projects.

3) Lack of recognition and promotion of customary forms of tenure and decision making processes: The recognition of ownership and customary rights would invoke

a) the consent principle under customary law, which requires community permission for any mining on communal land, and

b) high standards of redress and reparation for unlawful historic taking of customary land and mineral rights.

Currently section 5A of the principal act as amended by the 2008 act and section 50 as proposed to be amended by the bill, requires notification prior to entry of occupied communal land. Compensation for loss of land is limited to the market value of surface rental. The MPRDA is disrespectful to customary law which insists on the consent principle and requires equitable outcomes and reparation for loss of livelihoods and dislocation of community life. By contrast the recently released the state land lease policy of the department of rural development and land reform insists that all mining leases on communal land in former homelands must be authorized and consented to by communities in terms of the Interim Protection of Informal Land Rights Act of 1998 which include customary law decision making and state supervised public meetings of all land rights holders.

4) In the application process special considerations must be given as to which communities and whether a specific resource and ecological component are cumulatively affected by the proposed mining operation. Factors that should be considered include: whether the proposed operation is one of several projects or activities in the same geographic area impacting on the same or different communities and human settlements, and whether other projects or activities in the area have similar impacts on the specific social, resource and ecological components. The available water resources and other long term economic development opportunities for communities, and extractive industry should be conditional on surplus water resources. Integrated local development planning involving government, private sector and rural communities and taking into account spatial considerations including the apartheid legacy, environmental, water, climate and impacts and making best use of technological and knowledge development is mooted in the National Development Plan as the important ingredients for the transformation of our rural areas. The redirection of the dysfunctional and fractured rural economy can be supported with local planning for sustainable development based on community ownership and subject to sustainable use and extraction of water and renewable and non renewable natural resources.

Finally we point to the story of the Wonderkop community to illustrate the complexity legacy of the 1913 land act and its sister mining laws. The Marikana disaster and more specifically the story of the Wonderkop farm illustrates the challenge at various levels:
a) 75% of the Wonderkop farm was purchased by a consortium of individual families who did not necessarily recognise the property rights of the Bapo tribe. Some of the families were dispossessed of their nearby land under the Hartebeestpoort Irrigation Scheme Act of 1914 which scheme was established to support poor whites and victims of the Anglo Boer War and First World War. The Wonderkop community lodged a land claim to the land that they bought in the 1920s with their own money. At

the time, they did not belong to the jurisdiction of any chief. They thus requested the Bapo chief to facilitate their purchase of the land, because the laws of the time only allowed land of black people to be held on behalf of chiefs.

b) The Bapo tribe, tribal authority (TA)/traditional council (TC), established under the Bantu Authorities Act of 1951, [currently under administration] was thus given jurisdiction over the Wonderkop community land.

c) The Apartheid Bantu Development Trust gave old order mining rights to mining companies and received royalties in respect of mining on and under the Wonderkop farm. The Bophuthatswana Homeland government converted mining leases and rentals and granted benefits to the Bapo tribal authority.

d) Lonmin and other mining companies converted their old order rights and continue to pay royalties to the nearby Bapo TA without direct benefit to the Wonderkop community. However, even the Bapo TA is engaged in litigation against Lonmin because of the minute share of the spoils they receive. Lonmin's excuse for the mess is that they don't know who represents the community – although, in truth, they have not even investigated who 'the community' is. As a result, no part of the community is currently benefitting substantially.

e) Lonmin undertook to build houses for migrant employees but failed to do so.

f) The Wonderkop community bears the brunt of many decades of discrimination. It is in effect subsidising the extractives industry, the Bapo TA and the employees on the mines, and the MPRDA continues to exacerbate their fate.

We look forward to hearing from you regarding our proposals and we request to further motivate such to your committee in person at the earliest opportunity.

Your faithfully,

LEGAL RESOURCES CENTRE
Per:

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LRC
LEGAL RESOURCES CENTRE

SUBMISSION TO THE

Portfolio Committee on Mineral Resources
National Assembly
Parliament
In re:

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL B15-2013

The Legal Resources Centre

6 September 2013

	definitions.		

1. The LRC and its interest

1.1. The Legal Resources Centre (LRC) is an independent non-profit public interest law clinic which uses the law as an instrument of justice. It works for the development of a fully democratic South African society based on the principle of substantive equality, by providing free legal services for the vulnerable and marginalised, including the poor, homeless, and landless people and communities of South Africa who suffer discrimination by reason of race, class, gender, disability or by reason of social economic or historical circumstances. The LRC, both for itself and in its work, is committed to:

1.1.1. Ensuring that the principles, rights and responsibilities enshrined in the Constitution are respected, promoted, protected, and fulfilled;
1.1.2. Building respect for the rule of law and constitutional democracy;
1.1.3. Enabling the vulnerable and marginalised to assert and develop their rights;
1.1.4. Promoting gender and racial equality and opposing all forms of unfair discrimination;
1.1.5. Contributing to the development of a human rights jurisprudence; and
1.1.6. Contributing to the social and economic transformation of society.

1.2. The LRC has been in existence since 1979 and operates throughout the country from its offices in Johannesburg, Cape Town, Durban and Grahamstown.

1.3. The LRC represented and continues to represent citizens and communities in litigation involving:

- customary law and its status
- communal land and new development on communal land including mining
- environmental regulation and mining.

1.4. We appeared on behalf of clients in the Constitutional Court in the matters of *Bhe*,[1] *Richtersveld*[2] and *Shilubana*.[3] Our clients include the communities that

[1] *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) (15 October 2004).
[2] *Alexkor Ltd and Another v Richtersveld Community and Others* (CCT19/03) [2003] ZACC 18; 2004 (5) SA 460 (CC); 2003 (12) BCLR 1301 (CC) (14 October 2003).
[3] *Shilubana and Others v Nwamitwa* (CCT 03/07) [2008] ZACC 9; 2008 (9) BCLR 914 (CC); 2009 (2) SA 66 (CC) (4 June 2008).

successfully challenged the constitutionality of the Communal Land Rights Act of 2004.[4]

1.5. The LRC also represents a number of communities in court litigation and administrative representations concerning the impact of the Traditional Leadership and Governance Framework Act.

1.6. The LRC has over more than a decade been involved with making submissions to the Department of Mineral Resources on the development of the principal Act of 2002 and the 2008 amendment act. We also made representations to the relevant portfolio committee on the royalty bills, relevant environmental laws, land reform legislation and rural governance statutes including the legislation dealing with traditional councils and traditional courts.

2. THE BASIS FOR COMMUNITY CONSENT AS A CONDITION FOR MINING ON COMMUNAL LAND

2.1 THE LEGACY OF THE 1813 LAND LAW AND THE 1913 LAND ACT

2.1. This year marks the centenary of the 1913 Native Land Act which effectively ended black ownership of land in South Africa. Seventeen years after the Final Constitution was adopted which mandated and obligated the democratic State to turn the skewed patterns of resource ownership and access in South Africa around, disturbingly little has changed.

2.2. Earlier this year, the minister of mineral resources, correctly so, identified the 1913 act as the source of scourge of the migrant labour system in her mining indaba speech.[5] She said:

> *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.*

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[4] *Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09. The Legal Resources Centre, with Webber Wentzel attorneys, represented four communities Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The Act was declared unconstitutional by the Constitutional Court in May 2010. Prior to the institution of legal proceedings on the CLRA, the LRC and its clients made extensive written and oral representations to the department and to parliament on the problematic and unconstitutional aspects, both procedural and substantive, of the CLRA Bill.

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

2.3. But the 1913 Land Act and the preceding colonial laws such as the Glen Grey Act of the 1890s reflects much more. The ruling party recognises the significance of mining interests and the 1913 land act shaping the history and future of our economy:

> *The ANC was formed at a time when South Africa was changing very fast. Diamonds had been discovered in 1867 and gold in 1886. Mine bosses wanted large numbers of people to work for them in the mines. Laws and taxes were designed to force people to leave their land. The most severe law was the 1913 land Act, which prevented Africans from buying, renting or using land, except in the reserves. Many communities or families immediately lost their land because of the Land Act. For millions of other black people it became very difficult to live off the land. The Land Act caused overcrowding, land hunger, poverty and starvation.*[6]

2.4. Inequity in the mining industry has its roots in the dispossession of the African population of their land. Community protest as exemplified by the Marikana uprisings of 2012 has its roots in 200 years of discriminatory state law regimes.

2.5. From the early days the statute laws dealing with land also dealt with mineral rights. For example, in 1813 the Governor of the Cape Colony, Sir Cradock, issued a proclamation that converted the loan places certificates of white settlers into quitrent title deeds. The quitrent title contained a prescribed clause dealing with minerals: "All gold, silver and precious stones shall belong to the queen or king of England". By contrast, the customary ownership rights of black communities were ignored. Communities were conquered in border wars, land and property such as cattle confiscated, and citizens were subjugated to become workers or servants under Master and Servant laws. The tenure systems of colonial powers legalised squatting by white settlers and conquerors and ignored property rights of black occupiers of land.

2.6. Settler land owners owned all the minerals on their land, except for gold, silver and diamonds if these minerals had been reserved for the government. Land owners could mine their minerals although over the years the right to mine both reserved and unreserved minerals became more and more regulated by the state. Despite regulation, owners retained benefits and privileged treatment. For example, in 1883 after the discovery of diamonds all mining for diamonds was made subject to a permit to be issued by the magistrate. Initially permits for diamond mining could be issued without consent of the landowner. But three years later in 1887 the law was changed back and the consent of the landowner was needed before diamond mining was permitted on the owner's land.

[6] http://www.anc.org.za/show.php?id=206

2.7. Similarly the Gold Laws applicable in the South African Republic and the Transvaal Colony, preserved certain owner's privileges and concessions to allow digging for gold on land. The 1927 Precious Stones Act reserved for the owner prescribed shareholding in any kimberlite mine.

2.8. The history of mining law in South Africa shows that the government claimed rights to regulate strategic mining but that the private land owners retained a privileged bargaining position to negotiate benefits such as rental, royalties and shareholding. Land owners could use their land and mineral ownership rights to negotiate benefits.

2.9. By contrast, the history of land and mining law relating to rights of black communities on communal land, shows that their rights were consistently ignored or deliberately disregarded. The Native Land Act of 1913 outlawed ownership rights of black people in the largest parts of the country. In the rest of the country Native reserves were established where the ownership of land vested in the Governor General of the Union of South Africa.

2.10. Black communities could not own land or register their tenure rights on their ancestral land or land that they had bought. They could therefore not use their land and mineral ownership rights to negotiate benefits from mines on their land.

2.11. We have the opportunity today in 2013 the redress the regimes created in 1813 and reinforced in 1913, and afford rural communities on communal land to assert their negotiation rights.

2.2 THE CONSTITUTION, DISCRIMINATION AND EQUALITY

2.12. **The MPRDA and mining law discriminates against black people**

Our history shows that black original land ownership was consistently ignored and, since 1913, outlawed. Today the post constitution Mineral and Petroleum Resources Development Act promises redistribution but discriminates against black community land owners who get no benefit from mining on their land.

2.13. The MPRDA entrenches the historical discrimination against indigenous or customary forms of ownership (which discrimination was found to be unlawful by the Constitutional Court in Richtersveld) in the following way: only those with recognised ownership in the pre-MPRDA era had old order rights which could be converted. In practice, that meant (white) landowners with common law title only. While the constitutional provisions for restitution and security of tenure aimed to ensure the systematic overturning of such a racially discriminatory property regime, it came too late in most cases for communities to allow them equal opportunity to convert their rights in terms of

the MPRDA. Security of tenure is still not ensured in terms of s 25(6) while most restitution communities continue to await transfer of their land.

2.14. Examples of past statutory discrimination against black communities and promotion of white interests include the following:

- Black people were not allowed to participate in the industry in that they were prohibited from applying for prospecting and mining permits;

- White land owners and tenants i.e. those who had taken or acquired the occupational ownership rights of the surface, were given legislative backing to participate in mining and shares in the proceeds of mines , whilst black people could not become owners of the land they occupy and did not get benefits from mineral exploitation on their land.

2.15. The Development Trust and Land Act of 1936 contained a blanket provision reserving all mineral rights on trust land and black owned land for the Trust and all proceeds went to the trust fund as if it was the private holder of mineral rights[7]

2.16. Minimal benefits were obtainable under the now repealed Development Trust and Land Act of 1936 and the land control laws of former homelands.[8] Old order landowners and surface owners received mining benefits by virtue of their land ownership and by operation of law. In Namaqualand in the 1980s, the Trans Hex mining company negotiated a lucrative mining lease with the state on a communal reserve and on 5 May 1994 converted the standard 5% state royalty to a regional community royalty, called the Diamond Fund Trust, which until recently received 90% of the state royalty.

2.17. The Act accordingly discriminates against communities on communal land, and is inconsistent with the Constitution and the African Charter[9] to the extent that the property rights of African communities under customary law have not been recognised.

The constitutional basis of our proposal that community consent be required

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[3] section 23 of Act 18 of 1936 : the affected communities did not necessarily receive any benefit.

[4] Section 16(1) of the Bophuthatswana Land Control Act and section 16(1) of the Venda Land Control Act provided that the Ministers of Economic Affairs had to authorise mining on land held in trust for a tribe or community, and by operation of law conditions could be attached to benefit the communities concerned. See also paragraph 1.3.1.2 of the Minerals white paper of October 1998.

[9] Article 14 of the African Charter on Human and Peoples' Rights guarantees the right to property. The African Commission, in its interpretation of this article, has confirmed that "[p]rotected under this article are rights guaranteed by traditional custom and law to access to, and use of, land and other natural resources held under communal ownership. This places an obligation on State Parties to ensure security of tenure to rural communities, and their members".

2.18. It would be appropriate under this heading to consider the constitutional framework that requires a shift in the legal regime and recognition of ownership and customary rights which invoke a) the consent principle under customary law, which requires community permission for any mining on communal land, and b) high standards of redress and reparation for historic taking of customary land and mineral rights.

2.19. The bill in its current form fails to address adequately the complex reality of the South African rural landscape. It is common cause that the South African rural landscape is one still plagued not only by the gross inequality in land and service allocation of the apartheid era, but also with the reality of different operating notions of ownership and land rights. It is the latter state of affairs that makes it difficult for rural communities to assert their voices in the development discussion in South Africa. For this and other reasons, we argue that the bill should provide for effective mechanisms to facilitate the participation of communities *in their own development and on their own terms*.

2.20. While our Constitution already recognises customary law as an independent source of law, the rights arising from such law – to land and resources – remain largely unrecognised. Any legislation that deals with rural development and land use change must prioritise rural communities who were and continue to be the most marginalised and vulnerable. The legal basis for this submission is found in section 9 of the Constitution, and in the legislation that gave effect to this section. The Preamble to the Promotion of Equality and the Prevention of Discrimination Act 4 of 2000 reads:

> *"Although significant progress has been made in restructuring and transforming our society and its institutions, systemic inequalities and unfair discrimination remain deeply embedded in social structures, practices and attitudes, undermining the aspirations of our constitutional democracy.*
>
> *The basis for progressively redressing these conditions lies in the Constitution which, amongst others, upholds the values of human dignity, equality, freedom and social justice in a united, non-racial and non-sexist society where all may flourish;*
>
> *Section 9 of the Constitution provides for the enactment of national legislation to prevent or prohibit unfair discrimination and to promote the achievement of equality;*
>
> ***This implies the advancement, by special legal and other measures, of historically disadvantaged individuals, communities and social groups who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure the consequences**."*

2.21. Despite what national legislation may permit, trust can only be built where there is a right of consent involved. The South African Human Rights Commission states, "The study found that through the process of consultation between stakeholders and communities, there was a complete *disintegration of trust between all stakeholders*. Communities felt helpless since, in their view,

the granting of mining rights to the mining company was inevitable and the community ultimately had no power to control the process."[10]

2.22. The failure as yet of the legislature to give effect to section 25(6) of the Constitution of ensuring security of tenure for people on communal land is but one reason for the continued marginalisation of rural communities.

2.3 THE RECOGNITION AND PROMOTION OF CUSTOMARY FORMS OF TENURE AND DECISION MAKING PROCESSES

The status of customary law tenure systems in Africa and its emancipation in South Africa

2.23. The renowned scholar of customary law and related systems of tenure, the late Prof Okoth-Ogendo of Kenya, once recounted how, as the colonial era drew to a close in the 1950's and 60's, British legal scholars organised a series of conferences to discuss the 'future' of customary law in Africa and the need to 'construct a framework for the development of legal systems in the emerging states'. These initiatives assumed that the 'indigenous' legal systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.

2.24. These scholars must have felt vindicated when, upon independence most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's "general ambivalence as regards the applicability of indigenous law". Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that it was not repugnant to Western justice and morality or inconsistent with any written law. It is trite that the post-colonial era sadly continued the relegation of customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts.

2.25. The post constitutional South African courts have now dealt with customary forms of tenure. The case of the *Richtersveld*[11] community reached the Constitutional Court in 2003. In recognising the aboriginal title of the Richtersveld community, the Court held that

> *"the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to*

[10] South African Human Rights Commission report: 2008 Mining-related observations and recommendations: Anglo Platinum, affected communities and other stakeholders, in and around the PPL Mine, Limpopo ERM available at, http://www.reports-and-materials.org/SAHRC-report-on-Anglo-Platinum-Nov-2008.pdf

[11] Above n 2.

use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law."

This judgement confirmed the constitutional recognition and protection of customary law as found in sections 39(3) and 211 of the Constitution.

2.26. We submit that any legislative instrument that purports to address rural development and land questions in South Africa should have as a central concern the recognition of customary law as a source of law equal to statutory and common law as a source of tenure rights and resource rights in South Africa. What is needed is a shift in the legal regime and recognition of ownership and customary rights which would invoke a) the consent principle under customary law, which requires community permission for any mining on communal land, and b) high standards of redress and reparation for unlawful taking of customary land and mineral rights. We have argued above that such an approach would be in conformance with the constitution.

INTERNATIONAL TREATY LAW: THE AFRICAN CHARTER

2.27. The consent standard and the proposed solution, namely to facilitate participation and meaningful involvement of the communities themselves in development that would impact upon them, find further support in our country's treaty obligations. Such an approach would be in line with South Africa's regional obligations in this regard.[12] The *African Charter on Human and Peoples' Rights*, to which South Africa acceded to on 9 July 1996,[13] provides that 'all peoples'

> *shall pursue their economic and social development according to the policy they have freely chosen*.[14]

2.28. The African Commission on Human and Peoples' Rights[15] has given a definitive interpretation of the socio-economic rights contained in the Charter

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[12] In this instance, the country's obligation is to give legislative effect to the rights contained in the Charter. Article 1 of the Charter provides: Article 1 of the African Charter provides: *The Member States of the Organization of African Unity parties to the present Charter shall recognize the rights, duties and freedoms enshrined in this Chapter and shall undertake to adopt legislative or other measures to give effect to them.*

[13] This instrument is binding upon South Africa.
Section 231 of the Constitution states:

"231 International agreements

(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, …

[14] Article 20(1) of the African Charter.

(but for the noteable exclusion of group rights).[16] This interpretation is binding upon the signatories to the Charter.[17] The Commission has found that the notion of 'peoples' can denote a community within the geographical boundaries of a country.[18] The right to development has been found to belong to communities as peoples – in particular where such a community finds itself outside the mainstream development paradigm.[19]

2.29. There can be no doubt that South Africa is inhabited by various different cultural groupings with different notions of development, both in the former homelands and beyond. These obligations include to:

- Bear in mind that the implementation of economic, social and cultural rights in Africa requires taking into account the totality of the way of life and the positive cultural values of individuals and peoples in Africa to ensure the realisation of the dignity of all persons;[20]

- Regard as vulnerable and disadvantaged all 'landless and nomadic pastoralists, workers in the informal sector of the economy and subsistence agriculture'; and[21]

- Devise national plans and policies and periodically reviewed these, on the basis of a participatory and transparent process. They should take into account all other national plans, including where appropriate, poverty alleviation plans and policies whilst also ensuring that the special needs of members of vulnerable and disadvantaged groups are met.[22]

2.30. The most important rights under the Charter relevant to community consent are:

- The right to property including customary tenure rights (article 14)

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[15] The African Commission on Human and People's Rights ("the African Commission") is the body enjoined to interpret the African Charter and ensure that states parties comply with their obligations. It is required to "formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African Governments may base their legislations." It is also empowered to "Interpret all the provisions of the present Charter".

[16] Contained in the *Principles and Guidelines on the Implementation of Socio-Economic Rights contained in the African Charter*. See www.achpr.org.

[17] The Principles and Guidelines emphasize that All rights recognised in the African Charter must be made effective under national legal systems

[18] Principles and Guidelines: *Peoples are, for the purpose of these guidelines, any groups or communities of people that have an identifiable interest in common, whether this is from the sharing of an ethnic,3 linguistic or other factor.4 Within the scope of these guidelines peoples are therefore not to be equated solely with nations or states*

[19]

[20] Preamble.

[21] Definitions.

[22] Para 26 of the Principles and Guidelines.

- The right to culture (because rights in land that are integral to the identity and culture of a group are protected under this article and may not unnecessarily be disturbed by development projects)
- The peoples' right to freely dispose of natural resources
- The peoples' right to development which includes a peoples' right to determine its own development paths

2.31. In 2010, the Endorois community of Kenya asked the ACHPR to recognise their rights as a community under the Charter and to find that the Kenyan government violated these rights. The Endorois are a community of about 60 000 people who have lived in the Lake Bogoria area of Kenya for centuries. They claimed that they were dispossessed of their land in 1973 through the government gazetting of the land and, as a result of not being able to access their land ever since, their rights to property and religion and, as a people, their rights to development and to freely dispose of their natural resources were infringed.

2.32. The community claimed that they had a right to property both in terms of Kenyan law and the African Charter 'which recognise indigenous peoples' property rights over their ancestral land'. They argued that in cultivating the land and enjoying unchallenged rights to pasture, amongst other things, 'they exercised an indigenous form of tenure, holding the land through a collective form of ownership. Such behaviour indicated traditional African land ownership, which was rarely written down as a codification of rights or title, but was, nevertheless, understood through mutual recognition and respect between landholders'.

2.33. In finding in favour of the Endorois community, the ACHPR recognised that a peoples' right to development includes the consent standard:

- *Additionally, the African Commission is of the view that any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.*

- *The African Commission is of the view that the right to development is a two-pronged test, that it is both constitutive and instrumental, or useful as both a means and an end. A violation of either the procedural or substantive element constitutes a violation of the right to development. Fulfilling only one of the two prongs will not satisfy the right to development. The African Commission notes the Complainants" arguments that recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, over-arching themes in the right to development.*

- *In that regard it takes note of the report of the UN Independent Expert who said that development is not simply the state providing, for example, housing for particular individuals or peoples; development is instead about providing people with the ability to choose where to live. He states "… the state or any other*

authority cannot decide arbitrarily where an individual should live just because the supplies of such housing are made available". Freedom of choice must be present as a part of the right to development.

2.34. Consent must be obtained, according to the African Commission in *Endorois*, according to the customs and traditions of the people.[23] Cultural differences must be addressed, especially differences in understanding of key concepts like ownership and property. Illiteracy must be taken into account and accommodated.[24] The Commission determined that this was not the case in *Endorois*, the result being that "community members were informed of the impending project as a *fait accompli*, and not given an opportunity to shape the policies or their role in the Game Reserve."[25] If this is not to be the case, substantial and appropriate consultation must precede all development initiatives, and "[t]hese consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement."[26] This duty of active consultation "requires the State to both accept and disseminate information, and entails constant communication between the parties."[27]

2.35. Our evaluation is that the MPRDA as it currently stands falls short of the community rights contained in the African Charter to

- economic self determination [article 20];
- own and dispose of their natural resources [article 21];
- their social, cultural and economic development [article 22]; and
- property rights of communities living with customary law [article 14].

2.36. At a continental level the **African Mining Vision (AMV)** was conceived in preparation for the First African Union Conference of Ministers Responsible for Mineral Resources Development. It was drafted by a technical taskforce of the International Study Group (ISG)[28] on Africa's mineral regimes, a project of ECA. This initiative ultimately seeks to harmonise standards and increase the developmental impact of mining in Africa. The ISG process has already specifically noted the neglect of local communities stating, "The application of standard instruments for assessing and regulating impacts have not, in many African countries, developed deep roots. These limitations are

[23] Endorois v. Kenya para. 291
[24] Ibid para. 292
[25] Ibid para. 281
[26] Ibid para. 289
[27] Saramaka v. Suriname para. 133 as quoted in Endorois v. Kenya para. 289
[28] The ISG draft report can be accessed here; http://www.uneca.org/csd/csd6/AficanReviewReport-on-MiningSummary.pdf

even more pronounced in relation to the evaluation of social costs, ***particularly those of vulnerable groups close to mining operations.*** *"* p.58 [29]

2.37. The African mining vision statement specifically refers to local communities. **"Transparent, equitable and optimal exploitation of mineral resources to underpin broad-based sustainable growth and socio-economic development" through inter alia, "**Mutually beneficial partnerships between the state, the private sector, civil society, ***local communities*** and other stakeholders." The vision also states; " A sustainable and well-governed mining sector that effectively garners and deploys resource rents and that is safe, healthy, gender & ethnically inclusive, environmentally friendly, socially responsible **and appreciated by surrounding communities**;"30**:**

2.38. As part of the process towards harmonising standards first at a sub regional and later a regional level different economic communities have begun developing protocols relating to mining regimes. As time has progressed, these instruments have improved dramatically in terms of focus and the importance of proper relations at a local community level. The most recent of these instruments adopted in May 2009 by the Economic Community for West African States (ECOWAS) provides explicit recognition for the dual system of FPIC (Article 16) and benefit sharing (Article 8) with a broader localization or empowerment perspective(Article 11) and draws no artificial distinction between indigenous and local communities (Articles 4,16). It talks of providing capacity for communities engaged in negotiations (Article 18). It also couches obligations in terms of respect for human rights (Article 15) and provides for relief via the ECOWAS Court of Justice which can be done by a state, an individual or a stakeholder. (Article 18) West Africa has strong recognition for communal land rights which govern ownership as in much of the rest of Africa. [31] For example article 16 sections 3 and 4 states,

> **"3. Companies shall obtain free, prior, and informed consent of local communities before exploration begins and prior to each subsequent phase of mining and post-mining operations**.
> 4. Companies shall maintain consultations and negotiations on important decisions affecting local communities throughout the mining cycle."

[29] .ISG Draft Report 2009
[30] . ISG Draft Report 2009 http://www.uneca.org/csd/csd6/AficanReviewReport-on-MiningSummary.pdf

[31]Economic Community of West African States (ECOWAS) Directive C/DIR.3/05/09 on the Harmonization of Guiding Principles and Policies in the Mining Sector
http://www.comm.ecowas.int/sec/en/directives/ECOWAS_Mining_Directives.pdf

2.5 THE MPRDA DOES NOT CONFORM TO THE STANDARDS SET BY THE NDP, THE MINING CHARTER AND THE LAND REFORM POLICIES

2.39. Finally, the consent standard finds a basis in recent statements by the government on development planning and the restructuring of the extractives industry.

2.40. The National Development Plan (NDP), in November 2011, stressed the importance of rural communities' participation in the main- stream economy. The NDP calls for a "review of mining industry commitments to social investment" and a rise in economic participation in rural areas. It emphasises the explicit requirement that mining companies "participate in local economic development" in order to address the resource curse that bedevils the South African economy.

2.41. In its vision statement the NDP "tells a story" not just for South Africa but for "the region as a whole,"[32] and indeed does briefly report on and draw lessons from the economic experiences of Africa more broadly, writing for example that, "Minerals underpin the economic strength of many countries. Africa holds 95 percent of the world's platinum group metals reserves"[33] to reinforce the importance of the mining industry for South Africa.

2.42. Further motivation for community based restructuring of the extractives industry is found in the policy documents industry, labour and government and the BEE exercises. Particularly relevant are the BEE provisions in the Mining Charter including its most recent manifestations in the form of the the BBSEE charter of 2010[34], the charter scorecard[35] and scorecard reporting template.[36] The broad based socio economic charter for the South African mining industry is aimed at inter alia:

- Ownership participation in mining
- Participation in management

[32] NDP 225
[33] Ibid 61
[34] http://www.dmr.gov.za/publications/finish/108-minerals-act-charter-and-scorecard/128-amendedofbbseecharter/0.html
[35] http://www.dmr.gov.za/publications/finish/108-minerals-act-charter-and-scorecard/130-scorecard-mining-charter/0.html
[36] http://www.dmr.gov.za/publications/finish/108-minerals-act-charter-and-scorecard/131-mining-charter-reporting-template-final/0.html

- Integrated socio economic development for mine workers and communities.

2.43. It also requires that BEE transactions shall be concluded with clearly identifiable beneficiaries in the form of BEE entrepreneurs, employees including ESOPs and communities.

2.44. Significantly the charter invokes language reminiscent of the consent standard: "consistent with international best practices in terms of rules of engagement and guidelines, mining companies must invest in ethnographic community consultative and collaborative processes prior to the implementation or development of mining projects," and "mine communities form an integral part of mining development, there has to be meaningful contribution towards community development, both in terms of size and impact, in keeping with the principles of the social license to operate."

2.45. The charter scorecard and reporting template go further in giving content to these noble objectives. Meaningful economic participation and full shareholder rights should reach at least 26% by 2014. Mine community development should include "ethnographic community consultative and collaborative processes to delineate community needs analysis" resulting in the implementation of approved community projects which would "serve to enhance relationships amongst stakeholders leading to communities owing patronage to projects". Companies are required to evaluate themselves and be evaluated with reference to the following questions:

a) Did the company consider the profiles of relevant communities, and identify credible leaders of the communities?
b) Did the company consult with such leaders prior to the implementation of projects?
c) Did the company consult with the leaders to identify projects within the needs analysis and prioritise such projects?

2.46. But these objectives and normative targets are not enforceable in law and non compliance does attract liability. The next section proposeS that the MPRD amendment bill be brought in line with the policy statements and normative standards.

2.47. The State Land Lease and Disposal Policy signed by the Minister of Rural Development and Land Reform on 30 July 2013 replaces all earlier policies of that department dealing with leases in former homelands. Chapter 3 deals with commercial and industrial leases on communal land in former

homelands. Mining leases are listed in paragraph 22. It prescribes the appropriate rental calculations, duration and other terms of leases.

2.48. The policy prescribes that IPILRA consent requirements and procedure will apply. In addition it requires a 10% equity stake to communities. The relevant provisions of the policy include:

> *Whilst existing sector specific Broad Based Black Economic Empowerment targets may be used for guidance, the commercial entity operating in a communal area should allocate a minimum of 10% free-rider shareholding in the operating entity.*
>
> ***COMMUNITY PARTICIPATION***
> *24.1 Where the envisage development is to take place on land which, at any time prior to 27 April 1994, was allocated to a traditional community or other community, such community shall be consulted in accordance with procedures issues in terms of the Interim Protection of Informal Land Rights Act, 1996.*
> *24.2 Where the envisaged development is to take place on land where certain natural person have enj*
>
> *oyed informal rights to land, such persons shall also be consulted in accordance with the same procedures referred to at 24.1 above.*
> *24.3 The land development applicant or prospective lessee shall initiate and manage the consultation process and incur all costs relating to the convening of consultation meetings.*
> *24.4 The Department shall assist the land development applicant or prospective lessee in identifying the correct community to be consulted, where such community exists.*

3 The way forward

We expressed our reservations about specific wording for our proposals in the cover letter to our memorandum. The motivation above should be read with the brief explanations given in respect of the text proposed. The proposed text appear in blocks

1 Definitions

insert new definition: 'directly affected community' means a community or part of a community directly affected by mining on communal land occupied or used by members of such community or part of the community, and where a directly affected community was dispossessed of its rights in land as a result of mining on its communal land, the community shall have the meaning corresponding to the meaning ascribed in the Restitution of Land Rights Act 1994. insert new definition: 'communal land' means land in respect of which a community holds rights including informal rights as defined in Interim Protection of Informal Land Rights Act 1998.

IPILRA is currently the only statute that addresses tenure security under section 25(6) of the bill of rights. It is renewed annually. The new State Land Lease and Disposal Policy of the department of rural development and land reform offers state assistance with the community identification and consultation and consent process. But community self identification and ownership of the customary law decision making process are important ingredients for successful negotiations and sustainable outcomes.

The 1913 land act legacy requires of our society to invest in supporting communities to shape and pace their own development paths.

2 Section 2: principles

Subsection 2 paragraph (d)

Retain “women and communities”

There is no motivation in the memorandum, legally or constitutionally for removing women and children as a designated group identified for mining development.

by the insertion of the following paragraph after paragraph (i): (j) ensure that applicants for and holders of prospecting and mining rights must invest in community consultative and collaborative processes prior to and during the development or implementation of projects; (k) provide for a contribution to the reparation for the dislocation of effected communities on communal land that were dispossessed of their rights in land due to mining or otherwise directly affected.

The principles are warranted and motivated for in our memorandum. The wording of paragraph (j) is borrowed from the industry/labour/government amended BBSEE charter of 2010, and states the value underlying the consent standard.

Paragraph (k) includes impacts of mining on restitution communities and other communities.

Unless the consent and reparation standard is adopted in practice and as the foundational principle to address the 1913 land law legacy, history will simply be repeated. The Marikana disaster and more specifically the story of the Wonderkop farm illustrates the challenge at various levels:

a) 75% of the Wonderkop farm was purchased by a consortium of individual families who did not necessarily recognise the property rights of the Bapo tribe. Some of the families were dispossessed of their nearby land under the Hartebeestpoort Irrigation Scheme Act of 1914 which scheme was established to support poor whites and victims of the Anglo Boer War and First World War. The Wonderkop community lodged a land claim to the land that they bought in the 1920s with their own money. At the time, they did not belong to the jurisdiction of any chief. They thus requested the Bapo chief to facilitate their purchase of the land, because the laws of the time only allowed land of black people to be held on behalf of chiefs.

b) The Bapo tribe, tribal authority (TA)/traditional council (TC),[37] established under the Bantu Authorities Act of 1951, [currently under administration] was thus given jurisdiction over the Wonderkop community land.

c) The Apartheid Bantu Development Trust gave old order mining rights to mining companies and received royalties in respect of mining on and under the Wonderkop farm. The Bophuthatswana Homeland government converted mining leases and rentals and granted benefits to the Bapo tribal authority.

d) Lonmin and other mining companies converted their old order rights and continue to pay royalties to the nearby Bapo TA without direct benefit to the Wonderkop community. However, even the Bapo TA is engaged in litigation against Lonmin because of the minute share of the spoils they receive. Lonmin's excuse for the mess is that they don't know who represents the community – although, in truth, they have not even investigated who 'the community' is. As a result, no part of the community is currently benefitting substantially.

e) Lonmin undertook to build houses for migrant employees but failed to do so.

f) The Wonderkop community bears the brunt of many decades of discrimination. It is in effect subsidising the extractives industry, the Bapo TA and the employees on the mines, and the MPRDA continues to exacerbate their fate.

3 Section 5A: prohibited activities

by the insertion after paragraph (c) of the following paragraph:

(d) on communal land, without the prior written consent in terms of customary law if applicable and the Interim Protection of Informal Land Rights Act 1998 of the directly affected community: Provided that if a prospecting right, mining right or mining permit had been granted in respect of communal land and such consent is not given within 6 months of any grant, such right will lapse.

The motivation for the consent is requirement as the foundation principle for mining on communal land is motivated for in historical, legal and business terms. Section 5A should be amended to make it illegal to start mining without community consent under customary law and complying with IPILRA.

Under section 10, any applicant and the department must invite a community on communal land to negotiate with a view to find agreement. An applicant for a

[37] The status of traditional councils in the North West under the Traditional Leadership and Governance Framework Act is in serious doubt.

mining right without community consent or pending consent, can proceed with an application at his own risk but cannot start mining until consent is given and the department's grant will lapse after six months if community consent is not given.

Under section 100, communities that are considering giving consent to new mining on their land in terms of section 5A will at least get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter.

4 Section 10: consultation

by the insertion in subsection (1) after paragraph (b) of the following paragraph:

"Provided that if the application relates to communal land, the directly affected community must be invited to negotiate and seek agreement on the application."

5 Section 10B: RMDEC

by the insertion after paragraph (b) of the following paragrah:

(c) consider reports on negotiations in respect of communal land, and report thereon to the minister.

6 Section 10C: composition of RMDEC and expertise of members

by inserting at the end of section 10C(1) the following words:

"the development needs of communities"

by inserting a paragraph after paragraph (c) in subsection (2)

"the regional land claims commissioner"

7 Proceedings of RMDEC meetings

10H Proceedings of the RMDEC

The meetings of the committee shall be open to the public.

The reports and recommendations of the committee, minutes of meetings and comments, objections and agreements considered by the committee shall be

available for public inspection.

Whether or not the right to attend meetings and the right so access to information are implied in the PAJA or PAIA is neither here nor there. The fact is that in the extractives industry extraordinary efforts must be made in the statutory instruments to address the perception that the department and regional managers do not promote transparency and accountability in a manner that fosters trust between stakeholders. The right to attend meetings and get access to information in particular in relation to RMDEC should be stated in terms in the act itself.

8 Section 27 small scale mining and mining permits

by the insertion after subsection (9) of the following subsections:

(10) the minister shall, after consulting the Council, develop a Charter

a) to protect and promote customary and artisanal small scale miners,

b) that will set the framework for effecting the participation of members of communities in the exploitation of the resources of their communal land.

(11) the Minister may, with reference to the Charter envisaged in subsection (10)exempt persons who are members of communities or categories of such persons from certain of the provisions of this section.

Regarding the legitimate activities of small scale customary and artisanal miners on communal land who cannot comply with the onerous provisions relating to small scale mining in section 27 which are too cumbersome on the one hand or too restrictive on the other hand, the above provisions will allow for a flexible small scale policy, without sacrificing certainty and security.

9 Section 45A Minister's power to recover costs in event of urgent measures to prevent safety and security risks at abandoned and closed mines

Minister's power to recover costs in event of urgent measures to prevent safety and security risks at abandoned and closed mines

45A. (1) If, in the Minister’s opinion, any closed or abandoned mine or any cessation of operations as a result of relinquishment, abandonment or cancellation of a right or permit poses a risk to the security, health and safety of the public, or is used for illegal mining activities, and requires urgent remedial safety and security measures to be taken, the Minister may direct the holder or previous holder of the relevant right, permit or permission or the

previous holder of an old order right to---

(a) investigate, evaluate, assess and report on the impact of any safety or security risk;

(b) take such measures as may be specified in such directive; and

(c) complete such measures before a date specified in the directive.

(2) (a) If the holder fails to comply with the directive, the Minister may take such measures as may be necessary to protect the public or secure the abandoned or closed from illegal activities.

(b) Before the Minister implements any measure, he or she must afford the holder an opportunity to make representations to him or her.

(c) In order to implement the measures contemplated in paragraph (a), the Minister may by way of an ex parte application apply to a High Court for an order to seize and sell such property of the holder as may be necessary to cover the expenses of implementing such measures.

(d) In addition to the application in terms of paragraph (c), the Minister may use funds appropriated for that purpose by Parliament to fully implement such measures.

(e) The Minister may recover an amount equal to the funds necessary to fully implement the measures from the holder concerned.

(3) If the Minister directs that measures contemplated in this section must be taken to protect or secure but establishes that the holder of the relevant right or permit or old order right, or his or her successor in title, is deceased or cannot be traced or, in the case of a juristic person, has ceased to exist, has been liquidated or cannot be traced, the Minister may instruct the Regional Manager concerned to take the necessary measures to make the area safe and secure.

(4) The measures contemplated in subsection (3) must be funded from the financial provision made by the holder of the relevant right or permit or if there is no such provision or if it is inadequate, from money appropriated by Parliament for that purpose.

10 Section 47: cancellation of mining right

‘‘(c) is contravening any condition in the environmental authorisation, approved social and labour plan or undertaking by a holder or condition imposed in respect of the housing and living conditions standard for the

minerals industry, codes of good practice for the minerals industry and the broad-based socio-economic empowerment charter envisaged in section 100.

The enforceability of SLPs and mining charter undertakings and targets are undermined in that there is no real sanction for non compliance. A fine as provided for in section 99 has little if any deterrent value. Non compliance with the detailed provisions of SLPs and BEE undertakings should in terms be punishable with cancellation of the right, as in the case of environmental authorisations.

Retain paragraph (d) dealing with misrepresentations by mining companies

The memorandum and the departments give no explanation why after the act has been in operation for 11 years, why the offence and remedy must be now be repealed.

11 Section 56C: The composition of the Council

Include the following categories One representative from non governmental organisations Two persons from community based organisations The Chief Land Claims Commissioner

The memorandum and the department give no explanation why civil society and communities should lose the representation that they had on the Board which is now being replaced by the Council.

12 Section 100: empowerment and reparation

Section 100 of the principal Act is hereby amended by the substitution in subsection (2) for paragraph (a) of the following paragraph: ‘‘(a) To ensure the attainment of the Government’s objectives of redressing historical, social and economic inequalities as stated in the Constitution, the Minister must within six months from the date on which this Act takes effect develop a broad-based socio-economic empowerment Charter that will set the

framework for targets and time table for effecting

a) reparation and redress to directly affected communities on communal land who have not benefitted from mining on their land;

b) the entry into and active participation of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of the mining and mineral resources and the beneficiation of such mineral resources:

Provided that the target set in respect of mining on communal land shall be exclusively for the benefit of the directly affected community, and any equity associated with such target shall be held by an entity in which the community holds a controlling interest."

The proposal above means that

a) Communities that historically and currently lost their land rights in homelands and and on communal land as a result of mining will get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter.

   This does not mean that communities with land claims under the Restitution Act will be limited to this grant in their restitution packages, but it could make a significant contribution to the integration of the reparation aims of the land reform programme and the redistribution aims of the MPRDA.

b) Communities that are considering giving consent to new mining on their land in terms of section 5A will at least get the full benefit, ie 26%, of ownership and control targets in the BBSEE Charter.

by the amendment of section 100(2)(b):

the Charter must set out, amongst others how the objects referred to in section 2(c), (d), (e), (f), (i), (j) and (k) can be achieved**.**