1. **Report of the Portfolio Committee on Mineral Resource Based on the report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change, dated 13 March 2019**

The Portfolio Committee on Mineral Resources, having considered the High Level Panel (HLP) recommendations on the Mineral Resources legislation during the meetings held on 07 November 2018 and 19 February 2019 reports as follows:

1. **Background**

The Fourth Democratic Parliament identified the assessment of the impact of legislation passed since 1994 as a key priority to be undertaken by the Fifth Democratic Parliament. This priority was incorporated into the Strategic Plan of Parliament for 2014 – 2019. Subsequently, the High Level Panel of eminent South Africans was established by the Speakers Forum in December 2015 to undertake this task.

The mandate of the HLP was, inter alia, to:

* Assume overall responsibility for the assessment of key legislation and the acceleration of fundamental change;
* Assess the impact of existing legislation and identify legislative gaps;
* Assess possible unintended consequences, gaps and unanticipated problems in post-apartheid legislation, as well as how effectively laws have been implemented; and
* Propose appropriate remedial measures to Parliament, including amendment, repeal or additional legislation.

1. **Briefing by Dr Aninka Claassens (Ex panellist on HLP)**

Dr Claassens noted that key high level panel recommendations on the interpretation of the Mineral and Petroleum Resources Development Act, No. 28 of 2002 (MPRDA) have been confirmed by the Maledu Constitutional Court judgment of 25 October 2018. Judgment was (at that time) still outstanding on the Xolobeni case which highlighted the argument that the Free, Prior and Informed Consent (FPIC) of communities living on communally owned land was required before the Minister of Mineral Resources could grant prospecting or mining rights over such land.

The HLP expressed the view that many mining deals which involved mining companies and traditional leaders were legally precarious because:

* The MPRDA of 2002 was complemented by Traditional Leadership and Governance Framework Act (Act No 41 of 2003) (TLGFA)
* The TLGFA was the first in the intended package of traditional leadership laws drafted during the 2000s which comprised the Communal Land Rights Act (CLRA), several provincial traditional leadership laws and the Traditional Courts Bill (TCB) of 2003.
* But CLRA and TCB were defeated by popular opposition and were not enacted.
* Hence by implication, traditional leaders have no overt powers to sign deals which involve communal land. (Hence clause 24 of the pending Traditional and Khoi-San Leadership Bill (‘TKLB’)).
* Also, there is wide non-compliance with requirement for 40% elected representation in all Traditional Councils, of which one third have to be women.
* State and mining companies have been acting as if the provisions of the abandoned CLRA and TCB are in place, and that the Interim Protection of Informal Land Rights Act (IPILRA) of 1996, which requires consent before anyone is deprived of their informal right to land, does not exist.

**The Maledu judgment has implication for the following:**

* For current mining agreements.
* For future mining agreements.
* Role of different parts of government in supporting abrogation of IPILRA and lack of accountability, such as the Department of Mineral Resources (DMR), the Department of Rural Development and Land Reform (DRDLF) and Provincial Premiers.
* Role of mining houses, banks, legal firms, auditors.
* Elite interests privileged at the expense of the basic citizenship and property rights of poorest South Africans who bear the costs of damaged environment and lost rural livelihoods.

1. **Dr. Claassens reported on the HLP report as follows:**

* The Panel heard testimony from residents of mining areas about the acute disruptions caused in their lives and livelihoods by mining, a problem compounded by the role of traditional leaders who have assumed ownership of communal property and therefore the right to enter into commercial deals without consulting their populations. Forcible removal in the wake of these deals has been reported. Part of the solution lies in requiring compliance with IPILRA in these circumstances, supplemented with express provisions in the MPRDA ensuring that communities receive adequate information on proposed mining activities prior to deciding whether to consent or not.

With regards to the Interim Protection of Informal Land Rights Act of 1996 (IPILRA), it gives effect to sections 25(6) and 25(9) of the Constitution in order to protect those whose tenure is legally insecure because of past racially discriminatory laws and practices. In terms of IPILRA, no person or community can be deprived of informal rights to land without their consent except by expropriation

* + Occupy – e.g. house, thus family right as opposed to ‘communal’
  + Use – e.g. field, also family as opposed to ‘communal’
  + Access, shared access to grazing, forests. Therefore ‘communal’

1. **The HLP has made the following recommendations**

**4.1 Benefits**

* Where mining has already taken place on communal land and the directly affected community has not benefitted, the MPRDA must provide for compensation for individuals, households and communities to be calculated to put affected persons in the position that they would have been in had the mining not occurred.
* The MPRDA must be amended to ensure that both revenues from mining-related activities and opportunities generated by such mining activity are shared in an equitable and transparent manner amongst people whose land rights are directly affected.
* The MPRDA must be amended to include clear and binding financial and administrative protocols for entities that purport to represent community interests and companies that do business with them, including accountability mechanisms that align with customary law principles of transparency and accountability.
* The MPRDA must be amended to provide for a Charter to protect and promote customary and artisanal small- scale miners, and set a framework for the participation of communities in the sustainable and equitable exploitation of the resources of their communal land.
* Section 47 of the MPRDA (Minister’s Power to Suspend or Cancel Rights, Permits or Permissions) must be amended to expressly provide for the suspension or cancellation of mining rights where a company has significantly failed to meet its Social and Labour Plan (SLP) and B-BBEE commitments.  (This power is in the MPRDA, but it has never been used, so must be made explicit to put the matter beyond doubt).
* The MPRDA must also be amended to establish a mechanism to independently investigate and advise on community grievances in an efficient, democratic, and transparent fashion.

**4.2 Dispossession**

* Section 10 of the MPRDA must be amended to expressly require that directly affected communities must be invited to negotiate and seek agreement on any mining application.
* The MPRDA must be amended to expressly require compliance with IPILRA as a condition for the grant of a mining- related right.  (IPILRA rights are routinely ignored so compliance with IPILRA before a mining right is granted must be made explicit).
* The MPRDA must be amended to specify the minimum information to be shared with community members, including full mining right applications and environmental impact assessments, prior to any decision to accept mining under IPILRA.
* The MPRDA must be amended to provide that a mineral-right applicant must, at its own expense, invite the community to appoint an independent expert(s) of their own choosing to assist in the IPILRA negotiation in communal areas.
* The MPRDA must be amended to provide that where more than one community is affected, each shall have the right to independently decide whether to grant or refuse its consent.
* Where mining requires the relocation of specific community members’ homes, insert a requirement in the MPRDA that the majority of those to be relocated must consent to the mining activity.
* Amend MPRDA to provide that no person or community may be relocated to enable mining unless such relocation is unavoidable. Where relocation is unavoidable and consent is granted, remedies and compensation must be clearly defined.
* Alternative land must be the default compensation and people must be offered living conditions equal to, or better than, their conditions prior to the relocation.
* Cash compensation must be based not on market value, but on real value to affected people, taking into account the effective value of resources such as ploughing and grazing land, water access and cultural value.
* Amend MPRDA section 5A (Prohibition relating to illegal acts) to make it illegal to mine without community consent under customary law and in compliance with IPILRA.
* Should mining commence or a right be granted without the consent of the community, that community shall have the right to set aside the license and to be paid compensation for the full damages suffered, or to consent to the mining retrospectively through the process to be set out in the MPRDA - including the negotiation of compensation, and to recover all compensation that would have been owed to it had the community’s consent been received from the outset.
* Communities to have a right to revoke their consent should mining activities be conducted in a manner that is contrary to the MPRDA and its regulations, with communities entitled to compensation for the full damages suffered by all mining activities.

**Dr Claassens briefed by the Committee on the Maledu Judgement as follows:**

* In para 5, mining is described as one of the major contributors to the national economy. But there is a constitutional imperative that should not be lost from sight, which imposes an obligation on Parliament to ensure that persons or communities whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices are entitled either to tenure which is legally secure or to comparable redress. Accordingly, this case implicates the right to engage in economic activity on the one hand and the right to security of tenure on the other.
* In para 106, this conclusion also finds support in this Court’s decision in the earlier Maccsand judgment. In Maccsand, the court held that the exercise of a mining right was subject to any other laws bearing on such a right. The MPRDA was not read to override the applicability or requirement of other statutes, such as the Land Use Planning Ordinance, that may impact upon mining activity. By parity of reasoning, the MPRDA must be read, insofar as possible, in consonance with IPILRA. In the context of this case this means that award of a mining right does not without more nullify occupational rights under IPILRA. More is required to demonstrate that the IPILRA informal right holder was lawfully deprived of his or her right to occupy as required by section 2 of IPILRA. There is no conflict between these two statutes; each statute must be read in a manner that permits each to serve their underlying purpose. Significantly, both statutes make provision for expropriation of land if all else fails.
* In Para 108, In short, the respondents submitted that the *kgotha kgothe* of 28 June 2008 deprived the applicants of their informal land rights in terms of the customs and usages of the Bakgatla as contemplated in section 2(2) and (4) of IPILRA. In support of this contention, the respondents relied on a resolution adopted by the Bakgatla-Ba-Kgafela at the *kgotha kgothe* of 28 June 2008. But this resolution does no more than merely indicate that it was adopted and signed by Kgosi Pilane and a representative of Barrick. Thus, there is no shred of evidence to substantiate the respondents’ assertions that the applicants were deprived of their informal land rights in conformity with the prescripts of section 2(4) of IPILRA.

**The key outcomes were as follows:**

* MPRDA must be read concurrently with IPILRA. Those directly affected must be consulted and consent to any deprivation of their informal land rights.
* No evictions are possible until remedies provided by MPRDA section 54 (for compensation) have been exhausted.
* Once a section 54 dispute about compensation is lodged, mining may not proceed until compensation is agreed.

**Game changers were as follows:**

* No section 54 agreements have ever been issued as far as Dr. Claassens was aware. Certainly none have been issued when mining was planned in communal areas
* Once mining commences it undermines value of land and changes the balance of power.
* Now mining must be held back until people consent and compensation is decided up front.
* Expropriation of land rights is possible in terms of both IPILRA and MPRDA, but at least uncompensated confiscation is no longer allowed, following the Maledu judgment.

**Responses to judgement – TKLB**

* Department of Traditional Affairs has proposed some last-minute amendments to the TKLB.
* *“(3) Any partnership or agreement entered into by any of the councils contemplated in subsection (2) must be in writing and, notwithstanding the provisions of any other national or provincial law –*
* This represents an attempts to over-ride IPILRA rather than to make TKLB subject to IPILR, as the Maledu judgment has done in relation to the MPRDA

This is subject to:

* *(ii) a decision in support of the partnership or agreement taken by a majority of the relevant community members present at the consultation contemplated in subparagraph (i) ...”*

The new reference to ‘a majority of relevant community members’, was not a practical improvement in the view of Dr. Claassens, because it operates within the framework of the TKLB. The TKLB does not start with land rights holders, as IPILRA does. It starts with councils and traditional leaders who represent the ‘traditional communities’ formerly named ‘tribes’ in the apartheid legislation.

**Responses of the DMR to the HLP Report**

The report of the High Level Panel was referred to the Portfolio Committees as well as Joint Rules Committee for consideration and report. The Portfolio Committee on Mineral Resources referred the report to the Department of Mineral Resources for inputs and the inputs were received and are included in the following table.

[The DMR refers to the “Xolobeni High Court Judgment”. This was referred to above by Dr Claassens. Judgment was delivered on 22 November 2018, largely against the Minister. The Gauteng High Court in *Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829* endorsed the principle of Free Prior and Informed Consent in IPILRA over that of “meaningful consultation” in the MPRDA. The Minister has appealed this aspect of the judgment.]

**Table 1.**

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| **HPL Recommendation** | **DMR Response** |
| * MPRDA must be amended to comply with IPILRA to ensure any agreement affecting communal land must include steps taken to obtain consent from those affected, including lists of those consulted and proof of their consent. | * The MPRDA provides for meaningful consultation with landowners, lawful occupiers and interested and affected parties. Community consent is not a requirement and the Xolobeni High Court Judgment is being appealed to the extent that its requires consent by communities before a mining right is granted. |
| * Any action taken in terms of the Mineral Petroleum Resources and Development Act, No. 28 of 2002 (MPRDA), should be compliant with IPILRA, failing which it should be declared invalid. | * The MPRDA requires that the granting of a mining right must take into account all applicable laws, including IPILRA. However, the consideration of applicable laws should not translate into consent by communities but meaningful consultation as envisaged in the MPRDA. |
| * Laws, such as the MPRDA, that have been interpreted to enable land grabs, should be explicitly made subject to IPILRA and amended in other ways as well. | * The MPRDA provides for meaningful engagement and compensation of communities as a result of loss or damage as a result of proposed mining operations, section 54. * The section 54 process is an involved process and must be complied with before a right is granted. It further includes arbitration and mediation mechanisms to arrive at sufficient redress for communities. This provision, however does not envisage retrospective compensation of communities. |
| * The MPRDA must be amended to ensure that both revenues from mining-related activities and opportunities generated by such mining activity are shared in an equitable and transparent manner among people whose land rights are directly affected. | * Section 3 of the MPRDA prescribes that all royalties shall be administered by the Minister of Finance (Royalties Act). * The State is the custodian of mineral resources for the benefit of all South Africans and not just land right/communal land owners. * The Mining Charter and Social and Labour Plans are instruments designed to benefit parties directly affected by mining operations. |
| * The MPRDA must be amended to include clear and binding financial and administrative protocols for entities that purport to represent community interests and companies that do business with them, including accountability mechanisms that align with customary law principles of transparency and accountability. | * Entities that purport to represent community interest are recognised in the Mining Charter as part of Trusts or appropriate vehicles that may represent communities interest. The modalities for their representation can be agreed with the right holders/trusts or related vehicles. |
| * The MPRDA must be amended to provide for a Charter to protect and promote customary and artisanal small-scale miners, and set a framework for the participation of communities in the sustainable and equitable exploitation of the resources of their communal land. | * The Mining Charter, 2018 provides for a dispensation for junior miners. It has dedicated provisions for meaningful participation of host communities in ownership of mines and communities in general through SLP’s. * Small scale miners are regulated in terms of section 27 of the Act. Section 104 read with section 12 of the Act provides for community preferent right. |
| * Section 47 (Minister’s Power to Suspend or Cancel Rights, Permits or Permissions) must be amended to expressly provide for the suspension or cancellation of mining rights where a company has significantly failed to meet its Social and Labour Plan and B-BBEE commitments. (This power has never been used, so must be made explicit to put the matter beyond doubt.) | * Section 47 is sufficient to deal with transgression of the MPRDA including the SLP and B-BBEE commitment and any terms and conditions of a mining right. The use or non-use of this provision is a function of implementation and enforcement. |
| * The MPRDA must also be amended to establish a mechanism to independently investigate and advise on community grievances in an efficient, democratic and transparent fashion. | * The Section 54 process includes arbitration and mediation mechanisms where there are disagreements. Parties may resort to Courts where these other interventions fail. |
| * Section 10 of the MPRDA must be amended to expressly require that directly affected communities must be invited to negotiate and seek agreement on any mining application. | * Section 10 of the Act envisages meaningful consultation and not agreement/consent. The Xolobeni High Court Judgment is being appealed to the extent that its requires consent by communities before a mining right is granted. |
| * The MPRDA must be amended to expressly require compliance with IPILRA as a condition for the grant of a mining-related right. | The MPRDA requires that the granting of a mining right must take into account all applicable laws, including IPILRA. |
| * The MPRDA must be amended to specify the minimum information to be shared with community members, including full mining right applications and environmental impact assessments, prior to any decision to accept mining under IPILRA. | * Meaningful consultation means that an applicant must make available all pertinent information to enable a community to make a decision about the proposed mining project. Regulations to the MPRDA may be expanded to clarify this requirement. |
| * A mineral-right applicant must, at its own expense, invite the community to appoint an independent expert(s) of their own choosing to assist in the IPILRA negotiation in communal areas. | * This may be negotiated with the applicant as part of the meaningful consultation process required by the MPRDA. |
| * Where more than one community is affected, each shall have the right to independently decide whether to grant or refuse its consent. | * The consent requirement is not supported, Meaningful consultation as envisaged in the MPRDA may be community specific. |
| * Where mining requires the relocation of specific community members’ homes, insert a requirement that the majority of those to be relocated must consent to the mining activity. | * The Department is developing Mine Community Resettlement/Relocation Guidelines to cater for rights and interest of communities in the event of relocation. |
| * No person or community may be relocated to enable mining unless such relocation is unavoidable. Where relocation is unavoidable and consent is granted, remedies and compensation must be clearly defined. | * Modalities of relocation will be outlined in the Mine Community Resettlement/Relocation Guidelines. |
| * Alternative land must be the default compensation and people must be offered living conditions equal to, or better than, their conditions prior to the relocation | * Modalities of relocation will be outlined in the Mine Community Resettlement/Relocation Guidelines. |
| * Cash compensation must be based not on market value, but on real value to affected people, taking into account the effective value of resources such as ploughing and grazing land, water access and cultural value. | * Modalities of relocation will be outlined in the Mine Community Resettlement/Relocation Guidelines. |
| * Amend Section 5A (Prohibition relating to illegal acts) to make it illegal to mine without community consent under customary law and in compliance with IPILRA. | * The MPRDA provides for meaningful consultation with landowners, lawful occupiers and interested and affected parties. Community consent is not a requirement and the Xolobeni High Court Judgment is being appealed to the extent that its requires consent by communities before a mining right is granted. |
| * Should mining commence or a right be granted without the consent of the community, that community shall have the right to set aside the licence and to be paid compensation for the full damages suffered. | * The MPRDA provides for meaningful consultation with landowners, lawful occupiers and interested and affected parties. Community consent is not a requirement and the Xolobeni High Court Judgment is being appealed to the extent that its requires consent by communities before a mining right is granted. |
| * Communities to have a right to revoke their consent should mining activities be conducted in a manner contrary to the MPRDA and its regulations, with communities then entitled to compensation for the full damages suffered by all mining activities. | * The MPRDA provides for meaningful consultation with landowners, lawful occupiers and interested and affected parties. Community consent is not a requirement and the Xolobeni High Court Judgment is being appealed to the extent that its requires consent by communities before a mining right is granted. * Compensation is provided for in section 54 of the MPRDA. |

1. **Conclusion**

The Portfolio Committee on Mineral Resources, having considered the recommendations of the High Level Panel and responses of the Department of Mineral Resources to recommendations of the High level Panel, recommends that:

* The Committee should engage with all relevant stakeholders to get a sense on what is their attitude on the HLP recommendations.
* Legal counsel to be considered and assist the Committee on the implications of the recommendations on the developments that have followed the HLP report, such as judgments of the judiciary, the outcomes of pending appeals, and new legislation.
* Follow-up on HLP recommendations will be a responsibility of the 6th Parliament, now that the HLP has ceased to exist.
* The legacy report of the PCMR will include the additional issues of the theft of moneys from the D-Accounts and the questionable actions of Kgosi Pilane of the Bakgatla Ba Kgafela and mining companies, as mentioned by the HLP. A Parliamentary follow-up process is required on implementation of the 2017 Public Protector’s report on the D Account of the Bapa Ba Mogale and the 2019 report of the Baloyi Commission of Enquiry in the North West into the affairs of the Bakgatla Ba Kgafela.

Report to be considered.