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Your Ref:  
Our Ref: HJS

3 March 2008

The Chair  
Portfolio Committee on Finance  
Parliament  
Cape Town

[bviljoen@parliament.gov.za](mailto:bviljoen@parliament.gov.za)

Fax no: 021 403 8204

Att: Mr Bradley Viljoen

Dear Sir

**draft Mineral and Petroleum Resources Royalty Bill, 2008: public hearings**

The Legal Resources Centre is a non-profit public interest law firm. The Nkuzi Development Association is a non-profit community support organisation. Much of the work of both organisations is devoted to representing poor rural communities, and our comments on the draft Minerals and Petroleum Resources Royalty Bill (the Bill) are made on behalf of such communities.

We submitted comments to the National Treasury on the second draft in February 2007, and on the third draft on 29 February 2008. The Portfolio Committee for Minerals and Energy dealt with Bill 10B of 2007 (the Mineral and Petroleum Resources Development Amendment Bill) in the intervening period, and that bill is still under consideration. We

herewith comment on the third draft dated 6 December 2007 and in terms of your invitation for comment by 3 March 2008 contained in your notice of 18 February 2008 issued through Participation Junction.

We wholeheartedly endorse the overall objectives and provisions of the Bill, which we see as taking important steps forward in redressing past imbalances in the exploitation of the nation's mineral resources, and which at the same time will bring the control and management of our mineral resources into line with international best practice.

However, one of the unintended consequences of the Bill, if it were to be enacted in its present form, is that it does not adequately protect communities in the former homelands and coloured reserves, as well as communities with claims in terms of the Restitution of Land Rights Act 22 of 1994 (the Restitution Act). In addition it is proposed in Bill 10B of 2007 that the Minister of Minerals and Energy may impose conditions to new or converted mining rights requiring the participation of communities. In certain instances community royalties may be the most appropriate participation arrangements to protect community interests. The bill should facilitate such arrangements.

We attach our comments and the outline of proposed amendments. You will note that we make specific recommendations in paragraph 24 on how the bill can be improved. We would appreciate the opportunity to elaborate on our submission and if you so wish we shall let you have the draft wording for our proposed amendments. We would in any event appreciate the opportunity to make oral presentations to you. We have therefore made a few general comments in our conclusion in bullet point format because we would like to engage with you on these.

Your abovementioned notice makes mention of public hearings to be held on 11 and 19 March 2008. We note that the committees' schedule issued on 29 February 2008 refers to hearings on the bill to be held on 11 and 18 March. The LRC and Nkuzi would prefer to make their oral submissions and answer questions on the second date ie Tuesday 18 March 2008. Please let us know as soon as possible whether you can accommodate us on 18 March in order that we can timeously make our travel arrangements.

We look forward to hearing from you.

Yours faithfully

A handwritten signature in black ink, consisting of a large, stylized letter 'V' enclosed within a circular loop.

**LEGAL RESOURCES CENTRE and NKUZI DEVELOPMENT ASSOCIATION**

PP Per: JANET LOVE and TERESA YATES

## **LEGAL RESOURCES CENTRE AND NKUZI DEVELOPMENT ASSOCIATION**

### **Comment on the draft Mineral and Petroleum Resources Royalty Bill':**

The plight of rural communities

#### **INTRODUCTION:**

Inequity in the mining industry has its roots in the dispossession of the African population of their land. The first form of redress in relation to this legacy of inequity undertaken by the democratic government was to divorce mining rights from surface land occupation and ownership rights. While the placement of the country's mineral wealth in the hands of the State enables the nation to benefit from future extractions, it does not compensate for past injustice and plunder.

Secondly, in its effort to achieve some shift in the skewed demographics relating to the ownership of the mines in South Africa, a limited notion of black economic empowerment was introduced. However, the fact that using the surface ownership and use rights that communities acquire through the land restitution process would be a highly effective way of enabling those who were dispossessed to exercise their rights in a manner they think best; to derive full restitution of past rights in land; and to take up their rightful places as empowered African communities holding a genuine stake in the mining industry was not included in the current scheme.

The result is that rural land owning communities will not be better off as a result of the operation of the Mineral and Petroleum Resources Development Act 28 of 2002

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<sup>1</sup> Draft 3 dated 6 December 2007 downloaded from treasury website 27 February 2008; <http://www.treasury.gov.za/public%20comments/Royalty%20Bill%20%20Levy%20%206%20Dec%202007.pdf>; draft Mineral and Petroleum Resources Royalty (Administration) Bill dated 6 December 2007 and available at <http://www.treasury.gov.za/public%20comments/Royalty%20Bill%20Admin%206%20Dec%202007.pdf>

[MPRDA], the Communal Land Rights Act of 2002 [CLRA] and the draft Mineral and Petroleum Resources Royalty Bill [MPRRB or “the Bill”].

Colonial and apartheid land and mining laws discriminated against the participation of black communities in mining on the land that they occupied. In the case of land occupied by black communities, the state awarded royalties payable by the mining companies to itself (the state). In the case of white land there were special measures to promote the interests of the landowners and occupiers. The legislation guaranteed minimum royalties or equity to white land owners and surface occupiers.

The new legislative regime governing the relationship between landowners and mining companies, introduced by the MPRDA and the CLRA and now being completed by the MPRRB, does the following:

- The privileged bargaining position of white landowners is done away with;
- Black land owning communities, and communities in the process of acquiring land, are required to consent to mining on their land.

The state distances itself from protecting and promoting the rights and interest of black communities. Thus the basis of the consent which is required is not stipulated and nor are the conditions under which the opinion of the affected black communities is obtained. Thus, the company that stands to benefit from its acquisition of mining rights can be - and mostly is - the institution that facilitates the process of elections of 'community representatives' and obtaining community approval for a resolution that allows the mining company to extract the minerals without proportional benefit to the community.

The MPRRB does not address the issue of appropriate participation by historically disadvantaged landowning communities upfront. Instead, it was the media release<sup>2</sup> that

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<sup>2</sup> [http://www.treasury.gov.za/comm\\_media/press/2007/2007120601.pdf](http://www.treasury.gov.za/comm_media/press/2007/2007120601.pdf) accessed 27 February 2007: “A number of traditional communities currently receive royalty payments from mining operators that mine on their land. Item 11 of Schedule II of the Mineral Resources Development Act (Act No. 28 of 2002) (the “MPRDA”) provides that communities will continue to receive such royalties regardless of whether these

accompanied the draft Bill which proposed that current royalty arrangements involving communities and which qualify under item 11 of the second schedule of the MPRDA, could be converted to equity arrangements.

In examining the current legislative dispensation, it is necessary to deal with the following in order to ascertain whether the current proposals offer the appropriate solutions:

1. Past discrimination against communities: the legal regime before 1994
2. The legal regime after 1994 and before the MPRDA: the promise of the Constitution and the democratic Government's proclaimed policies as reflected in its White Papers
3. How communities are dealt with in terms of the Mineral and Petroleum Resources Development Act of 2002; and the Amendment Bill [bill 10B of 2007]
4. The impact of the Communal Land Rights Act (CLRA)
5. The claims and interests of communities
6. Conclusion

### **Past discrimination against communities**

- 1 Examples of past statutory discrimination against black communities and promotion of white interests include the following:
  - a) Black people were not allowed to participate in the industry in that they were prohibited from applying for prospecting and mining permits<sup>3</sup>
  - b) 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

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royalties are paid with respect to "old order" or "new order" mining rights. Communities and mining companies are encouraged to enter into negotiations to, where appropriate, convert the financial interest of communities into equity stakes in the operating companies. These negotiations will of necessity require that the role-players will have to make some concessions in order to ensure lasting and sustainable arrangements."

<sup>3</sup> Sections 7(3) and 61 of the repealed Mining Rights Act of 1967 prohibited and constrained

participate in mining and shares in the proceeds of mines<sup>4</sup>, whilst black people could not become owners of the land they occupy and did not get benefits from mineral exploitation on their land

- c) 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<sup>5</sup>

2 Minimal benefits were obtainable under the now repealed Development Trust and Land Act of 1936 and the land control laws of former homelands.<sup>6</sup> 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

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prospecting permits and subsequent mining leases to any "Bantu" or coloured person.

<sup>4</sup> By operation of law, owners, surface owners or tenants were advantaged in two ways: firstly (in terms of section 12 of the Mining Rights Act of 1967 and section 5 of the Precious Stones Act of 1964) they had the exclusive right to prospect on their land and a first option to take out a prospecting permit and subsequent mining lease or transact such right to a nominee, and secondly (in terms of the operation of section 31 of the Mining Rights Act) the owner received a 25% share of profits or royalty payable to the state.

In terms of section 17(1)(b) of the Precious Stones Act a surface owner or lessee of state land was entitled to at least a 32% share in a mine on his or her land.

<sup>5</sup> section 23 of Act 18 of 1936 [see endnote for an extract of the repealed act]; the affected communities did not necessarily receive any direct benefit. It is necessary to have clarity on the monies that have accrued to date in regard to licences, prospecting and mining profits and royalties that have accrued in relation to Trust land.

<sup>6</sup> 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. The relevant old order rights are described as follows in tables I to III of schedule 2 of the MPRDA:

"Any permission to prospect in terms of section 16(1) of the Bophuthatswana Land Control Act, 1979 (Act No. 39 of 1979), section 16(1) of the Venda Land Control Act, 1986 (Act No. 6 of 1986), section 15 of the Lebowa Minerals Trust Act, 1987 (Act No. 9 of 1987), section 51(1) of the Rural Areas Act (House of Representatives), 1987 (Act No. 9 of 1987), or section 6 of the Transformation of Certain Rural Areas Act, 1998 (Act No. 94 of 1998), and the common law mineral right attached thereto together with a prospecting permit obtained in connection therewith in terms of section 6(1) of the Minerals Act."

community royalty, called the Diamond Fund Trust, which receives 90% of the state royalty.

### **The legal regime after 1994 and before the MPRDA: the promise of the Constitution and White Papers**

- 3 The repeal of the 1936 Act and the new constitution required that the substantive and procedural rights of occupying communities had to be recognized. The communities would have been landowners were it not for the apartheid laws. The land reform White Paper of 1996 promised consultation and community participation in all decisions concerning tenure reform, sale of communal land and development of communal land.
- 4 The Restitution of Land Rights Act provided for the restoration of rights in land, including mineral rights, to dispossessed communities. Today a fraction of the rural community claims have been finalised.<sup>7</sup> A small number of these involve claims to the mineral rights associated with the land claims.

The significance of the delays in resolving the land claims that concern land where minerals are to be found is very great.

The Transformation of Certain Rural Areas Act no 94 of 1998 contained extensive provisions for equitable arrangements between landowning communities and mining companies starting new mining operations. (Unfortunately the relevant section<sup>8</sup> was repealed by MPRDA in 2002.)

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<sup>7</sup> 'We still have to settle an outstanding 5 279 rural claims,' she told MPs in the National Assembly during debate on her Budget vote... 18 May 2007, [http://land.pwv.gov.za/Documents&Publications/Publications/07Budget\\_Minister.pdf](http://land.pwv.gov.za/Documents&Publications/Publications/07Budget_Minister.pdf)

<sup>8</sup> section 6(3) Despite anything to the contrary contained in any other law, the Minister of Minerals and Energy in granting the consent referred to subsection (2) must impose such fees, restrictions and conditions as he or she may deem fit, in particular with respect to-



5 Concerning new mining development on community land, the stated policy of the government was that the Minister of Land Affairs in her capacity as trustee and nominal owner of almost all communal land, provided as follows:

“If land is involved which was previously owned by the disbanded South African Development Trust<sup>9</sup> (SADT) or land held in trust for a tribe or community, the Department of Land Affairs is approached by DME. DME and Land Affairs also agreed that the latter will consult with the Provinces and the occupiers of such land or the tribe or community when they are approached to comment on applications for prospecting or mining rights. The wishes of the Provinces and the occupiers are taken into consideration before any decision concerning such land is taken by the Minister of Minerals and Energy or his delegate. Only after a final decision has been taken and conditions have been embodied in a contract, the required permit will be issued by the Director: Mineral Development concerned.”<sup>10</sup>

6 In terms of policy directives<sup>11</sup> of the Department of Land Affairs, communities<sup>12</sup> with

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- a) a preference to exploitation by the residents, and in suitable instances in collaboration with external institutions, taking the optimal utilisation, exploration and exploitation of the minerals and the rehabilitation of the surface into account;
  - b) surface rentals;
  - c) the establishment of an equity sharing arrangement to the mutual benefit of all parties concerned; and
  - d) work opportunities to the extent reasonably possible for residents.

<sup>9</sup> When the SADT was disbanded in 1992 most of the land owned by the SADT was transferred to the then apartheid Minister of Regional and Land Affairs with effect from 1 April 1992. The trust moneys were dealt with under the Abolition of Racially Based Land Measures Act, but there was no account given to the affected communities.

<sup>10</sup> Website of the Department of Minerals and Energy, 10 October 2002

<sup>11</sup> Interim Protection of Land Rights Act (IPILRA) and departmental directives:

a) “Interim Procedures Governing Land Development Decisions Which Require The Consent Of The Minister Of Land Affairs As Nominal Owner Of The Land”, APPROVED BY POLCOM ON 20 NOVEMBER 1997 AND AMENDED ON 14 JANUARY 1998 & ALSO IN TERMS OF SECTION 3(1)(A)(II) OF ACT 112 OF 1991 AS AMENDED BY ACT 34 OF 1996

insecure tenure in the former homelands were to be treated as the putative owners of the land that they occupy. When land occupied by such a community was subject to a mining application, the Department of Land Affairs had to enter into a tripartite agreement with the relevant mining company and the community, in terms of which the community could obtain and negotiate benefits. These could include equity and/or royalty arrangements.

7. The Minerals and Mining Policy White Paper of October 1998 was largely based on the “use-it and keep-it” principle and licensing allowing for state determined royalties to the rights holder and surface rental to the owner [paragraph 1.3.6.2]. Up until now, prospecting fees and royalty payments have been payable where prospecting or mining operations involving state owned mineral rights have been taking place. The rates for prospecting and the level of royalties for mining were set out in a document approved by Director-General of the Department of Finance.

## **Communities under the Mineral and Petroleum Resources Development Act of 2002 (MPRDA)**

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b) THE ENTITLEMENT OF IPILRA AND ESTA RIGHTS HOLDERS IN RESPECT OF STATE LAND DISPOSAL PROJECTS, Tenure Reform Directorate, PC.DOC 52/1999

c) The Interim Procedures Governing Land Development Decisions which Require the Consent of the Minister of Land Affairs as Nominal Owner of the Land

[http://land.pwv.gov.za/tenurereform/New\\_TenureReform/Policies/Policies.htm](http://land.pwv.gov.za/tenurereform/New_TenureReform/Policies/Policies.htm). [downloaded 29 October 2006];

e) Payment of benefits to the occupants and users of land, where the power of formal disposal of rights in that land vests in the Minister of Land Affairs, dated 18 May 2000; read with the opinion of the Chief State Law Advisor, dated 6<sup>th</sup> October 1999;

f) LAND TENURE, INVESTMENT & ECONOMIC DEVELOPMENT IN COMMUNAL AREAS BRIEFING PAPER FOR THE CABINET INVESTMENT CLUSTER, Dr Siphon Sibanda Director, Tenure Reform Department of Land Affairs 3 September 1999 [downloaded from DLA website 19 May 2007] <http://land.pwv.gov.za/tenurereform/>

<sup>12</sup> including communities as defined in the MPRDA, ie: ‘community’ means a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law;”

8 The stated aim of the Act (MPRDA) is to redress past racial discrimination in respect of access to the mining industry.

9 Unused old order rights including mineral rights where the surface and minerals were not separated, could be converted into new order mining rights within one year of the coming into operation of the Act, i.e. by 1 May 2005. Other old order mining rights (those in use) can be converted into new mining rights within five years (i.e. by 1 May 2009), and prospecting rights within two years (i.e. by 1 May 2006). Otherwise these old order rights are permanently extinguished.

11 Section 104<sup>13</sup> provides that a community can apply for preferent rights to mine in

<sup>13</sup> **104 Preferent prospecting or mining right in respect of communities**

Any community who wishes to obtain the preferent right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must *in terms of section 16 or 22* lodge such application to the Minister. **[This puts communities in a position of weakness to negotiate.]**

The Minister must grant such preferent right if ~~the community can prove that the provisions of sections 17 or 23 have been complied with: Provided that-~~

- a) the right shall be used to contribute towards the development and the social upliftment of the community concerned;
- b) the community submits a development plan, indicating the manner in which such right is going to be exercised;
- c) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and
- ~~d) the community has access to technical and financial resources to exercise such right~~
- e) *section 23(1)(e) and (h) is not applicable.*

**[It should be noted that, in addition to compliance with section 17 or 23, the need to prove such (a) to (c) above in advance of being granted the rights, puts communities in a much weaker position to negotiate with prospective partners.]**

(3) The preferent right, granted in terms of this section is -  
valid for a period not exceeding five years and can be renewed for further periods not exceeding five years;  
and  
subject to prescribed terms and conditions.

**[Even if such a relief was granted in respect of land from which people had been previously dispossessed.]**

The preferent right referred to in subsection (1), shall not be granted in respect of areas, where a prospecting right, mining right, mining permit, retention permit, production right, exploration right, technical

respect of land to be transferred to the community. But a preferent right cannot be given on land where a new or converted mining or prospecting right has already been granted or an application for such new rights is being considered.<sup>14</sup>

- 12 Again the significance of unresolved land claims cannot be underestimated.
- 13 The Minister of Land Affairs as current owner of communal land and unused old order rights did not apply on behalf of communities for new mining rights within one year. On a reading of the MPRDA, the mineral ownership rights of communities on this communal land, through the ownership of the Minister, are thereby deemed extinguished.
- 14 The MPRDA does not provide for a holding mechanism or moratorium on new mining pending the finalisation of land claims or tenure reform and transfer of ownership to communities.
- 15 The MPRDA requires notification and consultation with the owner or lawful occupier before new mining commences, and such consent may include compensation for loss of use of the land. But a damages claim will be limited to 'reasonable' compensation or rental. It does not provide for the affirmative

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operation permit or reconnaissance permit has already been granted.”

**[These are often rights that are allocated currently without the claim to the land being finalised thereby depriving a community that subsequently succeeds in its land claim from applying for the preferent right. It should be noted that notwithstanding the enormous potential impact of this legislation on the future of communities and the time constraints involved, no government support programme of advocacy and awareness raising or assistance to communities was contemplated.]**

<sup>14</sup> To date there have been a handful of section 104 applications and none of them have been successful. The number of new order rights on communal land is unknown. The latest annual reports of the DME does explain what steps have been taken to implement section 12 of the act that requires a programme of assistance to historically disadvantaged persons. The number of new order rights on communal land is unknown. The 2005/6 annual report of DME states that “all applications granted on what was previously held state owned unused old order rights were subject to an HDSA participation of 51%”. This does not answer the question about participation by the communities occupying the land on which the state “held” unused old order rights on behalf of the occupying communities.

measures afforded to old order landowners.

- 16 The MPRDA does not prescribe the procedure for consultation and notice before new mining begins.<sup>15</sup> The Department was inconsistent in its application of the statutory consultation requirements and there were no regulations governing the consultation process to ensure that it is fair and protects the interests of the vulnerable and historically disadvantaged.<sup>16</sup> This lacuna will be addressed once bill 10B of 2007 is passed into law<sup>17</sup>.
- 17 Bill 10B of 2007 contains further drastic changes. It is proposed that the minister gets the power to determine conditions for community participation in new prospecting and mining ventures, and when authorising the conversion of old order mining rights.<sup>18</sup> It will be entirely within her discretion to afford communities

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<sup>15</sup> The appropriate procedure would be the consultation and consent procedure set out in the Interim Protection of Land Rights Act and the departmental directives under it. IPILRA protects the land rights of all people who live on or use communal land under customary law or custom, usage or practice in the area. The act prohibits the taking of land without the consent of the right holder. The right holder can lose his or her rights to communal land if the custom and usage of the community is followed and if he or she is paid compensation. But there must also be a community majority decision with enough notice and with opportunity to ask questions and participate. Any development on the land that affects the rights of the users must be authorized by the landowner [ie the Minister of Land Affairs in the case of most community land] and a community decision. The standard procedure of the DLA involves the following steps:

- Application to the Department for Agreed Access to Land For Development Purposes
- Appointment of An Official to Facilitate The Land Rights Holders Resolution
- Gathering of Preliminary Information About The Community
- Initial Meeting With The Stakeholders [purposes and notice of meeting]
- Land Rights Holders Meeting/s [majority decision, written resolution, attendance register]
- Submission to the Minister.

<sup>16</sup> Section 10 of the MPRDA and regulation 3 of the MPRDA regulations of 23 April 2004 provide for a notice and comment requirement in respect of all applications. "Interested and affected parties" have 30 days to comment on applications of which the regional manager had given notice. But a landowning community should be afforded a higher status in the decisionmaking process than an interested and affected party. In any event the participation of the interested and affected party is limited to strictly environmental concerns.

<sup>17</sup> Bill 10 B of 2007 proposes to amend the relevant provision to allow for regulations to govern the notice and consultation procedure: "notifying and consulting in a prescribed manner with the landowner or lawful occupier of the land in question."

<sup>18</sup> Sections 17, 23 and item 7(3) of schedule II are proposed to be amended by the insertion of the

participation privileges.

- 18 A community royalty may be the appropriate type of condition to be imposed to ensure community participation in a manner that will ensure certainty and real benefits for all the parties in the arrangement. We therefore propose that community royalties be incorporated and extensively regulated in the royalty bill.

### **Minerals under the CLRA**

- 19 The preamble of the CLRA raises expectations that the act deals comprehensively with insecure tenure on communal land under the constitutional imperative embodied in section 25(5), 25(6), 25(8) and 25(9), and to effect land and related reforms. The act raises the expectation that all rights associated with land will be transferred to communities. Section 3 provides that a community may own and dispose of immovable and movable property. But the act fails to set out how mineral rights associated with land ownership will be dealt with.
- 20 In due course communities will become owners of their land. Arguably new land owning communities could apply for preferent rights under section 104 of the MPRDA - except where rights have already been granted. Thus, applicants for prospecting and mining rights are being given rights on communal land on a first-come-first-serve basis before the land is transferred to the rightful community owners, and before they can effectively apply for preferent rights.
- 21 The CLRA is yet to be put into operation and regulations are yet to be promulgated. It may take many years before the community entities that are to

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following wording: "If the application relates to land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community."

take transfer of community land are identified; before the land rights inquiries are completed; and before the land is transferred.

## The claims of communities

22 We propose that a) the MPRDA be applied in a manner more consistent with the statement set out in section 12<sup>19</sup> that requires a comprehensive and effective programme of assistance to historically disadvantaged persons including rural communities; and b) the MPRRB be amended to allow for new community royalties.

23 MPRDA

- Communities should be given assistance to apply for preferent rights under section 104 of Act 28 of 2002 in order to avoid that new prospecting or mining rights are granted on their land without them being given the opportunity to negotiate appropriate terms for benefits and participation.
- Consultation with and consent by the community owners before new mining development happens should be supervised by the state or an independent, non-interested party delegated by the State and governed by regulations<sup>20</sup>.

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<sup>19</sup> Assistance to historically disadvantaged persons

12. (1) The Minister may facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations.

(3) ... the Minister must take into account all relevant factors, including

- a) the need to promote equitable access to the nation's mineral resources;
- b) the financial position of the applicant;
- c) the need to transform the ownership structure of the minerals and mining industry; and
- d) the extent to which the proposed prospecting or mining project meets the objects referred to in section 2(c), (d), (e), (f) and (i).

(4) When considering the assistance referred to in subsection (1). the Minister may request any relevant organ of State to assist the applicant concerned in the development of his or her prospecting or mining project.

<sup>20</sup> section 5 of the MPRDA will be amplified with regulations that will strictly govern the consultation

- State assistance should be available to those communities who give their consent, to negotiate fair agreements and compensation.

## 24 MPRRB

- Community royalties should be made available on application to qualifying communities, and assistance should be provided to applicant communities to make applications to the state to impose community royalties on mines on community land;
- Existing community royalties are to be retained, subject to item 11<sup>21</sup> of the transitional provisions of the MPRDA and further regulation under the MPRRB
- New community royalties to be introduced through the MPRRB - partly in lieu of the state royalty
- All community royalties and their management entities must be managed according to a strict regime of planning, budgeting and reporting under the MPRRB.
- Any hardship caused by the introduction of the community royalty could be offset on the same basis as provided for in respect of small mining business relief [clause 9 of the MPRRB] or an appropriate adjustment of the state royalty formula.

## 25 Conclusion

- The existing and proposed regime with regard to the allocation of mineral rights

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process. This is proposed in bill 10B of 2007.

<sup>21</sup> The MPRDA authorizes the Minister to determine and intervene in the administration and distribution of royalty proceeds. These include (a) the manner in which such royalty will be used for purposes of promoting rural, regional and local economic development and the social upliftment of a community; (b) proper financial control is in respect of such consideration or royalty; (c) a development plan, indicating the manner in which the consideration or royalty is being used and any projects sponsored therewith; (d) an undertaking that the consideration or royalty is being or will be used for the benefit of all the members of the community in question.

Item 11 is quoted in full in an endnote.



should not be allowed to proceed in a manner that exacerbates the existing negative impact of the lengthy delays in the resolution of land claims on historically disadvantaged communities who were illegitimately dispossessed of their land.

- Rights to access new order mining rights cannot be allowed to be extinguished through oversight or lack of consultation by a Minister or official.
- The empowerment of historically disadvantaged communities who were the direct victims of apartheid spatial design should be the first priority in pursuit of black economic empowerment and their exclusion from ownership, including equity and/or royalty participation should require cogent justification.
- The lack of protection of the interests of historically disadvantaged communities in the face of the financial and technical resources that established mining companies have at their disposal to support the narrow interests of their shareholders results in the state - intentionally or unintentionally - supporting the interests of the relatively wealthy rather than protecting the interests of the poor. It is therefore essential that due process and adequate support and advice are assured in the election of community representatives, in making decisions, in developing and signing agreements and decisions that clearly protect their interests.
- It is necessary to have clarity on the monies that have accrued to date in regard to licences, prospecting and mining profits and royalties that have accrued in relation to Trust land.

There are many examples of community claims for participation in mineral exploitation on their own land that have political, legal and economic merit. New order mining law should recognise this need and create enabling mechanisms to achieve outcomes that satisfy the obligation to redress the results of past racial discrimination.

## Development Trust and Land Act 18 of 1936

### 23. Prospecting or mining on land held by the Trust or by Blacks. –

- (1) Notwithstanding anything in any other law the following provisions shall apply to land in respect of which the mineral rights are held by the Trust or a Black or in trust for a Black tribe or community:
  - (a) No person shall prospect for minerals on such land without the written permission of the Minister: provided that this provision shall not apply in respect of land situated in the Province of the Transvaal, which at the commencement of this Act is a proclaimed public digging for precious or base metals or is land declared open to public prospecting for precious and base metals for so long as it remains so proclaimed or open. For such permission, such minimum fee as may be prescribed by regulation shall be paid to the Trust; and the Trust shall, in the case of land of which the Trust is the owner, pay the fee to the fund, and in the case of land of which any other person is the registered owner, pay the fee to that person.  
[Para. (a) amended by s.3 (b) of the Act No. 18 of 1954]
  - (b) If such land is proclaimed as a public digging or as a mine, or if any right to mine on such land is granted, such conditions shall be imposed as the Trustee may deem necessary or desirable for preserving the continued or future use by Blacks of the surface of such land.
  - (c) For the purposes of this section minerals shall be deemed to include all metals and ores of metals, precious or base, precious stones, and all clays, stones, earths, coals, oils or other mineral substances of whatever nature which may be dug or extracted or separated from the ground.  
[Sub-s. (1) amended by s. 3(a) of Act No. 18 of 1954.]
- (2) So much of the moneys received by the State in respect of licences to prospect or mine on any land situate in a scheduled Black area or in a released area or on any land wherever situated held by the Trust or a Black or in trust for a Black tribe or community as would be retained by the State if this Act had not been passed shall be paid by the State to the fund.  
[Sub-s. (2) amended by s. 3(c) of Act No. 18 of 1954.]
- (3) Save as is otherwise provided in this section, the Trust shall in respect of mineral rights held by it be in the same position as any private holder of mineral rights.

### Item 11 schedule II MPRDA

#### Consideration or royalty payable

11. (1) Notwithstanding the provisions of item 7(7) and 7(8), any existing consideration, contractual royalty or future consideration, including any compensation contemplated in section 46(3) of the Minerals Act, which accrued to any community immediately before this Act took effect, continues to accrue to such community,
- (2) The community contemplated in subitem (1) must annually, and at such other time as required to do so by the Minister, furnish the Minister with such particulars regarding the usage and disbursement of the consideration or royalty as the Minister may require.
- (3) If the consideration or royalties contemplated in subitem (1) accrued to a natural person, it may continue to accrue to the person subject to such terms and conditions as the Minister may determine, if
  - (a) the discontinuation of such consideration or royalty will cause undue hardship to the person;
  - or
  - (b) the person uses such consideration or royalty for social upliftment.
- (4) If it is determined that the consideration or royalties referred to in subitem (3) continues then the provision of subitem (2) apply to such a recipient.
- (5) The recipients contemplated in subitems (1) and (3) must within five years from the date on which this

Act took effect inform the Minister of their need to continue to receive such consideration or royalties and the reasons therefor. and furnish the Minister with the prescribed information.

(6) Any person who or community which receives any consideration or royalty by virtue of this item must

- (a) keep prescribed records at an address in the Republic where they may be inspected by the Director-General; and
- (b) submit annual audited financial statements.

(7) The preservation contained in subitem (1) and continuation contemplated in subitem (4) when applied in respect of communities is subject to such terms and conditions as may be determined by the Minister which terms and conditions must, among others, include

- (a) the manner in which such royalty will be used for purposes of promoting rural, regional and local economic development and the social upliftment of a community;
- (b) proper financial control is in respect of such consideration or royalty;
- (c) a development plan, indicating the manner in which the consideration or royalty is being used and any projects sponsored therewith;
- (d) an undertaking that the consideration or royalty is being or will be used for the benefit of all the members of the community in question;
- (e) the right of the Minister to intervene, in the event that it is alleged that, the said consideration royalties is not being utilised for the purposes agreed to between, the Minister and the community concerned; and
- (f) the establishment of a trust, section 21 Company, Agency or other structure to administer the funds, on whose Board of Directors or trustees or Executive Committee there is representation by members of the community affected.