

**COMMENTS ON THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT  
AMENDMENT BILL, B10-2007**

**Mining on community land: rights of communities**

TO: The Honourable Chairman  
Portfolio Committee: Minerals and Energy  
Parliament

FROM: LEGAL RESOURCES CENTRE

**INTRODUCTION**

- 1 The Legal Resources Centre is a non-profit public interest law firm. Much of our work is devoted to representing poor rural communities, and our comments on the Mineral and Petroleum Resources Development Amendment Bill No 10 of 2007 (the Bill) are made on behalf of such communities. In respect of the principal act the LRC commented on the draft bill in 2001, the bill in 2002, the regulations in 2003 and the royalty bill in 2007. The LRC presented its submission on the shortcomings of the original bill to your committee in 2002.
- 2 The explanatory memo on the draft bill was published on 19 April 2007<sup>1</sup>, the electronic version of the draft bill is dated 25 April 2007 and a media report about the bill appeared on 7 May 2007. On 11 May 2007 your committee invited comment on the bill by 25 May 2007. This gave inordinately little time [10 work days] for communities affected by the bill to inform themselves, consider and comment on the bill.
- 3 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.

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<sup>1</sup> The one page memo consists of the long title of the bill, and an invitation to obtain copies of the bill once it has been tabled. The memo does not alert the reader to the repeal of the consultation requirement contained in section 5(4).

- 4 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.
- 5 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 [MPRDA], the Communal Land Rights Act of 11 of 2004 [CLRA], and the Mineral and Petroleum Resources Royalty Bill [MPRRB] currently being considered by the treasury department. Our submission is that the Bill exacerbates the position of black communities. Instead the bill should cure the defects of the MPRDA to advance the plight of rural communities whose land is or will be mined.
- 6 One of the unintended consequences of the Bill, if it were to be enacted in its present form, is that it could adversely affect communities with insecure tenure 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). Rural land owning communities are not and will not be better off as a result of the operation of the MPRDA, whether or not it is amended by this bill, or the CLRA. The draft MPRRB is silent on the issue of community royalties.<sup>2</sup>
- 7 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 black land, 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 landowners and surface occupiers.
- 8 Our submissions are directed at eliminating these unintended consequences, strengthening the position of rural communities closely associated with land in respect of which mineral rights are granted and, hopefully, preventing potential challenges to the MPRDA and the Bill on the

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2 The MPRRB does not address the issue of appropriate participation by historically disadvantaged landowning communities upfront. Instead, the media release that accompanied the 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.

grounds that it violates the equality rights entrenched in the Constitution.

*Background summary:*

- 9 Under colonial and apartheid mining law, white owners and occupiers had the exclusive right to prospect and mine on their land without further authorisation from the state. This meant that mining companies as a matter of course negotiated joint ventures (such as contractual royalties or equity arrangements) or outright purchases with the landowners. The common law and statute law put the landowner in a strong bargaining position, and this formed the foundation for a remarkably successful rural development and affirmative action programme for whites.
- 10 Black communities, the putative owners and occupiers in the reserves, were excluded from mining proceeds. Instead, apartheid laws reserved the royalties from mining in the homelands to the apartheid state's Native Development Trust.
- 11 The new legal regime governing the relationship between landowners and mining companies, introduced by the MPRDA, does the following:
  - a) The privileged bargaining position of white landowners is taken away;
  - b) Black land owning communities, and communities in the process of acquiring land, have little if any choice and are required to accept mining on their land without their participation.
- 12 The state distances itself from protecting and promoting the rights and interests of black communities.
- 13 The MPRDA does not address past discrimination against black community land owners and occupiers, and the act does contain measures designed to advance black community land owners and occupiers previously disadvantaged by unfair discrimination.<sup>3</sup> The amendment bill now provides an opportunity to address this shortcoming.
- 14 Secondly, the amendment bill further dilutes the precarious consultation rights of communities and this needs to be rectified. The bill removes the consultation requirement in section 5 of the MPRDA. This means that black communities will not be consulted before prospecting and mining operations commence on their land. If the bill is passed by parliament in its present form then communities on land where old order mineral rights have been converted to new order rights under the MPRDA will not be consulted at all. In the case of new prospecting and mining applications under the MPRDA,

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3 We elaborate on the inadequacy and minimal impact of section 104 of the MPRDA below

- such communities will be consulted on limited issues only stipulated in sections 16 [as amended], 22 and 39 [as amended].
- 15 The amendments proposed in this submission aims to firstly, redress the discrimination against land owning communities and, secondly, to strengthen the consultation and negotiation rights of communities.
  - 16 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 for the Minister of Minerals and Energy to achieve outcomes that satisfy the obligation to redress the results of past racial discrimination.
  - 17 In order to ascertain whether the current proposals offer the appropriate solutions and motivate for the proposed amendments, we examine the current legislative dispensation under the following headings:
    - a) The affected communities
    - b) Past discrimination against communities: the legal regime before 1994
    - c) 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
    - d) How communities are dealt with in terms of the Mineral and Petroleum Resources Development Act of 2002
    - e) The impact of the Communal Land Rights Act (CLRA)
    - f) Proposed amendments
    - g) Conclusion

## **THE AFFECTED COMMUNITIES**

- 18 The purpose of the amendments which are proposed below, is to give recognition to the rights in land (which include mineral rights or the equivalent rights under the MPRDA) of communities which have occupied and developed their land for several generations and, in some cases, even centuries.
- 19 In most instances the communities have occupied the land communally<sup>4</sup> and used it for purposes which include habitation, grazing, cultivation, irrigation, hunting, fishing, mining and other forms of exploitation of natural resources. In some cases the community's attachment to the land would have an additional socio-cultural, spiritual or religious dimension.
- 20 Many of these communities for generations have regarded themselves as the owners of the land they occupy. However, one of the consequences of the disparagement of indigenous land rights under colonial law was that the rights of indigenous communities to the land they occupied were not recognised, and the land was usually treated by government as unalienated state land. Many communities were dispossessed of all or part of their land as a result of the failure of the state to acknowledge their rights.
- 21 It is our belief that those vulnerable communities which have not been entirely dispossessed and continue to occupy some or all of their traditional land are entitled to full recognition of their rights in land, including their mineral and mining rights.
- 22 Today most of these communities occupy what is now formally state owned land in the former homelands.<sup>5</sup> A small proportion of them live on land in and around the former coloured reserves. A small minority hold rights in land acknowledged by the common law.

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4 The MPRDA contains a definition of such communities in the definition clause.

5 There are currently about 800 traditional councils recognised or deemed to be recognised in terms of the Traditional Leadership and Governance Framework Act and the provincial traditional governance laws.

## Past discrimination against communities

- 23 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>6</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 participate in mining and shares in the proceeds of mines<sup>7</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>8</sup>.
- 24 Minimal benefits were obtainable under the now repealed Development Trust and Land Act of 1936 and the land control laws of former homelands.<sup>9</sup> Old order white landowners and surface owners received mining benefits by

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<sup>5</sup> Sections 7(3) and 61 of the repealed Mining Rights Act of 1967 prohibited and limited prospecting permits and subsequent mining leases to any "Bantu" or coloured person.

<sup>6</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>7</sup> section 23 of Act 18 of 1936; the affected communities did not receive any direct benefits. The moneys were not accounted for to the relevant communities. 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>8</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."

virtue of their land ownership and by operation of law.

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

- 25 One of the primary purposes underlying the enactment of sections 25 (6) to 25 (8) of the Constitution is the need to redress the injustices flowing from the failure of past governments to afford full recognition and dignity to land rights held in terms of indigenous law.
- 26 The Restitution Act gives effect to the Constitutional requirement (in section 25(7) of the Constitution) to provide either restitution or equitable redress to people or communities dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices.
- 27 The CLRA, the Transformation of Certain Rural Areas Act 94 of 1998 (the scope of which is limited to the former coloured reserves) and the provisional measures provided for in the Interim Protection of Informal Land Rights Act 31 of 1996, are the laws giving effect to section 25(6) of the Constitution. The aim of these laws is to provide comprehensive protection to people and communities whose tenure of land is insecure as a result of past racially discriminatory laws or practices.
- 28 The repeal of the 1936 Act and the new constitution required that the substantive and procedural rights of occupying communities had to be recognised. 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.
- 29 The Restitution 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>10</sup> A small but significant 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

10 '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)

communities and mining companies starting new mining operations. (Unfortunately the relevant section<sup>11</sup> was repealed by MPRDA in 2002.)

- 30 Concerning new mining development on community land, the stated policy of the government represented by 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>12</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>13</sup>

- 31 In terms of policy directives<sup>14</sup> of the Department of Land Affairs,

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11 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-

- (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.

12 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 no account was given to the affected communities.

13 Website of the Department of Minerals and Energy, 10 October 2002

14 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
- b) THE ENTITLEMENT OF IPILRA AND ESTA RIGHTS HOLDERS IN RESPECT OF STATE LAND DISPOSAL PROJECTS, Tenure Reform Directorate, PC.DOC 52/1999

- communities<sup>15</sup> with insecure tenure in the former homelands are to be treated as the putative owners of the land that they occupy. When land occupied by such a community is the subject of a mining application, the Department of Land Affairs has 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. In theory, these could include equity and/or royalty arrangements.
- 32 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]. 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 have been laid out in a document approved by Director-General of the Department of Finance.
- 33 The preamble to the MPRDA of 2002 emphasises equitable access to mineral resources and the redress of the results of past racial discrimination.
- 34 As explained above, racial discrimination in the mining industry occurred on four fronts:
- a) black people were not allowed to participate in the industry in that they were prohibited from applying for prospecting and mining permits;
  - b) white land owners and tenants 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;
  - 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 (white) holder of mineral rights.
  - d) black mine workers were discriminated against.<sup>16</sup>

We have shown that the new legal regime described in this paragraph does not address the concerns in b) and c) above.

### **THE IMPACT OF THE MPRDA ON RURAL COMMUNITIES**

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15 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;”

16 Worker rights are dealt with in other laws and probably appropriately so.

- 35 The stated aim of the MPRDA is to redress past racial discrimination in respect of access to the mining industry. The MPRDA:
- a) addresses entry discrimination by (indirectly) giving preference to historically disadvantaged applicants;
  - b) fails to redress past racial discrimination in respect of land ownership, in that it does not advance post-apartheid black landowning communities by giving them opportunities denied to black people under apartheid and afforded to white landowners and occupiers.
- 36 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.
- 37 Section 104<sup>17</sup> provides that a community can apply for preferent rights to

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17 “104 Preferent prospecting or mining right in respect of communities

- (1) 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 lodge such application to the Minister. This puts communities in a position of weakness to negotiate.
- (2) The Minister must grant such preferent right if the community can prove 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.

[It should be noted that the need to prove such (a) to (d) 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 -
  - (a) valid for a period not exceeding five years and can be renewed for further periods not exceeding five years; and
  - (b) subject to prescribed terms and conditions.

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

- (4) 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 operation permit or reconnaissance permit has already been granted.”

- mine in 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>18</sup>
- 38 Again the significance of unresolved land claims cannot be underestimated.
- 39 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.
- 40 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.
- 41 The MPRDA as enacted in 2002, 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 measures afforded to old order landowners.<sup>19</sup>
- 42 The MPRDA does not prescribe the procedure for consultation and notice before a prospecting or mining application is considered or before new mining or prospecting begins.<sup>20</sup> The Department is inconsistent in its

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[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.]

18 To date there have been a handful of section 104 applications and none of them have been successful. The latest annual reports of the DME does not 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 begs the question on participation by the communities occupying the land on which the state "held" unused old order rights on behalf of the occupying communities.

19 Section 5 and section 54. Section 54 provides limited relief. A claim for compensation under the act, including arbitration and expropriation depends on the discretion of the regional manager.

20 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

application of the statutory consultation requirements and there are no regulations governing the consultation process to ensure that it is fair and protects the interests of the vulnerable and historically disadvantaged communities.<sup>21</sup>

- 43 Thus the basis of the consultation 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.
- 44 At present, where the mineral rights of vulnerable communities are protected, these protections are generally limited and precarious. We shall examine briefly the position of the following communities and the impact of the MPRDA: (i) those which have restitution claims pending; (ii) those inhabiting the former coloured reserves; and (iii) those occupying state owned land.

### *Pending Restitution Claims*

- 45 In terms of section 25(7) of the Constitution a person or community dispossessed of property after 1913 as a result of racially discriminatory

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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 authorised 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.

- 21 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.

- laws or practices is entitled to either restitution or equitable redress. The Restitution Act provides the mechanism in terms of which the right to restitution may be realised.
- 46 Under both common law and customary law, mineral rights followed surface rights to land. The separation of mineral rights from surface rights was introduced through a combination of administrative practice and legislation; the extent to which the separation of mineral and surface rights took effect varied between the different provinces under the Union constitution and preceding laws of the British colonies and the Boer republics.
- 47 Where a claimant community held registered title to the property of which it was dispossessed, and the title included both surface and mineral rights, it would be entitled to restitution or compensation for the mineral rights. Similarly communities that held customary law rights to land, and where there had not been contrary statute law and mining authorisations that extinguished such rights, would be entitled to restitution or compensation. There appears to be no reason in principle why communities that establish ten years beneficial occupation of land prior to dispossession<sup>22</sup>, should not also be entitled to restitution of mineral rights or its equivalent under the MPRDA, provided such right had not been extinguished by a subsequent incompatible mining law and authorisation.
- 48 The restitution process is likely to continue for several years. As the MPRDA stands, it makes no particular provision for restitution claimants. Restitution claimants could easily find that old order mineral rights which had not been pursued in the manner provided for in the MPRDA, would be extinguished by the time their claims are finalised.<sup>23</sup> In such cases the Act does not promote or facilitate claims for the restitution of mineral rights.
- 49 In order to protect the interests of restitution claimants, we propose that the Act be amended so that the relevant time periods applicable for the extinguishment of old order rights do not begin to run against restitution claimants prior to the finalisation of their restitution claims.

*Communities occupying the former coloured reserves*

- 50 The entitlement of the inhabitants of the former coloured reserves to mineral rights was regulated by statute. Under section 6 [now repealed] of the

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22 Which establishes a right in land for the purpose of the Restitution Act.

23 The minister of land affairs would have had to apply for the conversion of the claimants' unused old order rights before 1 May 2005.

Transformation of Certain Rural Areas Act 94 of 1998 (the Transformation Act), the Minister of Minerals and Energy could only consent to prospecting for or mining of minerals on land occupied by these communities after consulting with and receiving the approval of the community concerned (which consent may not be unreasonably withheld).

- 51 Section 6 also provided for the imposition of fees, restrictions and conditions in terms of which residents of the area may receive preference in the exploitation of mineral resources, payment of surface rentals, equity sharing arrangements and the provision of work opportunities.<sup>24</sup>
- 52 We propose that section 6 of the Transformation Act be re-enacted, and that mineral rights in former coloured reserves be regulated by section 6, read in conjunction with the MPRDA (insofar as it is not inconsistent with the Transformation Act).

#### *Communities occupying state owned land*

- 53 Firstly, many communities in the former homelands may arguably have ownership rights of land and minerals under customary law.<sup>25</sup> Secondly, although communities occupying state owned land do not, except in exceptional circumstances, hold any formal mineral rights acknowledged in

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24 The relevant parts of section 6 read as follows:

##### **Mineral rights**

- a) Despite the repeal of the Rural Areas Act, 1987, and despite section 3 of this Act, at the commencement of this Act all mineral rights in land referred to in section 51 (1) and (2) of the Rural Areas Act, 1987, vest in the State.
- (2) (a) Despite anything to the contrary contained in any other law, prospecting for or mining of minerals on land situated in a board area must only be undertaken with the written consent of the Minister of Minerals and Energy in terms of sections 6 (3) and 9 (2) of the Minerals Act, 1991 (Act 50 of 1991).
- (b) The said Minister may only give his or her consent after consultation and with the approval of the entity concerned, which approval may not be unreasonably withheld.
- (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-
- (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.

25 In other countries (notably the United States, Canada and Australia) it has been held, in terms of the principles of aboriginal title, that indigenous law can confer mineral rights recognised by the common law.

law, some did receive protection as a result of administrative practices adopted by the executive. In terms of a policy directive of the Department of Land Affairs<sup>26</sup>, communities with insecure tenure in the former homelands are, for the purpose of mineral rights, treated as the putative owners of the land which they occupy.

- 54 When land occupied by such a community is to be mined, the Department of Land Affairs enters into a tripartite agreement with the relevant mining company and the community, in terms of which the community obtains defined benefits.
- 55 The definition of “owner” in the MPRDA in respect of state owned land is “the state together with the occupant thereof”. In terms of section 54 the owner or occupier may qualify for compensation for damages or loss suffered as a result of prospecting or mining operations.

*Communities occupying state owned land and the CLRA*

- 56 The preamble of the CLRA raises expectations that the act would deal 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 or mining rights associated with land ownership will be dealt with.
- 57 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 had already been granted. Currently 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 communities can

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

- effectively apply for preferent rights.
- 58 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 take transfer of community land are identified; before the land rights inquiries are completed; the before the minister has determined the tenure form and allocation, and before community rules are adopted. The statutory powers and functions of a land administration committee or a traditional council acting as a land administration committee are only conferred once the rules are registered. Until this process had been completed the provisions of IPILRA applies.
- 59 The CLRA does not deal explicitly with mining on communal land or commercial leases on communal land. The minister may reserve certain land for special purposes at the time that she of he partitions the communal land in terms of the section 18 ministerial determination. Subject to the community rules, land cannot be alienated to non-members.
- 60 Ironically disadvantaged communities on state owned land have forfeited (in terms of the operation of the Act) even the minimal benefits obtainable under the now repealed Development Trust and Land Act of 1936 and the land control laws of former homelands.<sup>27</sup>
- 61 It is proposed that the Minister should give special consideration to opportunities for historically disadvantaged communities to benefit from the exploitation of minerals on land occupied by them. This can be achieved by giving the Minister, when granting prospecting or mining rights on land occupied or claimed by communities, the discretion to set conditions requiring the participation of the community claimant in the exploitation of minerals and the creation of work opportunities for community members. Old order land owners and surface owners received mining benefits by virtue of their land ownership and by operation of law. As a matter of principle and consistency, black people who were could not get ownership of their land should now be afforded similar treatment.
- 62 It is proposed that the relevant time periods applicable for the extinguishment of old order rights do not begin running in respect of state owned land for a period of 10 years.

### *Indigenous law rights*

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<sup>27</sup> Section 16(1) of the Bophuthatswana Land Control Act and section 16(1) of the Venda Land Control Act provided that the Minister of Economic Affairs must authorise mining on land held in trust for a tribe or community, and by operation of law conditions can be attached to benefit the communities concerned.

- 63 In order to avoid a situation where mineral rights held in terms of indigenous law are extinguished before the relevant legal principles can be further tested and established, it is proposed that the relevant time periods applicable for the extinguishment of old order rights do not begin running for a period of ten years from the date on which the Bill is implemented, in respect of mineral rights that are established under indigenous law.

### **THE AMENDMENTS**

- 64 The proposed amendments are set out below. The purpose of the suggested amendments is to protect the interests of vulnerable communities in the manner described above and to ensure that the interests of such communities are taken into account in the allocation of prospecting and mining rights.

#### **1 Definitions**

“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;”

PROPOSED:

**"community" means**

- (a) **a group of historically disadvantaged 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: Provided that where as a consequence of the provisions of the Act negotiations or consultations with a community are required, a community shall include the members or part of the community directly affected by mining on land occupied by such members or part of a community; or**
- (b) **a community as defined in the Restitution of Land Rights Act, Act no 22 of 1994;**

## **“2 Objects of the Act**

The objects of the Act are to -

...

(d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;”

PROPOSED:

## **“2 Objects of the Act**

The objects of the Act are to -

...

(d) *substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources, **and to ensure that communities occupying land on which mining takes place participate in the benefits which flow from the exploitation of the land;***”

PROPOSED:

## **“3 Custodianship of nation's mineral and petroleum resources.**

“3(1) Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.

(2) As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may

(a) grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and

(c) in consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.

(3) The Minister must ensure the sustainable development of South Africa's mineral and petroleum resources within a framework of national environmental policy, norms and standards while promoting economic and social development.”

PROPOSED: additional subclause 4

**“3 Custodianship of nation's mineral and petroleum resources....**

**(4) Subject to the provisions of this Act, when considering the granting of a prospecting or mining right, preference must be given to historically disadvantaged persons, and in particular to communities and members of communities occupying land in respect of which the right is sought.”**

**“Assistance to historically disadvantaged persons**

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

PROPOSED:

**“Assistance to historically disadvantaged persons**

12.(1) The Minister may facilitate assistance to any historically disadvantaged person to conduct prospecting or mining operations, **including to make applications in terms of sections 13, 16 and 22, to prepare applications for environmental authorisations and to make financial provision for remediation of environmental damage.**

**(4) The Minister shall report annually to Parliament on the assistance provided under this section. ”**

**17. Granting and duration of prospecting right (proposed new subclause)**

PROPOSED:

**“(7) If the application relates to land occupied by a community or claimed in terms the Restitution of Land Rights Act, Act no 22 of 1994, the Minister may impose conditions as are necessary to promote the rights and interests of the community or claimant, including conditions requiring the participation of the community, claimant or their members in the exploitation of minerals, the benefits from exploitation and the creation of work opportunities for such members.”**

## 23. Granting and duration of mining right (proposed new subclauses)

PROPOSED:

**“(7) If the application relates to land occupied by a community or claimed in terms the Restitution of Land Rights Act, Act no 22 of 1994, the Minister may impose conditions as are necessary to promote the rights and interests of the community or claimant, including conditions requiring the participation of the community, claimant or their members in the exploitation of minerals, the benefits from exploitation and the creation of work opportunities for such members.**

**“(8) A condition referred to in subsection (6) shall be regarded as a provision contemplated section 33(e) of the Restitution of Land Rights Act, Act no 22 of 1994”**

### **“2. Objects of Schedule [schedule II]**

2. The objects of this Schedule are in addition to the objects contemplated in section 2 of the Act and are to

- (a) ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations which are being undertaken;
- (b) give the holder of an old order right, and an OP26 right an opportunity to comply with this Act; and
- (c) promote equitable access to the nation's mineral and petroleum resources”

PROPOSED:

### **“2. Objects of Schedule**

*The objects of this Schedule are to -*

- a. *ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations which are being undertaken;*
- b. *give the holder of an old order right, and an OP2 right an opportunity to comply with this Act; and*
- c. *promote equitable access to the nation's mineral and petroleum resources.*
- d. **ensure that historically disadvantaged communities are not prejudiced in the exercise of their old order mining rights.”**

**Continuation of old order mining right** proposed addition to subclause 2(k)

7(1) Subject to subitems (2) and (8), any old order mining right in force immediately before this Act took effect continues in force for a period not exceeding five years from the date on which this Act took effect subject to the terms and conditions under which it was granted or issued or was deemed to have been granted or issued.

(2) A holder of an old order mining right must lodge the right for conversion within the period referred to in subitem (1) at the office of the Regional Manager in whose region the land in question is situated together with:-

- k. an undertaking that, and the manner in which, the holder will give effect to the object referred to in section 2(d) of this Act, **and if the conversion application relates to land occupied by a community or claimed in terms the Restitution of Land Rights Act, Act no 22 of 1994, the holder will promote the rights and interests of the community or claimant, including participation of the community, claimant or their members in the exploitation of minerals, the benefits from exploitation and the creation of work opportunities for such members: Provided that such an arrangement shall be regarded as a provision contemplated section 33(e) of the Restitution of Land Rights Act, Act no 22 of 1994.**

(3) The Minister must convert the old order mining right if the holder of the old order mining right -

complies with the requirements of subitem (2);

PROPOSED (insertion of a new clause):

**“14. Old order rights of historically disadvantaged communities**

**(1) The relevant time periods stipulated in this schedule for the cessation of old order rights will not begin to run-**

**(a) in respect of any rights in land claimed in terms of the Restitution of Land Rights Act 22 of 1994, prior to the finalisation of the relevant restitution claim;**

**(b) in respect of state owned land, and in respect of any mineral rights that might be established on the basis of customary law, for a period of 10 years from the date of implementation of this amendment.**

**(2) The rights referred to in section 6 of the Transformation of Certain Rural Areas Act 94 of 1998 will continue to be regulated by section 6 of that Act, read in conjunction with the provisions of this Act, insofar as they are not inconsistent with section 6.”**

A consequential change is that section 6 of the Transformation Act should be re-enacted.

**PROPOSED:**

Clause 4(d) of the Bill and the amendment of section 5(4) of the MPRDA be deleted.

(4) No person may prospect for or remove, mine, conduct technical co-operation operations, reconnaissance operations, explore for and produce any mineral or petroleum or commence with any work incidental thereto on any area without

- (a)  an environmental authorisation;
- (b) a reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right or production right, as the case may be; and
- (c) **[notifying and consulting with]** giving the land owner or lawful occupier of the land in question at least 21 days written notice.”

The repeal of the consultation requirement in section 4(4) of the MPRDA is not warranted and not motivated, adequately or at all, in the memorandum on the objects of the bill.

**Consultation:**

- 65 The consultation requirement in section 5(4) of the act is important to communities whose land is subject to old order rights and whose land is the subject of new applications. In the case of converted old order rights and in particular converted unused old order rights and converted rights where operations are resumed and expanded, it provides the only opportunity for a community to participate the decision to allow mining operations on its land.
- 66 In the case of new applications, the retained consultation requirements elsewhere in the MPRDA are inadequate:
  - a) The repeal of the consultation requirement will do away with, in many circumstances, the only opportunity for communities to make input on the exploitation of their land and the manner thereof, or negotiate mitigation of prejudicial social and economic impacts on their land;
  - b) The notice and comment procedure proposed prejudice communities, it is inadequate to ensure reasonable decision making and it is procedurally

- unfair given the circumstances of communities<sup>28</sup>;
- c) The remaining consultation requirements in the MPRDA<sup>29</sup> have the status of mere formalities and fail to address the social and economic impact of mining on communities.

Section 5(4) as it stands needs to be strengthened with detailed regulations directing the consultation process, and in particular the consultation requirements if the landowner or occupier is a historically disadvantaged community. The foundational jurisdictional facts required before any mining or prospecting can commence should remain intact ie: environmental authorisation from the state, mining authorisation from the state, and consultation with the owner or occupier, and in the case of a community owner or occupier, special consultation provisions guided by regulations and overseen by an independent body.

### Conclusion

- 67 We propose that the MPRDA be applied in a manner more consistent with the statement set out in section 12 that requires a comprehensive and effective programme of assistance to historically disadvantaged persons including rural communities.
- a) Communities should be given assistance to apply for preferent rights under section 104 of the MPRDA in order to avoid that new prospecting or mining rights are granted on their land without them being given the opportunity to negotiate the terms for benefits and participation.
- b) Consultation with and consent by the community owners before new mining development happens should be supervised by the state or an

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28 The memorandum attached to the bill asserts: "The Bill seeks to amend the principal Act to facilitate the smooth implementation of the new minerals and mining dispensation by aligning it with sound administrative practices and the objects of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000)." In terms of PAJA, a public or community inquiry administrative process, rather than a notice and comment procedure would be more appropriate given the circumstances of communities.

29 Sections 15, 16 and 22 contain consultation requirements with the owner, lawful occupier and affected parties. But they are inadequate in that they are specific to the particular administrative action. Concomitantly the outcome of consultation relates to the information needed for the administrator to decide and the relevant factors that structure the decision making discretion. The consultation envisaged in section 15 (reconnaissance permit) relates permission for access to the owner's land. In section 17 (prospecting right) the consultation report is part of the "basic assessment report" that is considered as part of environmental factors listed in section 39. Section 39(4)(a) [as proposed to be amended by the bill] lists the factors to be considered. It confirms that the consultation report submitted as part of the basic assessment report, is a mere formality. Section 22 (mining permit) envisages consultation by the applicant with interested and affected parties, but that process does not go anywhere. It is not part of any jurisdictional facts required for a decision.

independent, non-interested person or organisation delegated by the State and governed by regulations<sup>30</sup>.

- c) State assistance should be available to those communities who give their consent, to negotiate fair agreements and compensation.
- 68 The existing and proposed regime with regard to the allocation of mineral rights 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.
- 69 Rights to access new order mining rights cannot be allowed to be extinguished through oversight or lack of consultation by a Minister or official.
- 70 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 equity should require cogent justification.
- 71 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 is assured in the election of community representatives, in making decisions, in developing and signing agreements and decisions that clearly protect their interests.
- 72 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.

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30 section 5(4) as it was, should be amplified with regulations that strictly govern the consultation process with rural communities before new prospecting or mining commence.