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LRC
Legal Resources Centre

Your Ref:
Our Ref: S/jc/zm/MPRDA

22 March 2017

Honourable Mr Olifile Sefako MP
Chairperson of the Select Committee on Land and Mineral Resources
Per email: osefako@parliament.gov.za; sefako@nwpl.org.za; lifilesefako@yahoo.com

And to: Mr Asgar A. Bawa
Committee Secretary: SC on Land and Mineral Resources
By Email: Asgar bawa <abawa@parliament.gov.za>

Dear Honourable Sefako:

RE: MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL: NO 15D OF 2013

1 The above Amendment Bill ("the Bill"), which has been remitted back to Parliament by President Zuma on certain grounds, refers. We also refer to:

1.1 our previous letters addressed to you and the Chair of the NCOP dated 30 November 2016, 21 December 2016 and 30 January 2017, and the various annexures thereto. We attach copies of these and an index of our attachments follow at the end of this letter;

1.2 The invitation issued by your committee secretary 2 March 2017 to comment by today;

1.3 The powerpoint presentation of the DMR presented to your committee 8 November 2016 which contained further proposed amendments by the DMR related to Oceans Phakisa, and the subsequent "TABLE OF PROPOSED AMENDMENTS TO THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013 (B15D-2013), FOR CONSIDERATION BY THE NCOP AND PROVINCIAL LEGISLATURES. LAST UPDATED: 24 NOVEMBER 2016" and distributed by your secretary in December 2016.

1.4 The media report of 6 February 2016 with the heading "More amendments to minerals bill" [p16 of the bundle] where the following is stated:

> *The select committee itself will not consider the department's amendments, which will be addressed via the provincial mandates. The select committee believes this process will circumvent the restrictions placed by the joint rules of Parliament on what can be considered in cases of presidential referrals.*

2 We made written representations to a number of Provincial Legislatures and attended at the public hearing of the Western Cape Legislature. We represent a

number of clients with Richard Spoor Attorneys Inc and are jointly are instructed by the Land Access Movement of South Africa (LAMOSA), the Amadiba Crisis Committee (ACC), Bench Marks Foundation and Ntinga Ntaba kaNdoda ("our clients"):

2.1 LAMOSA is a non-profit organisation that advocates for land and agrarian rights. LAMOSA first wrote to the President in April 2014 regarding the Bill's inadequate public participation process in the National Council of Provinces. This resulted in the President referring the Bill back to Parliament.

2.2 The ACC is a community movement that seeks to oppose mining in the Umgungundlovu Community, commonly referred to as Xolobeni, on the Wild Coast. The Umgungundlovu Community has applied to the High Court for a declaratory order that no mining right may be granted, alternatively that no mining may commence, without the Community's prior and informed consent.

2.3 Bench Marks Foundation is an independent, non-governmental organisation established by the South African Council of Churches (SACC), the Ecumenical Service for Socio–Economic Transformation (ESSET), the Industrial Mission of South Africa, the CDT Foundation, and the Justice and Peace Department of the South African Catholic Bishops' Conference. The Bench Marks Foundation seeks to monitor the practices of multinational corporations, including mining companies, to ensure that corporations respect human rights, protect the environment, and generally conduct their business in a manner where profit is not made the expense of the poor and marginalised.

2.4 Ntinga Ntaba kaNdoda is a community based organization of Keiskammahoek which supports other Eastern Cape communities with advocacy and legal advice. It works with communities on the Wild Coast who are concerned about the threat of mining of their land.

3 Our clients have a clear interest in ensuring that MPRDA entrenches the customary law principles of free, prior and informed consent, and that such amendments are lawfully enacted.

4 As we have recorded before, Bill 15D and the 57 further amendments proposed by the Department of Mineral Resources must be rejected because:

4.1 The joint rules of Parliament provide that no amendments can be made when a Bill is returned to Parliament by the President on the procedural ground of lack of participation.

4.2 The NCOP and the Provincial Legislatures therefore cannot cure the flawed NCOP and PL process of March 2014 by now holding fresh hearings because these belated hearings cannot make amendments, which render the hearings meaningless.

4.3 In any event the NCOP cannot consider amendments which fall outside the referral mandate of the President.

4.4 Bill 15D[1] and the 57 further proposed amendments[2] do not address the concerns of communities. They actually dilute the little community participation currently provided for in the MPRDA. For example, Bill 15D and the 57 further amendments delete the MPRDA's current requirement that when a prospecting or mining right is granted and the application relates to the land occupied by a community, the Minister may impose "conditions requiring the participation of the community." [3]

4.5 The 57 further amendments cannot be entertained by either the Select Committee or the Provincial Legislatures. Your invitation of 2 March 2012 is for comments on the D version of the Bill. But you committee entertained 57 further amendments from the DMR.

4.6 The legal and factual reasoning for these assertions, and the adequacy of the hearings are more fully set out in our earlier correspondence. We stand by each allegation made therein.

5 We are therefore instructed to demand that the Bill be rejected and a new draft bill submitted that provides for community consent.

6 If the committee and the NCOP decide to proceed with the public hearings despite this, our clients demand that they be given reasonable and meaningful opportunity to participate therein. We are therefore instructed to demand:

6.1 That venues for the hearings take into account the circumstances of our clients are announced well in advance, and transport is provided.

6.2 That our clients' concerns about the Bill and proposals for its amendment are meaningfully considered by the Select Committee and the NCOP. The principal demand of our clients is that the Interim Protection of Informal Land Rights Act (IPILRA) be explicitly incorporated into the MPRDA and that no mining on communal land be allowed without community consent. Our clients' proposed amendments are attached hereto. Our clients will further motivate the reasoning behind the proposed amendments at the hearings.

7 We record that when the President referred the Bill back to Parliament two years ago on 16 January 2016, he recorded one of the referral grounds as related to "the consent principle in customary law." The National Assembly and the NCOP

[1] In clause 18 (d) of Bill 15 D and the amendment of section 23(2A) of the MPRDA

[2] In line 16 relating to clause 12 and the amendment of section 16(4A) of the DMR proposed amendments dated 24 November 2016

[3] Our clients have motivated that the Mining Charter and SLPs [social and labour plans] have failed communities throughout South Africa. Even the Portfolio Committee of the National Assembly admits as much. It is therefore inexplicable why the Department now wants to remove the Minister's power to impose conditions for community participation. The fact that the Minister has not used his powers in the past, does not mean that these powers should be removed without reasonable motivation. This much is expected in any meaningful public participation process.

ignored the exhortation of the President. The eight editorial amendments of the NA and the 57 amendments proposed by the DMR fail to address customary law and other property rights of communities on customary land. Instead Bill 15D and the proposed further amendments of the DMR further undermine community property rights and the participatory rights of communities.

8 We await to hear from you regarding the demand that Bill 15D be rejected outright.

9 If you do decide to go ahead with the hearings, we request that you inform us timeously about the dates, venues, and transport arrangements.

Yours faithfully

LEGAL RESOURCES CENTRE
Per:

WILMIEN WICOMB & HENK SMITH

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6	2016 11 30	Letter from LRC and RSI to Chair NCOP and Chair SC	No amendments possible	34
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MPRDA and MPRD Amendment Bill No 15 of 2013 proposals

The purpose of the proposals below is to incorporate the principles of

a) Community consent for mining on communal land;
b) Community participation in decision making concerning matters affecting them;
c) Compensation and reparation for communities who lost their land and land rights as a result of mining.

1 Preamble

Communities and members of communities owning or possessing land in terms of any custom or practice shall have a right to property and the protection thereof, including the use and disposal of both surface and subsurface rights.

The Preamble must be augmented with foundational principles:

Communities should determine land use and provided the space to solicit ideas and input, from relevant sources, about possibilities for how to use their land, the impacts on the community and environment, and potential positive outcomes of that land use vs. costs.

FPIC is seen as a collective right held by all in a community and this assumes participation by the whole community and consent from as an absolute minimum the majority of the community. The exercise of FPIC must be participatory in nature. This means decisions can't be made by leaders on behalf of a group, nor by men for women. The group itself must decide and here democratic principles are important. As such it is an inclusive right and enjoyed by women and men equally.

The Act documents the aspirations of communities to defining their own development paths with due regard to their land and culture through enshrining the first principles of consent, respect, dignity and self determination

The Act serves as a basis to guide elements of land and minerals regulation to result in a developing rural economy where various development alternatives are explored in the interests of people and future generations.

2 Definitions

insert new definition: "customary law" means the rules and principles that communities use to govern themselves and their access, governance, development, allocation, conservation and disposal of shared resources. The customary law as practiced by communities today shall prevail over any written account of a community's customary law, particularly any account written by colonial administrators or their functionaries. insert new definition: 'directly affected community' means a community or part of a community directly affected by mining on communal land occupied or used by members of such

community or part of the community,

and where a directly affected community was dispossessed of its rights in land as a result of mining on its communal land, the community shall have the meaning corresponding to the meaning ascribed in the Restitution of Land Rights Act 1994.

insert new definition:

'communal land' means land in respect of which a community holds rights including informal rights as defined in Interim Protection of Informal Land Rights Act 1998.

Community shall be defined as a group of persons who have chosen or choose to adhere to and enforce shared rules of access to their land, minerals and other resources, owned by them through long occupation and or grant or other means regardless of whether title is formally held by the State or another person, provided that the community shall:

- practice a system of customary land tenure; or,
- be indigenous people or descendant; or,
- live on trust land under statute law.

Such a community may affirm its recognition and social boundaries with reference to its neighbours, and neighbouring communities may recognise a community for purposes of decision-making under this law. In the context of proposed mining activities, decision making power shall vest at the lowest level of organisation of customary rights holders, including at the village, ward or clan level or any other structure defined by that community's customary law.

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

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

3 Section 2: principles

Subsection 2 paragraph (d)

Retain "women and communities"

> (d) substantially and meaningfully expand opportunities for historically disadvantaged **[persons, including women and communities]** South Africans, to enter into and actively participate in the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;

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

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

(j) ensure that applicants for and holders of prospecting and mining rights are required to obtain community consent prior to and during the development or implementation of projects;

(k) provide for a contribution to the reparation for the dislocation of affected communities on communal land that were dispossessed of their rights in land due to mining or otherwise directly affected;

(l) communities and members of communities owning or possessing land in terms of any custom or practice shall have a right to property and the protection thereof, including the use and disposal of both surface and subsurface rights.

The additional principles are warranted in the light of the questionable record of the MPRDA and its implementor the DMR. The wording of paragraph (j) is borrowed from the industry/labour/government amended BBSEE charter of 2010, and states the value underlying the consent standard.

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

Unless the consent and reparation standards are adopted in practice and as the foundational principles to address the 1913 land law legacy, history will be repeated.

Section 5A: prohibited activities

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

(d) on communal land, without the prior written consent of the directly affected community in terms of customary law as applicable and the Interim Protection of Informal Land Rights Act 1996: Provided that if a prospecting right, mining right or mining permit had been granted after 16 January 2015 in respect of communal land and such consent is not given within 6 months of any grant, such right will lapse.

The motivation for the consent requirement as the foundation principle for mining on communal land is rooted in our history and our constitution. Section 5A should be amended to make it illegal to start mining without community consent under customary law and complying with IPILRA.

Under section 10, any applicant and the department must invite a community on communal land to negotiate with a view to find agreement. An applicant for a mining right without community consent or pending consent, can proceed with an application at his own risk but cannot start mining until consent is given and the department's grant will lapse after six months if community consent is not given.

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

4 Section 10: consultation

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

"Provided that if the application relates to communal land,

i. The directly affected community must be invited to negotiate and seek agreement on the application;

ii. Prior to seeking consent, the applicant must approach the community to have an independent expert appointed;

iii. The independent expert shall first facilitate a process in which the community decides whether to consent to the access required for the completion of impact assessments;

iv. Once a decision concerning access and impact assessment has been made, the independent expert shall facilitate a process in which the community shall make an informed decision regarding whether to consent to the granting of the mining right. This process shall be transparent, democratic and participatory, and shall at minimum include the following steps:

   a. A widely publicised public meeting where the independent investigator summarises the likely effects of the proposed mining activities, including the results of any impact assessment conducted, in a manner that is accessible to the community and at a convenient venue and time. The independent investigator must also summarise the proposed terms under which the applicant proposes to compensate the community and its members for the proposed mining activities, and advise the community regarding the extent of the applicant's compliance with the statutory requirements.
   b. At such a meeting, community members shall be entitled to comment freely and to seek further information.
   c. At or after such a meeting, the community may appoint community representatives to represent the community in engagements with the independent investigator and the applicant in terms of that community's customary law, provided that such representatives shall not be empowered to give binding undertakings on behalf of the community.
   d. After such a meeting, the independent investigator shall furnish all information sought by community members in an accessible form.

v. While the applicant and the independent expert may engage with the community throughout the application process, the decision regarding community consent shall only be taken after the integrated assessment report is finalised."

5 Section 10B: RMDEC

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

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

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

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

"the development needs of communities"

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

"the regional land claims commissioner"

7 Proceedings of RMDEC meetings

10H Proceedings of the RMDEC

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

The reports and recommendations of the committee, minutes of meetings and comments, objections and agreements considered by the committee shall be available for public inspection.

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

8 Section 27 small scale mining and mining permits

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

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

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

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

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

Regarding the legitimate activities of small scale customary and artisanal miners on communal land who cannot comply with the onerous provisions relating to small scale mining in section 27 which are too cumbersome on the one hand or too

restrictive on the other hand, the above provisions will allow for a flexible small scale policy, without sacrificing certainty and security.

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

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

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

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

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

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

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

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

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

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

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

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

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

10 Section 47: cancellation of mining right

‘‘(c) is contravening any condition in the environmental authorisation, approved social and labour plan or undertaking by a holder or condition imposed in respect of the housing and living conditions standard for the minerals industry, codes of good practice for the minerals industry and the broad-based socio-economic empowerment charter envisaged in section 100.

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

Retain paragraph (d) dealing with misrepresentations by mining companies

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

11 Section 56C: The composition of the Council

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

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

12 Section 100: empowerment and reparation

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

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

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

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

The proposal above means that

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

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

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

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

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

Guidelines for community consent processes

The following conditions for community consent processes shall be incorporated into the regulations and participation codes.

Communities and members of communities owning or possessing land in terms of any custom or practice shall have a right to property and the protection thereof, including the use and disposal of both surface and subsurface rights.

Community Governance
.1 Communities shall have the choice to practice customary forms of governance in matters internal to the community and involving relations external to the community.
.2 Such practice shall be recognised as a living and changing form of governance.
.3 Such practice shall not be defined or bound by colonial constructions of customary ownership, decision-making and governance.
.4 Customary decision-making processes shall be as defined by the communities' living practice, subject to the realisation of equality and democracy enshrined in the African Charter on Human and Peoples' Rights, especially the promotion of the rights of women to participate in and lead such processes.

Community Rights
.1 The continued existence of a community shall be considered inviolable.
.2 The rights of a community include, amongst others, the right to:
.2.1 pursue their own development path;
.2.2 the natural resources on and below the surface of their land; and
.2.3 collectively benefit from the use of the natural resources on and below the surface of their land.
10.3 No community may be arbitrarily deprived of these rights through mining or associated activities.
10.4 The State must facilitate and support the chosen development path of such a community, including supporting the community in considering all viable forms of development.

Community Consent Required
.1 Should a proposed mining activity require access to a portion of land owned, occupied or used by a community in terms of that community's custom or practice, or if an existing mining activity should require a significant change in the scope or nature of operations, the affected community's consent shall be required.
.2 The affected community shall have the right to grant consent unconditionally or subject to conditions that the community considers necessary to protect their socio-economic rights or interests, or their natural or cultural heritage.
.3 The affected community shall have the right to refuse to grant such consent.
.4 Should the affected community's consent not be granted, the State shall not permit the proposed mining activity to proceed until such consent is granted.
.5 Should mining commence or a mining right be granted without the consent of the community, the community shall have the choice to:
5.1 have the right set aside and to be paid compensation for the full damages suffered by the community including the value of any minerals extracted and the value of rehabilitating the land to the condition it was in prior to any mineral exploitation; or
5.2 consent to the mining retrospectively through the process set out in this Chapter, including the negotiation of compensation, and to recover all compensation that would have been owed to it had the community's consent been received from the outset.

.6 Communities shall have the right to revoke their consent should mining activities be conducted in a manner contrary to this Law, with communities then entitled to compensation for the full damages suffered by all mining activities.
.7 If more than one community is affected by a proposed mining activity, each community shall have the right to independently decide whether to grant or refuse its consent.

Free, Prior and Informed Consent
.1 Community consent may only be granted on the terms set out in this Chapter, and must be:
1.1 free from any form of manipulation, coercion, or pressure;
1.2 prior to the commencement of the activity; and
1.3 with full, detailed and accurate information on the nature and scope of the proposed mining activity, on the reasonably possible impacts on the community's economic, social and environmental wellbeing, including the impact on women informed by the precautionary principle that the burden of proof falls on the application to establish that an activity is not harmful, and on development alternatives.

Customary Decision-Making
1 When a community's consent is required, a community shall decide whether to grant its consent in terms of that community's customary law and practices, provided that such processes shall:
1.1 be transparent, democratic, and participatory;
1.2 ensure the participation of all persons directly affected by the proposed mining activities; and
1.3 protect and promote the right of women to participate, lead, and make decisions.
2 Where the proposed mining activity requires the relocation of specific community members' homes, the majority of the specific persons affected by the relocation must consent to the mining activity. This is a necessary requirement, without which the community as a whole cannot consent to such activity.
3 A decision to provide consent must include an agreement regarding compensation payable to the community and its members compliant with the standards set out in CHAPTER 6.
4 Notwithstanding any timeframes provided for in terms of statute law, communities have the right to sufficient time to give effect to decision making processes required by their customary law.

Outcome
1 Where consent is granted for a mining activity, it is mandatory that the applicant and the community conclude a written agreement setting out the terms of exactly what has been consented to in plain language, including the terms of compensation payable to the community and its members, provided that the community may nominate representatives to sign such agreement in terms of its customary law and practice after the final draft has been made available to the public.
2 This written agreement may be amended with the consent of all parties where it is necessary to change the project plan for the proposed mining activity which is likely to affect or change the impact of such activity.
3 Where consent is granted or refused, the independent investigator shall produce a report documenting the decision-making process, with a particular emphasis on the following factors:
3.1 The steps taken to notify the members of the community about the meetings convened by the independent investigator;
3.2 The quality of the information provided by the applicant and the extent of its cooperation;
3.3 Indications of manipulation, coercion or pressure from outside actors during the decision-making process.

3.4 The extent of community participation, including the extent of participation by vulnerable members of the community and minority groups;
3.5 Where consensus was not reached, the reasons why consensus was not reached, the views of those opposed to the mining activity including and especially minority and vulnerable households, and full details on the meeting at which the decision was taken.
3.6 The extent of the participation of and leadership by women in the process;
3.7 Where the relocation of members of the community had been proposed by the applicant, the steps that were taken to solicit the views of the persons affected by the relocation; and
3.8 Any other information that may be relevant to explaining the extent and quality of the public participation process and the decision of the community.

https://www.businesslive.co.za/bd/national/2017-02-06-more-amendments-to-minerals-bill/

More amendments to minerals bill

The Department of Mineral Resources looks to provincial legislatures to give the nod to 56 new changes after Zuma refers draft back to Parliament

06 February 2017 - 05:46 AM Linda Ensor

The amendments tackle the concerns of the offshore petroleum industry and deal with carried interest and state participation in ventures. Picture: SUPPLIED

The Department of Mineral Resources is relying on the support of provincial legislatures to be able to introduce 56 new amendments to the Mineral Resources and Petroleum Development Amendment Bill, which was referred back to Parliament by President Jacob Zuma at the beginning of 2016.

The amendments tackle the concerns of the offshore petroleum industry and deal with carried interest and state participation in ventures.

Whereas the bill adopted by Parliament granted the state a 20% free carried interest in all new exploration and production rights, the department's proposed amendment is that the 20% carried interest is not free.

The proposals also stipulate that future mining permits will only be granted to majority black-owned South African companies and that the breach of any provision of the mining charter or the housing and living conditions standard would constitute a breach of the act and thus allow the minister to suspend or cancel a mining company's rights.

It is understood the department is having to use the provincial route to introduce the new amendments because a joint rule of Parliament stipulates that parliamentary committees can only address those matters raised by the president in his referral of bills back to the legislature.

This same issue arose with Zuma's recent referral of the Financial Intelligence Centre Amendment Bill, which some lobby groups wanted to open up for a fuller debate.

Zuma sent the Mineral Resources and Petroleum Development Amendment Bill back to Parliament because of the lack of public consultation with the National Council of Provinces (NCOP), including with the National House of Traditional Leaders. The president was concerned over the constitutionality of the bill's provisions imposing export restrictions on strategic or designated minerals, which he said could violate international agreements.

Another constitutional concern was the inclusion of the mining charter into the act, elevating its status to that of a law.

The portfolio committee on mineral resources rejected the president's reservations and sent the bill to the NCOP's select committee on land and mineral resources which will get mandates from all the provinces on the bill and the proposed amendments in May.

The select committee itself will not consider the department's amendments, which will be addressed via the provincial mandates. The select committee believes this process will circumvent the restrictions placed by the joint rules of Parliament on what can be considered in cases of presidential referrals.

Provinces have been briefed by the department and will be holding public hearings on the bill and the proposed amendments. Public hearings have started in KwaZulu-Natal and are due to be held in the Western Cape and Gauteng shortly.

The Legal Resources Centre is contesting the department's introduction of the new amendments, saying the NCOP could not entertain new amendments within the limited terms defined by Zuma in his referral.

Herbert Smith Freehills partner Peter Leon agreed with this view, saying the department should withdraw the bill and introduce a new one.

Cape Town Office

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LRC
Legal Resources Centre

Your Ref:
Our Ref: HS

30 January 2017

Honourable Olifile Sefako MP
Chairperson of the Select Committee on Land and Mineral Resources
Per email: osefako@parliament.gov.za; sefako@nwpl.org.za;
olifilesefako@yahoo.com

Committee Secretary: Mr Asgar Bawa
abawa@parliament.gov.za

Dear Mr Sefako

Re: Mineral and Petroleum Resources Amendment Bill [B15D of 2013]

1 We refer to:

1.1 our letter of 30 November 2016, attached for ease of reference.

1.2 the letter from the Chair of the NCOP dated 7 December 2016 when she stated that you would be dealing with the 30 November letter;

1.3 our letter of 21 December 2016, attached;

1.4 the three e-mail notices issued this month by your secretary regarding the scheduling of provincial public hearings.

2 We note that the secretary's e-mails indicate that public hearings commenced in KZN during the past week, and that hearings will be held in Gauteng and Western Cape shortly.

3 We repeat our client's demands of 30 November 2016 that the bill be rejected forthwith and that a new bill be introduced that fully respects the rights of communities including their right to say no thank you to mining on their communal land.

4 We have now carefully considered the 56 amendments proposed by the department of mineral resources "for consideration by the NCOP and provincial legislatures." The table with the DMR amendments was again

distributed by your secretary on 19 January 2017. We are satisfied that the 56 proposed amendments constitute matters of policy and regulation. The 56 amendments have nothing to do with the constitutional and legal issues raised by the President when he referred the bill back to Parliament two years ago on 16 January 2015.

5 We have also considered the process for and the procedure adopted by Parliament this past week and over the past three months when it dealt with the FICA bill that was also referred back to Parliament by the President. Indeed, no new amendments or matter dealing with policy or regulation could be or were considered by the relevant committee, or could be raised by the participants at the public hearing. The mandate of the Committee was limited to a consideration of the President's grounds of reservation. Neither the relevant committee nor the relevant department could introduce new subject matter of general nature into the referred bill.

6 We have read the opinions by senior advocates Semenya and Gauntlett on the FICA bill solicited by Parliament and Treasury. The proposals for amendments contained therein are strictly within the four corners of the President's referral.

7 The MPRDB was remitted by the President on both substantive and procedural constitutional grounds. The procedural irregularity cannot be cured because no amendments are allowed. We have explained that in these circumstances the only option for Parliament and your committee was to reject the Bill in terms of Joint Rule 208 on the grounds that the Bill is "procedurally or substantively so defective that it cannot be corrected".

8 Your committee is now persisting in not holding public hearings yourself on the constitutionality of the Bill, as was done in the case of the FICA referral. Second, you insist that the provincial legislatures are briefed on, consider and hold hearings about 56 additional amendments. You expect the public to attend hearings and make submissions on general matter that

are completely divorced from the constitutionality referral of the President. In any event the 56 additional proposed amendments cannot lawfully and constitutionally be adopted by Parliament.

9 Our client wants us to repeat some of our averments in our earlier letters and we do so to emphasise their importance.

9.1 *It is inexplicable why the department is now proposing the removal of community participation conditions, and is refusing to heed the call for community consent [free prior informed consent or FPIC, and the right to negotiate] as a requirement for mining on communal land. And it is inexplicable why the Select Committee is accepting the proposed amendments of the DMR without any questions from the Select Committee. Instead the Select Committee passes the buck to the Provincial Legislatures.*

9.2 *In respect of the PL briefings scheduled for last month, November 2016, the programme states that "Representatives from the House of Traditional Leaders should be invited to attend these meetings." Why were the affected communities not invited to briefings where both the bill and the fresh proposed amendments of the DMR were motivated and interrogated? [note that the updated committee plan distributed by the secretary on 19 January 2017, Select Committee on Land and Mineral Resources Draft Fourth Term (2016), First and Second Term (2017) Committee Plan, file name: Pro Draft 4th 2016 - 17 MPRDA Leg Programme - ver 4, repeats the special treatment for the NHTL]*

9.3 *The draft programme for the second term envisages that the negotiating mandate meeting of the Select Committee takes place at the beginning of the second term of 2017. The programme states that "during this meeting all Provincial Negotiating Mandates as well as responses from the House of Traditional Leaders will be*

considered by the Committee in consultation with the Department of Mineral Resources, Legal Advisors from the Department, the State and Parliament." The question is why traditional leaders get a special mention, and why their responses are to be considered separate from the provincial negotiating mandates. Our understanding of the law is that the consideration of provincial mandates is exactly that. No other responses, unless incorporated in the provincial negotiating mandate reports, can be dealt with at that meeting. In addition we emphasise that the participation of traditional leaders or their houses cannot substitute for communities' voices and / or taking account of the content of constitutional customary law.

The way forward:

10 We have spelt out our client's proposal in our earlier correspondence.

11 Our client's position remains that any amendments would be unlawful. The bill should be rejected as the procedural irregularity cannot be cured. In addition, any hearings on additional policy, regulatory and general amendments would be meaningless. Such hearings would also be illegitimate if the NCOP and the PLs are not prepared to debate real community concerns such as community free prior informed consent and choice, and mining legacy issues. The department cannot set the agenda and scope the debate with superficial and myopic amendments.

12 We look forward to your response.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:

HENK SMITH and WILMIEN WICOMB

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21 December 2016

Honourable Olifile Sefako MP
Chairperson of the Select Committee on Land and Mineral Resources

Per email: osefako@parliament.gov.za; sefako@nwpl.org.za;
olifilesefako@yahoo.com
Committee Secretary: Mr Asgar Bawa
abawa@parliament.gov.za

Dear Mr Sefako

Re: Mineral and Petroleum Resources Amendment Bill [B15D of 2013]

1 We refer to our letter of 30 November 2016. We have not received a response to our letter from you or your office. We received a response from the chair of the NCOP dated 7 December 2016 wherein she stated that she had referred out letter to your committee

2 On 1 December we received an email from Mr Jooste in your office. That email is appended below.

3 On 12 December 2016 we received an email from the secretary of your committee Mr Bawa. There were 71 addressees, including e-mail addresses of departmental officials, PLs, mining industry bodies and commercial attorneys who represent mining companies. Attached to the email was a programme or draft programme of the select committee and a

> "TABLE OF PROPOSED AMENDMENTS TO THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL, 2013 (B15D-2013), FOR CONSIDERATION BY THE NCOP AND PROVINCIAL LEGISLATURES. LAST UPDATED: 24 NOVEMBER 2016."

4 We look forward to receiving your formal response to our letter of 30 November 2016. Pending your response and in the light of Mr Jooste's e-mail and the e-mail and attachments of 12 December we wish to bring further considerations to your attention and to the attention of the provincial legislatures. We trust that you will take this into consideration when you honour us with your reply. This letter augments our client's demands of 30 November 2016 that the bill be rejected forthwith and that a new bill be introduced that fully respects the rights of

communities including their right to say no thank you to mining on their communal land.

Fresh amendments cannot lawfully be entertained:

5 New amendments cannot be entertained by the NCOP and the PLs. It would be unlawful as the rules and the Constitution do not provide for new amendments in the case of a Presidential referral for procedural reasons. In our letter of 30 November 2016 and the earlier correspondence attached thereto, we fully explained the law on amendments where bills have been remitted by the President. In in any event the fresh amendments proposed by the DMR do not relate to the parallel substantive concerns of the President.

6 It is clear from the "table of proposed amendments" that the DMR wishes to push 56 fresh amendments through the NCOP and PL processes. You will recall that in our letter of 30 November 2016 we speculated, based on the power point presentation of the department to your committee on 8 November 2016, that the department intended proposing 19 amendments. It transpires that by 24 November 2016, 56 fresh amendments are proposed.

7 In our letter of 30 November 2016 we stated that our client was prejudiced by not having the wording of the DMR's proposed amendments. The text of the proposed amendments, updated to 26 November 2016, has now been provided.

8 The publication of the 56 proposed amendments has been limited to the 71 addressees of Mr Bawa's email and, presumably, the attendees of the provincial briefings. But the public was not invited to the provincial briefings.

9 The department and the portfolio committee took almost two years to consider eight cosmetic editorial amendments to the bill. These were unlawful as we explained in our letter of last month. The department now expects of your select committee to consider 56 significant amendments within one term.

<u>The content of the amendments proposed are objectionable:</u>

10 A number of the proposed amendments can be considered substantial. Our client LAMOSA instructed at this stage to raise concerns about one of the proposed amendments namely amendment number 16. Number 16 or clause 12 provides for the removal of the power of the minister to set "conditions requiring the participation of the community."

11 The wording of clause 12 reads as follows:

"(4A 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".]**~~

12 The department's formal explanation for this proposed amendment states that "the purpose and objective of the proposal is to delete the requirement for imposition of conditions for community participation to give effect to the objects of the MPRDA which provides that mineral and petroleum resources of this Country belong to all [sic] the nation. Issues relating to community interests and benefits are addressed in the SLP and Mining Charter. Community ownership is addressed in section 104 of the Act".

13 We have four observations:

13.1 The recognition of the "need to promote local and rural development and the social upliftment of communities affected by mining" and the acknowledgement that "South Africa's mineral and petroleum resources belong to the nation" stand equal in the preamble principles and national interest does not necessarily trump local rights.

13.2 A dogmatic application of a national interest principle would render any local rights, interests and participation obsolete.

13.3 The second last sentence of the motivation actually motivates for the scrapping of the whole of subsection 4A. The department's cynical attitude towards ministerial conditions is illustrated. The department is actually saying that it believes that departmentally regulated SLPs and BEE Charter provisions should suffice and that there is no need for ministerial conditions relating to communit rights, interests, benefits or participation.

13.4 Even Parliament acknowledges that the SLPs and the Charter has not benefited communities. The erstwhile chair of the portfolio committee said as much in an oversight report. The SLPs and the Charter are unlikely to become instruments of community transformation given their track record, including their track record in the hands of Lonmin and the DMR and given the outcomes at Marikana.

13.5 Section 104 is a poor excuse for giving recognition to community ownership of natural resources on communal land and community property rights. We say this because the discretionary granting of preferent rights require land owning communities to show that they have the financial resources to mine their own land themselves, before they are even given the preferent right to apply for a mining right. The qualifying conditions for applicant communities are more stringent than for applicant companies. This is discriminatory against communities.

14 It is inexplicable why the department is now proposing the removal of community participation conditions, and is refusing to heed the call for community consent [free prior informed consent or FPIC, and the right to negotiate] as a requirement for mining on communal land. And it is inexplicable why the Select Committee is accepting the proposed amendments of the DMR without any questions from the Select Committee. Instead the Select Committee passes the buck to the Provincial Legislatures.

The select committee's programme for the hearings and directives to the PLs:

15 In our letter of 30 November 2016 we complained that the 16 January 2016 deadline for comments in the SC's announcement [annexure E] meant an extremely short public participation period. In terms of the latest timetable, the public participation period is now being shifted to the month after SONA and before the end of the first term. This may still not allow enough time for meaningful participation especially given the further directives of the SC for locations and venues of hearings.

16 In respect of provincial public hearings, to be held during the first term after SONA, the programme proposes that these be held in the "areas / wards / communities that are directly affected". The question remains how the PLs are going to make this happen, given the short time proposed for hearings. The fact is that in some provinces such as Limpopo and Northwest Province mining and new mining applications occur in several districts, municipal areas and wards.

17 In respect of the PL briefings scheduled for last month, November 2016, the programme states that "Representatives from the House of Traditional Leaders should be invited to attend these meetings." Why were the affected communities not invited to briefings where both the bill and the fresh proposed amendments of the DMR were motivated and interrogated?

18 The draft programme for the second term envisages that the negotiating mandate meeting of the Select Committee takes place at the beginning of the second term of 2017. The programme states that "during this meeting all Provincial Negotiating Mandates as well as responses from the House of Traditional Leaders will be considered by the Committee in consultation with the Department of Mineral Resources, Legal Advisors from the Department, the State and Parliament." The question is why traditional leaders get a special mention, and why their responses are to be considered separate from the provincial negotiating mandates. Our understanding of the law is that the consideration of provincial mandates is exactly that. No other responses, unless incorporated in the provincial negotiating mandate reports, can be dealt with at that meeting. In addition we emphasise that the participation of traditional leaders or their houses

cannot substitute for communities' voices and / or taking account of the content of constitutional customary law.

19 No provision is made for public hearings by the select committee itself. Mr Jooste's email shows that this was not even considered. This in itself renders the public participation process unreasonable and unlawful.

20 The programme envisages a half hearted public participation process in the provinces, and no public involvement in the NCOP. We know that the National Assembly and the Portfolio Committee failed to involve the public in any manner whatsoever. The overall programme and lack of meaningful public participation means that the process is fatally flawed.

21 We have requested the committee secretariat to provide us with the reasoning and the minutes of the meeting where the decision was made that the SC and the NCOP will not hold public hearings. We have not received any clarification. We have to rely on the reasoning provided by Mr Jooste below. He said this: "the committee secretariat ... have met with all provincial liaison officers to develop a public engagement process that also take into account the schedules of provinces, end of year and beginning of year realities of operation." These are not relevant considerations or the only considerations in determining the process of public involvement envisaged under the constitution. The judgment obtained in the constitutional court by our client LAMOSA is on point: "Sections 59 and 118 impose separate but parallel obligations on the National Assembly and Provincial Legislatures respectively to facilitate public participation."

The way forward:

22 We have spelt out our client's proposal in paragraphs 13 to 19 of our November letter.

23 Our position remains that any amendments would be unlawful. Any hearings would be illegitimate if the NCOP and the PLs are not prepared to debate community free prior informed consent. The department cannot set the agenda and scope the debate with superficial and myopic amendments.

24 We look forward to your response.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:

HENK SMITH and WILMIEN WICOMB

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From: Henk Smith [mailto:henk@lrc.org.za]
Sent: Friday, 09 December 2016 10:11 AM
To: 'jjooste@parliament.gov.za'; 'Asgar bawa'
Cc: 'Sian Poulton'; 'Zulfa Mohammed'; 'Wilmien Wicomb'; Henk Smith (henk@lrc.org.za)
Subject: RE: MPRDA Bill - select committee response - Kobus Jooste

Dear Mr Jooste and Mr Bawa
Further to our email below, we wondered whether you could now let us have the further proposed amendments of the department [para 3(c below]. We look forward to hearing from you. Regards Henk Smith

From: Henk Smith [mailto:henk@lrc.org.za]
Sent: Monday, 05 December 2016 3:46 PM
To: 'jjooste@parliament.gov.za'; 'Asgar bawa'
Cc: 'Sian Poulton'; 'Zulfa Mohammed'; 'Wilmien Wicomb'
Subject: FW: MPRDA Bill - select committee response - Kobus Jooste

Dear Mr Jooste

Thank you for your email. We can meet about it on Wednesday if you wish to, and you are welcome to call me to make an appointment.

1 It appears that your email of Friday morning crossed with our letter of Thursday morning addressed to the NCOP chair, the chair of the select committee and copied to Mr Bawa. Mr Bawa acknowledged receipt of our letter early on Thursday morning.

2 Annexure E of our letter contains the full text of the announcement [dated 25 November] that we relied upon when we wrote to the provincial legislatures requesting inter alia details about the dates and venues of the scheduled public hearings referred to in the announcement. Seeing that we copied the letter and annexure E to the provincial legislatures, we believe that there should be no misunderstanding. Annexure E also mentions "comment expiry on 16 January 2016" and contains the hyperlink to the dates and venues table, annexure F.

3 We would like to a) reassure our client about the steps taken and considered by the select committee regarding public involvement on bill 15D of 2013, and b) develop a better understanding of what your committtee is planning. We would appreciate you letting us have the following:

a. The minutes of the meeting with all provincial liaison officers to develop a public engagement process that also took into account certain factors listed in your email;
b. The minutes of the meeting of the committee or its management committee when it decided on whether or not the select committee will itself hold public hearings, and the considerations taken into account;
c. The wording and text of the further proposed amendments referred to and summarised in the powerpoint presentation of the department on 8 November 2016;
d. Information on
    i. whether the committee is going to entertain the further proposed amendments from the department;

ii. how the further proposed amendments will be published; and
iii. how the select committee and the provincial legislatures will alert the public of the further proposed amendments sought by the department.

4 Please note that our invitation to you to meet and let us have the documents and information requested in paragraph 3 above does not mean that we have changed our view that any amendments would be unlawful. Please let us know if you want us to also send a formal letter to the chair and the secretary of the select committee responding to your email and our repeating our requests.

We look forward to hearing from you. Regards Henk Smith 083 266 1770

From: Jakobus Jooste [mailto:jjooste@parliament.gov.za]
Sent: Friday, 02 December 2016 8:28 AM
To: Henk Smith <henk@lrc.org.za>
Subject: MPRDA Bill

Good day

I would like to use this opportunity to introduce myself, the content adviser for the Select Committee dealing with the MPRD Bill, and to request greater communication between ourselves in the months coming. This committee did not deal with the MPRDA during the previous engagement cycle, and thus "inherited" the fall-out from the previous process. Everyone involved is very aware of the implications, and are taking their time with every decision that has to be made.

It is therefore concerning that you do not address your concerns regarding our public engagement process with us, but rather direct your communication at provinces. The committee secretariat and committee chairperson had to hear about your concerns via secondary sources, which is regrettable as some of the statements you have made regarding our proposed process for public hearings may not be correct and if you had requested clarity from us prior to directing this communication at provincial legislatures, you could have developed a better understanding of what we are planning.

At the onset of receiving a section 76 Bill, committees are requested to develop a **draft** programme based solely on time available in the year cycle, while planning on the actual process commences. I am not sure which draft programme you used to develop your opinion on the engagement process and public hearings, but the truth of the matter is that the committee secretariat had requested and received an extension of the six week cycle, and have met with all provincial liaison officers to develop a public engagement process that also take into account the schedules of provinces, end of year and beginning of year realities of operation, and the benefit of the extended engagement cycle. There will be no public hearings before 2017. A number of provincial legislatures have been briefed on the Bill, but all hearings will take place in 2017, and outside the traditional school and government recess period.

In your letter you state that "the secretary of the select committee announced, on 25 November 2016, that all nine provincial legislatures have scheduled public hearings on the bill". Mr Bawa was in surgery on the 24th and I have copies off all the emails he copied me in on the 25th. No

such statement is in my possession. What went out was updated lists of provinces that have scheduled provincial briefings or public hearings. The latest example I have contain no finalised dates for public hearings yet. Can you please clarify on what piece of communication you based this statement?

Your concerns about the process that will follow and the amendment of the Bill are noted, and shared. In terms of your assertions on the actions of the committee, I would appreciate some clarity on the matters raised in this mail and repeat my statement that the committee, as an extension of the NCOP, is directly approachable to all stakeholders and citizens should information be required, concerns be raised or input required.

Regards

Kobus Jooste
Content Advisor: SC on Land and Mineral Resources

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30 November 2016

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abawa@parliament.gov.za mletago@parliament.gov.za

Dear Ms Modise and Mr Sefako

Re: Mineral and Petroleum Resources Amendment Bill [B15D of 2013]

1 The above Bill refers.

2 We write to you on behalf of the Land Access Movement of South Africa ("LAMOSA"). We previously represented LAMOSA in writing to the President about the unconstitutionality of the Bill on 2 April 2014. A copy of the correspondence is annexed hereto marked **A**. We record that in particular this correspondence objected to the NCOP and Provincial Legislatures' failure to facilitate public participation in passing the Bill.

3 After considering our correspondence amongst others, the President referred the matter back to Parliament on 16 January 2015 to consider the constitutionality of the Bill as well as the constitutionality of the process by which the Bill was passed on *inter alia* the following grounds:

3.1 The NCOP and the Provincial Legislature did not sufficiently facilitate public participation when passing the Amendment Act as

required by Section 72 and 118 of the Constitution in that the consultation period was highly compressed and there appears to have been insufficient notice of the public hearings held by the provincial legislatures;

3.2 The Bill should have been referred to the National House of Traditional Leaders for its comments in that the Bill impacts upon customary law and customs of traditional communities by:

3.2.1 allowing persons to enter upon land to conduct an investigation after notifying and consulting with the owner, occupier or person in control in terms of Section 50 and in so doing ignores the consent principle in customary law;

3.2.2 amending the definition of “community” in Section 1 of the Amendment Act.

4 A copy of the President’s referral is annexed hereto marked B.

5 On 17 February 2015 and 2 July 2015, copies of which are annexed marked C and D, we wrote to the Speaker of the National Assembly, the Chairperson of the National Council of Provinces, and the Chairperson of the Portfolio Committee on Mineral Resources recording that in terms of the Joint Rules of Parliament the Bill had to be rejected. We did so on the following grounds:

5.1 The President referred the Bill back due to a procedural defect, namely, the failure of the NCOP and Provincial Legislatures to facilitate public participation.

5.2 Referrals due to procedural defects are dealt with in terms of Joint Rules 205 and 211. These rules only empower Parliament to consider the President’s referral, to correct the procedural defect,

and to return the bill back to the President in its same form. These rules do not allow for amendments to the bill.

5.3 To give effect to the President's referral of the Bill, however, Parliament had to consider amendments to the Bill. This is clear because any public participation process must consider amendments to be meaningful.

5.4 Accordingly, the only option available to Parliament was to reject the Bill in terms of Joint Rule 208 on the grounds that the Bill is "procedurally or substantively so defective that it cannot be corrected".

6 Despite these issues, the National Assembly proceeded to consider the Bill. In considering the Bill, none of the substantive issues raised by the President were addressed. Specifically, the President's finding that section 50 of the MPRDA ignores the consent principle in customary law was not addressed by the Portfolio Committee at all. Indeed, the consent principle and the impact of the Bill and the MPRDA, including sections 5A and 50 thereof, on customary law were not even mentioned in the deliberations of the Portfolio Committee.

7 The Portfolio Committee's report dated 19 October 2016 provides for eight amendments to the Bill. While these include amendments relating to "consultation" with communities as defined in the Bill, none deal with the consent principle.

8 To the extent that the Portfolio Committee and the report attempted to deal with the substantive issues raised in the President's remittance notice, the committee failed. On 1 November the National Assembly considered a flawed report and failed to return it to the Portfolio Committee. Now it is expected of the NCOP, the Select Committee and the Provincial Legislatures to consider a flawed report and eight editorial amendments

which do not touch base on the issues that concern our client and communities.

9 The dilemma facing the NCOP and the Provincial Legislatures has been exacerbated by the Department, which on 8 November 2016, when it briefed the NCOP Select Committee brought a further nineteen odd additional proposals for amendment.

10 The wording of these “additional proposals” were not provided by the Department and our client can thus not say for certain what they entail and how they would impact on the MPRDA. Our client, along with all others who will participate in the public participation process, is unable to participate meaningfully as these additional amendments have not been furnished. From the brief description in the powerpoint presentation to the NCOP Select Committee, however, these amendments also fail to address the President’s concern regarding the consent principle.

11 Even worse, it appears the public participation process will be extremely short. According to the announcement of the NCOP Select Committee, a copy of which is annexed marked E, comments are required by 16 January 2017 whilst they were called for as late as 25 November 2016. The announcement states that “all nine provincial legislatures have scheduled public hearings on the bill.” The draft programme (a copy of which is annexed marked F) accompanying the announcement does not provide the venues and dates for the hearings, but it appears that they are to occur in December and January. This is all to occur while the public still does not have the text and wording of the nineteen amendments proposed by the Department.

12 All indications are that the procedure for public involvement in terms of section 72 and 118 are again going to be flawed and open to attack.

Way forward

13 As appears from the above, Parliament's current process on the Bill disregards Parliament's own Joint Rules by introducing amendments and will likely be found unlawful on this basis alone. In addition, Parliament has failed to address the substantive concerns raised by the President. Finally, the current public participation process is rushed and does not provide participants with essential information.

14 For all these reasons the Bill may be challenged if passed.

15 It is important to record that these concerns are not minor. Community consultation as currently provided for in the MPRDA, and taking into account eight plus nineteen amendments proposed by the Assembly and the Department, results in RMDECs ignoring and even refusing to hear the objections of communities who resist mining on their communal land. This leaves communities in the unjust position of negotiating compensation for their ancestral land with mining companies who are entitled to enter their land having only given notice under section 5A. There is currently no compensation or reparation for the destruction of community livelihoods by historic mining on communal land.

16 In the face of these challenges, Parliament has taken almost two years to produce eight editorial amendments. These amendments are unlawfully added and do nothing to address the real issues facing communities on communal land currently mined or to be mined.

17 It is clear that a new amendment bill is necessary that addresses these issues. A better approach would be for the NCOP, the Select Committee and the provincial legislatures to debate and promote the consent principle of customary law. Our client states that the right of communities to say no thank you to mining on their communal land, and the right to negotiate meaningfully should the community wish to participate in mining, should be

incorporated directly into the MPRDA. An amendment bill dealing with free prior informed community consent would address legitimate issues facing communities. It would also address the President's concern about the customary law consent principle.

18 Such an approach may require the amendment of section 5A and community consent for entering communal land for mining purposes. Indeed this would:

18.1 put communities in a fair and strong bargaining position to negotiate fair access and participation rights;

18.2 assist the Minister to set conditions to promote the rights of the community as proposed in the amendment to section 23 of the MPRDA:

> *''(2A) If the application relates to the land occupied by a community, the Minister* ***must*** ***[****may] impose such conditions as are necessary to promote the rights and interests of the community [, including conditions requiring the participation of the community].''*

18.3 bring the MPRDA in line with the Interim Protection of Informal Rights to Land Act 31 of 1996 ("IPILRA") which already entrenches the customary law consent principle. We record in this regard recent legal proceedings launched by the Umgungundlovu community of Xolobeni in the matter of Baleni and others v Minister of Mineral Resources and others in the Gauteng Division, Pretoria under case number 73678/2016. In this application, the community seeks a declarator that the community's consent is required under IPILRA and customary law.

Conclusion

19 On behalf of our client we request that you take steps to reject the Bill and require the re-introduction of an amendment bill that respects and promotes the community consent principle unambivalently. Our client and many mining affected communities will then participate whole heartedly in public involvement facilitated by your council, the select committee and provincial legislatures.

20 We look forward to your response.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:

HENK SMITH and WILMIEN WICOMB

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Your Ref:

Our Ref: HS

THE PRESIDENCY
2014 -04- 03
PRIVATE BAG X1000
CAPE TOWN 8000

2 April 2014

The President
The Honourable Zuma

Office of the President
Tuynhuis
Parliament
Cape Town

Dear President

RE: MINERALS AND PETROLEUM RESOURCES AMENDMENT BILL B15B-2013
RESTITUTION OF LAND RIGHTS AMENDMENT BILL B35B-2013

1 We write to you on behalf of our clients, MACUA (Mining Affected Communities United in Action), LAMOSA (Land Access Movement of South Africa) and ARD (Association for Rural Development) about the constitutionality of the bills, the Minerals and Petroleum Resources Amendment Bill B15B-2013 ("**MPRDA Bill**") and the Restitution of Land Rights Amendment Bill B35B-2013 ("**Restitution Bill**").

2 Our clients request that you refer the bills back to Parliament in terms of your powers under section 79(1) and (3) of the Constitution because the National Council of Provinces and the Provincial Legislatures failed to take reasonable steps to facilitate public involvement when passing the bills. As a result, they failed to comply with their duties under ss 72 and 118 of the Constitution.

3 As a result of the rushed manner in which both the bills were processed, the provincial legislatures and the NCOP had insufficient time to organise and hold public hearings on the bills. This happened despite the NCOP having been requested to call public hearings on the bills (and amendments to bill 15 and bill 35 by the National Assembly). The bills impact directly on our clients, their member community organisations and rural communities generally. The MPRDA bill restricts community participation in mining, and eliminates the requirement that socio economic conditions of host communities be addressed and the requirement for public participation in the granting of prospecting rights, while the Restitution Bill re-opens restitution claims without adequate protection for those who have

already lodged their claims. The NCOP's failure to consider or comply with the provisions of section 72, denied them the opportunity to meaningfully participate in the legislative process.

Our clients and their participation in the legislative process of the bills:

1. Our clients are involved and have long been involved in representing poor rural communities in law reform by the Legislature and representations to the executive.

2. MACUA (Mining Affected Communities United in Action) was formed in 2012 following a dialogue among mining affected communities from eight provinces. It aims to present the voice of communities who have not been consulted in the process of allocating mining rights, do not receive benefits from mining on their own land and who bear the brunt of the health and environmental degradation and impact of mining.

3. The Land Access Movement of South Africa (LAMOSA) is an independent community based organisation advocating for land and agrarian rights, and substantive democracy. LAMOSA was formed by 48 dispossessed communities in 1991. In 1991 most of the LAMOSA affiliates who were forcefully removed from their ancestral lands returned to their lands in defiance. Now LAMOSA works with government and civil society organisations to support community development and land reform in four provinces.

4. The Alliance for Rural Democracy and its member organisations have been at the forefront of supporting rural communities and rural women in making representation to Parliament about, for example, the Traditional Courts Bill ("TCB") of 2008, later reintroduced in 2012. Our clients made submissions relating to the TCB's constitutionality, legality and potential impact on human rights and community agency. The TCB lapsed when the Fourth Parliament did not reinstate it this year.

5. Our clients participate in the legislative processes of our Parliament in a constructive manner, supporting new laws and provisions that promote the social and economic rights of rural communities, and engaging in a constructive manner on legislative matter that would undermine the rights and interests of communities. In addition our clients attempt where possible to support members of rural communities to themselves attend at the legislatures to participate in proceedings.

6. Our clients or their member organisations, and we on behalf of our clients, made written inputs to the National Assembly, the NCOP and the provincial legislatures with regard to both the MPRDA Bill and the Restitution Bill. We and a number of the member organisations of our clients participated in the public hearings of the Portfolio Committees of the National Assembly and the relevant committees of the

provincial legislatures where possible. The deliberations of the NCOP Portfolio Committees were also attended.

7. Our clients hold the view that both bills, as they were introduced and amended,
   (a) undermine the socio economic position of many rural communities; and
   (b) fail to promote the rights and interests of rural communities.

   The substantive merits or limitations of the bills is not the subject matter of this submission.

8. We requested the NCOP and the relevant select committees to consider and hold hearings in terms of section 72. The requests were denied and the bills were passed by the NCOP in plenary on 27 March 2013.

9. The bills were and remain of intense public interest and have far-reaching consequences for rural communities in respect of matters that are of substantial concern to them.

The process in the NCOP

<u>The MPRDA Bill</u>

10. The MPRDA Bill was on the agenda of the Select Committee on Economic Development of the NCOP on two occasions: 25 March 2013 on negotiating mandates and on 26 March for final mandates and adoption. The committee did not have a briefing session with the department beforehand. The committee did not consider holding public hearings on the MPRDA, and it did nothing else to involve public involvement in the legislative process.

11. With regard to public hearings held by the provincial legislatures, our instructions are that the Northwest Province Legislature held a public hearing on 24 March at the Madibeng Town Hall. The negotiating mandate report of the Northern Cape states that it held a hearing on 19 March. The Gauteng Economic Development Portfolio Committee reported that on 20 March its committee invited written comment from the public through the media. It deliberated on its negotiating mandate on 25 March. The Western Cape reported that "provinces had four working days to attempt to engage with the public in order to formulate negotiating mandates" and that "it is not possible for the Province to fulfill its constitutional duty to facilitate public involvement..."

12. On 25 March the committee considered the seven negotiating mandates received from the provincial legislatures. At least two provinces formally expressed concern about the timeframe to consider the Bill.

13. On 25 March 2013 after seeing the negotiating mandates we wrote to the NCOP Chair and the Select Committee Chairperson requesting that in terms of section 72 a public hearing be held to address concerns.

14. On 26 March, in the afternoon, the committee considered the final mandates before it. Limpopo Legislature's final mandate form reflects that it "was very much concerned with the fast tracking of the Bill" and recommended that the bill "be deferred to the Fifth Parliament." Nonetheless, it instructed its permanent delegates in the NCOP to vote in favour of the bill. North West instructed its delegates to vote in favour with proposed amendments.

15. On 27 March 2013 the NCOP adopted the MPRDA Bill.

The Restitution Bill

16. The Restitution Bill was on the agenda of the NCOP's Select Committee on Land and Environmental Affairs on three occasions: 28 February 2013 when the committee was briefed by the Land Claims Commission, 18 March when it considered the negotiating mandates and 25 March when it dealt with the final mandates. The committee did not consider holding public hearings on the Restitution Bill, and it did nothing else to involve public involvement in the legislative process.

17. The commission in its presentation to the select committee on 28 February emphasised the broad reach of the public consultation process by the department on the draft bill and the portfolio committee on the Bill. WE wrote a letter to the chairperson of the Select Committee on 6 March 2014 where we pointed out that the select committee itself and the provincial legislatures are required to independently consider their obligation to facilitate public involvement in their legislative processes under section 72 and section 118 of the constitution. We contended that public hearings on the Restitution Bill were appropriate for the following reasons:

    (a) The version of the Bill differed in material from the draft bill and Bill 35 that were the subject of earlier rounds of consultation;

    (b) The portfolio committee in its report on the public hearings concluded that it faced three options regarding the treatment of prior claims in relation to later claims namely, a) ring-fencing, b) prioritisation of prior claims or c) leaving the issue open. The amendment to section 6(1) and the insertion of sub-clause (g) fails to effectively prioritise or ring-fence. The select committee and provincial legislatures should therefore, with public input, consider the merits of clear and unambiguous statutory ring-fencing of prior claims;

(c) The fact that the legislative timeframe of the select committee and the provincial legislatures is truncated due to the imminent rise of the fourth parliament, should not have stood in the way of public hearings.

18. On 18 March at the time of the consideration of the negotiating mandates, the Parliamentary Legal Advisor stated that the public hearings by the provincial legislatures may be relevant to the NCOP when it considered its own role in facilitating public participation. However the select committee itself failed to consider or decide on the facilitation of public involvement as required in terms of section 72 despite it having received written inputs with regard to the Restitution Bill and the legislative process followed in respect of it.

19. The NCOP and the Select Committees did not invite submissions, oral or written, from the public nor did they hold any public hearings in respect of either the MPRDA Bill or the Restitution Bill. Nor was there any considered discussion by the Select Committee in terms of section 72(1)(a) about whether public participation was appropriate in the circumstances.

20. The only input received by the Select Committees were:

(a) a briefing by the Land Claims Commission in the case of the Restitution Bill; and

(b) a single contribution in the negotiating mandate meeting by the Department of Mineral Resources.

21. Without suggesting that this would in any way have been adequate, the meetings of the Select Committees reflect no attempt to place before them or to discuss or debate either the written or the oral submissions made to the Portfolio Committees or the content of any of those Committees' deliberations. All that was provided was a very brief summary of the preceding consultation processes in the presentation by the Commission in relation to the Restitution Bill on 28 February 2014.

22. The legislative timetable in the NCOP was about 2 weeks in the case of the MPRDA Bill. The Bill was adopted by the Portfolio Committee on Mining of the National Assembly on 6 March 2014. Reportedly, the Bill was referred to the provinces on 14 March, and negotiating mandates were required by 20 March.

23. In respect of the Restitution Bill the time available was about 6 weeks. The Bill was adopted by the Portfolio Committee on Rural Development and Land Reform on 5 February 2014.

24. By contrast the National Assembly dealt with the bills over periods of months. The Portfolio Committee was briefed on Bill 35 on 15 October 2013. Bill 15 was presented to the Portfolio Committee on Mining on 30 July 2013.

25. The draft Minerals and Petroleum Resources Amendment Bill was published by the Minister of Mineral Resources for public comment on 23 December 2012. The draft restitution amendment bill was published for comment by the department on 23 May 2013. We submit that the executive and Parliament had adequate time to ensure that each of the legislatures had adequate time for public participation and hearings by each legislature.

The importance of public participation

26. In *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) the Constitutional Court held that legislation that was passed without reasonable efforts to facilitate public involvement in the legislative process was invalid. Ours is not a purely representative democracy, but a fusion of representative, participatory and deliberative democracy. Participation is not a detraction from the democratic process, but an essential element of it. In the Court's words:

> *"The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, ... It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist."* (para 115)

27. The Court stressed that there must be public involvement before both the National Assembly and the National Council of Provinces. In some instances the NCOP could fulfil its duty by relying on public participation in the provincial legislatures.

28. The Constitutional Court held that the NCOP and/or the provincial legislatures must act reasonably and must *"provide meaningful opportunities for public participation in the law-making process."* What is reasonable will depend on the nature of the legislation at issue and the intensity of its impact on the public.

29. Vitally, the Court held that legislative timetables are not an excuse for truncating the process of participation. It wrote: *"When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted.*

Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable." (para 194) The desire to pass the Bills before the end of the Fourth Parliament is not a reason for reducing the degree of public participation.

30. The process followed with regard to both bills fell far short of the standard set in *Doctors for Life*. The steps taken in the NCOP and the provincial legislatures failed to afford people a meaningful opportunity to participate in the legislative process. The timetable made adequate participation impossible.

31. Accordingly, both bills were unconstitutionally passed.

32. Please let us know when you will refer the Bills back to the National Assembly for it to deal, with the participation of the Council as required in terms of section 79(3)(b), with the Council's non-compliance with the provisions of section 72(1)(a). Please note that we do not necessarily concede that there was compliance with the provisions of ss 59(1)(a) and 118(1)(a).

We look forward to hearing from you.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:

pp HENK SMITH

DELIVERED TO:

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Assistant Private Secretary
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16 January 2015

Dear Madam Speaker,

REFERRAL OF THE MINERAL AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL TO THE NATIONAL ASSEMBLY

The above Bill was passed by Parliament and referred to me for assent and signing into law.

I have given consideration to the Bill in its entirety and the various opinions and commentaries regarding *inter alia* the constitutionality and tagging of the Bill.

After consideration of the Bill and having applied my mind thereto I am of the view that the Bill as it stands does not pass constitutional muster.

The Constitution requires that the President must assent to and sign the Bill referred to him by the National Assembly. However, in terms of section 79(1) of the Constitution, 1996, if the President has reservations about the constitutionality of the Bill, he may refer it back to the National Assembly for reconsideration.

In terms of section 79(1) of the Constitution, I hereby refer the attached Bill to the National Assembly for reconsideration on the following basis:

a. The definition of "This Act" is likely unconstitutional in that the amended definition elevates the Codes of Good Practice for the South African Minerals Industry, the Housing and Living Condition Standards for the Minerals Industry and the Amended Broad-Based Socio-Economic Empowerment Charter for South African Mining and Minerals Industry to the status of national legislation. In addition, in terms of Section 74 of the Amended Act, the Minister is given the power to amend or repeal these instruments as and when the need arises effectively by-

passing the constitutionally mandated procedures for the amendment of legislation;

b. As amended, Sections 26(2B) and 26(3) appear to be inconsistent with South Africa's obligations under the General Agreement on Trade and Tariffs (GATT) and the Trade, Development and Cooperation Agreement(TDCA) insofar as they appear to impose quantitative restrictions on exports in contravention of GATT and TDCA and in so doing render the state vulnerable to challenges in international fora;

c. I am of the view that NCOP and the Provincial Legislature did not sufficiently facilitate public participation when passing the Amendment Act as required by Section 72 and 118 of the Constitution in that the consultation period was highly compressed and there appears to have been insufficient notice of the public hearings held by the provincial legislatures;

d. I am further of the view that the Bill should have been referred to the National House of Traditional Leaders for its comments in terms of Section 18 of the Traditional Leadership and Governance Framework Act in that the Bill impacts upon customary law or the customs of traditional communities by:

   i. allowing persons to enter upon land to conduct an investigation after notifying and consulting with the owner, occupier or person in control in terms of Section 50 and in so doing ignores the consent principle in customary law;
   ii. amending the definition of "community" in Section 1 of the Amendment Act.

Yours sincerely,

Mr Jacob Gedleyihlekisa Zuma
President of the Republic Of South Africa

Ms B Mbete
Speaker of the National Assembly
Parliament of the Republic of South Africa
P.O. Box 15
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LRC
Legal Resources Centre

Your Ref: bill 15B of 2013
Our Ref: WW/HS

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Committee on Mineral Resources
Honourable S Luzipho
Per address: Liezel Webb
lwebb@parliament.gov.za

17 February 2015

Dear Madams

Referral in terms of s79 of the Mining and Petroleum Resources Development Amendment Bill 15B of 2013

1. We refer to the statement released by the Presidency dated 23 January 2015 which announced that President Zuma has sent back the "Mining [sic] and Petroleum Resources Development Amendment Bill (MPRDAB) to the National Assembly for reconsideration in terms of section 79(1) of the Constitution".

2. The Legal Resources Centre is a non-profit public interest law firm. We write to you on behalf of a coalition of civil society, labour and community organisations[1] ('the

[1] Members include Mining Affected Communities United in Action (MACUA); Women Affected by Mining United in Action (WAMUA); Mining and Environmental Justice Community Network (MEJCON-SA); Vaal Environmental Justice Alliance (VEJA); Govan Mbeki Joint Communities; ActionAid South Africa; Benchmarks Foundation (BMF); GroundWorks; NUMSA; Oxfam; Federation for a Sustainable

Coalition') concerned with public participation in the legislative passage of this bill and a number of whom had made submissions on the bill to your select committee. The LRC in its own name also made submissions.

3. On 19 March 2014, the LRC addressed a letter on behalf of some of the rural communities who are members of the Coalition to the Chairperson of the Select Committee on Economic Development responsible for the bill indicating the communities' concerns with the process. On 25 March 2014, a letter in a similar vein was addressed to the Chairperson of the National Council of Provinces (NCOP).

4. On 2 April 2014, the LRC wrote on behalf of members of the Coalition to President Zuma to request him to use his powers under section 79 to refer the bill back to parliament because of the failure of the NCOP and the provincial legislatures to facilitate public involvement when passing the bill. The letter also raised the substantive concerns of the Coalition members with the bill. All three letters are attached for your ease of reference.

5. The President has now indeed used his powers in terms of the Constitution to send the bill back on the grounds of both procedural and substantive constitutional flaws. In the meantime, however, the Minister of Mineral Resources, the person responsible for the bill in terms of the Joint Rules of Parliament, has publicly voiced his intention to divide the current version of the Minerals and Petroleum Resources Development Act into separate pieces of legislation regulating the industries of oil and gas on the one hand and minerals on the other.[2]

6. In the circumstances, the Coalition wishes to point out that:
    a. These proposals by the Minister cannot be dealt with in the referral process. The Assembly is bound, in terms of Rule 203,[3] to limit its enquiry to the specific deficiencies raised by the President. It couldn't accommodate the proposals of the Minister.
    b. On the other hand, the referral considered the *entire process* of public participation of the NCOP and the provincial legislatures as deficient.[4] In order to correct these unconstitutional procedures, both the NCOP and the legislatures will have to embark on public participation into the *entire* amendment bill and not just the areas of deficiencies – otherwise the public will be prejudiced.

Environment (FSE). Legal Advisors: Centre for Applied Legal Studies (CALS); Lawyers for Human Rights; Centre for Environmental Rights (CER).

[2] 'Ramatlhodi wants 'urgent' certainty in laws governing mineral resources' Bday Live 2 February 2015.

[3] Joint Rules of Parliament.

[4] The referral states: "The NCOP and the Provincial Legislature did not sufficiently facilitate public participation when passing the Amendment Act as required by Section 72 and 118 of the Constitution in that the consultation period was highly compressed and there appears to have been insufficient notice of the public hearings held by the provincial legislatures".

c. Assuming that those consultations will be meaningful, there is a high likelihood that the NCOP will propose amendments to the bill that go beyond the points of referral of President Zuma. These amendments could in turn not be considered by the Assembly which is bound by the President's referral and the legislature will thus be in a deadlock.

7. For these reasons, the Coalition concludes that **the only reasonable option available to the Assembly, both legally and practically, is to exercise its powers in terms of Rule 208 to reject the bill and start the process afresh.**

8. Should the Assembly decide to attempt to cure the procedural and substantive defects of the bill and pursue a narrow referral route, it will have to enquire into:

   a. The nature and content of the Codes of Good Practice for the South African Minerals Industry, the Housing and Living Condition Standards for the Minerals Industry and the Amended Broad-Based Socio-Economic Empowerment Charter to establish the appropriate status of these documents under the MPRDA and the legislative procedure for their adoption;
   b. The lack of public participation in the NCOP and the provincial legislatures; and
   c. The impact of the MPRDAB on living customary law, in particular the principle of consent and the definition of community, and
   d. The consistency of the bill with South Africa's international trade obligations.

9. The Coalition is of the view that in particular the first and third areas of concern require further meaningful consultation from the National Assembly before reaching a decision. This, the Coalition suggests, would include public hearings on the nature, content and statutory status of the cited Codes and Standards.

10. With regards to the concerns raised about the impact of the bill on living customary law, the Coalition supports this objection from the President. However, it is incorrect to limit consultation on the issue of living customary law to the House of Traditional Leaders. In fact, it is not in line with the Constitution to do so. The Constitutional Court has found definitively that the content of living customary law must be sought in the past and the present practices of the people who live the law – the community – and that they have the constitutional right to change those laws.[5] Traditional leaders are a part of that system of law, but it cannot speak on its behalf. In order to satisfy the President's concern about the impact of the MPRDAB on living customary law, the Assembly must allow the participation of customary communities affected by mining.

11. With regards to the Assembly, the NCOP and the provincial legislatures' duty to ensure that their public participation processes pass constitutional muster, the Constitutional

[5] *Shilubana and Others v Nwamitwa* 2009 (2) SA 66 (CC) at para 44-48

Court has found that the test for the constitutionality of public participation by the legislature is whether the process is *reasonable*.[6]

12. The nature and importance of the bill in question and the intensity of its impact on the affected communities – in this case mining communities - raises the bar of what is required of the legislature[7] in ensuring that the process is indeed reasonable:

    a. it requires of the legislature to ensure that those most severely affected by the bill has an *effective opportunity* to impact upon the contents of the proposed legislation. This entails two separate duties: to "duty to provide meaningful opportunities for public participation" and "to take measures to ensure that people have the ability to take advantage of the opportunities provided".[8] These findings speak directly to those who had "been denied the right to influence those who ruled over them".
    b. in the circumstances and in order to act reasonably, the NCOP and provincial legislatures will have at a minimum to ensure that all affected communities, including the far-flung and under-resourced ones, are able to attend and give meaningful input at the hearings;[9]
    c. the peculiar timing of any proposed further hearings by the NCOP or the provincial legislatures – that is, after the bill has already been passed by the Council once before – may not prejudice the impact of these hearings. The Constitutional Court has held that[10]

       Legislatures must facilitate participation at a point in the legislative process where involvement by interested members of the public would be meaningful. It is not reasonable to offer participation at a time or place that is tangential to the moments when significant legislative decisions are in fact about to be made.

    d. moreover, the Constitutional Court has held that the purpose of public participation includes the strengthening of "the legitimacy of legislation in the eyes of the people [...] because of its open and public character it acts as a counterweight to secret lobbying and influence peddling".[11] In the letter dated 19 March 2014 to the Chairperson of the Select Committee, communities raised their concerns with how it came about that the bill as introduced in parliament was changed by the Portfolio Committee to their detriment. The communities point out that no-one asked for these changes at the public hearings. They also pointed out that they were startled by the announcement

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[6] *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at para 126
[7] ibid at para 128.
[8] Ibid at para 129.
[9] The Constitutional Court emphasizes that there is a duty upon the legislature to "*take steps*" to ensure that the public can effectively participate. Ibid at para 120.
[10] Ibid at para 171.
[11] Ibid at para 115

of one of the major mining houses on the fourth day of the public hearings, that they "acknowledge the constructive engagements that the Chamber and DMR has had in recent days to address the concerns" with the bill. This was done outside of and with no regard for parliament and its processes. It amounted to precisely the kind of 'lobbying and influence peddling' that public hearings should neutralise.

13. Finally, the Coalition must anticipate the possibility of the referral process, on the one hand, and the Minister's effort at splitting the legislation into two on the other, running parallel. In other words, it is possible that the intention is for the referral process to run its course while the Department continues to embark on an entirely new amendment route in a parallel process, drafting a new bill. If this is the case, the Coalition stresses in the strongest terms that simultaneous development of legislation on two fronts may in no way result in the detraction of public participation in either Parliament's or the Department's process.

14. In fact, the Department's questionable record in ensuring the participation of affected mining communities has been commented on by the Portfolio Committee themselves. In October last year, the Committee instructed the Department to ensure that its processes "resonate[s] with the realities of communities in the minerals sector. The Department needs to be more effective in reaching out to all affected parties as it formulates and implements minerals policy".[12]

15. In the circumstances, the Coalition demands that:
    a. The Assembly rejects the bill in terms of Rule 208(1); alternatively
    b. That the NCOP and the provincial legislatures, when the bill is referred to them, embark upon a public participation process that ensures that sufficient steps be taken to ensure that affected mining communities have an effective opportunity to participate in the process of public consultation. This would include, at a minimum, the translation and timely dissemination of the bill; provision of sufficient resources to affected communities to attend hearings; sufficient time for input; and creating an environment at the hearings that is conducive to the effective participation of communities, some of whom may be engaging in the process for the first time; alternatively
    c. If the referral and departmental processes continue to run in parallel, both processes abide by the highest standards of public participation; and
    d. That the Speaker responds to this letter within 10 days of receipt indicating the position of the Assembly on the matter.

We look forward to hearing from you within 10 days of receipt of this letter.

Yours sincerely

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[12] Mineral Resources Budget Review and Recommendations Report 24 October 2014. Available at www.pmg.co.za.

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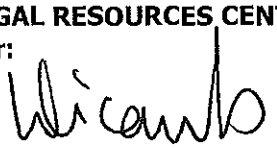
Per:



HENK SMITH AND WILMIEN WICOMB

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Your Ref:
Our Ref:

19 March 2014

The Chairperson Mr F Adams
Select Committee on Economic Development
National Council of Provinces, Parliament

By e-mail: fadams@parliament.gov.za; swalaza@parliament.gov.za

Att: Ms S Walaza

Dear Sir/Madam

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL 15B-2013

1 The Legal Resources Centre is an independent non-profit public interest law firm and we represent a number of rural communities whose communal land is being mined by mining companies with new order mining rights issued in terms of the Minerals and Petroleum Resources Development Act (MPRDA). We made submissions to the Department of Mineral Resources (DMR) on the draft bill that was published by the Minister in December 2012, to the Portfolio Committee of the National Assembly[1] and we addressed the Portfolio Committee on the Bill as it was introduced in Parliament.[2]

1
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013%2009%2006%20MPRDB[smallpdf.com].pdf
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013_11_04_pc_mineral_resources.pdf
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013_02_08_andreas.pdf
http://www.lrc.org.za/images/pdf_downloads/Law_Policy_Reform/2013_02_08_mprd_bill_2012.pdf

2
http://www.pmg.org.za/report/20130918-mineral-and-petroleum-resources-development-amendment-bill-b15-2013-public-hearings-day-4

2 We are concerned that the Bill as amended by the Portfolio Committee and now being considered by your committee, is leaving communities worse off. We say this for the following reasons:

a) the Bill removes the possibility that communities can participate in mining. We ask that you leave section 23(2A) as it is;
b) the B version of the Bill removes the clause which would have allowed the Minister to require a mining company to address social and economic needs and challenges facing a community. We ask that you bring back the clause and section 23(2)(b) that was in Bill 15 -2013 as approved by Cabinet and introduced in Parliament; and
c) the B version of the Bill gives an applicant mining company and the regional manager of the DMR the discretion to decide whether there must be a simultaneous application for a water use license under the National Water Act. We ask that you leave the Bill as it was approved by the Cabinet and introduced into Parliament.

Background:

3 section 23(2A) :the subsection in the Act as it stands reads as follows: "(2A) If the application relates to the land occupied by a community, the Minister may impose such conditions as are necessary to promote the rights and interests of the community, including conditions requiring the participation of the community." The Bill will remove ~~"including conditions requiring the participation of the community."~~ This means that communities no longer have the possibility of becoming shareholders in mining companies on their own land.

4 section 23(2)(b): this is a new clause proposed by the bill as introduced but the B version of the bill drops the clause. It reads: "(b) after taking into consideration the socio-economic challenges or needs of a particular area or community, direct the holder of a mining right to address those challenges or needs."

5. water use licences "where necessary": bill 15B inserts "where necessary" in 16 (sixteen) places in the act. It means that parallel applications for water use licences become discretionary according to the views of the DMR or the mining company. The authority of the Department of Water Affairs is undermined.

The answer and our proposal:

6 section 23(2A): delete clause 18(d) of Bill 15B

7 section 23(2)(b): retain clause 18(c) as it was in Bill 15

8 "where necessary": remove the offending words where it appears in Bill 15B [in the 16 (sixteen) places relating to sections 16, 17, 18, 22, 23, 24, 27, 75, 80, 83 and 84] and retain the relevant wording as it was in Bill 15.

How did this happen?

9 We do not know for certain how it happened that Bill 15 as introduced in Parliament was changed by the Portfolio Committee to the detriment of communities. The changes were not asked for by communities at the public hearings. The changes were not asked for or motivated by the Portfolio Committee. The DMR responded to the inputs at the public hearings on 23 October 2013 and on that occasion no mention was made of changes to section 23(2)(b) or making water use licences discretionary.

10 Instead, on 29 October 2013 the DMR produced a highlighted version of the bill with these proposed changes... apparently at its own initiative. We wonder whether it has something to do with the startling announcement made by one of the major industry players on day 4 of the public hearings the previous month. The company announced, on its power point presentation, that "BHP Billiton Energy Coal SA (BECSA) acknowledges the constructive engagements that the Chamber and DMR has had in recent days to address concerns with the Amendment Bill." This is our problem. The changes to the detriment of communities were made by DMR and the Chamber of Mines outside of Parliament and without regard to Parliament. Perhaps the announcement of the Chamber of Mines last week that it supports the MPRDA Amendment Bill (Bill 15B) must be seen in this light.[3]

The inferred arguments of the DMR:

11 If the DMR believes that:

a) Water use licences (WULs) are not necessary if the mine gets water from a municipality's waste plant, and a WUL is only necessary if groundwater is going to be used;

b) Section 23(2)(b) is superfluous because community benefit or redress for suffering from mining will be covered by social and labour plans,

we say this:

a) as far as WULs are concerned, it is not for the applicant or the regional manager to decide on the need for an application. The Department of Water Affairs should consider all applications and the

[3] http://www.bullion.org.za/content/?pid=88&pagename=Media+Releases?pid=9&pagename=Media+Room

need for applications cannot be screened by another department. In any event, WULs are necessary for extraction from both rivers and the ground and any interference with a watercourse. The provision is internally contradictory. If legislation requires a WUL then applications must of necessity be made for such licences. The necessity for an application has already been determined. The insertion of the words "where necessary" creates confusion as to the legislative intent, and it is in conflict with the requirements of regulatory certainty and rule of law contained in Section 1(c) of the Constitution;

b) with regard to community benefit and redress, we record once again that the record speaks for itself Parliament accepted that Social and Labour Plan mitigation measures have not worked. The Portfolio Committee itself said as much in its report on the hearings concerning the Mining Charter tabled before it on 5 June 2013:

> *"When we conduct oversights, we come back depressed. Because before you enter into a mine, you walk through a sea of poverty. ... In our own experience these Social and Labour Plans are indeed not implemented...Mining communities lament that here, within our area we extract the wealth of the country but there is no drop that comes back to us as the mining community."*

The changes are counter to the policy statements of Cabinet Ministers

12 At the Mining Indaba at the beginning of last year the Minister undertook to address the legacy of the 1913 Land Act and the community conditions that lead to the Marikana tragedy. She said that this was the context for reviewing the MPRDA:

> *This year also marks a hundred years since the enactment of the Native Land Act, which created a system of land tenure that deprived the majority of South Africans of the right to own land, and eventually compelled Africans who had lost their land to join the mining industry as migrant labourers... It is the remnants of this historical legacy of the migrant labour system, poor housing and living conditions, high levels of illiteracy, and low skills level that inevitably contributed to Marikana.*[4]

13 We do not believe that reversing the above changes now brought in by Bill 15B will be enough to begin to address the plight of mining communities. We have said in our submission that the principle of community consent for new mining, is in line with:

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

a) the action plan of the African Mining Vision [January 2012][5], and
b) the State Land Disposal policy of the Minister of Rural Development [July 2013] requiring Interim Protection of Informal Land Rights Act, 1996 procedures and a 20% community share before any mining happens on communal land,

both of which require community consent before new mining can happen on communal land, could begin to recognise the transformation challenges facing mining and rural development in our country.[6]

14 But to remove the little provided for in Bill 15 as introduced, at the instance of the DMR and the Chamber of Mines, and without real and meaningful public involvement for such changes on WULs and socio-economic needs of communities, is not justifiable. We ask you to do the right thing and to vote for the reversal of these anti community changes, in the terms as we set out in paragraphs 6 – 8 above.

Your faithfully,

LEGAL RESOURCES CENTRE
Per:

_____signed HJ Smith_____

[5] "Develop instruments to domesticate the Protocol of Free Prior Informed Consent with respect to communities affected by mining" "Develop programmes to strengthen the capacity of local governments, communities, CSOs and mining companies to make informed decisions on mining projects" p. 25
http://www.africaminingvision.org/amv_resources/AMV/Action%20Plan%20Final%20Version%20Jan%202012.pdf

[6] our submission to the DMR and the Portfolio Committee motivated for and included specific wording for amendments dealing with community consent, reparation for historic mining on communal land, promotion of artisanal mining on communal land in certain circumstances and stamping out dangerous illegal mining with enforceable statutory measures.

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Your Ref:
Our Ref:

25 March 2014

The Chairperson
The Honourable Mr Mninwa Johannes Mahlangu MP
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E-mail address: ljiyane@parliament.gov.za
Fax number: (021) 403-8219

The Chairperson
The Honourable Mr F Adams MP
Select Committee on Economic Development
National Council of Provinces, Parliament
By e-mail: fadams@parliament.gov.za; swalaza@parliament.gov.za

Dear Sirs

MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL 15B-2013

1 The Legal Resources Centre is an independent non-profit public interest law firm and we represent a number of rural communities whose communal land is being mined by mining companies with new order mining rights issued in terms of the Minerals and Petroleum Resources Development Act (MPRDA). We refer to our written submission on 19 March 2013 to the Select Committee (attached for ease of reference), the committee's consideration today of the negotiating mandates filed by seven Provincial Legislatures (listed in the schedule below and annexed for ease of reference) and our conversation with you, Mr Adams, earlier today.

2 With reference to section 72 of the Constitution we request to be heard by the Select Committee on our written submission and this letter. We say this for the following reasons:

a) Bill 15B as amended by the Portfolio Committee of the National Assembly includes new amendments to the Bill as introduced in the National Assembly which amendments were not motivated for in or considered by the Portfolio Committee, and there was no public involvement in respect of such amendments. The aforesaid amendments are set out in our written submission.

b) The amendments are to the detriment of communities whose communal land is being mined and who receive no reparation or benefit for their loss of rights. The Select Committee and the NCOP must hear and consider their plight as impacted upon by the said amendments.

c) A number of the negotiating mandates filed by the Provincial Legislatures contain recommendations for amendments to Bill 15B. Five of the seven recommendations for amendments call for the retention of section 23(2A) which empowers the minister to set conditions for community participation in mining. This illustrates that it is a matter of concern for the legislatures and the public.

d) At the meeting of the Select Committee today the responses of representatives of the State Law Advisor's office and the Department of Mineral Resources were demonstrably inaccurate and/or inadequate.

e) A hearing can clarify the above and put the Select Committee in a position to fulfill its constitutional mandate.

3 Further to our statement in 2(d) above:

a) The representative of the State Law Advisor's office stated that the deletion of the empowering provision (that the minister may set conditions for community participation) can be cured by the consultation requirements elsewhere in the act and by way of regulations. We submit that he missed the point and that subordinate legislation cannot regulate subject matter without a commensurate empowering statutory provision.

b) The representative of the DMR explained that communities are covered by the Empowerment Charter for the South African Mining and Minerals Industry provided for in section 100 of the Act. In the Charter's latest Amended Broad Based Socio-Economic version mining companies are required to structure BEE shareholding in three tiers which may include "community". But the charter guidelines cannot act as a substitute for the statutory ministerial power to set pre- conditions for a mining right and conditions for community participation in mining which may include shareholding and a range of other participation activities.

c) No explanation or no consistent explanation was given for the removal of the minister's power to set conditions requiring community participation in mining which go beyond protection and promotion of rights and interests.

4 We record that we do not concede that sections 59 and 118 had been or is being complied with by the respective legislative institutions.

5 We look forward to hearing from you regarding our urgent request to address the Select Committee and answer questions relating to our written summarised submissions.

Your faithfully,

LEGAL RESOURCES CENTRE
Per:

_____signed HJ Smith_____

Annexures:
1 our submission of 19 March 2014
2 the seven negotiating mandates of the provincial legislatures

schedule: list of provincial mandates

		23(2)(b)	23(2A) Conditions to participate in mining	WULs Where necessary	Interested party Section 16	hearing
1	Mpumalanga	retain	Retain			
2	Northern Cape					19/3
3	North West	Retain	retain	Remove	Retain	
4	Free State		retain			
5	Gauteng		retain		Retain	20/3
6	Western Cape					
7	Eastern Cape	retain	retain	Remove		
8	Kwa Zulu Natal					
9	Limpopo					

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Your Ref:

Our Ref: HS

THE PRESIDENCY
2014 -04- 03
PRIVATE BAG X1000
CAPE TOWN 8000

2 April 2014

The President
The Honourable Zuma

Office of the President
Tuynhuis
Parliament
Cape Town

Dear President

RE: MINERALS AND PETROLEUM RESOURCES AMENDMENT BILL B15B-2013 RESTITUTION OF LAND RIGHTS AMENDMENT BILL B35B-2013

1 We write to you on behalf of our clients, MACUA (Mining Affected Communities United in Action), LAMOSA (Land Access Movement of South Africa) and ARD (Association for Rural Development) about the constitutionality of the bills, the Minerals and Petroleum Resources Amendment Bill B15B-2013 ("**MPRDA Bill**") and the Restitution of Land Rights Amendment Bill B35B-2013 ("**Restitution Bill**").

2 Our clients request that you refer the bills back to Parliament in terms of your powers under section 79(1) and (3) of the Constitution because the National Council of Provinces and the Provincial Legislatures failed to take reasonable steps to facilitate public involvement when passing the bills. As a result, they failed to comply with their duties under ss 72 and 118 of the Constitution.

3 As a result of the rushed manner in which both the bills were processed, the provincial legislatures and the NCOP had insufficient time to organise and hold public hearings on the bills. This happened despite the NCOP having been requested to call public hearings on the bills (and amendments to bill 15 and bill 35 by the National Assembly). The bills impact directly on our clients, their member community organisations and rural communities generally. The MPRDA bill restricts community participation in mining, and eliminates the requirement that socio economic conditions of host communities be addressed and the requirement for public participation in the granting of prospecting rights, while the Restitution Bill re-opens restitution claims without adequate protection for those who have

already lodged their claims. The NCOP's failure to consider or comply with the provisions of section 72, denied them the opportunity to meaningfully participate in the legislative process.

Our clients and their participation in the legislative process of the bills:

1. Our clients are involved and have long been involved in representing poor rural communities in law reform by the Legislature and representations to the executive.

2. MACUA (Mining Affected Communities United in Action) was formed in 2012 following a dialogue among mining affected communities from eight provinces. It aims to present the voice of communities who have not been consulted in the process of allocating mining rights, do not receive benefits from mining on their own land and who bear the brunt of the health and environmental degradation and impact of mining.

3. The Land Access Movement of South Africa (LAMOSA) is an independent community based organisation advocating for land and agrarian rights, and substantive democracy. LAMOSA was formed by 48 dispossessed communities in 1991. In 1991 most of the LAMOSA affiliates who were forcefully removed from their ancestral lands returned to their lands in defiance. Now LAMOSA works with government and civil society organisations to support community development and land reform in four provinces.

4. The Alliance for Rural Democracy and its member organisations have been at the forefront of supporting rural communities and rural women in making representation to Parliament about, for example, the Traditional Courts Bill ("TCB") of 2008, later reintroduced in 2012. Our clients made submissions relating to the TCB's constitutionality, legality and potential impact on human rights and community agency. The TCB lapsed when the Fourth Parliament did not reinstate it this year.

5. Our clients participate in the legislative processes of our Parliament in a constructive manner, supporting new laws and provisions that promote the social and economic rights of rural communities, and engaging in a constructive manner on legislative matter that would undermine the rights and interests of communities. In addition our clients attempt where possible to support members of rural communities to themselves attend at the legislatures to participate in proceedings.

6. Our clients or their member organisations, and we on behalf of our clients, made written inputs to the National Assembly, the NCOP and the provincial legislatures with regard to both the MPRDA Bill and the Restitution Bill. We and a number of the member organisations of our clients participated in the public hearings of the Portfolio Committees of the National Assembly and the relevant committees of the

provincial legislatures where possible. The deliberations of the NCOP Portfolio Committees were also attended.

7. Our clients hold the view that both bills, as they were introduced and amended,
   (a) undermine the socio economic position of many rural communities; and
   (b) fail to promote the rights and interests of rural communities.

   The substantive merits or limitations of the bills is not the subject matter of this submission.

8. We requested the NCOP and the relevant select committees to consider and hold hearings in terms of section 72. The requests were denied and the bills were passed by the NCOP in plenary on 27 March 2013.

9. The bills were and remain of intense public interest and have far-reaching consequences for rural communities in respect of matters that are of substantial concern to them.

The process in the NCOP

The MPRDA Bill

10. The MPRDA Bill was on the agenda of the Select Committee on Economic Development of the NCOP on two occasions: 25 March 2013 on negotiating mandates and on 26 March for final mandates and adoption. The committee did not have a briefing session with the department beforehand. The committee did not consider holding public hearings on the MPRDA, and it did nothing else to involve public involvement in the legislative process.

11. With regard to public hearings held by the provincial legislatures, our instructions are that the Northwest Province Legislature held a public hearing on 24 March at the Madibeng Town Hall. The negotiating mandate report of the Northern Cape states that it held a hearing on 19 March. The Gauteng Economic Development Portfolio Committee reported that on 20 March its committee invited written comment from the public through the media. It deliberated on its negotiating mandate on 25 March. The Western Cape reported that "provinces had four working days to attempt to engage with the public in order to formulate negotiating mandates" and that "it is not possible for the Province to fulfill its constitutional duty to facilitate public involvement..."

12. On 25 March the committee considered the seven negotiating mandates received from the provincial legislatures. At least two provinces formally expressed concern about the timeframe to consider the Bill.

13. On 25 March 2013 after seeing the negotiating mandates we wrote to the NCOP Chair and the Select Committee Chairperson requesting that in terms of section 72 a public hearing be held to address concerns.

14. On 26 March, in the afternoon, the committee considered the final mandates before it. Limpopo Legislature's final mandate form reflects that it "was very much concerned with the fast tracking of the Bill" and recommended that the bill "be deferred to the Fifth Parliament." Nonetheless, it instructed its permanent delegates in the NCOP to vote in favour of the bill. North West instructed its delegates to vote in favour with proposed amendments.

15. On 27 March 2013 the NCOP adopted the MPRDA Bill.

The Restitution Bill

16. The Restitution Bill was on the agenda of the NCOP's Select Committee on Land and Environmental Affairs on three occasions: 28 February 2013 when the committee was briefed by the Land Claims Commission, 18 March when it considered the negotiating mandates and 25 March when it dealt with the final mandates. The committee did not consider holding public hearings on the Restitution Bill, and it did nothing else to involve public involvement in the legislative process.

17. The commission in its presentation to the select committee on 28 February emphasised the broad reach of the public consultation process by the department on the draft bill and the portfolio committee on the Bill. WE wrote a letter to the chairperson of the Select Committee on 6 March 2014 where we pointed out that the select committee itself and the provincial legislatures are required to independently consider their obligation to facilitate public involvement in their legislative processes under section 72 and section 118 of the constitution. We contended that public hearings on the Restitution Bill were appropriate for the following reasons:

    (a) The version of the Bill differed in material from the draft bill and Bill 35 that were the subject of earlier rounds of consultation;

    (b) The portfolio committee in its report on the public hearings concluded that it faced three options regarding the treatment of prior claims in relation to later claims namely, a) ring-fencing, b) prioritisation of prior claims or c) leaving the issue open. The amendment to section 6(1) and the insertion of sub-clause (g) fails to effectively prioritise or ring-fence. The select committee and provincial legislatures should therefore, with public input, consider the merits of clear and unambiguous statutory ring-fencing of prior claims;

(c) The fact that the legislative timeframe of the select committee and the provincial legislatures is truncated due to the imminent rise of the fourth parliament, should not have stood in the way of public hearings.

18. On 18 March at the time of the consideration of the negotiating mandates, the Parliamentary Legal Advisor stated that the public hearings by the provincial legislatures may be relevant to the NCOP when it considered its own role in facilitating public participation. However the select committee itself failed to consider or decide on the facilitation of public involvement as required in terms of section 72 despite it having received written inputs with regard to the Restitution Bill and the legislative process followed in respect of it.

19. The NCOP and the Select Committees did not invite submissions, oral or written, from the public nor did they hold any public hearings in respect of either the MPRDA Bill or the Restitution Bill. Nor was there any considered discussion by the Select Committee in terms of section 72(1)(a) about whether public participation was appropriate in the circumstances.

20. The only input received by the Select Committees were:

(a) a briefing by the Land Claims Commission in the case of the Restitution Bill; and

(b) a single contribution in the negotiating mandate meeting by the Department of Mineral Resources.

21. Without suggesting that this would in any way have been adequate, the meetings of the Select Committees reflect no attempt to place before them or to discuss or debate either the written or the oral submissions made to the Portfolio Committees or the content of any of those Committees' deliberations. All that was provided was a very brief summary of the preceding consultation processes in the presentation by the Commission in relation to the Restitution Bill on 28 February 2014.

22. The legislative timetable in the NCOP was about 2 weeks in the case of the MPRDA Bill. The Bill was adopted by the Portfolio Committee on Mining of the National Assembly on 6 March 2014. Reportedly, the Bill was referred to the provinces on 14 March, and negotiating mandates were required by 20 March.

23. In respect of the Restitution Bill the time available was about 6 weeks. The Bill was adopted by the Portfolio Committee on Rural Development and Land Reform on 5 February 2014.

24. By contrast the National Assembly dealt with the bills over periods of months. The Portfolio Committee was briefed on Bill 35 on 15 October 2013. Bill 15 was presented to the Portfolio Committee on Mining on 30 July 2013.

25. The draft Minerals and Petroleum Resources Amendment Bill was published by the Minister of Mineral Resources for public comment on 23 December 2012. The draft restitution amendment bill was published for comment by the department on 23 May 2013. We submit that the executive and Parliament had adequate time to ensure that each of the legislatures had adequate time for public participation and hearings by each legislature.

The importance of public participation

26. In *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) the Constitutional Court held that legislation that was passed without reasonable efforts to facilitate public involvement in the legislative process was invalid. Ours is not a purely representative democracy, but a fusion of representative, participatory and deliberative democracy. Participation is not a detraction from the democratic process, but an essential element of it. In the Court's words:

> "*The participation by the public on a continuous basis provides vitality to the functioning of representative democracy. It encourages citizens of the country to be actively involved in public affairs, ... It enhances the civic dignity of those who participate by enabling their voices to be heard and taken account of. It promotes a spirit of democratic and pluralistic accommodation calculated to produce laws that are likely to be widely accepted and effective in practice. It strengthens the legitimacy of legislation in the eyes of the people. Finally, because of its open and public character it acts as a counterweight to secret lobbying and influence peddling. Participatory democracy is of special importance to those who are relatively disempowered in a country like ours where great disparities of wealth and influence exist.*" (para 115)

27. The Court stressed that there must be public involvement before both the National Assembly and the National Council of Provinces. In some instances the NCOP could fulfil its duty by relying on public participation in the provincial legislatures.

28. The Constitutional Court held that the NCOP and/or the provincial legislatures must act reasonably and must "*provide meaningful opportunities for public participation in the law-making process.*" What is reasonable will depend on the nature of the legislation at issue and the intensity of its impact on the public.

29. Vitally, the Court held that legislative timetables are not an excuse for truncating the process of participation. It wrote: "*When it comes to establishing legislative timetables, the temptation to cut down on public involvement must be resisted.*

Problems encountered in speeding up a sluggish timetable do not ordinarily constitute a basis for inferring that inroads into the appropriate degree of public involvement are reasonable. The timetable must be subordinated to the rights guaranteed in the Constitution, and not the rights to the timetable." (para 194) The desire to pass the Bills before the end of the Fourth Parliament is not a reason for reducing the degree of public participation.

30. The process followed with regard to both bills fell far short of the standard set in *Doctors for Life*. The steps taken in the NCOP and the provincial legislatures failed to afford people a meaningful opportunity to participate in the legislative process. The timetable made adequate participation impossible.

31. Accordingly, both bills were unconstitutionally passed.

32. Please let us know when you will refer the Bills back to the National Assembly for it to deal, with the participation of the Council as required in terms of section 79(3)(b), with the Council's non-compliance with the provisions of section 72(1)(a). Please note that we do not necessarily concede that there was compliance with the provisions of ss 59(1)(a) and 118(1)(a).

We look forward to hearing from you.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:

Per **HENK SMITH**

DELIVERED TO:

Private Office of the President
Ms Lakela Kaunda
Per email: lakela@po.gov.za; charmaine@po.gov.za
and fax: (Union Buildings) 012 323 3231

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Mr Ntoeng Simphiwe Sekhoto
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LRC
Legal Resources Centre

Your Ref:
Our Ref: HS/WW

02 July 2015

Honourable Baleka Mbete
Speaker National Assembly Parliament

Per fax: 021 461 9462 and per email: speaker@parliament.gov.za

And to:
Honourable Thandi Modise
Chairperson National Council of Provinces Parliament

Per fax: 021 461 9640 and per email: ljiyane@parliament.gov.za

Copy to:
Honourable Sahlulele Luzipho
Chairperson Portfolio Committee on Mineral Resources Parliament

Per email: Liezel Webb - lwebb@parliament.gov.za

Dear Mesdames

Re: Mineral and Petroleum Resources Amendment Bill [15B of 2013]

1. We refer to our letter to you dated 17 February 2015 as well as your acknowledgement of receipt of our letter dated 1 April 2015.

2. It has now been almost four months since we sent the above letter and it is still not clear if the National Assembly has decided whether it intends to reject the Mineral and Petroleum Resources Amendment Bill [15B of 2013] (Bill) and to start the process afresh, which we maintain is the only option available to it, or whether it intends to attempt to cure the procedural and substantive defects of the Bill.

3. We have taken advice from counsel who supports the Coalition's position that a rejection of the bill under Joint Rule 208 is the only option available

to Parliament. That opinion largely tracks the reasoning set out in our letter of 17 February 2015. In summary, the difficulty confronting Parliament is this:

a) The President has referred a procedural defect back to the Assembly, namely the failure of the NCOP and the Provincial Legislatures to facilitate public involvement.

b) Procedural defects are dealt with by Joint Rules 205 and 211. Neither rule anticipates that there can be amendments to the Bill. They contemplate only that the relevant house will reject the President's referral, or will correct the procedural defect and refer the Bill in its same form back to the President.

c) Amendments are contemplated in Joint Rules 206 and 212 to deal with substantive defects. As the Bill is a s 76 bill, these would require passage by both houses and possibly referral to a mediation committee. The absence of similar provisions for dealing with procedural defects demonstrates that the Joint Rules do not contemplate amendments to cater for procedural defects.

d) The difficulty is that the procedural defect referred by the President – failure to facilitate public involvement – can only be cured if it is possible to amend the Bill. The public participation will not be meaningful (and therefore will not be constitutional) if it cannot result in amendments.

e) Accordingly, the only option available to Parliament is to reject the Bill in terms of Joint Rule 208. The Bill is plainly "*procedurally or substantively so defective that it cannot be corrected*".

f) Parliament cannot circumvent the procedures in Part 8 of the Joint Rules by relying on the general power in Joint Rule 2. This is not a matter which "*for which the Joint Rules do not provide*". The Joint Rules do provide for it and require that the Bill be rejected.

g) If Parliament wishes to proceed with considering the Bill, its only option is to re-introduce it in either the Assembly or the NCOP.

4. We understand that the Joint Tagging Mechanism (JTM) has been tasked with considering the President's reservations about the Bill. We would thus like the opportunity to present, with our counsel, our reasoning to the JTM. Alternatively, we can make a written opinion from our counsel available to you and/or the JTM.

5. We look forward to your response.

Yours faithfully
LEGAL RESOURCES CENTRE
Per:

HENK SMITH & WILMIEN WICOMB

and

CENTRE FOR ENVIRONMENTAL RIGHTS

Per:
MARTHAN THEART

Copy to:

Ms Zintle Ngoma
Legal Services Parliament - zingoma@parliament.gov.za

PMG PARLIAMENTARY MONITORING GROUP

Mineral and Petroleum Resources Development Amendment Bill [B15D-2013]

Comment expires on 2017-01-16

2016-11-25

Mineral Resources

The National Assembly passed the Mineral and Petroleum Resources Development Amendment Bill [B15D-2013] and referred it to the National Council of Provinces (NCOP) for further processing and concurrence.

The National Assembly adopted the Portfolio Committee on Mineral Resources **report** that outlines amendments to the Bill in accordance with reservations raised by the President.
The report noted that the consultation period in the NCOP and in the Provincial Legislatures was highly compressed and recommended that the Select Committee on Land and Mineral Resources remedy this procedural defect by starting their legislative process anew.

In line with the above recommendation, all nine provincial legislatures have scheduled public hearings on the bill.

The Bill seeks to amend the Mineral and Petroleum Resources Development Act, 2002, as amended by the Mineral and Petroleum Resources Development Act, 2008 (Act No. 49 of 2008); so as to:
▪ remove ambiguities that exist within the Act;
▪ provide for the regulation of associated minerals, partitioning of rights and enhance provisions relating to the regulation of the mining industry through beneficiation of minerals or mineral products;
▪ promote national energy security; to streamline administrative processes;
▪ align the Mineral and Petroleum Resources Development Act with the Geoscience Act, 1993 (Act No. 100 of 1993), as amended by the Geoscience Amendment Act, 2010 (Act No. 16 of 2010);
▪ provide for enhanced sanctions; to improve the regulatory system.

Find here: Mineral and Petroleum Resources Development Amendment Bill [B15D-2013]

Draft Programme

For **Public hearings'** dates and **enquiries** please contact Mr Asgar Bawa on tel (021) 403 3762 or cell 083 709 8530

DATES, VENUES AND CONTACT DETAILS FOR PROVINCIAL MEETINGS AND PUBLIC HEARINGS: MINERALS AND PETROLEUM RESOURCES DEVELOPMENT AMENDMENT BILL [B15D - 2013]					
No	**Province**	**Provincial Briefing**	**Public Hearing**	**Contact Person / Provincial Liaisons Officer**	**Contact Details of Department of Mineral Resources official assigned to attend**
1	Eastern Cape	**Date:** 9 December 2016 **Time**: 08h30 – 11h00 **Venue:** Conference Room, Kings Beach Garden Court, Port Elizabeth	**Date:** **Time**: **Venue**:	Stella Mhlana (Provincial Liaisons Officer) **Tel:** 021- 4241981 **Cell:** 082 448 1160 **Fax:** 021- 4241576 smhlana@parliament.gov.za All correspondence for briefings sent to Mr Makabongwe Tyiwani 079 496 6490 mtyiwani@ecleg.gov.za	**Provincial Briefing** Mr Sibusiso Kobese: Deputy Director: Mineral Policy Development 063 404 2770, Sibusiso.kobese@dmr.gov.za Mr Nhlanhla Jali: Deputy Director: Mineral Policy and Promotion 082 465 6082, nhlanhla.jali@dmr.gov.za Mr Mthokozisi Mtshali: 082 045 8028, Mthokozisi.mtshali@dmr.gov.za
2	Free State	**Date:** **Time**: **Venue:** **Cancelled Provincial Briefings.** **Everything to be**	**Date:** **Time**: **Venue:**	Marette Basson Tel: 021- 4241277 Cell: 082 646 3677 Fax: 021- 4240398 MaretteB@FSL.GOV.ZA	**Provincial Briefing**

		held in 2017		Mr Kgathatso Nkeane (082) 5559987 kgathatson@fsl.gov.za	
3	Gauteng	**Date:** **Time:** **Venue:** **Everything to be held in 2017**	**Date:** **Time:** **Venue:**	Joslyn Moeti **Tel:** 021- 4241427 **Cell:** 079 522 8590 **Fax:** 021- 4241428 joslynmoeti@gmail.com	**Provincial Briefing**
4	KZN	**Date:** 29 November 2016 **Time:** 09h00 **Venue:** ANC Caucus Room KZN Legislature 241 Langalibalele Street Pietermaritzburg	**Date:** **Time:** **Venue:**	Erwinn Jansen (Provincial Liaisons Officer) **Tel:** 021- 4241050 **Cell:** 073 381 3370 **Fax:** 021- 4241060 jansene@kznlegislature.gov.za All correspondence for briefings sent to Mr Derrick Dimba 0730014026 Dimbad@kznleg.gov.za	**Provincial Briefing** Mr Nhlanhla Jali: Deputy Director: Mineral Policy and Promotion 082 465 6082, nhlanhla.jali@dmr.gov.za Mr Mthokozisi Mtshali: 082 045 8028, Mthokozisi.mtshali@dmr.gov.za

5	Limpopo	**Date:** **Time**: **Venue:** **Everything to be held in 2017**	**Date:** **Time**: **Venue:**	Mpho Seabela (Provincial Liaisons Officer) **Tel:** 021- 4241008 **Cell:** 082 374 0774 **Fax**: 021- 4241024 mseabela@parliament.gov.za Phillip Makgoba Cell: 079 502 0776 pmakgoba@parliament.gov.za	**Provincial Briefing**
6	Mpumalanga	**Date:** 29 November 2016 **Time**: 11h00 – 13h00 **Venue:** Building 1, Government Boulevard Legislature & Government Complex Riverside Park Mbombela Committee Room 4 Lower Ground Floor	**Date:** **Time**: **Venue:**	Patience Mbalo (Provincial Liaison Officer) **Tel:** 021- 4243970 **Cell:** 082 979 5954 pmbalo@parliament.gov.za All correspondence for briefings sent to Ms Pretty Mahlangu Provincial Committee Co-ordinator Tel: 013 – 766 1441 Cell: 073 196 2274 prettyma@mpuleg.gov.za	**Provincial Briefing** Mr Kagiso Menoe: Director: Beneficiation Economics 072 090 2225, Kagiso.menoe@dmr.gov.za Mr Sibusiso Kobese: Deputy Director: Mineral Policy Development 063 404 2770, Sibusiso.kobese@dmr.gov.za Mr Chris Maluleke: 074 661 0615, chris.maluleke@dmr.gov.za

7	Northern Cape	**Date:** **Time**: **Venue:** **Everything to be held in 2017**	**Date:** **Time:** **Venue:**	Khanita Abrahams Cell: 082 564 3585 kabrahams@parliament.gov.za	**Provincial Briefing**
8	North West	**Date:** 29 November 2016 **Time**: 07h30 **Venue:** Committee Room 2 Legislature Building Dr James Moroka Drive Mmabatho	**Date:** **Time:** **Venue:**	Nomfuzo Dano **Tel:** 021- 4220813 / 4220852 **Cell:** 082 649 5823 **Fax:** 021- 4221088 ndano@parliament.gov.za All correspondence for briefings to be sent to: Ms K Magagane Tel: 018 392 7150 Fax: 086 673 8461 Email: karabo@nwpl.org.za Karabom1@gmail.com	**Provincial Briefing** Ms Sibongile Malie: Director: Mineral Policy Development 082 411 2674, Sibongile.malie@dmr.gov.za Ms Jeaniffer Ntome: 083 796 9197, Jeaniffer.ntome@dmr.gov.za Ms Dzunisani Mathebula: 078 578 7497, dzuni.mathebula@dmr.gov.za
9	Western Cape	**Date:** 28 November 2016 **Time**: 09h00 – 10h00 **Venue:**	**Date:** **Time**: **Venue:**	Ncediswa Mayambela (Provincial Liaison officer) **Tel:** 021- 487 1826	**Provincial Briefing** Mr Joel Raphela: Acting DDG, 082 497 7241, joel.raphela@dmr.gov.za

		Committee Room 2 4th Floor 7 Whale Street Cape Town		**Fax:** 021- 4871685 **Cell:** 086 577 4534 NMayambela@wcpp.gov.za ========== Ben Daza Tel: 021 – 487 1679 bdaza@wcpp.gov.za ========== Zaheedah Adams (Prov Committee Co-ordinator) Tel: 021 487-1641 Fax: 021 487-1685 zadams@wcpp.gov.za ========== Lizette Cloete (Snr Prov Committee Co-ordinator) Tel: 021 487-1678 Fax: 021 487-1685 lhcloete@wcpp.gov.za	Ms Sibongile Malie: Director: Mineral Policy Development, 082 411 2674, Sibongile.malie@dmr.gov.za Mr Kagiso Menoe: Director: Beneficiation Economics, 082 451 1475, Kagiso.menoe@dmr.gov.za Mr Sibusiso Kobese: Deputy Director: Mineral Policy Development, 063 404 2770, Sibusiso.kobese@dmr.gov.za Mr Jali – Deputy Director: Mineral Policy and Promotion 082 4656082 Nhlanhla.Jali@dmr.gov.za Mr Duduzile Kunene Western Cape Regional Mananger Duduzile.Kunene@dmr.gov.za