CALS
Centre for Applied Legal Studies

Preliminary, draft comments by the Centre for Applied Legal Studies on:

The Mineral and Petroleum Resources Development Amendment Bill published by the Department of Mineral Resources for public comment on 27 December 2012

8 February 2013

Attention: Mr Andre Andreas

Introduction

1. The Centre for Applied Legal Studies (CALS) is a civil society organisation based in the School of Law at the University of the Witwatersrand. CALS is committed to the protection of human rights through empowerment of individuals and communities and the pursuit of systemic change. CALS' vision is a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power, the dismantling of systemic harm and a rigorous dedication to justice.

2. CALS' mission is:
   2.1. to challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations;
   2.2. to provide professional legal representation to victims and survivors of human rights abuses;
   2.3. to actualise a politically, socially and economically just society;
   2.4. through a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable; and
   2.5. to act with courage against impunity for non-compliance with human rights standards.

3. CALS operates across a range of areas of human rights including environmental justice. Our Environment Programme focuses on issues such as public participation in environmental decision-making processes, local economic development, governance issues and the role of the private sector, particularly in the mining industry. Due to this focus on governance of the mining industry, CALS welcomes the opportunity to provide comments on the Mineral and Petroleum Resources Development Draft Amendment Bill of 2012 (the Bill).

Time period allowed for comment and importance of national discussion

4. The Bill was released for public comment by the Department of Mineral Resources (DMR) on 27 December 2012 and interested parties have been given until 8 February 2013 to make submissions. It is disappointing to see the release of a bill of such importance over the December period with no

accommodation made for the fact that many organisations (including CALS) will have been closed for a significant portion of the allotted comment period. The DMR has been working on this Bill for years. During the drafting process, it has consulted with a select group of stakeholders including the Chamber of Mines and National Union of Mineworkers. Such consultation is commendable but its selective nature is not. A number of civil society organisations engaged in this sector has repeatedly sought to also be given an opportunity to understand where the DMR is headed on these legislative developments and to give our input into the proposals on the table. These attempts at engagement have proved futile. Instead we have been provided a very limited, and in our view, insufficient time to consider what is an extremely complex amendment with far-reaching consequences.

5. It is appropriate and important that an inclusive national conversation is facilitated on issues of this significance.[1] We therefore strongly urge that further time is allowed for input on the Bill, and that engagement is sought with the full range of stakeholders who are active in the sector and whose interests are affected by it. This includes mine-affected communities and the non-governmental, community-based and other civil society organisations they work with.

6. CALS has engaged with the Bill in the limited time available. At this time CALS is submitting comments on a number of discrete issues. Where we have concerns about sections of the Bill but have not yet been able to develop extensive and detailed submissions, these concerns are flagged. We will continue to engage the Bill and the rationale for its provisions in depth as the process continues. Please see also the covering letter which accompanies these submissions.

<u>The approach of the Bill to historical redress and distributive issues</u>

7. There are four key participants in the mining industry, each indispensible to the process. Firstly there is government which is the custodian of mineral resources, has the power to issue or refuse licenses and ensures mining activities are conducted in accordance with the law. Secondly there are the mining companies that conduct the exploration, prospecting and extraction of the minerals. Thirdly there are the investors that provide the necessary financing for operations that involve extensive capital outlay before the proceeds of minerals are realised. Fourthly there are the labourers who conduct the physical work of mining, often at great risk to their lives, health and well-being. In addition to the direct participants, there are the communities residing in close proximity to the mining operations and who are exposed directly to the environmental and social impacts brought by the arrival of mines. Fairness would dictate that all essential participants and core stakeholders enjoy the benefits of an activity that generates immense wealth. However the benefits of the South African mining industry, and the broader economy of which mining forms a core part, have always preponderantly flowed to government, mining companies and investors to the exclusion of mine workers and communities who have had to endure cramped living

[1] The National Environmental Management Act No. 107 of 1998 (NEMA), which sets the framework for environmental management in South Africa requires promoting the "participation of all interested and affected parties in environmental governance" and decisions that "take into account the interests, needs and values of all affected parties." NEMA, Section 2 (4) (f) and (g) respectively.

quarters, poor service delivery and mining related ailments. Any reforms to the law regulating the mining industry must address this disparity in order to advance the Constitutional vision of a "society based on democratic values, social justice and fundamental human rights."[2]

8. A central object of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) - the piece of legislation which stands to be amended by the Bill - is to transform the minerals sector, control and ownership of which has historically been concentrated in the hands of the white elite. The MPRDA pursues this goal principally through, among other things, decoupling mineral rights from land ownership and appointing the State as custodian of South Africa's mineral resources. The Department of Mineral resources (DMR) now exercises the power to issue all mineral licenses and can thus ensure that mining rights are no longer concentrated in the hands of the white minority.

9. Rather, the MPRDA actively seeks to increase the access of historically disadvantaged individuals to mineral resources. Provisions along these lines include the requirement that preference be given to applications by previously disadvantaged individuals, or companies with ownership by previously disadvantaged individuals, where more than one application are received on the same day,[3] the Minister's powers to take measures to assist historically disadvantaged persons to conduct mining or prospecting activities,[4] and the duty on the Minister to establish a broad-based black economic empowerment charter for the mining industry.[5] In addition, the preamble to the MPRDA itself puts the state's commitment to reform to bring about equitable access to mineral and petroleum resources front and centre. Other key objects of the MPRDA include the promotion of socio-economic development goals including economic and sectoral growth, the creation of employment and investment opportunities as well as social upliftment of mine-affected communities.

10. Beneficiation of mineral resources has the potential to advance many of these goals as it promotes local industry taking part in the beneficiation process, and creates opportunities for new participants in the economy, including previously disadvantaged individuals, and ensures that South Africa's retention of mining-derived revenue is optimised. It is important to locate the mining industry within the larger picture and acknowledge its potential to contribute to growing the economy and therefore to furthering the realisation of state obligations to provide basic services, including housing, healthcare and education. These goals are crucial to the realisation of the constitutional vision of substantive equality which entails the empowerment of those disadvantaged by factors such as race, gender, class and disability and finds expression in the Bill of Rights.

11. However, while local beneficiation is a necessary condition for a fairer distribution of mineral wealth, it is not a sufficient one as it does not by itself ensure that the most disadvantaged South Africans will enjoy an equitable share of the benefits and not be forced to shoulder the costs, financial and otherwise. There are some respects in which the Bill may lead to further marginalisation of vulnerable population groups. The

[2] The Constitution of the Republic of South Africa, Preamble.
[3] Section 9(2) of the MPRDA.
[4] Section 12 of the MPRDA.
[5] Section 100(2) of the MPRDA.

Bill seeks to change the definition of historically disadvantaged individuals. Under the MPRDA, an historically disadvantaged person was defined as "any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect".[6] This definition clearly embraces all forms of institutionalised disadvantage. The Bill replaces this definition with the following understanding of historically disadvantaged person – "any person, category of persons or community who had no franchise in national elections prior to the introduction of the Constitution … which should be representative of the demographics of the country".[7] The new definition thus narrows the focus to race, referring merely to all who couldn't vote in the pre-democratic era.

12. This curtailing of the promotion of interests of vulnerable groups based on criteria other than race is further driven home in the Bill by the change to the wording of the objects of the Bill. The MPRDA expressly singles out women as a category of persons for whom opportunities to enter the industry should be expanded and who should benefit from the exploitation of mineral resources. The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (the 2008 Act) added a reference to communities in this context. However the Bill now deletes the reference to both women and communities and reverts back to the purely racial definition of disadvantage discussed above. In accordance with the new definition of "historically disadvantaged persons" in the Bill, reference to "women and communities" as intended beneficiaries has been excised. This change is unfortunate as it suggests a narrowly race-based conception of transformation that ignores other patterns of entrenched disadvantage.

13. An essential part of transformation in South Africa is the facilitation of participation in decision-making by those who stand to be affected by such decisions. Typically the communities living in close proximity to planned mining developments struggle to gain access to decision-making processes and must overcome a number of challenges to do so. It is thus vital that these communities are given an opportunity to be heard on every decision on the exploitation of minerals that has the potential to affect their rights and legitimate expectations. One of the most acute clashes of the interests of communities and extractive industries occurs where an application to mine involves land on which a community resides. The 2008 Act recognised the need to protect communities in such circumstances and consequently inserted 2A into section 23 which empowered the Minister to impose conditions in order to protect the rights and interests of communities "including conditions requiring the participation of the community." The Bill would remove this reference to participation requirements which is most unfortunate given South Africa's commitment to transparent and accountable governance and a participatory form of democracy.

<u>Amendments to the regulation of social and labour plans</u>

14. Social and labour plans (SLPs) are a fundamental component of our mineral licensing regime. There are a number of provisions of the Bill impacting on the regulation of SLPs which merit attention.

[6] Section 1 of the MPRDA.
[7] Mineral and Petroleum Resources Draft Amendment Bill, Clause 1 (g).

Clause 2: Amendment of section 2 of the MPRDA ("objects of act"), as amended by section 2 of the 2008 Act

15. Section 2(i) has been amended to clarify that the objects include requiring that rights-holders contribute to "labour sending areas" in addition to the area in which the mine is actually situated. While this is not currently an express object of either the MPRDA or the regulations, this amendment is welcomed as it brings the legislation as a whole more in line with the regulations dealing with SLPs which make express reference to infrastructure and poverty eradication projects in line with the Integrated Development Plans for "major sending areas" as well as areas in which the mine operates.[8]

Clause 18: Amendment of section 23 of MPRDA ("granting and duration of mining right"), as amended by section 19 of the 2008 Act

16. The Bill introduces a requirement of periodic review (every five years) of SLPs. Periodic review is an important addition to the legislation and can be viewed as a response to current failures in monitoring and enforcing such plans. For oversight to be effective it will have to go beyond box ticking and engage thoroughly with the soundness of both the design and the implementation of the SLP.

17. A major omission, however, is the absence of a requirement to consult with mine-affected communities in the review process. One cannot have an accurate picture of whether a SLP is responding to community needs and achieving its goals without obtaining the perspectives of the intended beneficiaries of an SLP. The Bill should require notice to communities of the review and the opportunity to make both written and oral comments on the existing SLP and the ways it should be improved.

18. The amendments to section 23 of the MPRDA now empower the Minister to "after having taken 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". Thus in addition to the new monitoring power the Minister can now issue directives to compel the meeting of socio-economic needs as well as the remedying of contraventions of environmental management obligations. This also seems to allow directives to improve SLPs if they do not adequately address the socio-economic needs of the area or community. This is a welcome development. Its shortcoming is that such pro-active measures are entirely at the discretion of the Minister, and further, no guidance is provided as to the circumstances and manner in which such discretion can and should be exercised.

19. The 2008 Act had inserted 2A which provided that:

    19.1. "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."

[8] Mineral and Petroleum Resources Development Act Regulations (MPRDA regulations), No.R 527 in GG No. 7479 , 46 (c) (iii)

20. The Bill retains 2A but deletes the reference to participation of the community. This regression on the public participation front is worrying as it is critical that community voices be heard when decisions are made about programmes, such as those contained in SLPS, designed to benefit them.

Clause 71: Amendment of section 102 of the MPRDA ("Amendment of rights, permits, programmes and plans) as amended by section 72 of the 2008 Act

21. The Bill adds SLPs to the tally of conditions and authorisations that can only be amended with the Minister's consent. In reality, however, this is nothing new since consent is already required by the MPRDA regulations.[9]

22. However, a serious problem not addressed by the Bill is the absence of an opportunity for public participation in relation to the amendment process. This is at odds with the emphasis on public participation in South Africa's environmental governance regime and risks becoming a mechanism by which conditions addressing the concerns of members of the public, especially members of the mine-affected community, are removed or diluted. We discuss this issue in relation to amendments beyond amendments to SLPs in more detail elsewhere.

<u>Regional Mining and Development and Environmental Committee</u>

Clause 7: Insertion of 10A-G (Establishment of Regional Mining Development and Environmental Committee)

23. It is widely acknowledged that the function of the Regional Mining and Development and Environmental Committee (REMDEC) under the MPRDA has been problematic. It is therefore encouraging to see evidence of re-consideration of this structure.

24. We note that the Bill now outlines that the members appointed to REMDEC must possess expertise in "mineral and mining development, mine environmental management and petroleum exploration and production". We would urge that expertise in sustainable development and community engagement be added to this list. This is particularly so because the activities are only triggered in instances of objection to an application (and hence typically of community dissatisfaction). The provision for the appointment of consultants in the new clause 10C would make gathering this kind of expertise on REMDEC possible.

25. The inclusion of reporting requirements in clause 10G will enhance good governance. It should be made explicit that these reports will be public documents in line with the constitutional commitment to transparent and accountable governance.

[9] MPRDA Regulations, regulation 44.

Consultation requirements

26. Below are some preliminary thoughts on some of the clauses in the Bill which deal with consultation requirements and public participation processes.

Clause 6: Substitution of Section 10 of MPRDA as amended by Section 7 of the 2008 Act

27. We note that the obligation to consult with interested and affected parties has been expanded, in particular to place obligations on the applicant as well as just the state. Any acknowledgement of the seminal importance of meaningful consultation is a progressive step. Further consideration of the nuts and bolts of consultation mechanisms, as well as how state obligations to facilitate public participation in decision-making relate to obligations on the private sector (license applicants), is required.

Clause 11: Amendment of section 16 of MPRDA ("Application for prospecting right") as amended by Section 8 of the 2008 Act

28. One of the changes to section 16 of the MPRDA (in relation to the 2008 amendments) is the removal of the words "any interested and" with the upshot that the applicant will now only be required to consult with "affected" parties, not merely "interested ones".[10] As the insertion of "interested" was to have occurred in terms of the 2008 amendments which have not come into effect, the status quo will remain.

29. As the Supreme Court of Appeal (SCA) noted in *SA Soutwerke v Saamwerk Soutwerke*[11] any differences between the two concepts are not statutorily defined.[12] The SCA were of the opinion that an "interested party" is one with a lawful interest in land on which a mining right is sought, such as the landowner or lawful occupier"[13] and that "Affected parties" refers to persons whose socio-economic conditions might be directly affected by the mining operation.[14] These would, for example, include persons who earn a livelihood in the immediate environment where mining operations are to be conducted. *Soutwerke* is therefore authority for the proposition that "affected parties" is the broader category, hence the Bill does not necessarily narrow the range of people who will need to be consulted. Nevertheless, to clarify this issue, it is suggested that definitions of "interested" and "affected" persons be inserted into the definitions section.

Clause 17: Amendment of section 22 of MPRDA (application for mining right), as amended by section 18 of Act 49 of 2008

[10] In addition to the land owner or lawful occupier.
[11] *SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd and Others* [2011] ZASCA 109.

[12] Ibid at para 30.
[13] Ibid.
[14] Ibid at para 31.

30. An important change brought by the Bill is the insertion of subsection (d) which imposes an express obligation "to consult with the community and relevant structures regarding the prescribed social and labour plan within 180 days of the notice..." Currently there is no express requirement to consult the community in drawing up the SLP. This contrasts with the participatory nature of our constitutional democracy, environmental management framework and of the MPRDA itself. It is impossible to know what needs are most keenly felt by members of the public without asking them. Neither is a social plan that is conceived without the benefit of the local and particular knowledge of communities likely to enjoy the kind of legitimacy necessary in order that it may achieve its objectives.

Establishment of Ministerial Advisory Council

Clause 56 – Insertion of section 56A-F (Establishment of Ministerial Advisory Council); Repeal of sections 57-68 of MPRDA (Establishment of Minerals and Mining Development Board)

31. The Bill replaces the Minerals and Mining Development Board (the Board) with a Ministerial Advisory Council (the Council). Like the Board, Council members will include a chairperson (now identified as the Director General), the Chief Inspector, three representatives of relevant state departments, three representatives of organised business and three representatives of organised labour. However, unlike the Board, there is no requirement that the Council include representatives of non-governmental organisations (NGOs) or community-based organisations (CBOs). Neither is the inclusion of experts or people with relevant experience to enhance the functioning of the Board required.

32. This absence of these 3 crucial stakeholders undermines key principles of our environmental management system including participation by all interested and affected parties including by "vulnerable and disadvantaged" sectors of the population,[15] decisions that "take into account the interests, needs and values of affected and interested parties, and this includes recognising all forms of knowledge, including traditional and ordinary knowledge."

33. More specifically their absence limits the ability of the Council to realise its purpose of enabling the Minister to make informed decisions and sound policy so as to advance the twin goals of sustainable development and growth and transformation of the extractives industry. On both of these subjects the absence of these three stakeholders will be keenly felt. Decisions on sustainability involve evaluating highly specialised and technical information. The input of experts is essential for informed decision-making. NGOs offer vital input in conveying different perspectives to those offered by government, business and organised labour. It is vital that the perspective of communities' impact by mining activity be integrated into the highest levels of decision making regarding the sector. Transformation, it must be stressed, entails the empowerment of vulnerable and disadvantaged members of society and mine-affected communities typically include a large proportion of people in vulnerable groups.

[15] NEMA Section 2 (4) (f).

34. As a consequence CALS strongly urges that 56A be adjusted to require representation of the NGO sector, CBOs and mining and environmental experts.

Issues which require further analysis

35. There are a number of issues which we have not yet canvassed in these preliminary draft submissions which call for further investigation. These include:
    35.1. Jurisdictional issues relating to the relative roles and responsibilities of the Departments of Mineral Resources and Environmental Affairs;
    35.2. The issuing of closure certificates;
    35.3. The regulation of bulk sampling; and
    35.4. Continued failure to make provision for public participation in the context of amendments to licenses and authorisations.

36. We will continue to engage with these issues, as well as the Bill more broadly, and will seek to supplement these initial submissions as the discussions on the Bill develop.

Conclusion

37. We thank you for this opportunity to comment on the Bill and look forward to participating further in this national dialogue. For queries or further information please contact Lisa Chamberlain (Deputy Director) at lisa.chamberlain@wits.ac.za or 011 717 8624 or Robert Krause (Researcher) at Robert.krause@wits.ac.za or 011 717 8615.