



National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa

13-14 SEPTEMBER; 26 AND 28 SEPTEMBER; 3 NOVEMBER 2016





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Acknowledgments

The South African Human Rights Commission acknowledges and appreciates the contribution of the many individuals who assisted with the Hearing process and the completion of this report.

The Commission expresses its gratitude for the support and guidance provided throughout the process by the Hearing Panel, chaired by Commissioner Mohamed Shafie Ameerma with Ms Janet Love, Professor Tracy-Lynn Humby and former Commissioner Lindiwe Mokate. This Report would not have been possible without their participation, guidance and input.

The Commission also extends its appreciation to all of the stakeholders who participated in the Hearing and provided information and assistance to the Commission throughout the process. The knowledge, experience and insight shared through the contributions provided depth and meaning to the process and were pivotal in the development of this report.

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Executive Summary



When underpinned by good governance and a respect for the community and environment in which they operate, extractive industries harness significant potential to transform a country's social and economic development. Employment opportunities, increased investment and access to revenues can drive economic growth and reduce poverty at local, regional and national levels. However, often these opportunities are not realised and the negative impacts of extractive industries detract from and undermine the potential benefits and opportunities that accompany them.

Over the past 23 years, South Africa has established a comprehensive regulatory framework to enable its mining industry to operate in a manner that protects and promotes the well-being and safety of communities affected by its operations (mining-affected communities). The framework is designed to facilitate sustainable and equitable development of South Africa's mining industry, while enabling and promoting inclusive growth and prosperity. While the framework has the potential to drive positive social and economic development, particularly at the local level, this Report reveals a disjuncture between its intended impact and the lived reality of many of South Africa's mining-affected communities.

Despite extensive regulation and notable attempts by mining companies and government to implement progressive and sustainable projects, current industry practice is characterised by inconsistent legal compliance and reflects concerning legislative gaps. As a result, many mining-affected communities continue to experience significant levels of poverty and systemic inequality, which reinforces the notion that the benefits of mining operations disproportionately favour mining companies and the State, and are often to the detriment of local communities.

Furthermore, existing socio-economic challenges in mining-affected communities are compounded by a lack of coordination and cooperation among industry stakeholders and a general disregard for South Africa's unique context and the cultural affiliation to land that grounds social relations and livelihoods. These challenges are heightened in rural or remote communities, where inadequate access to basic services, poor infrastructure, endemic unemployment and high levels of poverty often reflect an unresponsive and inactive local government.

However, this Report reveals that progressive, evidence-based reform requires more than improved cooperation and collaboration among industry stakeholders; it requires an appreciation for, and understanding of, the diversity of risks and challenges that accompany the mining industry and its impact on local communities. It shows that the prioritisation of social and environmental needs in the regulatory and policy framework governing South Africa's mining industry is crucial to ensuring equitable access to the benefits of resource development

and addressing the underlying socio-economic challenges experienced by mining-affected communities.

Furthermore, the Report highlights that a greater focus on social and environmental sustainability coupled with the introduction of improved measures to address systemic non-compliance and ineffective monitoring, is key to ensuring that the negative impacts of the mining industry are minimised and that the rights of mining-affected communities, particularly vulnerable groups such as women, children, the elderly and people with disabilities, are upheld.

It is against this backdrop that the South African Human Rights Commission (SAHRC or Commission) hosted a National Hearing to investigate the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa (National Hearing or the Hearing). This Report documents the legal context and the proceedings of the SAHRC's National Hearing. It draws on existing literature and evaluates oral and written submissions by respondents with varied roles and responsibilities in addressing the challenges and opportunities in South Africa's mining-affected communities.

FINDINGS

The Commission has made a number of findings based on the underlying issues that contribute to the socio-economic challenges experienced by mining-affected communities. The Commission's directives and recommendations attempt to address these findings.

All parties to whom directives and recommendations have been addressed are required to provide a detailed written report to the Commission in six months, and again in 12 months, from the date of receipt of the final report. The detailed written report must address all measures taken to implement the directives and recommendations contained herein.

In addition, as required by section 18(4) of the SAHRC Act, the executive authority of all relevant national and provincial departments concerned must, within 60 days of the final report, provide a written response to the Commission indicating the intention to take any steps to give effect to the recommendations.



Land

Land use management

The Commission finds that a considerable gap exists in the mining licence application process, where mining companies, the Department of Mineral Resources (DMR) and the Department of Rural Development and Land Reform (DRDLR) appear to systematically disregard key pieces of legislation, particularly the Municipal Systems Act, 32 of 2000, the Spatial Land Use Management Act, 16 of 2013 (SPLUMA), and the Interim Protection of Informal Land Rights Act, 31 of 1996. The Commission further finds that there is an immediate need for municipalities to be consulted throughout the licence application process to enable them to provide for integrated and sustainable land use systems.

The Commission finds that municipalities should fulfill their mandates and ensure that zoning requirements are met, i.e. applicants for mining rights are required, where appropriate, to lodge applications for land use change and municipalities have an



obligation to implement their land use planning tools when those applications are considered.

The Commission finds that improved inter-governmental cooperation is necessary to ensure that due consideration is given to the risk posed to local, regional and national food security, environmental resilience, and social and economic development by potential mining activities. The Commission further finds that greater consideration must be given to determining local government investment and development priorities and that broad-based and diversified local economies should be encouraged.

Relocation and Compensation

The Commission finds that mining companies who restrict compensation to the physical structure of the land are offering below what is considered to be appropriate in terms of global industry standards and are causing systemic economic displacement and impoverishment within mining-affected communities. In order for compensation to be meaningful, it should account for, inter alia, loss of life, loss related to communal and individually held tenure or title, as well as loss incurred for production value gained from the land, whether that production value is linked to traditional ways of life, or more commercial enterprises. The Commission further finds that the DRDLR, the Department responsible for promoting equitable and sustainable rural livelihood and development programmes¹ has not proactively considered means through which the rights and opportunities for development may be protected.

The Commission finds that there are no formal guidelines or oversight provided for the calculation of compensation and the finalisation of compensation agreements. This is problematic as relocations are often carried out before compensation agreements are reached on surface land leases, livestock, crops or housing. The Commission further finds that the DRDLR has failed to monitor compliance with, or enforcement of, lease and compensation agreements and that a lack of transparency and access to information allows the potential for abuse of power and non-compliance.

The Commission finds that there is a very real potential for the infringement of cultural and other human rights as a result of inappropriate grave relocation practices that are carried out by mining companies. Many mining companies appear to overlook or undervalue the sanctity and importance of grave relocations, which necessitates an evaluation of current processes. The Commission further finds that, despite strict regulatory requirements, unlawful grave relocations have been, and continue to be, conducted by a number of mining companies.

Mining in sensitive and protected areas

The Commission finds that there is an immediate need to give effect to the internationally recognised precautionary principle in matters dealing with environmental protection and strongly cautions against prioritising the immediate economic benefit of mining activities over the maintenance and protection of the environment, particularly in those areas that are crucial for sustaining ecological biodiversity, natural heritage, cultural significance and life. Furthermore, the Commission is particularly concerned by the DMR's inability to provide certain information about the monitoring of mining activities in protected areas.

¹ Department of Rural Development and Land Reform *Annual Report 2015/2016* (2016) <<http://www.ruraldevelopment.gov.za/publications/annual-report/file/4718>>.

The Commission finds that due to the potentially severe impact of mining-related activities on sensitive and protected areas, mining licences should be granted only in exceptional circumstances, under restricted conditions, and following public consultation. The Commission further finds that meaningful consultation should be legislatively mandated under these circumstances, where “interested and affected parties” span beyond surrounding municipalities and communities and include the country as a whole.

Rehabilitation and closure

The Commission finds that it is unacceptable for mining companies to not provide detailed and sufficient information to enable communities and local governments to clearly understand how land can be used post-closure. The Commission further finds that the DMR has not taken adequate steps to secure financial provision for rehabilitating damage to the environment and water resources and there is an immediate need for all Environmental Impact Assessments (EIAs) and Environmental Management Programmes (EMPs) to clearly detail land quality and potential post-closure land use. Licences should not be granted where long-term, sustainable land use cannot be guaranteed.

The Commission finds that there is an immediate need for legislative provisioning for standardised and realistic closure costing, concurrent rehabilitation, partial closure as well as the establishment of a “superfund” to cater for rehabilitation-related liability.



Housing

The Commission finds that the failure by mining companies, in close consultation with local government, to adequately address anticipated levels of migration and population growth in initial assessments undertaken during mining licence applications, the failure by the DMR to take this information into account when authorising mining rights; and the further failure by mining companies to adequately include local government in the planning phase of SLPs, directly contribute to inadequate planning and budgeting for housing at the local level. As a result, housing-related infrastructure including water and sanitation, electricity and roads is likewise jeopardised. Where a failure to integrate housing-related planning interferes with existing access to adequate housing, this constitutes a violation of the negative duty imposed by section 26(1) of the Constitution on all persons, including mining companies, to refrain from impeding existing access to adequate housing.



Water

The Commission finds that the current census for determining water reserves does not include measures to account for anticipated migration and population growth and other potential impacts on the availability of water resources, such as drought. Therefore, there is an immediate need for WULs to incorporate more stringent measures to better protect Communities’ water rights and the environment. In this respect, internal (self-regulating) and external auditing (by the DWS) in consultation with Communities, civil society, mining companies and other stakeholders is required to create effective regulatory tools such as licenses. The benefits of such an approach are direct for local government, groups which typically face barriers in



rights assertion and for sustainability. The audited information referred to must be made publically accessible and be provided to affected local government authorities.

The Commission further finds that the DWS with local government should address the problem of aging water infrastructure in mining-affected municipalities and collaborate with the DRDLR to translate guidelines regarding the provision of water on privately-owned land into policy.

Noting the fundamental right to access adequate water (and sanitation) of a quality fit for human consumption and use, the Commission finds that the WUL must be reviewed to allow for rights assertion where terms and conditions of such WUL can reasonably be anticipated to adversely impact the rights of affected communities to access water.

The Commission further finds that there is a compelling need for meaningful consultation and information sharing in respect of applications for WUL's, and audit and impact reports relating to WUL's to increase transparency, and accountability in respect of the use of this scarce resource.



Environment

One Environmental System

While the Commission recognises the positive intentions of the One Environmental System (OES) to streamline the application process and promote collaboration and partnership between the departments responsible for mining-related activities, the Commission finds that discrepant approaches in the application of environmental management laws and limited oversight of environmental management across multiple sectors are cause for concern.

The Commission finds that the DMR is not the appropriate authority for granting and enforcing environmental authorisations with respect to mining. The Commission acknowledges that there are several risks in dealing with mining-related environmental matters separately to those of other industries and that environmental management and impact do not occur in isolation.

Air Quality and blasting

The Commission finds that the lack of regulation around blasting operations is problematic given the frequency in which issues arise. Discrepant practices across the industry and the propensity for blasting operations to negatively impact communities and the environment compound the seriousness of these issues. The Commission further finds that industry bodies, such as the Chamber of Mines (CoM), are not duly active in monitoring behavioural trends within the industry or guiding members on best practice concerning blasting operations. The Commission identifies an immediate need for the DMR, as the competent authority responsible for developing regulations, to take urgent action to address this gap.

The Commission finds that mining companies are responsible for ensuring that, prior to conducting blasting operations, appropriate safety mechanisms are in place to prevent property damage (with due consideration given to the quality of structures in surrounding communities) and any risk to persons' health and safety. Mining companies should conduct ongoing engagements to ensure that such operations occur in a manner that has the least impact on people and the environment.

Nuclear waste management

The Commission finds that there is an immediate need to address the lack of clarity concerning the State's roles and responsibilities in the remediation of contaminated mine sites, particularly where such sites have been abandoned. The Commission further finds that, in light of the potentially severe and long-lasting impacts of contaminated sites, the State must prioritise funding for the National Nuclear Regulator (NNR) to undertake remediation activities.



Social and Labour Plans

The Commission finds that the current social and labour plans (SLP) system does not adequately address the negative impacts of mining activities and that systemic issues in the design of, and compliance with, SLP commitments limit their ability to drive socio-economic transformation in mining-affected communities. In addition, the process of developing SLPs should be consultative, and should respond to input by communities and local government regarding required socio-economic outcomes.

The Commission accordingly finds that there is an immediate need for the DMR to develop clear and binding requirements for the content of SLPs and to ensure that they are aligned to EIAs and EMPs and include environmental information on the potential impacts of mining and post-closure quality of land. There is also an immediate need for the DMR to enforce compliance and develop sanctions for those mining companies that fail to comply with their SLP commitments.

The Commission finds that the DMR should define the minimum amount of financial contribution towards SLP projects. This amount must be ring-fenced. The DMR should further take the lead in establishing a task team, to include the CoM, National Treasury, the Department of Planning, Monitoring and Evaluation (DPME), community-based organisations and other relevant stakeholders, to conduct research into the current financial regulation of the mining industry.



Meaningful participation, consultation, consent and access to information

Meaningful participation

The Commission finds that, there is a compelling need to develop clear consensus driven standards for compliance, evaluation and assertion of the duty to achieve meaningful participation from the commencement of mining operations such as applications for licenses. Meaningful participation must seek to legitimise and secure that the needs are understood and addressed as between all stakeholders creating accessible open, representative and inclusive platforms through which consultation occurs for impact driven outcomes. Meaningful consultation should not be confined to a tick-box exercise.

Noting the significant country-wide implications of mining operations, standards for consultation should ideally include opportunities for wider public participation in so far as the granting of mining licenses and evaluation of mining impacts are concerned.



Free, prior and informed consent

The Commission finds that collective consent has been accepted as a test for consent, but such consent for a number of reasons including a lack of representation of diverse groups, and groups which experience systemic disadvantage such as women do not necessarily adequately embody the principles of free, prior and informed consent which is a rights protective principle all stakeholders. The deficiencies in a model which accepts collective consent and the absence of consent in certain instances is evident from the example of the consistent disregard of the legal requirements outlined in IPILRA during the mining application process. Furthermore, the Commission finds that the DRDLR has not been sufficiently involved in community consultation processes to assess levels of consensus and consent.

The Commission finds that insufficient time and accessible information is availed to communities to undertake decision making processes as required by their customary law.

Multiplicity of consultation forums

The Commission finds that greater inter-governmental cooperation is needed to ensure the establishment of streamlined and representative community forums, which are broadly consistent in their function and operation.

Access to information

The Commission finds that the fundamental right to information as envisaged both in terms of the bill of rights and statute are inconsistently observed. The right to information is essential both for the purposes of achieving meaningful consultation and for ensuring sound corporate governance. This finding relates both to the duty to proactively release information, and in respect of limiting rights to information through clear criteria for the classification of information of certain mining-related information as “confidential.” Information is also not consistently made available in languages and formats which render them accessible. A large percentage of mining-related information, including SLPs, are not currently available to the public where such information should in fact be automatically publicly available in terms of the Promotion of Access to Information Act (PAIA).

The Commission notes legal obligations on mining companies to comply with section 51 of PAIA and finds that section 51 based compliance, must be extended to ensure that information is proactively disseminated in a manner that is accessible and which facilitates the understanding of such information, through all available platforms including the internet.



Compliance, monitoring and enforcement

The Commission finds that the existing sanctions for non-compliance with environmental laws and regulations are inadequate and do not address, nor disincentivise, systemic non-compliance in the sector.

The Commission finds that there is a lack of mechanisms to monitor compliance and ensure enforcement of SLP-related obligations.

The Commission finds that there is an immediate need for the development and implementation of effective complaints mechanisms by mining companies, the DMR, and local government.

Introduction



Given South Africa's history of discrimination, exploitation and exclusion within the extractives industry, it has made substantial progress in the regulation of mining operations. Its progressive laws are an attempt to realise the socio-economic opportunities that accompany extractive industries and are intended to drive transformation and development within local communities.

The legal framework governing South Africa's mining industry seeks to: advance the socio-economic welfare in mining-affected communities and enable the beneficiation of mineral extraction for all South Africans; transform the industry through the empowerment and meaningful participation of historically disadvantaged South Africans; promote environmentally sustainable mining operations; and promote a globally competitive industry. However, consistent with global experiences, South Africa continues to witness a disjuncture between the national and local benefits of mining. More alarmingly, South Africa's experience has shown that many mining-affected communities are often worse off as a result of the negative social, economic and environmental impacts of the industry.

Over the past few years, growing discontent amongst miners, trade unions and mining-affected communities over low wages, poor living conditions, inadequate community consultation and a lack of accountability in the sector have sparked wide-spread protest action. Many of these challenges were identified as the underlying causes which led to the death of 44 people at Marikana in August 2012. Although the response by Lonmin Plc management and the State, including the conduct of the South African Police Service (SAPS), in addressing the situation directly led to the events which transpired, the underlying causes for the anger and frustration felt by communities relate to more deeply entrenched social, economic, cultural and political realities they faced. The Marikana Commission of Inquiry identified the need to gain a deeper understanding of the underlying causes and lived realities of mine workers and communities which contributed to, and provided the broader context to, Marikana. However, it was recognised that these challenges were not limited to Lonmin's Marikana Mine, but were illustrative of systemic issues in the industry. Ultimately, the Marikana Commission did not address these underlying challenges.



The SAHRC has a long history of investigating and reporting on the observance of human rights in mining-related activities. At a systemic level, the Commission's 2014 National Hearing on Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa, together with its involvement in the Marikana Commission of Inquiry, illustrated the complexity of these issues and prompted the need for a national inquiry.

This Report is a culmination of a lengthy process undertaken by the SAHRC and aims to present a broad and impartial assessment of the current challenges experienced by multiple stakeholders in the mining industry. While this Report interrogates the capacity of South Africa's existing regulatory framework to promote and protect the rights and interests of mining-affected communities, the Commission is also cognisant of the need for greater awareness of the inherent challenges, gaps and opportunities that exist within South Africa's mining industry.

The SAHRC stresses the importance of using this Report to drive real change in the industry through critical reflection, and subsequent dedication to the development and implementation of solutions capable of promoting and ensuring sustainable transformation and development on the ground.

The Report is divided into several parts:

Section 1 of the Report briefly sets out the SAHRC's mandate for conducting the hearing and the subsequent development of the Report and its recommendations. It also covers the methodology and approach to the hearing process and the composition of the Hearing Panel.

Sections 2, 3, 4 and 5 explore the key socio-economic challenges experienced by mining-affected communities, seen through the lens of land, housing, water and the environment.

Sections 6, 7 and 8 examine key issues concerning Social and Labour Plans; explore challenges related to meaningful participation, consultation, consent and access to information in mining-affected communities; and further examine issues regarding compliance, monitoring and enforcement of legislative and regulatory obligations.

The Commission is hopeful that the Report's findings, directives and recommendations will assist in facilitating a coordinated approach to addressing the underlying issues and challenges experienced by South Africa's mining-affected communities.

Mandate of the SAHRC

The Commission is an independent national human rights institution established in terms of Section 181 of the Constitution of the Republic of South Africa, 1996 (Constitution) to support constitutional democracy. In terms of section 184(1) of the Constitution, the Commission is specifically mandated to:

- a. Promote respect for human rights and a culture of human rights;
- b. Promote the protection, development and attainment of human rights; and
- c. Monitor and assess the observance of human rights in the Republic.

In terms of the Constitution and the South African Human Rights Commission Act, 40 of 2013 (SAHRC Act), the Commission is empowered to, *inter alia*, carry out research; investigate and report on the observance of human rights in the country; to educate on human rights related matters; monitor implementation of and compliance with international and regional conventions; and review laws and policies relating to human rights and may make recommendations.²

In terms of the SAHRC Act, the Commission is competent and obliged to –

“make recommendations to organs of state at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights within the framework of the law and the Constitution.”³

The Commission may further –

“make known to any person, the head of the organisation or institution... any finding, point of view or recommendation in respect of a matter investigated by it.”⁴

In light of all available evidence, the Commission has drafted directives and recommendations in line with its mandate to promote the protection, development and attainment of human rights for all persons.

Methodology and hearing process

Due to the broad challenges faced by mining-affected communities, and in the interest of transparency, the SAHRC determined that a National Hearing was the appropriate mechanism to investigate the prevailing systemic human rights challenges. The Hearing was not intended to address individual complaints. Instead, it was intended to obtain a deeper understanding of the systemic challenges, with a view to making recommendations as a form of redress.

To better understand the challenges experienced by mining-affected communities across South Africa, the Commission conducted site visits and engaged with communities in three areas: Sekhukhune, Limpopo; Highveld, Mpumalanga; and Somkhele, KwaZulu-Natal. The communities were identified by considering a number of factors, including the nature, amount and duration of mining activity in a particular area as well as complaints regarding the mining operations and reports of unrest.

The consultations were supplemented by research and analyses of the key socio-economic issues in mining-affected communities.

² Section 13.

³ Section 13(1)(a)(i).

⁴ Section 18(3).



Identified stakeholders were invited to provide information and responses to specific questions, together with copies of documents where relevant. Selected stakeholders were invited to appear before the Hearing Panel to provide summarised presentations and answer questions under oath or affirmation.

The Hearing was held at the Commission's Head Office in Johannesburg, and was open to the public and the media, on 13 – 14 September 2016; 26, 28 September 2016; and 3 November 2016.

All submissions, including the record of proceedings and copies of documentation received during the Hearing process will be publicly available, with the exception of certain documents that contain legitimate confidential information, which will be published in a redacted form.

The Hearing was convened in terms of sections 13(1)(a)(i), 13(3)(a), and 15(1) of the SAHRC Act, read with Chapter 7 of the SAHRC Complaints Handling Procedures. The process was designed to incorporate participation and the perspectives from local stakeholders on the ground (including mining-affected communities, municipalities, mining companies and civil society organisations) as well as from those at a national level (including government departments and industry bodies).

This Report constitutes the findings, directives and recommendations of the Commission.

Composition of the Hearing Panel

The Hearing Panel constituted the following members:

- Advocate Mohamed Shafie Ameerma, Chair of the Panel and SAHRC Commissioner (with focus on Access to Justice and Housing);
- Ms Lindiwe Mokate, former SAHRC Commissioner;
- Ms Janet Love, National Director, Legal Resources Centre and former SAHRC Commissioner; and
- Professor Tracy-Lynn Humby, Professor, School of Law, University of the Witwatersrand.

Land



Mining of necessity occurs on land, irrespective of whether it takes the form of surface or underground operations. The phases of exploration, mine development, mine operation, and rehabilitation and closure, all significantly affect economic, social and environmental land relations. Mining is not a temporary use of land: its effects are long-term and are often environmentally detrimental.

Typically, where local communities occupy or use land that is subject to mining rights, mining companies are required to relocate families and facilitate the exhumation and internment of graves. While relocation can cause severe emotional hardship, it can also result in the breakdown of community structures, particularly when some community members are moved and others are not.

Many communities lose access to land vital for their livelihoods, including land used for grazing and farming purposes. Where land is key to a community's sustainable livelihood and food security, its importance goes beyond its economic or productive value and reflects a more deeply entrenched cultural affiliation that grounds social relations in particular localities. Therefore, many communities do not view land as a commodity, but rather as a heritage, a means of basic survival and the key to independence. When communities are displaced from communal land, not only are their individual rights impacted, but their collective interests may also be affected through the rupture of the community's social cohesion.

This section will be divided into four main areas of concern identified by the Commission, namely land use management, land relocation processes, mining in sensitive and protected areas, and the closure of mines and concomitant rehabilitation of land.



Land use management

In South Africa, development in relation to the use of land takes the form of strategic planning alongside more detailed land use management procedures. According to the South African Local Government Association (SALGA), all land use and development, including mining, takes place on land that forms part of municipalities' jurisdiction.⁵ In terms of the Local Government: Municipal Systems Act, 32 of 2000, municipalities are required to develop Integrated Development Plans (IDPs). These plans outline the local development priorities and strategies, and are the primary tools for driving social and economic development of local communities.

Closely linked to this, SPLUMA was enacted to regulate land development and sustainable and efficient land use management. This is done through the development of Spatial Development Frameworks (SDFs) by national, provincial and local spheres of government. In line with SPLUMA, municipalities create a single land use scheme for the area under its jurisdiction. As part of this scheme, a municipality determines land use zoning and regulations as well as environmental management programmes. Ultimately, the SDF aims to promote economic growth; social inclusion; efficient land development; and minimal impact on public health, the environment and natural resources, amongst other things.

Although SPLUMA requires that the SDFs of all spheres of government be aligned, the municipality is primarily responsible for determining land use and land developments taking place within its area of jurisdiction. As part of this scheme, the municipality determines land use zoning and regulations, which may incorporate environmental components.

During the Hearing, submissions by SALGA revealed that cooperation between mining companies and local government is not always adequate.⁶ Although consultation is not legally required in terms of the Mineral and Petroleum Resources Development Act, 28 of 2002 (MPRDA), the Commission notes with concern that municipalities are frequently not consulted. Municipalities are sometimes unaware of the fact that mining licences have been granted within their area of jurisdiction. Failure to consult a municipality in the application for, and granting of, a mining licence impairs the local government's ability to adequately plan and provide for integrated and sustainable land use systems. Furthermore, it directly violates the constitutional and legislative division of the roles and responsibilities of different spheres of government, as confirmed by the Constitutional Court in the *Maccsand* judgment.

⁵ SALGA *Supplementary Written Submission* (26 September 2016) 11. Section 152(1)(c) and (d) lists socio-economic development and the promotion of a safe and healthy environment as key objectives of local government, whereas municipalities must "participate in national and provincial development programmes" in terms of section 153(b). Furthermore, in terms of section 156(1)(a), municipalities possess executive authority over matters listed in Schedule 4 Part B of the Constitution, which includes municipal planning.

⁶ Based on research undertaken by SALGA, the overall state of partnerships between local government and mining companies improved significantly between 2005 and 2010. In addition to this, the submissions and the overall experience working in mining-affected communities has also reflected that in some instances, there is close collaboration on issues, including land use management, IDPs, SLPs and environmental management, where in other cases there is a complete lack of cooperation.

Maccsand (Pty) Ltd v City of Cape Town and Others⁷

In this case, the Constitutional Court dealt with the concurrence of the functions of local government in relation to municipal planning and land use management, with those of national government in regulating and granting authorisations for mining. Although both functions essentially overlap in practice due to the fact that mining takes place on land which falls within the jurisdictional area of a municipality, the Court emphasised that both spheres of government have been allocated distinct powers and functions in terms of the Constitution. Each sphere is thus constitutionally obliged to exercise its powers and functions in a manner that does not encroach on the geographical, functional or institutional integrity of the other.⁸

The application of one function by local government, such as land zoning, may inevitably impact on the exercise of the other, namely the ability of national government to grant an authorisation for the conducting of mining-related activities. Nevertheless, the Court found that the overlap does not constitute an impermissible intrusion by one sphere into the area of another.⁹ The Court reasoned that spheres of government do not operate in isolation from one another¹⁰ and that the relevant laws and functions forming the subject matter of the application serve different objects.¹¹ Therefore, the refusal by a municipality to permit the rezoning of land for the purpose of mining does not mean that the decision taken by the DMR has been vetoed. Rather, the municipality in question exercised its constitutional and legislative power. Where such an overlap occurs, the Court cited the constitutional obligation of different spheres of government to “co-operate with one another in mutual trust and good faith,”¹² failing which the decision of the municipality may be challenged on review in line with the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).¹³

Although the *Maccsand* judgment was made in terms of legislation that is no longer in force (namely the Land Use Planning Ordinance, 15 of 1985), the principles set out in relation to the exercise of distinct functions between spheres of government are relevant in considering mining authorisations within the context of SPLUMA.

The Commission also notes the disjuncture between the conclusion of lease agreements and the commencement of mining operations. Worryingly, mining operations frequently commence prior to a formal land use agreement being concluded. Numerous examples of this practice were highlighted during the Hearing, where operations have been conducted for years – some dating back to 2004 – even though draft agreements are still pending for consideration by the DRDLR. This has resulted in discrepant practices between industry stakeholders in that some mining companies have withheld the payment of surface lease rental, while others have paid amounts agreed upon into community trust funds pending final approval. Furthermore, the practice of commencing mining operations before concluding a formal land use agreement significantly reduces the bargaining power of affected communities and land owners.

⁷ 2012 (4) SA 181 (CC).

⁸ Para 37, with reference to section 41(1)(g) of the Constitution.

⁹ Para 43.

¹⁰ Para 43.

¹¹ Para 46.

¹² Para 47.

¹³ Para 48.



The Commission accordingly finds that a considerable gap exists in the mining licence application process, where mining companies, the DMR and the DRDLR appear to systematically disregard key pieces of legislation, particularly the Municipal Systems Act and SPLUMA. The Commission further finds that there is an immediate need for municipalities to be consulted throughout the licence application process to enable them to provide for integrated and sustainable land use systems.

A further concern consistently raised throughout the proceedings was the apparent land use bias toward mining-related activity as a form of investment and development, at the expense of other land use functions such as agriculture and tourism. Allegations of the mining industry asserting dominance over land use management considerations are not uncommon.

The feasibility of agricultural activities within the vicinity of mining operations has been continuously debated amongst stakeholders in the light of the sustainability principle enshrined in SPLUMA and the Subdivision of Agricultural Land Act, 70 of 1970, which requires that special consideration be given to the “protection of prime and unique agricultural land”.¹⁴ A report on environmental governance in the mining sector, compiled by DPME, the Department of Environmental Affairs (DEA) and DMR, notes:¹⁵

“According to the Bureau for Food and Agricultural Policy (2012), 46.4% of South Africa’s high potential arable soil is found in Mpumalanga. Given the current rate of coal mining in Mpumalanga, this gives rise to concerns around food security, food production and food prices in the long run. This is exacerbated by the fact that Mpumalanga has historically been the ‘bread basket’ of South Africa.”

Besides its potentially far-reaching implications for agricultural production and food security, mining additionally impedes economic diversification. The DPME explains:¹⁶

“Mining towns have traditionally over relied on a single economic sector i.e. mining. The nature of the mining sector is associated with boom and bust cycles. During economic downturns, single sector reliant economies cannot absorb the shocks and are therefore not resilient. There is a need to diversify the local economies and regional economies in both mining towns and labour sending areas, to develop other economic opportunities during and beyond the life of mines.”

¹⁴ Section 7(b)(ii) of the SPLUMA.

¹⁵ DPME, DEA & DMR *Report on the Implementation Evaluation of the Effectiveness of Environmental Governance in the Mining Sector* (2015) 26.

¹⁶ DPME *Draft Submission* (13 August 2016) 28.

The National Development Plan (NDP) emphasises the need to promote an integrated rural economy. While mining forms an important element of the NDP in relation to economic growth and the promotion of large-scale job creation, the NDP simultaneously requires effective land reform and the development of industries such as agro-processing, fisheries, tourism and small enterprises in rural areas.

The Commission accordingly finds that improved inter-governmental cooperation is necessary to ensure that due consideration is given to the risk posed to local, regional and national food security by potential mining activities. The Commission further finds that greater consideration must be given to determining local government investment and development priorities, and that broad-based and diversified local economies should be encouraged.

Relocation and compensation

Proposed mining-related activities often take place on or in close proximity to land occupied by communities, necessitating a process of relocation and the payment of appropriate compensation. Therefore, mining companies are obliged to engage with communities on potential relocations in order to understand and address the concerns and priorities of affected community members. Rather than alleviating tensions, consultation around relocation frequently gives rise to contention amongst stakeholders: including where such relocations result in a loss of agricultural or grazing land; where communities are split between those directly affected and those not; and where compensation agreements are negotiated on less-than-equal terms. Despite multiple ongoing disputes concerning relocation and compensation, the Commission is disappointed by the lack of transformed practices by some role players in the industry. Although good practices can be identified, much work must still be done from a regulatory perspective before industry practices reflect sustainable development and community empowerment principles.

In assessing the submissions received, it appears that relocation processes are relatively standard across mining companies. Mines frequently build new housing structures, which are often of improved quality, on alternative land. Moreover, where a number of extended family members (for example, parents, children and grandchildren) are residing in one structure, some companies build additional houses for each individual family. Certain mining companies have also implemented processes to facilitate security of tenure by transferring the ownership of properties to individual families. Security of tenure in the form of ownership contributes to the realisation of the right to housing, it facilitates economic empowerment and it protects beneficiaries from future deprivation of land rights.



However, security of tenure is not limited to private ownership but also includes customary law-, informal- and hybrid arrangements. Security of tenure can broadly be understood as a relationship to land that enables a person to live in one's home in security, peace and dignity.¹⁷ Ultimately, security of tenure is intended to guard against forced eviction, harassment and other threats. While the Commission supports an approach that seeks to transfer formal ownership to families, the mining sector must ensure that relocation practices adequately protect the rights and interests of affected persons. The fact that communities and individuals may not formally own land or houses prior to relocation does not mean they are deprived of other forms of rights and entitlements. Mining companies must be alive to this reality when entering into initial consultations and negotiations. Mining companies must ensure that they account for the loss of other land resources, such as communal grazing land, and communal farming land, as well as spaces where collection of resources (such as fuel, traditional medicine resources etc.) have been traditionally undertaken. Communally held land must also be included in any negotiations around land relocation.

Compensation

The Commission notes with concern the challenges in calculating compensation for relocation and loss of land rights. In addition, non-compliance with compensation agreements, and a failure to monitor such compliance, are problematic.

Section 25(1) of the Constitution stipulates that “no one may be deprived of property except in terms of a law of general application, and no one may permit arbitrary deprivation of property”. The granting of a mining authorisation over land used or occupied essentially amounts to a deprivation of property rights in that the ability of the owner or lawful occupier to exercise their rights over the land will be substantially limited.

Section 54 of the MPRDA makes provision for the payment of compensation in situations where the owner or lawful occupier “has suffered or is likely to suffer loss or damage” as a result of the mining-related activity. The MPRDA requires the relevant parties to “endeavour to reach an agreement” on the payment of compensation, failing which, compensation must be determined by arbitration or a court of law. Further to this, section 2(3) of IPILRA provides for the payment of “appropriate compensation” to any person deprived of a right to land. The law does not require the parties to have reached an agreement on the nature and amount of compensation prior to the granting of a mining licence or to the commencement of operations.

¹⁷ United Nations Human Rights Council, Resolution A/HRC/25/54 *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Raquel Rolnik* (30 December 2013) para 5.

The Supreme Court of Appeal explained the importance and calculation of compensation for dispossession of land in *Haakdoornbult Boerdery CC and Others v Mphela and Others*:¹⁸

*The purpose of giving fair compensation is to put the dispossessed, insofar as money can do it, in the same position as if the land had not been taken. Fair compensation is not always the same as the market value of the property taken; it is but one of the items which must be taken into account when determining what would be fair compensation. Because of important structural and politico-cultural reasons indigenous people suffer disproportionately when displaced and Western concepts of expropriation and compensation are not always suitable when dealing with community held tribal land. A wider range of socially relevant factors should consequently be taken into account, such as resettlement costs and, in appropriate circumstances, solace for emotional distress.*¹⁹

The International Finance Corporation (IFC), in Performance Standard 5,²⁰ notes that involuntary resettlement may result in long-term hardship and impoverishment through both physical and economic displacement of communities, and through the loss of access to land, assets, and opportunities for sustainable livelihoods. In this regard, it recognises the State as a key role player during negotiations with affected communities, particularly in relation to compensation. Performance Standard 5 further recognises that the calculation of compensation is difficult and complex. However, it specifically notes that such compensation should include market value of the land plus “transaction costs relating to restoring the assets”. These assets include access to land (including land subject to communal use) and seasonal natural resources. The ability of affected communities to restore standards of living or to access sustainable opportunities must be at the centre of the calculation.

Performance Standard 5 emphasises that preference should be given to the provision of replacement land that is at least equivalent to the current land. Where similar land cannot be provided, companies are encouraged to provide replacement opportunities such as employment or support in establishing businesses. It also recognises that the payment of mere compensation is insufficient for the “restoration or improvement of livelihoods and social welfare” and that cash compensation is thus usually not effective. Once-off payments and new housing structures will likewise not provide sustainable opportunities to families.

Access to assets such as land, social networks and natural resources are essential elements to consider during the calculation process. Importantly, Performance Standard 5 also highlights the need to include affected communities in resettlement planning. Therefore, mining companies should not only engage with affected communities with a view to negotiating compensation, but should also consider proposed areas of resettlement, access to grazing land, and timing in determining compensation. Loss of physical structures, current and potential use of land, as well as commodities such as crops or livestock, should thus be taken into account when calculating compensation.

¹⁸ 2008 (7) BCLR 704 (SCA).

¹⁹ Ibid para 48.

²⁰ IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement (1 January 2012).



Moreover, an essential feature missing in the current calculation of compensation is the fact that land is not merely a commodity that can be quantified in economic terms. Communities have often lived in an area for decades, if not centuries. The land, its history, and the community composition form essential elements of a social structure that has become deeply entrenched into the lives and livelihoods of many. However, there is currently no regulatory guidance provided for the calculation and payment of compensation. This, in practice, has led to multiple inconsistencies across the industry. Whereas some mining companies approach the calculation of compensation from the perspective of the market value of the physical housing structure, other companies include real or future loss of income for small businesses or for subsistence crops or livestock. In the latter case, the calculation of anticipated future loss of income also varies.

During the Hearing process, the Commission received submissions and complaints regarding threats and intimidation that are often carried out against community members who are unwilling to negotiate or to settle for proposed compensation agreements. In some instances, communities have indicated that threats are made by other community members who are in support of mining. However, in other instances, allegations of harassment, threats and intimidation were carried out by mining authorities and the police.²¹

When the Commission questioned the DRDLR about the calculation of compensation for relocation and loss of rights to land by communities, the Department noted that compensation is based on a “valuation report and subsequent negotiations”. However, the DRDLR has not proactively sought to consider means through which rights and opportunities for development may be protected, despite the severe challenges facing affected (predominantly rural) communities seeking security of tenure, opportunities for empowerment and self-sufficiency.

During the Commission’s community consultations, numerous community members raised allegations that compensation agreements had not been complied with. The DRDLR only monitors the payment of surface lease rental to community entities, it does not assess the adequacy of compensation for relocation nor does it monitor compliance with agreements. Whilst the majority of mining companies involved in the Hearing process submitted that relocation and compensation agreements are physically signed by each individual recipient, the lack of formal guidelines and mechanisms for transparency or oversight renders the process vulnerable to abuse.

The Commission notes serious deficiencies in cases where compensation is granted for the market value of the physical structure alone. First, the rights which are impacted by mining-related activities are not limited to the rights over a physical structure erected on the land. Instead, such rights extend to the broader use of the land, including for agriculture, grazing or other communal purposes such as social activities. Second, the argument put forward that communal land does not give rise to individual property rights is substantially flawed. Western concepts of land rights cannot be applied equally to customary law practices and greater effort must be made to understand the meaning of communal land rights within individual communities.

²¹ ActionAid *Precious Metals II: A Systemic Inequality* (2016) 30.

Case studies from submissions

Case Study 1: Anglo Platinum – Twickenham Platinum Mine

Anglo Platinum (AP) included reimbursement for the loss of crops in its compensation strategy. The amount of compensation was determined according to an independent land valuation assessment as well as a methodology jointly agreed upon with affected households. AP's *Resettlement and Integrated Development Action Plan* specifically outlined the fact that arable land was a "communal resource", which "implied that the land was 'owed' to the Traditional Authority or its representative. However, the value of land improvements by means of cultivation was 'owed' to the affected individual land user".

In this case, AP submitted that most farmers and land owners opted for cash compensation, as it was "deemed to be a more favourable option for them".

As part of the relocation agreements undertaken by AP, an amount of R20 million was donated to the Dishaba Kopano Trust for the benefit of various communities. However, the Trust account provides for multiple communities, and it was submitted that the donation for Twickenham communities was paid to the Traditional Trust Accounts or "such other bank accounts" notified in writing by the communities.

The problem that arises is that Twickenham itself has raised the challenge of a fractured community that lacks an agreed upon representative forum, yet a proposal for the payment of the funds into a different account was accepted on the basis of written notification by "the community". In addition, there is an admitted Chieftancy dispute within the community. Whether the Tribal Authorities have accounted to communities for the utilisation of trust funds is not clear, but it would appear from the Commission's general observation that this is unlikely to be the case.

Case Study 2: Marula – Marula Platinum (Pty) Ltd

Marula did not conduct any relocations, but provided compensation for the loss of crops. This compensation was determined by a land valuator and overseen by the DRDLR. However, the land valuation report is classified as "confidential". Compensation was determined along the following lines:

- For the years September 2001 – August 2002 and September 2002 – August 2003: Agricultural co-operative prices for maize and sorghum (whichever was the greater), with input costs (seeds and ploughing) deducted. This was further subject to minimum compensation amounts of R300 and R350 per crop field for the respective periods.
- The fluctuation of the price resulted in fluctuating compensation paid, and subsequently led to dissatisfaction.
- From September 2004, the payments were based on the average of the compensation amounts for the previous periods, subject to minimum compensation amount of R370 per crop field.
- It was further agreed that this amount would escalate annually by 5%.

The agreement in relation to the calculation of compensation was signed by communities and Traditional Councils in 2004. Thirteen years later, the DRDLR has not yet signed the agreement. Compensation for the surface lease agreement was divided equally amongst all affected communities. However, those communities located within a closer proximity to the mine have now requested a re-evaluation of the compensation agreement, pointing to the disproportionate impact felt by them as a result of the mining operations.



Case Study 3: Glencore Coal South Africa

According to Glencore, its policy ensures that the livelihoods of persons affected by the project are restored to the levels which prevailed before inception of the project, but typically aims to improve socio-economic welfare in line with IFC Performance Standard 5.

Compensation is provided for physical assets. In addition, where livelihoods are derived from land, land-based resettlement options of similar production potential are made available, where this is feasible and if chosen by the affected party.

Market value of the physical structure and crop/livestock is used. Where compensation is paid for livestock, the community is additionally allowed to keep their existing livestock.

Case Study 4 - Tendele Coal Mine, Somkhele

Tendele Coal does not provide compensation for land. Compensation includes the cost of relocation, replacement of the physical structure, costs of crops, moving costs, upset allowance, costs of traditional practices, and cost of amenities and services. The contract for relocation outlines that families have the right to nominate a person to be interviewed for employment, but that employment is not guaranteed. Families are also given the option of receiving cash compensation rather than replacement housing structures.

One instance arose where a household was deemed to be relocated for “humanitarian reasons”. In this case, the household was located outside of the mine’s fence lines, but at the main gate of the mine. Due to road traffic concerns, relocation was undertaken. Despite the submission indicating that the household “needed to be relocated”, this relocation was considered to be a humanitarian act and thus regarded as a deviation from normal relocation policy. The individual was not offered employment as he was not deemed to be a “directly affected community” member.

Other observations include the fact that the surface lease agreements, as well as relocation and compensation agreements are sometimes recorded in English, although some mining companies have ensured that all agreements are recorded in English as well as other local languages. Some communities have raised allegations that agreements are not reduced to writing, or that affected parties are not provided with physical copies of such agreements. However, the Commission notes that many misunderstandings arise as a result of inadequate consultation practices. Relocations, together with compensation, are generally not afforded to all community members, and are generally only to those who are physically relocated. On the other hand, compensation for surface rental agreements is generally paid into community trust funds, which are often riddled with complexities and a lack of transparency. Such complexities include the acknowledgment that there must be regular and adequate communication with the beneficiaries, corporate governance, and the capacitation of both the board of trustees and beneficiaries.

The Commission finds that mining companies who restrict compensation to the physical structure of the land are offering below what is considered to be appropriate in terms of global industry standards and are causing systemic economic displacement and impoverishment within mining-affected communities. The Commission further finds that the DRDLR, the Department responsible for promoting equitable and sustainable rural livelihood and development programmes,²² has not proactively considered means through which rights and opportunities for development may be protected.

Moreover, the Commission finds that there are no formal guidelines or oversight provided for the calculation of compensation and the finalisation of compensation agreements. This is problematic as relocations are often carried out before compensation agreements are reached on surface land leases, livestock, crops or housing. The Commission further finds that the DRDLR has failed to monitor compliance with, or enforcement of, lease and compensation agreements and that a lack of transparency and access to information allows the potential for abuse of power and non-compliance.

Gravesite relocation practice

The Commission is concerned over allegations that the exhumation of graves is not carried out respectfully. Allegations include cases where ancestral remains and headstones are damaged, remains are reburied and left unmarked, or the remains of different gravesites are mixed and buried together, thereby disrespecting the memory of the deceased.

The Commission has previously reported that grave relocations are one of the most sensitive and potentially contentious issues arising from the relocation process in mining-affected communities.²³ Ancestral graves have significant cultural and spiritual importance and their exhumation and re-internment should not be reduced to a consideration of the physical process of relocation. The relocation of graves can be a painful experience for families and relocation must be conducted with respect for communities' cultural beliefs. There are multiple challenges in the process and complainants frequently raise allegations that communities are not adequately consulted before and during the relocation process; that they are not given sufficient notice to make the necessary preparations; or that the manner in which exhumations and re-internments are conducted violates traditional requirements.

In carrying out grave relocation processes, mining companies must comply with the National Heritage Resources Act, 25 of 1999 as well as other relevant provincial legislation governed by the South African Heritage Resource Agency (SAHRA), the Department of Health and local government. General practice observed is that mining companies provide affected families with a "wake fee", which is designed to cover the actual cost of exhumation, transportation, temporary storage, re-internment of the remains, as well as any associated cost for conducting cultural practices. Some mining companies submitted that a representative from the mine is required to oversee the process, together with the relevant organ of State's officials. Despite the recognised emotional hardship caused to relatives and communities, no additional compensation is provided,

²² Department of Rural Development and Land Reform *Annual Report 2015/2016* (2016) <<http://www.ruraldevelopment.gov.za/publications/annual-report/file/4718>>.

²³ SAHRC *Report on Mining-Related Observations and Recommendations: Anglo Platinum, Affected Communities and Other Stakeholders in and around the PPL Mine, Limpopo* (2008) 45.



and communities are left with the burden of carrying out such processes themselves. In some instances, mining companies “may” provide assistance where explicitly requested to do so.

The Commission finds that there is a very real potential for the infringement of cultural and other human rights as a result of inappropriate grave relocation practices that are carried out by mining companies. Many mining companies appear to overlook or undervalue the sanctity and importance of grave relocations, which necessitates an evaluation of current processes. The Commission further finds that, despite strict regulatory requirements, unlawful grave relocations have been, and continue to be, conducted by a number of mining companies.

Mining in sensitive and protected areas

The Commission is concerned that insufficient legal protection is granted to strategic or sensitive environmental areas, despite the existence of various legislative instruments and guidelines.

Mining or other activities may be restricted or prohibited in certain areas in line with section 24(2A) of the National Environmental Management Act, 10 of 1998 (NEMA) and section 49 of the MPRDA. Chapter 3 of the National Water Act, 36 of 1998 (NWA) enables the Minister of Water Affairs to classify water resources and to identify Strategic Water Source Areas (SWSAs). In addition, mining licences cannot be granted over land being used for public or government purposes or reserved in terms of any other law – including land protected against mining activities as outlined in the National Environmental Management: Protected Areas Act, 57 of 2003 (NEMPAA). Section 48(1) of NEMPAA prohibits mining-related activities in:

- a. a special nature reserve, national park or nature reserve;
- b. a protected environment unless permission is obtained from the Minister of Environmental Affairs and the Minister of Mineral Resources; or
- c. a protected area referred to in section 9(b), (c) or (d) of NEMPAA.

In the matter of *Mpumalanga Tourism & Parks Agency v Barberton Mines (Pty) Ltd*,²⁴ the Supreme Court of Appeal contextualised the MPRDA within the environmental rights enshrined in section 24 of the Constitution, and further noted that the NEMPAA “binds all organs of state... and trumps other legislation in the event of a conflict concerning the management or development of protected areas”.²⁵ The DEA has, however, conceded that section 48 of NEMPAA is not explicit about the requirement of a public participation process or public notification around decisions taken to grant mining licences over protected environments under section 48(1)(b). In addition, no internal appeal process is available to contest the decision to grant a mining licence, and interested and affected parties must take the matter on review before a court of law.²⁶

²⁴ 2017 (5) SA 62 (SCA).

²⁵ Paras 11-12.

²⁶ See further Centre for Environmental Rights *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* (2016) 29.

The National Protected Areas Expansion Strategy, which provides for the declaration and management of protected and sensitive areas, is primarily aimed at promoting ecological sustainability and increased resilience to climate change. However, due to some areas holding a potential for mining, the list is currently being revised by the DEA, in consultation with DMR and DWS. A Mining and Biodiversity Guideline was developed by the DEA, in collaboration with the DMR, CoM, South African Mining and Biodiversity Forum and the South African National Biodiversity Institute (SANBI).²⁷ The Guideline outlines four categories of biodiversity priority areas, as well as their importance and risk in relation to mining activities.

SWSAs supply a disproportionately high amount of the country's mean annual run off in relation to their surface area – they make up 8% of the land area but provide for around 50% of water across South Africa, Lesotho and Swaziland. SWSAs have been identified for the whole country, and, as explained by DWS “form the foundational ecological infrastructure”.²⁸ They are therefore considered to be strategic national assets that are vital for water security and must be acknowledged as such across all sectors. SWSAs do not enjoy sufficient legal protection, even though such land must be managed in a manner that does not significantly undermine its role as a key water source. The DWS is currently working with the Centre for Environmental Rights (CER) to secure formal legal protection for SWSAs through the conducting of a legal review and mapping exercise. A comprehensive plan to ensure optimal legal protection for SWSAs will be developed and introduced in phases by different departments.

Despite some legislative or policy recognition, mining rights continue to be granted in protected areas. For example, although the CoM committed all of its members to the implementation of the Mining and Biodiversity Guideline, prospecting and mining rights applications are still being pursued in sensitive areas.²⁹ In a further example, Barberton Mines was granted prospecting rights within the Barberton Nature Reserve – an area in Mpumalanga Province that has been placed on the National List of Terrestrial Ecosystems that are threatened and in need of protection. Following the Supreme Court of Appeal's judgment in *Mpumalanga Tourism & Parks Agency v Barberton Mines (Pty) Ltd*, the licence was revoked due to the legislative prohibition of mining in a nature reserve in terms of section 48 of the NEMPAA.

In 2017, Atha-Africa Ventures was granted a licence to conduct coal mining in the Mabola region of Mpumalanga – including within the Mabola Protected Environment, which falls within the Ekgangala-Drakensberg SWSA and has been declared a legally protected area in line with the NEMPAA. The decision led to fierce criticism, including allegations that the decision was irregular, did not give sufficient consideration to the negative environmental impacts of underground coal mining, and was taken without proper public consultation. On 9 May 2017, the Portfolio Committee on Environmental Affairs questioned the DEA over the decision to grant a licence in the area – noting the matter was of public interest with litigation pending. The decision was explained in the light of the escalating demand for minerals, with concessions made over the fact that areas such as the Mabola region have multiple conflicting priorities, including high

²⁷ DEA, DMR, CoM, South African Mining and Biodiversity Forum & South African National Biodiversity Institute *Mining and Biodiversity Guideline: Mainstreaming Biodiversity into the Mining Sector* (2013).

²⁸ DWS National Water Resource Strategy 2 ed (2013) 42.

²⁹ *Mpumalanga Tourism & Parks Agency v Barberton Mines (Pty) Ltd* 2017 (5) SA 62 (SCA); Centre for Environmental Rights *Zero Hour: Poor Governance of Mining and the Violation of Environmental Rights in Mpumalanga* (2016) 29; WWF *Mining and Biodiversity: Evaluating EAP Standards in the Sector* (2014) 10.



water yields, high cultural value, and rich mineral deposits. The Deputy Director of Biodiversity and Conversation in the DEA, Mr Shoni Munzhedzi stated that “[m]ining is being increasingly undertaken in remote and biodiversity rich areas that were not previously explored”. This is despite the fact that the DEA has emphasised the need to extend protected areas in the country. The Chairperson of the Committee, Mr Philemon Mapulane, stated:

“But if you allowed mining at Mabola, it means it can be allowed elsewhere. Mining companies always look for mining deposits. A company may find deposits at the Kruger National Park. What will we do? We are setting a dangerous precedent. We may find out that we have shot ourselves in the foot on this matter. It may not be the Kruger National Park, there could be other protected environments where there could be an application for mining. How will the department deal with that when it has already set a precedent?”³⁰

The Commission finds that there is an immediate need to give effect to the internationally recognised precautionary principle in matters dealing with environmental protection and strongly cautions against prioritising the immediate economic benefit of mining activities over the maintenance and protection of the environment, particularly in those areas that are crucial for sustaining ecological biodiversity, natural heritage, cultural significance and life. Furthermore, the Commission is particularly concerned by the DMR’s inability to provide information about the monitoring of mining activities in protected areas.

The Commission finds that due to the potentially severe impact of mining-related activities on sensitive and protected areas, mining licences should be granted only in exceptional circumstances, under restricted conditions, and following public consultation. The Commission further finds that meaningful consultation should be legislatively mandated under these circumstances, where “interested and affected parties” span beyond surrounding municipalities and communities and include the country as a whole.

³⁰ A Mputing “Why do you Allow Mining in Protected Areas – Thomas Hadebe” (9 May 2017) *Parliament* <<https://www.parliament.gov.za/news/why-do-you-allow-mining-protected-areas-thomas-hadebe>>.

Closure and rehabilitation

The Commission notes that various challenges persist regarding post-closure land use, and the absence of legislative provision for concurrent rehabilitation and in respect of derelict and ownerless mines and closure costing.

The EMPs outlining post-closure land use are often vague or inappropriate. Although it should be clear from the commencement of mining operations the condition land will be restored to, some companies have merely identified objectives such as “a final land use that is optimised from an economic, social and environmental perspective”. In other cases, unrealistic promises are made that land will be restored to its pre-mining state. On the other hand, some mining companies have identified post-closure land use early on, but these are sometimes of significantly depreciated quality, such as that land will be restored to a quality suitable for grazing purposes. The land use option identified by mines is sometimes the cheapest option (for example, grazing or wilderness options) whereas others propose residential development for low cost or social housing, particularly where the quality of land is significantly degraded.

In order to obtain a mining licence, mining companies must make financial provision for rehabilitation or management of negative environmental impacts, and annually assess the adequacy of financial provisions. The MPRDA empowers the Minister to appoint an independent assessor if s/he deems it necessary. Submissions received during the National Hearing reflect that many mining companies do undertake concurrent rehabilitation. The failure to conduct concurrent rehabilitation activities may result in higher levels of degradation, longer-term impact, increased cost for remediation and rehabilitation, and arguably violate provisions of the NEMA.³¹ Partial closure is also not currently provided for in legislation, although some mines submitted that a partial closure provision in legislation could be a useful addition to the current framework.

In 2005, the DMR produced a Guideline Document for the Evaluation of the Quantum of Closure. Whereas some mining companies apply the Guideline rehabilitation costing, multiple concerns have been raised over its adequacy. First, these calculations do not factor in inflation, and second, they are viewed as too generic and unable to determine realistic financial liability. In practice, therefore, mining companies develop their own closure costing calculation models, resulting in multiple distinct approaches and no standardised approach for the assessment of appropriate liability. The fact that mining companies are responsible for determining their own model has, in some instances, meant that the required quantum for proper closure is grossly underestimated. For instance, funding models should be established to deal with historic pollution, to address rehabilitation beyond surface rehabilitation, and to cater for situations where there have been a succession of mining rights-holders. According to the DWS, the “no-project option” should be pursued where mines cannot prove that financial provision will be adequate for residual impact associated with issues such as mine water management including acid mine drainage (AMD), or where other long-term impacts cannot be sustainably addressed.³²

³¹ Sections 24N(7)(c) and (e) of the NEMA.

³² DWS *Submission to the SAHRC* (2016) 2.



The 2015 Financial Provisioning Regulations govern how mining rehabilitation costs should be calculated and funded, and will be coupled with annual review mechanisms and regular audits. According to the DEA, these Regulations aim to give effect to the “polluter pays” principle. However, industry role players have raised concerns regarding the ability of members to comply with the new requirements once the transitional period has lapsed. A lack of transparency around the calculations and/or financial provisions is similarly problematic.

In order to address financial liabilities in relation to closure and rehabilitation in areas where different mining operations are conducted in one area, the DMR advised that Regional Closure Strategies were developed in 2011 through the Council for Geosciences. However, these have not been implemented as a result of possible conflict with the OES. The DMR further submitted that it is in the process of conducting studies for a National Closure Strategy, which is planned to be completed within the next two years. Once finalised, mining companies will be required to factor recommendations contained in the National Closure Strategy into their rehabilitation calculations.³³

In the event of provisional winding up or liquidation of mining companies, the financial provision for rehabilitation is not recognised as a special claim against the company’s assets to be set aside prior to satisfying other creditors. This is hugely problematic as the burden of an un-rehabilitated environment is subsequently shifted to communities and the State. The Blyvooruitzicht Mine is an example: notwithstanding the undertaking provided for in the EMP that the environment would be left “geologically and geophysically stable and would not pose an economic, social or environmental liability to the local community and the state, now or in the future”,³⁴ the mine leaves behind an un-rehabilitated footprint that includes toxic and radioactive water, soil, infrastructure, tailing storage facilities without vegetation and dust fallout. The total liability in this case is estimated to be R890 million, whereas the rehabilitation fund stands at R44 million – an amount that is completely inadequate to address liabilities.³⁵ This case suggests that the DMR is not securing adequate financial provisioning to rehabilitate damage to the environment and water resources.

Abandoned or liquidated mines present significant challenges, and the DWS has expressed the need to consider retrospective liability for historic environmental damage. Whereas the DWS recognises the urgent need to address situations where water sources are at risk, it does not have an allocated budget for rehabilitation of abandoned mines. This gap is likely to be addressed by the newly developed Draft Mine Water Management Policy.³⁶ In addition, the DWS has proposed the establishment of a “superfund” similar to that in the United States, where mining companies deposit funds into a trust fund that is accessible to government for remedying water impacts.

³³ DMR *Response by Department of Mineral Resources to Questions dated 16 September 2016* (11 November 2016) para 4.26.4.

³⁴ The Federation for a Sustainable Environment *Presentation for the National Hearing on the Underlying Socio-economic Challenges of Mining-Affected Communities in South Africa* (2016) 6.

³⁵ *Ibid.*

³⁶ DWS *Draft Mine Water Management Policy Position in Government Gazette No 40965* of 07-07-2017 read with the correction notice in *Government Gazette No 40987* of 14-07-2017.

At the end of the life-cycle of a mine, a mining rights holder must submit an environmental risk report and apply for a closure certificate, which will only be issued once sustainability objectives have been met. The DMR has embarked on a rehabilitation and management programme for Derelict and Ownerless Mines (D&O Mines), in terms of which an estimated 6000 mines are undergoing continuous rehabilitation. In this regard, it has appointed the Council for Geoscience and the Council for Mineral Technology and Research (MINTEK) to carry out the rehabilitation. Over the past five years, fourteen asbestos mining sites have been rehabilitated, 110 dangerous mine holdings closed, and over 4000 D&O Mines visited and ranked according to the D&O database.

The Commission finds that it is unacceptable for mining companies to not provide detailed and sufficient information to enable communities and local governments to clearly understand how land can be used post-closure. The Commission further finds that the DMR has not taken adequate steps to secure financial provision for rehabilitating damage to the environment and water resources and there is an immediate need for all EIAs and EMPs to clearly detail land quality and potential post-closure land use. Licences should not be granted where long-term, sustainable land use cannot be guaranteed.

The Commission finds that there is an immediate need for legislative provisioning for standardised and realistic closure costing, concurrent rehabilitation, partial closure as well as the establishment of a trust account to cater for rehabilitation-related liability.

DIRECTIVES AND RECOMMENDATIONS

Land use management

- For all mining licence applications, including for prospecting and extraction, that have impacted on land that the DRDLR holds on behalf of communities, the DRDLR is directed to report on the steps it has taken to:
 - a. Identify prospective affected parties and to obtain the views of such affected communities in a manner that is in compliance with IPILRA;
 - b. Ensure that the views of women and minority groups are recorded and taken into account;
 - c. Properly identify the basis for valuation and compensation;
 - d. Monitor the implementation of agreements in terms of the Department's responsibility to communities;
 - e. Publish agreements that have been concluded, and make them accessible on the Department's website, so that other communities that stand to be affected by similar mining operations, can ensure that they have as much information at their disposal; and
 - f. Provide training to affected municipalities on IPILRA and SPLUMA.



- The DMR must, when considering applications for mining rights, ensure that alternative land uses for sustainable local development are identified and considered. It is important to emphasise that consideration may include not to approve applications. Such land use approvals must be secured from the applicable municipalities prior to the DMR granting the licenses or permits.

Relocation and compensation

- The DRDLR, where the provisions of IPILRA apply, must ensure that adequate and necessary consultation is undertaken with communities to complete a written resolution and that such resolution is with the consent of the majority of rights' holders.
- The DRDLR is directed to review the definition of "adequate notice" outlined in section 2 of IPILRA to ensure that sufficient time for conducting meaningful consultation is provided and is directed to report back to the Commission on steps taken in this regard.
- Where a proposed mining activity requires the relocation of specific community members' homes, a two-thirds 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.

Mining in sensitive areas

- The DWS and the DEA are directed to take definitive steps to ensure legal protection of our water source areas through, inter alia, the use of section 24(2A) of NEMA, the inclusion of a specific provision that provides that the Minister of Water and Sanitation has the powers to restrict or prohibit the grant of water use licences in water source areas alongside the use of a host of legal tools, including section 26(g) of the Regulations of the National Water Act, section 49 of the MPRDA, management tools in terms of Conservation of Agricultural Resources Act, 43 of 1983 (CARA), and SPLUMA, Environmental Management Frameworks, and any further tools available. A further provision that should be applicable, includes declarations in terms of the National Environmental Management: Biodiversity Act, 10 of 2004, of water source areas as threatened ecosystems.
- DEA, DAFF, DMR, and the Petroleum Agency South Africa (PASA) are directed to take definitive steps to ensure no seabed mining or extraction takes place in sensitive areas. This should include a strategic environmental assessment of impacts of existing rights on marine ecosystems. Such strategic environmental assessments must ensure that marine mining or prospecting, exploration or production rights issued in terms of the MPRDA, that overlap with proposed Marine Protected Areas (MPAs), do not hinder the declaration of MPAs. They should also provide for legal reform which would include a proper regulatory framework for offshore oil and gas, the development of an ocean SEMA, and Ocean Bill. The proper inclusion of an ecosystem based approach in marine spatial planning should include the provision for withdrawal of rights, and no go areas for extraction.
- Such processes must provide for extensive and meaningful public participation at national and local levels.
- In relation to existing mining licence applications in sensitive and protected areas, the DEA and DMR are directed to immediately issue public notices of such applications and convene extensive public participation, including with local communities, prior to the granting of such licences. The DEA and DMR are directed thereafter to report to the SAHRC on the number and particulars of applications received, the manner in which consultations are conducted, a list and details of objections lodged, the number of applications approved, as well as the conditions under which licences have been granted.

Rehabilitation and closure

- The DMR, together with the DEA, are directed to amend the content guidelines for EIAs and EMPs to include comprehensive information on the quality of land and sustainable options for potential post-closure land use.
- The DMR is directed to report on the progress and anticipated timelines for the finalisation of the National Closure Strategy. This strategy should consider the issues that are relevant to mine rehabilitation and closure more broadly and develop a strategic framework within which individual mine closure plans will fit and developmental goals are emphasised. The DMR must ensure that stakeholders such as communities and mineworkers participate in the development of the National Closure Strategy.
- The DMR is directed to consider legislative reform to address the gaps in partial and full mine closures. Specifically, the DMR must:
 - a. Provide clarity on the process for closure, including all processes followed by the Department prior to issuing of closure certificates, such as the need to ensure community participation, and monies set aside;
 - b. Provide a detailed list of all mines under “care and maintenance”. The list should include monitoring measures undertaken by the Department; and
 - c. Consider the establishment of a trust account where mining companies deposit funds, which the State can access to remedy water and other impacts caused by un-rehabilitated, abandoned or derelict mines.
- The DMR must, together with relevant stakeholders, develop a Regional Master Plan aimed at addressing environmental rehabilitation and the remediation of derelict and ownerless mines. The Plan should specifically refer to legacy issues such as acid mine drainage and illegal miners (colloquially known as zama-zamas), as well as sites with potential nuclear contamination and must include timelines and funding mechanisms.

Housing



“Mining towns are profoundly characterised by wide-scale informal settlements...without access to adequate services and [mining communities] have to endure poor living conditions.”

- Department of Human Settlements (DHS)

The Commission notes various challenges related to housing in mining-affected communities, including the failure to plan for and integrate migrant labourers and to provide such workers with decent housing, the failure to conduct integrated and sustainable human settlement planning, and the absence of adequate funding options and housing opportunities.

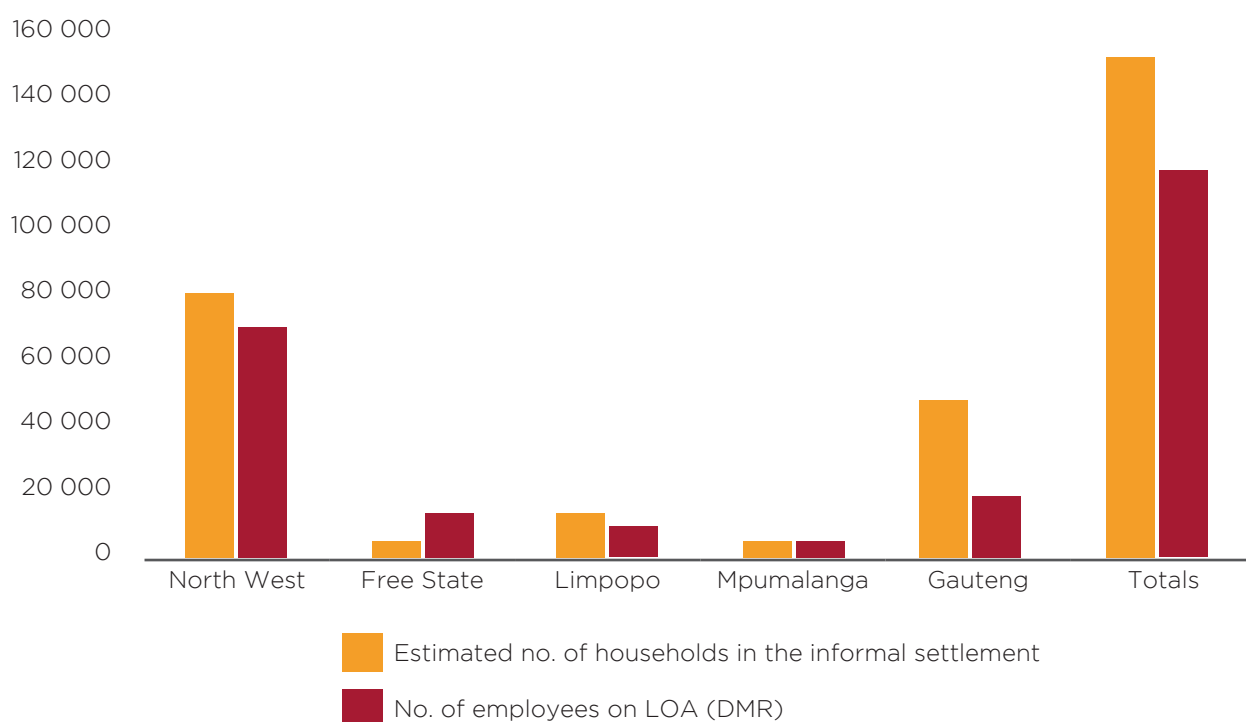
The mining industry in South Africa has largely been characterised as a compound- and migrant-based system, with domestic and foreign migration of workers to mining areas. Historically, migrant labourers were easily exploited and were housed in large compounds which were often crowded. Such exploitation resulted in atrocious living conditions. Miners were also separated from their families, resulting in the breakdown of family structures. Today, access to adequate housing is a socio-economic right,³⁷ and is directly linked to the realisation of other rights, including access to basic services, health and an environment not harmful to a person’s wellbeing, privacy and dignity. Furthermore, this right has implications for family unity, the ability to access employment opportunities and social cohesion through successful integration into a broader community. Despite the significance of housing, the Commission’s National Hearing did not engage with the issue at length and the evaluation provided herein is not, therefore, comprehensive.

The establishment of mines contributes significantly to population growth as a result of an influx of migrants. Whereas South Africa’s population between 2002 and 2011 grew by approximately 16%, the population growth along the Platinum Belt in Rustenburg and Madibeng, for example, grew by 40% over the same period, with the population in Rustenburg increasing from 300,000 to around 1 million. The rapid influx places an incredible strain on municipal planning and on the ability of municipalities to deliver basic services. Insufficient housing gives rise to the development of informal settlements, whereas old and aging bulk infrastructure is unable to cater for increased need. As a result, many people live in deplorable and unsafe conditions without access to basic services. Many miners and surrounding communities live in housing made up predominantly of shacks, with no lighting or electricity, no refuse collection and oftentimes, no water connection or adequate sanitation facilities.

³⁷ Section 26 of the Constitution.

While some mine workers are provided with accommodation in hostels, these are only available to a small number of employees and are not always able to accommodate families. As a result, many workers opt to receive a living-out allowance (LOA) in addition to their regular salary. Through a study conducted in mining towns prioritised under the Special Presidential Package (SPP),³⁸ the DPME and DHS identified a link between the number of households in informal settlements and the number of mine workers receiving a living-out allowance (approximate 40% correlation), as reflected in the table below.

Alignment of NDHS and DMR information on Informal Settlements and Housing options provided by Mining Companies as at 31 March 2015



Source: DPME Submission taken from Department of Minerals Resources & National Department of Human Settlements, 2015.

³⁸ In October 2012, former President Jacob Zuma signed a Social Accord with Government, Business and Labour, referred to as the Special Presidential Package (SPP). This was not limited to the mining industry, but was divided into three broad objectives, namely, restoring confidence in labour market institutions, addressing income inequalities and building social cohesion (Part 1); action to combat violence and lawlessness (Part 2); and addressing socio-economic challenges (Part 3). In July 2013, Organised Labour, Business and Government developed the Framework Agreement for a Sustainable Mining Industry to manage Part 1 and Part 2 of the Social Accord, along with some aspects of Part 3. Subsequently, an Inter-Ministerial Committee (IMC) for the SPP Revitalisation of Distressed Mining Communities Project was set up to oversee the implementation of part 3 of the Social Accord. The objectives of the IMC include the improvement of working conditions of mine workers and the health of mining communities (led by the Department of Health and supported by the Department of Labour and the DMR's Mine Health and Safety Directorate), and the promotion of decent living conditions for mine workers and meaningful contribution to the development trajectory of mining towns and labour sending areas, led by the DMR's Mineral Regulation Directorate. Initially, the IMC prioritised 15 mining areas in five provinces, and their associated labour sending areas. In March 2016, as a result of a downturn in the mining sector, the IMC also prioritised a number of distressed mining communities in the Northern Cape.



The findings highlight the fact that the LOA is often amalgamated into the overall gross salary received and is not always used for its intended purpose. Although the prevalence of the system of LOA is problematic, the Commission has noted that this frequently forms part of labour negotiations. The removal of the LOA or amendment to the current system will therefore be complex and likely be received with significant opposition. Ultimately, an attempt to address the current housing and living conditions crises faced by mine workers through the provision of a LOA is unfeasible. More work will need to be done to fully engage with the issues and consequences of the current system.

The 2004 Mining Charter outlined the obligation of mining companies to “establish measures for improving the standard of housing, including the upgrading of hostels, conversion of hostels to family units and the promotion of home ownership options for mine employees”.³⁹ The revised version of the Charter, released in 2010, outlined more specific obligations to:

- Convert or upgrade hostels into family units by end of 2014;
- Attain the occupancy rate of one person per room by the end of 2014; and
- Facilitate home ownership options for all mine employees in consultation with organised labour by the end of 2014.

In addition, the Housing and Living Conditions Standard for the Minerals Industry was promulgated in 2009 with the view to providing guidelines to foster suitable housing and living conditions for mine workers. The 2015 Mining Charter Assessment Report highlighted the fact that, overall, only 55% of mining companies had reached the target in relation to the reduction of occupancy or the conversion of hostels into family units. Although the 2017 version of the Mining Charter⁴⁰ reiterates the call for licence holders to improve the standards of housing and living conditions for mine workers, it no longer contains specific or measurable targets. Instead, it repeats the requirement for compliance with the Housing and Living Conditions Standard. Some progress has been made in moving away from the compound system through the upgrading of existing compounds to provide for better conditions and to accommodate families, while additional housing options have also been established by some mining companies. However, this only applies to a minority of mine workers and is insufficient to provide for the vast majority who are either unable to access adequate housing provided for by the mine, or have opted to live outside compounds in order to receive an additional LOA.

³⁹ DMR *Broad-based Socio-economic Empowerment Charter for the South African Mining Industry* (2004) para 4.5.

⁴⁰ The Minister of the DMR purported to launch the new Mining Charter in June 2017. DMR *Broad-Based Black Socio-economic Empowerment Charter for the South African Mining and Minerals Industry, 2017* (2017). The launch may have adversely affected mining share prices, and prompted the CoM to seek an urgent interdict suspending the implementation of the Charter. The Minister of Mineral Resources subsequently undertook not to implement the Charter pending judicial review thereof by a full bench of the High Court in December 2017. The CoM recorded its rejection of the “unilateral imposition” of the Mining Charter on the mining industry, citing a lack of engagement as well as unrealistic transformation targets as reasons for its position. Chamber of Mines *Chamber of Mines Rejects the Unilateral Imposition of the DMR’s Charter on the Industry* (15 June 2017). The North Gauteng High Court subsequently postponed the matter sine die on 19 February 2018, while explicitly ordering that community-based organisations representing mining-affected communities constitute interested parties that must be consulted with by the new Minister of Mineral Resources for purposes of formulating and finalising the new Charter. See *Chamber of Mines and Others v Minister of Mineral Resources and Others* 2018 Case no 71174/2017 (GNP).

Schedule 4 of the Constitution provides for the functions that the different spheres of government are responsible for. Notwithstanding housing being listed as a function of National and Provincial Governments, the management of the implementation of housing projects has become the responsibility of municipalities. As a result, local government is responsible for the planning of integrated and sustainable development, including the provision of adequate housing and basic service delivery. These plans are given effect to through spatial development frameworks and IDPs, which are also aligned to regional and national master spatial development frameworks. However, municipalities face various challenges, including the following:

- Planning is generally done on the anticipated population growth rate of 1.5% per year. The establishment of mines contributes to expedited growth rates beyond the 1.5%, without adequate notice or resources to enable municipalities to plan effectively.
- There is currently no basis for the coordination of housing delivery and the development and implementation of SLPs, and there is further no alignment to the policies of other departments. For example, policies and strategies of the Department of Labour (DoL) should be integrated to address challenges of employment migration, and the practices and impacts of living-out allowances, amongst other things. The delivery of housing opportunities by mining companies must be adequately aligned to Spatial Transformation Plans and Human Settlement Strategies in the prioritised mining towns, as well as to IDPs of municipalities. According to the DHS, this is one of the main challenges in the current system. Municipalities must accordingly ensure that housing-related plans, policies and strategies are readily available to mining companies before the commencement of mining operations.⁴¹
- The co-existence of local government with Traditional Councils may, at times, give rise to disputes over the allocation and management of land. Traditional Councils have in the past allocated land to communities for housing developments despite the fact that such portions of land have not been identified and/or prioritised for human settlements by the municipality. These sites are often poorly positioned for infrastructure development and may remain un-serviced as a result.
- Vast portions of land that are used for the development of human settlements are privately owned.
- Severe capacity constraints and inadequate skills contribute towards the lack of integrated settlement planning, the lack of alignment between pipelining of projects, project funding and implementation, as well as the technical inability to adequately allocate and expend funds from the municipal infrastructure grant.⁴²
- Overall, there is often a lack of integration of mine worker housing with the broader community.
- Mining companies bear a constitutional obligation not to diminish existing access to adequate housing that may be enjoyed by communities before a mine is established. To the extent that mining companies fail to adequately consult with local government and thereby align SLPs with IDPs in order to cater for mining-related influx of labour, existing access to adequate housing may be jeopardised through the exacerbation of housing backlogs.⁴³ In such instances, mining companies may be held accountable for the violation

⁴¹ Tendele Coal Comments on SAHRC Provisional Report: National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa (January 2018).

⁴² DHS Response to the South African Human Rights Commission for the National Investigative Hearing on the Underlying Socio-Economic Challenges in Mining Affected Communities in South Africa (23 August 2016) 30.

⁴³ Centre for Environmental Rights Comments on SAHRC Provisional Report: National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa (February 2018).



of the negative duty imposed on all persons to refrain from interfering with existing access to socio-economic rights.⁴⁴ In addition to providing access to decent housing for mine workers, existing access to adequate housing that precedes the establishment of a mining operation must thus be prioritised by both mining companies and relevant local government authorities.

Most government interventions that aim to provide housing-related funding do not apply to mine workers specifically. The Finance Linked Individual Subsidy Programme (FLISP), Social Housing and SLPs are the only interventions directly relevant for addressing market failure in mining towns. Nevertheless, the vast majority of mine workers do not qualify for State assisted housing as a result of the following:

- Most earn above the threshold which disqualifies them from accessing Breaking New Ground (BNG) and Reconstruction and Development Programme (RDP) houses, as well as Community Residential Units (CRU) and Social Housing rental units.
- High levels of indebtedness of mine workers, which is a common phenomenon, also disqualify them from accessing the FLISP.

Apart from inaccessible State housing options, there is a general lack of housing products to match middle to lower income bands. Rental housing options are either insufficient in number to meet demand, or alternatively, unaffordable for mine workers. These gaps consequently contribute to the mushrooming of informal settlements and backyard dwellers and the absence of security of tenure.

A number of options are currently being explored to address the shortage of appropriate housing options, including but not necessarily limited to the following:

- Some mining companies have incorporated the provision of housing as part of their SLP projects. As outlined above, these are not always aligned to broader housing plans. For example, one mining company provided a number of houses to community members whose names were submitted by communities themselves. While aimed at community-driven development, the identification of beneficiaries outside of the model of prioritisation used by government or without objective criteria exposes the system to potential abuse or nepotism on the part of dominant factions within communities.
- As part of the Special Presidential Package, a Mine Worker Housing Framework is being developed by the DPME and piloted in the Marikana Extension 2 integrated human settlement project.
- A number of employer-assisted housing models are being developed in partnership with development financial institutions and mining companies.
- Multiple public-private partnership funding models are being explored.
- The DHS encourages mining companies to develop rental housing stock for employees who do not wish to purchase houses. In this regard, mining companies would provide funding for construction while the State and the DHS would be in a position to provide subsidies to those who qualify.
- Social Housing Rental Units are currently only available to persons earning less than R15 000 per month to enable mine workers to access the rental units.

⁴⁴ The negative obligation to refrain from impeding existing access to socio-economic rights is implied by the first subsection of sections 26 and 27 of the Constitution. See *Jaftha v Schoeman, Van Rooyen v Stoltz* 2005 (2) SA 140 (CC).

- The DPME is also considering a waiver of the CRU policy. The DHS, on the other hand, does not support the establishment of a special housing assistance dispensation for mine workers. It is of the view that mining companies should provide support to their employees to meet their own housing needs, which is linked to addressing issues of indebtedness and credit worthiness as a common characteristic amongst mine workers.
- Government has also provided funding to municipalities for holistic development-oriented programmes for the creation of sustainable and integrated human settlements. In mining areas, it will often consist of the provision of serviced stands at cost or market value depending on income level, but funding will need to be obtained through mortgage loans.
- The DHS has established a Human Settlements Programme for Mining Towns, where the plan is to fast-track existing planned project pipelines in the 22 prioritised mining towns. In addition to this, there has been a development of Human Settlement Transformation Strategies and Plans for each mining town, together with initiatives aimed at the mobilisation of partnerships and local capacity building. R2.1 billion was ring-fenced by Government in 2013/14 alone to upgrade informal settlements in the 15 initially prioritised mining towns.

The responsibility for monitoring the implementation of housing obligations within the mining industry currently rests with the DMR. However, this reinforces a silo-based approach, rather than addressing housing from a coordinated perspective. The DHS has therefore suggested that the DMR establish an inter-departmental monitoring team that will define human settlement indicators and develop a dashboard for measuring and reporting on performance, where DHS would also assist in monitoring the implementation of SLP housing programmes. The Commission is supportive of this approach, noting the need for a system based on integrated solutions to human settlements in mining-affected areas. However, improved monitoring must be accompanied by stringent enforcement of SLPs by the DMR. The DHS further submitted that projects that form part of the current IDPs are “not catalytic enough to drive transformation in mining towns”, and there is a need to break from traditional models of housing opportunities.⁴⁵

The Commission accordingly finds that the failure by mining companies, in close consultation with local government, to adequately address anticipated levels of migration and population growth in initial assessments undertaken during mining licence applications; the failure by the DMR to take this information into account when authorising mining rights; and the further failure by mining companies to adequately include local government in the planning phase of SLPs, directly contribute to inadequate planning and budgeting for housing at the local level. As a result, housing-related infrastructure including water and sanitation, electricity and roads is likewise jeopardised. Where a failure to integrate housing-related planning interferes with existing access to adequate housing, this constitutes a violation of the negative duty imposed by section 26(1) of the Constitution on all persons, including mining companies, to refrain from impeding existing access to adequate housing.

⁴⁵ DHS Response to the South African Human Rights Commission for the National Investigative Hearing on the Underlying Socio-Economic Challenges in Mining Affected Communities in South Africa (23 August 2016) 34.



DIRECTIVES AND RECOMMENDATIONS

- SALGA must direct all its members to ensure that housing-related plans, policies and strategies are readily available to mining companies before mining licences are applied for.
- SALGA must ensure that municipalities in mining-affected areas receive adequate training and technical capacitation in order to properly expend the municipal infrastructure grant.
- All mining companies must refrain from interfering with existing access to adequate housing in communities where mining operations are established. A failure to properly plan for the influx of mining-related labour may exacerbate housing backlogs, and thereby violate the negative duty imposed by section 26(1) of the Constitution on all persons, including the private sector, not to impede existing access to adequate housing.
- All mining companies must closely consult with relevant local government authorities in order to ensure the proper alignment of SLPs to IDPs in relation to adequate housing. Mining companies must include local government in the planning phases of SLPs and mining applications.
- The DMR is directed to reject mining licence applications where such applications fail to adequately address potential housing and accommodation issues that may arise from mining projects. Before licences are granted, the DMR must require that proposed housing and accommodation plans submitted as part of the mining licence application process align with local government plans and strategies under SPLUMA. Proof of adequate consultation with local government must further be provided by mining companies when submitting mining licence applications.

Water



The Commission noted throughout its consultations with mining-affected communities and the Hearing that some of the most crucial challenges in respect of mining operations relate to the depreciation of water sources (availability of water) as well as the potential contamination of water (quality of water).

Mining operations utilise large quantities of water, and can impact significantly on availability and quality of water resources through the depreciation of water sources and their potential contamination.⁴⁶ In both instances, the right to water⁴⁷ is vulnerable to grievous violation where inadequate safeguards and remediation measures are in place. The Commission is cognisant of the fact that irresponsibly conducted mining operations may frequently give rise to the contamination of water sources. AMD in particular has long lasting impacts – it sterilises soil and contaminates food crops, poses a risk to biodiversity and is dangerous to health. The risk is particularly severe for abandoned mines where water is no longer pumped and treated. Despite the extensive impact of mining legacy issues, “AMD” and “Mine Water Management” are not formally defined in current legislation. According to the DWS, this hinders the process of dealing with AMD decisively. AMD is dealt with on a case-by-case basis, and civil society organisations have contended that the treatment process is often inadequate.⁴⁸

The DWS also raised concern over the lack of an integrated inter-governmental approach, leading to some conflicts or overlaps in powers and functions, specifically between the DWS, DMR and local government. For example, local authorities often grant permits for sand mining in rivers, which the DWS regulates. It has therefore proposed the development of a National Mine Water Strategy to give more clarity on roles and responsibilities and to enable an integrated and proactive approach to addressing the issues.⁴⁹

⁴⁶ The Federation for a Sustainable Environment *Rand Water Dialogue on Acid Mine drainage: The role of Civil Society: Acid Mine Water on the West Rand Goldfields* (2016) 11.

⁴⁷ S 27(1)(b) of the Constitution. The constitutional right of access to sufficient water is associated with the enjoyment of other rights, such as the right to health, safety and an environment that is not harmful to human health or well-being. Furthermore, a lack of access to water and sanitation has a disproportionate effect on vulnerable groups, including women, children, persons with disabilities, the elderly and those with ill health and hinders the ability of persons to access education and employment opportunities.

⁴⁸ The Federation for a Sustainable Environment *Letter to Department of Water and Sanitation: Urgent Request for Enforcement by the DWS for the Ongoing Pollution of the Rietspruit by Municipalities* (1 September 2016).

⁴⁹ DWS *Submission to the SAHRC* (2016) 1.



When processing a water use licence (WUL) applications, section 18 of National Water Act, 36 of 1998 makes it compulsory to provide for a Reserve, which is divided between basic human needs and ecological requirements. This provision aims to ensure that the fundamental human right to water is provided for prior to any other water usage. In implementing this prior right to water, the DWS conducts hydro-census studies to determine the exact population that is reliant on water resources and makes provision for their basic human needs as part of the water services requirements. Despite this, it is not uncommon to find that local communities do not have access to sufficient water to provide for their communities' most basic needs within the context of continuing mining operations. Even where water shortages have been exacerbated by droughts or an influx of people, mining operations directly contribute to this situation and cannot continue to operate without regard to the difficulties experienced by mining-affected communities.

A Draft National Mine Water Management policy has been released for public comment.⁵⁰ The draft policy includes a prohibition of mining in water sensitive areas, a recommendation for the development of a mining regional master plan, and further provides that mines should be compelled to do an impact prediction to improve environmental preparedness.

In some cases, mining companies provide water to communities. Tendele Coal in Somkhele is one such example. Its WUL allows it to draw water from the Mfolozi River. As a result of reduced rainfall, the river is not flowing at full strength, thus the Mine "relies on strategies to pump at maximum rates from the Mfolozi River when it does run".⁵¹ As a result of the drought and inadequate infrastructure, the Mpukunyoni Community does not have access to municipal water and the Mine has therefore installed several hand pumps to access water from boreholes. In addition to this, the Mine was providing 12 trucks, each carrying 16,000 litres of potable water, to the community per week, which was later reduced to 5 or 6 trucks. This water is obtained through a private entity at significant cost. The Mine, however, submitted that notwithstanding the fact that it is drawing water from natural sources within the community, it is "in no way obligated to provide this water to the community but does so out of goodwill". The characterisation of the provision of water as an act of goodwill is incongruent with the legal requirement in terms of the NWA to provide for a Reserve when applying for a WUL.

Civil society formations which often interface directly with affected communities expressed concerns in their submissions about the lack of information around the WUL application process, information about the quality of water, its availability, the monitoring of compliance with the WUL, and the impact of mining on the water reserve.⁵²

In light of the evidence before it, the Commission makes several observations:

- Notwithstanding water shortages and the prior right to water outlined in section 18 of the NWA and section 27 of the Constitution, communities are continually deprived of access to water necessary to cater for basic needs. Under these circumstances, mining companies continue to conduct operations that frequently draw water directly from natural sources meant to simultaneously provide for communities and ecological infrastructure.

⁵⁰ DWS *Draft Mine Water Policy Position* (2017).

⁵¹ Tendele Coal Mining *Supplementary submission* (23 September 2016) 4.

⁵² Further submissions by the Bench Marks Foundation and Action Aid (January 2018).

- While population growth places a significant burden on existing infrastructure and the availability of resources, population growth in mining-affected communities is largely attributable to the commencement of mining operations.
- Mining companies⁵³ directly contribute to the depreciation and pollution of water resources and bear responsibility for mitigating the negative impacts of mining even where population influx and droughts contribute to water scarcity.
- Municipalities struggle to provide water to mining-affected communities where infrastructure is aging and deteriorated, and is further dependent on the DWS and the DRDLR to translate guidelines regarding the provision of water on privately-owned land (including land owned by mines and communal land) into policy.
- Local government IDPs are not adequately informed by WUL's impacting their areas of delivery.

The Commission finds that the current census for determining water reserves does not include measures to account for anticipated migration and population growth and other potential impacts on the availability of water resources, such as drought. Therefore, there is an immediate need for WULs to incorporate more stringent measures to better protect Communities' water rights and the environment. In this respect, internal (self-regulating) and external auditing (by the DWS) in consultation with Communities, civil society, mining companies and other stakeholders is required to create effective regulatory tools such as licenses. The benefits of such an approach are direct for local government, groups which typically face barriers in rights assertion and for sustainability. The audited information referred to must be made publically accessible and be provided to affected local government authorities.

The Commission further finds that the DWS with local government should address the problem of aging water infrastructure in mining-affected municipalities and collaborate with the DRDLR to translate guidelines regarding the provision of water on privately-owned land into policy.

Noting the fundamental right to access adequate water (and sanitation) of a quality fit for human consumption and use, the Commission finds that the WUL must be reviewed to allow for rights assertion where terms and conditions of such WUL can reasonably be anticipated to adversely impact the rights of affected communities to access water.

The Commission further finds that there is a compelling need for meaningful consultation and information sharing in respect of applications for WUL's, and audit and impact reports relating to WUL's to increase transparency, and accountability in respect of the use of this scarce resource.

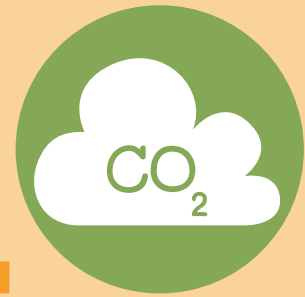
⁵³ Along with other actors, who historically or presently use and/or pollute water.



DIRECTIVES AND RECOMMENDATIONS

- The DWS is directed to provide a report on the current state of water use monitoring. The report should include:
 - a. Mechanisms in place to conduct regular determination of the water reserve, including how the DWS accounts for anticipated migration and population growth, limitations or inadequacies in municipal-infrastructure as well as other potential impacts on the availability of water resources, such as drought;
 - b. An audit of all existing WULs to ensure they adequately protect the water reserve, including basic needs and ecological requirements;
 - c. Steps taken to monitor compliance with WULs and its impacts, particularly in mining areas; and
 - d. The impact mining has, and will have, on the water reserve and how this aligns with the National Strategic Plan for Water.
- The DWS must report on the steps it has taken to guarantee security of water provision in the Mpukunyoni Community and provide evidence of the agreements in place between Tendele Coal Mine and national and local governments in this regard.
- A clear plan of action is to be provided in respect of all communities who are impacted by the WULs arising from the audit referred to above.
- The DWS is directed to take steps to ensure that formal legal protection is afforded to SWSAs.
- The DWS, together with the DRDLR, are directed to take steps to translate existing guidelines regarding the provision of water on privately-owned land into policy to ensure that basic protections in law regarding access to water are capable of being evaluated and enforced.

Environment



“The detrimental environmental impacts of mining on communities are both direct and indirect. Mining can lead to the loss of natural resources on which communities rely for their livelihoods and well-being, including water resources, agricultural land and important biodiversity. The pollution of the air, soil and water caused by mining furthermore results in pernicious impacts on the health of communities and the socio-demographic changes brought by mining can lead to social conflict. The industrialisation of a landscape through mining can also result in an impact on the psychological well-being of especially rural communities. Indirect impacts may include food insecurity and climate change impacts.”

- Excerpt from submission by the Centre for Environmental Rights

During the Commission’s consultations with affected communities, the most crucial factors raised with respect to environmental impact were increased levels of dust, safety concerns over blasting activities, and the impact of these factors on food security, health, and overall conditions of well-being. Furthermore, allegations of pollution, lack of information, and insufficient levels of participation in matters concerning environmental management and impact were also raised. While environmental rights and protections are broad-ranging and complex, their link to the realisation of socio-economic rights necessitated the inclusion of environmental factors in the National Hearing beyond those pertaining to land, housing and water.

Section 24 of the Constitution outlines the right to an environment that is not harmful to health or wellbeing and that is protected for the benefit of future generations (the principle of intergenerational equity). This constitutional right recognises the close links between sustainable development and “justifiable” social and economic development. The NEMA recognises that poverty is linked to unsustainable environmental protection and that the State’s environmental responsibility is linked to the responsibility to respect, protect and fulfil socio-economic rights. Furthermore, environmental degradation, and the failure to conserve biodiversity, prejudice the realisation of numerous other human rights, particularly the right to equality, but also the rights of access to sufficient food and water, health, housing, land and ultimately, the right to live with dignity. Thus, a key objective of environmental legislation is the protection of the basic needs of vulnerable groups, as it is these groups that unfairly bear the negative impacts of mining.



The following section focuses on aspects of environmental rights that are not addressed in the previous sections on land, housing and water. It begins by examining concerns regarding the One Environmental System and proceeds to identify and analyse the key issues and challenges around air quality, dust control and blasting, and nuclear waste management.

Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others (Fuel Retailers)⁵⁴

“[44]...development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.”

One Environmental System

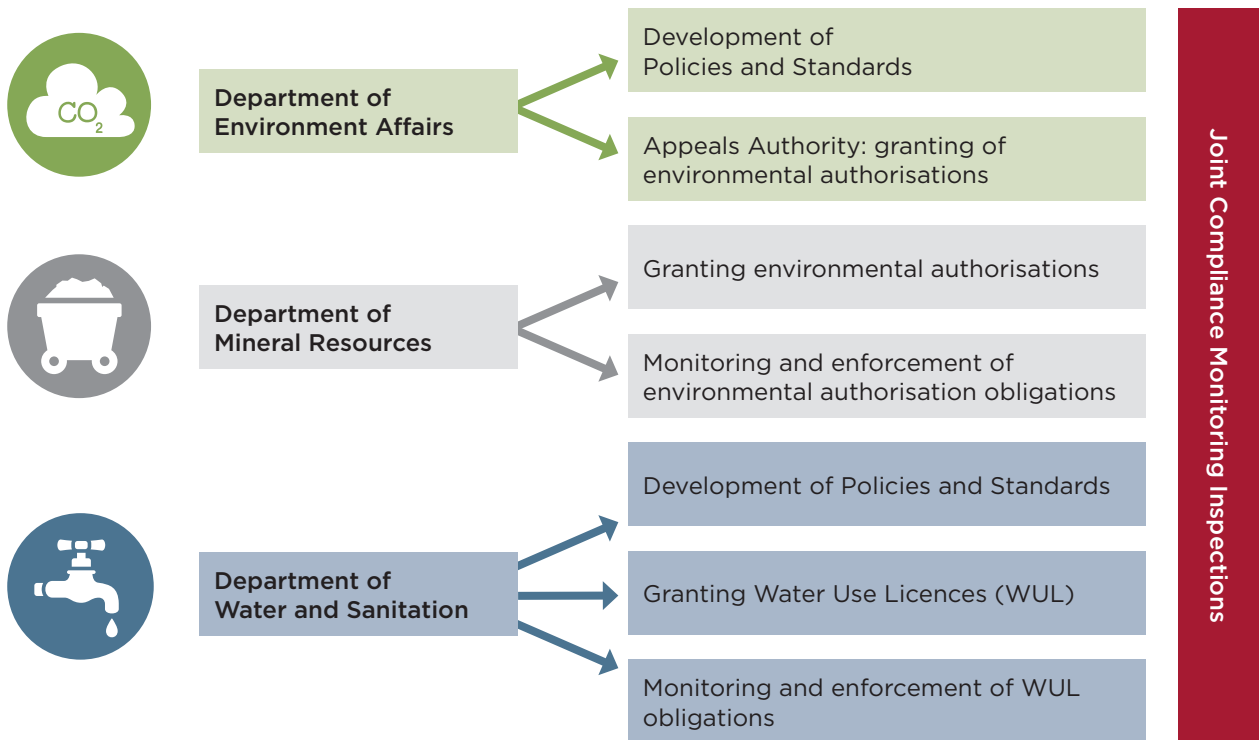
The Commission recognises the need for an integrated approach to environmental management, monitoring and enforcement in respect of mining activities. However, it notes with concern, certain challenges that persist in the implementation of the OES.

Prior to 2014, the mining industry criticised the duplication of laws and the multiple, separate licence application systems for mining, environment and water matters. In response, in 2014, the OES was introduced to promote integrated planning and enforcement between the DEA, DWS and DMR. In brief, the OES requires that, as part of the licence application process, mining companies consult with interested and affected parties and conduct an EIA, following which they must submit an EMP for approval. The EMP must establish baseline information regarding the affected environment; and investigate, assess and evaluate the impact of proposed mining activities on the environment, socio-economic conditions of affected persons, and the national estate (in terms of the National Heritage Resources Act, 25 of 1999). In addition, applicants must develop an Environmental Awareness Plan (EAP).

In terms of the division of roles and responsibilities, the DEA sets the standards in relation to environmental protection matters, but the DMR is the responsible authority for both the issuing and enforcement of mining-related environmental authorisations. The DEA also remains an independent appeals authority. The DWS is responsible for the setting of standards and the issuance and enforcement of water use authorisations and protections. In addition, the three departments conduct joint site inspections for monitoring and enforcement purposes. In order to mitigate the challenges experienced in the alignment of legislative processes, an Inter-departmental Project Implementation Committee (IPIC) has been established to coordinate the activities of the three Departments.

⁵⁴ 2007 (10) BCLR 1059 (CC).

One Environment System: Roles and Responsibilities



Despite partly achieving its purpose, the implementation of the OES continues to face a number of practical difficulties, including:

- Pending amendments to the MPRDA; NEMA and WUL Applications Regulations and the non-alignment of timeframes and triggers. This presents compliance and implementation challenges with the simultaneous submission of applications, parallel assessment processing, and the coordination of information;
- The DMR's significant capacity restraints in relation to the monitoring and enforcement of environmental authorisations; and
- Uncertainty around the divisions of responsibilities between the three departments.
- Notably, the DMR and DEA were both involved in litigation over the environmental enforcement capacity of each Department in the Tormin Sand Mine case.



In the case of **Mineral Sands Resources (Pty) Ltd v Magistrate for the District of Vredendal, Kroutz NO and Others**⁵⁵ (Tormin Sand Mine case), uncertainty regarding the division of responsibilities for the monitoring and enforcement of environmental laws between the DMR and DEA was brought to light. In this matter, both the DEA and the DMR conducted compliance inspections at the Tormin Mine and the DEA sought to institute action against the Mine. However, The Tormin Mine sought a declaratory order stating that the DEA had no jurisdiction to perform compliance, monitoring and enforcement of the NEMA in respect of the Tormin Mine (save as provided for in very limited circumstances under sections 31D(5) to (8) of the NEMA) as jurisdiction to perform compliance, monitoring and enforcement rests exclusively with the DMR. Subsequently, the DEA argued that it had maintained certain oversight functions under the NEMA, as well as under other environmental legislation, such as the Integrated Coastal Management Act and the Control of Use of Vehicles in the Coastal Area Regulations.

The warrant issued to the DEA to inspect the Tormin Mine was impeached as a result of the failure on the part of the DEA to adequately disclose all material information to the Presiding Magistrate and therefore, the Court did not deal with the issue of the declaratory order.

Although no decision was taken in regard to the above matter, it is clear that practical challenges plague the implementation of the OES.

While the Commission recognises the positive intentions of the OES to streamline the application process and promote collaboration and partnership between the departments responsible for mining-related activities, the Commission finds that discrepant approaches in the application of environmental management laws and limited oversight of environmental management across multiple sectors are cause for concern.⁵⁶

Accordingly, the Commission finds that the DMR is not the appropriate authority for granting and enforcing environmental authorisations with respect to mining.⁵⁷ The Commission acknowledges that there are several risks in dealing with mining-related environmental matters separately to those of other industries and that environmental management and impact do not occur in isolation.

⁵⁵ [2017] 2 All SA 599 (WCC).

⁵⁶ One municipality indicated that the separation of environmental matters in the context of mining from general environmental matters creates a challenge for the environmental management unit of the municipality in gaining access to conduct inspections and investigations.

⁵⁷ In SAHRC *Report on the Right to Access Sufficient Water and Decent Sanitation in South Africa* (2014) 19 the following recommendation is made:

An amendment of the current Mineral and Petroleum Resources Development Act and National Environmental Management Act is needed to move the decision-making powers regarding mining and prospecting licences from the Department of Mineral Resources to the Department of Environmental Affairs.

Air quality, dust control and blasting

Air pollution from blasting, coal stock piles, coal truck haulage, sink holes, abandoned mine dumps and noise and vibration disturbances were commonly observed by the Commission during its National Hearing. Despite multiple claims of the detrimental impact of dust and air pollution on health, particularly respiratory health, no studies have been conducted to determine the link between allegations of increased ill health amongst mining-affected communities. Quoting one community member from MACUA:

[T]he only thing for us is to suffer, breathing this radioactive dust from the mine dumps.⁵⁸

The National Environmental Management: Air Quality Act, 39 of 2004 (NEMAQA) was promulgated to provide for national norms and standards regulating air quality monitoring, management and control.⁵⁹ NEMAQA is founded on the need to prevent pollution and ecological degradation, and to ensure the protection of the right to an environment that is not harmful to health and well-being. Furthermore, section 32 of NEMAQA requires the Minister or MEC to prescribe measures for the control of dust in specified places or areas; steps that must be taken to prevent nuisance by dust; or other measures aimed at the control of dust.

The DEA released the National Dust Control Regulations in 2013. Under the Regulations, the MEC and each municipality must appoint an air quality officer to co-ordinate matters pertaining to air quality management in the province or municipality concerned. In addition, municipalities must develop and incorporate an air quality management plan into their IDPs. The DEA stated that the National Atmospheric Emission Inventory Reporting Regulations make it compulsory for mines to report atmospheric emissions on an annual basis. This information will be made available to the public in the form of the annual emissions report published by the DEA.

With respect to air quality management and mining operations, the Commission has noted the following concerns:

- There is uncertainty around the applicability of NEMAQA to mining activities, as some mining companies do not apply for, and implement, atmospheric emission licences.
- A number of municipalities do not comply with the provisions of NEMAQA, as IDPs frequently do not include an air quality management plan.
- Despite coming into effect in 2013, the National Dust Control Regulations are not fully operational and many mining companies are unaware of requirements under the Regulations or developed EMPs prior to their operationalisation. However, the Commission notes that the DEA and DMR are conducting capacity building and awareness raising activities amongst municipalities, communities and mining companies.
- The DEA conceded that “where air pollution impacts of mining operations were identified for control and coordination between the mines, DEA and DMR have not yet been adequately streamlined, resulting in little/no accountability”.
- At the time of the National Hearing, no mechanisms had been put in place for collation, verification and dissemination of information between stakeholders in relation to impacts

⁵⁸ Quote from oral submission by MACUA.

⁵⁹ Challenges in the implementation of the NEMAQA persist. For example, see Centre for Environmental Rights and GroundWork *Broken Promises: The Failure of the Highveld Priority Area* (October 2017).



having been reported and/or interventions having been undertaken. While the DMR should coordinate this process, the DPME can play a key role in collation and monitoring activities.

- Some stakeholders submitted that the Regulations fall short of international best practice for the control and monitoring of dust. However, the Commission notes that the DEA hosted a joint seminar on the monitoring of dust fallout with the National Association for Clean Air in August 2016. It is anticipated that this engagement, which was attended by government, industry, NGOs and academia, will inform revisions to the Regulations.
- The mechanisms for reporting on dust impacts through the National Emission Inventory System and annual compliance reports are relatively new and it is too early to determine their effectiveness.

Multiple complaints were raised in relation to blasting operations conducted by mining companies. Complaints predominantly related to concerns around safety, claims of damage to housing and other infrastructure, increased levels of dust and noise pollution, lack of sufficient notice, and the general disruption caused to communities. One community member recounts:

It is painful when a mining company comes to your community and says we are here with an agenda to develop this community, and then the next thing they tell you in this village when we start blasting you must all run out of your houses and stand in front of that road or on that road, that is the most painful thing.⁶⁰

From the submissions received, it appears that the general practice is for communities to be notified of scheduled blasting activities in advance. The delivery of such notice differs between companies, but may include alerts via notice boards and/or text messages and verbal notification administered from a vehicle that drives through communities with a siren warning community members to evacuate the area. However, many communities stated that they only become aware of scheduled activities when evacuations take place and not before. Furthermore, despite advanced notice, the reality for many communities is that they experience consistent disruptions, fear for their safety, and are ultimately forced to evacuate their homes. While the Commission understands that blasting is a necessary component of mining operations, the current manner in which blasting is carried out is not conducive to a respect for human dignity and the safety and well-being of persons in affected communities.

The majority of submissions indicated that the monitoring and evaluation of blasting operations is conducted by mining companies. The methodology differs between mining companies, but may include seismographs to measure waves (vibrations and air blasts) during operations and cameras to record the impact on all physical structures within a particular radius. The latter is mostly utilised to assess whether any damage has been caused to physical structures as a result of the blasting.

The Commission notes that complaints around damage allegedly caused to housing structures appear to be a common feature in communities where blasting occurs. However, a number of mining companies submitted that damage to infrastructure is often a result of poor quality structures and not a direct result of blasting operations. Despite this, mining companies should consider the quality of housing structures before carrying out blasting operations. Generally, on

⁶⁰ Quote from oral submission by MACUA.

receipt of a complaint, mining companies appoint a consultant to investigate the claim. However, consultants are often perceived as partial as they are directly appointed by mining companies, which can undermine the credibility of investigations. Where blasting is determined to be the direct cause of damage, compensation is provided. However, in practice, it appears that claims are difficult to prove and rarely result in compensation.

The DMR has submitted that mines must conduct a risk assessment to determine the impact of blasting on employees and other affected persons and draw up a blasting procedure. Despite several submissions from mining companies in relation to blasting operations, only one mentioned compliance with the Mine Health and Safety Act 29 of 1996 Regulations on Explosives. Regulation 4.6 'General precautionary measures when blasting' reads as follows:

The employer must take reasonable measures to ensure that when blasting takes place, air and ground vibrations, shock waves or fly material are limited to such an extent and at such a distance from any building, public thoroughfare, railway, power line or any place where persons congregate to ensure that there is no significant risk to the health or safety of persons.

Apart from this provision, blasting operations remain completely unregulated.

The Commission finds that the lack of regulation around blasting operations is problematic given the frequency in which issues arise. Discrepant practices across the industry and the propensity for blasting operations to negatively impact communities and the environment compound the seriousness of these issues. The Commission further finds that industry bodies, including the CoM, are not duly active in monitoring behavioural trends within the industry or guiding its members on best practice concerning blasting operations. The Commission identifies an immediate need for the DMR, as the competent authority responsible for developing regulations, to take urgent action to address this gap.

The Commission finds that mining companies are responsible for ensuring that, prior to conducting blasting operations, appropriate safety mechanisms are in place to prevent property damage (with due consideration given to the quality of structures in surrounding communities) and any risk to persons' health and safety. Mining companies should conduct ongoing engagements to ensure that such operations occur in a manner that has the least impact on people and the environment.



Nuclear waste management

While the National Hearing did not examine nuclear waste management in depth, certain mining activities involve hazardous and radioactive materials which, if released into the environment, can have disastrous effects on the environment and health.

To reduce the risk of exposure, the CoM uses a guideline stipulating a 500-metre buffer zone between tailing deposits and human settlements. However, this is not always enforced in practice, and land in close proximity to mining operations is often used for residential, grazing, or recreational activities. Furthermore, high radiation exposure is hugely problematic, as in the case of the Tudor Mine Shaft, where the Tudor Shaft Informal Settlement had to be relocated. Despite the serious risk involved to health and safety, the State's reaction has been slow.

The National Nuclear Regulator (NNR) exercises regulatory control over mining and mineral processing facilities handling material containing naturally occurring radioactive properties. In line with the National Nuclear Regulator Act, 47 of 1999, companies must obtain a certificate of registration or exemption when engaging in any action capable of causing nuclear damage. The certificate of registration contains a number of conditions that must be complied with. The NNR conducts regular inspections and monitors compliance with these conditions and failure to comply constitutes an offence. To date, there have been no instances that have led to the revocation of a licence.

In terms of the Act, "nuclear damage" is narrowly defined as:

- a. injury to or the death or any sickness or disease of a person
- b. other damage, including any damage to or any loss of use of property or damage to the environment which arises out of, or results from, or is attributable to, the ionizing radiation associated with a nuclear installation, nuclear vessel or action.

However, the NNR interprets nuclear damage mainly in relation to death, personal safety or injury of a person. The NNR submitted that there is not sufficient guidance with regard to property or environmental damage and has accordingly proposed an amendment to the definition.

Between 1995 and 2004, the NNR was involved in the remediation of a number of sites through the use of private funding provided by the CoM. However, there is a lack of clarity over the role of the NNR in instances where mine sites have been abandoned. The NNR is not mandated to undertake remediation of contaminated sites in terms of legislation, nor is it capacitated to do so. In practice, where the NNR becomes aware of elevated radiation levels, the relevant government department is informed and is expected to respond to the situation. However, the NNR has no authority to enforce the implementation of remediation activities and pointed to a lack of coordination amongst relevant stakeholders in addressing the situation relating to potential contamination of abandoned mines. The NNR developed a proposed coordinative plan and attempted to engage relevant stakeholders, including the DMR, DEA, DWS and the Department of Cooperative Governance and Traditional Affairs, over a number of years. Nevertheless, the NNR does not appear to have received sufficient cooperation and the roles and responsibilities of stakeholders remain unclear.

Section 36 of the Act enables the NNR Board to make recommendations to the Minister of Energy for the development of safety standards and regulatory practices. In this regard, the NNR has developed draft safety standards and regulations, and is in the process of establishing

remediation criteria. These standards have been based on international standards in line with those issued by the International Commission of Radiation Protection, and will distinguish between existing exposure scenarios and planned exposure scenarios. These draft standards have been submitted to the Department for further consideration, following which they will be released for public comment.

The NNR is also in the process of establishing a laboratory to analyse samples from sites where radiological contamination is expected. It is also working on improving legislation, processes and procedures for addressing contaminated sites and the establishment of a database of all potentially contaminated sites. The NNR experiences huge capacity restraints and does not possess the funding, nor the human resources, necessary to conduct proper planning, coordination and monitoring activities and remediation plans can only be implemented when finances are available.

The Commission notes that stakeholders have voiced complaints regarding the lack of responsiveness and transparency in respect of data on radioactivity in certain areas. While it notes the sensitivity and complexity of the issues involved, it is important for communities to have access to information that can be used to protect or realise their rights. In this regard, the Commission notes Principle 10 of the Rio Declaration on Environment and Development, which states:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities...

The Commission finds that there is an immediate need to address the lack of clarity concerning the State's roles and responsibilities in undertaking remediation of contaminated mine sites, particularly where such sites have been abandoned. The Commission further finds that, in light of the potentially severe and long-lasting impacts of contaminated sites, the State must prioritise remediation and funding for the NRR.

DIRECTIVES AND RECOMMENDATIONS

One Environmental System

- The DEA, DMR and DWS must, respectively, include in their annual reports the number of compliance notices or other sanctions imposed, including the proportion of successful interventions and/or criminal prosecutions undertaken against non-compliance.
- The DMR, in partnership with the Department of Health (DoH) and key stakeholders, is directed to commission a study to assess the impact of mining activities on communities' health, particularly respiratory and brain health. It is critical that the study is participatory and includes affected communities, community-based organisations and civil society organisations. In the interim, the DMR and the DoH are directed to introduce mechanisms to monitor and assess health levels in mining-affected communities. The Departments should ensure that all resulting monitoring reports are publicly accessible, particularly by affected communities.



Air quality, dust control and blasting

Air quality

- The DEA, in cooperation with COGTA and SALGA, is directed to conduct an audit of all provincial governments and municipalities to confirm:
 - a. Whether all municipalities have developed and incorporated an air quality management plan into their IDPs; and
 - b. Whether all provincial MECs and municipalities have appointed an air quality officer in line with NEMAQA.
- Noting the reported lack of certainty around the applicability of NEMAQA to mining activities, the DMR together with the DEA are directed to issue a formal notice clarifying the requirements. A copy of this public notice must be submitted to the SAHRC within three months from the release of this Report and must be accompanied by a report outlining measures taken to ensure that all industry role players are adequately made aware of the requirements.
- The DEA and DMR must jointly report on the measures taken to streamline the control of the cumulative air pollution impacts of mining operations. This report must outline the mechanisms that have been put in place for collation, verification and dissemination of information between stakeholders in relation to impacts reported and/or interventions undertaken in relation to air quality.

Blasting

- The DMR is directed to develop blasting regulations, which include provisions for sufficient and appropriate notice and adequate safety and monitoring measures, including mechanisms for community-based monitoring. The regulations should also set out the processes to be followed in assessing damages from blasting operations, compensation payments, and practical repair measures, amongst other things.
- In the interim, the CoM and other industry bodies must provide guidance to their members regarding appropriate standards for conducting blasting operations.

Nuclear waste management

- The NNR, together with key stakeholders, must develop appropriate mechanisms for communities and other interested parties to access information necessary to protect or exercise their rights.

Social and Labour Plans



“There has been some significant implementation of the social and labour plan by way of hospitals and schools and the community did not have that. We know of many communities that do not still have that. That clearly brings something in, but the community that is in a situation where those things are really mainly associated with being Government’s responsibility... and when they are looking at the mine they are looking at what the mine takes away in terms of wealth...I think when you navigate the difficulty you need to navigate it from not so much the perspective that you are bringing something, but also the cost analysis. What from a community perspective and from particular people in the community are you taking away ...”

- Janet Love, quote from National Hearing transcript

In terms of the MPRDA Regulations, all mining companies are required to submit an SLP as part of their application for a mining licence. The overall impetus for the SLP component of the regulatory regime is the desire to address historical socio-economic imbalances by driving socio-economic transformation in some of the most underdeveloped and marginalised communities in the country. The SLP system is also aimed at addressing the negative impacts of mining, and projects should therefore seek to prioritise these issues. An SLP must incorporate a number of elements, including a human resource development programme and a local economic development (LED) programme to spur economic growth and improve socio-economic welfare. The LED programme must include information regarding the social and economic background and key economic activities of the area in which the mine operates. The plan must include initiatives aimed at poverty eradication and infrastructure development; plans to address housing and living conditions, as well as the nutrition of mine employees; together with procurement progression plans.⁶¹ In terms of the SLP Guidelines developed by the DMR, development projects should consist of both infrastructure as well as income-generating projects.⁶²

⁶¹ Section 46.

⁶² Department of Mineral Resources *Revised Social and Labour Plan Guidelines* (2010) Available at: <http://www.dmr.gov.za/guidelines-revised-social-and-labour-plans.html>.



Throughout the National Hearing, multiple stakeholders referred to a “social licence” in their written and oral submissions. Globally, the need to obtain a “social licence to operate” is identified as standard mining industry practice. Broadly, this term denotes the idea of community acceptance and deals with approval, consent, and the overall reputation of mining companies. Given the ability of stakeholders to affect the sustainability and profitability of mining operations, mining companies endeavour to both obtain approval from relevant stakeholders to commence with mining operations, and to maintain such support throughout the lifecycle of a mine. However, a social licence to operate is not a legal requirement, and is often belied by the socio-economic reality in mining-affected communities. A “social licence to operate” should not be confused with legally binding SLPs. SLPs are a core legal requirement for the granting of a mining licence, and must be submitted to and approved by the DMR. As explained below, SLP obligations are not discretionary, and non-compliance breaches both the social licence and the legal mining licence – a fact that does not appear to be adequately acknowledged by all industry stakeholders.

Overview of previous findings on Social and Labour Plans

A number of concerns have repeatedly been raised relating to the effectiveness of the SLP system, including a plethora of issues surrounding the design as well as compliance with SLP commitments. The Commission recognises that substantive research has already been conducted by multiple organisations. The most comprehensive assessment of the SLP system to date is that of the Centre for Applied Legal Studies (CALs), having culminated in the production of two reports as well as a community toolkit.⁶³ Many of the findings outlined in CALs’ research was further corroborated during the Commission’s National Hearing, as well as in the course of the Commission’s previous work. This Report will not, therefore, provide a detailed assessment of the multiple challenges identified during previous inquiries, but will focus on additional information received. Briefly, however, the following are the key challenges identified in the SLP system:

- A lack of adequate consultation and meaningful participation, including in relation to the absence of a requirement for consultation where an SLP is amended, and the question as to whether replacement SLP projects have equivalent value to original projects.
- A lack of sufficient alignment with other relevant documents and processes, especially municipal IDPs. In addition, SLPs are often not aligned to social impact assessments (SIAs), EIAs and EMPs.
- The content, scope and layout of SLPs are not standardised across the industry. Although the DMR has produced SLP Guidelines aimed at assisting companies, these guidelines are not binding, resulting in the divergent quality and content between different companies. In addition, SLPs frequently exhibit what CALs has referred to as the “year zero scenario” in that SLPs rarely take into account the historical and cumulative social and environmental impact of mining operations as well as other industry activities within the area.

⁶³ Centre For Applied Legal Studies *The Social and Labour Plan Series* (2016) <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/Social%20and%20Labour%20Plans%20First%20Report%20Trends%20and%20Analysis%2030%20March%202016.pdf>>. See also Centre For Applied Legal Studies *Social and Labour Plan Mining Community Toolkit* (2017) <<https://www.wits.ac.za/media/wits-university/faculties-and-schools/commerce-law-and-management/research-entities/cals/documents/programmes/environment/resources/SLP%20Community%20Toolkit%202%20March%202017.pdf>>.

- There is often a failure to conduct proper feasibility studies during the conceptualisation phase, resulting in projects being scrapped, or where completed, facing serious sustainability challenges:

Examples identified in the National Hearing

- Twickenham identified the development of a pack-house, but subsequently realised that the current pack-house already in existence is already not fully utilised and the construction of a new one was therefore not sustainable.
- Twickenham built a Centre for Orphans and Vulnerable Children (OVC Centre). However, following completion, the centre did not meet the stipulations of multiple accommodation as required by the Department of Social Development (DSD). Moreover, it was established that two existing OVC Centres were already under-utilised. It was thereafter proposed that the Centre be converted into a Day Care Centre or Drop-in Centre.
- Marula Platinum initiated a hydroponic project aimed at empowering women, but as a result of harsh weather conditions, prices for the products and a lack of an available market for the products, the project failed and was replaced by a brickmaking project.
- In one case the development of a community centre had been identified through consultation with communities and the local municipality. However, the location of the community centre was disputed and eventually replaced by another project. Similarly, the development of a clinic was identified, but following consultation with the Department of Health, it was determined that the location of the clinic would need to be changed. The building of the clinic was subsequently interrupted by protests.

However, the non-sustainability of projects is not always due to the failure to conduct feasibility studies. The Commission noted several examples where external factors such as a lack of commitment and cooperation by other stakeholders has significantly hampered the delivery or operationalisation of projects. The Lebalelo Water User Association (LWUA) pipeline project in Limpopo constitutes a prime example: In this instance, several mining companies collaborated with the DWS to build a pipeline to provide water to certain mining developments. In addition, the pipeline would make raw water available to the municipality for conversion into potable use and delivery to local communities. The pipeline was completed in 2013 and registered with the Sekhukhune District Municipality as the Water Services Authority, but has not yet been operationalised. Despite infrastructure having been developed, communities still do not have access to potable water. In addition, the Mooihoek Water Treatment Plant was built but never commissioned. The DWS has allegedly declined several proposals to assist in operationalising the Plant. In a further example, Twickenham Mine committed to the electrification of households. After the successful electrification of 52 households, the electrification of remaining households was stalled after Eskom advised that it lacked the capacity to support additional domestic connections.



Analysis of SLP projects

The Commission notes with concern challenges in respect of the types of SLP projects that are undertaken, the isolated impact of certain SLP projects, and the conflation of responsibilities associated with SLP projects and rehabilitation liabilities, respectively.

The Commission's National Hearing highlighted serious concerns around the kind of projects undertaken under the guise of development. If one considers the negative impacts of mining operations holistically, some of the main challenges experienced by communities include access to and quality of water, health concerns (particularly in relation to increased levels of dust in the air), access to quality housing and basic services, increased traffic placing strain on local road networks, and greater competition for employment opportunities. Therefore, it makes sense for the DMR's SLP Guidelines to emphasise infrastructure (including water, sanitation, electricity and road networks), housing and income-generating projects. Increased migration often associated with the commencement of new mining operations also places strain on existing public services such as health care and basic education. The emphasis of SLP projects should thus ideally be aimed at addressing these issues as the ones that most directly affect the lived reality of people residing in local communities. SLPs should therefore always be formulated on the basis of socio-economic challenges faced by communities in specific contexts, rather than through a top-down, a contextual process that fails to respond to local needs.⁶⁴

Some of the most common projects identified include the construction of houses, schools, clinics, roads and water infrastructure, which can be clearly linked to human rights-based development outcomes. However, the Commission has previously noted the views raised by community members that the construction of roads and bridges – while improving the transportation network for local communities – simultaneously benefits mining companies. In this regard, the Commission has noted allegations raised that such initiatives were not in line with community-based priorities, but rather that such projects were predetermined by mining companies to enhance the sustainability and profitability of the mining operation. This is not always the case, and improved road networks may significantly address barriers to accessing basic services such as education and health care, while providing easier access to economic opportunities for communities more broadly. However, the perception created amongst affected communities is important and underscores the need for meaningful consultations to promote local ownership of the types of projects subsequently implemented. Some such projects have been specifically identified by the DMR – such as the contribution towards a portion of a Provincial Road in Limpopo.

Other projects include the development of sporting facilities and community centres, as well as investment in income-generating projects and small business enterprises. Examples include investment in a small sewing project, commercial farming initiatives, or the provision of dumping trucks to be used in providing services to the mine. SLP commitments also include the provision of basic services, such as water, refuse removal, and electricity to local communities. However, the suitability of this approach has been questioned on several occasions since some projects blur the lines between public and private goods, constitutional accountability, and sustainable welfare.

⁶⁴ CoM Comments on SAHRC Provisional Report: National Hearing on the Underlying Socio-economic Challenges of Mining-affected Communities in South Africa (31 January 2018) 5.

One of the contributing factors to communities' perception that SLP projects do not bring about sufficient benefits may be the type of projects undertaken in certain instances. Some examples provided to the Commission include projects identified by Nkomati Nickel Mine in Mpumalanga for the upgrading of the Chief Mnisi Pavillion at Mantjolo Village Badplaas and Chief Malaza Pavilion at Tjakastad "to be utilised during the cultural celebration held in April each year by VIPs".⁶⁵ African Rainbow Minerals (ARM), likewise contributed approximately R1.2 million to the construction of the Matimatjatji Tribal Office, and R5 million on a community hall and offices. During its oral submission, ARM further explained that each of the host communities (eight in total) will be receiving a tribal office at an estimated amount of R2 million each. Other examples include Leeuw Mining, which undertook to provide six houses to address the housing needs of the Mbilani community,⁶⁶ the provision of electricity to 44 houses in Inkululeko and Masakhane by Jindal Mining, as well as the establishment of a "government service centre" aimed at improving access to local government for local community members in Matzikamma Local Municipality.⁶⁷ Wescoal Intibane Colliery built 18 houses for pensioners, drilled four boreholes, renovated a crèche and provided educational toys. In the Elandspruit Colliery it renovated ablution facilities at a primary school and funded small sewing and bakery businesses. It further identified a sustainable housing project, although the number of houses had not been determined. Projects of this nature, although linked to socio-economic conditions, are small with isolated benefit. Generally, it is rare to find collaboration between mining companies in larger projects that hold the potential for greater socio-economic impact more broadly, although the Commission has noted a few good examples of how the industry is beginning to break the silo approach.

Superficially, SLP projects appear to be in line with broader development objectives and capable of improving the socio-economic welfare of affected communities, while contributing to economic growth at a municipal and provincial level. However, communities have not seen a great enough improvement to offset the negative impacts of mining. The DPME explained that credible social and economic projects that meet the real needs of communities on a regional level are curtailed by the SLP being linked to an individual licence to operate. The DPME further explained that "the economic development projects that are part of SLPs are not sustainable, do not have the necessary market or cannot be marketed outside the locale and generally do not have the scale required to lift communities into meaningful economic development". Each company ultimately contributes significant financial resources to multiple community development projects, but due to the fact that projects are varied and dispersed, communities do not adequately benefit from such projects. For example, one SLP that allocates an average of R25 million over a five-year cycle is divided between the construction of a mobile clinic, the tarring of a portion of a road, the construction of a school, the construction and electrification of a number of houses, provision of water, and capital support to a small business enterprise. The effects are, therefore, divided between different portions of the community.

Despite the entire community experiencing negative impacts of mining, there is no overall improvement in socio-economic circumstances of the community as a whole. Similarly problematic is where projects are perceived to benefit influential stakeholders such as Traditional Councils. Where communities are not adequately consulted, or do not collectively support projects of this

⁶⁵ DMR *Submission: Annexure A to Question 8.5* (28 August 2016) items 13 and 14.

⁶⁶ Item 32.

⁶⁷ A collaborative project between Saint Gobain (Pty) Ltd, Steenkamps Kraal Monazite, Tronox, and Mineral Sands Resources.



nature, perceptions of bribery and corruption may arise. This may, in turn, catalyse a breakdown of trust between communities, Traditional Councils, municipalities and mining companies. This does not mean that the contribution of mining companies is insignificant, nor does it mean that the intentions of mining companies are dubious. Rather, the current SLP system might merit holistic reconsideration.

A final example relates to the conflation of SLP project-related responsibilities with other financial obligations, potentially arising as a result of a loophole in regulation. According to documentation provided by the DMR, BHP Billiton undertook to develop an environmental remediation project “to treat the net surplus of contaminated mine water from BHP Billiton Energy Coal South Africa (Pty) Ltd (BECSA) to qualify a release back into the Upper Olifants River Catchment”. The project was identified as “water infrastructure development”. The Commission raises concern with this project, noting the conflation of environmental protection and rehabilitation responsibilities with SLP projects, thus significantly reducing the company’s overall financial obligations.⁶⁸

The Commission accordingly finds that the current SLP system does not adequately address the negative impacts of mining activities and the shortcomings in the design of, and compliance with, SLP commitments limit their ability to drive socio-economic transformation in mining-affected communities. In addition, the process of developing SLPs should be consultative, and should respond to input by communities and local government regarding required socio-economic outcomes.

The Commission accordingly finds that there is an immediate need for the DMR to develop clear and binding requirements for the content of SLPs and to ensure that they are aligned to EIAs and EMPs and include environmental information on the potential impacts of mining and post-closure quality of land. There is also an immediate need for the DMR to enforce compliance and develop sanctions for those mining companies that fail to comply with their SLP commitments.

SLP investment

The Commission is concerned about the absence of clear guidelines to determine proportionate investment in SLP projects by mining companies.

There is currently no regulation around the financial contribution to be made towards SLP projects other than the requirement outlined in the Mining Charter that such contributions must be “proportionate to the size of the investment”. No guidance is provided on the meaning or determination of proportionality, although general practice appears to accept a benchmark of around 1% of a company’s annual turnover. However, without objective criteria or guidance for determination, this is left largely to the discretion of individual mining companies. Disappointingly, although the draft 2016 Mining Charter had initially proposed a commitment of 1% of annual turnover, this was later removed from the 2017 version. The DMR thus missed a crucial opportunity to provide certainty amongst stakeholders. When the Commission asked

⁶⁸ DMR Submission: Annexure A to Question 8.5 (28 August 2016) item 16.

the DMR how it evaluated the size of investments, the Department conceded that there is no prescribed threshold to ensure that investment is proportionate in relation to a cost-benefit analysis. Rather, it explained that this is guided by “the needs of communities and unfunded or partially funded projects within the IDPs”.⁶⁹

Given that SLPs are intended to play a crucial role in offsetting potentially negative impacts of mining activities, one of the most problematic elements of the SLP system is the fact that SLP commitments are often subject to the ‘profitability’ of the mining company. Thus, when communities and municipalities are consulted and undertakings regarding development projects are made, implementation is largely subject to the volatility of market prices or other factors impacting profitability. SLPs are essential licence conditions – companies cannot operate unless an approved SLP is in place. In considering the objectives of the regulatory framework to drive transformation and contribute to the socio-economic welfare and development of communities, the requirement for SLPs cannot be limited to the mere production of a document which may or may not see fruition. If this were the case, the move away from voluntary corporate social investment towards mandatory development initiatives would not have been necessary. The impact of an operation on the local environment and people occurs regardless of whether or not such operation is profitable. The Commission is sensitive to the challenges faced by the extractives industry in respect of labour and energy costs as well as volatile commodity prices globally. Nonetheless, the failure to provide ring-fenced funding for SLP obligations ignores the socio-economic realities of mining-affected communities. Despite the DMR identifying the need for ring-fencing, the amended regulatory framework has failed to address this significant gap.

In addition to normal corporate and other taxes, mining companies pay royalties to the State. Royalties reflect the fact that mineral resources are seen to belong to all South Africans, and not just to those owning land or living within the vicinity of mineral deposits. While the Commission is generally supportive of this view – noting the lasting effects of the discriminatory land redistribution practices of the past – mining communities suffer the effects of mining operations disproportionately. The CoM has continuously called for the ring-fencing of a portion of mine royalties to be ear-marked for development in mining-affected communities, similar to the position in countries such as Peru, Ghana, Guinea, and Argentina. It was suggested that this would enable the State to deal with in-migration and other impacts of mining. Several mining companies appearing before the Commission during its National Hearing reiterated their support for this position. The CoM has argued that royalties should be used to serve the sustainable development agenda through human resource and infrastructural development. According to the CoM, “[t]he worst outcome from a sustainable development point of view is if the non-renewable natural capital is converted into financial capital and this is then used for recurrent government expenditure (e.g. salaries)”.⁷⁰ The National Treasury is responsible for the development of tax legislation. However, the CoM notes that the “National Treasury has, in the past, always been firm in its position that it was unwilling to countenance ring-fencing of fiscal revenues in principle, and of royalties in particular, on the grounds that the nation’s natural resources belong to the citizenry as a whole”. Recent research shows that whereas the ring-fencing of royalties can benefit mining-affected communities and alleviate poverty in these regions, it can likewise lead to perverse incentives such as dependency by local government on

⁶⁹ DMR Response by Department of Mineral Resources to Questions dated 16 September 2016 (11 November 2016) para 4.4.

⁷⁰ Chamber of Mines Supplementary submission (21 October 2016) 2.



such revenue streams or the exacerbation of regional disparities.⁷¹ In noting the social impacts of mining and the socio-economic disparities that persist in mining regions and historically labour-sending areas, it may be an opportune time to reignite this debate.

The Commission finds that the DMR should define the minimum amount of financial contribution towards SLP projects. This amount must be ring-fenced. The DMR should further take the lead in establishing a task team, to include the CoM, National Treasury, DPME, community-based organisations and other relevant stakeholders, to conduct research into the current financial regulation of the mining industry.

DIRECTIVES AND RECOMMENDATIONS

- The DMR, in consultation with affected communities, SALGA, mining companies and other relevant stakeholders, is directed to amend the regulatory framework in respect of SLPs and report to the SAHRC on how it will review the current limitations of SLPs and the scope of its consultation process (how the Department intends carrying out the review process). The amendment review process must include the explicit consideration of the introduction of prescribed and ring-fenced financial contributions by mining companies towards the implementation of SLPs. The review process must determine to what extent consultation with relevant communities and local government should be legislatively mandated in order for SLPs to respond to contextual socio-economic challenges. The review process must further evaluate the current SLP regulatory framework against the criterion of gender responsiveness. The review process must consider the introduction of an express prohibition of the amendment of SLPs without prior consultation with both mining-affected communities and relevant local government authorities. Finally, the review process must consider the introduction of sanctions for mining companies that fail to comply with the commitments set out in their SLPs.
- The DMR is directed, within six months, to provide a report to the Commission on all existing SLP investments, projects, trusts and other entities that have been undertaken and established for each mining project. The report should include the basis on which each entity was valued as well as the monitoring, evaluation and reporting mechanisms that are in place for existing SLP projects, including the DMR's reporting requirements to DPME. In addition to setting out the monitoring actions of the DMR, the report must include steps taken by the DMR to ensure compliance by mining companies with the commitments made in SLPs.
- The DMR is directed to electronically publish the above report and a list of all existing SLP investments, projects, trusts and other entities that have been undertaken and established for each mining project. The DMR is further directed to electronically publish all SLPs in its possession.
- BHP Billiton and DMR are to provide a report on the implementation status of BHP Billiton's environmental remediation project and the treatment of contaminated mine water from BECSA. The DWS is directed to report to the Commission on the steps it has taken in monitoring this project.

⁷¹ National Resources Governance Institute & United Nations Development Program *Natural Resource Revenue Sharing* (2016).

Meaningful Participation, Consultation, Consent and Access to Information



Meaningful participation

The Commission notes with concern submissions indicating inconsistency and in certain instances disregard of the duty to secure meaningful participation. Instances involving land ownership, disposal of land rights, SLPs, and other issues were often cited as not meeting levels where they could be deemed to be meaningful. Furthermore, participation and consultation processes were described as lacking in legitimate representation, not being sufficiently inclusive, not accommodating in terms of process, level and quality of information provided, and often not including key stakeholders, such as municipalities. While compliance with the obligation to consult is often affirmed in accounting; openness, inclusivity and consensus appear to have been compromised, often at great cost to legitimacy, community confidence, and acceptable impacts for both communities and mining operations. Meaningful consultation and participation therefore arose in the context of almost all dimensions in the chain of the mining operation from the grant of licenses to the close out of operations.

Our courts have been very clear in various contexts about the need for participation and for consultations to be meaningful. In *Bengwenyama*⁷² the Constitutional Court found that various notice and consultation requirements are “indicative of a serious concern for the rights and interests of land owners and lawful occupiers” in mining-affected communities.⁷³ The Court emphasised the fact that the central purpose of consultations was to explore whether any form of accommodation is possible between the mining right applicant and the lawful landowner or occupier. Thus, adequate consultation requires an engagement in “good faith” in an attempt to reach accommodation.⁷⁴ Beyond this case, the courts have on multiple occasions reiterated the obligation of conducting meaningful consultation,⁷⁵ while the UN has also recognised participation as a core element of a rights-based approach to development.⁷⁶

⁷² *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others* 2011 (4) SA 113 (CC).

⁷³ Para 63.

⁷⁴ Para 65.

⁷⁵ See in the context of socio-economic rights, for example, *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) and *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC). In the legislative context, see, for example, *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC).

⁷⁶ UN Department of Economic and Social Affairs *The United Nations Development Agenda: Development for All* (2007); UN Declaration on the Right to Development (1986).



In terms of the MPRDA, the granting of a prospecting or mining right must be preceded by extensive consultation. This includes notifying interested and affected parties and inviting comments or objections once an application for a right has been received by the DMR. Objections are then referred to the Regional Mining Development and Environmental Committee (RMDEC), and the Minister is notified. Once an application has been accepted, the applicant is again required to notify and consult with the lawful owner or lawful occupier as well as other interested and affected parties. This includes consultation regarding the legitimate disposal of land usage or ownership rights, since the MPRDA defines “owner” to include both the State and lawful occupiers of land. Where land is owned by the State and falls under the administrative control of the DRDLR, the Minister of Rural Development and Land Reform is empowered to conclude lease agreements in order to facilitate access to the surface for the conducting of mining operations. Despite this, the DRDLR is often not consulted or even informed of mining rights applications over land subject to its control. Instead, mining companies frequently interpret the requirement for consultation as the need to consult either the State (normally through the DRDLR as the custodian of large portions of State-owned land), Traditional Authorities, or communities, in violation of regulatory requirements. The Commission has also noted that very little mention was made over the consideration of land subject to land claims or ownership disputes. While some government departments indicated that this forms part of the application and consultation process, it does not appear to be consistently addressed in practice.

Consultation furthermore relates to prospective mining activities, as well as environmental impacts and management programmes and the identification of SLP projects. In respect of the latter, it is noteworthy that the amendment procedure for SLPs does not require consultation or even notification – instead, only an approval from the Minister is required. Reasons submitted by some mining companies for amendments of SLPs include a volatile global economic environment; restructuring of mine business strategy; difficulties in project execution due to third party or other stakeholders not delivering on required elements of projects; unanticipated escalation in project construction costs; and conflict with communities, disagreement on project location, or changing community priorities.

Although not binding, the DMR has produced Guidelines for Consultation. The type of information provided in terms of the EIA scoping report includes:

- Proof of notification
- Minutes of consultation meetings, including date and time
- Record of attendance
- List of issues raised by parties
- How such issues have been addressed
- List of interested and affected parties
- Identification of the land owner (and whether the community is the owner)
- Existence of any land claim
- Description of information provided to interested and affected parties
- Existing status of cultural, socio-economic and biophysical environment, and anticipated impacts

Despite requirements for consultation with all interested and affected parties, the Commission has noted discrepant practices and selective consultations:

- **Municipalities** are not adequately consulted. Research conducted by SALGA has identified multiple shortcomings, including the fact that many mining companies do not consult with municipalities at all, or have predetermined SLP projects, which municipalities must attempt to incorporate into IDPs⁷⁷. This is despite the fact that municipalities are constitutionally mandated to drive local development.
- **Community members** are, at times, not consulted at all, and are not always aware that SLPs have been developed, or are not aware of the projects committed to under SLPs. In some instances, mining companies conducted consultations with small portions of communities or Traditional Councils on the mistaken assumption that they represent the broader interests of local communities. This results in the identification of projects that are not in line with the needs and priorities of affected communities, while excluding and disempowering communities.
- **Traditional Councils** often present themselves as “custodians of communities”, and Traditional Councils are thus consulted. Throughout the proceedings, the Commission noted the consistent misconception that land under the jurisdiction of traditional authorities is owned by Traditional Councils. This misconception leads to the belief that consent for land use must be sought from Traditional Councils, and not from the State or from affected communities. Lease agreements are therefore negotiated and concluded with Traditional Councils to the exclusion of other relevant parties. During its National Hearing, the Commission noted several examples of cases where resolutions for the sale or lease of land – or, in some cases, lease agreements themselves – appear to have been signed by Traditional Councils. This has even occurred where a dispute around the legitimacy of Traditional Leaders is explicitly acknowledged. In other instances, Traditional Councils have asserted that consultations have not been conducted in line with customs, which subsequently undermines the authority of traditional structures and customary law.

Some community members highlighted the fact that people are afraid to speak out against a mine in open consultations, particularly where there is fear that Traditional Councils have been “bought over”. Others are afraid to openly oppose the mine for fear of intimidation or unfavourable treatment. While the Commission acknowledges the importance of traditional structures and prescription to customary law, it is also important to ensure that consultative mechanisms protect minority or dissenting voices. Furthermore, not all community members are represented by traditional leadership structure.

In addition, the Commission received submissions in which one Traditional Council complained about the conduct of representatives of the mine in engaging with certain community members on an ongoing basis, without affording the Traditional Council a similar audience. In this matter, the Traditional Councils within the area sent legal correspondence to the mine requesting that it refrains from consulting with particular individuals seen to be engaging in acts of violence and criminality. Ultimately, it was alleged that the conduct of the mine undermined the authority of Traditional Councils.

The DMR proposed that it should play a more active role going forward, whereby the Regional Manager will give direction on the nature and substantive content of consultation⁷⁸.

⁷⁷ In its further submission, SALGA has impressed on the need for mining companies to participate in the development of IDPs to achieve better alignment and integration of local government priorities.

⁷⁸ The COM in its further submission to the Commission during January 2018, indicated an appreciation of the need to explore public participation more closely and proposed that the 3 pillars of public participation developed by the International Association for Public Participation could be more fully explored in South Africa.



Example

Tendele Coal Mine outlined in its submissions that initial consultations were conducted with the Traditional Council. Later, a Mine Community Committee was appointed to represent the Traditional Council and community. Communication was filtered down to the broader community by the Somkhele Traditional Authority Committee (STAC), through local radio stations, and community newsletters. The STAC was later disbanded due to the realisation that it “could not function in a complicated and fragmented community”, and a New Community Structure is being established in its place. In addition, a Mpukunyoni Community Forum has been established, where the EXCO forum consists of traditional leaders, the Mayor, mine representatives and a representative from the Mpukunyoni Community Property Association (MCPA).

Industrial theatre shows and Roadshows were held by Tendele Coal after the SLP was completed to “sensitise” communities to the community projects the mine would embark on. Ongoing feedback on the implementation of projects is provided at Iziduna meetings in the community, at Traditional Council meetings, at the STAC, through newsletters and radio presentations.

The submissions from Tendele Coal Mine noted that “[i]t is concerning that a few members of the Community can create a structure (that is not recognized by the Traditional Council), operate thus ‘illegally in the area’, can cause so much divide in the community that the Municipality denies them the right to march and a Judge provides an interdict against its leader.” In this submission, reference is made to the MCPA, against whom the Mine has successfully obtained an interdict on the basis of allegations of violence, destruction of property and intimidation.

The Commission is concerned about the tone of this submission, and fails to understand how community-based representative forums may be considered to be operating illegally based on the fact that they are not formally recognised by the Traditional Council. The Commission condemns any form of conduct that violates the bounds of the Constitution, including intimidation and violence, but maintains that the rights to freedom of expression, association and assembly must at all times be respected, by the State and mining companies alike.

The Commission finds that, there is a compelling need to develop clear consensus driven standards for compliance, evaluation and assertion of the duty to achieve meaningful participation from the commencement of mining operations such as applications for licenses. Meaningful participation must both through process and outcome, seek to legitimise process and ensure that needs are understood and addressed as between all stakeholders creating accessible open, representative and inclusive platforms through which consultation occurs for impact driven outcomes. Meaningful consultation should not be confined to a tick-box exercise.

Noting the significant country-wide implications of mining operations, standards for consultation should ideally include opportunities for wider public participation in so far as the granting of mining licenses and evaluation of mining impacts are concerned.

Free, prior and informed consent (FPIC)

Community consent implies that a decision made by the community must be free from any form of manipulation, coercion, or pressure; prior to the commencement of the activity; and with full, detailed and accurate information on the nature and scope of the proposed mining activity. This information is to include the reasonably possible impacts on the community's economic, social, environmental wellbeing, including the impact on women informed by the precautionary principle that the burden of proof falls on the applicant to establish that an activity is not harmful, and on development alternatives.

Despite extensive regulatory requirements around the need for mining rights applicants to consult with interested and affected parties, the MPRDA does not require these parties to consent.⁷⁹ This includes consent for land use, relocation, SLP projects, as well as for the continuity or closure of mining operations generally. Although not explicitly included in the MPRDA, express consent must be obtained in two instances: First, mining licence applicants must obtain consent and approval for mining operations from local government in line with the provisions of SPLUMA. Second, the express consent of communities must be obtained under circumstances where the IPILRA is applicable.⁸⁰

Thus, where communities hold informal land rights,⁸¹ the IPILRA⁸² provides that “no person may be deprived of any informal right to land without his or her consent”.⁸³ It further states that where land is held on a communal basis, a person may be deprived of such right in accordance with the custom and usage of that community.⁸⁴ However, any decision to dispose of any right (including occupation and usage rights) may only be taken when certain requirements have been met, namely:

- A meeting must be convened for the purpose of considering the disposal of such land rights
- Community members must have been given sufficient notice

⁷⁹ In *276/03 Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* (2009), the African Court of Human and Peoples' Rights found that in cases where development or investment projects would have a major impact, the State “has a duty to not only consult with the community, but also to obtain their free, prior and informed consent, according to their customs and traditions” (para 291).

⁸⁰ Section 2(1).

⁸¹ Informal land rights are defined to include:

(a) *the use of, occupation of, or access to land in terms of –*

(i) *any tribal, customary or indigenous law or practice of a tribe;*

(ii) *the custom, usage or administrative practice in a particular area or community, where the land in question at any time vested in*

(aa) *the South African Development Trust established by section 4 of the Development Trust and Land Act, 1936 (Act No. 18 of 1936);*

(ab) *the government of any area for which a legislative assembly was established in terms of the Self-Governing Territories Constitution Act, 1971 (Act No. 21 of 1971); or*

(ac) *the governments of the former Republics of Transkei, Bophuthatswana, Venda and Ciskei;*

(b) *the right or interest in land of a beneficiary under a trust arrangement in terms of which the trustee is a body or functionary established or appointed by or under an Act of Parliament or the holder of a public office;*

(c) *beneficial occupation of land for a continuous period of not less than five years prior to 31 December 1997; or*

(d) *the use or occupation by any person of an erf as if he or she is, in respect of that erf, the holder of a right mentioned in Schedule 1 or 2 of the Upgrading of Land Tenure Rights Act, 1991 (Act No. 112 of 1991), although he or she is not formally recorded in a register of land rights as the holder of the right in question.*

⁸² Section 2.

⁸³ Section 2(1).

⁸⁴ Section 2(3).



- A majority of community members must be present or represented at the meeting
- Community members must have been given a reasonable opportunity to participate
- Decisions must be taken by a majority of the holders of rights
- “Appropriate compensation” must be provided to any person who has disposed of a land right

Given the IPILRA requirement that any decision regarding the disposal of rights must be taken by a majority of the land rights holders, agreements reached with State departments, Traditional Councils or community forums are not adequate. Where an agreement cannot be reached through consultation, sections 54(5) and 55 of the MPRDA provide for the expropriation of land where such a measure is deemed necessary for the achievement of the objects of the Act.

Although no regulations were ever enacted to give effect to its content, the DRDLR developed a policy document in 1997, entitled the *Interim Procedures Governing Land Development Decisions which require the Consent of the Minister of Land Affairs as Nominal Owner of the Land*. In terms of this policy document, the DRDLR is required to take steps to ensure that the process of consultation and procurement of consent is fair and inclusive. The DRDLR must conduct a thorough investigation into background circumstance (including social dynamics); ensure that a proper climate for consultations and negotiations is created; further ensure that all stakeholders are heard and that the process is fair and inclusive; ensure that the decision taken is truly representative of the community’s will, and that the rights of all individuals and women in particular are protected. The policy therefore requires that the meeting referred to in the IPILRA be either presided over or witnessed by an official of the DRDLR.

The period of “adequate notice” outlined in section 2 of the IPILRA is interpreted by the DRDLR as meaning 21 calendar days. Noting the complexities of the issues involved – including conflicting interests of community members, vast amounts of information around the potential impact of mining, and the need to negotiate specific terms of agreement – it is highly unlikely that 21 calendar days constitute an adequate notice period.

The DRDLR submitted that, where it is informed that a mining rights application has been lodged and where the provisions of the IPILRA are applicable, it provides oversight to ensure that the consultation process is in line with the requirements of the Act. It further acts to ensure that a community resolution is obtained prior to the conclusion of any lease agreement by the Minister. The DRDLR further submitted that through its participation in the RMDEC, the DMR and provincial authorities are becoming more aware of the requirements of the IPILRA and are “beginning to insist on the production of community resolutions”. The fact that, after almost 20 years of being in operation, some government authorities are only now beginning to implement this piece of legislation highlights the lack of cooperative governance and inadequate levels of oversight. In addition to frequent non-compliance with the provisions of the IPILRA, the Commission has previously outlined its concern that it is not standard practice to inform and/or consult with the DRDLR during mining rights applications.

Overall, there does not appear to be any form of assessment of the adequacy of consultation processes prior to the granting of rights. The Commission was extremely concerned to note that, notwithstanding its essential role in the promotion and protection of the rights of rural communities, the DRDLR has never dealt with an instance where there has been opposition to the granting of a mining right by a community. In contrast, community-based organisations such as

Mining-Affected Communities United in Action (MACUA) and Mining and Environmental Justice Community Network South Africa (MEJCON-SA) submitted that most (if not all) communities they have been involved with, have opposed the commencement of mining operations within their areas. It would appear, therefore, that the DRDLR is unaware of some of the fundamental challenges taking place in these communities.

Besides consent required in terms of the IPILRA, it is not a requirement for mining companies to obtain consent from local communities in respect of the activities surrounding mining operations or development. Legally, the obligations are limited to consultation, without providing guidance regarding what this should entail. Moreover, failure to require consent means that communities have little or no bargaining power, and thus limited control over development projects that directly impact on their lives and livelihoods⁸⁵.

The Commission finds that while collective consent appears to be accepted as a condition for consent, such consent for a number of reasons needs reconsideration. These include a known lack of diversification and inclusivity in the representation of stakeholders, including groups which experience systemic disadvantage such as women and persons with disabilities. Additionally to meet the strict requirements for collective or group consent, the necessary controls to ensure a rights protective approach are not in place permitting the asserting of individual rights should such need arise. In such instances, the principles of free, informed and prior consent are negated. The deficiencies in a model which accepts collective consent and the absence of consent in certain instances is evident from the example of the consistent disregard of the legal requirements outlined in IPILRA during the mining application process. A pressing need for harmonisation of the framework and controls to ensure the principle of free, informed and prior consent is given sufficient regard is necessary.

The Commission has also found on the basis of submissions that the DRDLR has not been sufficiently involved in community consultation processes to assess levels of consensus and consent.

The Commission finds that insufficient time and accessible information sharing has been availed to communities to undertake decision making processes as required by their customary law.

⁸⁵ The report of the High Level Panel on the Assessment of Key Legislation and the Acceleration of Fundamental Change which was released post the hearing by the Commission, is an endorsement of the observations by the Commission and submissions received from civil society organisations, calling for urgent reforms to legislation which do not clearly include protections for rights where meaningful consultation has not occurred; and in instances where consent is not obtained; refused or revoked. A number of civil society organisations such as Action Aid and the Bench Marks Foundation raised this concern in their further submissions to the Commission, in January 2018.



Multiplicity of consultation forums

The Commission notes that a multiplicity of sometimes unrepresentative consultation forums presents an ongoing challenge.

There is generally no standard industry practice in respect of ongoing consultation with stakeholders. Platforms for engagement include LED forums; IDP forums; and the establishment by some provinces of forums such as the Provincial Employment Growth Advisory Council or the Government Facilitating Task Team in Limpopo. Some mining companies conduct community consultations through local ward councillors or through the offices of the executive mayor, whereas others opine that this leads to political factionalism and conflict. The majority of mining companies have established community consultative or engagement forums, although membership and participation differ. Some of these forums consist of community representatives and local businesses, while others also include ward councillors or representatives from Traditional Councils. The manner in which community representatives are selected likewise differs between mining companies: Certain mining companies facilitate elections amongst local communities, whereas others allow communities to identify their own representatives. There is a general perception amongst communities that mining companies establish forums and help elect representatives in an effort to protect their own interests. Some community members reject those appointed as representatives due to perceived inadequate election processes or significant levels of mistrust. Often, separate representative bodies are established. Mining companies are sometimes expected to consult with several different community representative forums that continuously change and do not always represent broader community interests. Multiple forums have been disbanded as a result of fragmentation, violence and threats.

The Commission has further observed that some of these forums serve as platforms for sharing of information and addressing concerns generally, while other forums serve as decision-making bodies for employment and procurement matters. Despite the fact that participation in community forums generally does not include any form of direct payment, there is a perception that members personally gain through their involvement.

Communities are not homogenous entities, but complex social structures made up of multiple groups, oftentimes with divergent interests. As noted previously, mining companies are operating in environments beset with deep-seated social tensions. In many instances, the establishment and functioning of community forums have endeavoured to promote transparency, participation and empowerment. However, this often gives rise to unintended consequences, such as the potential growth of powerful elites who act as gatekeepers for opportunities meant to benefit communities more broadly.

Almost all stakeholders noted the challenges experienced with regard to community forums. Several mining companies called for the establishment of a statutory community structure to provide some certainty, similar to Communal Property Associations. Mining companies further indicated that the National Hearing presented an opportunity to identify ways of ensuring that communities are represented by stable structures appointed by democratic methods.

The Commission finds that greater inter-governmental cooperation is needed to ensure the establishment of streamlined and representative community forums, which are broadly consistent in their function and operation.

Access to information, transparency and confidentiality

The Commission notes with concern that an inability to access pertinent information materially negates affected communities' ability to engage in meaningful participation.

Access to information is a fundamental right⁸⁶ that holds the potential to drive the realisation of other rights – including the right to freedom of expression, which cannot be achieved without having access to sufficient information to make informed decisions. Through the ability to access information, communities, local governments, and other relevant stakeholders are better positioned to meaningfully participate and drive sustainable development initiatives. Access to information provides an opportunity for public scrutiny and critical reflection, which in turn promotes improved standards of delivery and enhanced levels of accountability.

Access to information must include information regarding all short- and long-term risks and benefits of mining operations. Access to sufficient information includes the requirement that information is suited to the needs of consumers and is easily accessible, and that interested and affected parties have sufficient time to consider it. The provision of information was raised frequently as a challenge in submissions to the Commission. In particular consultations were cited as sometimes emphasising the benefits while downplaying the risks and negative impacts of mining operations. Furthermore, information provided to communities is often provided in English, in writing, and is riddled with technical scientific and legal language.

Access to information is a constitutionally enshrined and statutorily protected right. The premium it enjoys is in recognition of its role as an enabling mechanism for public participation, accountability, transparency and growth. While not an absolute right, the presumption in law and one observed globally is that access to information should be provided proactively and refusals of access to information should take place only exceptionally. The basic principle of access to information is that disclosure of information is the rule, and exemption from disclosure is the exception.⁸⁷ Exceptions to the rule should be clearly and narrowly defined. A number of mining companies maintained that documents like SLPs contain “commercial, financial or scientific technical information”, the disclosure of which is “likely to cause harm to the commercial or financial interest of the company”.⁸⁸ Notwithstanding requests for elaboration of the reasons for the classification of information as “confidential”, the Commission did not receive any substantive explanation during the Hearing process, nor were submissions providing indicating that in favour of the presumption favouring disclosure, protected information could be redacted permitting the release of other non-sensitive information. According to the DMR, confidential information includes information that could influence share prices, including pending applications, shareholder agreements, funding agreements, the unverified financial extent of statutory obligations, and trade secrets.

Nothing in the course of the hearing was expressly raised around the need for a systematic arrangement for the release of information through the course of mining operations. Later submissions from organisations like the CALS proposed that dissemination of information be

⁸⁶ S 32 of the Constitution.

⁸⁷ *President of the Republic of South Africa v M & G Media Ltd* 2012 (2) SA 50 (CC) para 22.

⁸⁸ Mirroring the wording of the ground for refusal of disclosure set out in section 68 of the Promotion of Access to Information Act, 2 of 2000.



made systematic and that record keeping be emphasized to ensure that information is released in a timely manner, in formats that are accessible and can be understood.⁸⁹

While the Commission is sensitive to the reality that some information of a commercial, financial, scientific or technical nature may legitimately expose mining companies to potential financial and commercial harm if disclosed, it has also observed a general culture of secrecy which oftentimes goes beyond justifiable concerns. In practice, multiple documents are therefore classified as confidential, including but not limited to EIAs, EMPs, SLPs and annual implementation reports. The Commission, in its 2014 Hearing Report, found that “[t]he withholding of information results in creating inequity and disadvantages for poorer people by obliging them to engage in lengthy legal processes unnecessarily. The lack of information disempowers them from being able to monitor compliance with legal obligations and various undertakings”.⁹⁰ Despite having outlined recommendations that these documents be made publically available and easily accessible, this is still not the case.

In contrast to the position of certain mining companies, the DMR indicated that an audit revealed that approved documents such as SLPs, EMPs, Work Programmes and closure and rehabilitation plans do not contain confidential information. Both the DMR as well as the CoM have supported the approach of making these documents publicly accessible, and some mining companies are commended for proactively doing so. The DEA, DWS and DMR have subsequently identified a number of documents, including SLPs, Environmental Authorisations, water use licences and compliance reports, as well as other environmental licences, as being automatically available to the public. In addition, the DMR has submitted that it is in the process of developing mechanisms to make documents more readily available for a larger audience, but no timeframes could be provided. Despite the classification of SLPs as being automatically publically available, the DMR conceded that officials remain reluctant to disclose SLPs out of fear of legal action.

The Commission has noted, however, that the term “confidential” is oftentimes used loosely as a mechanism to protect mining companies from any form of risk. For example, one mining company outlined the fact that a land valuation document was deemed to be confidential due to dissatisfaction and disputes amongst communities and “is likely to be used as a source of strife”, noting the delicate position of the mine. The company further submitted that the information was revealed to traditional leaders at the time of negotiation, that the information relates to issues of economic value to which the public have no right, and that “there is every reason to keep the details of the document from the general public”. The company further claimed that public disclosure of the document could reasonably be expected to put the company at a disadvantage in negotiations “with those who seek to undermine the existing structures”.

An approach that favours secrecy or restrictive information sharing places both communities, regulatory authorities (including those within mining companies), at an automatic disadvantage. Our history of more recently evidenced by the tragic loss of life in Marikana, demonstrates how not only were the plight of miners, but the conditions in the affected communities were largely unexplored by the wider public. Civil society organisations such as the Bench Marks Foundation

⁸⁹ Further submission by the Centre for Applied Legal Studies, 30 January 2018.

⁹⁰ SAHRC *Report of the SAHRC Investigative Hearing: Issues and Challenges in relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa* (2015) 62.

emphasized the need for transparency and information sharing as central tenets which ground consultation with communities toward reforms and for ethical accountable mining operations⁹¹.

It is clear that, without access to information, meaningful consultation and participation are seriously marred. In such situations views, needs and reciprocal information much needed for successful outcomes and impacts cannot materialise. Additionally, mining companies will find disruptions to projects and a poor relations with the communities and area of their operation. These negative impacts are therefore not limited to communities alone, as they have serious economic consequences to business and to the State. Additional benefits which see Communities actively engaging in the monitoring process are much reduced in quality. Both the State and business are disadvantaged by a far reduced ability to hold to account or to enhance operations and impacts.

The absence of proper industry guidelines and standard reporting templates means that interested parties must continue to follow lengthy legal processes in terms of the Promotion of Access to Information Act, 2 of 2000 (PAIA) or pursue court action to gain access to crucial documents. Given the high level of regulation in the industry, some mining companies submitted that additional regulation is not the answer, and that sufficient mechanisms are already in place and should be properly utilised - including the processes outlined in terms of PAIA. However, PAIA compliance goes beyond the production of information manuals in terms of section 51 of PAIA, and requires business to take steps in accordance with the principles of business and human rights and the PAIA itself, to be transparent, accountable and ethical.

Ultimately, the proactive disclosure of broad categories of information is beneficial to communities, to mining companies that are relieved from the duty to address *ad hoc* information requests, and to government in that the burden on State departments to conduct compliance and monitoring exercises will be eased. Through increased access to information, potential risks can be identified at an early stage, thereby enhancing the sustainability of projects. Communities are frequently provided with inaccurate information or unrealistic promises. In such instances, civil society and non-profit organisations play a crucial role in the promotion and protection of rights on the ground, including through the provision of assistance, capacity development, and empowerment of communities. Such organisations similarly require access to information in order to fulfil their responsibilities adequately.

The duty to provide and to receive information is intrinsically linked to the duty to consult, and the need for consensus and consent. Consultation has a number of interpretations which depending on the interpretation determines differing actions, outcomes and impacts. Our Courts have time and again expanded the obligation to consult by requiring that consultation must be meaningful, particularly where rights are potentially adversely impacted. The potential for impacts to be acutely adverse and enduring in societies typified by marked and extreme imbalances such as ours mean that both at the level of policy and at the level of practise, meaningful, widespread, inclusive and sustained consultation is a non-negotiable condition for positive impact to be achieved. Whilst appreciating the often times interdependent complexities which mark the terrain of engagement, consent and participation, the Commission emphasizes the need for profound changes which must be embarked on to improve the current situation for communities, the State and business. Imposing the duty to provide information, consult

⁹¹ Further submission from the Bench Marks Foundation, 30 January 2018.



and interrogate the quality of consent which informs community and business actions is the beginning of such change.

The Commission finds that the fundamental right to information as envisaged both in terms of the bill of rights and statute are inconsistently observed. The right to information is essential both for the purposes of achieving meaningful consultation and for ensuring sound corporate governance. This finding relates both to the duty to proactively release information, and in respect of limiting rights to information through clear criteria for the classification of information of certain mining-related information as “confidential.” Information is also not consistently made available in languages and formats which render them accessible. A large percentage of mining-related information, including SLPs, are not currently available to the public where such information should in fact be automatically publicly available in terms of the PAIA.

The Commission notes legal obligations on mining companies to comply with section 51 of PAIA and finds that section 51 based compliance, must be extended to ensure that information is proactively disseminated in a manner that is accessible and which facilitates the understanding of such information, through all available platforms including the internet.

DIRECTIVES AND RECOMMENDATIONS

Meaningful participation, consultation and consent

- In the consideration of and decision-making relating to the granting of mining rights, the principle and policy of FPIC need to be adhered and reported on.
- The DMR is directed to establish a working group with the CoM, SALGA, civil society, community-based organisations, and other relevant stakeholders with a view to establishing best practice guidelines or binding standards for the establishment of community engagement forums within mining-affected communities. These guidelines or standards must adhere to the principle of FPIC and provide for the inclusion of diverse representation, democratic elections, set roles and responsibilities, financial oversight mechanisms and clear reporting and transparency obligations and be capable of enforcement.
- Existing standards are already in place in some jurisdictions, advancing the commitments recorded in the Brisbane Declaration on Community Engagement in 2005. The most recent having been developed through the International Association for Public Participation for the Australasia region. Our frameworks could benefit from such benchmarking and should be taken forward through the consultative processes referred to above.
- The DMR, in consultation with the DEA, is directed to develop clear policy and procedures for assessing the adequacy of consultations, including with respect to environmental authorisations. The DMR should ensure that the nature and quality of consultation processes are assessed prior to the granting of mining rights.
- When a community’s consent is required, the community shall decide whether to grant its consent in terms of that community’s customary law and practices, provided that such

processes shall: be transparent, democratic, and participatory; ensure the participation of all persons directly affected by the proposed mining activities; and protect and promote the right of women to participate, lead and make decisions.

- Where consent is granted for a mining activity, the applicant and the community should conclude a written agreement, setting out the terms of exactly what has been consented to in plain language, including compensation payable to the community and its members; provided that the community may nominate representatives to sign such an agreement in terms of its customary law and practice after the final draft has been made available to the public.

Access to information, transparency and confidentiality

- The DMR must develop formal criteria for the classification of information as “confidential” and expressly include the duty to disseminate information that is timely, adequate, and accessible in all guidelines, regulation and legislation.
- The DMR should require mining companies to submit motivations for the classification of certain documents as confidential within a period of three months. Certain documents, for example SLPs, are public documents and should not be classified as confidential.
- The DMR must ensure that all reports and documents, with the exception of strictly confidential information as determined by the DMR, are immediately made available to the public. The DMR must develop a dissemination strategy and should consider making this information available through the Open Data Portal initiative led by the Department of Public Service and Administration which seeks to improve access to information, data and services offered by government.
- The NNR, together with other relevant stakeholders, must develop mechanisms through which communities and other interested parties can access information, including information on potentially hazardous material and contamination, on a basis that informs the realisation of rights.
- The DMR is directed to immediately give effect to its PAIA Manual, which has listed SLPs as well as other documents as automatically publically available. The DMR must provide a list of all information requested, as well as an indication as to whether such information was disclosed on an *ad hoc* basis or proactively, or the reasons for refusal.
- The DMR must engage with the Information Protection Regulator for the enforcement of compliance with PAIA where mining companies are not in compliance with the statute.

Compliance, Monitoring and Enforcement



Compliance with regulatory obligations, as well as monitoring and enforcement of such responsibilities, remains a crucial concern in the context of mining activities. The Commission requested the DMR to indicate the rate of compliance with all regulatory obligations in the sector. In response, the DMR indicated concerns with levels of compliance in the sector, but failed to provide substantive details.

However, the DMR did provide the Commission with provincial reports outlining the findings of annual compliance inspections conducted over the 2013/14, 2014/15, and 2015/16 financial years. In analysing the reports, the Commission observed discrepant approaches in how mining companies are identified for compliance inspections on an annual basis. Where some provincial departments appear to base decisions on an assessment of the annual reports submitted by mining companies, together with records of non-compliance or the date of the last inspection, other provincial departments specifically noted that complaints received, together with the occurrence of community unrest, are key determinants. In some cases, proximity of different mining companies to one another is also considered with a view to ameliorating capacity restraints. Some provincial departments specifically take into account factors such as the magnitude of the potential socio-economic and environmental impact of mining operations, while others intentionally exclude size or type of operation as factors. All provincial departments identify a number of planned inspections and provide for unplanned inspections to be informed by events throughout the course of the year, such as applications for new licences or renewal of existing licences; applications for closure certificates; complaints received; community unrest; or instruction received from the National Department.

The following section outlines key challenges in obtaining approval for mining-related activities and projects, as well as in establishing compliance, monitoring and enforcement mechanisms in respect of environmental and SLP-related obligations.

Delay in obtaining government approval

In the course of the National Hearing, mining companies noted the significant delay in obtaining approvals from various government departments, particularly in relation to SLPs, EMPs and lease agreements. Municipalities and other organs of State raised similar complaints of non-responsiveness by other government departments. Delays often result in uncertainty, the escalation of costs, and can lead to further delays in the implementation of projects. In addition,

companies are exposed to reputational risk, which may impact the sustainability of projects. Moreover, delays in approval inevitably cause further delays in compliance, monitoring and enforcement processes.

Examples

- Twickenham Mine submitted a consolidated EMP to the DMR in September 2014. At the date of the National Hearing, it was still awaiting feedback and approval from the DMR.
- As a result of the delay in the approval of community leases by the DRDLR, Twickenham Mine has not yet been able to construct the concentrator plant and tailings dam facility which form an element of the EMP. As a result, the mine cannot reuse underground water and water is instead discharged. A motivation for the management of the excess water shaft was submitted in June 2014 and again in August 2015. The DWS issued a notice with the intent to issue a directive in June 2015, following which the mine submitted a response. At the date of the Hearing, the DWS had still not taken a decision.
- Of the nine lease agreements entered into by Twickenham Mine, five are still outstanding. In all cases, the State has been identified as the owner of the relevant land. Applications for the nine properties were submitted in March 2003, and were approved by the Provincial State Land Disposal Committee in December 2006. The applications were subsequently submitted to the national office for consideration and approval. Some leases were eventually registered in 2012, while others were initially rejected as a result of the alleged failure to comply with a newly released DRDLR Policy requiring that a 10% equity interest be provided to a community occupying or having rights to the land. Following engagements, an agreement was reached for an exemption due to the demonstrated value of benefits that would flow to the community. This exemption was granted through the Land Claims Commission in March 2015, yet at the time of the National Hearing, the lease agreement had still not been approved. Following this, the leases were approved by the Provincial DRDLR in June 2016 and have been submitted to the national department for approval.
- According to submissions, this process normally takes 12 to 18 months. In some instances, copies of the original applications were lost or misplaced by the DRDLR and had to be resubmitted.
- Marla Platinum submitted a request for the approval of a revised SLP to the Provincial DMR in 2013, which was approved. However, Marla is still waiting for approval from the Minister.

In some cases, the delay in finalising lease agreements has resulted in mining companies withholding payment to community trust funds. However, this is not standard practice and some mining companies have continued to make regular surface lease payments despite the agreement being outstanding. Accordingly, the Commission urges the DMR, DRDLR, DWS and all other government stakeholders to consider SLPs, EMPs and lease agreements expeditiously and in accordance with FPIC principles. Furthermore, the Commission encourages the DMR to play a more active role in facilitating intergovernmental cooperation on mining-related matters and ensuring responsiveness and cooperation by mining companies.



Environmental law and regulations

Submissions to the National Hearing revealed that there is significant non-compliance with various environmental laws and regulations by mining companies. When coupled with the severe capacity restraints of compliance and regulatory bodies, concerns over the sustainability and constitutionality of operations are amplified.

The majority of non-compliance cases relate to inadequate financial provision for closure and rehabilitation liabilities.⁹² Other common issues included the failure to submit revised EMPs; failure to conduct dust fallout, noise, and groundwater monitoring exercises; inadequate waste disposal, including hazardous waste;⁹³ spillages and water pollution; the release of contaminated water back into dams; impeding the flow of rivers; and taking water from boreholes meant for drinking.⁹⁴ The DWS stated that, since 2010, 394 mines were investigated. Of those investigated, 14 directives were issued for non-compliance, 23 resolved and 22 were under rehabilitation. The remaining mines were partially compliant and still under investigation.

The DMR is the responsible authority for monitoring and the enforcement of environmental laws and licence conditions and the DWS is the competent authority in relation to water. While these two departments conduct monitoring and evaluation exercises individually, the DMR, DWS and DEA, through the Enforcement Task Team of the IPIC, also conduct joint monitoring exercises. Since the OES came into operation in December 2014, environmental criminal investigations, including cases concerning biodiversity, pollution, waste, EIA and oceans and coasts, have been referred to the DMR and not investigated by the DEA. The DEA provides support and guidance to the DMR and the SAPS where required.

Section 93 of the MPRDA empowers any authorised person to issue compliance orders, instructions, or to order the suspension or termination of a mining licence for a variety of reasons, including a breach of any material term or condition or a contravention of any condition in the environmental authorisation. Such order or instruction is confirmed by the Director-General of the DMR. In addition, section 47 of the MPRDA enables the Minister to cancel or suspend mining licences. However, this sanction is generally reserved for extremely serious contraventions. The Minister must direct the holder of a licence to take specified measures to remedy any contravention, breach or failure, and afford the holder an opportunity to give reasons why the licence should not be cancelled or suspended. From the information before the Commission, it does not appear that a mining licence has ever been withdrawn in line with section 47.

When the Commission requested the DMR to provide information on the rate of compliance with statutory orders, the DMR indicated that in the 2015/16 financial year, 666 non-compliance orders were issued for all offences (not limited to environmental matters). The Commission notes that non-compliance is not characteristic of all mining companies, and that there are good practices amongst some industry stakeholders. According to a report by DPME, DEA and DMR on environmental governance in the mining industry, approximately 5% of all completed

⁹² See section 2.4 above.

⁹³ See section 5.3 above.

⁹⁴ See section 4 above.

inspections are deemed non-compliant,⁹⁵ and the majority of compliance orders issued by the DMR relate to environmental issues.⁹⁶

Section 33 of the NEMAQA requires mining companies to notify the Minister in writing if mining operations are likely to cease within a period of five years. Notification must include plans for the rehabilitation of the area and plans to prevent dust pollution after the cessation of operations. Despite this, the DEA has not received a single notice since the promulgation of the Act in 2007.

Departmental enforcement capacity has not grown at the same pace as the mining industry. For the 1,757 authorised mining operations in 2016, there were 96 Environmental Mineral Resource Inspectors (EMRIs) employed by the DMR and an additional 30 earmarked to receive training. As part of the effort to streamline compliance and enforcement, the DEA has provided training materials to the DMR to assist in training EMRIs. In addition, the DWS had 68 persons in its monitoring and compliance unit, which is not dedicated to monitoring compliance in the mining industry.

A number of measures have been taken to promote enforcement of, and access to justice for non-compliance with, environmental laws, including:

- 2009 standard operating procedures between the DEA's Environmental Management Inspectorate (EMI) and SAPS to facilitate collaboration in investigating environmental crimes;
- EMI's active role in the National and Provincial Joint Operational and Intelligence Structure (NATJOINTS and PROVJOINTS) through the Priority Committee on Wildlife Crime and Operation Phakisa;
- The Environmental Crime Working Groups that have been established in some provinces, which include SAPS and the National Prosecuting Authority (NPA);
- Training of judicial officers (prosecutors and magistrates) on environmental and water-related offences (conducted in partnership with Justice College and SA Judicial Education Institute); and
- The establishment of the Priority Committee focusing on illegal mining.

A number of other concerns were also raised by stakeholders and while the Commission is not in a position to make specific findings on these issues, they bear mentioning due to their potential impact on the effective monitoring of, and compliance with, environmental laws and rights. These issues include:

- Discrepancies between commitments made in EIAs and EMPs and their actual implementation;
- Failure to enforce or follow up directives for non-compliance;
- Poor quality of directives, which are unable to withstand court challenges, resulting in low levels of sanction and/or prosecution for criminal offences; and
- Inadequate and reactive inspections conducted by the DMR in response to complaints, which have the potential to be perceived as actively resisting enforcement action.

⁹⁵ DPME, DEA & DMR *Report on the Implementation Evaluation of the Effectiveness of Environmental Governance in the Mining Sector* (2015) 26.

⁹⁶ *Ibid* 27.



Although information provided to the Commission indicated that measures are implemented by the DMR to enforce compliance, it is unclear whether compliance levels are improving. Despite multiple compliance directives issued by the DMR, very few mining licences are ever revoked. The imposition of monetary fines alone is not an adequate deterrent and despite the possibility of criminal sanctions being imposed, or of mining licences being suspended, these are rarely invoked in practice. Although the Commission recognises that monitoring and enforcement of legal obligations falls within the purview of the DMR, this does not prevent the CoM, or other industry bodies, from introducing peer review mechanisms. Furthermore, the competitive nature of the industry can be positively exploited where the performance of companies is subjected to critical assessment.

The Commission finds that the existing sanctions for non-compliance with environmental laws and regulations are inadequate and do not address, nor disincentivise, systemic non-compliance in the sector.

SLPs

The Commission has identified significant levels of non-compliance with SLP obligations. The controversial 2017 Mining Charter, which is not yet implemented pending review proceedings, requires 100% compliance with ownership, mine community development, and human resources development elements at all times. These three elements have been identified as “ring-fenced”, meaning that if a company has not met 100% of these obligations, they will be considered to be non-compliant for the purposes of the Charter scorecard.

SLP COMPLIANCE BASED ON DMR ANNUAL INSPECTION PLANS: 2013/14 TO 2015/16 FINANCIAL YEARS

Province	SLP compliance level 2013/14	SLP compliance level 2014/15	SLP compliance level 2015/16	Average
Eastern Cape	12/28	12/30	7/27	31/85 (36%)
Free State	2/21	4/26	6/28	12/75 (16%)
Gauteng	3/19	0/11	0/31	3/61 (4%)
KwaZulu-Natal	1/12	2/8	5/19	8/39 (21%)
Limpopo	16/27	18/25	11/18	45/70 (34%)
TOTAL	34/107 (32%)	36/100 (36%)	29/123 (24%)	99/330 (30%)

Across each of the five provinces analysed, only 30% of mining companies inspected by the DMR were found comply with SLP obligations. Gauteng reflected the lowest level of compliance at 4% with the highest in the Eastern Cape at 36%. These compliance levels align with the findings outlined in the DMR Assessment of the Broad-Based Socio-Economic Empowerment Charter for the South African mining Industry, released in May 2015. In this assessment, the Western Cape, Eastern Cape, KwaZulu-Natal and Gauteng were the worst performing provinces,

with between 13% and 30% compliance.⁹⁷ However, the Commission was not provided with sufficient detail to enable a more in-depth assessment on the manner in which compliance was defined and acknowledges that the figures provided are only indicative of the general trend. Despite widespread non-compliance, the Commission is concerned with the apparent lack of enforcement mechanisms to hold companies accountable for compliance with essential mining licence conditions.

The Commission is also concerned that during the course of the National Hearing, the DMR submitted that it does not have a system in place that provides a clear overview of all SLP obligations at national, provincial and local levels. The Commission requested the DMR to provide information on the compliance record of the implementation of SLPs. The Department failed to provide a comprehensive response and submitted a table outlining an example of 41 SLP projects across the country. The information contained in this table included the name of the company, name and type of project, project background, location, impact and number of jobs created. The detail provided under “impact” was scant and limited to phrases such as “infrastructure development”; “promoting home ownership”; “job creation” or the creation of a “conducive environment for learning”, without any real effort to engage in the extent of implementation, success or impact. From the table, it appears that the number of jobs created is an indicator used by the Department to assess impact. Although this is one of the many indicators that should be taken into account, an in depth assessment must be undertaken to determine whether the jobs are permanent or temporary, the length of employment, the percentage of local persons employed, as well as the proportion of women and persons with disabilities employed.

The Commission appreciates that the DMR has serious capacity restraints, which negatively impact its ability to monitor and evaluate company obligations. According to the DMR, in most provinces, there is only one official responsible for the assessment of SLPs during the application process and for the monitoring and enforcement of SLP obligations.

The number of compliance inspections that the DMR must complete annually is set out in the DMR's Annual Performance Plan targets. Inspection targets are divided into four categories, namely Mineral Laws Administration, Mine Economics, SLPs, and Mine Environmental Management. The 2015/16 annual report of the DMR notes that the target for compliance inspections was overachieved due to the high number of complaints received. 502 inspections were conducted in total, which was more than 50% of what was initially planned for and almost double that conducted in the previous financial year. The increased level of inspections reflects systemic challenges on the ground. The Commission notes the significant achievement of the DMR in this respect, but urges the DMR, in collaboration with the DPME, to address the shortcomings identified in its monitoring and evaluation activities.

Mining licence holders are legally required to submit annual reports to the DMR on the implementation of the Mining Charter and SLP obligations, together with an implementation plan for the following year. The Commission notes with concern that a significant number of mining companies fail to submit annual compliance reports to the DMR. Additionally, the Commission is concerned that compliance reports are drafted and submitted without consultation with

⁹⁷ DMR *Assessment of the Broad-Based Socio-Economic Empowerment for the South African mining Industry (Mining Charter)* (2015) 30 <<http://www.dmr.gov.za/mining-charter-assessment-report.html>>.



relevant stakeholders, particularly local government and affected communities. Furthermore, not only are municipalities and communities not consulted, they are unable to access the reports submitted to the Department. Many stakeholders have consistently disputed the credibility or objectivity of the information provided in the reports. Such perceptions are exacerbated by a lack of participation and transparency, which further creates practical difficulties for local government in monitoring the completion of development projects. It also fuels the level of frustration and mistrust experienced by communities through their continual disempowerment and exclusion from matters that directly affect them. The Commission has not identified any legitimate motivation for the confidentiality of these documents, particularly aspects of the reports that address the implementation of SLP projects.

A number of mining companies conceded that no monitoring and evaluation exercises are conducted around the impact of projects being implemented, but indicated that this form of evaluation is currently under consideration. From the mining companies that participated in the Commission's National Hearing, Glencore Coal South Africa was the only company that has implemented processes aimed at measuring the impact of development initiatives on a regular basis. Community baseline surveys are conducted every three years and include an analysis of the socio-economic profile of communities as a means of assessing impact. Additionally, Glencore includes surveys to measure community perceptions of the impact of mining activities on their wellbeing and the environment. The surveys aim to measure trends in quality of life and levels of trust between communities, municipalities, ward councillors, mining companies and foreign nationals. The Commission commends the approach of Glencore as an industry leader in this respect.

The Commission finds that there is a lack of mechanisms to monitor compliance and ensure enforcement of SLP-related obligations.

Complaints monitoring and resolution

The Commission is concerned that a number of mining companies do not have complaints monitoring and resolution mechanisms in place.

The Commission noted two instances whereby complaints resolutions were based on the UN Guiding Principles on Business and Human Rights While other companies did address complaints, but failed to keep any records or statistics. At times, Traditional Councils form part of the body to address community-based complaints. While traditional leaders may facilitate complaints resolutions, the mistrust that sometimes exists between leaders and the communities in which they represent may hinder the ability of communities to voice complaints.

Timelines and procedures for the resolution of complaints are not always in place. Without an accurate reflection of the kind of complaints lodged, as well as the ability to track progress and resolution, companies are unable to accurately measure trends and systemic issues. Mining companies submitted that they adopt "open door" policies to enable communities to walk in and raise concerns or to consult. However, this has not been the Commission's observation, as such attempts are often dealt with in a volatile or unwelcoming manner.

Communities submitted that complaints lodged with the DMR or other government stakeholders are not addressed or responded to, in which case they turn to municipalities for help. At

times, assistance is provided, but the perception of collusion between mines and municipal officials persists. Where complaints are not adequately monitored and addressed, communities frequently embark on demonstrations under the Regulation of Gatherings Act, 205 of 1993. Previously, the Commission has found that local municipalities misinterpret the requirements of the Act, which can stifle the ability of persons to legally exercise their rights in line with section 17 of the Constitution.⁹⁸ While many protests are peaceful in nature, others have been characterised by incidents of vandalism and intimidation. Further, while the right of all persons to peacefully protest must be respected and protected, persons wishing to engage in such activities must be aware of their correlating responsibilities to respect the rights of others who choose not to do so.

The Commission finds that there is an immediate need for the development and implementation of effective complaints mechanisms by mining companies, the DMR, and local government.

DIRECTIVES AND RECOMMENDATIONS

- The DMR must seek to address internal capacity constraints so that it can effectively ensure that the mining application process complies with all relevant laws and policies across all spheres and departments of government.
- The DMR is directed, in collaboration with the DPME, to establish adequate mechanisms to monitor compliance and ensure enforcement of SLP-related obligations. These mechanisms should include roles for local government and mining-affected communities as well as education and training on the function and requirements of SLP projects to ensure clear and transparent delineation between government responsibilities and the classification of SLP projects.
- The DMR must consider introducing a policy or legislative amendment to impose sanctions in instances of non-compliance by mining companies, including non-compliance on SLPs. Sanctions could include the suspension or cancellation of mining licences, possible imposition of community service and/or fines for persons responsible for ensuring compliance; public exposure of non-compliant companies, and possible criminal sanctions for serious breaches.
- The DMR, together with relevant agencies and/or departments, should work with industry bodies such as the CoM, and through the DMR's tripartite forums, to encourage independent monitoring of members' compliance with applicable laws and policies.
- All mining companies and industry bodies, such as the CoM, should develop internal mechanisms for the dissemination of information to ensure that all relevant documents are made available to interested and affected parties and the public more generally.

⁹⁸ The SAHRC previously expressed that “[w]hen attempting to participate in the democratic processes afforded to those both in terms of the Constitution and its enabling legislation, communities are met with resistance by state respondents. Rather than being viewed as active participants in developmental processes, they are viewed as passive recipients of general service delivery”. See SAHRC *Report on Access to Housing, Local Government, and Service Delivery* (2015) 78.

Conclusion



Overall, the mining sector is riddled with challenges related to land, housing, water, the environment, and an absence of sufficient participation mechanisms and access to information. Non-compliance, the failure to monitor compliance, poor enforcement, and a severe lack of coordination amongst especially government stakeholders, exacerbate the socio-economic challenges faced by mining-affected communities. Nevertheless, the Commission commends the efforts made by some bodies to facilitate collaboration and partnership through the OES and SPP.

The Commission is sensitive to the challenges faced by the mining industry, including volatile commodity prices and increasing costs. Nonetheless, sight cannot be lost of the real and long-lasting impacts that mining operations have on communities and surrounding environments. The non-profitability of mining operations cannot be cited to avoid social and legal obligations towards development and environmental management. Key industry role players such as the CoM should do more to hold its members to account. Mining companies themselves must reflect a greater commitment towards the principles of good corporate governance.

There needs to be move away from the adversarial nature of relations between civil society, government, traditional leaders and business, towards greater engagement and collaboration. For example, consultation can be facilitated through municipalities and community-based organisations, and inter-governmental collaboration should be enhanced.

The fact that the mining industry makes an important contribution to economic growth and social upliftment has been acknowledged throughout this process. At the same time, this report has sought to highlight that it is not only about what is given, but equally about what is taken away. Mining corporations bear constitutional obligations not to violate existing access to socio-economic rights, including the rights of access to adequate housing, sufficient food and water, and the right to an environment that is not harmful to health or well-being. Where existing enjoyment of such rights is derogated, mining corporations violate the socio-economic rights held by mining-affected communities. It is thus crucial that government ensures that communities are able to participate meaningfully in mining-related activities and influence decisions that detrimentally impact their enjoyment of constitutionally guaranteed rights and general well-being. Moreover, the State must do more to include communities in reporting and monitoring

mechanisms. Local government, which is constitutionally mandated to drive spatial and local socio-economic development, should likewise be systematically included. Finally, relevant government departments must work with the DPME to monitor and enforce compliance with legislative and regulatory obligations.

Whereas government bears the primary responsibility to respect, protect, promote and fulfil the socio-economic rights of those who live in mining-affected communities, a collaborative partnership between all relevant stakeholders is needed to holistically address these issues.



ANNEXURE A: FINDINGS, DIRECTIVES AND RECOMMENDATIONS

The Commission has made a number of findings based on the underlying issues that contribute to the socio-economic challenges experienced by mining-affected communities. The Commission's directives and recommendations attempt to address these findings.

All parties to whom directives and recommendations have been addressed are required to provide a detailed written report to the Commission in six months, and again in 12 months, from the date of receipt of the final report. The detailed written report must address all measures taken to implement the directives and recommendations contained herein.

In addition, as required by section 18(4) of the SAHRC Act, the executive authority of all relevant national and provincial departments concerned must, within 60 days of the final report, provide a written response to the Commission indicating the intention to take any steps to give effect to the recommendations.

Land

Land use management

Findings

- The Commission finds that a considerable gap exists in the mining licence application process, where mining companies, the Department of Mineral Resources (DMR) and the Department of Rural Development and Land Reform (DRDLR) appear to systematically disregard key pieces of legislation, particularly the Municipal Systems Act, 32 of 2000, the Spatial Land Use Management Act, 16 of 2013 (SPLUMA), and the Interim Protection of Informal Land Rights Act, 31 of 1996. The Commission further finds that there is an immediate need for municipalities to be consulted throughout the licence application process to enable them to provide for integrated and sustainable land use systems.
- The Commission finds that municipalities should fulfill their mandates and ensure that zoning requirements are met, i.e. applicants for mining rights are required, where appropriate, to lodge applications for land use change and municipalities have an obligation to implement their land use planning tools when those applications are considered.
- The Commission finds that improved inter-governmental cooperation is necessary to ensure that due consideration is given to the risk posed to local, regional and national food security, environmental resilience, and social and economic development by potential mining activities. The Commission further finds that greater consideration must be given to determining local government investment and development priorities and that broad-based and diversified local economies should be encouraged.

Directives and Recommendations

- For all mining licence applications, including for prospecting and extraction, that have impacted on land that the DRDLR holds on behalf of communities, the DRDLR is directed to report on the steps it has taken to:
 - a. Identify prospective affected parties and to obtain the views of such affected communities in a manner that is in compliance with IPILRA;
 - b. Ensure that the views of women and minority groups are recorded and taken into account;
 - c. Properly identify the basis for valuation and compensation;
 - d. Monitor the implementation of agreements in terms of the Department's responsibility to communities;
 - e. Publish agreements that have been concluded, and make them accessible on the Department's website, so that other communities that stand to be affected by similar mining operations, can ensure that they have as much information at their disposal; and
 - f. Provide training to affected municipalities on IPILRA and SPLUMA.
- The DMR must, when considering applications for mining rights, ensure that alternative land uses for sustainable local development are identified and considered. It is important to emphasise that consideration may include not to approve applications. Such land use approvals must be secured from the applicable municipalities prior to the DMR granting the licenses or permits.

Relocation and compensation

Findings

- The Commission finds that mining companies who restrict compensation to the physical structure of the land are offering below what is considered to be appropriate in terms of global industry standards and are causing systemic economic displacement and impoverishment within mining-affected communities. In order for compensation to be meaningful, it should account for, inter alia, loss of life, loss related to communal and individually held tenure or title, as well as loss incurred for production value gained from the land, whether that production value is linked to traditional ways of life, or more commercial enterprises. The Commission further finds that the DRDLR, the Department responsible for promoting equitable and sustainable rural livelihood and development programmes, has not proactively considered means through which the rights and opportunities for development may be protected.
- The Commission finds that there are no formal guidelines or oversight provided for the calculation of compensation and the finalisation of compensation agreements. This is problematic as relocations are often carried out before compensation agreements are reached on surface land leases, livestock, crops or housing. The Commission further finds that the DRDLR has failed to monitor compliance with, or enforcement of, lease and compensation agreements and that a lack of transparency and access to information allows the potential for abuse of power and non-compliance.
- The Commission finds that there is a very real potential for the infringement of cultural and other human rights as a result of inappropriate grave relocation practices that are carried



out by mining companies. Many mining companies appear to overlook or undervalue the sanctity and importance of grave relocations, which necessitates an evaluation of current processes. The Commission further finds that, despite strict regulatory requirements, unlawful grave relocations have been, and continue to be, conducted by a number of mining companies.

Directives and Recommendations

- The DRDLR, where the provisions of IPILRA apply, must ensure that adequate and necessary consultation is undertaken with communities to complete a written resolution and that such resolution is with the consent of the majority of rights' holders.
- The DRDLR is directed to review the definition of "adequate notice" outlined in section 2 of IPILRA to ensure that sufficient time for conducting meaningful consultation is provided and must report back to the Commission on steps taken in this regard.
- Where a proposed mining activity requires the relocation of specific community members' homes, a two-thirds 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.

Mining in sensitive and protected areas

Findings

- The Commission finds that there is an immediate need to give effect to the internationally recognised precautionary principle in matters dealing with environmental protection and strongly cautions against prioritising the immediate economic benefit of mining activities over the maintenance and protection of the environment, particularly in those areas that are crucial for sustaining ecological biodiversity, natural heritage, cultural significance and life. Furthermore, the Commission is particularly concerned by the DMR's inability to provide certain information about the monitoring of mining activities in protected areas.
- The Commission finds that due to the potentially severe impact of mining-related activities on sensitive and protected areas, mining licences should be granted only in exceptional circumstances, under restricted conditions, and following public consultation. The Commission further finds that meaningful consultation should be legislatively mandated under these circumstances, where "interested and affected parties" span beyond surrounding municipalities and communities and include the country as a whole.

Directives and Recommendations

- The DWS and the DEA are directed to take definitive steps to ensure legal protection of our water source areas through, inter alia, the use of section 24(2A) of NEMA, the inclusion of a specific provision that provides that the Minister of Water and Sanitation has the powers to restrict or prohibit the grant of water use licences in water source areas alongside the use of a host of legal tools, including section 26(g) of the Regulations of the National Water Act, section 49 of the MPRDA, management tools in terms of Conservation of Agricultural Resources Act, 43 of 1983 (CARA) and SPLUMA, Environmental Management Frameworks, and any further tools available. A further provision that should be applicable, includes declarations in terms of the National Environmental Management: Biodiversity Act, 10 of 2004, of water source areas as threatened ecosystems.

- DEA, DAFF, DMR, and the Petroleum Agency South Africa (PASA) are directed to take definitive steps to ensure no seabed mining or extraction takes place in sensitive areas. This should include a strategic environmental assessment of impacts of existing rights on marine ecosystems. Such strategic environmental assessments must ensure that marine mining or prospecting, exploration or production rights issued in terms of the MPRDA, that overlap with proposed Marine Protected Areas (MPAs), do not hinder the declaration of MPAs. They should also provide for legal reform which would include a proper regulatory framework for offshore oil and gas, the development of an ocean SEMA, and Ocean Bill. The proper inclusion of an ecosystem based approach in marine spatial planning should include the provision for withdrawal of rights, and no go areas for extraction.
- Such processes must provide for extensive and meaningful public participation at national and local levels.
- In relation to existing mining licence applications in sensitive and protected areas, the DEA and DMR are directed to immediately issue public notices of such applications and convene extensive public participation, including with local communities, prior to the granting of such licences. The DEA and DMR are directed thereafter to report to the SAHRC on the number and particulars of applications received, the manner in which consultations are conducted, a list and details of objections lodged, the number of applications approved, as well as the conditions under which licences have been granted.

Rehabilitation and closure

Findings

- The Commission finds that it is unacceptable for mining companies to not provide detailed and sufficient information to enable communities and local governments to clearly understand how land can be used post-closure. The Commission further finds that the DMR has not taken adequate steps to secure financial provision for rehabilitating damage to the environment and water resources and there is an immediate need for all Environmental Impact Assessments (EIAs) and Environmental Management Programmes (EMPs) to clearly detail land quality and potential post-closure land use. Licences should not be granted where long-term, sustainable land use cannot be guaranteed.
- The Commission finds that there is an immediate need for legislative provisioning for standardised and realistic closure costing, concurrent rehabilitation, partial closure as well as the establishment of a “superfund” to cater for rehabilitation-related liability.

Directives and Recommendations

- The DMR, together with the DEA, are directed to amend the content guidelines for EIAs and EMPs to include comprehensive information on the quality of land and sustainable options for potential post-closure land use.
- The DMR is directed to report on the progress and anticipated timelines for the finalisation of the National Closure Strategy. This strategy should consider the issues that are relevant to mine rehabilitation and closure more broadly and develop a strategic framework within which individual mine closure plans will fit and developmental goals are emphasised. The DMR must ensure that stakeholders such as communities and mineworkers participate in the development of the National Closure Strategy.
- The DMR is directed to consider legislative reform to address the gaps in partial and full mine closures. Specifically, the DMR must:



- a. Provide clarity on the process for closure, including all processes followed by the Department prior to issuing of closure certificates, such as the need to ensure community participation, and monies set aside;
 - b. Provide a detailed list of all mines under “care and maintenance”. The list should include monitoring measures undertaken by the Department; and
 - c. Consider the establishment of a trust account where mining companies deposit funds, which the State can access to remedy water and other impacts caused by un-rehabilitated, abandoned or derelict mines.
- The DMR must, together with relevant stakeholders, develop a Regional Master Plan aimed at addressing environmental rehabilitation and the remediation of derelict and ownerless mines. The Plan should specifically refer to legacy issues such as acid mine drainage and illegal miners (colloquially known as zama-zamas), as well as sites with potential nuclear contamination and must include timelines and funding mechanisms.

Housing

Finding

- The Commission finds that the failure by mining companies, in close consultation with local government, to adequately address anticipated levels of migration and population growth in initial assessments undertaken during mining licence applications; the failure by the DMR to take this information into account when authorising mining rights; and the further failure by mining companies to adequately include local government in the planning phase of SLPs, directly contribute to inadequate planning and budgeting for housing at the local level. As a result, housing-related infrastructure including water and sanitation, electricity and roads is likewise jeopardised. Where a failure to integrate housing-related planning interferes with existing access to adequate housing, this constitutes a violation of the negative duty imposed by section 26(1) of the Constitution on all persons, including mining companies, to refrain from impeding existing access to adequate housing.

Directives and Recommendations

- SALGA must direct all its members to ensure that housing-related plans, policies and strategies are readily available to mining companies before mining licences are applied for.
- SALGA must ensure that municipalities in mining-affected areas receive adequate training and technical capacitation in order to properly expend the municipal infrastructure grant.
- All mining companies must refrain from interfering with existing access to adequate housing in communities where mining operations are established. A failure to properly plan for the influx of mining-related labour may exacerbate housing backlogs, and thereby violate the negative duty imposed by section 26(1) of the Constitution on all persons, including the private sector, not to impede existing access to adequate housing.
- All mining companies must closely consult with relevant local government authorities in order to ensure the proper alignment of SLPs to IDPs in relation to adequate housing. Mining companies must include local government in the planning phases of SLPs and mining applications.
- The DMR is directed to reject mining licence applications where such applications fail to adequately address potential housing and accommodation issues that may arise from mining projects. Before licences are granted, the DMR must require that proposed housing and accommodation plans submitted as part of the mining licence application process align with local government plans and strategies under SPLUMA. Proof of adequate

consultation with local government must further be provided by mining companies when submitting mining licence applications.

Water

Findings

- The Commission finds that the current census for determining water reserves does not include measures to account for anticipated migration and population growth and other potential impacts on the availability of water resources, such as drought. There is therefore an immediate need for water use licences (WULs) to incorporate more stringent measures to better protect Communities' water rights and the environment. In this respect, internal (self-regulating) and external auditing (by the Department of Water and Sanitation (DWS)) is required. Such processes must perforce include the sharing of accessible information and consultation with stakeholders.
- The Commission finds that the current census for determining water reserves does not include measures to account for anticipated migration and population growth and other potential impacts on the availability of water resources, such as drought. Therefore, there is an immediate need for WULs to incorporate more stringent measures to better protect Communities' water rights and the environment. In this respect, internal (self-regulating) and external auditing (by the DWS) in consultation with Communities, civil society, mining companies and other stakeholders is required to create effective regulatory tools such as licenses. The benefits of such an approach are direct for local government, groups which typically face barriers in rights assertion and for sustainability. The audited information referred to must be made publically accessible and be provided to affected local government authorities.
- The Commission further finds that the DWS with local government should address the problem of aging water infrastructure in mining-affected municipalities and collaborate with the DRDLR to translate guidelines regarding the provision of water on privately-owned land into policy.
- Noting the fundamental right to access adequate water (and sanitation) of a quality fit for human consumption and use, the Commission finds that the WUL must be reviewed to allow for rights assertion where terms and conditions of such WUL can reasonably be anticipated to adversely impact the rights of affected communities to access water.
- The Commission further finds that there is a compelling need for meaningful consultation and information sharing in respect of applications for WUL's, and audit and impact reports relating to WUL's to increase transparency, and accountability in respect of the use of this scarce resource.

Directives and Recommendations

- The DWS is directed to provide a report on the current state of water use monitoring. The report should include:
 - a. Mechanisms in place to conduct regular determination of the water reserve, including how the DWS accounts for anticipated migration and population growth, limitations or inadequacies in municipal-infrastructure as well as other potential impacts on the availability of water resources, such as drought;
 - b. An audit of all existing WULs to ensure they adequately protect the water reserve, including basic needs and ecological requirements;



- c. Steps taken to monitor compliance with WULs and its impacts, particularly in mining areas; and
 - d. The impact mining has, and will have, on the water reserve and how this aligns with the National Strategic Plan for Water.
- The DWS must report on the steps it has taken to guarantee security of water provision in the Mpukunyoni Community and provide evidence of the agreements in place between Tendele Coal Mine and national and local governments in this regard.
 - A clear plan of action is to be provided in respect of all communities who are impacted by the WULs arising from the audit referred to above.
 - The DWS is directed to take steps to ensure that formal legal protection is afforded to SWSAs.
 - The DWS, together with the DRDLR, are directed to take steps to translate existing guidelines regarding the provision of water on privately-owned land into policy to ensure that basic protections in law regarding access to water are capable of being evaluated and enforced.

Environment

One Environmental System

Findings

- While the Commission recognises the positive intentions of the One Environmental System to streamline the application process and promote collaboration and partnership between the departments responsible for mining-related activities, the Commission finds that discrepant approaches in the application of environmental management laws and limited oversight of environmental management across multiple sectors are cause for concern.
- The Commission finds that the DMR is not the appropriate authority for granting and enforcing environmental authorisations with respect to mining. The Commission acknowledges that there are several risks in dealing with mining-related environmental matters separately to those of other industries and that environmental management and impact do not occur in isolation.

Directives and Recommendations

- The DEA, DMR and DWS must, respectively, include in their annual reports the number of compliance notices or other sanctions imposed, including the proportion of successful interventions and/or criminal prosecutions undertaken against non-compliance.
- The DMR, in partnership with the DoH and key stakeholders, is directed to commission a study to assess the impact of mining activities on communities' health, particularly respiratory and brain health. It is critical that the study is participatory and includes affected communities, community-based organisations and civil society organisations. In the interim, the DMR and the DoH are directed to introduce mechanisms to monitor and assess health levels in mining-affected communities. The Departments should ensure that all resulting monitoring reports are publicly accessible, particularly by affected communities.

Air quality and blasting

Findings

- The Commission finds that the lack of regulation around blasting operations is problematic given the frequency in which issues arise. Discrepant practices across the industry and the propensity for blasting operations to negatively impact communities and the environment compound the seriousness of these issues. The Commission further finds that industry bodies, such as the Chamber of Mines, are not duly active in monitoring behavioural trends within the industry or guiding members on best practice concerning blasting operations. The Commission identifies an immediate need for the DMR, as the competent authority responsible for developing regulations, to take urgent action to address this gap.
- The Commission finds that mining companies responsible for ensuring that, prior to conducting blasting operations, appropriate safety mechanisms are in place to prevent property damage (with due consideration given to the quality of structures in surrounding communities) and any risk to persons' health and safety. Mining companies should conduct ongoing engagements to ensure that such operations occur in a manner that has the least impact on people and the environment.

Directives and Recommendations

- The DEA, in cooperation with COGTA and SALGA, is directed to conduct an audit of all provincial governments and municipalities to confirm:
 - a. Whether all municipalities have developed and incorporated an air quality management plan into their IDPs; and
 - b. Whether all provincial MECs and municipalities have appointed an air quality officer in line with NEMAQA.
- Noting the reported lack of certainty around the applicability of NEMAQA to mining activities, the DMR together with the DEA are directed to issue a formal notice clarifying the requirements. A copy of this public notice must be submitted to the SAHRC within three months from the release of this Report, and must be accompanied by a report outlining measures taken to ensure that all industry role players are adequately made aware of the requirements.
- The DEA and DMR must jointly report on the measures taken to streamline the control of the cumulative air pollution impacts of mining operations. This report must outline the mechanisms that have been put in place for collation, verification and dissemination of information between stakeholders in relation to impacts reported and/or interventions undertaken in relation to air quality.
- The DMR is directed to develop blasting regulations, which include provisions for sufficient and appropriate notice and adequate safety and monitoring measures, including mechanisms for community-based monitoring. The regulations should also set out the processes to be followed in assessing damages from blasting operations, compensation payments, and practical repair measures, among other things.
- In the interim, the CoM and other industry bodies must provide guidance to their members regarding appropriate standards for conducting blasting operations.



Nuclear waste management

Finding

- The Commission finds that there is an immediate need to address the lack of clarity concerning the State's roles and responsibilities in the remediation of contaminated mine sites, particularly where such sites have been abandoned. The Commission further finds that, in light of the potentially severe and long-lasting impacts of contaminated sites, the State must prioritise funding for the National Nuclear Regulator to undertake remediation activities.

Recommendation

- The NNR, together with key stakeholders, must develop appropriate mechanisms for communities and other interested parties to access information necessary to protect or exercise rights.

Social and Labour Plans

Finding

- The Commission finds that the current SLP system does not adequately address the negative impacts of mining activities and that systemic issues in the design of, and compliance with, SLP commitments limit their ability to drive socio-economic transformation in mining-affected communities. In addition, the process of developing SLPs should be consultative, and should respond to input by communities and local government regarding required socio-economic outcomes.
- The Commission accordingly finds that there is an immediate need for the DMR to develop clear and binding requirements for the content of SLPs and to ensure that they are aligned to EIAs and EMPs and include environmental information on the potential impacts of mining and post-closure quality of land. There is also an immediate need for the DMR to enforce compliance and develop sanctions for those mining companies that fail to comply with their SLP commitments.
- The Commission finds that the DMR should define the minimum amount of financial contribution towards SLP projects. This amount must be ring-fenced. The DMR should further take the lead in establishing a task team, to include the CoM, National Treasury, the Department of Planning, Monitoring and Evaluation (DPME), community-based organisations and other relevant stakeholders, to conduct research into the current financial regulation of the mining industry.

Directives and Recommendations

- The DMR, in consultation with affected communities, SALGA, mining companies and other relevant stakeholders, is directed to amend the regulatory framework in respect of SLPs and report to the SAHRC on how it will review the current limitations of SLPs and the scope of its consultation process (how the Department intends carrying out the review process). The amendment review process must include the explicit consideration of the introduction of prescribed and ring-fenced financial contributions by mining companies towards the implementation of SLPs. The review process must determine to what extent consultation with relevant communities and local government should be legislatively

mandated in order for SLPs to respond to contextual socio-economic challenges. The review process must further evaluate the current SLP regulatory framework against the criterion of gender responsiveness. The review process must consider the introduction of an express prohibition of the amendment of SLPs without prior consultation with both mining-affected communities and relevant local government authorities. Finally, the review process must consider the introduction of sanctions for mining companies that fail to comply with the commitments set out in their SLPs.

- The DMR is directed, within six months, to provide a report to the Commission on all existing SLP investments, projects, trusts and other entities that have been undertaken and established for each mining project. The report should include the basis on which each entity was valued as well as the monitoring, evaluation and reporting mechanisms that are in place for existing SLP projects, including the DMR's reporting requirements to DPME. In addition to setting out the monitoring actions of the DMR, the report must include steps taken by the DMR to ensure compliance by mining companies with the commitments made in SLPs.
- The DMR is directed to electronically publish the above report and a list of all existing SLP investments, projects, trusts and other entities that have been undertaken and established for each mining project. The DMR is further directed to electronically publish all SLPs in its possession.
- BHP Billiton and DMR are to provide a report on the implementation status of BHP Billiton's environmental remediation project and the treatment of contaminated mine water from BECSA. The DWS is directed to report to the Commission on the steps it has taken in monitoring this project.

Meaningful participation, consultation, consent and access to information

Meaningful participation, consultation and consent

Findings

- The Commission finds that, there is a compelling need to develop clear consensus driven standards for compliance, evaluation and assertion of the duty to achieve meaningful participation from the commencement of mining operations such as applications for licenses. Meaningful participation must seek to legitimise and secure the that needs are understood and addressed as between all stakeholders creating accessible open, representative and inclusive platforms through which consultation occurs for impact driven outcomes. Meaningful consultation should not be confined to a tick-box exercise.
- Noting the significant country-wide implications of mining operations, standards for consultation should ideally include opportunities for wider public participation in so far as the granting of mining licenses and evaluation of mining impacts are concerned.



Free, prior and informed consent

Findings

- The Commission finds that collective consent has been accepted as a test for consent, but such consent for a number of reasons including lack of representativity of diverse groups, and groups which experience systemic disadvantage such as women do not necessarily adequately embody the principles of free, prior and informed consent which is a rights protective principle all stakeholders. The deficiencies in a model which accepts collective consent and the absence of consent in certain instances is evident from the example of the consistent disregard of the legal requirements outlined in IPILRA during the mining application process. Furthermore, the Commission finds that the DRDLR has not been sufficiently involved in community consultation processes to assess levels of consensus and consent.
- The Commission finds that insufficient time and accessible information is availed to communities to undertake decision making processes as required by their customary law.

Multiplicity of consultation forums

Findings

- The Commission finds that greater inter-governmental cooperation is needed to ensure the establishment of streamlined and representative community forums, which are broadly consistent in their function and operation.

Directives and Recommendations

- In the consideration of and decision-making relating to the granting of mining rights, the principle and policy of FPIC need to be adhered and reported on.
- The DMR is directed to establish a working group with the CoM, SALGA, civil society, community-based organisations, and other relevant stakeholders with a view to establishing best practice guidelines or binding standards for the establishment of community engagement forums within mining-affected communities. These guidelines or standards must adhere to the principle of FPIC and provide for the inclusion of diverse representation, democratic elections, set roles and responsibilities, financial oversight mechanisms and clear reporting and transparency obligations and be capable of enforcement.
- Existing standards are already in place in some jurisdictions, advancing the commitments recorded in the Brisbane Declaration on Community Engagement in 2005. The most recent having been developed through the International Association for Public Participation for the Australasia region. Our frameworks could benefit from such benchmarking and should be taken forward through the consultative processes referred to above.
- The DMR, in consultation with the DEA, is directed to develop clear policy and procedures for assessing the adequacy of consultations, including with respect to environmental authorisations. The DMR should ensure that the nature and quality of consultation processes are assessed prior to the granting of mining rights.

- When a community's consent is required, the community shall decide whether to grant its consent in terms of that community's customary law and practices, provided that such processes shall: be transparent, democratic, and participatory; ensure the participation of all persons directly affected by the proposed mining activities; and protect and promote the right of women to participate, lead and make decisions.
- Where consent is granted for a mining activity, the applicant and the community should conclude a written agreement, setting out the terms of exactly what has been consented to in plain language, including compensation payable to the community and its members; provided that the community may nominate representatives to sign such an agreement in terms of its customary law and practice after the final draft has been made available to the public.

Access to information

Finding

- The Commission finds that the fundamental right to information as envisaged both in terms of the bill of rights and statute are inconsistently observed. The right to information is essential both for the purposes of achieving meaningful consultation and for ensuring sound corporate governance. This finding relates both to the duty to proactively release information, and in respect of limiting rights to information through clear criteria for the classification of information of certain mining-related information as "confidential." Information is also not consistently made available in languages and formats which render them accessible. A large percentage of mining-related information, including SLPs, are not currently available to the public where such information should in fact be automatically publicly available in terms of the PAIA.
- The Commission notes legal obligations on mining companies to comply with section 51 of PAIA and finds that section 51 based compliance, must be extended to ensure that information is proactively disseminated in a manner that is accessible and which facilitates the understanding of such information, through all available platforms including the internet.

Directives and Recommendations

- The DMR must develop formal criteria for the classification of information as "confidential" and expressly include the duty to disseminate information that is timely, adequate, and accessible in all guidelines, regulation and legislation.
- The DMR should require mining companies to submit motivations for the classification of certain documents as confidential within a period of three months. Certain documents, for example SLPs, are public documents and should not be classified as confidential.
- The DMR must ensure that all reports and documents, with the exception of strictly confidential information as determined by the DMR, are immediately made available to the public. The DMR must develop a dissemination strategy and should consider making this information available through the Open Data Portal initiative led by the Department of Public Service and Administration which seeks to improve access to information, data and services offered by government.



- The NNR, together with other relevant stakeholders, must develop mechanisms through which communities and other interested parties can access information, including information on potentially hazardous material and contamination, on a basis that informs the realisation of rights.
- The DMR is directed to immediately give effect to its PAIA Manual, which has listed SLPs as well as other documents as automatically publically available. The DMR must provide a list of all information requested, as well as an indication as to whether such information was disclosed on an *ad hoc* basis or proactively, or the reasons for refusal.
- The DMR must engage with the Information Protection Regulator for the enforcement of compliance with PAIA where mining companies are not in compliance with the statute.

Compliance, monitoring and enforcement

Findings

- The Commission finds that the existing sanctions for non-compliance with environmental laws and regulations are inadequate and do not address, nor disincentivise, systemic non-compliance in the sector.
- The Commission finds that there are a lack of mechanisms to monitor compliance and ensure enforcement of SLP-related obligations.
- The Commission finds that there is an immediate need for the development and implementation of effective complaints mechanisms by mining companies, the DMR, and local government.

Directives and Recommendations

- The DMR must seek to address internal capacity constraints so that it can effectively ensure that the mining application process complies with all relevant laws and policies across all spheres and departments of government.
- The DMR is directed, in collaboration with the DPME, to establish adequate mechanisms to monitor compliance and ensure enforcement of SLP-related obligations. These mechanisms should include roles for local government and mining-affected communities as well as education and training on the function and requirements of SLP projects to ensure clear and transparent delineation between government responsibilities and the classification of SLP projects.
- The DMR must consider introducing a policy or legislative amendment to impose sanctions in instances of non-compliance by mining companies, including on SLPs. Sanctions could include the suspension or cancellation of mining licences, possible imposition of community service and/or fines for persons responsible for ensuring compliance; public exposure of non-compliant companies, and possible criminal sanctions for serious breaches.
- The DMR, together with relevant agencies and/or departments, should work with industry bodies such as the CoM, and through the DMR's tripartite forums, to encourage independent monitoring of members' compliance with applicable laws and policies.
- All mining companies and industry bodies, such as the CoM, should develop internal mechanisms for the dissemination of information to ensure that all relevant documents are made available to interested and affected parties and the public more generally.

ANNEXURE B: LIST OF ABBREVIATIONS

AP	Anglo Platinum
ARM	African Rainbow Minerals
BNG	Breaking New Ground
BECSA	Billiton Energy Coal South Africa (Pty) Ltd
Constitution	Constitution of the Republic of South Africa, 1996
CoM	Chamber of Mines
CER	Centre for Environmental Rights
CALS	Centre for Applied Legal Studies
CRU	Community Residential Units
DoL	Department of Labour
D&O Mines	Derelict and Ownerless Mines
DMR	Department of Mineral Resources
DRDLR	Department of Rural Development and Land Reform
DWS	Water and Sanitation
DEA	Department of Environmental Affairs
DPME	Department of Planning, Monitoring and Evaluation
EAP	Environmental Awareness Plan
EIAs	Environmental Impact Assessments
EMPs	Environmental Management Programmes
EMI	Environmental Management Inspectorate
FLISP	Finance Linked Individual Subsidy Programme
FPIC	Free, Prior and Informed Consent
IDPs	Integrated Development Plans
IPIC	Inter-departmental Project Implementation Committee
IFC	International Finance Corporation
IPILRA	Interim Protection of Informal Land Rights Act, 31 of 1996
IDPs	Integrated Development Plans
IMC	Inter-Ministerial Committee
LOA	living-out allowance
LED	Local economic development



MPRDA	Mineral and Petroleum Resources Development Act, 28 of 2002
MCPA	Mpukunyoni Community Property Association
MACUA	Mining-Affected Communities United in Action
MEJCON-SA	Mining and Environmental Justice Community Network South Africa
NDP	National Development Plan
NEMA	National Environmental Management Act, 10 of 1998
NWA	National Water Act, 36 of 1998
NEMPAA	National Environmental Management: Protected Areas Act, 57 of 2003
NNR	National Nuclear Regulator
NATJOINTS and PROVJOINTS	National and Provincial Joint Operational and Intelligence Structure
NPA	National Prosecuting Authority
NEMA	National Environmental Management Act, 10 of 1998
NEMAQA	National Environmental Management: Air Quality Act, 39 of 2004
OES	One Environmental System
PAIA	Promotion of Access to Information Act, 2 of 2000
RMDEC	Regional Mining Development and Environmental Committee
RDP	Reconstruction and Development Programme
RMDEC	Regional Mining Development and Environmental Committee
RDP	Reconstruction and Development Programme
SAPS	South African Police Service
SAHRC Act	South African Human Rights Commission Act, 40 of 2013
SPLUMA	Spatial Land Use Management Act, 16 of 2013
SDFs	Spatial Development Frameworks
SAHRA	South African Heritage Resource Agency
SANBI	South African National Biodiversity Institute
SPP	Special Presidential Package
SAHRC	South African Human Rights Commission / The Commission
SALGA	South African Local Government Association
STAC	Somkhele Traditional Authority Committee
WULs	Water Use Licences

ANNEXURE C: LIST OF PARTICIPANTS AND ATTENDEES

COMMUNITIES, DEPARTMENTS, INSTITUTIONS AND ORGANISATIONS THAT PARTICIPATED

COMMUNITIES AND COMMUNITY BASED ORGANISATIONS

1. Members of the Somkhele Community (KwaZulu-Natal)
2. Members of the Sekhukhune Community (Limpopo)
3. Members of the Highveld Community (Mpumalanga)
4. Members of the Bapo Ba Mogale Community (North West)
5. Mining and Environmental Justice Community Network of South Africa (MEJCON-SA)
6. Mpukunyoni Community Property Association (MCPA)
7. Highveld Environmental Justice Network (HEJN)
8. Mining Affected Communities United in Action (MACUA)
9. Members of the Mampa Community
10. Members of the Fonteintjie Trust
11. Anglo Inyosi Coal Development Trust's People

ORGANS OF STATE / GOVERNMENT DEPARTMENTS

1. Department of Co-operative Governance and Traditional Affairs (COGTA)
2. Department of Environmental Affairs (DEA)
3. Department of Human Settlements (DHS)
4. Department of Mineral Resources (DMR)
5. Department of Planning Monitoring and Evaluation (DPME)
6. Department of Rural Development and Land Reform (DRDLR)
7. Department of Trade and Industry (DTI)
8. South African Local Government Association (SALGA)
9. Department of Water and Sanitation (DWS)
10. Department of Health (DoH)
11. National Nuclear Regulator (NNR)
12. Government Employees Pension Fund (GEPF)
13. Office of the Public Protector
14. Emakhazeni Local Municipality (Mpumalanga)
15. Sekhukhune District Municipality (Limpopo)
16. Fetakgomo Greater Tubatse Local Municipality
17. Mtubatuba Local Municipality (KZN)
18. Emalahleni Local Municipality
19. Victor Khanye Local Municipality
20. Emakhazeni Local Municipality (Mpumalanga)



TRADITIONAL AUTHORITIES	
1.	Chief Mohlabane Mashabela, Sekhukhune
2.	Mampa Serole Traditional Authority
3.	Swazi-Mnyamane Traditional Authority
4.	Inkosi Mzokhulayo Myson Mkhwanazi
5.	Chief Mohlabane Mashabela, Sekhukhune
6.	Mampa Serole Traditional Authority
CIVIL SOCIETY ORGANISATIONS, INSTITUTIONS AND ACADEMIA	
1.	Land Accountability Research Centre (LARC)
2.	Federation for a Sustainable Environment (FSE)
3.	Bench Marks Foundation
4.	Centre for Applied Legal Studies (CALS)
5.	Legal Resources Centre (LRC)
6.	Centre for Environmental Rights (CER)
7.	GroundWork
8.	Lawyers for Human Rights (LHR)
9.	Amnesty International South Africa
10.	Hivos
11.	Society, Work and Development Institute (SWOP)
12.	Mining and Rural Transformation in Southern Africa (MARTISA)
13.	Limpopo Mining Watch
14.	Centre for Sustainability in Mining and Industry (CSMI), Wits University
15.	Umeå University
16.	ActionAid South Africa (AASA)
17.	Congress of South African Non-Racial Community Organisation's Movement (COSANCOM)
18.	Southern African Green Revolutionary Council (SAGRC)
19.	United Front of Civics
BUSINESS AND THE PRIVATE SECTOR	
1.	Russell and Associates (R&A)
2.	GDT
3.	BASF South Africa
4.	Chamber of Mines (CoM)
5.	Anglo American Platinum (AAP)
6.	Tendele Coal Mining / Petmin
7.	Impala Platinum Ltd (Marula Platinum Mine, Sekhukhune)
8.	African Rainbow Minerals Limited (ARM)
9.	GDF SUEZ
10.	Sun Rise Mining
11.	Mbuyelo Group (Pty) Ltd
12.	Glencore Operations South Africa (Pty) Ltd
13.	Wescoal Mining (Pty) Ltd
INTERNATIONAL ORGANISATIONS	
1.	United Nations Office of the High Commissioner for Human Rights (OHCHR)



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