

# REPORT ON STATUTORY LAW REVISION



December 2011

LEGISLATION ADMINISTERED BY THE DEPARTMENT OF MINERAL  
RESOURCES AND ANCILLARY LEGISLATION ADMINISTERED BY OTHER  
DEPARTMENTS



**REPORT**

**PROJECT 25**

**STATUTORY LAW REVISION:  
LEGISLATION ADMINISTERED BY THE  
DEPARTMENT OF MINERAL RESOURCES  
AND ANCILLARY LEGISLATION  
ADMINISTERED BY OTHER DEPARTMENTS**

**DECEMBER 2011**

**TO MR JT RADEBE MP, MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT**

I am honoured to submit to you in terms of section 7(1) of the South African Law Reform Commission Act, 1973 (Act 19 of 1973) (as amended), for your consideration, the Commission's Report on statutory law revision: the review of legislation administered by the Department of Mineral Resources (project 25).

**MADAM JUSTICE Y MOKGORO**

CHAIRPERSON: SOUTH AFRICAN LAW REFORM COMMISSION

3 December 2011

## Introduction

The South African Law Reform Commission Act, 1973 (Act 19 of 1973) established the South African Law Reform Commission (SALRC).

The members of the SALRC who approved this Report on 3 December 2011 were -

The Honourable Madam Justice Yvonne Mokgoro (Chairperson)  
The Honourable Mr Justice Willie Seriti (Vice Chairperson)  
Professor Cathi Albertyn  
The Honourable Mr Justice Dennis Davis  
Mr Thembeke Ngcukaitobi  
Advocate Dumisa Ntsebeza SC  
Professor PJ Schwikkard  
Advocate Mahlape Sello

Mr Michael Palumbo was the Secretary of the SALRC when this Report was written. The project leader responsible for this investigation was Advocate Dumisa B Ntsebeza, SC. The researcher was Mr Pierre van Wyk.

On 31 July 2008 the then Minister of Justice and Constitutional Development appointed the following advisory committee members who assisted the SALRC in this review:

Professor Elmarie van der Schyff of the North-West University;  
Professor Oladejo Justus Olowu of the North-West University;  
Ms Pumza Mnonopi of the University of Fort Hare; and  
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## Summary of recommendations

1. The SALRC is mandated with the task of reviewing the South African statute book with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the equality clause in the Constitution, or which are redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 Acts on the statute book. Furthermore, the SALRC has identified 28 statutes (11 principal Acts and 17 amendment Acts) that are administered solely by the Department of Mineral Resources (see Annexure B) and 13 statutes that are relevant ancillary statutes administered by other Departments (see Annexure C).

2. After analysis of these statutes, the SALRC recommends in this Report that:

(i) The 14 statutes listed in the Mineral Resources Laws Repeal and Related Matters Bill in Annexure A be amended for the reasons set out in Chapter 2 of this Report and to the extent outlined in the Bill; and

(ii) Four statutes listed in the Schedule to the Bill be repealed, namely the Diamonds Amendment Act 28 of 1988; the Diamonds Amendment Act 22 of 1989; the Diamonds Amendment Act 10 of 1991; and the Abolition of the Lebowa Mineral Trust Act 67 of 2000.



## List of sources

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# Chapter 1

**PROJECT 25:**  
**STATUTORY LAW REVISION**

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## A. INTRODUCTION

### 1. The objects of the South African Law Reform Commission

1.1 The objects of the SA Law Reform Commission (SALRC) are set out in the South African Law Reform Commission Act, 1973 (Act 19 of 1973), as follows: to do research with reference to all branches of the law of the Republic, and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including:

- (a) the repeal of obsolete or unnecessary provisions;
- (b) the removal of anomalies;
- (c) the bringing about of uniformity in the law in force in the various parts of the Republic; and
- (d) the consolidation or codification of any branch of the law.

1.2 Thus the SALRC is an advisory statutory body whose aim is the renewal and improvement of the law of South Africa on a continual basis.

### 2. History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC began revising all pre-Union legislation, as part of its Project 7. This investigation resulted in the repeal of approximately 1 200 laws, ordinances, and proclamations of the former colonies and republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its Project 25 on statute law, which aims to establish a permanently simplified, coherent, and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act, 1981 (Act 94 of 1981), which repealed approximately 790 post-Union statutes.

1.4 Immediately after the advent of constitutional democracy in South Africa in 1994, the legislation enacted prior to that year remained in force. Numerous pre-1994 provisions do not comply with the country's new Constitution, a discrepancy exacerbated by the fact that some of those provisions were enacted to promote and sustain the policy of apartheid.

1.5 In 2003, Cabinet approved that the Minister of Justice and Constitutional Development should coordinate and mandate the SALRC to review provisions in the legislative framework that would result in discrimination, as defined by section 9 of the Constitution. Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

1.6 In 2004 the SALRC included in its law reform programme an investigation on statutory law to revise all statutes from 1910 to date. Whereas previous investigations had focused on identifying obsolete and redundant provisions for repeal, the current investigation emphasizes compliance

with the Constitution. Redundant and obsolete provisions that are identified in the course of this investigation are also recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution.

1.7 A 2004 provisional audit by the SALRC of national legislation that has remained on the statute book since 1910 established that roughly 2 800 individual statutes exist, comprising principal Acts, amendment Acts, private Acts, additional or supplementary Acts, and partially repealed Acts. A substantial number of Acts on the statute book no longer serve any useful purpose and many others have retained unconstitutional provisions. This situation has already resulted in expensive and sometimes protracted litigation.

## B. WHAT IS STATUTORY LAW REVISION?

1.8 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.<sup>1</sup> Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live”. If statutory provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.9 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.<sup>2</sup> Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or are presently remedied by another measure or provision.

1.10 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.11 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:<sup>3</sup>

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;

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1 See the Background Notes on Statute Law Repeals compiled by the Law Commission for England and Wales, par 1 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 20 February 2009.

2 See the Background Notes on Statute Law Repeals compiled by the Law Commission for England and Wales, par 6 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 20 February 2009.

3 See the Background Notes on Statute Law Repeals compiled by the Law Commission for England and Wales, par 7 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 20 February 2009.

- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
- (c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. "Section 33 is repealed/shall cease to have effect";
- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.12 The Law Commission of India notes that in England the terms "expired", "spent", "repealed in general terms", "virtually repealed", "superseded", and "obsolete" were defined in memoranda to Statute Law Revision Bills as follows: <sup>4</sup>

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required
- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.13 Statutory provisions usually become redundant as time passes.<sup>5</sup> Generally, the redundancy of legislation is not signalled by a single occurrence; rather, legislation is often simply overtaken by social

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4 Law Commission of India Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 20 February 2009.

5 Background Notes on Statute Law Repeals compiled by the Law Commission for England and Wales, par 9 and 10 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 20 February 2009.

and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of legislation and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.14 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The South African Interpretation Act, 1957 (Act 33 of 1957) mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.<sup>6</sup> Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.15 The methodology adopted in this investigation is to review the statute book by Department – the SALRC identifies a Department, reviews the national legislation administered by that Department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper and consults with that Department to verify the SALRC’s preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each Department, and upon its approval by the SALRC, it is published for general information and comments. Finally, the SALRC develops a report in respect of each Department that reflects the comments on the discussion paper and contains a draft Bill proposing amending legislation.

## C. THE INITIAL INVESTIGATION

1.16 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies at the University of the Witwatersrand to conduct a preliminary

<sup>6</sup> Background Notes on Statute Law Repeals compiled by the Law Commission for England and Wales, par 8 accessed from [http://lawcommission.justice.gov.uk/docs/background\\_notes.pdf](http://lawcommission.justice.gov.uk/docs/background_notes.pdf) on 20 February 2009.

study on law reform. The study examined the feasibility, scope, and operational structure of revising the South African statute book for constitutionality, redundancy, and obsolescence. The Centre for Applied Legal Studies pursued four main avenues of research in this study, which was conducted in 2001 and submitted to the SALRC in April 2001.<sup>7</sup> These four steps are outlined here.

1. A series of interviews was conducted with key role-players drawn from the three governmental tiers, Chapter 9 institutions, the legal profession, academia, and civil society. These interviews revealed a high level of support for a law reform project.
2. All Constitutional Court judgments up to 2001 were analysed. The results were compiled as schedules summarising the nature and outcome of these cases, and the statutes impugned. The three most problematic categories of legislative provisions were identified, and the Constitutional Court's jurisprudence in each category was analysed. The three most problematic categories were reverse onus provisions, discriminatory provisions, and provisions that infringe on the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled for each category.
3. Sixteen randomly-selected national statutes were tested against the guidelines. The results were compared with the results of a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. Comparison of the outcomes showed that a targeted revision of the statute book in accordance with the guidelines had produced highly effective results.
4. A survey of law reform in five other countries (United Kingdom, Germany, Norway, Switzerland, and France) was conducted. Apart from France, all these countries had conducted or were conducting statutory revision exercises. The motivation for the revision and the outcomes of the exercises differed by country.

1.17. The SALRC finalised the following Reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions –

- (a) the Recognition of Customary Marriages (August 1998);
- (b) the Review of the Marriage Act 25 of 1961 (May 2001);
- (c) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- (d) Traditional Courts (January 2003);
- (e) the Recognition of Muslim marriages (July 2003);
- (f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- (g) Customary Law of Succession (March 2004); and
- (h) Domestic Partnerships (March 2006).

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"Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand April 2001, available upon request from [pvanwyk@justice.gov.za](mailto:pvanwyk@justice.gov.za).

## D. SCOPE OF THE INVESTIGATION

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms this means that this leg of the investigation is limited to those statutes or provisions in statutes that:

- Differentiate between people or categories of people, and which are not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair or have the potential to impair a person's fundamental human dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears, on the face of it, to be neutral and non-discriminatory but which has or could have discriminatory effect or consequences has been left to the judicial process. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution. The investigation also attends to obsolescence or redundancy of provisions. In 2003, Cabinet directed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution, which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth. The SALRC agreed that the project should proceed by scrutinising and revising national legislation that discriminates unfairly.<sup>8</sup> However, as explained in the preceding sections of this chapter, even the section 9 inquiry was limited because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity. Nonetheless, during the investigation some other anomalies and obvious inconsistencies with the Constitution were identified, and recommendations have been made on how to address them.

## E. CONSULTATION WITH STAKEHOLDERS

1.20 In 2004, Cabinet endorsed the proposal that government departments should be requested to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered "inside" knowledge – of the type usually accessible within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation

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<sup>8</sup> Cathi Albertyn prepared a document titled "Summary of Equality Jurisprudence and Guidelines for Assessing the SA Statute Book for Constitutionality against Section 9 of the 1996 Constitution", specifically for the SALRC in February 2006, available upon request from pvanwyk@justice.gov.za.



being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and legislative amendment or repeal proposals. The SALRC relies on the assistance of departments and stakeholders. This will ensure that all relevant provisions are identified during this review, and dealt with responsively and without creating unintended negative consequences.

1.21 In January 2010 the SALRC submitted its Consultation Paper containing preliminary findings and proposals to the Department of Mineral Resources and to the other Departments administering ancillary mineral resource legislation for their consideration. The purpose of the Consultation Paper was to consult with the Department of Mineral Resources and the other Departments administering ancillary mineral resource legislation on the SALRC's preliminary findings reached and proposals made in the Consultation Paper. The SALRC requested Departments to indicate whether they support the findings and the provisionally proposed repeal and amendments of statutory provisions. On 30 August 2010 the Department of Mineral Resources submitted its comments to the SALRC on the preliminary findings and proposals contained in the Consultation Paper. Most of the Departments administering ancillary legislation also provided comments to the SALRC by the initial closing date for comments.

1.22. During September 2010 the SALRC identified additional obsolete provisions in the legislation reviewed and requested the DMR, the Department of Rural Development and Land Reform and SA Revenue Services (SARS) to provide comment. In November 2010 the SALRC followed up with the DMR, and the Departments of Health, and Arts and Culture and SARS on their awaited comments. On 2 December 2010 the DMR submitted its additional comments to the SALRC.

1.23. The SALRC then developed a draft Discussion Paper which took into account the stakeholder comment. The SALRC considered the draft Discussion Paper at its meeting held on 14 May 2011. At the meeting the SALRC approved the publication of Discussion Paper 124 for general information and comments. Discussion Paper 124 was published during the second last week of May 2011. The closing date for comments was 31 August 2011.

1.24. Taking into account stakeholder comment, the SALRC developed a draft Report which was considered at its meeting on 3 December 2011. The SALRC approved the submission of the Report to the Minister of Justice and Constitutional Development for referral by the Minister to the Minister of Mineral Resources to consider the promotion of the recommendations made in this Report.

1.25. The SALRC acknowledges the valuable assistance it received on this review, particularly from officials in the Legal Services section of the former DME and the newly established Department of Mineral Resources as well as from the officials based in the Departments administering ancillary legislation as is reflected in this Report.

## Chapter 2

### **EVALUATION OF LEGISLATION ADMINISTERED BY THE DEPARTMENT OF MINERAL RESOURCES**

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## A. INTRODUCTION

2.1 On 10 May 2009 President Jacob Zuma announced the appointment of the new Cabinet. The new Cabinet necessitated the establishment, reorganisation, and renaming of some of the national departments to support Ministers in the execution of their mandates. In his statement, the President emphasized the importance of the type of structure that would best serve government's goals. 'We wanted a structure that would enable us to achieve visible and tangible socio-economic development within the next five years. It should be a structure which would enable us to effectively implement our policies . . .'. President Zuma said. This is the approach that the former Department of Minerals and Energy indicated that it had adopted in its process of establishing two Departments, namely the Department of Mineral Resources, and the Department of Energy, mandated with the mining, minerals and energy portfolios.<sup>9</sup> The establishment of the two Departments necessitates legislative amendments not only to the legislation administered by the two departments but also to ancillary legislation to update references to the two Departments.

2.2 The Department of Mineral Resources is the primary Government institution that is responsible for formulating and implementing policy on mining. The Department advises the Minister of Mineral Resources who with Cabinet takes final responsibility for Government policy on this portfolio.<sup>10</sup> The Mineral and Petroleum Resources Development Act 28 of 2002 is the principal statute that governs the regulatory function of Government on mineral resources. The Mine Health and Safety Act 29 of 1996 provides for protection of the health and safety of employees and other persons at mines, the promotion of a culture of health and safety, and the enforcement of health and safety measures at mines.

2.3 The DME administered 58 statutes. The 11 principal statutes and 17 amendment statutes presently administered by the Department of Mineral Resources are evaluated in this Report as well as 13 ancillary statutes that are the responsibility of other government departments. The SALRC conducted this investigation to determine whether any of these statutes or provisions therein may be repealed because of redundancy, obsolescence or infringements of section 9 of the Constitution.

2.4 The SALRC identifies four statutes for repeal, namely the Abolition of the Lebowa Mineral Trust Act 67 of 2000, and the Diamonds Amendment Acts of 1988, 1989 and 1991, and it recommends the amendment of 14 statutes. The recommended repeal and amendment of these statutes are set out in the draft Mineral Resources Laws Repeal and Related Matters Bill attached as annexure A to this Report. The discussion that follows below provides the motivation for these proposals and why these statutes or provisions were identified for repeal or amendment.

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9 See Proclamation 44 of 2009 of 1 July 2009 published in Government Gazette No 32367 about the transfer of administration and powers and functions entrusted by legislation to certain Cabinet members in terms of section 97 of the Constitution. See also Proclamation 48 of 2009 of 7 July 2009 published in Government Gazette No 32387 which in terms of section 7(5)(a) of the Public Service Act, 1994 amended Schedule 1 to the said Act with respect to national departments and the heads thereof.

10 See <http://www.dmr.gov.za> accessed on 29 October 2010.

2.5 In August 2010 Ms Susan Shabangu, MP, Minister of Mineral Resources commented in general as follows on the Consultation Paper:

Thank you for the opportunity to comment on the aforementioned consultation paper dated January 2010 containing preliminary findings and proposed repeals and amendments in the Mineral Resources Laws Repeal and Related Matters Bill.

My Department has carefully examined the three statutes selected for repeal as well as the mineral resources related statutes and ancillary legislation proposed for amendment. My Department concurs with the repeal of the Acts as proposed in Schedule 1 of the Mineral Resources Laws Repeal and Related Matters Bill, and by and large concurs with the relevant amendments to the Acts proposed in the Bill. For your convenience, all changes proposed by my Department to the Mineral Resources Laws Repeal and Related Matters Bill have been tracked in the attached document.

Save for the changes proposed in the attached Bill, my Department has no objections to the amendments proposed to the ancillary legislation. However, the relevant Departments responsible for the administration of those Acts should make the final pronouncement thereon.

2.6 In August 2011 the DMR commented as follows to Discussion Paper 124, in addition to its specific comments on particular issues:

Please be advised that the Minister of Mineral Resources already consented to the proposals set out in the consultation paper in response to your consultation paper dated January 2010 on the same subject matter.

It is deemed unnecessary to repeat the comments save to state that this Department still holds the same views subject to what is stated herein below.

2.7 Mr JM Rabodila, Director-General in the Office of the Premier of the Mpumalanga Provincial Government advised that the Mpumalanga Provincial Government confirms that it is satisfied with the contents of Discussion Paper 124 and based on the information currently available, the underlying principles contained in the proposed Mineral Resources Laws Repeal and Amendment Bill are supported.

## B. GENERAL OBSERVATIONS

2.8 We noted above that the SALRC has a limited review mandate to conduct this investigation. We therefore need to make it clear that this Report forms part of a narrowly focused and text-based statutory review process as is indicated in Chapter 1 above. The former Department of Minerals and Energy participated in the SALRC audit of legislation, which commenced in 2004. During October and November 2008, the Department of Minerals and Energy also updated the list of primary legislation that formed the focus of this review and submitted their list of legislation to the SALRC. In June 2009, the Department also provided an updated list of principal statutes administered by the new Departments of Mineral Resources and Energy to the SALRC. Where a statute administered by the new Department of Mineral Resources seems to be free from any provisions that contradict or violates section 9 of the Constitution, it is not to say that the execution of such statute necessarily takes place in line with the protection afforded by the section 9 equality clause. Therefore, this Report does not reflect on any consequential and/or operational effects of the execution of powers in terms of the legislation reviewed. Without exception, we found that the statutes scrutinised complied with section 9 of the Constitution.

## C. EVALUATION OF LEGISLATION

2.9 This review of the mineral resources related legislation in this Report does not deal with the statutes in a chronological order as per the number and year of each Act, but according to identified themes. The SALRC considers that this approach enhances the clarity of the recommendations made. The advisory committee identified the following five themes in relation to the mineral resources and energy related legislation reviewed by the committee: Theme 1 – Mines and Minerals; Theme 2 – Energy, Nuclear and Electricity; Theme 3 – Petroleum, Oil and Gas; Theme 4 – Geoscience, Diamonds and Precious Metals; and Theme 5 – Ancillary legislation. This Report deals with themes 1, 4 and 5. Themes 2 and 3 are evaluated in a separate Report dealing with the review of the energy related legislation. The SALRC approved the submission of the latter Report to the Minister of Justice and Constitutional Development for referral to the Minister of Energy at its meeting held on 22 October 2011. That Report was preceded by Discussion Paper 116 dealing with the review of the energy related legislation.<sup>11</sup>

### 1. Theme 1 – Mines and Minerals

#### (a) Mines and Works Act 27 of 1956

2.10 The purpose of the Mines and Works Act was to provide for the safety of personnel engaged in mining and for protecting the underground and surface works and installations in mines. The Minerals Act 50 of 1991, which came into operation on 1 January 1992, repealed most of the provisions of the Mines and Works Act, except certain definitions in section 1 and section 9. Most of the provisions of the Minerals Act, except for certain items in the Schedule, were repealed by section 110 of the Mineral and Petroleum Resources Development Act 28 of 2002 which came into operation on 1 May 2004. The provisions of the Mines and Works Act were further repealed, as far as any provision thereof deals with any day other than a Sunday, by section 4(1) of the Public Holidays Act 36 of 1994, which came into operation on 1 January 1995. The definition in the Mines and Works Act describes the word 'Sunday', as meaning the period from twelve o'clock midnight on the day previous to any such day to twelve o'clock midnight on such day. Section 9 deals with restrictions to work on Sundays, Christmas Day and Good Friday and is the only remaining operative section in this Act apart from the definition noted above. The definition contained in the Act and section 9 of the Act still serves a purpose for it protects employees against unfair labour practices as it sets out the prerequisites for work on Sundays. The Act defines Minister to mean the Minister of Mineral and Energy Affairs. This definition must be updated to define Minister to mean the Minister of Mineral Resources.

2.11 The SALRC proposed in Discussion Paper 124 that since the remaining provisions of the

<sup>11</sup> Discussion Paper 116 was published for general information and comment in August 2010 (see <http://salawreform.justice.gov.za/dpapers/dp116.pdf>).

Mines and Works Act of 1956 are still operative the Act must be retained but the definition of the term 'Minister' should be updated to mean the Minister of Mineral Resources. Commenting on the Consultation Paper the Department of Mineral Resources (DMR) commented that it concurs with the amendment proposed by the SALRC. The DMR further noted that the Inspectorate, through the Chief Inspector of Mines, had suggested that the Act be repealed as it believes that the protection afforded to employees under section 9 can best be regulated under labour legislation. Labour legislation, however, does not prohibit work on Sundays, Christmas Day or Good Friday, and until such time as these specific issues are regulated in such other legislation, the repeal of the Act cannot be supported.

2.12 Commenting on Discussion Paper 124 the DMR comments that careful consideration of the legislation leads to the conclusion that employees could be severely prejudiced by the repeal of this Act and supports the finding that the Act is not redundant or obsolete, that it should be retained and that the reference to the Minister of Minerals and Energy ought to be updated as is proposed by the SALRC. The SALRC therefore recommends that the definition of 'Minister' in the Mines and Works Act be updated to provide that Minister means the Minister of Mineral Resources.

#### **(b) Mines and Works and Explosives Amendment Act 46 of 1964**

2.13 The purpose of this Act was to amend the Mines and Works Act 27 of 1956. In 2003, Parliament passed the Explosives Act 15 of 2003. The President assented to the Explosives Act on 19 December 2003. Section 34 of the Explosives Act of 2003 repeals not only the Mines and Works Act 27 of 1956 but also the Mines and Works and Explosives Amendment Act of 1964. Pending the finalisation of regulations, the Explosives Act has not been put into operation yet. The repeal of the Mines and Works and Explosives Amendment Act of 1964 will therefore only commence once the Explosives Act of 2003 is put into operation in future. The SALRC consequently agrees with the retention of the Mines and Works Explosives Act 46 of 1964 until it ceases to apply upon the commencement of the Explosives Act 15 of 2003.

#### **(c) Mining Titles Registration Act 16 of 1967**

2.14 The purpose of the Mining Titles Registration Act is to regulate the registration of mining titles, other rights connected with prospecting and mining, stand titles and certain other deeds and documents. The Act serves an important purpose in regulating mining activities. The Act was amended several times since it commenced on 1 October 1967. The latest amendment to the Act was effected by the Mining Titles Registration Amendment Act 24 of 2003.

2.15 The following terms are not any longer defined in section 1 of the Act: 'bewaarplaats'; 'certificate of bezitrecht'; 'certificate of reservation of a trading site'; 'holder'; 'mining title'; 'nomination agreement'; 'permit to retain and treat residues'; 'prospecting contract'; 'registrar'; 'stand title'; 'surface right permit'; 'tributing agreement' and 'water right'. All of these definitions and titles are definitions and titles derived from prior legislation and were defined as such in prior repealed legislation. These titles were preserved generically in terms of the Minerals Act 50 of 1991 and likewise preserved as

old order mining rights generically in terms of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA). These titles are referred to presently as *unused old order rights* or *old order prospecting rights* or *old order mining rights*. As these titles are no longer known by their former names, the question arises about the need to retain the references in the statute to the former definitions as the wording defining these terms have been repealed. The SALRC is of the view that these remaining expressions should be retained in the Act for purposes of legal certainty to assist users of the Act and to confirm that these definitions once formed part of the Act.

2.16 Furthermore, section 3(1)(b) of the Act provides that subject to the laws governing the public service the Director-General must designate one or more officers in the service of the Department to perform the functions delegated or assigned under this Act or any other law. The SALRC recommends that since the Public Service Amendment Act 30 of 2007 amended the law governing the public service by replacing the word 'officers' with 'employees', section 3 must be amended accordingly to refer to *employees*.

2.17 Section 2 of the Mining Titles Registration Act established the Mineral and Petroleum Titles Registration Office. This entity became the office for the registration of all mineral and petroleum titles and all other related rights, deeds and documents for which provision is made in the Act or any other law. Section 2(2) provides that all mineral titles and petroleum titles, deeds and documents lodged for registration in the Mining Titles Office after the commencement of the Mineral and Petroleum Resources Development Act of 2002 shall be dealt with in terms of the Act. The Mineral and Petroleum Resources Development Act defines Mining Titles Office to mean the Mining Titles Office contemplated in section 2 of the Mining Titles Registration Act 16 of 1967. Section 2(3) of the Mining Titles Registration Act provides that any reference in the Mining Titles Registration Act or any law to the Mining Titles Office must be regarded as a reference to the Mineral and Petroleum Titles Registration Office. Section (5)(1) provides for the duties of the Director-General who be in charge of the Mining Titles Office.

2.18 The SALRC therefore explained in Discussion Paper 124 that the question nevertheless arises whether the substitution of the term 'Mining Titles Office' with the term 'Mineral and Petroleum Titles Registration Office' would not effect increased legal certainty, if the name of the Act were to be changed as well, and if section 5 of the Act were to be amended to replace the expression 'Mining Titles Office' with 'Mineral and Petroleum Titles Registration Office' since the expression 'mining title' does not exist in current South African mining law. The SALRC proposed in Discussion Paper 124 that the Act be renamed 'the Mineral and Petroleum Titles Registration Act' by amending the short title of the Act.<sup>12</sup>

12 The SALRC noted how the name change of the South African Law Reform Commission was effected by the Judicial Matters Amendment Act 55 of 2002 which provides, inter alia, as follows:

**Amendment of section 1 of Act 19 of 1973, as amended by section 1 of Act 49 of 1996**

4. Section 1 of the South African Law Commission Act, 1973, is hereby amended by the substitution for the definition of "Commission" of the following definition:

"Commission" means the South African Law Reform Commission [established by section 2] referred to in section 2(2)."

**Substitution of section 2 of Act 19 of 1973**

5. The following section is hereby substituted for section 2 of the South African Law Commission Act, 1973:



In December 2010 the DMR indicated its support of this proposal. In Discussion Paper 124 the SALRC invited stakeholders to provide comments in particular on this proposal and to consider whether the SALRC's proposal will effect legal uncertainty taking into account the deeming provision of section 2(1) whereby any reference in the Act or any law to the Mining Titles Office must be regarded as a reference to the Mineral and Petroleum Titles Registration Office.

2.19 The SALRC also pointed out in Discussion Paper 124 that the Act defines in section 1 the expression Minister to mean the Minister of Minerals and Energy, and Department is also defined to mean the Department of Minerals and Energy. The name of the Department was changed to the Department of Mineral Resources. The SALRC therefore proposed that these definitions be amended to refer to Mineral Resources. The DMR concurred with the amendments proposed by the SALRC.

2.20 Commenting on Discussion Paper 124 the DMR notes that the SALRC proposed the retention of the reference to the Mining Titles Office for purposes of legal certainty due to the deeming provision of the Act. The DMR states that it has no objection that these references be retained on the statute book. The SALRC consequently recommends that due to the deeming provision of section 2(1) whereby any reference in the Act or any law to the Mining Titles Office must be regarded as a reference to the Mineral and Petroleum Titles Registration Office there is no need to update references to the Mining Titles Office in the Act. The SALRC further recommends that the definitions of Minister and Department be updated to refer to the Minister and Department of Mineral Resources, respectively.

#### **(d) Mining Titles Registration Amendment Act 60 of 1980**

2.21 The Mining Titles Registration Amendment Act amended the Mining Titles Registration Act of 1967. It further defined 'nomination agreement' and further defined the duties of the Registrar of Mining Titles with regard to the registration of any cession, renewal, modification, abandonment or cancellation of a nomination agreement. It also further regulated the procedures in connection with and following upon the registration of any cession, renewal, modification, abandonment or cancellation of a registered nomination agreement, and provided for matters connected therewith. The SALRC considers that the Mining Titles Registration Amendment Act continues to serve a purpose to ensure legal certainty. The SALRC therefore recommends that the Mining Titles Registration Amendment Act should be retained on the statute book.

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##### **"Establishment of Commission**

- 2(1) There is hereby established a body to be known as the South African Law Commission.
- 2(2) As from the date of the commencement of the Judicial Matters Amendment Act, 2002, the Commission referred to in subsection (1) shall be known as the South African Law Reform Commission."

##### **Substitution of section 10 of Act 219 of 1973**

- 8. The following section is hereby substituted for section 10 of the South African Law Commission Act, 1973:

##### **"Short title**

- 10. This Act shall be called the South African Law Reform Commission Act, 1973 [, and shall come into operation on a date to be fixed by the State President by proclamation in the Gazette]."

**(e) Mining Titles Registration Amendment Act 14 of 1991**

2.22 The Mining Titles Registration Amendment Act of 1991 amended the Mining Titles Registration Act of 1967. It deleted the definition of 'registrar' and replaced the expression 'registrar' in the Act by the expression 'Director-General'. It empowered the Director-General of the Department of Mineral and Energy Affairs to appoint or designate one or more officers employed at the Mining Titles Office to do any act or thing which may lawfully be done under that Act or any other law by the Director-General. It provided for the proof of certain facts in connection with registration in terms of the said Act by means of certain certificates. The Act further regulated the registration of rights in the name of married persons, it further regulated the endorsement on deeds where marriages are dissolved by divorce, or joint estates are divided, or the matrimonial property system is changed; and it provided for matters connected therewith. This Amendment Act still serves a purpose to ensure legal certainty. Therefore the SALRC recommends that the amendment Act needs to be retained on the statute book for purposes of legal certainty.

**(f) Mining Titles Registration Amendment Act 24 of 2003**

2.23 The Mining Titles Registration Amendment Act of 2003 amended the Mining Titles Registration Act of 1967. It substituted, added or deleted certain definitions. It re-regulated the registration of mineral and petroleum titles and other rights connected therewith and certain other deeds and documents. It effected certain amendments necessary to ensure consistency with the Mineral and Petroleum Resources Development Act, 2002 and repealed obsolete provisions. It amended the Deeds Registries Act, 1937, to remove certain functions relating to the registration of rights to minerals from the ambit of the Act, and provided for matters connected with the Act. The SALRC considers that the Mining Titles Registration Amendment Act of 2003 continues to serve a purpose to ensure legal certainty. The SALRC therefore recommends that the Mining Titles Registration Amendment Act should be retained on the statute book.

**(g) Minerals Act 50 of 1991**

2.24 Section 110 of the Mineral and Petroleum Resources Development Act 28 of 2002 repealed the whole of the Minerals Act with the exception of two items in the Schedule to the Minerals Act. These items are, in the first instance, the definition of Sunday in the Mines and Works Act of 1956, and secondly, the definitions of 'precious metals' and 'unwrought precious metal' in section 1, and Chapter XVI in the Mining Rights Act of 1967. The repeal of the Minerals Act was subject to the transitional provisions of Schedule II of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRD). The transitional provisions applied until the expiry of the transitional period by April 2009. (The MPRD is discussed below.) Applications for conversion had to be lodged by the end of April 2009. The process of conversion of old order mining rights may, however, still take some time. Furthermore, it must be noted that the Mine Health and Safety Act 29 of 1996 also refers in its transitional provisions to the Minerals Act of 1991.

2.25 The SALRC is of the view that there is still a need to reflect those provisions of the Minerals Act that are reflected in the Schedule and which are still operative. The SALRC therefore recommends that the remaining operative part of the Minerals Act must be retained on the statute book.

**(h) Minerals Amendment Act 103 of 1993**

2.26 The Minerals Amendment Act of 1993 amended the Minerals Act 50 of 1991. The Minerals Amendment Act consists of 28 sections and it effected important amendments to the Minerals Amendment Act of 1991. It dealt with the furnishing of certain particulars about the ability of an applicant for a prospecting permit to rehabilitate surface disturbances that may be caused by intended prospecting operations. It further regulated the period within which the holder of a prospecting permit could apply for a renewal thereof. It empowered the regional director to suspend mining operations pending rectifying steps to be taken in respect of rehabilitation measures or the suspension or cancellation of a permit, permission or authorisation by the Minister. It provided for the granting of consent for the removal of minerals found in the course of prospecting operations on land where the holder of the mineral right or an undivided share therein could not be readily traced, or where persons entitled to such rights or undivided shares therein by virtue of intestate succession or any testamentary disposition had not obtained cession thereof, and a period of not less than two years had expired from the date on which he or she became so entitled. It provided for the investigation of geological formations by the State.

2.27 The Minerals Amendment Act provided for approval for the division of the right to any mineral or minerals or an increase in the number of holders of undivided shares in such right. It extended certain powers of the regional mining engineer in relation to safety and health. It further regulated the enquiring into the cause of accidents at mines and works. It further regulated the appointment of a manager at a mine or works. It regulated the use of prescribed equipment. The Act provided for adequate provision that needed to be made for the rehabilitation of a mining area within a certain period before mining operations were ceased. It empowered the regional director to grant exemption or temporary authorisation or to approve or effect amendments to environmental management programmes. It provided for consultation with each department charged with the administration of any law which relates to a matter affecting the environment before a decision regarding such a matter is taken. It empowered the Director-General to require environmental impact assessments. The Act provided for endorsements to be made on a title deed. It inserted a transitional provision in relation to the granting of a mining lease for natural oil. It provided for the collection and payment by the Mining Commissioner of certain moneys to the owner of land comprising an alluvial digging or proclaimed land in so far as the continuation of mining rights is concerned. It provided in the transitional provisions for cases where the State was the holder of an undivided share in the right to a mineral in relation to prospecting and digging agreements. It authorised the Director-General to authorize officers of the Department to enter upon land to perform certain functions for the purposes of the Act. The Act also criminalised certain conduct. The Act authorised any Minister who was empowered to exercise powers under the Act to delegate those powers, and further empowered the Minister to make regulations. It repealed certain obsolete laws, and provided for matters in connection therewith.

2.28 The Minerals Amendment Act is not obsolete or redundant. The SALRC considers that the amendment Act continues to serve a purpose to ensure legal certainty and recommends that the Amendment Act be retained on the statute book.

**(i) Mine Health and Safety Act 29 of 1996**

2.29 The main purpose of the Mine Health and Safety Act is to provide for protection of the health and safety of employees and other persons at mines. In addition to the main purpose of the Act, the long title of the Act lists the following purposes of the Act:

- to promote a culture of health and safety;
- to provide for the enforcement of health and safety measures;
- to provide for appropriate systems of employee, employer and State participation in health and safety matters;
- to establish representative tripartite institutions to review legislation, promote health and enhance properly targeted research; to provide for effective monitoring systems and inspections, investigations and inquiries to improve health and safety;
- to promote training and human resources development; to regulate employers' and employees' duties to identify hazards and eliminate, control and minimise the risk to health and safety;
- to entrench the right to refuse to work in dangerous conditions; and to give effect to the public international law obligations of the Republic relating to mining health and safety.

2.30 As will be seen below, the Mine Health and Safety Amendment Act No 74 of 2008 which commenced on 30 May 2009 effected amendments to the Mine Health and Safety Act. It amongst others, substituted, added and removed ambiguities in certain definitions and expressions, effected certain amendments necessary to ensure consistency with other laws, particularly the Mineral and Petroleum Resources Development Act, 2002. Prior to these amendments, the Act referred in sections 2(2), 49(3) and 53 and in the definition section (section 102) to the Minerals Act. The Mine Health and Safety Amendment Act No 74 of 2008 also inserted into section 102 of the Mine Health and Safety Act a definition of 'Mineral and Petroleum Resources Development Act'.

2.31 Commenting on Discussion Paper 124 Mr Pieter Stassen of the Contemporary Gazette (Pty) Ltd notes that the Mine Health and Safety Act contains outdated references in section 41, 46, 59 and 98 to the South African Qualifications Authority Act, 1995 (Act 58 of 1995). The National Qualifications Framework Act, 2008 (Act 67 of 2008), which commenced on 1 June 2009, repealed the South African Qualifications Authority Act. The outdated references to the South African Qualifications Authority Act therefore need to be updated with references to the National Qualifications Framework Act, 2008. Section 41 of the Mine Health and Safety Act provides for the establishment of tripartite institutions.<sup>13</sup> Section 41(3)(c) deals with the South African Qualifications Authority Act which advises

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13 41(1) A Mine Health and Safety Council is hereby established to advise the Minister on health and safety at mines.

41(2) A committee, ad hoc committee or subcommittee may when necessary be established, which committee may include-

(a) the Mining Regulation Advisory Committee;

the Minister on proposals for the registration of education and training standards and qualifications in the mining industry on the National Qualifications Framework referred to in the South African Qualifications Authority Act, 1995 (Act 58 of 1995). The reference to the South African Qualifications Authority Act ought to be replaced with a reference to the National Qualifications Framework Act, 2008 (Act 67 of 2008).

2.32 Commenting on the Consultation Paper the DMR proposed that cognisance be taken of Item 4A of Schedule 2 of the Skills Development Act, 1998 in so far as it amends section 41(3) of the Mine Health and Safety Act, 1996.<sup>14</sup> Section 41(3) of the Mine Health and Safety Act provides for the establishment of the Mining Qualifications Authority to advise the Minister on (a) qualifications and learning achievements in the mining industry to improve health and safety standards through proper training and education; (b) standards and competency setting, assessment, examinations, quality assurance and accreditation in the mining industry; and (c) proposals for the registration of education and training standards and qualifications in the mining industry on the National Qualifications Framework referred to in the South African Qualifications Authority Act, 1995 (Act 58 of 1995). Item 4A provides that despite anything to the contrary in either the Skills Development Act, 1998 or the Mine Health and Safety Act, 1996 and with effect from 20 March 2000, the Mining Qualifications Authority established in terms of section 41(3) of the Mine Health and Safety Act, 1996, must be regarded as having been established in terms of section 9 (1) of the Skills Development Act, 1998 as SETA 16. The question arises whether for purposes of legal certainty, section 41(3) ought not be amended to reflect the amendment effected by Item 4A of Schedule 2 to the Skills Development Act, 1998. The SALRC therefore recommends that the following phrase be added after section 41(3) (c): 'and despite anything to the contrary in either this Act or the Skills Development Act, 1998 (Act 97 of 1998), and with effect from 20 March 2000, the Mining Qualifications Authority established in terms of this subsection, must be regarded as having been established in terms of section 9(1) of the Skills Development Act, 1998'.

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- (b) the Mining Occupational Health Advisory Committee; and
  - (c) the Safety in Mines Research Advisory Committee.

#### 14 **4A Mining Qualifications Authority**

Despite anything to the contrary in either this Act or the Mine Health and Safety Act, 1996 (Act 29 of 1996)

- (a) and with effect from 20 March 2000-
  - (i) the Mining Qualifications Authority established in terms of section 41 (3) of the Mine Health and Safety Act, 1996, must be regarded as having been established in terms of section 9 (1) of this Act as SETA 16;
  - (ii) Schedule 7 to the Mine Health and Safety Act, 1996, must be regarded as the constitution of SETA 16; and
  - (iii) the Chief Inspector of Mines must be regarded as the chairperson of SETA 16;
- (b) the Minister may, in consultation with the Minister of Minerals and Energy and after consulting the Mining Qualifications Authority-
  - (i) amend Schedule 7 to the Mine Health and Safety Act, 1996, in order to bring the constitution of SETA 16 into line with the constitutions of other SETAs; and
  - (ii) allow an interested professional body or a bargaining council with jurisdiction in the mining sector to be represented on the Mining Qualifications Authority; and
- (c) the Minister must, in consultation with the Minister of Minerals and Energy, with regard to SETA 16, perform any function entrusted to the Minister in Chapter 3 of this Act.

2.33 Section 46 of the Mine Health and Safety Act deals with the Mining Qualifications Authority's functions. Section 46(1) provides that the Mining Qualifications Authority must (a) seek registration in terms of the South African Qualifications Act, 1995 (Act 58 of 1995), as a body responsible for generating education and training standards and qualifications as contemplated in section 5(1)(a)(ii)(aa) of that Act; and (b) seek accreditation in terms of the South African Qualifications Act, 1995 (Act 58 of 1995), as a body responsible for monitoring and auditing achievements as contemplated in section 5(1)(a)(ii)(bb) of that Act. Since registration and accreditation of the Mining Qualifications Authority are historical events that occurred in the past when the South African Qualifications Act applied, there is no need for updating section 46(1) with references to the National Qualifications Framework Act of 2008.

2.34 Section 46(5) of the Mine Health and Safety Act provides that in performing its functions, the Mining Qualifications Authority must comply with the policies and criteria formulated by the South African Qualifications Authority in terms of section 5(1)(a)(ii) of the South African Qualifications Authority Act, 1995 (Act 58 of 1995). The National Qualifications Framework Act provides in section 11(1)(h) that the South African Qualification Authority must, in order to advance the objectives of the National Qualifications Framework, with respect to qualifications - (i) develop and implement policy and criteria, after consultation with the Quality Councils, for the development, registration and publication of qualifications and part-qualifications; (ii) register a qualification or part-qualification recommended by a Quality Council if it meets the relevant criteria; (iii) develop policy and criteria, after consultation with the QCs, for assessment, recognition of prior learning and credit accumulation and transfer. It further provides in section 11(1)(h)(i) that the South African Qualification Authority must, in order to advance the objectives of the National Qualifications Framework with respect to professional bodies - (i) develop and implement policy and criteria for recognising a professional body and registering a professional designation for the purposes of this Act, after consultation with statutory and non-statutory bodies of expert practitioners in occupational fields and with the QCs; and (ii) recognise a professional body and register its professional designation if the criteria contemplated in subparagraph (i) have been met.

2.35 The SALRC recommends that section 46(5) of the Mine Health and Safety Act be updated with reference to section 11(1)(h) and 11(1)(i) to provide that performing its functions, the Mining Qualifications Authority must comply with the policies and criteria developed by the South African Qualifications Authority in terms of section 11(1)(h) and 11(1)(i) of the National Qualifications Framework Act, 2008 (Act 67 of 2008).

2.36 Mr Stassen also notes that the references to section 57A in section 59(1) and (2) ought to be deleted since section 22 of the Mine Health and Safety Amendment Act 74 of 2008 (which commenced on 30 May 2009) repealed section 57A. The SALRC therefore recommends that the references to section 57A in sections 59(1) and (2) be deleted.<sup>15</sup>

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15 59 Appeal does not suspend decision

(1) An appeal against a decision under either section 57, 57A or 58 does not suspend the decision.

(2) Despite subsection (1)-

(a) an appeal in terms of section 57A or 58 against a decision to impose a fine suspends the obligation to pay the fine, pending the outcome of the appeal; and



2.37 The DMR proposes in its comments on the Consultation Paper that the outdated reference in section 72(3) of the Mine Health and Safety Act to the 'Attorney-General' be amended to refer to the 'Director of Public Prosecutions'. Section 72(3) provides that the Chief Inspector of Mines may submit a copy of the inquiry report to the appropriate Attorney-General.

2.38 Mr Pieter Stassen comments that the references in section 98 to the repealed South African Qualifications Authority Act, 1995 (Act 58 of 1995) ought to be updated too. Section 98(4) of the Mine Health and Safety provides that regulations made in terms of subsection (3) must be in accordance with the National Qualifications Framework approved in terms of the South African Qualifications Authority Act, 1995 (Act 58 of 1995). Section 4 of the National Qualifications Framework, 2008 provides that the NQF is a comprehensive system approved by the Minister for the classification, registration, publication and articulation of quality-assured national qualifications. The SALRC supports Mr Stassen's proposal and therefore recommends that the reference in section 98(4) to the South African Qualifications Authority Act, 1995 ought to be updated to refer to the National Qualifications Framework Act, 2008 (Act 67 of 2008).

2.39 Mr Stassen further notes that section 98(12) refers to the Standards Act of 1993 which was repealed by section 35 of the Standards Act 8 of 2008. Section 98(12) provides that the provisions of section 31 of the Standards Act, 1993 (Act 29 of 1993),<sup>16</sup> do not apply to any incorporation of a health and safety standard or to any amendment or substitution of a health and safety standard under this section. Section 28 of the Standards Act, 2008 now deals with the incorporation of South African national standards in laws. It provides in section 28(1) that a South African National Standard, or any provision thereof, that has been published in terms of the Act in respect of any commodity, product or service which may affect public safety, health, or environmental protection, may be

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- (b) the Labour Court may suspend the operation of the decision, pending the determination of the matter, if there are reasonable grounds for doing so.

16 Section 31 provided for the incorporation of standards in laws

- (1) (a) If a standard has been published in the Gazette, such standard or a provision of such standard may be incorporated in any law by a mere reference to the title and number thereof.
- (b) If a standard or a provision of such standard has been incorporated in any law in terms of paragraph (a) and that standard or provision is amended in terms of section 16 (3) (a) (ii), the amended standard or provision shall be deemed to be so incorporated.
- (2) A State department, local authority or other institution or body responsible for or involved in the administration of a standard or provision so incorporated shall keep available for free inspection at each of its offices where or from where the administration of that standard or provision is undertaken, a copy, issued by the SABS, of the full text of-
  - (a) the standard concerned and every amendment thereof; and
  - (b) every standard or document referred to in section 16 (3) (b) the whole or a part of which appears in a standard referred to in paragraph (a), and every amendment thereof.
- (3) (a) Criminal prosecution may only be instituted against a person on a charge of having contravened or failed to comply with a provision so incorporated if the State department, local authority or other institution or body referred to in subsection (2) has in every case furnished to the attorney-general or public prosecutor concerned a copy issued by the SABS, of each relevant standard or document which he shall in terms of the said subsection keep available for free inspection.
- (b) The standard or document referred to in paragraph (a) shall on the mere production thereof be prima facie proof of the contents of the standard concerned or an amendment thereof.
- (4) At the commencement of this Act a provision incorporated in terms of section 33 (1) of the Standards Act, 1982 (Act 30 of 1982), and the incorporation of which is still in force, shall be deemed to be incorporated in terms of subsection (1) (a).



incorporated in any law. Section 28(2) provides that the South African National Standard, or any provision thereof, contemplated in subsection (1) may be incorporated by referring to – (a) the title and the number; or (b) the title, the number and the year or edition number. Section 28(3) provides that if the South African National Standard, or any provision thereof, contemplated – (a) in subsection (2)(a) is subsequently amended, such amended South African National Standard, or any provision thereof, is deemed to be incorporated; (b) in subsection (2) (b) is subsequently amended, such amended South African National Standard, or any provision thereof, is not deemed to be incorporated. Section 28(4) provides that any South African National Standard or any provision thereof, incorporated in terms of subsection (2) (a) or (b) or (3) (a) may be withdrawn.

2.40 Section 98 Mine Health and Safety Act contains comprehensive prescripts on regulations made in terms of that Act. Section 98(2) provides that no regulation may be made relating to State revenue or expenditure except with the concurrence of the Minister of Finance; or any health matter, except after consultation with the Minister for Health. Section 98(3) provides that the Minister, after consultation with the Mining Qualifications Authority, by notice in the Gazette, may make regulations to provide for the qualifications for employment in any occupation; conditions for acceptance as a candidate for examinations; the issuing of certificates of competency in respect of any occupation; the funding of the Mining Qualifications Authority including the manner by which such funds may be raised; procedures for assessing competency; the accreditation of assessors; the establishment of examination bodies; the appointment of examiners and moderators; the monitoring and administration of examinations; the setting of examination fees; the accreditation of providers of training; the establishment of quality assurance procedures; the issue of qualifications; the registering of qualifications; and any other matter, the regulation of which may be necessary or desirable in order to promote the activities of the Mining Qualifications Authority. Section 98(4) provides that regulations made in terms of subsection (3) must be in accordance with the National Qualifications Framework approved in terms of the South African Qualifications Authority Act, 1995 (Act 58 of 1995) and subsection (5) provides that the Minister may incorporate all or part of any health and safety standard, without restating the text of it, in a regulation by referring to the number, title and year of issue of that health and safety standard or, to any other particulars by which that health and safety standard is sufficiently identified. In terms of subsection (6) the Minister must consult the Council before incorporating a health and safety standard in a regulation.

2.41 Section 98(7) provides that the Minister, after consulting the Council, by notice in the Gazette may make regulations imposing any function of an employer on any person, other than the employer, who employs employees and in terms of subsection (8) for the purposes of the Act, any health and safety standard referred to in subsection (5) incorporated in a regulation is deemed to be a regulation, in so far as it is not repugnant to any regulation made under subsection (1). Subsection (9) provides that whenever a health and safety standard which has been incorporated in a regulation is subsequently amended or substituted by the competent authority, the regulation referred to in subsection (5) incorporating that health and safety standard is deemed to refer to that health and safety standard as so amended or substituted, unless a contrary intention is stated in the notice. Subsection (10) provides for the register of particulars which the Chief Inspector of Mines must keep, namely every amendment or substitution of a health and safety standard incorporated

in the regulations; the publication of any amendment or substitutions; every publication in which a health and safety standard that has been incorporated in the regulations under subsection (5) was published; and the place in the Republic where each of those standards and publications is obtainable or otherwise available for inspection. Subsection (11) prescribes that the Chief Inspector of Mines must allow any person to inspect the register kept in terms of subsection (9) and to make an extract from it.

2.42 Given the comprehensive prescripts of the Mine Health and Safety Act on regulation making it is clear why the Mine Health and Safety Act excludes the provisions of the Standards Act providing for the incorporation of standards in law. The SALRC therefore recommends that section 98(12) be updated to provide that the provisions of section 28 of the Standards Act, 2008 (Act 8 of 2008), do not apply to any incorporation of a health and safety standard or to any amendment or substitution of a health and safety standard under this section.

2.43 The Mineral and Petroleum Resources Development Act of 2002 and the Mine Health and Safety Act define the expression 'mineral' differently. The question arises what the motivation is for these differently defined definitions. Section 102 of the Mine Health and Safety Act defines the expression 'mineral' as follows, namely: 'mineral' means any substance, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than top soil – (a) whether that substance is in solid, liquid or gaseous form, (b) that occurs naturally in or on the earth, in or under water or in tailings, and (c) that has been formed by or subjected to a geological process. The Mineral and Petroleum Resources Development Act of 2002, defines 'mineral' to mean any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes – (a) water, other than water taken from land or sea for the extraction of any mineral from such water, (b) petroleum, or (c) peat. The question arises whether the definition of 'mineral' in the Mine Health and Safety Act ought not to correspond with the definition of 'mineral' as defined in the Mineral and Petroleum Resources Development Act. The DMR comments that the Inspectorate agrees that the definition of 'mineral' in the Mine Health and Safety Act should be amended to correspond with the definition of 'mineral' as defined in the Mineral and Petroleum Resources Development Act. The SALRC therefore recommends that the definition of 'mineral' in the Mine Health and Safety Act should be amended to correspond with the definition of 'mineral' as defined in the Mineral and Petroleum Resources Development Act.

2.44 'Mining area' is defined in the Mine Health and Safety Act to mean a prospecting area, mining area, retention area, exploration area and production area as defined in section 1 read with section 65(2)(b) of the Petroleum and Mineral Resources Development Act, 2002 (Act 28 of 2002).<sup>17</sup> Section 65 of the Mineral and Petroleum Resources Development Act deals in one section with the funding of the Minerals and Mining Development Board established by section 57 of the

17 Lexis Nexis points out in an editorial note to this section that the reference to section 65(2)(b) of the Petroleum and Mineral Resources Development Act, 2002, is incorrect as there is no such section in that Act. They suggest that section 1 of the Petroleum and Mineral Resources Development Act, 2002, was intended, but that it is their policy to publish as per Gazette, but that they have notified the relevant Government Department and await their response.

Act. The Act does not contain a section 65(2). It is clear that the intention is to refer to the Mineral and Petroleum Resources Development Act. The Mine Health and Safety Act refers, however, also incorrectly to the 'Petroleum and Mineral Resources Development Act'. Section 1 of the Mineral and Petroleum Resources Development Act defines the term mining area in detail. The definition of "mining area" in the Mine Health and Safety Act should be amended by the deletion of the reference to section 65(2)(b) of the Mineral and Petroleum Resources Development Act and the Act should be correctly referred to. The SALRC noted in its Consultation Paper that subject to confirmation from the Department of Mineral Resources the SALRC assumes that the motivation for the differently worded definitions of 'mining area' in the two statutes concerned lies in the different aims and objects of the two Acts. The SALRC considered that there may be cogent reasons for the existence of the two differently worded definitions. The SALRC therefore proposed the retention of the two definitions save for correcting the two issues highlighted in this paragraph. The definition of 'mining area' in the Mine Health and Safety Act should be amended by the deletion of the reference to section 65(2)(b) of the Mineral and Petroleum Resources Development Act and the Act should be correctly referred to. The DMR concurs with the amendment of the definition of 'mining area' as proposed by the SALRC.

2.45 Section 102 refers to the Department of Mineral and Energy Affairs and 'Minister' means the Minister of Minerals and Energy. As we noted at the beginning of this chapter two Departments, namely Mineral Resources and Energy were created in 2009. The SALRC recommends an amending clause in the Bill to substitute the reference to the Department with a reference to 'Mineral Resources'. The DMR concurs with the amendments proposed by the SALRC.

2.46 The Mine Health and Safety Amendment Act of 2008 also substituted, amongst others, the definition of "occupational medical practitioner". The term 'occupational medical practitioner' was prior to the amendment Act of 2008 defined to mean a medical practitioner who holds a qualification in occupational medicine, or an equivalent qualification, recognised by the Interim National Medical and Dental Council of South Africa or a medical practitioner engaged in accordance with section 13(4). Subsection (4) was deleted by the amendment Act. Section 13(3)(a)(ii) also referred to the Interim National Medical and Dental Council of South Africa but this subparagraph was deleted by the amendment Act of 2008.<sup>18</sup> The Medical, Dental and Supplementary Health Service Professions Amendment Act 89 of 1997 provided for the Health Professions Council of South Africa. Section 2 of the Health Professions Act presently provides for the juristic person known as the Health Professions Council of South Africa. The Act now provides that 'occupational medical practitioner' means a medical practitioner who holds a qualification in occupational medicine, or an equivalent qualification, recognised by the Health Professions Council of South Africa. (It needs to be noted that Lexis Nexis and Jutastat did not in their databases substitute the definition of 'occupational medical practitioner' in the Mine Health and Safety Act with the amended definition as set out in the amendment Act but deleted this definition.) The DMR noted that it would request Lexis Nexis and Jutastat to correct their databases.

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- 18 (3) Every employer who establishes or maintains a system of medical surveillance must –
- (a) engage the part-time or full-time services of-
    - (i) an occupational medical practitioner; and
    - (ii) in so far as it is necessary, other practitioners holding a qualification in occupational medicine recognised by the Interim National Medical and Dental Council of South Africa or the South African Interim Nursing Council.

2.47 The term 'medical practitioner' is still defined in section 102 of the Mine Health and Safety Act to mean a medical practitioner as defined in the Medical, Dental and Supplementary Health Service Professions Act, 1974 (Act 56 of 1974). This short title (Medical, Dental and Supplementary Health Service Professions Act), was, however, substituted by section 65 of the Medical, Dental and Supplementary Health Service Professions Amendment Act 89 of 1997 with the short title 'the Health Professions Act'. The SALRC recommends that the definition of 'medical practitioner' be updated in the Mine Health and Safety Act to refer to medical practitioner as defined in the Health Professions Act.<sup>19</sup> The DMR concurs with the amendment of the definition of "medical practitioner" as proposed by the SALRC.

2.48 The Mine Health and Safety Act provides in section 102 that 'standard' means any provision occurring – (a) in a specification, compulsory specification, code of practice or standard method as defined in section 1 of the Standards Act, 1993 (Act 29 of 1993); or (b) in any specification, code or any other directive having standardisation as its aim and issued by an institution or organisation inside or outside the Republic which, whether generally or with respect to any particular article or matter and whether internationally or in any particular country or territory, seeks to promote standardization. The Standards Act of 1993 defined standards as meaning a standard referred to in section 16(3)(a) (i) or (8). Section 16(3)(a)(i) provided that the SABS may set and issue as a standard a specification, code of practice or standard method and section 16(8) provided that at the commencement of the Act a specification referred to in section 13, a code of practice referred to in section 18, a standard method referred to in section 19 or a document referred to in section 19(4) of the Standards Act, 1982 (Act 30 of 1982), which is in force in terms of the provisions of that Act, shall be deemed to be a standard which has been set and issued in terms of the provisions of this Act. We noted above that the Standards Act of 1993 was repealed. Hence, the question arises whether the definition of 'standard' ought not to be updated too.

2.49 The Standards Act of 2008 defines 'standard' as meaning means a document that provides for common and repeated use, rules, guidelines or characteristics for products, services, or processes and production methods, including terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method. Section 23 of the Standards Act of 2008 deals with the SA Bureau for Standards (SABS) having to develop and maintain a national norm for setting and amending South African national standards. It provides, amongst others, that the norm must detail a process for the development and amendment of South African National Standards, which ensures that as far as possible the latest technological developments are considered; the interests of all parties concerned, including manufacturers, suppliers and consumers, are considered; such South African National Standards are harmonised with international standards, if applicable; and there has been an appropriate national consensus-building process in developing such South African National Standards.

2.50 The SALRC is of the view that the definition of standard as set out in the Standards Act of 2008, considered in the context of the Act and the functions of the SABS is framed broadly enough to achieve the purposes envisaged for 'standards' contemplated in the Mine and Health Safety Act. The SALRC therefore recommends that the definition of 'standard' in the Mine and Health Safety Act

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<sup>19</sup> 'Medical practitioner' is defined to mean a person registered as such under this Act (the Health Professions Act).

be updated by replacing the wording of the definition of 'standard' with the wording used in the Standards Act of 2008.

2.51 Schedule 7 of the Mine Health and Safety Act contains the Constitution of the Mining Qualifications Authority. Mr Stassen notes that item 3(2) and item 24 of Schedule 7 to the Mine Health and Safety Act refers to the South African Qualifications Authority Act, 1995 (Act 58 of 1995). Item 3(2) provides that in order to promote its objects the Mining Qualifications Authority must seek registration in terms of the SAQA Act as a body responsible for generating education and training standards and qualifications as contemplated in section 5(1)(a)(ii)(aa) of that Act; and accreditation in terms of the SAQA Act as a body responsible for monitoring and auditing achievements as contemplated in section 5(1)(a)(ii)(bb) of that Act. The SALRC is of the view that item 3(2) refers to the historical event of the registration and accreditation of the Authority in terms of the South African Qualifications Authority Act, 1995 and therefore these reference need to remain unchanged. Item 24 of Schedule 7 contains the definitions defining terms and phrases used in the Constitution of the Mining Qualifications Authority.

2.52 'National Qualifications Framework' is defined in the Mine Health and Safety Act as meaning the National Qualifications Framework as defined in section 1 of the SAQA Act. Although the National Qualifications Framework was defined in section 1 of the repealed South African Qualifications Authority Act, Chapter 4 of the National Qualifications Framework Act, 2008 (Act 67 of 2008) now deals with the National Qualifications Framework. The SALRC is therefore of the view that the reference in item 3(2) of Schedule 7 to the South African Qualifications Authority Act is outdated. Item 23 of Schedule 7 of the Mine Health and Safety Act prescribes the procedure for affecting amendments to the Constitution of the Mining Qualifications Authority. Item 23(1) provides that if the Minister or the Authority wants to amend the Constitution, the Minister or the Mining Qualifications Authority, as the case may be, must serve a proposal containing such amendments to the chairperson of the Council who must convene a meeting to consider the proposal. The SALRC therefore recommends that the Minister of Energy and the Mining Qualifications Authority consider updating item 24 of the Constitution of the Mining Qualifications Authority to define 'National Qualifications Framework' to mean the National Qualifications Framework contemplated in Chapter 4 of the National Qualifications Framework Act, 2008 (Act 67 of 2008). In view of the procedure created by the Mine Health and Safety Act for effecting amendments to the Constitution of the Mining Qualifications Authority, the SALRC does not include a provision to address this issue in the Bill in Annexure A to the Report.

#### **(j) Mine Health and Safety Amendment Act 72 of 1997**

2.53 The Mine Health and Safety Amendment Act amended the Mine Health and Safety Act 29 of 1996. The amendment Act provided for a system of administrative fines. It further regulated the operation of the tripartite institutions. It provided for the participation of health and safety representatives responsible for a working place in an inquiry in respect of that working place. It also effected certain textual alterations, and provided for matters connected therewith. The principal Act and amendments brought about by this amendment Act are still in force. In this sense the Act is not obsolete or redundant. The SALRC therefore recommends that the Mine Health and Safety Amendment Act 72 of 1997 be retained on the statute book.



**(k) Mine Health and Safety Amendment Act 74 of 2008**

2.54 The Mine Health and Safety Amendment Act amended the Mine Health and Safety Act of 1996 to review and strengthen enforcement provisions. It simplified the administrative system for the issuing of fines. It reinforced offences and penalties. It substituted, added and removed ambiguities in certain definitions and expressions, effected certain amendments necessary to ensure consistency with other laws, particularly the Mineral and Petroleum Resources Development Act, 2002, and provided for matters connected therewith. The President assented to the Act on 15 April 2009 and the provisions of the Act commenced on 30 May 2009. The Act now provides, amongst others, that 'occupational medical practitioner' means a medical practitioner who holds a qualification in occupational medicine, or an equivalent qualification, recognised by the Health Professions Council of South Africa. It was noted above that Lexis Nexis and Jutastat did not substitute this definition with the amended definition but deleted this definition in their databases.

2.55 The SALRC considers that this recent amendment Act continues to serve a purpose to ensure legal certainty and recommends that the Amendment Act be retained on the statute book.

**(l) Mineral and Petroleum Resources Development Act 28 of 2002**

2.56 This Act was promulgated to provide for equitable access to and sustainable development of the nation's mineral and petroleum resources. The objects of this Act are to-

- (a) recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;
- (b) give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
- (c) promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
- (d) substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;<sup>20</sup>
- (e) promote economic growth and mineral and petroleum resources development in the Republic;<sup>21</sup>
- (f) promote employment and advance the social and economic welfare of all South Africans;
- (g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;(h) give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and

20 Para. (d) was substituted by section 2 of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, a provision which will be put into operation by proclamation.

21 Para. (e) has been substituted by s 2 of the Mineral and Petroleum Resources Development Amendment Act 49 of 2008, a provision which will be put into operation by proclamation.



- (i) ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.

2.57 The Act also contains Schedules. The objects of Schedule II of the Act are to ensure security of tenure in respect of existing prospecting, mining or production operations, to give the holders of old order rights the opportunity to comply with the Act and to promote equitable access to the nation's mineral and petroleum resources.<sup>22</sup> Items 3, 4, 5, 6 and 7 of the Schedule are aimed at bringing existing prospecting and exploration operations, conducted before the coming into operation of the Act, within the purview of the Act. "Unused old order rights" are all the rights listed in table 3 to the schedule in respect of which no prospecting or mining was being conducted immediately before the Act took effect. There are 11 categories. The first category consists of common law mineral rights for which no prospecting permit or mining authorization was issued. The definition of "holder" in relation to such a right is the person to whom the right was granted or by whom the right was held before the Act came into effect i.e. before 1 May 2004.<sup>23</sup> Item 8 deals with the processing of unused

22 Prof AJ van der Walt notes in *Juta's Quarterly Review of South African Law* the case of *Agri South Africa (Association incorporated under Section 21) v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* which dealt with the expropriation of mineral rights. (See <http://www.saflii.org/za/cases/ZAGPPHC/2009/2.html> to access the case. He points out that the decision is interesting because it raises an issue that has been simmering ever since the Minerals and Petroleum Resources Development Act 28 of 2002 (MPRDA) was promulgated. Prof Van der Walt points out that the issue is whether the MPRDA, in forcing holders of unused 'old order' mineral rights to apply for converted 'new order' rights under the Act, effectively expropriated those rights, particularly in instances where the holders of the old order rights might not have been in a position to invest the capital outlay and expertise required for a successful conversion application. Prof Hanri Mostert notes in an article published in the August 2009 *De Rebus* titled "Expropriation of unused mineral rights – or not?" by commenting on this case that the dispute that gave rise to the decision in this matter seems to be the product of the poor drafting of some of the transitional provisions in the MPRDA. She considers that it furthermore seems as if the position of the inactive mineral right holder was not contemplated properly in the drafting of the MPRDA. She says that in this sense, the dispute was supposedly inevitable and the judgment therefore is commendable in the restraint it displays. She notes that considering the kind of questions that will have to be decided in further rounds of litigation, it seems as if the judiciary certainly has its task cut out. Prof Mostert also explains that Section 83(d) of the Mineral and Petroleum Resources Development Amendment Act 49 of 2009 (the Amendment Act), inserts an amendment into the MPRDA, dealing partially with these difficulties. It inserts Item 7(3A) to (3B) into Schedule II, which grants the Minister the statutory power to refuse an application for conversion of an active mining right, upon non-compliance. She notes that the Amendment Act hence now renders failed applications for conversion of active mining rights possible for the first time. The clause is to the effect that the Minister will be compelled to refuse conversion of the old order mining right, after the non-compliant applicant has been given notice of non-compliance and has had a 60-day window period to rectify non-compliance, but failed to do so. Prof Mostert explains that prior to the Amendment Act, the MPRDA conveyed no statutory power upon the Minister to refuse an application for conversion of such rights, the Amendment Act rectifies this oversight, and renders the specific provision operative retrospectively, as from the date of commencement of the original MPRDA (see s 94(4) of the Amendment Act). Prof Mostert points out that the Amendment Act was assented to on 19 April 2009, but the date of commencement has yet to be proclaimed. Until such time, the original anomaly persists. She notes, however, that the Amendment Act does not address the difficulty regarding the interim position of holders of inactive rights at all. See <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu> accessed on 4 September 2009).

23 See the Legalbrief of 29 April 2011 (at <http://www.legalbrief.co.za>) which reported that in a landmark judgment that could lead to millions in claims against the state, the North Gauteng High Court ruled on 28 April 2011 that the holder of an old order mineral right was entitled to compensation, as the Mineral Resources and Petroleum Development Act deprived and expropriated the holder of its previously held property. Farmers body AgriSA brought the case to court to get legal clarity on whether the enactment of the MPRDA constituted expropriation, which, under section 25 of the Constitution, is subject to compensation. It was reported that Judge Du Plessis disagreed with the state's assertion (the Minister of Mineral Resources was the defendant) that the MPRDA did not deprive Sebenza of its coal rights, but only regulated the use thereof. See *Agri South Africa v Minister of Minerals and Energy and Another* (55896/07) [2011] ZAGPPHC 62 at <http://www.saflii.org/za/cases/ZAGPPHC/2011/62.html> [75] Finally, as to deprivation, Mr Badenhorst submitted that, in any event, Sebenza was not deprived of its property on 1 May 2004 (when the MPRDA commenced). The argument continued that the deprivation, if there had been one, took place a year later when the transitional right under item 8 lapsed. For the reasons that I have given, I do not agree. As Mr Grobler put it, on the day before the commencement of the MPRDA Sebenza had a real right in the form of quasi-servitude. On the following day it only had a right to apply to be granted competencies that the real right had conferred upon it.'

old order rights. An old order right remains valid for not longer than a year from the commencement of the Act, the holder has the exclusive right to apply for a prospecting or mining right for a period of not longer than one year. The application has to be in terms of either section 16 or section 22 of the Act and the existing right remains valid until the application is granted or refused. Unless an application in terms of item 8 is brought the unused old order right ceases to exist after a period of not longer than a year. The holder of rights had no obligation to exploit those rights, before 1 May 2004. That situation changed drastically thereafter. The holder had a maximum of one year within which to bring an application, either in terms of section 16 of the Act or in terms of section 22, depending on the circumstances.

2.58 The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 effected certain amendments to this Act. The President assented to the Act on 21 April 2009 and he will determine the commencement date of the Act by proclamation in the Gazette. The Amendment Act deals with many technical issues arising from the Act that are not relevant to this review. It effected, however, amendments that are of relevance to this review. Prior to the amendment the definition provided that 'Mining Titles Office' means the Mining Titles Office contemplated in section 2 of the Mining Titles Registration Act, 1967 (Act 16 of 1967). Once the amendments commence the Act will define the term 'Mineral and Petroleum Titles Registration Office' to mean the Mineral and Petroleum Titles Registration Office contemplated in section 2 of the Mining Titles Registration Act, 1967 (Act 16 of 1967). The reference to section 20 of the National Parks Act in section 48 of the Act was deleted and replaced with a reference to section 48 of the National Environmental Management: Protected Areas Act of 2003 as the National Parks Act was repealed by section 90 of the National Environmental Management: Protected Areas Act 57 of 2003.<sup>24</sup>

2.59 The Mineral and Petroleum Resources Development Act defines the term 'officer' to mean any officer of the Department appointed under the Public Service Act, 1994 (Proclamation 103 of 1994). The Public Service Act defines the term 'employee' to mean a person contemplated in section 8, but excludes a person appointed in terms of section 12A. The Public Service Act deals with the composition of the public service in section 8. Section 12A of the Public Service Act deals with the appointment of persons in the public service on grounds of policy considerations. The Public Service Amendment Act 13 of 1996 provided, amongst other things, for the removal of unjust differentiation between 'officers' and 'employees' as defined in the Public Service Act, 1994.

- 1 Removal of differentiation between officer and employee
- (1) From the date of commencement of this Act (hereinafter referred to as the commencement date), unless clearly inappropriate-
  - (a) every person who is an 'employee' as defined in section 1 (1) of the Public Service Act, 1994 (Proclamation 103 of 1994), immediately before the commencement date, by virtue of his or her relationship with the State as employer, shall be deemed to be an 'officer' as so defined, and the provisions of the Public Service Act, 1994, shall for all purposes apply to such person as if he or she were an 'officer' as so defined;
  - (b) any post which immediately before the commencement date is included in the B division of the public service in terms of section 8 of the Public Service Act, 1994, shall be deemed to have been so included in the A division of that service; and

24 'Subject to section [20 of the National Parks Act, 1976 (Act No. 57 of 1976)] 48 of the National Environmental Management: Protected Areas Act, 2003 (Act No. 57 of 2003), and subsection (2), no reconnaissance permission, prospecting right, mining right may be granted or mining permit be issued in respect of— . . .'

- (c) the provisions of the Public Service Act, 1994, which immediately before the commencement date applied to employees and to posts in the B division, shall cease to apply to such persons or posts,  
and to that extent the Public Service Act, 1994, shall be deemed to have been amended.

2.60 The SALRC recommends that the definition of 'officer' section 1 of the Act should be amended in accordance with the amendment earlier made to the Public Service Act. The SALRC therefore recommends that the reference should be 'employee' in section 1 of Act 28 of 2002 rather than to "officer". In addition, the definition of 'Minister' and 'Department' are outdated and must be amended. These definitions should provide that 'Minister' means the Minister of Mineral Resources and that 'Department' means the Department of Mineral Resources. The DMR concurs with the amendments proposed by the SALRC.

2.61 Commenting on the Consultation Paper, the Department of Mineral Resources commented as follows on Item 3 and 7 of Schedule II of the MPRDA:

Item 3 of Schedule II of the Mineral and Petroleum Resources Development Act, 2002 (MPRDA) made provision for applications lodged in terms of the Minerals Act, 1991 (Act No. 50 of 1991) immediately prior to the coming into operation of the MPRDA. All such applications have been dealt with and item 3 has therefore served its purpose and is no longer relevant. Items 4, 5, 6, and 7 made provision for the conversion of old order (prospecting, exploration, production and mining) rights granted in terms of the Minerals Act, 1991 to be converted to new rights in terms of the MPRDA. The final date for the conversion of such rights (mining and production) was April 2009. Therefore these items are no longer relevant and should be deleted.

Item 7 of Schedule II of the MPRDA provided for the conversion of old order mining rights but omitted to empower the Minister to refuse such rights in cases of non compliance. The Mineral and Petroleum Resources Amendment Act 49 of 2008 sought to rectify the omission through the insertion of subitem 3A in Item 7. However this subitem has become obsolete as Act 49 of 2008 is still not in operation and the due date for the conversion of old order mining rights has already passed.

2.62 The SALRC noted in Discussion Paper 124 that it did not agree with the suggestion made by the Department of Mineral Resources as regards the deletion of items 3 and 7 of Schedule II. The SALRC explained that there are numerous applications which are still in the pipeline, many conversion applications that have not yet been approved and that are being administered currently in terms of that item. The SALRC therefore considered that these items need to be preserved in the Schedule. Commenting on Discussion Paper 124 in August 2011 the DMR remarked that it has noted the reasons why the SALRC is not in agreement with the proposed deletion of these items. The DMR comments that the SALRC's views regarding this issue are supported and the Department has no objection against these items being retained. The SALRC therefore recommends that items 3 and 7 of Schedule II be retained in the Act.

2.63 Discussion Paper 124 noted that an issue which does not fall within the narrow ambit of this review is the issue of consultation provided for by the MPRDA. The SALRC explained that the Constitutional Court recently considered, amongst others, the issue of consultation in terms of the MPRDA in the case of *Bengwenyama Minerals Pty Ltd and others v Genorah Resources Pty Ltd and others*.<sup>25</sup> At issue in this case was the lawfulness of the grant to the company Genorah Resources of a prospecting right on the land of the Bengwenyama-Ye-Maswazi community. The Constitutional

25 See [2010] ZACC 26 at par 65 and further at <http://www.saflii.org/za/cases/ZACC/2010/26.html>

Court noted that equality, together with dignity and freedom, lie at the heart of the Constitution, that equality includes the full and equal enjoyment of all rights and freedoms, and that to promote the achievement of substantive equality the Constitution provides for legislative and other measures to be made to protect and advance persons disadvantaged by unfair discrimination. The Court stated that the Constitution also furnishes the foundation for measures to redress inequalities in respect of access to the natural resources of the country. The Court explained that the Mineral and Petroleum Resources Development Act was enacted, amongst other things, to give effect to those constitutional norms, and that it contains provisions that have a material impact on individual ownership of land, community ownership of land and the empowerment of previously disadvantaged people to gain access to South Africa's bounteous mineral resources.

2.64 The Constitutional Court explained that one of the purposes of consultation with the landowner must surely be to see whether some accommodation is possible between the applicant for a prospecting right and the landowner insofar as the interference with the landowner's rights to use the property is concerned. The Court noted that under the common law a prospecting right could only be acquired by concluding a prospecting contract with the landowner, something which presupposed negotiation and reaching agreement on the terms of the prospecting contract. The Court stated that the Act's equivalent is consultation, the purpose of which should be to ascertain whether an accommodation of sorts can be reached in respect of the impact on the landowner's right to use his land, and that the Act does not, of course, impose agreement on these issues as a requirement for granting the prospecting right, but that does not mean that consultation under the Act's provisions does not require engaging in good faith to attempt to reach accommodation in that regard. Failure to reach agreement at this early consultation stage might result in the holder of the prospecting right having to pay compensation to the landowner at a later stage. The common law did not provide for this kind of compensation, presumably because the opportunity to provide recompense for use impairment of the land existed in negotiation of the terms of the prospecting contract. The Constitutional Court also explained that another more general purpose of the consultation is to provide landowners or occupiers with the necessary information on everything that is to be done so that they can make an informed decision in relation to the representations to be made, whether to use the internal procedures if the application goes against them and whether to take the administrative action concerned on review. The consultation process and its result is an integral part of the fairness process because the decision cannot be fair if the administrator did not have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair.

[68] Genorah did not comply with these requirements for consultation in terms of the Act. Essentially its purported compliance with the consultation requirements of the Act consisted of notifying the Kgoshi of the Community of its application before lodging it with the Regional Manager and leaving a prescribed form for him to indicate, by ticking a box on the form, whether he on behalf of the Community supported its application or not. The form was never signed by the Kgoshi. Genorah did nothing further, despite being notified of the requirements under section 16(4) of the Act by the Department and despite receiving a letter from the Kgoshi on 13 March 2006 inviting Genorah to get to know each other better. There was never any consultation in relation to Eerstegeluk.

[72] Section 25 of the Constitution also recognises the public interest in reforms to bring about equitable access to all South Africa's natural resources, not only land, and requires the state to foster conditions which enable citizens to gain access to land on an equitable basis. A

community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. The Act gives recognition to these constitutional imperatives. It recognises communities with rights or interests in community land in terms of agreement, custom or law. Section 104 of the Act makes provision for a community to obtain a preferent right to prospect on community land for an initial period not exceeding five years that can be renewed for further periods not exceeding five years.

[73] It seems to me that these provisions of the Act create a special category of right for these communities, in addition to their rights as owners of the land, namely to apply for a preferent right to prospect on their land. It is only where a prospecting right has already been granted on communal land that the preferent right may not be granted. It therefore appears to me that any application for a prospecting right under section 16 of the Act that might have the effect of disentitling a community of its right to apply for a preferent prospecting right under section 104 of the Act, materially and adversely affects that right of a community. Before a prospecting right in terms of section 16 may be granted under those circumstances, the community concerned should be informed by the Department of the application and its consequences and it should be given an opportunity to make representations in regard thereto. In an appropriate case that would include an opportunity to bring a community application under section 104 prior to a decision being made on the section 16 application.

[74] This is such a case. The Department was at all times aware that the Community wished to acquire prospecting rights on its own farms. It gave advice to the Community over a long period of time in this regard, to the extent of requiring better protection for the Community in the investment agreement. It continued dealing with the Community and Bengwenyama Minerals in relation to their application brought on prescribed section 16 forms without informing them of the fact that approval of that application would end their hopes of a preferent prospecting right. There is no explanation from the Department for this strange behaviour. The Department had an obligation, founded upon section 3 of PAJA, to directly inform the Community and Bengwenyama Minerals of Genorah's application and its potentially adverse consequences for their own preferent rights under section 104 of the Act. This obligation entailed, in the circumstances of this case, that the Community and Bengwenyama Minerals should have been given an opportunity to make an application in terms of section 104 of the Act for a preferent prospecting right, before Genorah's section 16 application was decided. None of this was done. The review must succeed on this ground as well. [Footnotes omitted]

2.65 The media reported in February 2011 that the Minister of Mineral Resources, Ms Susan Shabangu, indicated at a mining indaba conference held during February 2011 in Cape Town that the prevalence of community factions siding with competing mineral rights applicants would be addressed in proposed legal amendments.<sup>26</sup> Minister Shabangu reportedly said that the current guidelines in the Mineral and Petroleum Resources Development Act (MPRDA) on the interaction by mining companies with local communities, as well as who may act as community representatives, were too vague, and that the issue would be addressed by proposed amendments to the MPRDA, a process which was initiated in September 2010. The Minister was quoted as saying that the Act contained too many ambiguities, and that the definition of what a community entails has been left wide open.<sup>27</sup> These would be streamlined in the amendment of the Act. Minister Shabangu further reportedly said that the new legislation would also set much stricter rules on how mining companies consult with communities.<sup>28</sup>

26 André Janse van Vuuren "Mining law review to tackle factionalism" see [http://www.miningmx.com/special\\_reports/conf\\_cover/2011/mining-indaba-2011/Mining-law-review-to-tackle-factionalism.htm](http://www.miningmx.com/special_reports/conf_cover/2011/mining-indaba-2011/Mining-law-review-to-tackle-factionalism.htm)

27 The new 2008 definition provides as follows: 'community means a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affected by mining on land occupied by such members or part of the community'.

28 Commenting on the case of *Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd (Formerly*



2.66 Commenting on Discussion Paper 124 the DMR noted that reference is made in the Discussion Paper to the need to strengthen the consultation process. The DMR advises that a Task Team has been established in the Department to review the MPRDA and the MPRDA Amendment Act, and that the team is considering this issue as well as other matters in consultation with stakeholders.

2.67 Discussion Paper 124 further pointed out that another crucial issue which falls outside the ambit of this review is the alignment of the MPRDA, and environmental, water and local government legislation. The Discussion Paper explained that the Constitutional Court also noted in the case of *Bengwenyama Minerals (Pty) Ltd and others v Genorah Resources (Pty) Ltd and others*<sup>29</sup> that one of the objects of the Act is to give effect to the environmental rights protected in section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development. The Court explained that in terms of section 17(1)(c) of the Act the Minister must grant a prospecting right if, amongst other requirements, the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment. An applicant for a prospecting right must submit a prescribed environmental management plan in terms of section 39(2) of the Act. Section 41(1) of the Act requires that the prescribed financial provision for the rehabilitation or management of negative environmental impacts must be provided to the Minister by an applicant for prospecting rights. The Court found that there was no evidence on affidavit by the Deputy Director General who granted the prospecting rights to Genorah that he or she considered and was satisfied that the environmental requirement in section 17(1)(c) read with section 39(2) was fulfilled. The Court noted that it would in any event have been difficult to do so because Genorah's

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*Tropical Paradise 427 (Pty) Ltd and Others [39808/07] [2008] ZAGPHC 177 [13 June 2008]* <http://www.saflii.org/za/cases/ZAGPHC/2008/177.html> Proff PJ Badenhorst and NJJ Oliver remark, amongst others, as follows (see 'Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002' De Jure 44 Vol 1 2011 p 126 to 148 at 148 <http://www.dejure.up.ac.za/images/files/vol44-1-2011/Chapter%208.pdf>):

The facts of *Bengwenyama Minerals* decision, however, illustrate the weakness of the current (2002) section 104 MPRDA mechanism in protecting communities if someone else applies in due course for a prospecting right in terms of section 16 MPRDA. After all, anyone may apply for a prospecting right. One may argue that this is in line with a year zero starting-place for new applicants for mineral resources.

The 2008 amendment to section 104 MPRDA clarifies the application procedure and requirements for a preferential right to prospect or mine. The 2008 new definition of "community" is also an improvement by requiring the community to constitute of a group of historically disadvantaged persons. In addition, the 2008 amendments will make it possible for the Minister to promote the rights and interests of the community during prospecting or mining by imposing conditions when granting a prospecting right or mining right. It is suggested that the Department urgently considers promulgating the commencement of the amended section 104 MPRDA.

It is suggested that during the interim period (prior to the commencement of the 2008 Amendment Act), a community would be better served if it applies from the outset for a prospecting right in terms of section 16 MPRDA but with an indication that it also takes place in terms of section 104 MPRDA. Both the requirements of section 17(1) and 104(2) MPRDA will then have to be met. This is because a community which is overtaken in the rush by an applicant for a prospecting right is reduced by the first come, first served principle to mere a spectator of prospecting or mining activity on their land.

In conclusion, it is clear that even the amended (2008) section 104 MPRDA does not go far enough to ensure full community participation, involvement and sustainable receipt of benefits, and that a number of further amendments are urgently required. Furthermore, it is suggested that the development of a comprehensive mechanism to give substantive effect to the preferential right of the community to prospect or mine in the new rush for mineral resources should be a matter of the highest priority for the Department and Parliament.

29 See [2010] ZACC 26 at par 75 and further at <http://www.saflii.org/za/cases/ZACC/2010/26.html>



environmental plan was only approved by a different (acting) Regional Manager on 13 November 2006, some two months after the prospecting rights were granted. The financial guarantee was also only provided after the granting of the prospecting rights, namely on 15 September 2006. The Court pointed out that counsel argued on Genorah's behalf that environmental satisfaction was not a prerequisite or jurisdictional fact for the granting of a prospecting right because section 17(5) provides that the granting of a prospecting right in terms of section 17(1) only 'becomes effective on the date on which the environmental management programme is approved in terms of section 39.' The Court held that this argument was misconceived, firstly because an applicant who applies for the granting of a prospecting right needs to submit an environmental management *plan* (not a programme), and secondly because the section explicitly states that the granting of the prospecting right only becomes 'effective' on approval of the programme, and that it obviously relates to the implementation of the prospecting operation, not its approval. The Court pointed out that approval of the prospecting operation is dependent on an assessment that the operation will not result in unacceptable pollution, ecological degradation or damage to the environment. The Court found that this ground of review must succeed on the basis that there is nothing on record to show that the requirement set out in section 17(1)(c) of the Act was fulfilled.

2.68 The alignment of the MPRDA, environmental and provincial and local government legislation was also in issue in the Western Cape High Court in the recent case of *City of Cape Town v Maccsand (Pty) Ltd and Another*.<sup>30</sup> In this case, the respondents contended that, once the Minister of Mineral Resources, the second respondent or his or her delegate have granted a mining right or permit, the holder is granted a right to undertake mining at the location and that no other law or authority may 'veto' the decision taken by the relevant Minister or delegate. There were three different legal regimes

30 [2010] ZAWCHC 144; 2010 (6) SA 63 (WCC); [2011] 1 All SA 506 (WCC) see <http://www.saflii.org/za/cases/ZAWCHC/2010/144.html> and also the case of *Swartland Municipality v Louw* [2009] ZAWCHC 203; 2010 (5) SA 314 (WCC) at <http://www.saflii.org/za/cases/ZAWCHC/2009/203.html> where the dispute related largely to the parties' different stands on the interpretation of provisions of the MPRDA, its effect on LUPO as a subordinate legislation and the constitutionality of LUPO, or parts thereof. The Court held, amongst others, as follows in this case:

[20] The legislature, in my view, at the time the MPRDA was enacted, must have been aware of the fact that provincial or local legislation regulating land planning and zoning may be in place and that these legislation may potentially have a bearing on the activities permitted by mining rights approved in terms of the MPRDA. The MPRDA is silent on the issue of rezoning of land and the only proper interpretation of the provisions of section 23(6) and 25(2)(d) of the MPRDA is that the meaning "any other relevant law" includes legislation like LUPO. To view it any differently, as submitted by the Respondents, cannot be correct as it may undermine the proper functioning of municipalities who are under an obligation in terms of the Municipal Structures Act, to achieve the integrated, sustainable and equitable social and economic development of its area as a whole. LUPO is therefore relevant and binding law. A contravention of its provisions constitutes, in terms of section 39(2), a criminal offence and a local authority has therefore a statutory duty to ensure that its laws are complied with. . . .

[40] Given the fact that the object and focus of the MPRDA and LUPO are not the same, as well as the fact that provincial and local spheres of government are given considerable constitutional latitude to regulate areas of interests, the impact of which can only be locally determined, the MPRDA cannot be regarded as water-tight to the exclusion of relevant zoning legislation. . . .

[41] The zoning of land is essentially a planning function in terms of Schedule 4 and 5 of the Constitution. The legislator could not have intended to grant the Minister the power to make decisions outside the scope, aims and objectives of the MPRDA. Such an exercise of power has the potential to stand in conflict with the spirit and purport of the Constitution. In my view such a wide ministerial power will negate the municipal planning function conferred upon all Municipalities and it may well trespass into the sphere of the exclusive provincial competence of provincial planning. I am satisfied that there is no conflict between LUPO and the MPRDA as contemplated in section 146 of the Constitution, as LUPO and the MPRDA can be read as mutually supportive.

which operated at different spheres of government, all of which were relevant to mining, being the National Environment Management Act 107 of 1998 (NEMA), the Land Use Planning Ordinance 15 of 1985 (LUPO) and the MPRDA. It was submitted that, if there was a clash between these three regimes, then if second respondent, pursuant to the powers granted in terms of the MPRDA, approved the application for mining, this decision put an end to the case; that is this decision trumped all other considerations. The Court noted that the critical decision for resolving this dispute turned on a determination of a clash, between the legislative regimes set out respectively in the MPRDA and LUPO. In further framing this dispute, counsel for applicant noted that the very nature and purpose of LUPO was that it represented the key mechanism for municipal planning, in this case, for the Province of the Western Cape. If LUPO was over-ridden, it would make it extremely difficult for authorities such as applicant to fulfill their constitutional function with regard to municipal principal planning.

2.69 Referring to the decision of the Constitutional Court in *City of Johannesburg Metropolitan Municipality and the Gauteng Development Tribunal and Others*<sup>31</sup> the Court found in *City of Cape Town v Maccsand* that two significant implications flow from this judgment for the purposes of the dispute: Firstly, municipal planning includes the control and the regulation of the use of land which falls within the jurisdiction of a municipality and secondly, the national and provincial spheres of government cannot by legislation give themselves the power to exercise executive municipal powers nor the right to administer municipal affairs. A mandate of these two spheres of government should ordinarily be limited to regulating the exercise of executive municipal powers and the administration of municipal affairs by local authorities.

2.70 The Court held that its finding that LUPO is applicable to the use of land, including mining, is congruent with the constitutional scheme of concurrent powers, and unless there is a direct invocation of powers to override LUPO and the MPRDA, both legislative schemes operate as concurrent powers. The Court noted that Parliament recognised that activities which required environmental authorisation under NEMA may also be regulated by other legislation which required similar authorisation. Where the requirements for authorisation in terms of legislation other than NEMA would meet the requirements of such authorisation under NEMA, the legislation indicated the desirability for the organs of state responsible for issuing these authorisations to avoid duplication and to integrate their decision making. The Court pointed out that critically, however, the requirement for environmental authorisation under NEMA in respect of listed activities was not removed because the activity may now be regulated in terms of another law. Referring to sections 24(8) and 24L(4) of NEMA, the Court noted that these provisions deal expressly with the question whether the obtaining of authorisations for activities under other laws, which include the processes for the investigation, assessment and communication of the potential impacts or consequences of the activities, absolves the holders of those authorisations from obtaining environmental authorisations under NEMA, if the activities are listed or specified under NEMA. In the Court's view, these provisions make clear, notwithstanding the processes and authorisations under other laws including the MPRDA, that an environmental authorisation under NEMA must be obtained unless the competent authority, empowered to issue the NEMA authorisation, decides to regard the authorisation under another law as a NEMA authorisation because it meets all the requirements stipulated in section 24(4).

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31 See [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) [http://www.saflii.org/ za/cases/ZACC/2010/11.html](http://www.saflii.org/za/cases/ZACC/2010/11.html)

2.71 The cases of *City of Cape Town v Maccsand*<sup>32</sup> and *Swartland Municipality v Louw*<sup>33</sup> were both taken on appeal. The SALRC remarked in Discussion Paper 124 that although not strictly within the parameters of the SALRC's present review, it was of the view that the principles raised in the two cases demonstrate the need for clarity whether the national MPRDA trumps NEMA, and provincial planning and local government planning legislation. In September 2011 the Supreme Court of Appeal gave judgment in the case of *Maccsand v City of Cape Town*<sup>34</sup> and held:<sup>35</sup>

[34] . . . I have found that the MPRDA and LUPO are directed at different ends and therefore there is no duplication. In any event, for as long as the Constitution reserves the administration of municipal planning functions as an exclusive competence of local government, a successful applicant for a mining right or a mining permit will also have to comply with LUPO in the provinces in which it operates. The authority to mine granted by the Minister after taking into account mining-related considerations is 'logically anterior to the procurement of consents that may be necessary for its execution', to borrow a phrase from *Minister of Public Works & others v Kyalami Ridge Environmental Association & another (Mukhwevho Intervening)*. In any event, as the cases (including the *Kyalami Ridge* case) demonstrate, dual authorisations by different administrators, serving different purposes, are not unknown, and not objectionable in principle – even if this results in one of the administrators having what amounts to a veto. In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd & another*, Kroon AJ made the point that there is no reason why 'two spheres of control cannot co-exist' and that where, as in that case and this case, one operates from 'a municipal perspective and the other from a national perspective' they each apply their own 'constitutional and policy considerations'.

[35] In the result, the LUPO issue must be decided against Maccsand and the Minister and in favour of the City and the Minister of Local Government, Environmental Affairs and Development Planning in the Western Cape. That means that the appeal must fail in respect of paragraphs 1 and 4.1 of the order issued by the court below. [Footnotes omitted]

2.72 In *Louw NO & others v Swartland Municipality*<sup>36</sup> Acting Judge of Appeal Plasket held in the

32 [2010] ZAWCHC 144; 2010 (6) SA 63 (WCC); [2011] 1 All SA 506 (WCC).

33 [2009] ZAWCHC 203; 2010 (5) SA 314 (WCC).

34 (709/2010; 746/2010) [2011] ZASCA 141 (23 September 2011) <http://www.saflii.org/za/cases/ZASCA/2011/141.html>

35 Plasket AJA (Harms AP, Cloete, Shongwe and Wallis JJA concurring).

36 [2011] ZASCA 142; 650/2010 (23 September 2011); [2011] JOL 27929 (SCA) <http://www.saflii.org/za/cases/ZASCA/2011/142.html> The facts of the case were as follows: the first four appellants were trustees in a trust which owned a farm within the respondent municipality's jurisdictional area. The fifth appellant was the holder of a mining right issued in terms of section 23(1) of the Minerals and Petroleum Resources Development Act 28 of 2002 ('the Act') by the sixth respondent, the Minister of Mineral Resources, authorising it to mine granite on the farm. In terms of the Land Use Planning Ordinance 15 of 1985 (C) ('LUPO'), the farm was zoned for use for the cultivation of crops or plants, the breeding of animals or be left as natural veld. In 2008, the trust gave its consent to the fifth respondent to mine granite on the farm. An application was subsequently made to the municipality for the rezoning of the land to 'industrial III' (which includes mining as a permissible use of the land) for the purpose of establishing a granite quarry subject to the issuing of a mining right in terms of the Act. However, upon being advised that the granting of mining rights and the control over mining activities was the exclusive preserve of national government as represented by the Department of Mineral Resources, the fifth respondent withdrew the rezoning application before it was considered by the municipality.

In February 2009, the Minister granted the fifth respondent a mining right, authorising it to mine granite for 30 years on the farm. It commenced its preparations for its mining operations. In June 2009 the Municipal Manager of the municipality wrote to the trust to say that it had learnt that the farm was being prepared for mining. He said that this was not authorised as the land was zoned for agricultural use. The trust was requested to cease its unlawful activities and, instead, to apply to the municipality for a rezoning that would allow for the mining operations to proceed. When the trust and the fifth respondent demurred, the municipality launched an urgent application against the trustees of the trust, the fifth respondent and the Minister to interdict mining operations on the farm until it had been rezoned in terms of LUPO to permit mining.

The High Court granted the interdict, finding that the Act and LUPO regulated different undertakings – mining, on the one hand, and land use planning, on the other – and that there was no conflict between the two that required

### Supreme Court of Appeal:

- [11] This appeal was argued together with a similar matter, *Maccsand v City of Cape Town*. As that judgment determines the outcome of this appeal, I do not intend to set out the reasoning in any detail. Suffice it to say that for the reasons set out from paragraphs [10] to [35] of the *Maccsand* judgment this Court concluded that the MPRDA does not concern itself with land use planning and the minister, when she considers the grant of a mining permit, does not, and probably may not, take into account such matters as a municipality's integrated development plan or its scheme regulations. As a result, the MPRDA does not provide a surrogate municipal planning function in place of LUPO and does not purport to do so. Its concern is mining, not municipal planning.
- [12] LUPO thus operates alongside the MPRDA with the result that once a person has been granted a mining right in terms of section 23 of the MPRDA he or she will not be able to commence mining operations in terms of that right unless LUPO allows for that use of the land in question. [Footnote omitted]

2.73 Commenting on Discussion Paper 124 in August 2011 before judgment was given in the cases of *Maccsand* and *Louw*, the DMR notes in its comments that reference is made in Discussion Paper 124 to the need for alignment of the MPRDA, NEMA and Local Government legislation in view of the *Maccsand* case. The DMR states that the Task Team reviewing the MPRDA has taken cognizance of the problems and proposed certain amendments to solve the problems experienced. The Task Team is guided by the policy decisions taken. The DMR remarks that they suspect that the last word on the conflict has not yet been spoken.

### **(m) Mineral and Petroleum Resources Development Amendment Act 49 of 2008**

2.74 The Mineral and Petroleum Resources Development Amendment Act amended the 2002 Mineral and Petroleum Resources Development Act. It made the Minister the responsible authority for implementing environmental matters in terms of the National Environmental Management Act, 1998 and specific environmental legislation as it relates to prospecting, mining, exploration, production and related activities or activities incidental thereto on a prospecting, mining, exploration or production area. It aligned the Mineral and Petroleum Resources Development Act with the National Environmental Management Act, 1998 in order to provide for one environmental management system. It removed ambiguities in certain definitions and added functions to the Regional Mining Development and Environmental Committee. It amended the transitional arrangements to further afford statutory protection to certain existing old order rights, and provided for matters connected therewith. This recently passed amendment Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC recommends that it should be retained on the statute book.

### **(n) Minerals and Energy Laws Amendment Act 11 of 2005**

2.75 This Act provided for amendments made to the Deeds Registries Act of 1937 by the Mining Titles Registration Amendment Act, 2003, and the Mineral and Petroleum Resources Development Act, 2002. The amendment Act substituted the Schedule to the Mining Titles Registration Amendment Act 24 of 2003. It also amended Schedule 1 to the Mineral and Petroleum Resources Development

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resolution. Once a person has been granted a mining right, he can only begin mining operations if mining is permitted as a land use in terms of LUPO.

Act 28 of 2002 by deleting the expression 'Act 47 of 1937' in the first column and deleting the related information opposite that expression in the second and third columns of the Schedule.

2.76 Since the principal Acts are still in force, the amendment Act should be retained for the sake of legal certainty. The amendment Act is therefore not obsolete or redundant. The SALRC therefore recommends that the Minerals and Energy Laws Amendment Act 11 of 2005 should be retained.

#### **(o) Abolition of Lebowa Mineral Trust Act 67 of 2000**

2.77 The Abolition of Lebowa Mineral Trust Act provided for the transfer of assets, liabilities, rights, obligations and staff of the Lebowa Mineral Trust to the State and for matters incidental thereto. The Act was passed to abolish the Lebowa Mineral Trust by repealing the Lebowa Mineral Trust Act 9 of 1987, the statute which established the Trust. In addition, the Act was intended to empower the Minister of Minerals and Energy to implement such transitional measures as was necessary in order to wind up the affairs of the Trust and the handling and transfer of staff in the employ of the Trust. Section 3 and 4 of the Act empowered the Minister to make such arrangements as may be necessary regarding matters relating to the employees, assets, liabilities, rights, obligations and finances of the Trust as well as entries and endorsements in terms of the Deeds Registries Act 47 of 1937. Section 5 empowered the Minister to make regulations regarding the nature of proof required by persons who claim rights to minerals which were to be vested in the State subsequent to the abolishment of the Trust and also for making regulations regarding any matter which was necessary in order to achieve the objects of the Act. Section 6 dealt with the power of the Minister to delegate powers and duties. The Minister could in writing authorise any officer or employee of the Department of Minerals and Energy to exercise or perform any power or duty conferred or imposed on the Minister by or under the Act.

2.78 The memorandum on the objects of the Abolition of the Lebowa Mineral Trust Bill of 2000 explained that the Lebowa Mineral Trust was established in 1991 by the promulgation of the Lebowa Mineral Trust Act 9 of 1987. The Lebowa Mineral Trust was a statutory body established with a view to hold, as a private rights holder, all the mineral rights that, under the previous constitutional dispensation, were transferred to the Government of the former self-governing territory of Lebowa. Mineral issues in Lebowa were administered by and through the Trust, unlike the rest of the country where State owned mineral rights were administered by Government directly. Although the assignment of the Lebowa Mineral Trust Act to the Minister of Minerals and Energy, re-established legal certainty and also the constitutionality of that body, the continued existence of the Lebowa Mineral Trust created a gross anomaly in respect of South Africa's mineral rights governance and administration. Against the background of the White Paper on Minerals and Mining Policy and the new constitutional dispensation, it was clear that the Lebowa Mineral Trust's continued existence was incompatible with the existing circumstances, due to, *inter alia*, the following reasons: Its statutory mandate was geographically limited to a former territory which was no longer recognised by the Constitution. It was incompatible with the intention of the Constitution that all minerals related matters were to be dealt with on a national basis. It was not supportive of a coherent, nation-wide approach to ensure that the country's mineral wealth was developed to the benefit of the entire population. From an investor perspective,



it contributed to inconsistency in the State's approach and the governance of the minerals industry. It opposed the objective to have all mineral rights vested in the State.

2.79 On 22 June 2004 in her Budget Vote speech the then Minister of Minerals and Energy, Phumzile Mlambo-Ngcuka stated as follows regarding the Lebowa Minerals Trust (LMT): 'When we presented to this house the Legislation abolishing Lebowa Mineral Trust, we committed that the communities of Limpopo would benefit, we have now completely abolished LMT. I am glad to announce that we will be repatriating significant resources that previously belonged to LMT, to the Limpopo Province to support small-scale mining, skills development, and job creation. We will also announce the exact financial contribution to this process, once we have finished discussions with National Treasury.'

2.80 As concerns the transitional arrangements provided for in sections 3 to 6, the SALRC stated in its Discussion Paper 124 that the SALRC presumed that the Minister has taken all such steps, as were necessary and that, subject to confirmation by the Department, sections 3 to 6 of the Act are therefore obsolete or expired. If the transitional arrangements contemplated in sections 3 to 6 of the Act have run their course, then those provisions are now obsolete or expired and could be repealed. Section 3(1)(c) deals with persons who claim rights to minerals which were to be vested in the State subsequent to the abolishment of the Trust. This provision is the only remaining potentially operative provision of the Act, as the other provisions of the Act were included to – abolish the Lebowa Mineral Trust (section 2); to repeal the statute that established the Council (section 7); and to provide the short title of the Act (section 8). The Act commenced before the promulgation of the Mineral and Petroleum Resources Development Act. The SALRC proposed in Discussion Paper 124 that should, however, the Act still be operable and applicable, the relevant sections should be amended to reflect the status quo regarding rights to minerals. The definition section also refers to the 'Minister' means the Minister of Minerals and Energy. In terms of Proclamation 44 in Government Gazette 32367 of 1 July 2009 the definition should be 'Minister' means the Minister of Mineral Resources.

2.81 In its Discussion Paper the SALRC proposed that the Abolition of Lebowa Mineral Trust Act 67 of 2000 should be repealed if the Act has fulfilled the purpose for which it was enacted. The DMR commented that it concurs with the SALRC's recommendation to repeal this Act, as it has fulfilled the purpose for which it was enacted.

## **2. Theme 2 – Geoscience, Diamonds and Precious Metals**

### **(a) Diamonds Act 56 of 1986**

2.82 This Act provided for the establishment of the South African Diamond and Precious Metals Regulator and for the establishment of the State Diamond Trader, for control over the possession, the purchase and sale, the processing, the local beneficiation, and the export of diamonds. It was amended a number of times. The last amendment was effected by the Diamond Export Levy (Administration) Act, No. 14 of 2007. The statutes adopted after the 1994 constitutional transformation made a series of sweeping changes to the Act in definitional and other substantive areas. The most prominent among these was the Diamonds Amendment Act 29 of 2005.



2.83 Although the following terms in section 1 of the Act are not any longer defined in the Act, namely 'board', 'cutter', 'diamond exchange', 'executive officer', licence and 'tool-maker' the SALRC recommends that these expression be retained for purposes of legal certainty. The Act defines 'Minister' to mean the Minister of Minerals and Energy. In terms of Proclamation 44 in Government Gazette 32367 of 1 July 2009 the definition is outdated and should be amended to read: 'Minister' means the Minister of Mineral Resources. The DMR concurs with the amendments recommended by the SALRC.

**(b) Diamonds Amendment Act 28 of 1988**

2.84 This amendment Act substituted the definition of 'Minister'. It also altered the constitution of the South African Diamond Board. Due to further and extensive amendments by the Diamonds Amendment Act 29 of 2005 and the Diamond Export Levy (Administration) Act 14 of 2007, the question arises whether this amendment Act has not become redundant and ought to be repealed. The SALRC requested the view of the Department of Mineral Resources in particular on the retention of this Act on the statute book. The DMR supports the repeal of this Act.

**(c) Diamonds Amendment Act 22 of 1989**

2.85 This Act amended the Diamonds Act of 1986. It made provision that the executive officer of the South African Diamond Board would be a person in the service of the Board instead of an officer in the service of the Department of Mineral and Energy Affairs. It provided that the Minister of the said Department would appoint an alternate member for the chairman of the said Board. It made further provision that the Minister may determine the conditions of service and service benefits of persons appointed by the Board and to determine that the chairman of the said Board may designate a person in the service of the said Board to act as executive officer in certain circumstances. It also made provision for matters connected therewith. Due to further and extensive amendments by the Diamonds Amendment Act 29 of 2005 and the Diamond Export Levy (Administration) Act 14 of 2007, the question arises whether this amendment Act has not become redundant and ought to be repealed. The SALRC requested the view of the Department of Mineral Resources in particular on the retention or repeal of this Act. Since the DMR supports the repeal of the Act, the SALRC recommends the repeal of this Act.

**(d) The Diamonds Amendment Act 10 of 1991**

2.86 The Diamonds Amendment Act 10 of 1991 amended the Diamonds Act of 1986. It amended the definition of 'Minister'. It effected certain adjustments consequent upon the repeal of the Precious Stones Act, 1964, by the Minerals Act, 1991. It conferred wider powers on the Minister in respect of the compilation of the South African Diamond Board. It made other provision about the remuneration of members of the Board and of executive and other committees. It further regulated the conditions of service of employees of the Board. It deleted the provision in terms of which Parliament appropriates money to enable the Board to perform its functions. It provided for the searching of persons, vehicles, vessels, aircraft or other articles. It made other provision in connection with the penalties that may be

imposed for certain offences, and increased the amounts of fines. It provided that a levy may be imposed on certain persons only if the majority of certain members of the Board supports the levy; and to provide for matters incidental thereto.

2.87 Due to further and extensive amendments by the Diamonds Amendment Act 29 of 2005 and the Diamond Export Levy (Administration) Act 14 of 2007, the question arises whether this amendment Act has not become redundant and ought to be repealed. The SALRC requested the view of the Department of Mineral Resources on the repeal of this Act. Since the DMR supports the repeal of the Act, the SALRC recommends the repeal of this Act.

**(e) Diamonds Amendment Act 29 of 2005**

2.88 We noted in the foregoing discussion that this amendment Act effected extensive changes to the Diamonds Act 56 of 1986. It defined certain words and expressions, and amended and deleted certain definitions. It established the South African Diamond and Precious Metals Regulator and provided for its objectives and functions. It provided for the constitution of its Board and the management of the Regulator by the Board. It provided for the chief executive officer and other staff of the Regulator. It provided for the finances of the Regulator. It established the State Diamond Trader and provided for its objectives and functions. It provided for the constitution of its Board and the management of the Trader by its Board. It provided for the chief executive officer and other staff of the Trader, and provided for the finances of the Trader. It required diamond producers to offer a percentage of all diamonds produced in a production cycle to the State Diamond Trader. It did away with the requirement that licensees have to display their names and other particulars at their business premises. It required a licensee to retain a note of receipt of purchase in respect of unpolished diamonds for five years and not only two years.

2.89 The Diamonds Amendment Act 29 of 2005 provided that only synthetic diamonds are exempted from export duty. It repealed the provision providing for the deferment of payment of export duty. It made it obligatory that the registering officer examine unpolished diamonds registered for export and verify particulars furnished in respect thereof. It adjusted the amount of the fine payable if the value of an unpolished diamond as assessed on behalf of the Regulator exceeds the value of the diamond as specified by the exporter. It provided anew for the release of unpolished diamonds for export. It required an exporter to, within three months from the date on which an unpolished diamond has been released for export, submit proof that the proceeds of the transaction have been repatriated to the Republic. It made it obligatory that the registering officer examine polished diamonds registered for export and verify particulars furnished in respect thereof. It made it an offence to sell synthetic or enhanced diamonds without disclosing that they are synthetic or enhanced diamonds. The amendment Act replaced certain obsolete provisions and deleted others. It empowered the Minister to make regulations regarding guidelines for, and the implementation of, broad-based socio-economic empowerment. The Act also to provide for matters connected therewith.

2.90 It is clear from the foregoing that extensive amendments were effected by this amendment Act. These amendments are not redundant or obsolete. The SALRC recommends that for purposes of legal certainty that this amendment Act be retained.

**(f) Diamonds Second Amendment Act 30 of 2005**

2.91 This Act amended the Diamonds Act 56 of 1986. It defined certain expressions. It prohibited assistance to licensees by non-licensed persons at any place where unpolished diamonds are offered for sale. It provided anew for the kinds of licences that may be issued by the South African Diamond and Precious Metals Regulator. It provided for the issue of temporary diamond buyers' permits and certificates which entitle holders thereof to be in possession of unpolished diamonds under certain circumstances. It made fresh provision for the premises on which unpolished diamonds may be dealt in. It required that unpolished diamonds intended for export purposes must first be offered at a diamond exchange and export centre; to extend the powers of the Regulator and of the State Diamond Trader. It required diamond producers to offer a percentage of all diamonds produced in a production cycle to the State Diamond Trader. It required a licensee to retain a register in respect of unpolished diamonds for five years and not only two years. It also repealed certain obsolete provisions, and provided for matters connected with the Act.

2.92 The provisions of this Act are not obsolete or redundant. The SALRC therefore recommends that the Diamonds Second Amendment Act 30 of 2005 be retained on the statute book for purposes of legal certainty.

**(g) Precious Metals Act 37 of 2005**

2.93 This Act provides for the acquisition, possession, smelting, refining, beneficiation, use and disposal of precious metals. The Act defines 'Minister' in section 1 to mean the Minister of Minerals and Energy. In terms of Proclamation 44 in Government Gazette 32367 of 1 July 2009, this definition is now outdated and the definition should be amended to provide that 'Minister' means the Minister of Mineral Resources. The SALRC recommends that this definition be substituted for the following definition: 'Minister' means the Minister of Mineral Resources. Apart from the definition of Minister, no other obsolete or redundant provisions or provisions that infringe the constitutional equality provisions have been identified in this Act. The SALRC therefore recommends that the Precious Metals Act 37 of 2005 be retained on the statute book. The DMR concurs with the amendment of this Act as proposed by the SALRC.

**(h) Mineral Technology Amendment Act 24 of 1988**

2.94 The Mineral Technology Amendment Act amended the Mineral Technology Act 84 of 1981. It made other provision for the remuneration of the officers and employees of the council. It reduced from seven to six the minimum number of members who serve on the council, it provided that the president of the council shall be the accounting officer thereof, and provided for matters connected therewith. The Mineral Technology Act 30 of 1989 repealed the Mineral Technology Act of 1981. The

1989 Act provided for the Council for Mineral Technology and for the management thereof by a Board. The Act provides, amongst other things, that the Council for Mineral Technology established by section 2 of the Mineral Technology Act, 1981 (Act 84 of 1981), shall, notwithstanding the repeal of that Act by the 1989 Act, continue to exist as a juristic person known as Mintek.

2.95 The question consequently arises whether the Mineral Technology Amendment Act has become obsolete. In its Consultation Paper the SALRC requested the Department of Mineral Resources in particular to confirm whether there are reasons for the retention of this amendment Act and whether it is foreseen that legal certainty might be jeopardised if this Act were to be repealed. Commenting on the Consultation Paper the DMR recommended that this Act should be retained for legal certainty. Advocate Mamokete Ramoshaba of Mintek commented they do not concur with the retention of the Mineral Technology Amendment Act 24 of 1998, which in their view, has become obsolete. They state that its reason for existence was to amend the old Mineral Technology Act of 1981, which has now been repealed in its totality by the Mineral Technology Act of 1989, therefore this amending Act no longer has any legislative effect and it ought to have been listed as repealed on the statute book. The SALRC notes the comments provided by Mintek but remains of the view that this Act ought to be remained on the statute book for purposes of increased legal certainty.

#### **(i) Mineral Technology Act 30 of 1989**

2.96 The objectives of the Minerals Technology Act 30 of 1989 includes developing competitive and innovative processing technology and equipment; strengthening South Africa's international position as a supplier of mineral technologies, capital goods and services; and, developing regional strategies for the mineral processing sector, concentrating on value-addition, capacity-building and broad-based development. The Mineral Technology Act 30 of 1989 established the Council for Mineral Technology as the regulatory body under this regime. The Council subsists to date.

2.97 Section 18 of the Minerals Technology Act refers to the State President. Section 18 provides that the State President may by proclamation in the Gazette assign the administration of this Act to any Minister, and may determine that any power or duty conferred or imposed by this Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers. The Constitution provides now for the President as the head of the State. Apart from the proposal that the term State President should be substituted for the term President, no obsolete or redundant provisions or provisions that infringe the constitutional equality provisions have been identified in this Act. The SALRC recommended in its Discussion Paper 124 that the Mineral Technology Act 30 of 1989 be retained on the statute book. The DMR concurred with the amendment of this Act as proposed by the SALRC. In July 2011 Advocate Mamokete Ramoshaba of Mintek commented that they concur with the proposed amendment to the Mineral Technology Act 1989, that of substituting the term 'State President' with 'President' in accordance with our Constitution and they are happy with the decision to retain the Act on the statute book.

## (j) **Geoscience Act 100 of 1993**

2.98 The Geoscience Act provides for the promotion of research and the extension of knowledge in the field of geoscience. It made provision for the establishment of a Council for Geoscience and for the management thereof by a Management Board and provided for matters connected with the Act. The Act commenced on 1 November 1993.

2.99 A number of outdated references were identified in the initial review of this Act. Commenting on the Consultation Paper the DMR remarks that it concurs by and large with the amendments to this Act as proposed by the SALRC, and that provision has been made for these amendments in the Geoscience Amendment Bill 12 of 2010. This Act has now been passed by Parliament, the President assented to and on 3 December 2010 it was published for general information as the Geoscience Amendment Act 16 of 2010.<sup>37</sup> The commencement of the amendments still needs to be proclaimed.

2.100 Section 1 of the Act was amended in 2010 to refer to the definition of mineral as defined in the Mineral and Petroleum Resources Development Act 28 of 2002 and replaced the previous definition of 'mineral' which referred to the Minerals Act 50 of 1991. Section 1 also referred to the Minister as the 'Minister of Mineral and Energy Affairs'. The amended definition now refers to the Minister of Mineral Resources. Section 1 defined 'prospecting' with reference to the Minerals Act 50 of 1991. This definition has also now been amended to define the expression 'prospecting' with reference to the Mineral and Petroleum Resources Development Act 28 of 2002.

2.101 Section 4 of the Geoscience Act deals with the Management Board of the Council for Geoscience. Section 4(2) was also amended in 2010 by updating the references to the changed government departments. The reference in section 6 to the Department of Mineral and Energy Affairs was amended to refer to the Department of Mineral Resources. Section 26 deals with the transfer of certain assets and obligations to Council. Section 26(1)(b) provides that the movable and immovable property belonging to the State, and which immediately prior to the commencement of the Act was being utilised by the Geological Survey Branch of the Department of Mineral and Energy Affairs, shall be deemed to have devolved upon the Council. The SALRC agrees with the DMR's comment on the SALRC's Consultation Paper that section 26 deals with a factual position at a given point of time and that section 26 should therefore not be updated.

2.102 Sections 5, 9, 11 16, 18, 19, 20, 24 and 26 of the Act referred to the Minister of State Expenditure, a portfolio that no longer exists. These references were amended by the Geoscience Amendment Act in 2010 to refer to the Minister of Finance. Section 12 was also updated to refer to the Electoral Act 73 of 1998 and to the Constitution of the Republic of South Africa, 1996.<sup>38</sup> It is

37 The main objects of the Amendment Act are to mandate the Council for Geoscience ('the Council') to be the custodians of geotechnical information, to be a mandatory national advisory authority in respect of geo-hazards related to infrastructure development, to undertake exploration and prospecting research in the mineral and petroleum sectors and to add to the functions of the Council. The Bill seeks to put mechanisms in place to address problems which are associated with infrastructure development on dolomitic land in the Republic. It empowers the Council to be the custodian of all geotechnical data, for the purpose of compiling a complete geotechnical risk profile of the country. It further enables the Council to become the custodians of technical information relating to exploration and mining. It also updates obsolete expressions such as 'Minister of State Expenditure'.

38 Section 2(2) of the Citation of Constitutional Laws Act 5 of 2005 provides that any reference to the 'Constitution

consequently only a matter of the Geoscience Amendment Act of 2010 to be put into operation and for these updated references then to commence. The SALRC did not identify any other obsolete provisions or provisions infringing the equality provisions of the Constitution in the Geoscience Act.

**(k) Geoscience Amendment Act 11 of 2003**

2.103 The Geoscience Amendment Act amended the Geoscience Act, 1993, to make further provision for the transfer of certain designated movable and immovable property from the Department of Minerals and Energy to the Council for Geoscience. It made further provision regarding the rights and obligations of the State in respect of the former Geological Survey Branch of the said Department, and provided for matters connected with the amendment Act. The SALRC recommends that the amendment Act be retained for purposes of legal certainty.

**(l) Geoscience Amendment Act 16 of 2010**

2.104 The 2010 Geoscience Amendment Act amended the Geoscience Act, 1993, to mandate the Council for Geoscience to be the custodians of geotechnical information, to be a national advisory authority in respect of geohazards related to infrastructure and development, and to undertake reconnaissance operations, prospecting research and other related activities in the mineral sector; and provided for matters connected therewith. The President assented to the Act on 1 December 2010. The date of commencement of the amendment Act is yet to be proclaimed. The amendment Act is not redundant and should be retained on the statute book.

### **3. Theme 3 – Ancillary Legislation**

2.105 This review established that there are statutes administered by other government departments that overlap within the theme of 'Minerals' and that require amendment or updating. Reference is only made to the identified provisions of the various statutes that ought to be amended.

**(a) Sea-shore Act 21 of 1935**

2.106 The purpose of the statute is to declare the State President to be the owner of the sea-shore and the sea within the territorial waters of the Republic, to provide for the grant of rights in respect of the sea-shore and the sea, and for the alienation of portions of the sea-shore and the sea, and for matters incidental thereto. Section 3(2)<sup>39</sup> of the Sea-shore Act refers to the Precious Stones Act 73 of 1964, the Mining Rights Act 20 of 1967 and the Sea Fisheries Act 58 of 1973. All three of these Acts

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of the Republic of South Africa, 1996 (Act 108 of 1996)', contained in any law in force immediately prior to the commencement of the Act, must be construed as a reference to the 'Constitution of the Republic of South Africa, 1996'.

39 (2) The Minister may permit, on such conditions as he may deem expedient and at such a consideration as he may determine, the removal of any material, except precious stones as defined in section 1 of the Precious Stones Act, 1964 (Act No. 73 of 1964), natural oil, precious metals or any base mineral as defined in section 1 of the Mining Rights Act, 1967 (Act No. 20 of 1967), or any aquatic plant, shell or salt as defined in section 1 of the Sea Fisheries Act, 1973 (Act No. 58 of 1973), from the sea-shore and the sea of which the State President is by section 2 declared to be the owner.



have been repealed. The National Environmental Management: Integrated Coastal Management Act 24 of 2008 however repealed the whole of the Sea-shore Act 21 of 1935 to the extent that the Act has not been assigned to provinces. (Government Gazette 31884 of 11 February 2009). On 27 November 2009 the President determined in terms of section 101 of the Integrated Coastal Management Act, 2008 (Act No. 24 of 2008), 1 December 2009 as the date on which the Act, with the exclusion of sections 11, 65, 66, 95, 96 and 98, came into operation. Section 98 of the National Environmental Management: Integrated Coastal Management Act deals with repeal of legislation. (Government Gazette 32765 Proclamation Notice 84 dated 1 December 2009.)

2.107 Since the Sea-Shore Act was assigned to the provinces it needs to be applied by them and it remains operative notwithstanding the commencement of the National Environmental Management: Integrated Coastal Management Act. The SALRC noted in its Consultation Paper that the question therefore arises whether there is not still a need to update the outdated cross references in the Sea-Shore Act to the statutes that replaced the repealed Precious Stones Act, the Mining Rights Act and the Sea Fisheries Act. The SALRC also posed the question whether the updating of the outdated cross references would not contribute towards effecting increased legal certainty. The SALRC informed the Department of Environmental Affairs that it would appreciate the views of the Department in this regard.

2.108 In July 2010 the Department of Environmental Affairs (DEA) submitted its comments on the Consultation Paper to the SALRC. The DEA notes that the Precious Stones Act, the Mining Rights Act and the Sea Fisheries Act were repealed. The DEA remarks that the question is therefore whether they now correct these cross-references or do they wait until section 98 of the National Environmental Management: Integrated Coastal Management Act (ICM Act) is brought into operation, and the effect of the ICM Act would be the repeal of the Sea-shore Act. The DEA explains that all the provisions of the Sea-shore Act have been assigned to the four coastal provinces, excluding those that regulate the seashore and the sea within ports and harbours (Proclamation R27/16346/6 dated 7 April 1995). The DEA explains further that in terms of section 239 of the Constitution, laws administered by the Provinces when the Constitution came into force have been reclassified as provincial laws, and different regulations have been passed by provincial legislatures and local authorities that relate to specific areas of the seashore under their control.

2.109 The DEA therefore commented that they are of the view that it is only the provincial legislature that may amend or repeal those sections that have been assigned to the coastal provinces. In July 2010 the DEA suggested that the commencement of section 98 of the ICM Act be awaited which in fact would be repealing the whole of the Sea-shore Act to the extent that the Act has not been assigned to the provinces. On 14 November 2011 the DEA advised that they are in the process of amending the National Environmental Management: Integrated Coastal Management Act (ICM Act) and their intention is that section 98 commence simultaneously with the Amendment Bill. The DEA explains that this is necessary for the proper implementation of the Act, that the draft Bill is scheduled for publication by 25 November 2011 for public comments and they anticipate promulgation of the Amendment Act towards the end of 2012.

**(b) Transfer Duty Act 40 of 1949**

2.110 The purpose of this statute was to consolidate and amend the laws relating to transfer duty. The Transfer Duty Act 40 of 1949 defines the expression 'property' in section 1 as follows:

- (a) any real right in land but excluding any right under a mortgage bond or a lease of property other than a lease referred to in paragraph (b) or (c)
- (b) a lease or sub-lease of any lot or stand which is registrable in the office of the Rand Townships Registrar in terms of the Registration of Mining Rights Proclamation, 1902 (Proclamation No. 35 of 1902, Transvaal) as read with section one of the Mining Titles Registration Act, 1908 (Act No. 29 of 1908, Transvaal);
- (c) any right to minerals (including any right to mine for minerals) and a lease or sub-lease of such a right; *(this is only an extract of the definition)*

2.112 The SALRC noted in its Discussion Paper 124 that the question arises because the office of the Rand Township Registrar was incorporated into the Deeds Registry, whether part (b) of the definition of property has not become obsolete. If that is the case, the SALRC recommended that paragraph (b) of the definition of "property" be repealed.

2.113 The definition of 'deeds registry' still refers to the 'Registrar of Mining Titles'. We noted above that the Mining Titles Registration Amendment Act No 24 of 2003 replaced section 2 of the Mining Titles Registration Act. Section 2 established the Mineral and Petroleum Titles Registration Office that became the office for the registration of all mineral and petroleum titles and all other related rights, deeds and documents for the registration of which provision is made in that Act or any other law. We also pointed out that section 2(3) provides that any reference in the Act or any law to the Mining Titles Office must be regarded as a reference to the Mineral and Petroleum Titles Registration Office. Notwithstanding the wording of section 2(3) the SALRC was of the view that legal certainty would be increased if the expression 'Registrar of Mining Titles' in section 1 of the Transfer Duty Act were replaced by the expression 'Mineral and Petroleum Titles Registration Office'. The SALRC requested comments from the Departments of Mineral Resources, and Rural Development and Land Reform on the SALRC's proposals set out in the two previous paragraphs.

2.114 Mr George Tsotetsi commented that the Office of the Chief Registrar of Deeds supports the proposed amendment of the definitions of 'property' and 'deeds registry' contained in the Transfer Duty Act (TDA). He stated that the said amendment will not affect the operations of the deeds registry nor the duty placed on the registrar of deeds by section 12 of the TDA. Mr Allan Stanley West, Chief Deeds Training, advised that he concurs with the sentiments expressed by Mr Tsotetsi.

2.115 The deletion of paragraph (b) of the definition of property also means that consequential amendments need to be effected as regards other definitions in the Transfer Duty Act. The SALRC therefore recommends that the reference to paragraph (b) be deleted in paragraphs (a) and (b) of the definition of "fair value", in paragraph (a) of the definition of 'property', in paragraph (a) of the definition of 'transaction' and in section 5(5). Mr Allan Stanley West concurred with the amendments proposed in this paragraph.

2.116 Schedule 3 B to the Mine Health and Safety Act 29 of 1996 amended the reference to the expression 'Government Mining Engineer' in a number of statutes. It substituted the expression 'Government Mining Engineer', wherever it occurs, with the expression 'Chief Inspector of Mines as contemplated in the Mine Health and Safety Act, 1996,' in the Advertising on Roads and Ribbon Development Act, 1940 (Act 21 of 1940); the Rand Water Board Statutes (Private) Act, 1950 (Act 17 of 1950); the Mines and Works Act, 1956 (Act 27 of 1956); the Atmospheric Pollution Act, 1965 (Act 45 of 1965); the National Roads Act, 1971 (Act 54 of 1971); the Occupational Diseases in Mines and Works Act, 1973 (Act 78 of 1973) and the National Building Regulations and Building Standards Act, 1977 (Act 103 of 1977). Section 5 of the Transfer Duty Act 40 of 1949 deals with determining fair value of property on which duty is payable and also refers to the 'Government Mining Engineer':

(6) If the Commissioner is of opinion that the consideration payable or the declared value is less than the fair value of the property in question he may determine the fair value of that property, and thereupon the duty payable in respect of the acquisition of that property shall be calculated in accordance with the fair value as so determined or the consideration payable or the declared value, whichever is the greatest: Provided that the provisions of this subsection shall not be construed as preventing the Commissioner, after a determination of the fair value of the property in question has been made, from revising such determination or from making a further determination of the fair value of that property under this subsection, provided such revision or further determination is made not later than two years from the date on which duty was originally paid in respect of the said acquisition.

(7) In determining the fair value in terms of subsection (6), the Commissioner shall have regard, according to the circumstances of the case, inter alia to-

- (a) the nature of the real right in land and the period for which it has been acquired or, where it has been acquired for an indefinite period or for the natural life of any person, the period for which it is likely to be enjoyed;
- (b) the municipal valuation of the property concerned;
- (c) any sworn valuation of the property concerned furnished by or on behalf of the person liable to pay the duty;
- (d) any valuation made by the Government Mining Engineer or by any other competent and disinterested person appointed by the Commissioner.

(8) If the fair value of property as determined by the Commissioner-

- (a) exceeds the amount of the consideration payable in respect of that property, or the declared value, as the case may be, by not less than one-third of the consideration payable or the declared value, as the case may be, the costs of any valuation made by a person referred to in paragraph (d) of subsection (7) (other than the Government Mining Engineer) shall be paid by the person liable for the payment of the duty;
- (b) does not exceed the said consideration or declared value as the case may be, to the extent set out in paragraph (a), the costs of the valuation shall be borne by the State.

(9) The provisions of subsections (6) and (7) shall not apply in respect of the acquisition of property sold by public auction, unless the Commissioner is satisfied that the sale was not a bona fide sale by public auction, or that there was collusion between the seller and the purchaser or their agents.

2.117 In addition to other amendments, the Environmental Laws Rationalisation Act, 1997, substituted, in section 6(2)(a) of the Atmospheric Pollution Prevention Act, 1965 the expression 'Government Mining Engineer' with the expression 'Director-General: Minerals and Energy'. The Minerals Act 50 of 1991, prior to repeal by the Mineral and Petroleum Resources Development Act 28 of 2002, provided in section 50 that any reference in (a) any nomination agreement; (b) any prospecting lease, prospecting permit or prospecting permission granted or issued in terms of a section mentioned in section 44 (1) (a); (c) the document or documents concerned referred to in section 47 (1) (a) or 48 (1) (a); or (d) any other law, to Government Mining Engineer or Registrar of Mining Titles, shall be construed as a reference to the Director-General: Mineral and Energy Affairs. The SALRC requested the DMR to comment on this issue.

2.118 On 2 December 2010 the Department of Mineral Resources indicated its support for the proposed substitution in section 5 of the Transfer Duty Act of the phrase Government Mining Engineer with the phrase Director-General: Mineral Resources:

The Department is in favour of replacing the reference to "Government Mining Engineer" as it appears the Transfer Duty Act with the appropriate term. As you have ably demonstrated the said terminology is outdated. The question is with what it should be replaced having regard to the legislation referred to by you.

It is our considered opinion that the term should not be replaced with "Chief Inspector of Mines". The reason for this is that years ago, the Chief Inspector of Mines was heading the Mine Economics Branch. This is no longer a function of the Chief inspector of Mines. The core function of the Chief Inspector relates to issues of Mine Health and Safety. The valuations that may require the involvement of the Department Mineral Resources will therefore be outside the normal line functions of Mine Health and Safety.

It is suggested that the reference to Government Mining Engineer should be deleted and replaced with reference to the Director-General: Mineral Resources.

2.119 On 25 October 2011 Treasury published a Draft Taxation Laws Amendment Bill (B19 of 2011)<sup>40</sup> which, amongst others, addresses and mirrors the proposals of the SALRC made in its Discussion Paper 124. The SALRC therefore does not include in the Mineral Resources Laws Repeal and Related Matters Bill in Annexure A the amending proposals it made in Discussion Paper 124.

### **(c) Subdivision of Agricultural Land Act 70 of 1970**

2.120 The purpose of this statute is to control the subdivision and the use of agricultural land. Section 3 of the Subdivision of Agricultural Land Act refers to the Mines and Works Act 27 of 1956. Although section 1 of the Subdivision of Agricultural Land Act Repeal Act 64 of 1998 repealed the whole of this Act, and the President has assented to the Act already on 16 September 1998, the 1998 Act has not yet commenced. Section 3(e)(i) provides that no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956 (Act No. 27 of 1956). Section 3(e)(ii) provides that no right to such portion shall be sold or granted for a period of more than 10 years or for the natural life of any person or to the same person for periods aggregating more than 10 years, or advertised for sale or with a view to any such granting, except for the purposes of a mine as defined in section 1 of the Mines and Works Act, 1956. The whole Mines and Works Act, except for certain definitions contained in section 1 (Minister) and section 9 (Sunday) was repealed by the Minerals Act 50 of 1991.

2.121 In its Discussion Paper 124 the SALRC requested comments from the Department of Agriculture, Forestry and Fisheries on its proposal that section 3 of the Subdivision of Agricultural Land Act be amended to refer to the definition of 'mine' as defined in section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002. On 30 June 2011 Mr Barry Beukes of the Department of Agriculture, Forestry and Fisheries confirmed that they support the amendment of section 3. The SALRC therefore recommends that section 3 of the Subdivision of Agricultural Land Act be amended to refer to the definition of 'mine' as defined in section 1 of the Mineral and Petroleum Resources Development Act 28 of 2002.

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40 See <http://treasury.gov.za/legislation/bills/2011/Default.aspx>

**(d) Occupational Diseases in Mines and Works Act 78 of 1973**

2.123 This Act aims to consolidate and amend the law relating to the payment of compensation in respect of certain diseases contracted by persons employed in mines and works. The SALRC initially considered that since certain terms are no longer defined in section 1 of the Act these terms are obsolete and should be deleted. These terms are the following: 'adopted child', 'Black affairs authority', 'Black person', 'child', 'Coloured person', 'Coloured female', 'dependent', 'dependent child', 'medical adviser', 'Republic', 'secretary', 'White person'. Upon reflection the SALRC is of the view that the retention of these terms is advisable for purposes of legal certainty to inform users of the Act that these terms were originally defined in the Act.

**(e) Maritime Zones Act 15 of 1994**

2.124 The purpose of this statute is to provide for the maritime zones of the Republic. Section 8 of the Maritime Zones Act provides as follows:

**Continental shelf.**—(1) The continental shelf as defined in Article 76 of the United Nations Convention on the Law of the Sea, 1982, adopted at Montego Bay on 10 December 1982, shall be the continental shelf of the Republic.

(2) Subject to any other law the outer limits of the continental shelf shall consist of a series of straight lines joining the co-ordinates mentioned in Schedule 3.

(3) For the purposes of—

- (a) exploration and exploitation of natural resources, as defined in paragraph 4 of Article 77 of the United Nations Convention on the Law of the Sea, 1982; and
- (b) any law relating to mining of precious stones, metals or minerals, including natural oil, the continental shelf shall be deemed to be unalienated State land.

2.125 The two expressions 'precious stones' and 'natural oil' no longer feature in mineral law legislation and they thus have become obsolete. The expressions 'mineral' and 'petroleum' are used. The SALRC proposed in the Consultation Paper that the Act should be amended by deleting the references to 'precious stones' and 'natural oil'. The SALRC requested the Departments of Transport and Mineral Resources to comment on this proposal. The Departments of Transport and of Mineral Resources advise that they support the proposed amendment.

**(f) Development Facilitation Act 67 of 1995**

2.126 The purpose of the statute is essentially to introduce extraordinary measures to facilitate and speed up the implementation of reconstruction and development programmes and projects in relation to land. Section 33(2) provides that In approving a land development application a tribunal may, either of its own accord or in response to that application, impose any condition of establishment relating to –

- (a) the provision of engineering services;
- (b) the provision or transfer of land to any competent authority for use as a public open space, or the payment of a sum of money in lieu thereof;
- (c) the provision of streets, parks and other open spaces;
- (d) the suspension of restrictive conditions or servitudes affecting the land on which a land development area is to be established.



2.127 Section 34 deals with the suspension and removal of servitudes and restrictive conditions. Section 34(7) provides that this section or section 33 (2)(d) does not authorise the suspension or removal of any registered right to minerals, and nothing contained in the Act detracts from the remedies of the holder of rights to minerals under the common law.

2.128 In its Discussion Paper 124 the SALRC proposed that section 34(7) be amended to substitute the expression 'rights to minerals under the common law' with 'rights to minerals under the common law and/or the Mineral and Petroleum Resources Development Act 28 of 2002, whichever is applicable'. The SALRC requested the Departments of Rural Development and Land Reform and Mineral Resources to comment on this proposal.

2.129 Commenting on the SALRC's Consultation Paper, Dr Rinaldi Bester of the Department of the Department of Rural Development and Land Reform notes that he referred the SALRC's proposed amendments to their relevant line-functionaries and they have not raised any objections against the proposed amendments. He also pointed out that he wished to inform the SALRC that the Development Facilitation Act (DFA) is to be repealed once the Land Use Management Bill (LUMB) is enacted. He explains that although LUMB was introduced to Parliament in 2008, it was not adopted before the term of the previous Parliament came to an end. He states that it will hopefully be re-introduced in the near future. The SALRC has taken note of the draft Spatial Planning and Land Use Management Bill, 2011 as published in Government Gazette No. 34270 (Government Notice No. 280 of 2011) dated 6 May 2011 which proposes the repeal of the Development Facilitation Act. In view of the proposed repeal of the latter Act, the SALRC has not included a clause in the Draft Bill providing for the amendment of provisions in the Development Facilitation Act.

#### **(g) Land Reform (Labour Tenants) Act 3 of 1996**

2.130 The purpose of this statute is to provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants and to provide for the acquisition of land and rights in land by labour tenants. In its Discussion Paper 124 the SALRC noted that section 2(3) of the Land Reform (Labour Tenants) provides that nothing in the Act shall affect the rights of any person, other than an owner, who is entitled to mine any land in terms of the Minerals Act, 1991. In their database Jutastat indicates provision as follows: '(3) Nothing in this Act shall affect the rights of any person, other than an owner, who is entitled to mine any land in terms of the Minerals Act, 1991 (Act 50 of 1991), or who is the holder of mineral rights'. Jutastat indicates, however, in an editorial note that subsection (3) has been amended by the deletion of the reference to mineral rights by section 110 of the Mineral and Petroleum Resources Development Act 28 of 2002, a provision which came into operation on 1 May 2004. The SALRC considered that the provision should be made clearer in Jutastat's database. The SALRC proposed in its Discussion Paper that the reference in this Act to the Minerals Act 50 of 1991 should be substituted with a reference to the Mineral and Petroleum Resources Development Act 28 of 2002 (the Act that repealed the Minerals Act).



2.131 The SALRC requested the Department of Rural Development and Land Reform to comment on these proposals. Commenting on the SALRC's Consultation Paper Dr Rinaldi Bester of the Department of Rural Development and Land Reform notes that he referred the SALRC's proposed amendments to their relevant line-functionaries and they have not raised any objections against the proposed amendments. The Land Tenure Security Bill of 2011, if passed by Parliament, will result in the repeal of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act. The objective of the proposed Land Tenure Security Bill is to give effect to sections 25(5) and (6) and 26 of the Constitution in order to overcome the challenges experienced in the implementation of both Extension of Security of Tenure Act and the Land Reform (Labour Tenants) Act 3 of 1996. Thus, the SALRC does not include proposed amendments to this Act in the Bill in Annexure A.

#### **(h) Extension of Security of Tenure Act 62 of 1997**

2.132 The purpose of this statute is to provide for measures with State assistance to facilitate long-term security of land tenure; to regulate the conditions of residence on certain land, and the conditions on and circumstances under which the right of persons to reside on land may be terminated; and to regulate the conditions and circumstances under which persons, whose right of residence has been terminated, may be evicted from land. Section 1 of the Act defines consent as meaning express or tacit consent of the owner or person in charge of the land in question, and in relation to a proposed termination of the right of residence or eviction by a holder of mineral rights, including the express or tacit consent of such holder. The expression 'mineral rights' has become obsolete in the South African mineral law regime.

2.133 In its Consultation Paper the SALRC invited comments from the Departments of Rural Development and Land Reform and Mineral Resources on the SALRC's provisional proposal that the definition of consent be amended by the substitution of the expression 'mineral rights' with 'rights to minerals'. The Department of Mineral Resources advised that subject to the concurrence of the Department of Rural Development and Land Reform, the Department has no objections to the amendment proposed by the SALRC. Commenting on the SALRC's Consultation Paper Dr Rinaldi Bester of the Department of Rural Development and Land Reform noted that he referred the SALRC's proposed amendments to their relevant line-functionaries and they have not raised any objections against the proposed amendments. The SALRC therefore proposed in its Discussion Paper 124 that the definition of 'consent' in section 1 should be amended by the substitution of the expression 'mineral rights' with 'rights to minerals'.

2.134 As noted in the discussion of the Land Reform (Labour Tenants) Act above, if the Land Tenure Security Bill of 2011 were to be passed by Parliament, it will result in the repeal of the Extension of Security of Tenure Act 62 of 1997 and the Land Reform (Labour Tenants) Act. Thus, the SALRC does not include proposed amendments to the Extension of Security of Tenure Act in the Bill in Annexure A.

**(i) National Forests Act 84 of 1998**

2.135 The purpose of this statute is to reform the law on forests. Section 24(9) of the National Forests Act provides that nothing in the Act prohibits the grant in terms of any law of a right to prospect for, mine or dispose of any mineral as defined in the Minerals Act, 1991 (Act 50 of 1991), or any source material as defined in the Nuclear Energy Act, 1993 (Act 131 of 1993), in a State forest but the holder of such a right may not do anything which requires a licence in terms of section 23 without such a licence; and the grant of any such right after the commencement of the National Forest and Fire Laws Amendment Act, 2001, must be made subject to the principles set out in section 3(3) of that Act. The whole of the Minerals Act 50 of 1991, except for certain items in the Schedule, was repealed by section 110 of the Mineral and Petroleum Resources Development Act 28 of 2002 that came into operation on 1 May 2004. The SALRC therefore provisionally proposed that the reference in section 24(9) of the National Forests Act to the Minerals Act 50 of 1991 should be substituted with a reference to the Mineral and Petroleum Resources Development Act 28 of 2002. The SALRC requested comments from the Department of Agriculture, Forestry and Fisheries on this proposal. Mr Barry Beukes of the Department of Agriculture, Forestry and Fisheries advises that the Department supports the proposed amendment to section 24(9) of the National Forests Act.

2.136 Section 24(9) of the National Forests Act refers to source material as defined in the Nuclear Energy Act of 1993. The DMR notes in its comments on the Consultation Paper that the Nuclear Energy Act of 1993 was repealed by the Nuclear Energy Act 46 of 1999. Source material is now defined in section 1 of the Nuclear Energy Act 46 of 1999 to mean any material declared under section 2(b) of the Act to be source material. Section 2(b) provides that the Minister may, by notice in the Gazette, declare any substance containing uranium or thorium with concentration and mass limits higher than those specified in the notice, to be source material for the purposes of the Act. The SALRC therefore recommends that the reference in section 24(9) should be updated to refer to source material as defined in the Nuclear Energy Act 46 of 1999.

**(j) National Heritage Resources Act 25 of 1999**

2.137 The purpose of this statute is essentially to introduce an integrated and interactive system for the management of the national heritage resources of South Africa. Section 28(4) of the National Heritage Resources Act provides that with regard to an area of land covered by a mine dump referred to in subsection (1)(c) the South African Heritage Resources Agency (SAHRA) must make regulations providing for the protection of such areas as are seen to be of national importance in consultation with the owner, the Minister of Minerals and Energy and interested and affected parties within the mining community. The SALRC recommends that the reference in this Act to the Minister of Mineral and Energy Affairs should be substituted with a reference to the Minister of Mineral Resources.

2.138 Section 38(8) of the National Heritage Resources Act provides that the provisions of this section do not apply to a development as described in subsection (1) if an evaluation of the impact of such development on heritage resources is required in terms of the Environment Conservation Act, 1989 (Act 73 of 1989), or the integrated environmental management guidelines issued by the

Department of Environment Affairs and Tourism, or the Minerals Act, 1991 (Act 50 of 1991), or any other legislation: Provided that the consenting authority must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent. The SALRC recommends that the reference in section 38(8) of the National Heritage Resources Act to the Minerals Act 50 of 1991 be substituted with a reference to the Mineral and Petroleum Resources Development Act 28 of 2002. The reference to the Department of Environment Affairs and Tourism should also be updated. Since the Departments of Water Affairs and Environmental Affairs remain two separate Departments, the reference should be to the Department of Environment Affairs. The SALRC requested comments from the Department of Arts and Culture and the DMR on these proposals.

2.139 Subject to the concurrence of the Department of Arts and Culture, the DMR concurred with the amendments as proposed by the SALRC. The SALRC indicated in its Discussion Paper 124 that it would appreciate receiving the views of the South African Heritage Resources Agency on the SALRC's proposal, namely that the reference in section 38(8) of the National Heritage Resources Act to the Minerals Act 50 of 1991 be substituted with a reference to the Mineral and Petroleum Resources Development Act 28 of 2002. In August 2011 Advocate Telana Halley, the legal adviser of the South African Heritage Resources Agency confirms that the SAHRA has no objections to the proposals made in Discussion Paper 124 and that they concur with the SALRC's proposed amendments.

#### **(k) Diamond Export Levy (Administration) Act 14 of 2007**

2.140 The Diamond Export Levy (Administration) Act provides for administrative matters in connection with the imposition of an export levy on unpolished diamonds (but not including synthetic diamonds). The explanatory memorandum on the Diamond Export Levy (Administration) Bill of 2006 explained that the Bill introduces administrative provisions to the Diamond Export Levy Bill. All importers and exporters of unpolished diamonds must register with the South African Revenue Service. These importers and exporters (registered persons) include producers, dealers, diamond beneficiaries (cutters) and persons holding an export permit granted by the Regulator. Registered persons must pay the export levy twice per year (ie roughly every 6 months). Registration was critical to the administration of this Bill. Most diamond smuggling stems from record defects at the importer/exporter level. Once a diamond is officially recorded, smuggling that diamond offshore presents a far greater compliance risk. Hence, compelled registration at the importer/exporter level initiates an audit document trail that is easily traceable, thereby deterring illegal activities.

2.141 The Schedule to the Diamond Export Levy (Administration) Act sets out amendment and repeal provisions. Jutastat indicates that in item 4 of the amendments to the Diamonds Act section 64 of the Diamonds Act is substituted with a new section 44. Mr Gerrie Swart of SARS noted in his comments on the SALRC that it appears that this error was corrected in the final version of the Act. The version of the Diamond Export Levy (Administration) Act as published in Government Gazette 30557 of 10 December 2007 indicates in item 4 that section 64 was substituted with an amended section 64. Mr Swart notes also that Item 3 of the amendments to the Diamonds Act also appears to be

incorrect. It reads as follows: 'Section 61A is hereby amended by the insertion after section 61 of the following section'. It should read as follows: 'The Diamonds Act is hereby amended by the insertion after section 61 of the following section'.

2.142 Furthermore, the Schedule indicates an amendment of the Diamond Amendment Act 29 of 2005 by the insertion into the Act of section 61(2A). It appears that the intention was to insert section 61(2A) in the Diamonds Act 56 of 1986. The Schedule also indicates the repeal of sections 66 and 68 by item 2 of the Diamonds Amendment Act 29 of 2005. The intention seems to have been the repeal of sections 66 and 68 of the Diamonds Act 56 of 1986. These sections were, amongst others, in fact repealed by item 5 of the amendments to the Diamonds Act 56 of 1986. Item 3 of the Diamond Amendment Act 29 of 2005 purportedly inserted section 69(3) in the Diamonds Amendment Act. The intention seems to have been to insert section 69(3) in the Diamonds Act 56 of 1986.

2.143 The Schedule also indicates an amendment of the Diamonds Second Amendment Act 30 of 2005 by the insertion of a section 74A into this Act. Section 74A provides that section 48A will not apply to any person in respect of any unpolished diamond that was purchased by that person pursuant to section 6 of the Levy Bill to the Diamond Export Levy Bill. There is no section 74 in the Diamonds Second Amendment Act 30 of 2005. The intention seems to have been to insert section 74A in the Diamonds Act 56 of 1986.

2.144 The Department of Mineral Resources advises that this it has no objections to the amendments proposed by the SALRC. It notes that this Act is administered by SARS on behalf of National Treasury and the latter should make the final pronouncement on the proposed amendments. Commenting on the SALRC's Consultation Paper, Mr Gerrie Swart of SARS confirms that this statute is correctly categorised as ancillary legislation principally administered by SARS. He notes further that the South African Diamond and Precious Metals Regulator is responsible for the verification of any information described in section 16(2) of the Diamond Export Levy (Administration) Act. Section 16(2) provides that the Regulator will be responsible for the verification of the fair market value of any unpolished diamond; the verification of the quantity and quality of any unpolished diamonds; and the verification of any other information that the Commissioner for the South African Revenue Service and the Regulator agree will assist in administering the Act or the Diamond Levy Act. For purposes of section 16, 'administering this Act and the Levy Act' means determining the correctness of any return, financial statement, document, declaration of facts, or valuation relevant to the Act or the Levy Act; determining and collecting any amounts due under the Act or the Levy Act; determining whether an offence has been committed under the Act or the Levy Act; and performing any other administrative function necessary for carrying out the Act or the Levy Act. Mr Swart comments that he agrees with the provisional proposal regarding the need for remedial legislation.

2.145 In its Discussion Paper 124 the SALRC proposed that the Schedule to the Diamond Export Levy (Administration) Act be substituted with a corrected Schedule due to the large extent of the corrections to be effected to the Schedule. The SALRC also proposed that a provision be included in the Bill that provides that the amended Schedule be deemed to have commenced on the date of the commencement of the Diamond Export Levy (Administration) Act namely 1 November 2008.

The SALRC still holds the view that the Schedule to the Diamond Export Levy (Administration) Act ought to be replaced as proposed in Discussion Paper 124. The SALRC consequently recommends the substitution of the Schedule as proposed in Discussion Paper 124.

## **(I) Diamond Export Levy Act 15 of 2007**

2.146 This Act provides for the imposition of an export levy on unpolished diamonds (but not including synthetic diamonds) and allows for offsets with respect to that levy. The explanatory memorandum to the Diamond Export Levy Bill of 2006 explained that the Diamonds Act, 1986 (Act No. 56 of 1986), as amended, sought to promote the local beneficiation of rough diamonds by imposing a 15 per cent levy on rough diamonds exported from South Africa.<sup>41</sup> The 15 per cent export levy essentially operated as a 'regulatory' measure to ensure an adequate supply of rough diamonds to the local polishing and cutting industries. The original version of the Diamonds Act, 1998 (before the 2005 amendments) contained key exemptions from the 15 per cent export levy. Agreements in terms of section 59 allowed for an exemption if the exporting party could demonstrate the promotion of local beneficiation via other means (such as the long-term contractual supply of rough diamonds to local cutters). All parties (miners and dealers) could escape the 15 per cent levy merely by proving that the rough diamonds had been offered for sale on a local bourse before export. As a result, the 15 per cent export levy had rarely been applied over its more than 20-year history.

2.147 It was further explained that Government was stepping up its efforts to promote the local beneficiation of rough diamonds and that this strategy included the following: The 2005 Diamond Amendment Acts ((Diamond Amendment Act (Act No. 30 of 2005) and Diamond Second Amendment Act (Act No.30 of 2005)) created a State Diamond Trader. Producers would be required to sell a certain percentage of their rough diamonds to the State Diamond Trader at market value. The Minister of Minerals and Energy would set this prescribed percentage of sales. The State Diamond Trader in turn would sell these diamonds to local cutters for polishing. This process should create a steady long-term supply for local cutters. The export levy on rough diamonds would be retained at a reduced rate and would be subject to slightly different procedures and exemptions. The objective of the export levy on rough diamonds was similar to what it was in the past and would complement the intentions of the State Diamond Trader (also ensuring that diamonds sold by the State Diamond Trader were polished and cut locally and not merely exported by local purchasers). The 5 per cent diamond export levy would be enacted via the Diamond Export Levy Bill for Constitutional reasons. As of 1996, all taxes and levies had to be imposed or amended by Money Bills (a requirement not in existence when the original Diamonds Act was enacted in 1986).

2.148 The memorandum to the Diamond Export Levy Bill noted that the Bill provides for two sets of levy payers, namely producers (miners) and non-producers (independent dealers and

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41. (2) The Minister may permit, on such conditions as he may deem expedient and at such a consideration as he may determine, the removal of any material, except precious stones as defined in section 1 of the Precious Stones Act, 1964 (Act No. 73 of 1964), natural oil, precious metals or any base mineral as defined in section 1 of the Mining Rights Act, 1967 (Act No. 20 of 1967), or any aquatic plant, shell or salt as defined in section 1 of the Sea Fisheries Act, 1973 (Act No. 58 of 1973), from the sea-shore and the sea of which the State President is by section 2 declared to be the owner.



cutters). All diamond producers (miners) were required to register with the South African Revenue Service. Registered producers must pay these export levies twice per year (i.e. every 6 months). Non-producers (independent dealers and cutters) must pay the full levy when a rough diamond is exported (ie when a bill of entry for export is submitted to Customs). Producer-level registration was critical to the administration of the Bill. According to the South African Police Service most diamond smuggling stemmed from record defects at the local producer-level. Compulsory registration at the producer-level would initiate an audit document trail that is traceable, thereby deterring illegal activities. The producer definition extended beyond holders of mining rights, other companies within the same consolidated financial group could be treated as producers if approved by the Minister of the Department of Minerals and Energy, and a company within a consolidated group of companies sells diamonds purchased from that producer. This extension of the term producer reflected the economic reality of group operations, which often separate extraction from their sales activities into different companies.

2.149 Section 16(2) of the Diamond Export Levy (Administration) Act provides that the Regulator will be responsible for the verification of the fair market value of any unpolished diamond; the verification of the quantity and quality of any unpolished diamonds; and the verification of any other information that the Commissioner for the South African Revenue Service and the Regulator agree will assist in administering the Act or the Diamond Levy Act. For purposes of section 16, administering this Act and the Levy Act means determining the correctness of any return, financial statement, document, declaration of facts, or valuation relevant to the Act or the Levy Act; determining and collecting any amounts due under the Act or the Levy Act; determining whether an offence has been committed under the Act or the Levy Act; and performing any other administrative function necessary for carrying out the Act or the Levy Act.

2.150 No obsolete or redundant provisions or provisions that infringe the constitutional equality provisions were identified in this Act. The SALRC therefore recommends the retention of the Diamond Export Levy Act 15 of 2007 without any amendments being effected. Moreover, the SALRC reviews this Act comprehensively in its separate review of the tax legislation administered by National Treasury. The SALRC will publish a discussion paper and report on this review in future.

#### **(m) Civil Aviation Act 13 of 2009**

2.153 The purpose of the Civil Aviation Act 13 of 2009 is essentially to provide for the control and regulation of aviation within the Republic. It came into operation on 10 March 2010 unless otherwise provided. Section 7 of the Act refers to the Minister of Minerals and Energy. This section deals with permission to use land held under any reconnaissance permission, exploration, prospecting or mining authorisation or permission for airports. Section 7(1) provides that subject to the Mineral and Petroleum Resources Development Act 28 of 2002, the National Environmental Management Act 107 of 1998, the National Water Act 36 of 1998, and the Constitution, the Minister of Minerals and Energy may permit the use of land held under any reconnaissance permission, exploration, prospecting or mining authorisation or permission, for the establishment of airports or heliports. Section 7(2) provides that before granting any permission in terms of subsection (1) for the use of land held under any



reconnaissance permission, exploration, prospecting or mining authorisation or permission for the establishment of airports or for landing places for aircraft, the Minister of Minerals and Energy must consult with the Minister and all interested parties. The SALRC recommends that the references in the Civil Aviation Act to the Minister of Minerals and Energy should be substituted with a reference to the Minister of Mineral Resources. The SALRC requested comments from the Department of Transport on this proposal. The Department of Transport supported this proposal.

## ANNEXURES

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## Annexure A

### MINERAL RESOURCES LAWS REPEAL AND RELATED MATTERS BILL

#### GENERAL EXPLANATORY NOTE:

- [        ]        Words in bold type in square brackets indicate omissions from existing enactments  
 \_\_\_\_\_ Words underlined with a solid line indicate insertions in existing enactments

#### BILL

To amend and repeal certain laws containing obsolete provisions pertaining to mineral resources; to correct amendments made to the Diamonds Act, 1989 by the Diamond Export Levy (Administration) Act, 2007; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

#### Amendment of section 3 of Act 21 of 1935

1. Section 3 of the Seashore Act, 1935, is hereby amended by the substitution for subsection (2) of the following subsection:

“(2)        The Minister may permit, on such conditions as he or she may deem expedient and at such a consideration as he or she may determine, the removal of any material, except **[precious stones as defined in section 1 of the Precious Stones Act, 1964 (Act No. 73 of 1964), natural oil,]** precious metals as defined in section 1 of the Precious Metals Act, 2005 (Act No. 37 of 2005) or [any base mineral as defined in section 1 of the Mining Rights Act, 1967 (Act No. 20 of 1967)] minerals and petroleum as defined in section 1 of the Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002), or any aquatic plant, shell or salt as defined in section 1 of the Sea Fisheries Act, 1973 (Act No. 58 of 1973), from the sea-shore and the sea of which the State President is by section 2 declared to be the owner.”

#### Amendment of section of Act 27 of 1956

2. Section of the Mines and Works Act, 1956, is hereby amended by the substitution for the definition of ‘Minister’ of the following definition:

“‘Minister’ means the Minister of Mineral **[and Energy Affairs]** Resources;”.  
 Amendment of section 1 of Act 16 of 1967

3. Section 1 of the Mining Titles Registration Act, 1967, is hereby amended by–

- (a) the substitution in section 1 for the definition “Department” of the following definition:

“‘Department’ means the Department of Mineral**[s and Energy]** Resources;”;

- (b) the substitution in section 1 for the word “mans” in the definition of “Director-General” of the word “means”; and

- (c) the substitution in section 1 for the definition of "Minister" of the following definition:

"Minister' means the Minister of Mineral[s and Energy] Resources;"

#### **Amendment of section 3 of Act 16 of 1967**

4. Section 3 of the Mining Titles Registration Act, 1967, is hereby amended by the substitution in section 3 for the word "officer" in paragraph (b) of subsection (1) of the word "employee".

#### **Amendment of section 3 of Act 70 of 1970**

5. Section 3 of the Subdivision of Agricultural Land, 1970, is hereby amended by the substitution for subparagraph (i) of paragraph (e) of the following subparagraph:

"(i) no portion of agricultural land, whether surveyed or not, and whether there is any building thereon or not, shall be sold or advertised for sale, except for the purposes of a mine as defined in section 1 of the **[Mines and Works Act, 1956 (Act No. 27 of 1956)]** Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002);"

#### **Substitution of section 18 of Act 30 of 1989**

6. The following section is hereby substituted for section 18 of the Mineral Technology Act, 1989:

"18. The **[State]** President may by proclamation in the Gazette assign the administration of this Act to any Minister, and may determine that any power or duty conferred or imposed by this Act on such Minister, shall be exercised or carried out by that Minister after consultation with one or more other Ministers."

#### **Amendment of section 1 of Act 56 of 1986**

7. Section 1 of the Diamonds Act, 1986, is hereby amended by the substitution for the definition of "Minister" of the following definition:

"Minister' means the Minister of Mineral[s and Energy] Resources;"

#### **Amendment of section 8 of Act 15 of 1994**

8. Section 8 of the Maritime Zones Act, 1994, is hereby amended by the substitution in subsection (3) for paragraph (b) of the following paragraph:

"(b) any law relating to mining of precious **[stones,]** metals or minerals, including **[natural oil]** petroleum."

#### **Amendment of section 41 of Act 29 of 1996**

9. Section 41 of the Mine Health and Safety Act, 1996, is hereby amended by-

- (a) the substitution in subsection (3) for paragraph (c) of the following paragraph:

"(c) proposals for the registration of education and training standards and qualifications in the mining industry on the National Qualifications Framework referred to in the **[South African Qualifications Authority Act, 1995 (Act 58 of 1995)]** National Qualifications Framework Act, 2008 (Act 67 of 2008)," and;

- (b) the addition after paragraph (c) of subsection (3) of the following phrase:

"and despite anything to the contrary in either this Act or the Skills Development Act, 1998 (Act 97 of 1998), and with effect from 20 March 2000 the Mining Qualifications Authority, established in terms of this subsection, must be regarded as having been established in terms of section 9(1) of the Skills Development Act, 1998."

#### **Amendment of section 46 of Act 29 of 1996**

10. Section 46 of the Mine Health and Safety Act, 1996, is hereby amended by the substitution for subsection (5) of the following subsection:

"(5) In performing its functions, the Mining Qualifications Authority must comply with the policies and criteria formulated by the South African Qualifications Authority in terms of section **[5(1)(a)(ii)]** 11(1)(h) and 11(1)(i) of the [South African Qualifications Authority Act, 1995 (Act 58 of 1995)] National Qualifications Framework Act, 2008 (Act 67 of 2008)."

#### **Amendment of section 59 of Act 29 of 1996**

11. Section 59 of the Mine Health and Safety Act, 1996, is hereby amended by the substitution for section 59 of the following section.

"59(1) An appeal against a decision under either section 57**[, 57A]** or 58 does not suspend the decision."

"(2) Despite subsection (1)-

(a) an appeal in terms of section **[57A or]** 58 against a decision to impose a fine suspends the obligation to pay the fine, pending the outcome of the appeal; and

(b) the Labour Court may suspend the operation of the decision, pending the determination of the matter, if there are reasonable grounds for doing so."

#### **Amendment of section 72 of Act 29 of 1996**

12. Section 72 of the Mine Health and Safety Act, 1996, is hereby amended by the substitution for the term "Attorney-General" of the term "Director of Public Prosecutions".

#### **Amendment of section 98 of Act 29 of 1996**

13. Section 98 of the Mine Health and Safety Act, 1996, is hereby amended by-

- (a) the substitution for subsection (4) of the following subsection:

"(4) Regulations made in terms of subsection (3) must be in accordance with the National Qualifications Framework approved in terms of the **[South African Qualifications Authority Act, 1995 (Act 58 of 1995)]** National Qualifications Framework Act, 2008 (Act 67 of 2008)."; and

- (b) the substitution for subsection 12 of the following subsection:

"(12) The provisions of section **[31]** 28 of the Standards Act, **[1993]** 2008 (Act **[29 of 1993]** 67 of 2008), do not apply to any incorporation of a health and safety standard or to any amendment or substitution of a health and safety standard under this section."

### Amendment of section 102 of Act 29 of 1996

14. Section 102 of the Mine Health and Safety Act, 1996, is hereby amended by –

- (a) the substitution for the definition of “Department” of the following definition:  
“Department” means the Department of Mineral [and Energy Affairs] Resources;”
- (b) the substitution for the definition of ‘medical practitioner’ of the following definition:  
“medical practitioner” means a medical practitioner as defined in the [Medical, Dental and Supplementary] Health [Service] Professions Act, 1974 (Act 56 of 1974);”
- (c) the substitution for the definition of “mineral” of the following definition:  

“mineral” means any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process, and includes sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits, but excludes-

  - (a) water, other than water taken from land or sea for the extraction of any mineral from such water;
  - (b) petroleum; or
  - (c) peat.”
- (d) the substitution for the definition of “Minister” of the following definition:  
“Minister” means the Minister of Mineral [and Energy Affairs] Resources;”
- (e) the substitution for the definition of “mining area” of the following definition:  
“mining area” means a prospecting area, mining area, retention area, exploration area and production area as defined in section 1 [read with section (65)(2)(b)] of the [Petroleum and Mineral Resources Development Act] Mineral and Petroleum Resources Development Act;” and
- (f) the substitution for the definition of “standard” of the following definition:  
“standard” means a document that provides for common and repeated use, rules, guidelines or characteristics for products, services, or processes and production methods, including terminology, symbols, packaging, marking or labelling requirements as they apply to a product, service, process or production method.”

### Amendment of section 24 of Act 84 of 1998

15. Section 24 of the National Forests Act, 1998, is hereby amended by the substitution for subsection (9) of the following subsection preceding paragraph (a):

“(9) Nothing in this Act prohibits the grant in terms of any law of a right to prospect for, mine or dispose of any mineral as defined in the [Minerals Act, 1991 (Act 50 of 1991)] Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002), or any source material as defined in the Nuclear Energy Act, 1999 (Act 46 of 1999), in a State forest but –”.

### Amendment of section 28 of Act 25 of 1999

16. Section 28 of the National Heritage Resources Act, 1999, is hereby amended by the substitution for subsection (4) of the following subsection:



“(4) With regard to an area of land covered by a mine dump referred to in subsection (1) (c) SAHRA must make regulations providing for the protection of such areas as are seen to be of national importance in consultation with the owner, the Minister of Mineral[**s and Energy**] Resources and interested and affected parties within the mining community.”

#### **Amendment of section 38 of Act 25 of 1999**

17. Section 38 of the National Heritage Resources Act, 1999, is hereby amended by the substitution for subsection (8) of the following subsection:

“(8) The provisions of this section do not apply to a development as described in subsection (1) if an evaluation of the impact of such development on heritage resources is required in terms of the Environment Conservation Act, 1989 (Act 73 of 1989), or the integrated environmental management guidelines issued by the Department of Environmental Affairs **[and Tourism]**, or the **[Minerals Act, 1991 (Act 50 of 1991)]** Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002), or any other legislation: Provided that the consenting authority must ensure that the evaluation fulfils the requirements of the relevant heritage resources authority in terms of subsection (3), and any comments and recommendations of the relevant heritage resources authority with regard to such development have been taken into account prior to the granting of the consent.”

#### **Amendment of section 1 of the Act 28 of 2002**

18. Section 1 of the Mineral and Petroleum Resources Development Act, 2002, is hereby amended by–

- (a) the substitution for the definition of “Mining Titles Office” of the following definition:

“**[Mining]** Mineral and Petroleum Titles Registration Office’ means the **[Mining]** Mineral and Petroleum Titles Registration Office contemplated in section 2 of the **[Mining]** Mineral and Petroleum Titles Registration Act, 1967 (Act 16 of 1967);”.and

- (b) the substitution for the definition of “officer” of the following definition:

“Officer’ means any **[officer]** employee of the Department appointed under the Public Service Act, 1994;”.

#### **Amendment of section 1 of Act 37 of 2005**

19. Section 1 of the Precious Metals Act, 2005, is hereby amended by the substitution for the definition of “Minister” of the following definition:

“Minister’ means the Minister of Mineral**[s and Energy]** Resources”;

#### **Substitution of Schedule to Act 14 of 2007**

20. The Diamond Export Levy (Administration) Act, 2007 is hereby amended by the substitution for the Schedule to the Act of the following Schedule:

**Schedule**  
**AMENDMENT OF LAWS**

(Section 19)

No. and year of law	Short title	Extent of amendment or repeal
Act 56 of 1986	Diamonds Act, 1986	<ol style="list-style-type: none"> <li>1. Section 1 of the Diamonds Act is hereby amended by the substitution for the definition of 'unpolished diamonds' of the following definition:  "unpolished diamonds" means- <ol style="list-style-type: none"> <li>(a) diamonds in their natural state, as they occur in deposits or extracts from the parent rock;</li> <li>(b) diamonds simply sawn, cleaved, bruted, tumbled or which have only a small number of polished facets (windows which allow expert examination of the internal characteristics), and includes diamonds that are provisionally shaped but clearly require further working;</li> <li>(c) tumbled diamonds of which the surface has been rendered glossy or shiny by chemical treatment or chemical polishing;</li> <li>(d) broken or crushed diamonds;</li> <li>(e) diamond dust; or</li> <li>(f) diamond powder, and applies regardless of whether such diamonds are won or recovered within the Republic;'. </li></ol> </li> <li>2. Section 60 of the Diamonds Act is hereby substituted with the following section:  '60 Export and import of unpolished diamonds <ol style="list-style-type: none"> <li>(1) No exporter shall export any unpolished diamond from the Republic unless- <ol style="list-style-type: none"> <li>(a) that diamond has been registered and released for export in terms of this Act; and</li> <li>(b) that exporter is registered in terms of the Diamond Export Levy Act.</li> </ol> </li> <li>(2) No importer shall import any unpolished diamond into the Republic unless- <ol style="list-style-type: none"> <li>(a) that diamond has been registered and released for import in terms of this Act; and</li> <li>(b) that importer is registered under the Diamond Export Levy Act.</li> </ol> </li> <li>(3) The Regulator shall confiscate any unpolished diamond that does not satisfy the requirements of the Kimberley Process Certification Scheme, as prescribed.'</li> <li>3. Section 61 is hereby amended by the</li> </ol> </li></ol>

Act 56 of 1986	Diamonds Act, 1986	<p>insertion after subsection (2) of the following subsection:</p> <p>(2A) Notwithstanding subsection (1), any exporter that desires to register any unpolished diamond for export that pursuant to section 74 is not subject to section 48A shall at any diamond exchange and export centre furnish the registering officer with a return on the prescribed form in respect of that diamond specifying the value of that diamond and declaring that the value so specified is to the best of his or her knowledge and belief the fair market value of that diamond.’.</p> <p>4. Section 61 is hereby amended by the insertion after section 61 of the following section:</p> <p>‘61A Registration of unpolished diamonds for import</p> <p>olished diamond for import shall at a diamond exchange and export centre furnish the registering officer with a return on the prescribed form in respect of that diamond.</p> <p>(2) In the return furnished in terms of subsection (1), the importer shall specify the value of the unpolished diamond and declare that the value so specified is (to the best of his or her knowledge and belief) the fair market value of that diamond.</p> <p>(3) A return referred to in subsection (1) shall be accompanied by the unpolished diamond in question and the prescribed documents.</p> <p>(4) If the registering officer is satisfied that an importer has complied with the provisions of this section, he or she shall register the unpolished diamond in question for import.’.</p> <p>5. Section 64 of the Diamonds Act is hereby substituted with the following section:</p> <p>‘64 Temporary exemption from diamond exchange and export centre</p> <p>(1) If the Regulator is satisfied that an unpolished diamond will be exported from the Republic-</p> <p>(a) solely for purposes of-</p> <p>(i) being exhibited or displayed; or</p> <p>(ii) obtaining an expert opinion as to the fair market value or manner of benefiting that</p>
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Act 56 of 1986	Diamonds Act, 1986	<p style="text-align: right;">diamond; and</p> <p>(b) for no longer period as the Regulator may determine (but not exceeding a period of 180 days from the date upon which that diamond was released for export as described in section 69), that diamond will not be subject to the provisions of section 48A.</p> <p>(2) If the Regulator is satisfied that an unpolished diamond may be exported as described in subsection (1), a registering officer will issue the exporter of that diamond with a temporary exemption certificate stipulating –</p> <p>(a) that the diamond is not subject to section 48A;</p> <p>(b) the value of that diamond as released for export in terms of section 69; and</p> <p>(c) any other particulars required to be furnished by the Regulator in respect of that diamond.</p> <p>(3) The exporter of an unpolished diamond that is exported as described in subsection (2) is in contravention of this Act if that diamond upon its re-importation is –</p> <p>(a) not registered for import as described in section 61A on a date within the date determined by the Regulator as described in subsection (1) in respect of that diamond; or</p> <p>(b) is physically different in any manner as of the date that diamond was released for export as described in section 69.</p> <p>(4) If the exporter of any unpolished diamond that is exported as described in subsection (2) contravenes subsection (3), that exporter shall be subject to a fine equal to 25 per cent multiplied by that diamond's value as released for export in terms of section 69 of the Diamonds Act.</p> <p>(5) The Regulator may reduce the fine described in subsection (4) (c) up to 20 percentage points if he or she is satisfied that an exporter contravened subsection (3) for reasons beyond the exporter's control.</p> <p>(6) Any fine imposed in terms of this section shall be paid by the exporter concerned to the Regulator within 30 days of being notified by the Regulator that such amount is due.</p> <p>(7) Any money paid to the Regulator as described</p>
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Act 56 of 1986	Diamonds Act, 1986	<p>in subsection (6) shall be paid into the National Revenue Fund within seven days after receipt thereof.’.</p> <p>6. The Diamonds Act is hereby amended by the repeal of sections 62, 63, 66, 68, 93 and 95 (h).</p> <p>7. Section 65 of the Diamonds Act is hereby amended by the substitution for the heading of section 65 of the following heading:</p> <p>‘Examination and valuation of unpolished diamonds for export’.</p> <p>8. The Diamonds Act is hereby amended by the insertion after section 65 of the following section:</p> <p>‘65A Examination and valuation of unpolished diamonds for import</p> <p>(1) The registering officer or another person designated by the Regulator-</p> <p>(a) shall examine; and</p> <p>(b) may assess the value of, any unpolished diamond registered for import as described in section 61A and verify any particulars furnished in respect thereof.’.</p> <p>9. Section 67 of the Diamonds Act is hereby substituted with the following section:</p> <p>‘67 Fine in case of difference in values</p> <p>(1) If the difference in value of any unpolished diamond-</p> <p>(a) as specified in the return referred to in section 61 (2) in relation to the value of that diamond as released for export in terms of section 69; or</p> <p>(b) as specified in the return referred to in section 61A(2) in relation to the value of that diamond as released for import in terms of section 69B, is greater than 20 per cent, the Regulator shall impose upon the exporter or importer concerned a fine equal to 20 per cent of the value of that diamond as released in terms of section 69 or section 69B (as the case may be).</p> <p>(2) Any fine imposed in terms of this section shall be paid by the exporter or importer concerned to the Regulator within 30 days of the date that fine was imposed.</p>
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Act 56 of 1986	Diamonds Act, 1986	<p>(3) Any money paid to the Regulator as described in subsection (2) shall be paid into the National Revenue Fund within seven days after receipt thereof.’.</p> <p>10. Section 69 of the Diamonds Amendment Act is hereby amended by the insertion after subsection (2) of subsection (3):</p> <p>‘(3) Any packet contemplated in subsection (2) may not be exported from the Republic if a bill of entry delivered in terms of section 38 (3) (a) of the Customs and Excise Act, 1964 (Act 91 of 1964) is not delivered in respect of that packet within 10 business days of the date the Regulator released that packet.’.</p> <p>11. The Diamonds Act is hereby amended by the insertion after section 69A of the following section:</p> <p>‘69B Release of unpolished diamonds for import</p> <p>(1) The registering officer shall not release any person’s unpolished diamond for import unless –</p> <ul style="list-style-type: none"> <li>(a) that unpolished diamond was registered for import as described in section 61A;</li> <li>(b) all fines imposed on that person in terms of this Act have been paid;</li> <li>(c) the provisions of any other law relating to the import of that unpolished diamond have been complied with;</li> <li>(d) that unpolished diamond has been made up in a parcel in such manner as the registering officer may determine; and</li> <li>(e) the prescribed certificate, which certifies that the unpolished diamond for import has been handled in a manner that satisfies the requirements of the Kimberly Process Certification Scheme, accompanies the parcel contemplated in paragraph (d).</li> </ul> <p>(2) The registering officer shall release an unpolished diamond for import by sealing the parcel contemplated in subsection (1) (d) with the seal of the Regulator.’.</p> <p>12. The Diamonds Act is amended by the insertion after section 74 of the following section:</p> <p>‘74A Relief for certificated purchases</p> <p>Section 48A will not apply to any person in respect of any unpolished diamond that was purchased by that person pursuant to section 6 of the Levy Bill to the Diamond Export Levy Bill.’.</p>
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### Amendment of section 7 of Act 13 of 2009

21. Section 7 of the Civil Aviation Act, 2009, is hereby amended by–

(a) the substitution for subsection (1) of the following subsection:

“(1) Subject to the Mineral and Petroleum Resources Development Act, 2002 (Act 28 of 2002), the National Environmental Management Act, 1998 (Act 107 of 1998), the National Water Act, 1998 (Act 36 of 1998), and the Constitution, the Minister of Mineral[s **and Energy**] Resources may permit the use of land held under any reconnaissance permission, exploration, prospecting or mining authorisation or permission, for the establishment of airports or heliports.” and;

(b) the substitution for subsection (2) of the following subsection:

“(2) Before granting any permission in terms of subsection (1) for the use of land held under any reconnaissance permission, exploration, prospecting or mining authorisation or permission for the establishment of airports or for landing places for aircraft, the Minister of Mineral[s **and Energy**] Resources must consult with the Minister and all interested parties.”.

### Repeal of laws

22. The laws specified in the Schedule to the Act are hereby repealed.

### Short title and commencement

23. This Act is called the Mineral Resources Laws Repeal and Related Matters Act, 201... and –

- (a) subject to paragraph (b), comes into operation on a date determined by the President by proclamation in the Gazette; and
- (b) section 20 is deemed to have come into operation on 1 November 2008.

### SCHEDULE

(Section 22)

Item No.	No. and year of law	Title or subject of law
1.	Act No 28 of 1988	Diamonds Amendment Act, 1988
2.	Act No 22 of 1989	Diamonds Amendment Act, 1989
3.	Act No 10 of 1991	Diamonds Amendment Act, 1991
4.	Act 67 of 2000	Abolition of the Lebowa Mineral Trust Act, 2000

## ANNEXURE B

### MINERAL RESOURCES RELATED LEGISLATION:

#### ADMINISTERED BY THE DEPARTMENT OF

#### MINERAL RESOURCES

Number	Name of Act, number and year
1	Mines and Works Act 27 of 1956
2.	Mines and Works and Explosives Amendment Act 46 of 1964
3.	Mining Titles Registration Act 16 of 1967
4.	Mining Rights Act 20 of 1967
5.	Mining Titles Registration Amendment Act 60 of 1980
6.	Diamonds Act 56 of 1986
7.	Mineral Technology Amendment Act 24 of 1988
8.	Diamonds Amendment Act 28 of 1988
9.	Diamonds Amendment Act 22 of 1989
10.	Mineral Technology Act 30 of 1989
11.	Diamonds Amendment Act 10 of 1991
12.	Mining Titles Registration Amendment Act 14 of 1991
13.	Minerals Act 50 of 1991
14.	Geoscience Act 100 of 1993
15.	Minerals Amendment Act 103 of 1993
16.	Mine Health and Safety Act 29 of 1996
17.	Mine Health and Safety Amendment Act 72 of 1997
18.	Abolition of Lebowa Mineral Trust Act 67 of 2000
19.	Mineral and Petroleum Resources Development Act 28 of 2002
20.	Geoscience Amendment Act 11 of 2003
21.	Mining Titles Registration Amendment Act 24 of 2003
22.	Minerals and Energy Laws Amendment Act 11 of 2005
23.	Diamonds Amendment Act 29 of 2005
24.	Diamonds Second Amendment Act 30 of 2005
25.	Precious Metals Act 37 of 2005
26.	Mineral and Petroleum Resources Development Amendment Act 49 of 2008

Number	Name of Act, number and year
27.	Mine Health and Safety Amendment Act 74 of 2008
28.	Geoscience Amendment Act 16 of 2010

### Principal Statutes listed in Proclamation 44 of 2009

Legislation	Previous Cabinet member	New Cabinet member
Mining Titles Registration Act, 1967 (Act No. 16 of 1967)	Minister of Minerals and Energy	Minister of Mineral Resources
Diamonds Act, 1986 (Act No. 56 of 1986)	Minister of Minerals and Energy	Minister of Mineral Resources
Mineral Technology Act, 1989 (Act No. 30 of 1989)	Minister of Minerals and Energy	Minister of Mineral Resources
Geoscience Act, 1993 (Act No. 100 of 1993)	Minister of Minerals and Energy	Minister of Mineral Resources
Mine Health and Safety Act, 1996 (Act No. 29 of 1996)	Minister of Minerals and Energy	Minister of Mineral Resources
Abolition of Lebowa Mineral Trust Act, 2000 (Act No. 67 of 2000)	Minister of Minerals and Energy	Minister of Mineral Resources
Mineral and Petroleum Resources Development Act, 2002 (Act No. 28 of 2002)	Minister of Minerals and Energy	Minister of Mineral Resources
Precious Metals Act, 2005 (Act No. 37 of 2005)	Minister of Minerals and Energy	Minister of Mineral Resources

## **ANNEXURE C**

### **ANCILLARY LEGISLATION CONSIDERED**

Seashore Act 21 of 1935

Transfer Duty Act 40 of 1949

Subdivision of Agricultural Land Act 70 of 1970

Occupational Diseases in Mines and Works Act 78 of 1973

Maritime Zones Act 15 of 1994

Development Facilitation Act 67 of 1995

Land Reform (Labour Tenants) Act 3 of 1996

Extension of Security of Tenure Act 62 of 1997

National Forests Act 84 of 1998

National Heritage Resources Act 25 of 1999

Diamond Export Levy (Administration) Act 14 of 2007

Diamond Export Levy Act 15 of 2007

Civil Aviation Act 13 of 2009

## ANNEXURE D

### LIST OF STAKEHOLDERS WHO COMMENTED ON DISCUSSION PAPER 124

1. Department of Agriculture, Forestry and Fisheries: Mr Barry Beukes, Chief Directorate Legal Services;
2. Department of Mineral Resources: Mr A Niemann, Legal Services;
3. Mintek: Adv Mamokete Ramoshaba;
4. Pieter Stassen of the Contemporary Gazette (Pty) Ltd;
5. Director-General: Mpumalanga Provincial Government;
6. South African Heritage Resources Agency (SAHRA): Adv Telana Halley, legal adviser;
7. Department of Environmental Affairs: Chief Directorate Legal Services.

## Notes

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