INTRODUCTION

1 The Minerals Council of South Africa ("the Minerals Council") thanks the Chairperson and Members of the Parliamentary Portfolio Committee on Rural Development and Land Reform for affording it the opportunity to make these written submissions on the above Bill ("the Bill").

ABOUT THE MINERALS COUNCIL

2 The Minerals Council is a voluntary membership, private sector employer organisation founded in 1889. The Minerals Council is a mining industry employers’ organisation that supports and promotes the South African mining industry. The Minerals Council exists as the principal advocate of major policy positions endorsed by the mining industry employers and represents these policy positions to various organs of South African national and provincial governments and to other relevant policy making and opinion-forming entities, both within South Africa and abroad. The Minerals Council also works closely with the various employee organisations in formulating these positions where appropriate. It represents mining companies producing about 90% of South Africa’s mineral production and employing about 90% of the employees employed in the mining industry.

THE ECONOMIC AND SOCIAL IMPACT OF MINING

3 Mining is the “Flywheel” of the South African Economy and it:

- Created 1,4 million jobs in 2017 (464 776 direct & 935 224 indirect).
- Accounts for about 6,8% GDP
- In the period 16/17 contributed R16 billion towards taxes
- In 2016/17, paid R5.8 billion in royalties.
- Is a significant contributor to community development through Social and Labour Plans (SLPs) and the Mining Charter
Besides its direct contribution to the economy, mining also has significant multiplier effects:

In summary, the positive benefits of mining on the economy are generated at all levels of the economy, i.e. at local municipal, regional, provincial and national levels.

The Minerals Council attaches as Annexure A hereto a document dealing with the economic importance of mining in South Africa.

**APPROACH OF THE MINERALS COUNCIL IN THESE SUBMISSIONS**

4 The approach of the Minerals Council in these submissions is not to deal with general issues relating to the Bill but rather to focus pertinently on the issues which impact directly on the mining industry, and which the Minerals Council will do in the paragraphs which follow.

**MINERALS COUNCIL’S SUPPORT FOR THE CONCEPT OF RESTITUTION**

5 The Minerals Council supports the concept of restitution as contained in s25(7) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”) and in the Restitution of Land Rights Act, 1994 (“the Restitution Act”), notwithstanding that such concept has led to uncertainty in regard to ownership of land by mining companies. The Minerals Council accepts that such uncertainty is outweighed by the need and imperative for restitution, as set forth in the judgment in *Land Access Movement of South Africa & Others v Chairperson of the National Council of Provinces & Others*, 2016 (5) SA 635 (CC) (“the Land Access Case”), paragraph 1. In so supporting and accepting, the Minerals Council has relied on the facts that:

5.1 the date for lodgement of claims had been set at 31 December 1998, and

5.2 if restitution had taken the form of restoration of a particular piece of land which was the subject of a restitution claim, no further claims could be lodged over the same piece of land.

6 In essence therefore, the Minerals Council wishes to raise the following two issues in regard to the Bill, namely:

6.1 the extension of the date for lodgement of claims to 5 years after the commencement of the Amendment Act (“the Amendment Act, 2017”) once enacted and assented to and which flows from the Bill, and

6.2 the non-ring fencing of:

(1) claims lodged on or before 31 December 1998 from all claims lodged thereafter, and
(2) claims lodged on or before 28 July 2016 (when the Land Access Case was decided) from all claims lodged thereafter.

FIRST ISSUE: EXTENSION OF THE DATE FOR LODGEMENT OF RESTITUTION CLAIMS

7 By virtue of clause 1(b) of the Bill, s2(1)(e) of the Restitution Act would be amended to permit restitution claims to be lodged until the expiry of 5 years after the commencement of the Amendment Act, 2017. This would however clearly affect the security of tenure of mining companies.

8 Although in terms of s5 of the Mineral and Petroleum Resources Development Act, 2002 ("MPRDA") the holder of a right of mining has broad statutory rights in respect of use of the relevant property, mining companies frequently elect to acquire the land, irrespective of whether the mining is underground or opencast, to avoid conflicts with third party landowners, and to avoid having to pay compensation to third party landowners in terms of s54(3) of the MPRDA which provides:

“(3) If the Regional Manager, after having considered the issues raised by the holder under subsection (1) and any written representations by the owner or the lawful occupier of the land, concludes that the owner or occupier has suffered or is likely to suffer loss or damage as a result of the reconnaissance, prospecting or mining operations, he or she must request the parties concerned to endeavour to reach an agreement for the payment of compensation for such loss or damage.”

9 An extension of the date for lodgement of restitution claims is contrary to the object of security of tenure in the 9th preamble to, in s2(g) of, and in item 2(a) in schedule II to, the MPRDA, which respectively provide:

“REAFFIRMING the State’s commitment to guaranteeing security of tenure in respect of prospecting and mining operations”.

2. Objects of Act

The objects of this Act are to –

... 

(g) provide for security of tenure in respect of prospecting, exploration, mining and production operations;

...

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

(a) ensure that security of tenure is protected in respect of prospecting, exploration, mining and production operations which are being undertaken."

In relation to the concept of security of tenure, the following is said in Dale et al, South African Mineral and Petroleum Law, LexisNexis, 2005 (loose leaf):

9.1 Page MPRDA – 11 (Service Issue 17) para 14.1.1 and footnotes 49 to 52:

"14.1.1 Introduction

Various works exist on the requirements of internationally competitive mining law regimes.49 Whether the MPRDA constitutes such a regime has been considered in various works50 aspects of which are discussed below. Many of these criteria relate directly or indirectly to aspects of security of tenure.51 Whether the MPRDA will succeed in attracting mineral investment depends on the degree to which the Act satisfies the internationally identified investment criteria relating to prospecting and mining.52 Examination of the words used in the ninth preamble will determine the manner in which the MPRDA seeks to satisfy these investment requirements. . . .


9.2 Page MPRDA – 119 (Service Issue 17), footnote 583:

9.3 Pages Sch II – 27 and 28 (Service Issue 21) and footnotes 4 to 9:

Views on the importance of and the content of the concept of security of tenure have been published by the World Bank and Warden-Fernandez and Wälde. Security of tenure, in so far as it relates to the right to mine minerals, has traditionally been described as the reasonable entitlement to obtain extraction rights after successful completion of the exploration phase. As pointed out by Elizabeth Bastida in her article A Review of the Concepts of Security of Mineral Tenure: Issues and Challenges, security of mineral tenure could, in a narrow sense, refer to the legal entitlement to acquisition of the right to mine after successful exploration. Legislative codes may allow the prospector an automatic right to mine, give it a preferent right to obtain the right to mine or allow the [SchII-28] government a discretion to grant the right to mine to the prospector. Each of these will translate into a legislative regime which is seen as either providing security of mineral tenure or not. The trend has been to recognise the competitive advantage of a regime which promotes security of mineral tenure and thus to reduce discretionary grants by government agencies and provide for a more or less automatic right to obtain a mining right.

Lately it has also been recognised that security of mineral tenure can be understood in a wider sense, namely, the stability of rights granted to implement different stages of the mining sequence. Realising this, the World Bank, in its mining policy guidelines suggests that in order to provide for proper security of tenure, a mining code should ensure that a mineral right, once granted, cannot be suspended or revoked except on specified grounds clearly set out by law and provides for reasonable assurances guaranteeing the continuity of mining operations over the life of the mine.

* Whether the MPRDA in general and Schedule II specifically provide for such an entitlement is discussed at SchII-31 below.
* Whether the security of tenure provided by the conversion process is negatively affected by ministerial discretion is discussed in more detail at SchII-31 below.
* Onorato and Fox The Role of the World Bank and Other Multilateral and Private Sector Finance Institutions in Resources Development in Developing Countries Rocky Mountain Mineral Law Foundation Ch 7 at 7–22.

As is evident from the above, security of tenure is an important investor requirement, whether such investor is a citizen or a foreign person. South Africa is trying to encourage direct investment in the mining industry, whether by citizens or by foreign persons. The limitations placed by the Bill in its extension of the date for lodgement of restitution claims on security of tenure in regard to land are contrary to South Africa’s attempts to encourage direct investment in the mining industry, be it by citizens or by foreign persons alike.

Insofar as feasibility of restitution is concerned, the following issues are relevant.
11.1 The court recently pointed out that even after restoration of land pursuant to a restitution claim in terms of the Restitution Act, the new owner will still be subject to the rights of mining which are granted in terms of the MPRDA, as was held in Macassar Land Claims Committee v Maccsand CC\(^1\) where the court said:

"[32] It follows that whatever rights the community might have enjoyed to mine sand on Erf 1197 prior to the dispossession of their commonage rights, would in any event have been removed in 1991, even if that dispossession had not occurred.

And in 2004, when the MPRDA came into operation, the situation under the 1991 legislation would have changed again to take account of altered priorities in regard to mining in South Africa. Even if, at any stage after that date, the community was awarded ownership of Erf 1197 by way of restitution, that would not carry with it a right to mine and exploit the sand on the property. Such a right could only arise through the grant of the mining right in terms of the MPRDA and, if that right had been granted to a third party, as was the case with Maccsand, the community would not have been able to prevent its mining activities. So the loss of the right to mine sand would have occurred irrespective of the dispossession of the community’s commonage rights."

11.2 In terms of s5(3) of the MPRDA\(^2\) the holder of a right to mine has very extensive rights to use the land for mining and purposes incidental thereto, often rendering the land unusable for other purposes.

11.3 Section 53 of the MPRDA\(^3\) prohibits the use of land in a way contrary to the objects of the MPRDA save with approval of the Minister of Mineral Resources.

\(^1\) (2001/2016) [2016] ZASCA 167 (23 November 2016); 2017 (4) SA1 (SCA).

\(^2\) "5(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may -
(a) enter the land to which such right relates together with his or her employees, and bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;
(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;
(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;
(cA) subject to section 59B of the Diamonds Act, 1986 (Act No. 56 of 1986), (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;
(d) subject to the National Water Act, 1998 (Act No. 36 of 1998), use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and
(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act."

\(^3\) "53. Use of land surface rights contrary to objects of Act
(1) Subject to subsection (2), any person who intends to use the surface of any land in any way which may be contrary to any object of this Act or which is likely to impede any such object must apply to the Minister for approval in the prescribed manner
(2) Subsection (1) does not apply to-
(a) farming or any use incidental thereto; or
(b) the use of any land which lies within an approved town-planning scheme which has applied for and obtained approval in terms of subsection (1); or
(c) any other use which the Minister may determine by notice in the Gazette.
(3) Despite subsection (1), the Minister may cause an investigation to be conducted if it is alleged that a person intends to use the surface of any land in any way that could result in the mining of mineral resources being detrimentally affected.
(4) When an investigation is conducted in terms of subsection (3), the Regional Manager must-
(a) by written notice served on the person concerned, notify the person of the allegation and of the Minister’s intention to issue a directive to take corrective measures;
11.4 A comprehensive exposition on surface use for mining is set forth in annexure B hereto.

12 Furthermore, South Africa was party to various Bilateral Investment Treaties (BITs) with other countries. Although South Africa is in the process of not renewing, or of withdrawing from, such BITs normally contain a provision that in respect of investments which were made while the relevant BIT was in force, its provisions continue in effect with respect to such existing investments for a period such as 20 years after termination. For example, Article 14 of the UK/RSA BIT, 1994, provides:

“This agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of 12 months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investment for a period of 20 years after the date of termination and without prejudice to the application thereafter of the rules of general international law.”.

13 Disposals of land acquired by foreign persons during the subsistence of BITs will be subject to the expropriation provisions in the relevant BIT. Such foreign investors will still have a claim for compensation in terms of the relevant BITs. BITs tend to contain a broad definition of “investment” and of “expropriation”. See for example article 5(1) of the UK/SA BIT, 1994 which provides that investments of nationals or companies of either contracting party may not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (referred to as “expropriation”) in the territory of the other contracting party except for a public purpose related to the internal needs of that party or on a non-discriminatory basis and against prompt, adequate and effective compensation which must amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, must include interest, and must be made without delay. See also Piero Foresti & Others v Republic of South Africa, ICSID Case ARB (AF) 07/01 relating to BITs between South Africa and Italy and Belgo-Luxembourg.

14 An extension of the date for lodgement of restitution claims would also contravene the “fair and equitable treatment” clause in BITs which prohibits subjecting investors or investments to unjustified, unreasonable or discriminatory measures. This has been held in international arbitration cases to encompass transparency and non-discrimination in regulatory processes; full protection and security for foreign

(b) set out the measures to be taken in order to rectify the matter; and
(c) offer that person the opportunity to respond within 30 days.

(5) After considering the results of the investigation contemplated in subsection (3), and any representations contemplated in subsection (4)(c), the Minister may direct the person concerned to take the necessary corrective measures within a period specified in the directive.”.

4 See for example Article 2.3 of the Italy/RSA BIT and Article 3(1) of the Belgo-Luxembourg/RSA BIT and the Foresti arbitration above.

5 Metalclad Corp v United Mexican States, ICSID (NAFTA) Case ARB (AF) 97/1.
investments;\(^6\) acting in good faith and in a non-arbitrary manner towards foreign investors;\(^7\) and not undermining the legitimate expectations which were taken into account by foreign investors in making their investments.\(^8\) As mentioned above, the fact that South Africa has not renewed or has terminated its BITs does not prevent the BITs remaining in force in regard to existing investments which were made during the currency of the BIT.

In the light of the above, the Minerals Council submits that an extension of the date for lodgement of restitution claims does not satisfy the need for security of tenure of land for mining purposes, and that the proposed extension of such date should not proceed. The raising by the Minerals Council of the Second Issue below is made without detraction from or prejudice to the aforesaid submission.

**SECOND ISSUE: NON-RING FENCING OF EXISTING CLAIMS LODGED ON OR BEFORE 31 DECEMBER 1998**

Section 6(1)(g) of the Restitution Act (as amended by the Restitution of Land Rights Amendment Act, 2014, which was declared invalid in the Land Access Case) provided that the Land Claims Commissioner had to:

\[(g) \text{ ensure that priority is given to claims lodged not later than 31 December 1998 and which were not finalised at the date of the commencement of the Restitution of Land Rights Amendment Act, 2014.} \]

Although the effect of the Land Access Case is that the abovementioned s6(1)(g) was set aside, and although the draft Bill which preceded the present tabled Bill B19 – 2017 proposed to insert a new replacement s6(1)(g), the Bill, which deals in clause 2 with s6, no longer proposes to insert a new replacement s6(1)(g). Instead it relies in clause 1(a) on s2(1)(a) (incorrectly called “(a)” in the Bill (being prefaced by the words “Subject to section 16A”).

The new s16A as proposed to be inserted by clause 5 of the Bill reads:

\*[Processing of claims]

\[16A. \text{(1) Upon the finalisation or referral to Court of all claims lodged on or before 31 December 1998, the Chief Land Claims Commissioner shall certify in writing that such claims have been finalised or referred to the Court, and shall publish a notice in the Gazette and in the media circulating}\]

\(^7\) Occidental Exploration and Production Company v Republic of Ecuador (London Court of International Arbitration, Administered Case UN 3467), 1 July 2004.
\(^8\) Tecmed SA v United Mexican States, ICSID Case ARB (AF)/00/2, 29 May 2003.
nationwide and, in the province, stating the date on which the Commission shall start processing claims lodged -

(a) from 1 July 2014 until 28 July 2016; and

(b) in terms of the Restitution of Land Rights Amendment Act, 2017.

(2) Notwithstanding anything to the contrary contained in subsection (1), when processing claims lodged on or before 31 December 1998, the Commission may, on a case by case basis and where it would be in the interest of justice to do so, consider a claim contemplated in paragraph (a) or (b) of subsection (1) to determine whether a claimant who lodged a claim on or before 31 December 1998 has a valid claim.

18 Without prejudice to the First Issue raised by the Minerals Council above, the Minerals Council submits that the omission of s6(1)(g) and the insertion of the proposed s16A do not resolve the issues which were raised by the applicants and by the Court in the Land Access Case.

18.1 In paragraph 4 of the judgment in the Land Access Case the court summarised the applicants’ contentions as follows:

“[4] The applicants base their constitutional attack upon procedural defects in the passage of the Amendment Act. They allege that Parliament failed to facilitate adequate public participation before this Act was passed. Their substantive concerns about the Amendment Act are twofold. First, they are of the view that re-opening the window for lodgement of land claims will gravely prejudice claimants who filed their claims by 31 December 1998 but whose claims remain unresolved. This is primarily due to competing claims. Under the re-opened process, new claimants would be free to claim against land that has already been claimed or awarded to existing claimants. The Amendment Act contains no “ring-fencing” provisions; where people or communities have already lodged a claim or been restored to their land, the Amendment Act does not immunise the land against claims lodged under the Amendment Act. The applicants also aver that the Commission lacks capacity, which is why there are still many claims which are yet to be finalised. If more claims are added under the Amendment Act, that will exacerbate an already intolerable situation. Second, the applicants argue that section 6(1)(g) is impermissibly vague, and thus fails to protect adequately the interests of existing claimants. The section requires the Commission to “ensure that priority is given” to claims lodged by the 31 December 1998 deadline. It does not, however, elaborate what this means in practice.”.

Footnote 6 above reads:

The applicants contend that section 6(1)(g) is impermissibly vague as: (i) the words “ensure priority is given” are capable of multiple interpretations and as the term is not
defined it will be up to Executive and administrative officials to give it meaning; (ii) this leads to a likelihood of conflicting interpretations by different officials at different times with regard to different claims; and (iii) this is itself problematic as the provision has the potential to affect various rights in the Constitution including that contained in section 25(7), and it is a principle of law that legislation should give proper guidance to administrators when exercising a discretion if fundamental rights may be limited. They also allege that various organs of State have adopted different interpretations of the provision already, none of which is outright correct, as they are all plausible. Thus, the applicants argue, the provision is in conflict with the doctrine against vagueness of laws which "requires that laws must be written in a clear and accessible manner" (see Affordable Medicines Trust and Others v Minister of Health and Others [2005] ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 108). According to the applicants, the following are plausible interpretations of the words “ensure that priority is given”: (a) old claims have substantive priority over new claims competing for restoration of the same land; (b) land already restored to an old claimant cannot be expropriated and restored to a new claimant; (c) all old claims must be finalised before new claims can be processed; (d) old and new claims competing for the same land must be processed simultaneously, but non-competing new claims must only be dealt with after all old claims are finalised; or (e) a competing new claimant will only be treated as an interested party in respect of a corresponding existing claim.”.

18.2 In relation to the hearings on the Restitution of Land Rights Amendment Bill, 2014 in the Provinces, the court said the following in the following paragraphs in its judgment.

(1) In paragraph 22 in relation to the hearing in Port Elizabeth, the court said:

"Those in attendance questioned the wisdom of re-opening claims when a significant number of old claims remained unresolved.".

(2) In paragraph 31 in relation to the hearing in Johannesburg, the court said,

"Members of the public demanded that the re-opening of claims should commence only after all outstanding old claims had been settled. ".

(3) In paragraph 33 in relation to the hearing in Pietermaritzburg, the court said:

"There was loud approval by the people of a suggestion by the Legal Resources Centre that the Bill provide for the ring-fencing of old claims to protect them from competing new claims."

(4) In paragraph 36 in relation to the hearing in Polokwane, the court said:

" Those whose concerns involved outstanding land claims were not permitted to raise them inside the venue of the hearing."

(5) In paragraph 39 in relation to the Elukwatini hearing, the court said:

"A concern was raised that re-opening the claims process would interfere with outstanding land claims adversely."

(6) In paragraph 40 in relation to the Belfast hearing, the court said:
“They complained about the slow pace of restitution and sought clarity on how the re-opening would affect existing outstanding claims.”.

(7) In paragraph 47 in relation to the Cape Town Hearing, the court said:

“In addition to the concerns expressed in other provinces about the Bill’s lack of protection for existing claims and capacity problems at the Commission, attendees were frustrated by the Department’s failure to honour approved claims because of perceived lobbying by traditional leaders.”.

(8) In paragraph 50 in relation to Limpopo’s negotiating mandate, the court said:

“Limpopo’s negotiating mandate required its delegates to take specific concerns into account when voting, including the protection of existing claims . . .”.

18.3 Finally, in dealing with the fact that its order of invalidity would take effect on date of the judgment (i.e. on 28 July 2016) and would hence be prospective, the court said the following in paragraph 89:

“[89] In the face of the prospective order of invalidity, a question arises as to when and how the preserved new claims that compete with old claims will be considered. The effect of the prospective nature of the declaration of invalidity is to keep alive the contentious section 6(1)(g) of the Restitution Act insofar as the disposal of the old and preserved new claims is concerned. In terms of this section the Commission must “ensure that priority is given” to old claims. This raises all the problems that the applicants are complaining about and brings about uncertainty that may be prejudicial to claimants whose claims were lodged by 31 December 1998. Because the Amendment Act has been declared invalid in its entirety, I do not find it necessary to grapple with what exactly section 6(1)(g) means merely for purposes of how it should apply to old and preserved new claims. It seems to me that a just and equitable remedy is to interdict the settlement, and referral to the Land Claims Court, of all new claims, whether competing with the old or not. Our wide remedial power under section 172(1)(b) of the Constitution permits us to do so. Even though the new claims have been kept alive, the reality is that the Restitution Act under which they were lodged has been found to be invalid. The interdict is consonant with this reality. In the face of the declaration of invalidity, there cannot be much cause for complaint for keeping the new applications in abeyance. Also, the question how new claims should be dealt with whilst there are outstanding old claims is fraught with imponderables. It is best left to the Legislature to resolve.”.

Footnote 86 reads:

“[86] For example, see the applicants’ concerns regarding section 6(1)(g) in [4].”.
The Minerals Council submits that:

19.1 the omission of s6(1)(g) and the insertion of the proposed s16A do not solve the interpretational difficulties which were highlighted in the Land Access Case;

19.2 these sections should in fact provide for the following as highlighted in the above-quoted footnote 6 in the judgment in the Land Access Case, namely:

“(a) old claims have substantive priority over new claims competing for restoration of the same land; (b) land already restored to an old claimant cannot be expropriated and restored to a new claimant”;

19.3 the proposed new s16A(2) also does not solve the problem, and simply reflects the finding to the same effect in the judgment in In Re Amaqamu Community Claim (Land Access Movement South Africa & Others as Amici Curiae) 2017 (3) SA409 (LCC) and in relation to which in the Memorandum on the Objects of the Bill, paragraph 2.6, it is indeed stated that the provisions of s16A(2) whereby during the processing of claims lodged on or before 31 December 1998 the Commission may consider a new claim to determine whether the first mentioned claim is a valid claim, are indeed “only in order to ascertain whether a claimant who lodged his or her claim by 31 December 1998 has a valid claim for restitution”;

19.4 in the Memorandum on the objects of the Bill, paragraph 2.6, last sentence, the statement that “The Bill separates the lodgement of a claim from the processing of a claim” does not deal with the abovementioned problem as identified in the Land Access Case, namely that a successful claim lodged on or before 31 December 1998 is still vulnerable to the subsequent consideration of a claim lodged after that date;

19.5 insofar as the Honourable Member who tabled the Bill thinks that if a claim lodged on or before 31 December 1998 has been successful it is unlikely that a subsequent claim will be successful, he is mistaken in that this is not necessarily so because the subsequent claimant (whose claim may be lodged after the successful finalisation of the first mentioned claim) may adduce new evidence which contradicts the evidence adduced in support of the first mentioned claim.

20 In other words, if the Minerals Council’s submission in relation to the First Issue raised by the Minerals Council above is not accepted, a new replacement s6(1)(g) and the proposed new s16A should provide that:

20.1 if there is an existing claim lodged on or before 31 December 1998, then save in the circumstances envisaged in the proposed s16A(2) it is only if such existing claim is unsuccessful, that a new claim can be considered at all;

20.2 if there is an existing claim lodged in terms of the Restitution of Land Rights Amendment Act, 2014, then save in the circumstances envisaged in the proposed s16A(2) it is only
if such existing claim is unsuccessful, that a new claim in terms of the Amendment Act, 2017, could be considered at all;

20.3 If there are no existing claims lodged either on or before 31 December 1998 or in terms of the Amendment Act, 2014, then a claim lodged by the proposed new cut-off date of five years from the commencement of the Amendment Act, 2017 in the proposed s2(1)(e) of the Restitution Act in terms of the Amendment Act, 2017 could proceed.

21 In the above regard, the Minerals Council points out that some of its members have made available land for restoration to existing claimants who lodged their claims on or before 31 December 1998, such members acting in the belief that such restoration would put an end to any claims for restitution of the relevant land. It would be inequitable if the self-same land could now be subjected to new restitution claims. Therefore, the Minerals Council submits that existing claims should indeed be “ring-fenced” as suggested by the applicants in paragraph 4 of the judgment in the Land Access Case. 9

22 Finally, the Minerals Council submits that in its reference to “finalisation or referral to Court”, the proposed s16A has misinterpreted the court’s reference in paragraph 87 of the judgment in the Land Access Case to the Commission continuing “to settle or refer to the Land Claims Court all land restitution claims filed by 31 December 1998”. The Minerals Council submits that these are not alternatives, and rather that finalisation of a claim occurs either by settlement by the Commission or by a final judgment (be it by the Land Claims Court, the Supreme Court of Appeal, or the Constitutional Court) from which no further appeal lies.

OTHER ISSUE: PROPOSED REPEAL IN CLAUSE 15 OF THE BILL OF THE AMENDMENT ACT, 2014

23 Clause 15 of the Bill proposes the repeal of the Amendment Act, 2014. However, the Amendment Act, 2014 has already been declared invalid in the Land Access Case, paragraphs 93.2 and 93.3, so that technically it may not now be possible to repeal it, a matter which the Minerals Council recommends be considered by the Parliamentary Law Advisers.

CONCLUSION

24 The Minerals Council therefore respectfully requests that the Parliamentary Portfolio Committee recommend that the Bill not be passed, but that if it is to be passed it first be amended in accordance with the Minerals Council’s submissions above.

---

9 The Minerals Council submits that even if subsequent claims were to be stated to qualify only for equitable redress as defined in s1 of the Restitution Act (i.e. including by grant of alternative state-owned land or by payment of compensation by the State, but excluding by way of restoration as so defined), that would still not solve the problem in that thereby the State would have to bear the cost of restitution twice or even thrice in regard to the same claimed land, i.e. once in the form of restitution (whether by restoration or equitable redress) to the existing claimant, and again (by way of equitable redress) to a second or even to a third claimant.
Annexures

A: Economic importance of mining in South Africa
B: Surface use for mining
THE ECONOMIC IMPORTANCE OF MINING IN SOUTH AFRICA

The establishment of a mine brings untold benefits to a community. Investments in roads, schools, clinics, safety & security and recreational facilities improve community welfare. The income resulting from being employed at the mine is a principal and direct way in which the community’s well-being is changed positively. In South Africa, the social multiplier is 1:10 highlighting the extent to which the employment of one person can have on an entire household including extended family members. The multiplier effects go beyond just the impact on job creation and infrastructure development but also improvement in management processes and systems. At a macro level the setting up of a mine in a community has positive spin-offs for other economic sectors such as agriculture, retail & wholesale, finance & insurance, construction, etc. (Figure 1). The backward and forward linkages continue throughout the lifetime of a mine.

In South Africa the mining sector has historically paid higher wages compared to other sectors of the economy (see Table 1 below).

Figure 1: The establishment of a mine results new jobs and higher incomes in other sectors

Households: The household sector enjoys the most benefits in terms of wages and salaries as a result of being employed by the mine directly. The increase in household income could also be a result of people who were previously unemployed now earning an income. Indirect benefits include bursaries extended to the mine’s employees and their children, and non-workers. This helps shift the depth of human capital in that particular community. Higher demand for housing increases income of people employed in the construction sector, for example.

Retail & wholesale: The establishment of a mine attracts ‘greenfield’ investment in new shops and eateries thus increasing household income and employment in the community. Some retail outlets expand operations in response to the increased demand brought about by higher aggregate income. The income of the property developers also increase.

Agriculture: Mining can have a direct economic benefit for agriculture. The increase in demand for food inevitably increases incomes for suppliers (and employees) in the agricultural sector. The sector could also respond by hiring more workers. Ironically the agricultural sector is usually thought to be in completion for land and water with the mining sector. While it is true that globally in some jurisdictions agriculture is prioritised whilst in others certain
land portions are strictly designated for agricultural/industrial use. Internationally, evidence suggests that these sectors can and do co-exist, providing back-and-forth growth catalysts for the development and sustainability of communities.

The infrastructure triggered by mining development may be needed for agriculture e.g. roads, and banking services. Mining development can support local agricultural value chains and local agribusiness entrepreneurs through skills and capacity building programs.

- **Manufacturing:** The benefit to the manufacturing sector may not necessarily accrue directly to the community but to the wider economy as the mine sources manufactured goods from across the country. Household spending on consumer goods soars as a result of the mine establishment.

- **Community services:** These are services which include education, health, recreation, and personal care (hair salons, spas etc.). There is also growth in the informal sector offering such services as haircuts, cobbler, repair & maintenance of houses and automobiles, hawkers and vendors, and other similar services.

- **Construction:** Offices, houses for employee accommodation, and other auxiliary facilities such as schools, clinics, shops, and roads further boost employment and household incomes.

- **Finance and insurance:** Financial and banking services are among the most important services that are demanded by the mine and its employees. The mine will require insurance services, although the insurance firm does not have to be physically present in the area, which means the value of having the mine established is felt economy-wide. Household benefit with the presence of the financial institution in the community in terms of, inter alia, access to credit and other banking services that can hardly be accessed remotely.

- **Transport and communication:** The mining firm will require transport services. Some of these services will be internal to the mine while it contracts transports firms to deliver the ‘finished’ products to ports for export or to domestic consumers.

Telecommunication services (mobile, fixed, and internet), which are enablers will form part of the recurrent expenditure that the mine consumes.

At a micro level, Figure 2 depicts actual expenditures by mining companies. The data – used here for illustrative purposes - is from the Annual Financial Statistics (2015) published by Statistics South Africa. While it is aggregate data, the entries indicate actual expenditure lines common with mining firms. Most of the expenditure is with enterprises that have located in or around the area where the mine is based.

**Figure 2: Selected mining sector expenditure items* (R mn; 2015)**

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>IT</td>
<td>R113</td>
<td>Insurance premiums</td>
<td>R1 631</td>
<td>Interest</td>
<td>R19 329</td>
<td>Mineral rights leased</td>
<td>R135</td>
<td>Motor vehicle running expenses</td>
<td>R1 710</td>
<td>Operational leasing &amp; hiring of vehicles</td>
<td>R2 305</td>
<td>Stationery</td>
<td>R182</td>
<td>Postal services</td>
<td>R26</td>
</tr>
<tr>
<td>Security services</td>
<td>R975</td>
<td>Property tax</td>
<td>R78</td>
<td>Provisions</td>
<td>R1 913</td>
<td>Railage &amp; transport-out</td>
<td>R25 084</td>
<td>Rentals</td>
<td>R23 852</td>
<td>Repair &amp; maintenance</td>
<td>R14 126</td>
<td>Research and development</td>
<td>R968</td>
<td>Royalties</td>
<td>R4 961</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Training</td>
<td>R537</td>
<td>Subcontractors</td>
<td>R19 982</td>
<td>Telecommunication services</td>
<td>R298</td>
<td>Travelling</td>
<td>R1073</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Earning Power of the Mining Sector**

Source: Chamber of Mines, Stats SA

*The Annual Financial Statistics contains 35 expenditure lines for the mining industry.

According to Stats SA\textsuperscript{10} between 2010 and 2015, employees in Mining and Utilities continued to be the top performing earners, with the largest increases in earnings also recorded for these two industries (R2 500 and R1 500 respectively).

\textsuperscript{10} Labour market dynamics in South Africa, 2015.
followed by Agriculture (R936)”. Mining has the largest share – 99.3%\(^{11}\) - of people employed in the formal sector, which contributes to the sector paying taxes to the fiscus without ‘leakages’.

Using median monthly earnings of employees as a criterion for earning power, table 1 indicates that earnings in the mining sector ranked among the top three in the period 2010-2015. In 2014 and 2015 earnings in the sector were - respectively R7,000 and R7,500 - tied for first spot with the earnings of workers in the utilities industry.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Agriculture</td>
<td>1 295</td>
<td>1 300</td>
<td>1 495</td>
<td>1 733</td>
<td>2 153</td>
<td>2 231</td>
</tr>
<tr>
<td>Mining</td>
<td>5 000</td>
<td>5 800</td>
<td>6 000</td>
<td>6 000</td>
<td>7 000</td>
<td>7 500</td>
</tr>
<tr>
<td>Manufacturing</td>
<td>3 250</td>
<td>3 500</td>
<td>3 500</td>
<td>3 672</td>
<td>3 900</td>
<td>3 800</td>
</tr>
<tr>
<td>Utilities</td>
<td>6 000</td>
<td>6 000</td>
<td>6 000</td>
<td>8 666</td>
<td>7 000</td>
<td>7 500</td>
</tr>
<tr>
<td>Construction</td>
<td>2 437</td>
<td>2 600</td>
<td>2 600</td>
<td>2 800</td>
<td>2 816</td>
<td>3 000</td>
</tr>
<tr>
<td>Trade</td>
<td>2 505</td>
<td>2 800</td>
<td>3 000</td>
<td>3 000</td>
<td>3 033</td>
<td>3 100</td>
</tr>
<tr>
<td>Transport</td>
<td>3 500</td>
<td>3 600</td>
<td>3 800</td>
<td>3 900</td>
<td>4 000</td>
<td>4 000</td>
</tr>
<tr>
<td>Finance</td>
<td>3 501</td>
<td>4 333</td>
<td>4 000</td>
<td>4 000</td>
<td>4 000</td>
<td>4 000</td>
</tr>
<tr>
<td>Services</td>
<td>6 000</td>
<td>6 000</td>
<td>6 500</td>
<td>6 000</td>
<td>5 000</td>
<td>5 000</td>
</tr>
<tr>
<td>Private households</td>
<td>1 000</td>
<td>1 200</td>
<td>1 200</td>
<td>1 300</td>
<td>1 400</td>
<td>1 500</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>2 900</strong></td>
<td><strong>3 000</strong></td>
<td><strong>3 115</strong></td>
<td><strong>3 033</strong></td>
<td><strong>3 033</strong></td>
<td><strong>3 100</strong></td>
</tr>
</tbody>
</table>

Source: Stats SA

Provincial Economy

Four of the nine provinces in South Africa depend on mining i.e. mining is the largest economic sector. The North West province, by far, depends on mining activity with mining sector value add recording R58,9 billion in 2015. The second largest mining province is Mpumalanga, where mining GDP was R51,5 billion. North West is the third province where the mining sector is the biggest with mining GDP value add of R49,7 billion. The following graphs show that provinces where mining is the biggest industry. In view of the spin-offs emanating from the establishment of a mine it is clear that for most communities in these provinces mining is an important sector.
Northern Cape: GDP Value Added by Sector (R mn)

Key mineral(s):
- Manganese
- Iron ore
- Diamonds

Mining industry employment (2015):
- 21,894

Mpumalanga: GDP Value Added by Sector (R mn)

Key mineral(s):
- Gold
- Coal

Mining industry employment (2015):
- 46,500
1

1.1 Special attributes of mining

There are special attributes which apply to the mining industry and which do not apply to other land uses, namely the following:

(1) Minerals are area-bound.

(2) Mineral deposits, and therefore also mining activities, extend across artificial land, municipal and provincial boundaries.

(3) Mining is in the national interest and affects the economic interest of South Africa as a whole.

(4) Vested land use and development rights have been acquired and exist under the current statutory provisions and which rights should not be subjected to negation or deprivation.

(5) Mining is a temporary land use activity.

(6) Upon cessation of mining once the minerals have been extracted, the land must as far as is reasonably practicable be rehabilitated to its natural or predetermined state.

As can be seen, mining, as a land use typology, is unique in many respects. For one, it is geographically bound to the source of the mineral and, as a result it cannot be planned for in a typical planning sense. In other words, a planning body cannot, in advance, determine the optimum situational context of a future mining land use as it would typically do for other land-use typologies, including farming.

1.2 The legal position of the mining industry in regard to land use, prior to the Constitution of the Republic of South Africa, 1996

Both statutorily and at common law, mining uses predominated over other land uses.

(7) Statutorily, the following are examples of provisions which applied.

(a) Sections 90(1) and 91(1) of the Mining Rights Act, 1967 respectively provided as follows:

(i) Section 90(1): "The right of disposal over the surface of proclaimed land and land held under mining title is reserved to the State for the purposes of this Act or any other law, and save as is specially otherwise provided in this Act, the surface of land held under such title shall not without the written permission of the mining commissioner be used otherwise than for mining."

(ii) Section 91(1):

"The mining commissioner may grant permission to any person to use the surface of any proclaimed land or land held under mining title for agriculture or afforestation, and the State President may authorise any department as defined in section 1 of the Public Service Act, 1957 (Act No.54 of 1957), or the railway administration to use for such
purposes the surface of any such land owned by the State and not held by a Lessee”.

(b) Section 5(1) of the Minerals Act, 1991 provided that:

“Subject to the provisions of this Act, the holder of the right to any mineral in respect of land or tailings as the case maybe, or any person who has acquired the consent of such holder . . . , shall have the right to enter upon such land or the land on which such tailings are situated, as the case may be, together with such persons, plant or equipment as may be required for purposes of prospecting or mining and to prospect and mine for such mineral on or in such land or tailings as the case may be, and to dispose thereof.”,

and as a corollary s23(1) of that Act provided that:

“(1) If any person in any manner uses or causes to be used or intends to use or to cause to be used the surface of any land or includes or causes it to be included or intends to include or to cause it to be included into any town planning scheme which may, in the opinion of the Minister, detrimentally affect the object of this Act in relation to the optimal exploitation of any mineral which occurs or may occur in economically exploitable quantities in or on such land or in tailings on such land, the Minister may —

(a) cause an investigation to be held into the matter., and

(b) after consideration of the comment contemplated in subsection (2) if any, and the result of the investigation contemplated in paragraph (a), issue a direction ordering such person to take such rectifying steps within a period specified in the direction as may be required by the Minister.”.

(8) At common law, the following prevailed.

(a) The mineral right holder was entitled to use the surface of land for prospecting, mining, and purposes incidental thereto, it having been put thus in the leading case of Hudson v Mann & Another 1950(4) SA485(T) (which was again approved recently in Anglo Operations Ltd v Sandhurst Estates (Ply) Ltd 2007(2) SA363 SCA)):

“In the course of his operations, he ((the mineral right holder)) is entitled to exercise all such subsidiary or ancillary rights without which he will not be able efficiently to carry out his prospecting and/or mining operations”.

(b) As a corollary to the above, the mineral right holder could obtain an interdict against the landowner from engaging in land uses which would frustrate the exercise of the mineral right holder’s rights of surface use, such as by way of establishment of townships or agricultural holdings, and building of dams and other structures. See for example:

Transvaal Property & Investment Co Ltd v SA Townships Mining & Finance Corporation Ltd 1938 TPD 512 (township establishment);

Yelland & Others v Group Areas Development Board 1960 (2) SA151 (T);
Nolte v Johannesburg Consolidated Investment Co Ltd 1943 AD 295;
Zuurbekom Ltd v Union Corporation Ltd 1947(1) SA514 (A);

1.3 Special recognition of mining uses in some statutory land use provisions

In recognition of the abovementioned special attributes of the mining industry and of the abovementioned recognition of the predominance of mining uses over other land uses, amongst others the following special provisions directly or indirectly applicable to mining uses appeared in legislation.

(1) In the Town-planning and Townships Ordinance, 1986 (Transvaal), the following provisions appear:

(a) sections 21 and 22:

"21 Town-planning scheme in respect of proclaimed land

(1) Subject to the provisions of subsection (3) and section 22, a local authority shall not prepare a town-planning scheme in respect of land —

(a) which is proclaimed land;

(b) on which prospecting, digging or mining operations are being carried out,

unless such land is situated within an approved township or within a township in respect of which a notice as contemplated in section 111 was published.

 . . .

22. Town-planning scheme in respect of deproclaimed land

(1) When a notice of intention to de-proclaim land is published in terms of section 44(3) of the Mining Rights Act, 1967, and the land defined in the notice is situated within the area of jurisdiction of a local authority: —

the local authority may . . .

 . . .

(a) prepare a town-planning scheme in respect of that land or any portion thereof."

(b) Section 43(1) and (5):

"(1) Where on the date of the coming into operation of an approved scheme any land or building is being used or, within one month immediately prior to that date, was used for a purpose which is not a purpose for which the land concerned has been reserved or zoned in terms of the provisions of the scheme, but which is otherwise lawful and not subject to any prohibition in terms of this Ordinance, the use for that purpose may, subject to the provisions of subsection (2), be continued after that date . . .

(5) The local authority may, on application by the owner of any land . . . extend the period . . . for a further period or periods, not exceeding 15 years in the aggregate . . .".
1. Section 69(5):

"(5) Where —

(a) the rights to minerals in respect of the land on which the applicant wishes to establish a township have been severed from the ownership of the land;

(b) the owner of land contemplated in paragraph (a) has, in respect of the land, granted a lease of the rights to minerals or entered into a prospecting contract.

the applicant shall satisfy the local authority that —

(i) the holder, usufructuary or lessee of the rights to minerals or the holder of the rights in terms of the prospecting contract or notarial deed: —

(aa) has consented to the establishment of a township; or

(bb) cannot be traced and that the applicant has given notice of the application in such manner as may be prescribed

(2)

(c) In similar fashion to s69 of the above Ordinance, regulation 21(6) of the regulations made in terms of the Development Facilitation Act, 1995 provided for notice to the mineral right holder, of a land development application, and the application form (annexure B in the regulations) provided for lodgement of the mineral right holder's consent.

(d) Furthermore, the definition of "land development" in s1 of the Development Facilitation Act, 1995 expressly excludes prospecting and mining. It reads as follows (underlining added):

"'land development' means any procedure aimed at changing the use of land for the purpose of using the land mainly for residential, industrial, business, small-scale farming, community or similar purposes, including such a procedure in terms of Chapter V, VI or VII, but excluding such a procedure in terms of any other law relating exclusively to prospecting or mining;".

(3) Although s6(1) of the Physical Planning Act, 1967 prohibited use of land except under authority of a permit, s6(2) provided that:

"(2) Subsection (1) shall not apply in respect of —

(c) the use of land for prospecting or mining for base minerals or for any other purpose for which authority, provision or consent is required in terms of any other law . . . ".

(4) Similarly, although s27(1) of the Physical Planning Act, 1991 restricted uses of land and grants of permissions in conflict with regional or urban structure plans, s27(2) provided that:

"(2) The provisions of subsection (1)(b) and (c) shall not apply in respect of any right of any person to prospect for or to mine any mineral as defined in section 1 of the Minerals Act, 1991, or the use of any land for prospecting or mining purposes, or for purposes connected therewith.".
Section 18(a) of the Southern Johannesburg Region Town Planning Scheme, 1962, which was the subject of *Falcon Investments Ltd v CD of Birnam* 1973 (4) SA 384 (A), provided that:

"18 . . . nothing in the foregoing provisions of this part of this Scheme shall be construed as prohibiting or restricting or enabling the Local Authority to prohibit or restrict —

(a) the winning of minerals by underground working, or the winning of minerals by surface working, or the erection of any buildings or the carrying out of any works which is incidental thereto as regards any land not included in established townships and agricultural holdings; . . . ."

To address the problem of unreasonable withholding of consent by mineral right holders to township establishment the Expropriation of Mineral Rights (Townships) Act, 1969 empowered the expropriation of mineral rights in those circumstances.

The Subdivision of Agricultural Land Act, 1970, in ss3(e)(i) and (ii) recognises mining as deserving of special exceptions, in providing that without Ministerial consent:

"(e) (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); and

(ii) 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 reference to s1 of the Mines and Works Act, 1956 now falling in terms of s12(1) of the Interpretation Act, 1957 to be read as a reference to s102 of the Mine Health and Safety Act, 1996.

1.4 The legal position of the mining industry in regard to land use under the Constitution of the Republic of South Africa, 1996

In terms of the Constitution of the Republic of South Africa, 1996, mining is a national competence since it appears neither in schedules 4 nor 5. As a result, the MPRDA, which is national legislation, provides amongst others for the following.

(1) The objects of the MPRDA as disclosed in section 2 are to recognise the State's sovereignty and custodianhip over the nation's mineral and petroleum resources, to promote equitable access to such resources, to expand empowerment in the mineral and petroleum industries; to promote economic growth and mineral resources development; to promote employment and advance social and economic welfare; to provide for security of tenure in respect of prospecting, exploration, mining and production operations, to promote orderly and ecologically sustainable mineral development; and to ensure socio-economic development of mining areas.

(2) Section 3 provides that as custodian of the nation's mineral and petroleum resources, the State, acting through the national Minister of Mineral Resources may grant prospecting and mining rights and that the Minister of Finance may, as he has done in the Mineral and Petroleum Resources Royalty Act, 2008, levy a royalty payable to the State.
Sections 5(2) and (3) provide that the holders of prospecting and mining rights are entitled to the rights referred to in section 5 and to such other rights as may be granted under the MPRDA or any other law, and that:

"(3) Subject to this Act, any holder of a prospecting right, a mining right, exploration right or production right may —

(a) enter the land to which such right relates together with his or her employees, and may bring onto that land any plant, machinery or equipment and build, construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting, mining, exploration or production, as the case may be;

(b) prospect, mine, explore or produce, as the case may be, for his or her own account on or under that land for the mineral or petroleum for which such right has been granted;

(c) remove and dispose of any such mineral found during the course of prospecting, mining, exploration or production, as the case may be;

(cA) subject to section 59B of the Diamonds Act, 1986 (Act No. 56 of 1986, (in the case of diamond) remove and dispose of any diamond found during the course of mining operations;

(d) subject to the National Water Act, 1998, , use water from any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting, mining, exploration or production on such land; and

(e) carry out any other activity incidental to prospecting, mining, exploration or production operations, which activity does not contravene the provisions of this Act."

Section 48 empowers the Minister to grant a prospecting or mining right even in respect of land comprising a residential area or land reserved in terms of any other law, if the Minister is satisfied that:

"(a) having regard to the sustainable development of the mineral resources involved and the national interest, it is desirable to issue it;

(b) the reconnaissance, prospecting or mining will take place within the framework of national environmental management policies, norms and standards; and

(c) the granting of such rights or permits will not detrimentally affect the interests of any holder of a prospecting right or mining right."

Section 53 ("Use of land surface rights contrary to the objects of Act provides as follows:

"53, Use of land surface rights contrary to objects of Act

(1) Subject to subsection (2), any person who intends to use the surface of any land in any way which may be contrary to any object of this Act or which is likely to impede any such object must apply to the Minister for approval in the prescribed manner

(2) Subsection (1) does not apply to -
(a) farming or any use incidental thereto; or

(b) the use of any land which lies within an approved town-planning scheme which has applied for and obtained approval in terms of subsection (1); or

(c) any other use which the Minister may determine by notice in the Gazette.

(3) Despite subsection (1), the Minister may cause an investigation to be conducted if it is alleged that a person intends to use the surface of any land in any way that could result in the mining of mineral resources being detrimentally affected.

(4) When an investigation is conducted in terms of subsection (3), the Regional Manager must –

(a) by written notice served on the person concerned, notify the person of the allegation and of the Minister's intention to issue a directive to take corrective measures;

(b) set out the measures to be taken in order to rectify the matter; and

(c) offer that person the opportunity to respond within 30 days.

(5) After considering the results of the investigation contemplated in subsection (3), and any representations contemplated in subsection (4)(c), the Minister may direct the person concerned to take the necessary corrective measures within a period specified in the directive.”.

(6) The above rights of entry and restrictions on other surface uses have been confirmed also by the Courts in their judgments in:

Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd
[2011] 1 All SA 364 (SCA)

Sephaku Tin (Pty) Ltd v Kranskoppie Boerdery,
GNP 47561/2010, 7 May 2012

Witwatersrand Estates Ltd & Others v AfriSam (South Africa) Properties (Pty) Ltd & Others, SGJ 29427/2012, 10 December 2013

Coal of Africa Ltd & Another v Akkertand Boerdery (Pty) Ltd,
NGP 38528/2012, February 2014

Anglo American Inyosi Coal (Pty) Ltd v Claassen & Another,
GDP 40387/2013, 28 March 2014

Joubert & Others v Maranda Mining Company (Pty) Ltd 2010(1)
SA198 (SCA) and in regard to which subsequently also [2010] 2 All SA 67 (GNP)

Aquila Steel SA (Pty) Ltd v South African Steel Company (Pty) Ltd
GNP14612/2013, 14 March 2014 and 30 May 2014

Itireleng Bakgatle Mineral Resources (Pty) Ltd & Another v Maledu & Others,
NWHC 495/2015, 16 February 2017