CHAMBER OF MINES
of South Africa

T: 011 498 7100
E: info@chamberofmines.org.za

5 Hollard Street, Johannesburg 2001
PO Box 61809, Marshalltown 2107

Mr Pandelis Gregoriou
Head of Legal Services Department
South African Human Rights Commission
33 Hoofd Street
Braampark-Forum 111
Braamfontein
2198

Dear Mr Gregoriou

RE: NATIONAL INVESTIGATIVE HEARING ON THE UNDERLYING SOCIO-ECONOMIC CHALLENGES IN MINING AFFECTED COMMUNITIES

The Chamber of Mines welcomes the opportunity to provide additional information to the commission with a view to enhancing understanding of the issues raised.

GENERAL

4.1. The Chamber of Mines estimates that it represents 90% of mineral production by value. The Chamber currently has 87 members, including three associations. The full membership list can be found in Annexure 1.

We do not have a comprehensive list of companies that are not members.

4.2. Regarding the **ring fencing of a proportion of royalties for the benefit of mining areas**, we would envisage the National Treasury introducing legislation which specifies the proportion of royalties to be allocated to mining areas, and the basis for allocation to regions. The proportion would be a matter for research, including on international practice, and for public and parliamentary discourse.

In Ghana, for example 20% of royalties are allocated to mining regions and towns.

Once that proportion is determined, we would see it as a responsibility of the Financial and Fiscal Commission to determine on a regular basis allocations to provincial and local (including municipal) governments. The basis should be determined by:

- a combination of provincial and local contributions to royalty payments; and
- impacts of mining and developmental needs.

4.3. The **issue has been raised** by the Chamber and some individual members at various times, most notably during discussions on the new Minerals Act in 2001-2002 and in terms of the development of the Mineral and Petroleum Resources Royalty Act in 2008 and on various occasions since.

The mining industry through the Chamber was intricately involved in the minerals policy reform process, with discussions starting with the ANC in 1992. The industry and government agreed to move from a dual system of private and public ownership of mineral rights to a system of state custodianship of minerals, with the state licensing out the mineral rights on the basis of clear criteria. One of the key issues accepted by the industry was that the system of state custodianship also would enable the state to charge a severance tax or royalty on mining companies for the extraction of a non-renewable resource.

The Chamber's position on a severance tax, or royalty, is that the state has the sovereign right to impose a royalty for the extraction of a non-renewable resource. The Chamber also argued that on a sustainable development basis that the royalty should be ring fenced for investment in renewable forms of capital. In other words the conversion of non-renewable natural capital (the minerals) into financial capital would best serve the sustainable development agenda if it was then invested in human capital (skills development) or physical capital (infrastructure in communities). The worst outcome from a sustainable development point of view is if the non-renewable natural capital is converted into financial capital and this is then used for recurrent government expenditure (e.g. salaries).

In the discussions between the DMR and the Chamber, it was agreed that the royalties, or a substantial portion thereof, should be ring fenced for community development. This was reflected in the first draft of the Minerals Act that was published in 2001. However, given the fact that Treasury has sole mandate to develop taxation legislation, the royalty discussion was removed from the Minerals Bill process and a separate Royalty Act was developed by Treasury.

The National Treasury has, in the past, always been firm in its position that it was unwilling to countenance ring-fencing of fiscal revenues in principle, and of royalties in particular, on the grounds that the nation's natural resources belong to the citizenry as a whole. However, given developments in recent years that have drawn attention to mining's social impacts and underdevelopment in mining regions, the National Treasury may now be willing to reconsider. The nation's sustainable development ambitions are best served by using the mineral royalties for sustainable development outcomes and this includes investment in communities.

4.4. The Chamber **monitors** aggregate royalty payments annually. Given that there is no ring-fencing and the funds accrue to the general fiscus, it is not possible to monitor expenditure.

4.5. The Chamber's **Membership Compact** (see Annexure 2) was introduced in 2015, and its adoption was approved by the Chamber Council. All new members are required to sign the compact irrespective of the nature or scale of their businesses.

Members recognise that inappropriate behaviour by one company has an impact on the industry's reputation as a whole. Members are encouraged to act in concert, adopt leading practices and to strive for improvement. Where it make sense to do so, the Chamber collates data on behalf of members, and benchmarks this data against international and other standards. This may be described as a form of self-regulation. Again, where this is appropriate the Chamber will commission independent verification of data by a third party. This was done, for example, in respect of the Mining Charter compliance.

4.5.1 The Chamber **does not have executive or regulatory oversight role** over the activities of members. This is the role of the company's governance structures, government's regulatory functions and other bodies (such as auditors, stock exchanges, etc).

4.5.2 For the most part, the Chamber is **reliant on public reporting of activities** that would be seen as transgressing the membership compact. The most severe form of sanction the Chamber would be able to impose would be to expel a member from the organisation.

The membership compact is new to the Chamber and its members, and no cases of 'non-compliance' have yet been reported or acted upon. Procedures for dealing with transgressions will have to be developed over time. In principle, the intention would be to encourage compliance through the example of peers, then through peer pressure before the ultimate sanction is applied.

4.5.3. The Chamber would argue that **compliance with the law is what is required** of any operating company and that Chamber **members seek to go beyond** that.

There are many areas in which mining companies go beyond legal or regulatory requirements. In the area of health and safety which you raise:

- mining companies were the first to provide ART to HIV positive employees at a time when government was resistant to the idea;
- currently, the industry is working closely with government and organised labour on the Masoyise iTB campaign designed to reduce the incidence of TB among employees and in mining towns.
- both the Chamber and the gold companies involved in the Occupation Lung Disease Working Group are working intensively with the Compensation Commissioner at the National Department of Health to repair the dysfunctional Medical Bureau for Occupational Diseases.
- mining companies have committed to mine health and safety targets beyond that required in law. Of interest, Chamber of Mines members' performance far exceeds that of non-members.

- mining companies have collaborated with national bodies and between themselves in addressing employee indebtedness, and the claims made by unscrupulous lenders.

There are many other examples in many other spheres. That said, there are doubtless many areas where useful work could still be done.

4.6. The **living out allowance** was a well-intended initiative, introduced through collective bargaining in the late 1990s, to broaden mineworkers' accommodation choices beyond hostel living.

An unintended consequence, however, has been that recipients use the allowance, currently about R2,000 a month for workers in the lowest job categories, as part of their overall wage, not necessarily using all of it for board and accommodation.

This has contributed to the spread of informal settlements in and around mining towns, exacerbated by the flow of people from rural areas to those towns in search of economic opportunity. It is particularly pronounced on the platinum belt which was, until the impact of the 2008 international financial crisis began being felt, the fastest growing part of the mining sector.

Research commissioned by mining companies suggests that home ownership opportunities would not be the solution as only a small proportion of miners would want to own homes in those areas. The availability of more and affordable rental housing stock may mitigate the situation, depending how the market for rental housing versus informal housing were to play out. The situation is complex, however, and any attempts to de-emphasize the role of the living out allowance in recent wage negotiations has failed. We believe the situation calls for constructive dialogue between companies, the relevant levels of government and employees and communities in delivering accommodation options for employees and their families, where and how they are needed.

SOCIAL AND LABOUR PLANS

4.7. We know of the following companies who have made their **SLPs available on their websites**:

AngloGold Ashanti:

Lonmin

Anglo American Platinum

Harmony

Sibanye has indicated that their SLPs will be published later this year

4.8. The Chamber of Mines does not, as a matter of course, have access to members' SLPs and their annual compliance reports.

4.9. The Chamber, as part of its initiative to encourage transparency in respect of SLPs, is currently discussing internally a plan to request of its members copies of their SLPs and annual SLP compliance reports which we would then make available online. The Chamber does not have a right of access to members' documentation, so this would be limited to those companies willing to participate.

Where an SLP has not been approved by the DMR it is not the final version of the plan, so it would seem inappropriate to publicise it broadly. The authorisation by the DMR of some SLPs is overdue, with some not approved two years after submission. This impedes the community development efforts of some mining companies.

EIAs and EMPs are developed through transparent public processes. For this reason, we see no reason that the documents should not be publicly available and accessible, at least on request. Beyond that, environmental management is an extremely dynamic and ongoing process. While transparency in these respects would in principle be useful too, in practice it would be necessary that the information made available is provided in a holistic manner with clear understanding of context.

4.10. The Chamber **does not have the capacity or authority to monitor the impact of SLP and of social investment projects**. This is something that companies and the DMR are required

to do. We do, however, see value in such an exercise, particularly in establishing collective impact of projects and initiatives in mining regions.

LEGITIMATE REPRESENTATION

4.11. The Chamber does not provide guidance to members on **identifying legitimate representation**. We are very conscious of the issues that have arisen in this regard and their complexities.

The Mining Charter (and the DMR) require companies to engage primarily with constitutionally recognised authorities – local authorities and/or traditional authorities in the main. Those authorities often enjoy limited legitimacy in some jurisdictions, due to poor service delivery, perceptions that only they and their constituents benefit from commercially beneficial transactions or opposition to them due to other factors.

Clearly, mining companies need to work with all stakeholders that have often conflicting interests. But doing so can itself exacerbate social conflicts, and anyway it is not always easy for companies to develop a clear understanding of the complex and often hidden social dynamics at play. We look forward to the perspectives of the SAHRC panel on the issue.

4.12. In line with 4.11 above, the **Chamber does not provide guidance to members on issues of customary law**. On the role of traditional authorities, our impression is that there is no simple formula because traditional authorities have different levels of legitimacy at different locations, and the same applies to other sectors of communities.

As already mentioned, mining companies are required by regulation and the regulator to engage with traditional authorities where they exist in mining licence areas. There is evidence that some traditional authorities do not operate with the broad consent of their communities. In those situations, we can see the need for a more nuanced approach by companies. We hope the regulatory authorities will take this into account in their work. And, again, we look forward to the SAHRC recommendations on this issue.

ENVIRONMENTAL MANAGEMENT

4.13. **Water is acknowledged by the industry to be scarce and critical resource**. Water shortages are recognised as a serious business risk by the industry, alongside energy constraints and climate change. Industry as a whole has adopted sustainable water resources management approaches/initiatives such as water conservation and recycling, water demand management, integrated water resources management, separation of 'clean' water from 'dirty' water and the prevention of acid mine drainage. Many companies have adopted 'zero discharge' systems.

Although the Chamber is not involved in the day to day management of activities at the mines, it develops best practice guidelines and other tools on water resources management in the mines. Where a member is not compliant with the requirements of the law on water resources management, then the law (National Water Act) must take its course. The National Environmental Management Protected Areas Act (NEM: Protected Areas Act) describes the basis of designating an area as being protected, and by virtue of this statute, mining activities are not permitted in such an area and the Chamber is supportive of this position.

However there are areas that are colloquially regarded as "sensitive areas" by virtue of a particular outstanding universal value (such as unique heritage, water potential, biodiversity, spirituality, etc) as per the views of that particular constituency/stakeholder, but has not passed the stress test as a protected area to be proclaimed as such in terms of the NEM: Protected Areas Act. These areas are therefore contested terrain and therefore any activity (including mining activities) that takes place in such an area will be subjected to the various NEMA environmental decision making tools such as an Environmental Impact Assessments (EIA) or Strategic Environmental Assessments (SEA) to determine whether such an activity can proceed or not, or determine the increased level of environmental protection measures (beyond the norm) that should be imposed.

4.14. The National Environmental Management: Protected Areas Act (NEM:PAA) is the overarching legislative framework governing the declaration of areas as **protected areas**. The Act outlines

the process for the declaration of legally protected areas which allows for consultation and public participation by the Minister or MEC.

The Act places restrictions on prospecting and mining activities in protected areas, which the industry must comply with. The Chamber and a number of its member companies are members of the International Council on Mining and Metals (ICMM) and subscribe to its principles. This includes a commitment not to mine in legally protected areas and world heritage sites. The Chamber relies on the law to designate legally protected areas, and the appropriate buffer zones and, as such, will support mining activities next to or near protected areas as long as the environmental decision making tools have not identified any fatal flaws in the Environment Management Programme's commitment to undertake remedial measures to mitigate the impacts that will be caused.

4.15. The Chamber and its members were highly supportive of the development of the **One Environmental System** and are committed to its full implementation. Unfortunately, its implementation has been dogged by the tardy development of regulations, the lack of alignment between different legislation and different regulatory authorities, capacity constraints within the regulators, and, critically, the impractical and punitive financial regulations that have been developed.

4.16. The Chamber is committed to supporting SA's international commitment to lowering its GHG emissions, and the national policy to do so as reflected in the National Climate Change Response White Paper and the National Development Plan. The mining industry has gone far beyond regulatory requirements in an effort to reduce its carbon emissions through various initiative, especially through mitigation (energy efficiency) programmes. The mining sector has been a strong supporter of the Carbon Disclosure Project, and its members' disclosure on climate change impacts and mitigation, performance and improvements, have been widely recognised.

The Chamber acknowledges that carbon tax and other climate change response policy measures can assist a trajectory to lower carbon economy, if designed and implemented

appropriately. However, the Chamber notes that any imminent introduction of carbon tax would have negative economic and social impacts on various economic sectors of the economy, including mining, without having an impact on emission reduction (as near-term emission reduction targets have already been achieved).

CLOSURE

4.17. It is **not correct to say that a large number of mines close prematurely** – this is very often the exception rather than the rule. Further, very few operations have being declared insolvent or have entered business rescue. The only mines that the COM is aware of being closed prematurely are ERPM (Pamodzi & Aurora) and Blyvoorzicht mines, which are century old mining operations that predates the current contemporary environmental legislative frameworks which came into force only in 1990 and onwards.

In fact, it could be argued that – many operations in South Africa have in fact exceeded their original planned life of mine. While sales of assets do occur, there are usually undertaken on the basis of those operations being sold as going concerns. And, sales often facilitate the exchange of assets into a lower cost structure, which in turn enables the life of mine to be sustained and even extended. Where operations are placed on care and maintenance, social and environmental obligations continue to be met, as required by law.

Mines have to comply with South African constitutional and common law by conducting their operational and closure activities with due diligence and care for the rights of others. The holder remains liable and responsible for complying with the relevant provisions of all applicable environmental legislation until he/she has satisfied government of compliance to requirements. The holder is required in terms of the law to undertake the necessary rehabilitation practices and also apply for a closure certificate. Apart from the involvement of government and the holder during closure planning process, affected communities are also involved as key stakeholders for their views and input. The reports generated are available on request and some are accessible from respective company's website. The Chamber has also developed a best practice guideline on rehabilitation.

4.18. Care and maintenance is often referred to as temporary closure of a mine where the mine is said to be in a state of care and maintenance when it has temporarily stopped production for various technical, environmental, financial or labour related reasons.

Consultation with employees and employee representatives as well as the regulator is required when operational downsizing occurs. Further, consultation with the relevant authorities in respect of environmental management planning and the execution of SLPs is required by law.

Certainly there is room for improved communication with communities during operation, closure and when care and maintenance is envisaged in respect of timing and impacts, and – where possible – to mitigate negative impacts.