

Acknowledgements	xii
List of Abbreviations	xiii
Table of Cases	xiv
Table of Statutes	xviii
1 Introduction	1
1.1 Mineral Law: The Central Paradox	1
1.2 Proprietary and Regulatory Aspects	1
1.3 Line of Inquiry	2
2 Foundations of Mineral Law	4
2.1 Brief History	4
2.2 Core Property Concepts in Mineral Law	7
2.2.1 The <i>Cuius est Solum</i> Rule	7
2.2.2 ‘Severance’	8
2.2.3 Relationship between Mineral Rights Holders and Landowners	11
2.2.4 Search for an Appropriate Theoretical Basis	13
2.3 Impact of Public Law	15
2.4 Course of the Historical Analysis	15
3 Piecemeal Regulation in the Colonial and Union Eras (ca 1860 to 1964)	19
3.1 Introduction	19
3.2 Content of Regulatory Framework: Colonial Period and Union	20
3.2.1 State Control	21
3.2.1.1 Precious Stones	23
3.2.1.2 Precious Metals	26
3.2.1.3 Base Metals and/or Base Minerals	29
3.2.1.4 Natural Oil and Source Material	30
3.2.2 Discrimination	30
3.2.2.1 Colonial Treatment of Claims to Land and Minerals	30
3.2.2.1.1 Kimberley	31
3.2.2.1.2 Richtersveld	32
3.2.2.2 Racial Prejudice and the Labour Issue	33
3.2.2.3 Racial Segregation and Group Areas	34
3.3 Implications for Relationship between Owner and Mineral Rights Holder	35
3.4 Assessment	37
4 Regulation of Mineral Resources from 1964 to 1991: ‘Conferral’	39
4.1 Introduction	39
4.2 Extent of Regulation	45
4.2.1 State Control	45
4.2.1.1 Mining Rights Act 20 of 1967	46
4.2.1.2 Precious Stones Act 73 of 1964	48
4.2.2 Discrimination	51
4.3 Implications of Statutory Regulation for Entitlement to Minerals	53
4.4 Assessment	55

5	Regulation of Minerals and Mining between 1992 and 2004: 'Authorisations'	57
5.1	Introduction	57
5.2	Extent of Regulation	59
5.2.1	State Control	60
5.2.1.1	System of Authorisations	62
5.2.1.1.1	Types of Authorisations and their Content	62
5.2.1.1.2	Surface Rehabilitation	64
5.2.1.2	Overhaul of Previous Dispensation	66
5.2.2	Reversal of Discriminatory Policies	69
5.3	Implications for Dominium and Mineral Title	69
5.4	Assessment	72
6	The 'Custodianship' Model (Regulation in Mineral Law since 2004)	74
6.1	Background	74
6.1.1	Rationalisation of Mineral Laws	74
6.1.2	Outcomes of the Policy Review Process (1994 to 2002)	75
6.1.3	Character of the Mineral and Petroleum Resources Development Act 28 of 2002	78
6.1.3.1	Preamble, Purposes and Definitions	78
6.1.3.2	Fundamental Principles	79
6.2	Extent of Regulation	80
6.2.1	State Control: New Order Rights	81
6.2.1.1	Granting and Renewal of Rights	82
6.2.1.1.1	Prospecting Rights	82
6.2.1.1.2	Mining Rights	83
6.2.1.1.3	Retention Permits	84
6.2.1.1.4	Comment	85
6.2.1.2	Content of Rights Awarded	85
6.2.1.2.1	Rights and Entitlements	85
6.2.1.2.2	Duties	86
6.2.1.3	Negotiability of Rights	88
6.2.1.4	Powers of the Minister/Delegatee	90
6.2.2	State Control: Transitional Provisions	92
6.2.2.1	Process of Conversion	93
6.2.2.2	Conversion as Opposed to New Applications	101
6.2.2.3	Possible Adverse Effects of the Transitional Provisions	101
6.2.2.3.1	Factual Circumstances of Conversion	101
6.2.2.3.2	Expropriatory Effect?	104
6.2.2.3.3	Compensation	107
6.2.3	Reversal of Discriminatory Policies	111
6.3	Implications for Dominium	113
6.4	Assessment	114
7	Implications of the Systemic Change in Mineral Law	116
7.1	Introduction	116
7.2	Constitutional Context	116
7.2.1	Issues Raised	117
7.2.2	Flexible Structure of Analysis	118

7.2.2.1	Preliminary Questions	119
7.2.2.2	Deprivation Question	119
7.2.2.3	Expropriation Question	120
7.2.3	Implication of Conceptual Continuity	122
7.2.4	Excess and <i>De Facto</i> Expropriation	124
7.3	Example of a Section 25 Enquiry into the MPRDA: Comments on <i>Agri South Africa v Minister of Minerals and Energy</i>	126
7.3.1	Infringement?	127
7.3.1.1	Proprietary and Regulatory Aspects of the Law	128
7.3.1.2	System Change	130
7.3.1.3	New Nomenclature	131
7.3.1.4	Custodianship	133
7.3.1.5	What Was Lost?	136
7.3.2	Nature of Infringement on Property Interest	142
7.3.2.1	Curtailed of the <i>Ius Disponendi</i> by Imposition of Administrative Requirements	143
7.3.2.2	Loss of <i>Ius Disponendi</i> Pursuant to Failure to Obtain a New Order Right	145
7.3.2.3	Loss of <i>Ius Abutendi</i> Pursuant to Unsuccessful Conversion	148
7.3.3	Expropriation or Equalisation?	150
7.4	The Nationalisation Issue	154
7.4.1	The Argument for Nationalisation	154
7.4.2	Nationalisation within the Current Framework of the MPRDA	155

8 Lessons from the Past for the Present 157

8.1	Four Generations of Mineral Law	157
8.2	Link between Policy and Regulatory Purpose	157
8.3	Historical Development of Regulatory Framework in South African Mineral Law	159
8.4	Implications of Regulation for Ownership and Entitlement	162
8.4.1	Mineral Law in the Domain of both Property Law and Administrative Law	163
8.4.2	Right to Minerals and Right to Mine	163
8.4.3	Dilution and/or Adaptation of Private-law Principles	164
8.4.4	Continued Functionality of Rights	165
8.5	Concluding Remark	166

Bibliography 167

Index 174

List of Figures

Figure 1: Timeline of Key Events in South Africa	16
Figure 2: Map of South Africa 1885	19
Figure 3: Map of the Union of South Africa, ca 1920	22
Figure 4: Piecemeal Regulation of Minerals in Colonies and Union	24
Figure 5: Map of South Africa: Black Homelands, ca 1940	34
Figure 6: 1964 to 1991: 'Conferral' of Rights	42
Figure 7: Common-law and Statutory Rights to Minerals after 1964/1967	44
Figure 8: Transitional Period and the New Democratic Regime	61
Figure 9: Sequence of Transition from Third to Fourth Generation Rights	95
Fold out: Map of South Africa including Homelands	