GENERAL NOTICE

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DEPARTMENT OF LAND AFFAIRS

REPORT AND RECOMMENDATIONS BY THE PANEL OF EXPERTS ON THE DEVELOPMENT OF POLICY REGARDING LAND OWNERSHIP BY FOREIGNERS IN SOUTH AFRICA

The above-mentioned Report is hereby published for general comment by interested persons.

Comment must be submitted in writing within 60 days of the date of publication of this Notice in the Government *Gazette* and sent to :

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Note : The Afrikaans version of the Report is a translation of the original English Report.

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for DIRECTOR-GENERAL

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REPORT AND RECOMMENDATIONS
BY THE PANEL OF EXPERTS ON THE DEVELOPMENT OF POLICY REGARDING LAND OWNERSHIP BY FOREIGNERS IN SOUTH AFRICA

PRESENTED TO
THE MINISTER OF AGRICULTURE AND LAND AFFAIRS, HON. LULU XINGWANA

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Pretoria, City of Tshwane, August 2007

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In South Africa:

- The persons who made written and oral presentations to the Panel

- Department of Land Affairs

- Department of Provincial and Local Government

- Institute of Estate Agents, South Africa

- Parliamentary Committee on Agriculture and Land Affairs

- Total Geo-spatial Information Solutions

- National Land Summit (2005)

Outside South Africa:

Singapore:	Singapore Land Agency
Indonesia:	National Land Agency
Canada:	Highlands Regulatory Appeals Commission Ministry of Natural Resources and Environment Foreign Ownership of Land Administration
Chile:	Ministry of National Properties Ministry of Agriculture National Agricultural Society Chilean and South African Chamber of Commerce
Scotland:	Department of Environmental and Rural Affairs Crofting Law Group Scottish Land Court
England:	Department of Constitutional Affairs Royal Institute of Chartered Surveyors Chartered Institute of Taxation
Brazil:	Ministry of Agrarian Development
USA:	Embassy in Pretoria

INTRODUCTION AND TERMS OF REFERENCE

Since the establishment of democracy in South Africa the Constitution (section 25) allowed for the right to own property and the quest for land reform to stand in a delicately balanced relationship. Ownership of land by non-South African citizens (foreigners) is an intervening factor, and its impact on ownership patterns and land reform is not clearly known to policy-makers. In the first ten years since 1994 the impression emerged that foreigners are increasingly acquiring land in South Africa. The extent of it remained unknown, and therefore informed policy-making remained elusive.

As a consequence of this uncertainty, the Panel of Experts on the Development of Policy Regarding Land Ownership of Foreigners in South Africa (hereafter the Panel) was appointed by the former Minister of Agriculture and Land Affairs, Hon. Ms Thoko Didiza, on 24 August 2004. The Panel was established several months before the National Land Summit held in July 2005, which urged the Government to impose a moratorium on acquisition of land by foreigners in South Africa. On August 14, 2006, the Minister of Agriculture and Land Affairs, Hon. Ms Lulu Xingwana, extended the mandate of the Panel to 15 January 2007 and appointed two new members to the Panel as replacements for two of the original members who requested to step down.

On 17 February 2006 the Panel handed an interim report to Minister Didiza. The report was also released to the public for consideration and further inputs. It received substantial coverage in the media. The Panel received several responses, notably from the diplomatic community in South Africa.

An updated report was presented to Minister Xingwana on 5 December 2006 as a means to brief her on the developments in the Panel's work.

In view of the uncertainty regarding foreign landownership, and hence its relevance for policy-making, the Minister determined that the Panel's Terms of Reference (TOR) were to investigate, consider and make recommendations regarding:

- The nature, extent, trends and impact of the acquisition and use of, and investment in, land in South Africa by non-South African citizens;
- The extent to which the current lack of a comprehensive policy and legislative framework contributes to the acquisition, use and investment in land by non-South African citizens;
- Whether the Government should (and how) monitor and intervene by policy, legislative and other means, in monitoring and preventing any possible negotive consequence of land acquisition/use by non-South African citizens;
- The impact on the property markets on land acquisition and use by non-South African citizens, distinguishing between land use for residential, commercial, agriculture, eco-tourism/tourism/ game lodge and golf course purposes; ond
- Comparative international/foreign practices (laws, policies, impact, etc) on the issue of land ownership by non-citizens.

The Panel interpreted its task on the basis of the TOR to be the following:

The Panel has to provide answers to the questions 'Who owns South Africa?' ond "How much do they own?' specifically in relation to non-citizens. Therefore, the first task is to determine the extent and nature of foreign land-ownership. The Deeds Registries do not keep such information. The Panel's task wos therefore to analyse available but incomplete information to provide o partial indication of the extent and nature of foreign ownership. At the same time, the Panel has to recommend improvements on disclosure of information to improve the national statistics on this type of ownership.

For the purpose of designing an appropriate policy framework, the Panel interpreted the TOR as an instruction to investigate international policies and practices in this regard, and to distill the most appropriate elements from them for consideration in South Africa.

At the same time the Panel understood its task to be an investigation into the impact which the current policy of non-regulation of the property market in respect of foreigners, has had so far on ownership patterns and use of land in South Africa. Taking the public's view and perceptions into account and weighing them against the arguments of the relevant interest groups, the questions to answer are whether policy intervention and regulation will be appropriate, what should the nature of such intervention be, and what will its possible impact and side-effects be?

Taking all these considerations into account, the Panel understands its TOR as an instruction to integrate all its analyses and conclusions into policy-relevant recommendations.

STRUCTURE OF THE REPORT

This Report is the product of a two reports already presented to the Minister in 2005 and 2006, as well as investigations done since those reports. It also incorporates the Panel's response to the public and media comments on the interim report. It further incorporates elucidation of some aspects in response to the observations and directive of Cabinet following its initial consideration of the draft Report on 24 July 2007. The Report is divided into three sections:

• **Section 1** consists of the Executive Summary – being a concise synthesis of the Panel's methodology and its main findings, conclusions and recommendations.

• **Section 2** consists of an analysis of the public hearings and submissions presented to the Panel; a quantification and spatial mapping of patterns of land ownership in South Africa; a brief comparative discussion of the regulation of ownership and use of land and landed property by non-citizens in a number of other countries; a discussion in which the South African legislation regulating development planning and the use of land are investigated with the view that they might have to be revised, harmonized or rationalized; and finally the Panel's recommendations.

• **Section 3** is a separate compilation consisting of appendices 1-13 which clarify some of the aspects raised in Section 2. Appendices 1-12 were already included in the first interim report, while appendix 13 is an addition, containing statistics of "properties without owners". (The explanation from the Office of the Chief Registrar of Deeds is that these are mainly properties in "township registers"[1]. Their information is therefore incomplete.)

[1] Memo from Deeds Registries to Dr Sipho Sibanda of the Department of Land Affairs dated 5 February 2007.

SECTION ONE:

EXECUTIVE SUMMARY

1. Policy moking ond the meaning of "lond" and the size, value and significonce of lond owned by foreign nationals

1 Introduction

1.1 For reasons contained in the Report, land is o finite ond an indispensable asset which defines a people's identity and provides human dignity. It is an integral component of national sovereignty and a basis for national cohesion. To the extent that the Executive Authority is enjoined by the Constitution to develop and implement nationol policy[2], the Panel concluded that Cabinet ought to consider a wide range of factors raised in the Report, and not focus exclusively on the size or percentage of land owned by foreigners. In other words, the precautionary principle in responding to threats ought to be preferred[3].

The Panel's opinion is that determining the exoct size of land owned by foreigners and the purpose for which the land is used, are indeed important ond will be relevant for national sovereignty, governance, security and economic policy considerations. They have to be pursued as a matter of urgency. This Report provides indicotive statistics ond information regarding lond ownership by foreign individuals. As far as ownership by foreign corporations and trusts is concerned, statistics are incomplete and extremely difficult to collect and interpret. The Panel has initiated a process to analyse the existing records held by the Deeds Registries, the Masters' of the High Court's Offices, Componies and Intellectual Property Office (CIPRO)[4] and commercial banks. It is one of the tasks which the Department of Land Affairs will hove to continue with after the Panel has concluded its work.

For the purpose of assisting in developing South African policy on landownership by non-South African citizens it is importont to provide internotional comparisons. This is vital to determine whether there are ony appropriate lessons to be leornt from attempts to regulate foreign land ownership in other countries. To this end, the Panel investigated comporotive foreign trends at some length. The Panel analysed policies and laws from several countries and then selected and visited a few, on the basis of their levels of economic development and the manner in which they have managed regulation of land holding by foreigners while continuing to attract foreign direct investment. The countries visited were Conada, Chile, Brazil, Indonesio, Singapore, England and Scotlond.

1.2 In carrying out its mandate, the Panel adopted an opproach that starts with a critical and holistic understanding of the meaning of land and the land question in South Africa. In brief this entailed a departure from the narrow meaning of land as merely an economic resource ond a commodity in the market, to the understanding of land as the national heritage of all the peoples of South Africa. It was bequeathed by nature and past generations (ancestors) to those who are living to-day to hold and nurture for the benefit of the present and future generations. In the broader African context, land is not just "a thing", as understood in transplanted conventional Roman Dutch Law that places land in the legal regime of the "Law of Things". As a Nigerian Chief submitted to the West African Land Commission in 1912: "I conceive that land belongs to o vast family of which many are dead, few are living and countless yet unborn"[5]. In Africa, including South Africa, land has historical, political, economic, social, cultural and spiritual value and meaning. There are indeed many other societies, such as the Chinese, who regard land as holy.

It is to be pointed out that except for land previously falling within the infamous 13% reserved for the majority "natives" by the colonial regimes in South Africa since 1913, land in South Africa has been the subject of sustained commoditisation for a long time. In determining the significance and policy-relevance of the size, value and impact of land owned by foreign nationals, one has to take account of these multiple, but interrelated, meanings and context.

1.3. The Panel concluded that foreign natural persons own around 3% (and a significantly higher percentage in coastal and game farming areas) of land in the categories of erwen (land used for residential housing), agricultural holdings, farm land and sectional titles. The size and value of foreign ownership will certainly be higher once the process of analysing information regarding corporations, trusts and section 21 companies is completed. It is important to point out, however, that the exact size and value of land owned by foreign nationals can only be established definitively once all existing and future registered owners (natural and corporate) have made declarations and disclosures in the form and manner recommended below.

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2 Section 85 (2)(b) of the Constitution.

3 plG N Mandel and J T Gathi, "Cost-Benefit Analysis versus the Precautionary Principle: Beyond Cass Sunstein's *Laws of Fear*" ***University of Illinois Law Review***, Vol. 2006, Number 5 (2006) 1037-1079.

4 The Panel is aware that CIPRO has been criticized in the media for the backlog in its processing of information and updating of its records (see the Editorial "Sorting out Cipro", ***Business Day***, November 10, 2006).

5 T.O. Elias, ***The Nature of African Customary Law*** (1970) at page 162. See also Edwin A Gyasi and Juha I. Uitto, ***Environment, Diodiversity and Agricultural Change in West Africa: Perspectives from Ghana*** (United Nations University Press (1997), at page 1.

1.4. From the public hearings conducted in the nine provinces and written submissions to the Panel, it was established that the ordinary citizens, both black and white, feel very strongly that acquisition of prime land by foreigners is denying them affordable access to land and rendering them strangers in their own country. (See Section One, Part 1 below). Given that foreign ownership tends to be concentrated in certain areas (according to a provisional analysis of available Deeds Registries information and information gathered from the public hearings and written submissions), it may have serious implications for the dynamics of development in the country.

1.5. The Panel established thot the lack of o national policy on the regulation of foreign ownership of land in South Africa is certainly not the norm in the world, including countries with comparable economic systems and levels of development and even in countries with more advanced economies.

2. Some constitutional imperatives

2.1 The Constitution of the Republic of South Africa 1996 (hereinafter "the Constitution") mokes an important and material distinction on the conferring of rights and freedoms to citizens on the one hand and non-citizens or foreigners on the other. As a general rule, the Bill of Rights (Chapter 2 of the Constitution) confers rights on "everyone" or "a person". In such cases, the rights and freedoms are presumed to be bestowed on all persons, citizens and non-citizens. However, where the Constitution specifically confers rights and freedoms on "citizens", it is clear that such rights and freedoms cannot generally apply to non-citizens or foreigners. Examples of the former include the right to life, human dignity, equality before the law, and freedom of association (sections 11, 10, 9 and 18 respectively). Examples of the latter include political rights, the right to a passport and the right to choose their trade, occupation or profession freely (sections 19, 21(4) and 22, respectively).

For the present purposes, the relevant provisions in the Constitution that bestow rights on citizens only are section 21(3) – right to enter, to remain in and to reside anywhere in the republic – and section 25(5) – state duty to make resources available and to create conditions which enable citizens to gain access to land on an equitable basis.

It is necessary to emphasise thot the differentiation that the Constitution makes between citizens and non-citizens on the issue of residence, access to land and participation in politics creates constitutional expectations and obligations on the government.

2.2. It is clear from the above that policy and legislative measures may be taken to give meaning to the specific rights and freedoms of citizens with regards to residence and access to land that may positively discriminate against non-citizens, provided that such measures do not amount to arbitrary deprivation of property as contemplated in section 25(1) of the Constitution.

2.3. In interacting with the Public Land Support Services (PLSS) of the Department of Land Affairs, the Panel learnt that by convention public land falling within the jurisdiction of municipalities continue to be categorised as "private" and not "state" land. This clearly explains the disparities in the manner municipalities handle allocation of land for housing and other constitutional imperatives and the latitude they have in selling off public land to private developers – including foreigners. It is self-evident that municipalities are organs of state and a sphere of government (sections 140 and 239 of the Constitution). Besides, land is a national competence. Regulation of land ownership and use, especially by foreigners, cannot be properly carried out if municipalities, which cover the entire country "wall-to-wall", are left to their own devices in matters pertaining to disposal of a national asset of supreme importance. This understanding should not be viewed as being unmindful of the needs of municipalities to utilise land as a development and revenue generating asset.

3. Summary of Actionable Recommendations

The policy-relevant recommendations vary in the degree to which they remain at the level of policy alone or are accompanied by suggested legal strategies for implementation. The Panel is of the view that once Government has adopted a policy option(s), details about implementation mechanisms have to be developed by the Department of Land Affairs.

The following are the recommendations:

3.1. Compulsory Disclosure of Nationality, Race and Gender and other information

(i) To improve the information and statistics in the Deeds Registries, it is recommended that all owners of properties – not only foreigners – should be subject to Compulsory Disclosure Requirements for all past, present and future registrations of titles along the lines of the FICA. A two-pronged approach is recommended for existing and future disclosure by registered owners: (a) amending Regulation 18 of the Deeds Registries Act, No. 47 of 1937 and (b) amending the Act itself.
(ii) Amendment to Regulation 18 can be effected immediately by the Deeds Registration Regulation Board which,

subject to the approval by the Minister, is empowered under section 10(j) of the Act to make regulations prescribing "the manner and form of identity of persons". It is consequent to such authority that Regulation 18(2) in its present form provides for "The name of a person, the relevant identity number, date of birth or registered number as the case may be .... shall be recorded in the relevant records of the Deeds Registry". The Panel recommends that Regulation 18 be amended to have a comprehensive disclosure including:

- Citizenship (including dual citizenship)
- Nationality
- Permanent residents status
- Gender
- Race
- South African national identification number
- Foreign passport number
- Company registration number
- Income tax registration number
- VAT registration number
- Nature of shareholders (name and place of ordinary residence of all substantial shareholders and their race, gender and citizenship)
- Trust registration number and the nature of beneficiaries (and their race, gender, citizenship and place of ordinary residence).

The object of Regulation 18 is for disclosure and statistical purposes and not for effecting any unfair discrimination. A number of pieces of legislation providing for various types of distinctions and differentiations have been passed under the democratic constitutional regime. Examples include the Employment Equity Act, Promotion of Equality and Prevention of Unfair Discrimination Act, Preferential Procurement Policy Framework Act and the broad based Black Economic Empowerment Act.

(iii) Amendments to the Deeds Registries Act will need an enactment by Parliament as it will require the existing owners to make a Declaration/Disclosure similar to what will be expected of all future owners under the amended Regulation 18 (see above). The thrust for the provisions of the envisaged amendment must, amongst other things, be:

- Compulsory identification of land owners
- A verification system of land owners
- Accurate and reliable record keeping of land owners in S.A.
- Admissibility of records for legal purposes.
- Source of finance of land acquisition
- Monitoring mechanism.
- Prohibition of transfers that do not conform to the regulatory regime
- Procedure for forfeiture of land to the state where there is non-compliance
- Protection of confidential information
- Records of current land use.

It is further recommended that the proposed disclosure by companies also be considered for the new Companies Bill, which is under consideration.

The Panel is of the view that the Financial Intelligence Centre Act (FICA) provides a comparable and effective mechanism for disclosures and declarations which can provide important guidance for the proposed recommendations.

3.2. Special Ministerial Approval

The Panel recommends that Special Ministerial Approval (with or without conditions) be introduced for certain changes in land use in general and for disposal of certain categories of land to foreigners – especially where such change of use or disposal to foreigners have the potential to negatively impact on the state's constitutional obligations to effect land reform and achieve realization of access to adequate housing (land which is subject to restitution claims or which is earmarked for redistribution or integrated human settlement). Special Ministerial Approval should also apply to acquisition of land or changes to land use by South African citizens that may have the same negative impact. The decision whether land falls within such a category or categories should be determined by, amongst others, the mechanisms of the Inter-ministerial/ -Depart-mental Oversight Committee (see below in 3.3).

Currently there exists a State Land Dispasal Cammittee and there are provisions allowing the establishment of Provincial State Land Disposal Committees. These committees have no jurisdiction over municipal lands, because they continue to be incorrectly and unconstitutionally categorized as "private land". Besides, not all pravinces have functioning committees[6] or cooperate with the State Land Disposal Committee.

3.3. Inter-Ministerial/-Departmental Oversight Committee

A permanent Inter-Ministerial/-Departmental Oversight Committee should be established, consisting of at least Agriculture, Land Affairs, Provincial and Local Government, Housing, and Environmental Affairs and Tourism, to monitor trends in foreign ownership of land and changes in land use, and to recommend to Government appropriate corrective interventions. The suggestion that the existing Cabinet Clusters should be used for this purpose is not supported, because the dedicated purpose of this Committee will then be lost.

3.4. Outright prohibition on foreign ownership in classified/protected areas

Policy is recommended regarding prohibition of private ownership of land by foreigners (and in some cases South African citizens) in certain areas (to be classified) within the territorial jurisdiction of the Republic on grounds of national interest, environmental considerations, areas of historical and cultural significance, and national security[7]. Examples of such land include the National Key Points[8], coostal oreas[9], conservation areas, land close to military installations, water catchment areas and land along borders/international boundaries.

3.5. Limited temporary moratorium on the disposal of state land to foreigners

The Panel recommends o Limited Temporary Moratorium of approximately two years prohibiting the disposal of state land, including land held by any organ of state and any of the three spheres of government (including municipal government), to foreigners[10] - and, in limited cases, to South African citizens who do not qualify for redress under the national land reform policies and legislation. This is not a blanket prohibition. It is meant to prevent certain spheres of government and organs of state from disposing land that may be used for land reform and human settlements for the dispossessed and marginalized individuals and communities. Naturally, special exemptions could be considered. The limited, temporary moratorium could be lifted, once the Ministerial Approval process and the Inter-Ministerial/-Departmental Oversight Committee suggested above, have been established and are operational.

The Panel sought the opinion of senior legal counsel on the issue of a moratorium[11]. The Panel is advised that such a moratorium is not unconstitutional provided it does not lead to arbitrary deprivation of property and is imposed through a law of general application (see Recommendation under paragraph 3.9 below).

Since the recommendation is limited to broadly-defined state/public land (including municipal land), it should be expected that the entities that own the affected land shall comply in ony case with national policy even in the absence of a stotutory prohibition.

3.6. Zoning, land use and planning legislation

The Panel recommends that there should be rationalisotion and harmonisation of laws affecting land use planning and zoning through enactment of overarching national legislation to provide some certainty, minimum standards and order. The current Land Use Management Bill should be revisited and activated. The lack of overarching national standards leads to disparate and confusing practices in land use, especially at local government level. Foreigners and powerful "developers" seem to exploit the situation, thus leading to public resentment and perceptions of corruption. A review of current practices in the zoning and rezoning procedures, the development of golf estates, lifestyle farming, polo estates and game farming[12] ought to be brought under the purview of ministerial and intergovernmental oversight.

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[6] See Recommendation 3.7 on page 11.

[7] Reporting obligations on existing ownership by foreigners on the designated areas within a prescribed period should be imposed via the Full Disclosure Regulations. Thereafter, Government may exercise the constitutional power of expropriation, subject to the "just and equitable" compensation, of such land and either hold the same as state land or allocate the land to authorized nationals.

[8] National Key Points Act, No 102 of 1980

[9] The Coastal Management Bill covers aspects of this.

[10] Should it be determined that any legislation, including municipal by-laws and ordinances, exist that categorises land belonging to any organ of state or sphere of government as "private land", this would be unconstitutional and the Constitutional Court may be approached for an order under section 167 (5) of the Constitution for an appropriate declaration.

[11] Available at the Department of Land Affairs.

[12] The country is already sitting with a case of murder of a farm manager connected to the conversion of land use to game farming (see, W Hlongwa, "Make Way for Wild Animals" ***City Press***, 28 January 2007 at p. 21).

3.7. Disposal of State Land

As pointed out in the recommendations under paragraph 3.2 above, the State Land Disposal Committee and provincial committees have no jurisdiction over municipal lands which (in the view of the Panel) continue to be incorrectly and unconstitutionally categorized as "private land". This is a convention or practice inherited from the past. The three spheres of government are institutions and organs of one sovereign democratic state and schedules 4 and 5 of the Constitution do not bestow state land ownership and disposal as an exclusive competence of municipalities (sections 1 read with Chapter 3 and Schedules 4 and 5 of the Constitution). It is therefore recommended that all the three spheres of government should be covered by all the recommendations in this Report. Government and all organs of state ought to lead by example in implementing the regulatory regime on foreign landownership and a general prohibition on disposal or change in land ownership which may undermine land reform and compromise the sovereignty of the state.

3.8. Leaseholds

In line with the practice in some of the countries studied, the Government may consider medium- and long-term leases of public land as a viable mechanism for future acquisition of land use by foreigners. Leaseholds have time limits and may be less controversial than full ownership rights, even though in practice they still exclude citizens from ownership and use. They provide the type of security of tenure that many genuine foreign investors would actually prefer.

3.9. Enabling omnibus legislative amendments to give effect to some of the recommendations

The Panel recommends a comprehensive General Laws or Land Matters Amendment Bill, similar to Judicial Matters Amendment Bills for the recommendations which may require enabling legislative amendments and not entirely new legislation or subsidiary legislation (regulations), such as the recommended amendment to Regulation 18. The advantage of such an approach is that the consequences to other legislation that may arise from amendments to a specific Act or Acts are easily accommodated in a single Bill.

3.10 Fronting

Fronting has been identified as an issue that can undermine the Government's policy on land reform and regulation of foreign landownership. It is therefore recommended that measures should be included in any policy formulation to deal with this problem. Fronting is a hugely complex policy issue. It therefore necessary to utilize cross-cutting policy and regulatory instruments used in other national Departments. The Panel recommends close cooperation at an inter-ministerial level to address the address. Consideration may be given to various sanctions, including assets forfeiture.

In the next section the Panel presents its analysis of the factors mentioned in the Terms of Reference. The section concludes with recommendations.

SECTION TWO:

ANALYSIS AND RECOMMENDATIONS

This section consists of five parts. In the first part the Panel provides analyses of the written public submissions and oral presentations to the public hearings, of the recommendations made by the parliamentary portfolio committee on Land Affairs, and of the relevant resolutions adopted by the National Land Summit (2005). In the second part the focus is on patterns of land ownership in South Africa. The Panel presents a quantification and spatial mapping of them. In the third part an international comparison is introduced. Regulation of ownership and use by non-citizens of land and landed property in a number of countries are discussed. In the fourth part the legislative dimension is introduced. Possible revision, harmonization and rationalization of legislation which regulates development planning and land use, is considered. In the final part the Panel presents its recommendations.

Section 2 Part 1:

Analysis of written public submissions, oral presentations, the recommendations by the Parliamentary portfolio committee and the relevant resolutions adopted by the National Land Summit (2005) [13]

The Panel received about 60 oral submissions and about 10 written submissions from different organisations and individuals. They represented a wide range of opinions, including organised agriculture, organised estate agents, NGOs, organised business, local communities, municipal councillors, traditional healers, trade unions and political parties.

For the purpose of this report this wide range of views will be summarised in two broad categories. The first category approaches the issues from the perspective of the impact on investor confidence, foreign direct investments (FDI), the free market, and economic growth's "trickle-down" effect on employment opportunities. The second category approaches it from the perspective of land reform and community development. They are not in all respects mutually exclusive.

The first issue addressed in both categories is the relevance of foreign landownership for the general concerns about landownership articulated by proponents of both perspectives. The first category does not perceive foreign landownership to be a major concern, except by the organised agricultural sector. The second category includes a combination of views. Some are convinced that foreign landownership is an obstacle in land reform and that they are more insensitive towards the interests of community development than South African owners. Others - notably community organisations in the Southern Cape - do not attribute their land problems to foreigners exclusively but to foreigners and insensitive local authorities, South African developers and absentee landowners.

A second issue presented by the submissions, is that foreign landownership is not necessarily an issue throughout South Africa, but that it is regionally concentrated. The number of submissions presented to the Panel is not a scientific methad to locate these regions but it is noteworthy that the highest number originated from the Southern Cape and Northern Cape, Limpopo and KwaZulu Natal. They represented concerns in respect of the second category, articulated mainly by community organisations. The Cape Peninsula is certainly another concentration point, mainly from the perspective of the first category. Therefore the main presentations made there came from the estate agents and the Democratic Alliance.

A third issue addressed in both categories, is the extent of foreign ownership in the country, and its impact on property prices and land reform. The Panel's dilemma is that almost no empirical evidence or data has been presented to it to substantiate the various arguments. A number of submissions used the same data made available by estate agents that 0.5% of the total value of property transactions between 1997 and 2002 were foreign in nature. Pam Golding claimed that 5-8% of all the company's sales were foreign in nature. Apart from these vague data, nothing has been forthcoming.

Most of the submissions arguing for and against the impact of foreign ownership rely on public perceptions. Perceptions cannot be discarded as irrelevant for policy-making when the policy environment is a democratic one. But it has to be complemented by empirical data, which is incomplete and inconclusive at present.

Moreover, the Panel did not receive adequate submissions or other information from the public about the economic impact of foreign ownership, except as relates to changes in land use and exclusion of nationals from certain "hot spots" because of high property prices. No economic analysis is yet available on the impact of foreign ownership on the property market (prices and changes in land usage) and FDI or investor confidence. Equally inconclusive, is the

[13] On 25 February 2007 a public debate on the issue of foreign ownership of land, including housing, in the City of Cape Town, was broadcast on SABC2 under the title: "The Big Question Property Show. The Chair of the Panel participated in the programme and considers the diverse and passionate views presented in the debate as akin to those articulated at the Panel's provincial public hearings and presented and analysed in this Report.

impact of commercial agricultural land converted into game farms/lodges on job opportunities, food production and security, income generation, etc.

Within the context of the above considerations, the arguments in the two categories as presented in the submissions, are now summarised:

1) Free market, investor confidence, job creation and no government intervention:

The main argument is that the South African government since 1994 has embarked on macro-economic policies which opened and liberalised the economy and encourages FDI. It therefore depends on unrestricted competition and investor confidence. It also assumes that FDI will encourage economic growth, which will "trickle down" and create more job opportunities. Price increases in the property market since 1994 are attributed to relatively low interest rates, good and attractive economic policies and rising construction costs.

According to this argument, Government intervention will harm investor confidence and therefore the "trickle down" results. Moreover, it is argued that the extent of foreign ownership in the overall market is relatively small and therefore does not require policy interventions. The Panel still requires a clarification of this argument in view of the fact that, on the one hand it states that the proportion of foreign ownership is arguably relatively small or even insignificant but on the other hand it is argued that their FDI contribution is an important justification against any policy intervention. Organised estate agents and the Democratic Alliance are the main proponents of this view. AgriSA uses it also in a qualified manner.

2) Land reform and community development:

The main argument is that a new government policy is urgently required to regulate landownership, because the principle of "willing buyer, willing seller" promotes a free market but not necessarily land reform which, together with the provision of adequate housing, are constitutional imperatives. Unregulated property developments also have detrimental effects on established communities. In this category there is no consensus about the blame foreign ownership should carry for the problems experienced in lond ownership.

Development is supported by almost all the proponents of this category, but its preferred nature is contested. Local communities in particular, view development often as a threat to their established livelihoods. In the Southern Cape, for example, new developments (foreign and local) appropriate land used by these communities, who sustain their living conditions partly by using sources from the sea. Developers pay the house owners o substantial amount of money to relocate them to a house in a town, where they cannot continue with their established lifestyle. New developments also require other types of skills from their workers, and therefore farm-workers seldom can be re-employed by the new developments. Even if communities can remain on their land, new developments on the coastline (like golf estates) are fenced-in and therefore often they deny access to beaches and the sea for collecting food and fire-wood.

Organised agriculture like NAFU and AgriSA, and individual farmers are also in their own way in support of this category. They argue that the Rand currency cannot compete with foreign currencies in an open market on the basis of willing buyer, willing seller. Therefore prime agricultural land is purchased by foreigners. Even in the absence of foreign competition the same principle is counter-productive for emerging NAFU farmers. AgriSA added another dimension to it by insisting on policy intervention to protect prime agricultural land against conversion into other uses, and to protect specified strategic areas. As noted elsewhere in the Report, incidents of violent conflicts over conversion of agricultural land to game farms have started to be experienced (see footnote 12 on page 10).

Farmers and local communities also argue for national government intervention in response to the local authorities' inadequate vision and support, as well as the inadequate cooperation between the three spheres of government. They are of the opinion that local authorities work in cahoots with developers, without being sensitive to established communities. Some proponents of this view believe that local authorities are overwhelmed by applications for developments, that they do not apply their minds to the applications but are more concerned about the income (rates and taxes) which the developments can generate than about their social and environmental impact. Application procedures are so diverse (some are lodged at local authorities; others at tribunals, etc) that coordinated spatial development is almost impossible.

Special areas of contention

Several of the submissions in both categories highlighted three contentious areas of landownership: golf estates, game farms/lodges and high potential agricultural land.

Golf estates are developed mainly in South Africa's eastern and southern coastal areas and in Gauteng. Submissions from the Southern Cape refer to them in particular. It appeared from those submissions that the 34-odd estates are developed mainly by South Africans but marketed abroad. Houses are therefore owned by foreigners but not the estate itself. The public debate on golf estates focuses on their environmental impact like water consumption, but not equally much on their social impact on local communities dislocated by these developments.

Game farms/lodges are also a contested issue. The free market argument is that they attract FDI which creates employment opportunities and economic growth. It also argues that unproductive or under-utilised agricultural land

will become productive as well as promote tourism/eco-tourism. The contested point is whether game farming is more labour intensive than commercial farming. The intervention argument is that conversion of commercial to game farming/lodges negatively affects South Africa's food security, that it encourages speculation with land, that it does not necessarily create so many new job opportunities and that it leads to unemployment for farm workers. The latter point is that workers on commercial farmers are often uneducated and only skilled in commercial farming tasks, while game farming requires higher educated workers with other skills.

The extent of foreign ownership of game farms/lodges, and of conversions from commercial to game farming, is not known to the Panel, and no submission could provide any more clarity on this matter.

Both organised agriculture and local communities maintained that high potential agricultural land should be protected by government. The balance of views is in favour of the argument that it should be excluded from foreign ownership.

In view of the arguments raised in the submissions, they made the following suggestions.

Suggestions from the public

The suggested recommendations extracted from the submissions are also summarised in accordance with the two main categories:

1) Free market, investor confidence, job creation, and no government intervention:

The proponents of this category did not suggest many recommendations, except to encourage a free market in the property environment. Government intervention would discourage investor confidence and might also violate bilateral investment agreements between South Africa and her trade and investment partners. The current tax regime is considered to be appropriate and should not be altered. The proponents also endorsed the "willing seller, willing buyer" principle. One of the provincial, organised agricultural societies (but not the national body) argued that the opportunity costs of land used for agricultural purposes might dictate that it be used for purposes other than agricultural. This cost, according to this argument, can only be effectively determined if the scarcity value of land is determined by market forces.

2) Land reform and community development:

The following are suggestions listed in no particular order of importance and also not designed as an internally-consistent package:

i) Leasehold

Title-deed ownership by foreigners should be converted into leasehold rights. Alternatively, new land acquisitions by foreigners should only be in the form of leasehold rights. This does not necessarily improve access to land for South African citizens but it will prevent land from being alienated. The public suggestion is linked to the other suggestion that foreign investors should establish partnerships with South Africans - a model used in several countries.

ii) Land quantity restrictions

A maximum size/value of land for ownership by foreigners and South Africans should be considered. Such an intervention will have to take into consideration the nature of farming (extensive/intensive) and property utilisation in the different regions of the country.

iii) Impact studies

Environmental impact studies are already a statutory requirement and an established practice. The same principle should be extended to include also a social impact study, which includes the impact a proposed development will have on communities affected by it: their residential and settlement patterns, their economic and sustainability patterns, and the possible impact on sites of historical, cultural and heritage importance.

iv) Indaba of interested groups

Several submissions emphasised that communities feel isolated from decision-making in the big centres and insisted on more communication with them, and also amongst them. Therefore they proposed a land-use indaba first at local level, which can evolve into provincial or a national indaba.

v) Review of investment agreements

A special committee should be established to review investment agreements based on criteria such as land reform needs, land usage, sensitive heritage sites, and the benefits for the poor and landless.

vi) First-option purchaser ("option of first refusal")

Whenever agricultural land becomes available on the market (the relevance of nationality is not specified here), the South African government should have the right of first option for purchasing it.

vi) BEE framework

BEE should be incorporated into the land issue and it should apply to both local and foreign investors.

vii) Local authorities and development
Local authorities have to adhere to national spatial development and planning frameworks. Through their Integrated Development Plans they have to implement policies to promote integration and redistribution of land.

ix) Government regulation of land usage and ownership
Special approval procedures should be applicable when land exceeding a certain value or size changes in ownership. This should apply to all buyers and sellers, irrespective of their nationality. The agricultural community is also in favour of regulations to protect South African ownership of certain strategic areas while other areas are regulated by lesser restrictions.

x) Limitations on foreign ownership
Some submissions suggested an immediate moratorium on foreign ownership and others suggested an arbitrary cut-off date for transactions with foreigners. The majority of submissions did not support such drastic intervention.

xi) Permanent residents
The Panel distinguishes mainly between South Africans and foreigners on the basis of citizenship. A submission also suggested that "permanent residents" should be treated as another, intermediary category, and should be distinguished from seasonal foreign visitors.

xii) Taxation/land-fee
Taxation as an alternative for restrictions on foreign landownership emerged as a popular proposal in a number of submissions. The one set of proposals suggested:

- foreigners should pay a separate scale of duties and transfer fees when purchasing property
- different rates should be paid to local authorities in respect of undeveloped stands; properties owned by fareign, permanent residents; and by foreign, seasonal visitars.

xiii) Another public suggestion is the following:
A distinction is made between "raw land" (the value of the property which arises independently of the owner's efforts, such as by nature, goad governance, public infrastructure, amenities, etc) and "improvements". The value of raw land lasts "in perpetuity" while improvements have a shorter economic life due to depreciation and obsolescence. Alienation of raw land to foreigners means that its rental income leaves South Africa for as long as the foreigner retains ownership. Improvements - even by foreigners, on the other hand, are good for the economy and can create job opportunities. Therefore the suggestion is a policy to prohibit alienation of land but ane which encourages investment in improvements by foreigners. This can be achieved by introducing a land-user charge or land-fee, which is similar to the "differential" rating available as an option in the new Rats Act. Depending on the rate used to calculate the land-fee, it can deter absentee ownership (foreign and local), and it can ensure that both urban and rural land are developed and not left vacant. It can also ensure that more improvements are made and that land prices acrass South Africa are reduced, because it discourages speculation with land.

Consultation with, and special submissions by, the Institute of Estate Agents of South Africa

The Panel received written submissions and presentations during the public hearings in which estate agents were generally critical of contemplated government interventions in foreign land ownership. In recognition of the important role estate agents play in the matters included in the Panel's Terms of Reference, it held consultative meetings in Pretoria/Tshwane and Cape Town with the representatives of the Institute of Estate Agents of South Africa (hereinafter the "Estate Agents"). The written submission presented by the Estate Agents confirmed some of the informatian in the possession of the Panel, but also introduced some new information and opinions. The following were particularly relevant for the work of the Panel:

- Confirmation of administrative bottlenecks and sometimes inadequate capacity at local government level;
- Confirmation of rapid escalation in house prices leading to lack of affordability for new-comers;
- Confirmation that between 1999 and 2004 the sale of housing units to foreigners in Cape Tawn averaged between 6% and 7% of the total sales. (Addendum A provides statistics about the residential property market in the Western Cape.)
- Confirmation that foreign buyers have significant investments in wine farms;
- Contention that sales to foreigners (not cumulative ownership by foreigners) does not exceed 1% of residential praperty sales, except for some prime seaboard areas in Western Cape and KwaZulu-Natal where foreign buyers constitute a significant percentage. The percentage of corporate property sales is not known.

The Estate Agents recommended, amongst others, that:

- A common definition of a fareign buyer is needed; and
- The Deeds Registries Office should be mandated to record disclosures of foreign ownership in relation to transfer of residential property.

ADDENDUM A

SUBMISSION TO THE DEPARTMENT OF LAND AFFAIRS FROM THE INSTITUTE OF ESTATE AGENTS OF SOUTH AFRICA REGARDING THE MAGNITUDE AND IMPACT ON THE RESIDENTIAL PROPERTY MARKET OF ACQUISITIONS BY NON-SOUTH AFRICAN CITIZENS

SOURCE: Residential Property Price Ranger (RPPR) by month for the Western Cape & South African Property Transfer Guide (SAPTG) totals for the Western Cape

RPPR – TOTAL SALES IN TERMS OF UNITS

UNITS	Dec/Jan	February	March	April	May	June
1999	1133	778	1033	922	920	910
2000	1685	1412	1389	908	1165	1004
2001	1785	1217	1241	1017	1135	1109
2002	2245	1527	1356	1294	1650	1191
2003	2346	1458	1325	1266	1297	1372
2004	2538	1597	1631	1423	1405	1508

SAPTG – TOTAL SALES IN TERMS OF UNITS

UNITS	July	August	September	October	November	TOTAL
1999	873	1023	987	1138	1130	37 258
2000	962	1152	1002	1286	1139	37 734
2001	991	1165	1014	1298	1290	38 890
2002	1134	1347	1265	1397	1309	47 033
2003	1480	1306	1575	1815	1578	50 103
2004	1232	1373	1485	1492	1435	45 782

RPPR – TOTAL SALES TO FOREIGNERS IN TERMS OF UNITS

UNITS	Dec/Jan	February	March	April	May	June
1999	101	57	56	55	39	31
2000	90	82	68	42	56	37
2001	112	68	76	53	46	45
2002	226	146	145	143	118	71
2003	273	158	149	145	104	79
2004	219	142	141	124	88	83

UNITS	July	August	September	October	November	TOTAL
1999	25	24	27	49	61	528
2000	26	42	38	30	40	549
2001	40	34	34	44	66	618
2002	59	91	86	88	130	1304
2003	140	100	86	116	92	1442
2004	59	68	61	87	54	1126

RPPR – PERCENTAGE UNITS BOUGHT BY FOREIGNERS

UNITS	Dec/Jan	February	March	April	May	June	July
1999	8.9%	7.35%	5.71%	5.97%	4.24%	3.41%	2.86%
2000	5.34%	5.81%	4.90%	4.63%	4.81%	3.69%	2.70%
2001	6.35%	5.59%	6.12%	5.21%	4.05%	4.06%	4.04%
2002	10.07%	9.56%	10.77%	11.05%	7.15%	5.96%	5.20%
2003	11.64%	10.85%	11.25%	11.45%	8.02%	5.76%	9.46%
2004	8.63%	8.89%	8.65%	8.71%	6.26%	5.51%	4.79%

SPTG – PERCENTAGE OF UNITS BOUGHT BY FOREIGNERS

UNITS	August	September	October	November	TOTAL	TOTAL
1999	2.35%	2.74%	4.31%	5.40%	4.87%	1.42%
2000	3.85%	3.59%	2.33%	3.51%	4.19%	1.45%
2001	2.92%	3.35%	3.39%	5.12%	4.67%	1.59%
2002	6.76%	6.80%	6.30%	9.93%	8.30%	2.77%
2003	7.66%	5.48%	4.85%	5.83%	8.58%	2.88%
2004	4.95%	4.11%	5.83%	3.76%	6.58%	2.45%

RPPR – TOTAL VALUE OF SALES FOR THE YEAR (in Rand)

UNITS	Dec/Jan	February	March	April	May	June	July
1999	459,532,643	329,113,817	388,528,841	367,725,500	385,321,204	344,189,287	335,517,534
2000	716,444,914	588,142,784	624,948,091	422,913,961	475,245,212	398,955,466	389,122,010
2001	821,837,321	801,195,130	604,560,018	483,303,959	578,982,255	528,725,451	457,851,191
2002	1,233,604,975	969,764,035	877,414,060	853,935,238	970,069,200	756,264,428	655,624,514
2003	1,664,478,810	1,057,967,442	983,408,343	926,839,184	947,788,816	1,008,477.683	1,022,759,450
2004	2,220,684,273	1,443,107,950	1,417,127,314	1,272,145,314	1,331,295,877	1,356,129,244	1,191,618,206

SPTG – TOTAL VALUE OF SALES FOR THE YEAR

UNITS	August	September	October	November	TOTAL	TOTAL
1999	330,330,982	406,722,385	458,493,789	215,867,070	4,049,343,062	16,069,816,600
2000	514,106,800	418,367,541	556,119,048	311,008,308	5,411,374,155	16,050,619,569
2001	541,139,964	438,304,295	602,557,533	619,132,609	6,275,599,724	15,180,963,243
2002	781,687,678	789,980,180	850,455,457	915,494,611	9,654,294,356	17,398,475,492
2003	931,867,328	1,203,671,298	1,292,467,414	1,137,589,508	12,177,315,276	23,491,649,609
2004	1,252,299,242	1,434,732,891	1,516,005,447	1,519,000,765	15,954,146,620	30,286,719,634

SOUTH AFRICAN TRANSFER GUIDE (SAPTG)
SAPTG excludes sales to Companies and Closed Corporations
Information obtained from the Deeds Office.
SAPTG data in report reflect date of sale and not date of transfer.

RESIDENTIAL PROPERTY PRICE RANGER (RPPR)
RPPR report criteria: Sales confirmed during the month as recorded as per sales date, to be transferred later.
The RPPR report is inclusive of sales to Companies, Closed Corporations ond Trusts.
The areas reported on are listed in on addendum.
Note: The interpretation by individual estate agents is subjective based on accent, source of capital, etc.

Recommendations by the Parliamentary Portfolio Committee and the relevant National Land Summit resolutions

The Panel took note of three of the recommendations by the Portfolio Committee on Agriculture and Land Affairs formulated on 7 June 2005 that have relevonce for the TOR. The three recommendations are the following:

- Government must consider placing a moratorium on the selling of agriculturol land to foreigners until the Ministerial Panel on Land Ownership by Foreigners reported to the Minister;
- The office of the Registrar of Deeds should register land in terms of race so that land reform progress or the transfer of land to blacks could be adequately monitored; and
- Government should develop mechanisms especially within the current land policy to dissuade an inappropriate inflation of land prices.

The Panel also noted that before the National Land Summit provincial land marches and summits in all the nine provinces strongly recommended a moratorium on acquisition of lond by foreign individuals and corporations as well as the need for government regulation of land prices to ensure affordability so that land restitution and redistribution could be accelerated.

Special attention was given to the recommendations of the National Land Summit that

- "the state should actively intervene in the land market including through regulating foreign ownership";
- foreigners should only be allowed to purchase land if there is clear indication of productive investment and sustainable job creation; and
- a land tax should be introduced.

In her closing address at the Summit the Minister of Agriculture and Land Affairs noted the following:

"Simultaneously, the issue of foreign land ownership was raised sharply, with almost unanimity that a policy on this matter must be developed. I am happy that that this summit had three members on the Ministerial panel that is attending to this matter."

Section 2 Part 2:
Patterns of land ownership in South Africa – quantification and spatial mapping

1 The General Overview

This section concentrates on a quantification of landownership, the use of land and prices of land and property. The national division of landownership in South Africa reveals that 76,2% of the total land surface is privately held, and thot the rest is held by the State (20,4%) or in trust on behalf of the state (3,4%). It should be emphasized that land owned by municipal authorities are not yet included under "state land" but is still listed under "private land". The following table provides a more detailed breakdown of ownership in South Africa.

TABLE 1: DIVISION OF LAND OWNERSHIP

	Hectare	**Hectare**	**%**
State Land: Department of Public Works	6,845,916	24,919,290	20.4%
Department of Land Affairs	13,759,968		
Provincial	4,313,406		
Trust:		4,103,096	3.4%
Ingonyama	2,893,232		
Coloured Rural	277,926		
Traditional	931,938		
Private: **Total**		92,885,406 **121,907,792**	76.2% **100%**

1.1 The use of land in South Africa

In terms of land use, most of South Africa is under natural pasture (73,2%), approximately 12% is arable productive agricultural land, and about the same proportion is allocoted to nature conservation while only about 1% of the land is currently used for urban and residential purposes.

Table 2 provides a detailed presentation of land use in South Africa.

TABLE 2: LAND USE PATTERNS

Land Use	**Hectare**	**%**
Arable / Agriculture	14,753,249	12.1%
Nature Conservation	14,549,797	11.9%
Forestry	1,790,270	1.5%
Natural Pasture	89,240,143	73.2%
Industrial / Commercial	274,549	0.2%
Urban Residential	1,299,784	1.1%
TOTAL	121,907,792	100.0%

This table does not yet indicate the proportion of foreign ownership in each of these categories. Three categories will receive more attention in this regard, namely urban residential property, industrial/commercial use, and arable/ agricultural use.

1.2 Land prices

The Panel's TOR includes a request to look at property prices and the possible impact of foreign ownership on them. Regarding patterns of property prices without distinguishing between domestic ond foreign ownership, the focus will be on the three categories most relevant for foreign ownership.

i) Urban residential

Urban residential use of land constitutes one of the smallest proportions (1.1%) of land use. However, the number of landowners in this category is much more significant. Residential properties can be divided into three distinctive market categories, viz. low (below 80m2), middle (between 80m2 and 440m2 or with a value below R2 million) and high/luxury (bigger than 440m2 or with a value more than R2 million). Since 1998 property prices in the low segment of the market have increased at a rate below the average inflation rate while prices at the high end of the market increased more or less in line with inflation. Residential property prices of the middle-market have recorded substantial increases in real terms.

The following table is a summary of price movements in the middle-category residential market.

TABLE 3: PRICE PATTERNS

Newly-built homes (160m2)	Land (in Rand)	Building (in Rand)	Total (in Rand)	Land as % of total value	Building as % of total value
June 1998	65,776	208,138	273,914	24.0%	76.0%
June 1999	80,562	238,775	319,337	25.2%	74.8%
June 2000	92,335	258,335	350,670	26.3%	73.7%
June 2001	101,825	288,314	390,140	26.1%	73.9%
June 2002	120,695	337,243	457,938	26.4%	73.6%
June 2003	154,575	414,872	569,447	27.1%	72.9%
June 2004	178,639	445,460	624,099	28.6%	71.4%
% change per annum	**18.1%**	**13.5%**	**14.7%**	**3.0%**	**-1.0%**

Source: *Finance Week* – 27 September 2004: ABSA

This table indicates that over a period of six years the increase in prices was 14.7%. It is apparent that the land prices increased substantially more than the building/construction component of urban residential properties. It means that in comparative terms land is becoming increasingly expensive (24% of total costs in 1998 compared with 28.6% in 2004) and the building/ construction prices are becoming less (76% of the total costs in 1998 versus 71.4% in 2004).

Some of the factors that have contributed to the significant increases in property prices of middle-category houses are: relatively low interest rates, higher disposable income of middle-income earners partly due to tax relief, increased demand by an expanding black middle class, and increased demand by foreign buyers partly due the weakening of the Rand in 2000 and 2001.

ii) Commercial and industrial properties

Price increases in commercial and industrial properties have been around 10 per cent per onnum.

iii) Agriculture

Price increases in agriculture properties have been between 10 and 25 per cent per in 2002 and 2003.

Although substantial more work is required to quantify the impact of foreign buyers on the prices of properties in all sectors of the property market (residential, agriculture, commercial and industrial) there are clear indications that the increased demand by foreigners have put upward pressure on property prices, especially residential properties in Cape Town and areas such as Umhlanga near Durban (see Appendix 9). Further examination of the available data is required before any definitive opinion can be made by the Panel on the exact impact of foreign ownership of land on the escalation of land prices in general.

2 Registrar of Deeds' data: spatial mapping, analysis, interpretation

The Panel had to investigate the nature and scope of the data available in the Office of the Registrar of Deeds and how it can assist in analyzing foreign landownership in South Africa. The data supplied by the Deeds Registry is generally:
(i) not designed to differentiate between citizens and non-citizens (or foreigners) in general
(ii) poorly structured
(iii) contains significant errors in data the entries, and
(iv) includes significant duplication.

A key feature of the data and information provided on registration documentation is that they are never updated after the registration of the deed. The prices of land reflect the price at the time of registration and do not necessarily reflect the current value. According to the Chief Registrar of Deeds, data capturing and recording takes place only when a transaction is presented for registration. Given the fact that overall foreign purchases have increased since 1994, and especially during the weakening of the Rand, it is reasonable to conclude that the value of the bulk of the land owned by foreigners reflect values that are close to the 2005 prices.

Categories of Foreigners

Registration of deeds requires only a South African identity document number or a passport number. The absence of an ID number and the presence of a foreign passport number is assumed as indicative of foreign ownership. This assumption is more reliable for analyzing the identities of individual owners than for corporate owners. For the purpose of analysis, the Panel assumes that foreign ownership is made up of the following categories:

i. External Public: Foreign public companies
ii. Foreign - Permanent Residents
iii. Foreign Refugee

It should be noted that the Deeds Registries regard persons who were citizens of the former TBVC states at the time when they registered their title deeds, as "foreigners", and therefore it continues to distort any analysis of the available data.

Regarding foreign landownership, in an analysis of the Deeds Registries' data, corporate ownership of properties will most probably be found in the following categories:

i. Conflicting/Unidentified/Blank
ii. Different number/text: Registration entries which don't conform to a known pattern
iii. Pty. Ltd (private companies)
iv. Public Company (public companies)
v. CC (close corporations)
vi. Section 21 (Section 21, non-profit companies)
vii. Trust (registered trusts)

2.2 Consolidated statistics on land ownership in South Africa

The following three tables represent a consolidated view of the various percentages of ownership for each of the five major owner groupings and four forms of land use.

The five owner groups are incomplete or defective Registrar data in which the categary of ownership is unclear (the category "Defective records"), secondly South African private, individual owners ("South African"), thirdly land owned the South African state ("State-owned"), fourthly foreign landownership by individuals ("Foreign individuals") and lastly properties owned by corporate bodies, both South African and foreign ("Corporate"). The land use categories are urban residential use ("Erf"), for commercial agricultural purposes ("Farm"), agricultural holdings ("AH") and sectional title use ("Sectional"). Table 4 summarises the number of owners in each of these categories.

TABLE 4: HEAD-COUNT

OWNER	ERF	FARM	AH	SECTIONAL
Defective records	11.15%	16.40%	10.52%	5.28%
South African	71.06%	49.80%	69.95%	74.33%
State-owned	12.19%	5.80%	6.17%	1.11%
Foreign individuals	0.93%	0.55%	1.79%	3.02%
Corporate	4.67%	27.45%	11.57%	16.26%
TOTAL	**100.00%**	**100.00%**	**100.00%**	**100.00%**

Table 5 presents a summary of the value of properties in all the categories.

TABLE 5: VALUE OF THE PROPERTIES

OWNER	ERF	FARM	AH	SECTIONAL
Defective records	17.66%	15.70%	4.10%	11.40%
South African	17.73%	5.69%	43.19%	48.03%
State-owned	0.26%	0.37%	0.14%	0.14%
Foreign individuals	0.74%	0.15%	1.75%	2.46%
Corporate	63.61%	78.09%	50.82%	37.97%
TOTAL	**100.00%**	**100.00%**	**100.00%**	**100.00%**

Table 6 presents a summary of the area or size of the land owned by the different categories of owners.

TABLE 6: AREA/SIZE OF LAND

OWNER	ERF	FARM	AH	SECTIONAL
Defective records	8.27%	11.97%	18.48%	1.17%
South African	6.53%	48.60%	49.34%	22.27%
State-owned	81.00%	5.73%	21.97%	0.11%
Foreign individuals	0.07%	0.07%	1.98%	0.52%
Corporate	4.13%	33.63%	8.23%	75.93%
TOTAL	**100.00%**	**100.00%**	**100.00%**	**100.00%**

This table should not be analysed on its own, because of the regional differences in land uses. It is clear from this table that corporate ownership of farms are high in value but much lower in size. It means that they are high-value farms such as wine estates. Farms owned by South African individuals are big in size but much lower in value. Ownership by individual foreigners in terms of size and value are internally consistent and relatively small.

TABLE 7: COMBINED DATA OF OWNERSHIP BY FOREIGN INDIVIDUALS

Measurement	Erf	Farm	AH	Sectional
Head-count	0.93%	0.55%	1.79%	3.02%
Value	0.74%	0.15%	1.75%	2.46%
Size	0.07%	0.07%	1.98%	0.52%

The only conclusion drawn form these data is that individual foreigners appear to be more interested in urban residential land. Their strongest presence is in the category of sectional title owners.

TABLE 8: PATTERNS OF OWNERSHIP AMONGST INDIVIDUAL FOREIGNERS

Type of land	Head-count	Percentage head-count	Value (in Rands)	Percentage of total value	Size (km2)	Percentage of size
Erf	52 786	65.66%	13,992,479,496	61.99%	945.488	31.99%
Farm	2 540	3.16%	1,009,916,956	4.47%	1724.143	58.33%
AH	1 049	1.30%	258,657,755	1.15%	283.8	9.60%
Sectional	24 013	29.87%	7,312,556,270	32.39%	2.316	0.08%
Total	**80 388**	**100%**	**22,573,610,477**	**100%**	**2 955.804**	**100%**

The difference between table 7 and 8 is that 7 summarises ownership by foreign individuals as a proportion of the other categories of owners. Table 8 focuses only on individual foreigners and summarises tendencies and distribution of ownership only those individuals.

Table 8 above clearly indicates that foreigners are primarily interested in urban residential properties, with erven and sectional title deeds constituting more than 90% of the head-count and value of foreign properties in South Africa. The physical size of their sectional title properties can be ignored, because of the inherently small size of all such units compared to erven, farms and agricultural holdings. This table confirms the internal consistency also prevalent in tables 5-7. Table 8 emphasises urban, residential ownership more than tables 5-7, though the prominence of sectional title properties is confirmed by table 8.

Tendencies regarding erven and farms are the following:

Erven

According to table 7, in terms of numbers, individual foreigners own 0.93% of the residential erven in South Africa. The value and size of these properties as percentages of the total are 0.74% and 0.07% respectively.

According to the table 8, urban residential Erven constitute about 65% of all the properties owned by foreign individuals in South Africa.

The majority of foreigners who own the 0.93% of properties are persons with permanent residence status (52 529), with foreign refugees (153) making up the second largest group, and foreign Public Companies (104) making up the smallest group. No information is available of individual foreigners who are not permanent residents. They may well lie in the Unknown category of owners. The total percentage of 0.93% residential owners may well change significantly once the category of defective records of owners is rectified.

Farms

The ownership of farms by individual foreigners account for about 0.55% (table 4), which is significantly lower than the number and value of Erven. These farms are owned almost entirely by foreigners with permanent residence status.

Conclusion

Foreign individuals with permanent residence status have acquired about 1% of urban residential land in South Africa being. Individual foreigners with permanent residence status have acquired a probably insignificant percentage (0.5%) of rural land in South Africa. However, they are much more significant in the urban residential (especially sectional title properties) category. No conclusions could be reached regarding foreigners who are not permanent residents, because no reliable statistics are available.

2.3 Foreign Corporate Ownership

One of the most serious shortcomings in the current registration requirements at the Deeds Registries Offices is that corporate owners or juristic persons do not have to disclosure their nationality. The deeds statistics are therefore not of any assistance to determine the extent of foreign ownership by corporate entities in South Africo.

The nature of corporate (South African and foreign) ownership has already been demonstrated in tables 4-6, and it can be summarized as follows:

TABLE 9: COMBINED DATA OF OWNERSHIP BY CORPORATE ENTITIES

Measurement	Erf	Farm	AH	Sectional
Value	63.61%	78.09%	50.82%	37.97%
Head-count	4.67%	27.45%	11.57%	16.26%
Size	4.13%	33.63%	8.23%	75.93%

A striking feature of these statistics is that although the number and physical size of the properties are relatively small, their value is disproportionately high. It means that they are mainly properties in the prime market, which will therefore have a high speculative value. The impact of corporate ownership on the South African economy can therefore not be discarded and requires close monitoring.

Anecdotal evidence (such as those provided to the Panel by estate agents and at the public hearings, or reported in the media) as well as evidence provided by commercial banks, especially ABSA Bank, suggest that foreign corporate ownership is substantial. The following are a few examples:

The Panel has established that there are instances where foreign corporations establish wholly-owned subsidiaries that are registered as South African companies. An example is the Utrechtse Beheer Maatschappij "Catherine" B.V. that owns the Marakele Park (Pty) Ltd, CCG088 Investments (Pty) Ltd and CCG 108 Investments (Pty) Ltd. These corporations have substontial holdings in and around Marakele National Park in Limpopo.

Foreign corporate owners have also invested in the wine farms in a significant number. Recent noticeable foreign investments include:

- French owner Anne Cointreau-Huchon of the liqueur and Cognac family has made huge investments in the Morgenhof Estate.
- Italian Count Ricardo Agusta invested about R17 million in revamping the Agusta Wines' cellar in Franschoek.
- A Bahaman-American-SA wine partnership established BoweJoubert Vineyards & Winery in 2001
- Dornier Wines represents a R100 million investment by its Swiss owner.
  Chateau Pichon-Longueville-Lalande has recently bought a 310 acres estate, Glen Elly, in Simonsberg
  Transnet's sale of the Cape Waterfront is another example which involves substantial foreign capital.

Obstacles to a more accurate analysis of the current situation are the following:

Regarding closed corporations, they are registered at the Companies and Intellectual Property Office (CIPRO). The Registrar's file of such a registration does not provide for a field dedicated to nationality. It requires the owner's South African identity number. In its absence the owner's date of birth is included. Foreign ownership of a closed corporation can therefore only be detected by applying the assumption that the absence of an ID number denotes a foreign owner.

Regarding private companies, no nationality declarations are included in their registration requirements. Therefore, the nationality of their shareholders has to be determined individually. Most companies appear to have a mixture of individual and juristic shareholders. Disclosure of the shareholders by the companies is determined by statutory regulations, allowing them 30 days to respond. It is therefore labour-intensive and a tedious process.

Regarding trusts, the Office of the Master of the High Court in each of the fourteen provincial divisions are responsible for their registration. In view of the fact that a deeds registration does not provide information on the nationality of trustees, the Office of the Master has to be approached for such information.

In view of the above, the following policy considerations will be relevant:

1 The shortcomings in the registration of deeds justify an amendment to the statutory requirements regarding nationality and citizenship not only for foreign individual owners, but also for corporate owners;

2 Possible loopholes in the disclosure requirements, such as fronting, have to be addressed.

3 The definition of "foreign ownership" requires more attention, such as the percentage threshold of its owners, trustees or shareholders for a corporate entity to qualify as either South African or foreign, and how to deal with fluctuating ownership, such as shareholding in listed companies.

3 The extent of state-owned land

The argument is often used that land reform can be achieved by using state-owned land and therefore attention paid to other forms of land ownership (including foreign ownership) is not justified. Hence, attention should be paid to the availability and use of state-owned land.

Given the link between the availability of land for meaningful land reform and the Panel's TOR, the Panel was presented with concrete evidence which dispels the view that the State owns large portions of land suitable for land reform (see also tables 1 and 4-6). The statistics given below speak volumes on the issue. Even if it were to be true that such land existed, the Panel's TOR will still be relevant.

The bulk of state-owned land is already under occupation ond used by Africans and Coloureds who were previously merely "tenants" of the state and will now acquire title to the land they occupy under CLARA (approximately 19 million hectares) and other legislation. State land will therefore be dramatically reduced. Other state land owned by the Department of Public Works and in some instances by Land Affairs (in the former homelands), is managed and used by the defence force, public works, state-owned enterprises and conservation. Besides, large areas of state-owned land are in ecologically-poor regions and not suitable for immediate low-cost sustainable productive development.

The Panel is of the view that the Government needs to address the public perception that large areas of state-owned land are not used and can be earmarked for land reform. In terms of the Panel's TOR the need for monitoring and regulating foreign ownership and use of land is enhanced by the fact that the privately-owned land, and not state-owned land, is critically important for land reform and transformation. The answer to equitable access to land cannot be met by distributing state-owned land.

The following is a presentation of the extent of state-owned land in South Africa (in hectares).

THE EXTENT OF STATE LAND IN THE REPUBLIC OF SOUTH AFRICA (ha*)

NATIONAL STATE LAND PER PROVINCE		PROVINCIAL STATE LAND (the nine province government)
Department of Public Works	Department of Land Affairs	

PROVINCE	SANDF	SAPS	DCS	DWAF	AGRICULTURE (FALA-land) (1)	SOUTH AFRICAN NATIONAL PARKS	OTHER (2)	Ex-TBCV-STATE & SGT's	Ex- SADT (3) & Other land obtained for lane reform	NATURE RESERVES & PROTECT D ARREAS	OTHER	RSA - TOTAL	%
	18 215	3 870	13 678	246 855	17 060		201 355	4 696 243	78 505	461 984	133	6 007	24.7%
Eastern Cape											300	921	
Limpopo	16 318	2 245	7 890	58 234	8 574	1 025 940	239 385	3 203 840	326 234	335 602	130 050	5 354 312	22,1%
North West	32 110	1 605	2 422	8 742	6 890	0	169 680	3 451 200	77 077	240 119	156 300	4 146 145	17,1%
Mpumalonga	9 890	2 190	3 275	89 478	5 636	955 675	167 600	545 434	161 102	208 900	165	2 314 300	9,5 %
Western Cape	42 824	3 982 146	16 588	396 840	18 315	202 983	226 010	0	0	836 135	120	1 890	7,8 %
Northern Cape 1 298	246 850	1 298	908	11 950	25 483	1 258 842	130 135	0	21 432	62 176	560 116	237 1 875	7,7 %
KwaZulu-Natal	7 860	3 225	17 220	116 678	7 319	0	211 770	30 902	508 106	770 354	250 161	324 1 834	7,6 %
Free State	31 080	875	3 730	7 675	5 508	11 633	87 20	140 557	38 388	202 738	250 58 860	684 588 254	2,4 %
Gauteng	9 766	2 216	10 212	3 815	9	4	70 350	0	35 210	42 191	68 690	242 463	1,0 %
GRAND TOTAL	**414**	**21**	**75 923**	**940 267**	**94 794**	**3 591 933**	**1 503 495**	**12 068 176**	**1 246 054**	**3 160 199**	**1 136 380**	**24 253 640**	

Notes:-

* Excluding the following:-
- some unsurveyed, unregistered state land (e.g. coastal areas)
- foreign properties (e.g. SA embassies)

- offshore islands (e.g. Seal Island) (Robben Island is included under Western Cape "other": 476 ha)
- parastatal land (e.g. Transnet)
- former KwaZulu land (naw Ingonyama Trust land - 2 883 884 ha)
- former Coloured Rural Areas (e.g. Rural Area of Enon) - administrated and held in trust in terms of Act 9 of 1987 - 1 277 926 ha
- land held in trust by the Minister of Land Affairs for various African traditional communities (e.g. tribes) - 931 938 ha

(1) FALA-land refers to Financial Assistance Land (land bought in from insolvent farmers and PWD agricultural land) administrated by the National Department of Agriculture.

(2) Includes unreserved PWD-land, land held in shares, and other smaller holder departments (e.g. Home Affairs, Justice, Mineral & Energy Affairs, etc.).

(3) Ex-SADT - refers to South-African Development Trust land outside the geographical boundaries of the former homelands and Self Governing Territories.

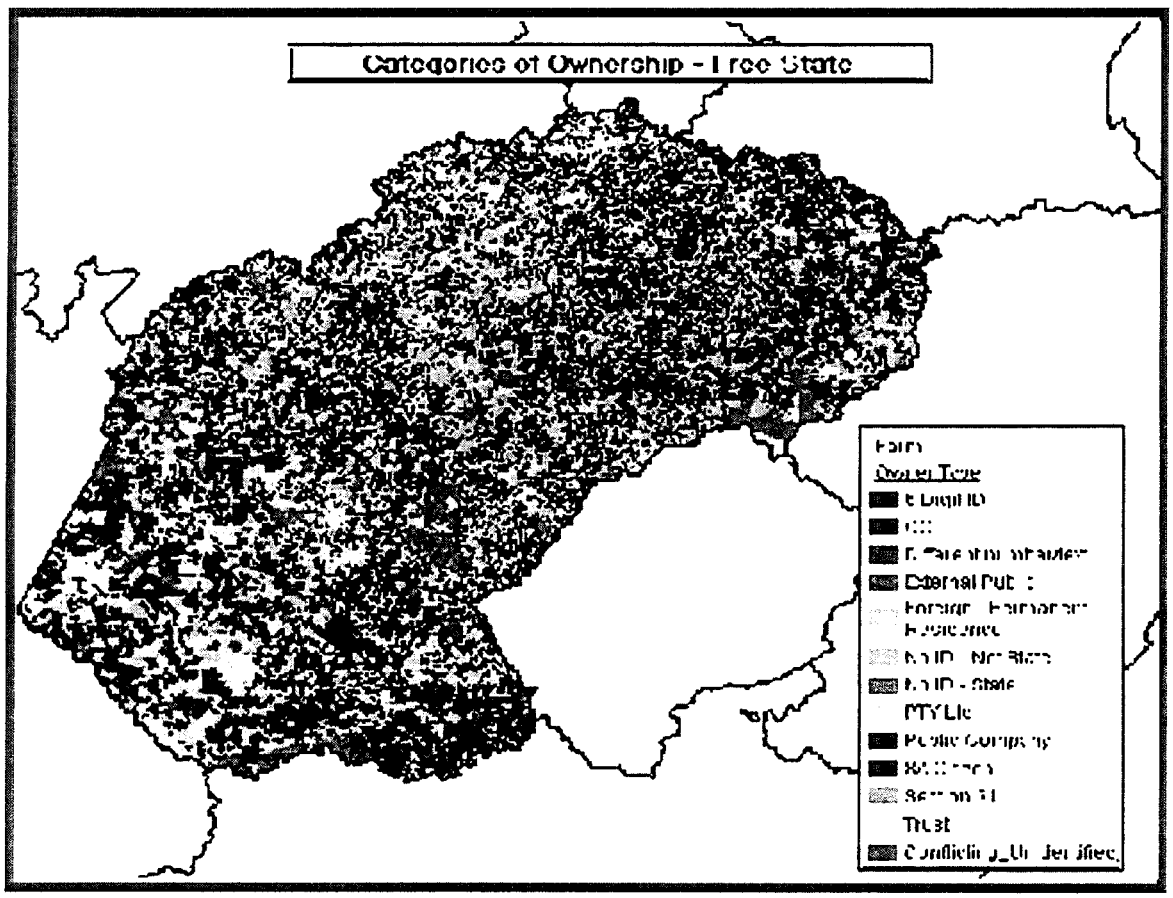
(4) Includes provincial agricultural land, as well as school sites, hospital land and provincial road reserves.

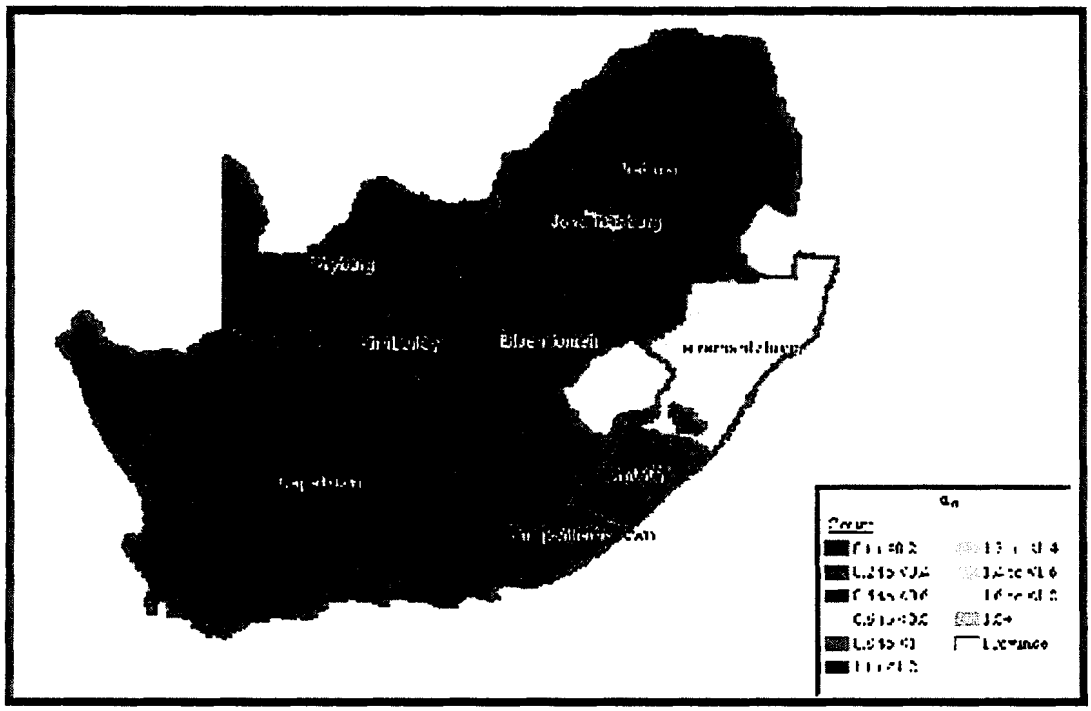
Source: Department of Land Affairs, Directorate Public Land Support Services, 30 June 2006

In the following four maps a visual presentation is made of the nature and extent of foreign ownership of land in South Africa.

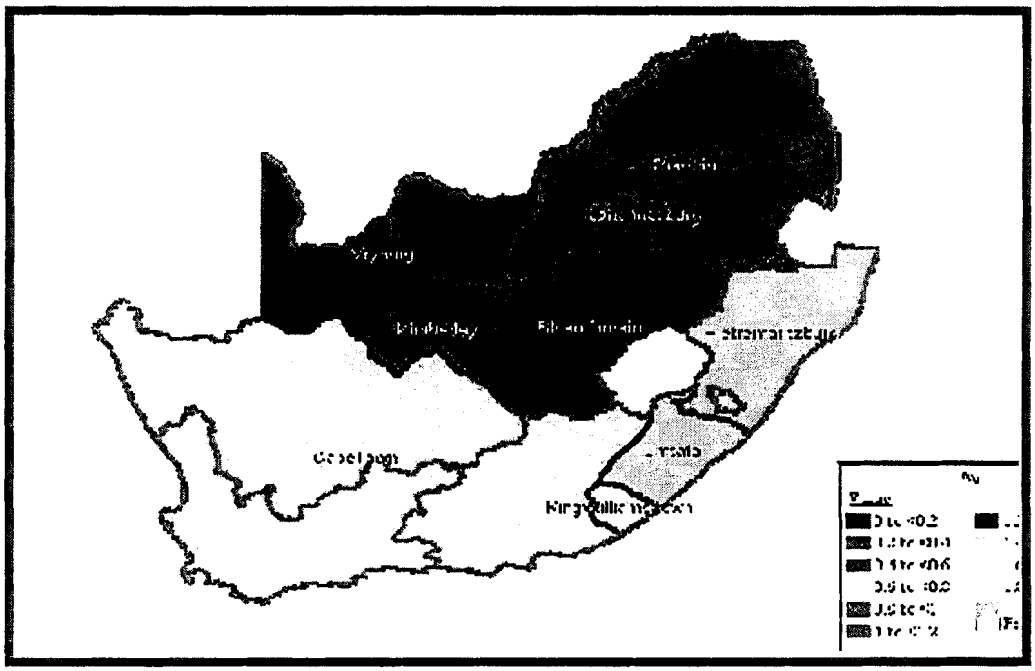
ADDENDUM B

MAP 1: CATEGORIES OF OWNERSHIP – FREE STATE

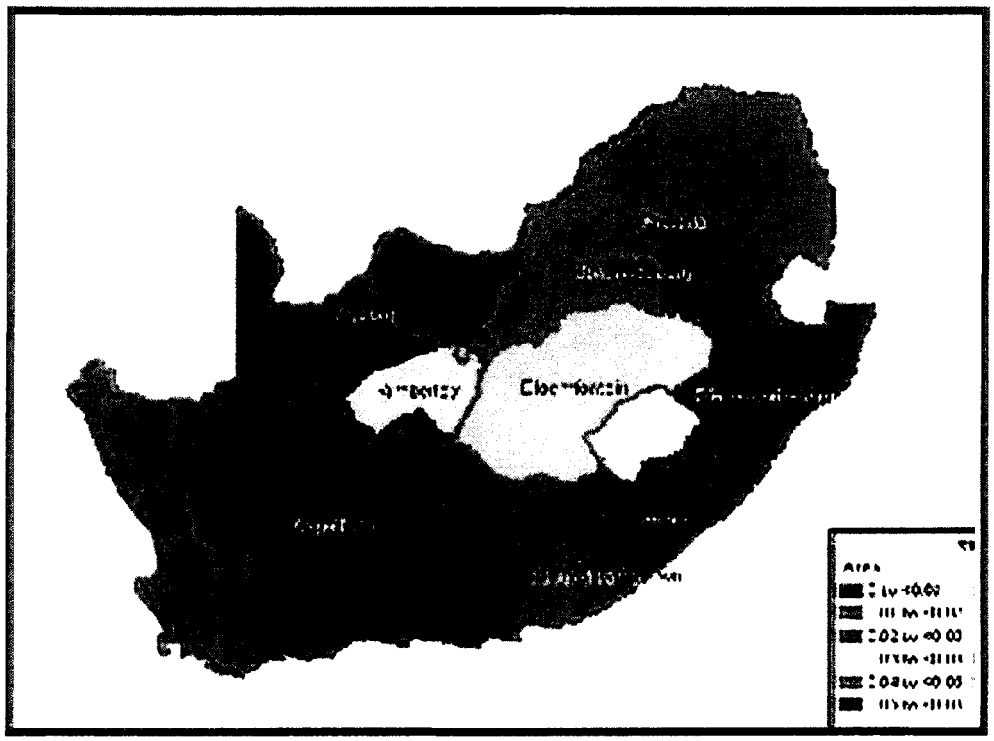




MAP 2: COUNT OF FOREIGN OWNERSHIP AS A PERCENTAGE OF TOTAL PROPERTIES



MAP 3: VALUE OF FOREIGN OWNERSHIP AS A PERCENTAGE OF TOTAL VALUE



MAP 4: AREA OF FOREIGN OWNERSHIP AS A PERCENTAGE OF TOTAL AREA

Section 2 Part 3:

International practices and policies: Regulation of ownership and use of land and property by foreigners in other countries

In order to conduct a proper consideration of landownership by foreigners, the Panel's recommendations should also be informed by comparable policies and practices in other countries. The Panel's Terms of Reference therefore also include, inter alia, the request to investigate "comparative international/foreign practices (laws, policies, impact, etc) on the issue of land ownership by non-citizens". The Panel interprets it as a task to look at what other states are doing in this respect and then to identify those approaches most suitable for consideration in South Africa also. Appendix 6 contains the detailed survey of international practices and policies in other parts of the world. In this section the most relevant aspects are emphasised.

The following countries were surveyed by the Panel:

Africa: Malawi, Nigeria, Zambia, Zimbabwe
Middle East: Jordan, Iran, Israel
Western Europe and Nordic countries: Austria, France, Norway, Switzerland, Turkey, United Kingdom (England, Scotland and Wales), Spain, Sweden, Denmark, Finland, Greece, Ireland, Portugal.
East and Central Europe: Lithuania, Slovakia, Poland, Czech Republic, Hungary
North America: Canada, United States of America
Asia and the Pacific: India, Japan, South Korea, Thailand, Singapore, Indonesia, Australia, New Zealand
Latin America: Colombia, Brazil, Mexico, Chile

In July and August 2005 members of the Panel and members of the technical support team conducted study tours to the following countries: Canada, Chile, Brazil, Indonesia, Singapore, England and Scotland. The information gathered has been analysed and appear in summary in Appendix 12 in full.

General tendencies identified in the international practices and policies

The following discussion identified five general tendencies extracted from the international examples which the Panel had investigated:

1 Strategic factors and national interest

National interest and national security, perhaps more than any other factors, are advanced as the main reason for the imposition of restrictions on foreign ownership of land or other land-based resources. What amounts to national and security interests are influenced by many factors, including the time of the decision and other geopolitical considerations. As such, what becomes a question of national security importance may fall away or may arise with time or by sudden changes in the geopolitical climate.

A couple of other motivations justifying foreign ownership restrictions are also defensible on grounds analogous to national interest or security. National interest therefore encompasses concerns around food security, protection of coastal and sensitive land and water protection, communal lands, national monuments, security or military installations, and other areas of national strategic importance. The Government of Australia (Summary of Australia's Foreign Investment Policy issued by the Treasury - May 2000) reports that:

> The Government determines what is 'contrary to the national interest' by having regard to the widely held community concerns of Australians. Reflecting community concerns, specific restrictions on foreign investment are in force in more sensitive sectors such as the media and developed residential real estate. The screening process provides a clear and simple mechanism for reviewing the operations of foreign investors in Australia whenever they seek to establish or acquire new business interests or purchase additional properties. In this way Government is able to put pressure on foreign investors to operate in Australia as good corporate citizens if they wish to extend their activities in Australia. By far the largest number of foreign investment proposals involve the purchase of real estate.
>
> The Government seeks to ensure that foreign investment in residential real estate increases the supply of residences and is not speculative in nature. The Government's foreign investment policy, therefore, seeks to channel foreign investment in the housing sector into activity that directly increases the supply of new housing (i.e. new developments – house and land, home units, townhouses, etc) and brings benefits to the local building industry and their suppliers.

2 Economic factors

Economic-related control measures seem quite prevalent in many countries since the very nature of foreign acquisitions and use of immovable property in a country is said to be influenced mainly by the relative financial superiority of the non-nationals against the local citizens. Measures are thus instituted to restrict or direct the flow of investment according to national interest considerations. The economic control justification includes the need to restrict land speculation which is a potential source for distortion of agricultural and housing land market prices.

It is vital that we search for answers to the hovering question of what are the determinants of FDI? Or rather more directly: will the regulation of land ownership by foreigners negatively influence FDI? Studies have revealed that while a liberal policy on investment is necessary to attract FDI, it is not sufficient. Other determinants for increased FDI flows are: the market size, growth, production costs, skills levels, adequate infrastructure, economic stability, and the clarity and stability of rules which can effectively rule out corruption and other forms of rent-seeking. This explains why countries with varying nationality restrictions on investment equity, like Thailand, Malaysia, Singapore and especially China are among the top 20 recipients of FDI worldwide. China, with the most stringent nationality requirement, is number one on the list of twenty.

The leading grouping of industrialized countries of the world, the Organisation for Economic Co-operation and Development (OECD)'s *Checklist for Foreign Direct Investment Incentive Policies* (OECD 2003) stated as "Guiding Principles for Policies Toward Attracting Foreign Direct Investment" that:

> The aim of policies for attracting FDI must necessarily be to provide investors with an environment in which they can conduct their business profitably and without incurring unnecessary risk. Experience shows that some of the most important factors considered by investors as they decide on investment location are:
>
> - A predictable and non-discriminatory regulatory environment and an absence of undue administrative impediments to business more generally.
> - A stable macroeconomic environment, including access to engaging in international trade.
> - Sufficient and accessible resources, including the presence of relevant infrastructure and human capital.

The most effective action by host country authorities to meet investors' expectations is:

- Safeguarding public sector transparency, including an impartial system of courts and law enforcement.
- Ensuring that rules and their implementotion rest on the principle of non-discrimination between foreign and domestic enterprises and are in accordance with international law.
- Providing the right of free transfers related to an investment and protection against arbitrary expropriation.
- Putting in place adequate frameworks for a healthy competitive environment in the domestic business sector.
- Removing obstacles to international trade.
- Redress of those aspects of the tax system that constitute barriers to FDI.
- Ensuring that public spending is adequate and relevant.

Property tax, as an economic factor, is also sometimes moot as an instrument to draw a distinction in the land market between speculation and investment by foreigners. Several countries, including Namibia, France, the United States, and New Zealand, indeed utilize this, either solely or in conjunction with other measures as a balancing act. The US Foreign Investment Real Property Tax Act (FIRPTA) governs dispositions of United States real property interests by a foreign person or entity. A person who meets the substantial presence test (to be in the USA for at least 183 days) or is considered a resident alien for income tax purposes is however not considered to be a foreign person. The amount of tax required to be withheld and paid to the Inland Revenue Service (IRS) by the buyer is 10% of the amount realized on the transfer, or 35% of the gain recognized by a domestic corporation, domestic partnership, domestic trust or domestic estate. A foreign corporation that holds a U.S. real property interest, and under any treaty obligation, is entitled to non-discriminatory treatment with such interest, can elect to be treated as a domestic corporation for purposes of this section. If the real property interest is used by the foreign person or entity for the production of income during the taxable year, and it is located in the U.S. the law imposes a 30 percent tax rate (or tax treaty rate if lower). However, the foreign person or entity can make an election to treat the real property income as income effectively connected with a U.S. trade or business, thus making it subject to graduated tax rates.

3 Complete, compulsory prohibition

Debates on land ownership by foreigners are partly informed by proponents of a compulsory and complete prohibition of ownership by non-citizens. According to Stephen Hodgson, Cormac Cullinan, Karen Campbell[14], "relatively few countries surveyed have an outright ban on foreign ownership or use of land. Some countries such as China, Vietnam, Ethiopio and a number of others form a distinct category in that nationals are not permitted to own land outright either. Chino grants "equal treatment" to foreigners in that they too may be granted land use rights. In Zambia, the Land (Conversion of Titles) Act provides that all land vests absolutely in the President, "and shall be held by him in perpetuity for and on behalf of the people of Zambia", and that no person shall be granted land except for a specified term af up to 100 years. Such a provision, not unusual in the African context, does not in itself preclude foreigners from acquiring land rights as strong as any national might acquire. Such land rights may in practice be tantamount to ownership, though subject to a superior *de jure* right held by the state or the President".

Qualified forms of prohibition are more widespread throughout the world. Examples are Singapore (where foreigner ownership of landed property is prohibited), Mexico close to its international borders, or Switzerland.

4 Reporting and Restrictions

The majority of the countries in all the regions of the world have either or both restrictions on the ownership/acquisition of land, and reporting requirements of the ownership/acquisition of land by non-citizens. Various forms of restrictions exist including (a) leases or term restriction; (b) restrictions on coastal zones, and in sensitive, forbidden areas; (c) land quantity restrictions; (d) reciprocity or preferential national treatment; (d) pre-emption and right of first refusal; and (e) permit or authorization requirements. Reporting or disclosure measures enable countries to secure an accurate base of data on land-ownership by non-citizens or non- residents in a timeous manner as a basis for policy intervention. These reporting or disclosure measures are used for a range of planning and governance purposes, including taxation and security issues, by countries including Mexico, Canada, Australia, New Zealand, Thailand, and the United States of America.

5 Land Information Reporting, Monitoring or Disclosure Legislation

Tracking land ownership[15] (as applicable for example in Nova Scotia in Canada) provides a mechanism to gather and update information as properties change hands in a timely fashion. This ensures that an accurate and comprehensive database on non-citizenship and non-residency status is available upon which to base future decisions. Relioble dato collected over time offers the information needed to address issues of societal concern when they arise.

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[14] Land Ownership and Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and Use of Land by Foreigners (FAO, December 1999, p31)

[15] see *Non-Resident Land Ownership in Nova Scotia* - Final Report of the Voluntary Planning's Task Force on Non-Resident Land Ownership, December 2001

A summary of the land regulations regarding foreign ownership in Chile, Indonesia, Singapore, England and Scotland.

Chile

The overwhelming characteristic of Chile's FDI environment is the very open climate that the country portrays. Land is no exception. There are virtually no regulations pertaining to the purchase of land by foreigners, except in respect of border and coastal areas. Nationals of Peru, Argentina, Bolivia cannot acquire land in a 10 km buffer zone between the boundaries of these countries. Furthermore, the very long western coast is not transferable but only granted under concession.

About 35% of the land surface of Chile is state-owned, of which 15% falls under the jurisdiction of the Ministry of National Property, and 20% is protected land and falls under the Forestry Department. About 65% is under private ownership. The Ministry of National Property is charged with the responsibility of managing all of land under the various branches of government in respect of a coherent strategy of territorial development and regulating the different uses of state property. It takes care of the procurement of land by the state for the purposes of good governance through purchases, transfers, donations or expropriation. The sale of public property is only allowed in the event that the Ministry declares a piece of land as non-essential to the proper functioning the state. The transfer of state property is done by open and public tender.

The Ministry of National Property has two main lines of activity. It seeks to promote productive investments in state land and it attempts to ensure a model of sustainable protection of state assets.

Chile does not discriminate against foreigners in respect of investment in the country. There are two mechanisms for foreign investment. Firstly, Chapter 14 of the Compendium of Foreign Exchange Regulations of the Chilean Central Bank and secondly, the Foreign Investment Statute, Decree Law 600.

While Chapter 14 establishes o general mechanisms for the registration of foreign investment, it has no powers to screen or reject any foreign investment project. Instead, it is supposed to facilitate the free entry, use and exit of investment flows. Decree Law 600, on the other hand, is an optional mechanism through which a foreign investor enters into an investment contract with the Chilean state. The decree provides special conditions for investors such as the right to transfer capital, to repatriate profits, guarantee of non-discrimination against foreigners, the right to participate in any form of investment and to hold assets indefinitely and tax stability. These voluntary applications for such contracts can be rejected only if they contradict public order, national security or general economic policy. The Foreign Investment Committee is charged with the responsibility of administering Decree Law 600. While the general climate tends to encourage foreign investment, there are some restrictions. Non-Chileans may not invest in Chilean fishing companies or in the media, unless their home country has a reciprocal arrangement with Chile. The European Union signed such an agreement in 2002 to cover commercial fishing companies. While there are no restriction on foreign investment in telecommunications, investors are required to acquire a licence and these are strictly limited. Chile entered into a Free Trade Agreement with the USA which came into force on 1 January 2004.

This open investment climate has allowed one individual Douglas Tompkins to acquire vast tracts of land in Chile (estimates range between 400 000 and 500 000 hectares). Ostensibly purchased to create national parks to protect the country's temperate forests, Tompkins's vast ownership of Chilean land, effectively splitting the country in two, has stimulated intense debate over whether a foreigner should have been allowed to acquire so much land. Chilean nationalists (from the left and right of the political spectrum) have publicly questioned his motives and have drafted a bill to curb this kind of foreign ownership on the basis of the territorial integrity of the country.

Indonesia

All regulations in respect of ownership, occupation, use and utilisation of land apply to both Indonesian citizens and foreigners. Currently Indonesia belongs only to Indonesians and the right of land ownership is limited and regulated.

Generally, there is no differentiation between Indonesian citizens and foreigners who are resident in Indonesia except that foreigners cannot have freehold title. Foreigners domiciled in Indonesia can derive benefit from the land in the same way as citizens. However, access to land can only be gained by foreigners who meet certain criteria as prescribed by law. Failure to do so disqualifies foreigners to have any form of land right. The National Agrarian Law of 1960 allows foreigners the rights of use, which affords holders ownership of residential house or tenancy in Indonesia on the basis of Government regulation 41/1996. The regulation requires that foreigners should be domiciled in Indonesia and that their presence should benefit national development. Individuals owning this right can only own one house or one unit of mansions (condominium) not qualified as small. The rationale is only to allow them to take care of their investments in the country. Foreign legal entities founded according to Indonesian law and domiciled in Indonesia can acquire the right to cultivate land owned by the state. Indonesia restricts the size upon which this right can be exercised to five hectares in densely populated areas and seventy hectares in less densely populated areas.

Leasehold is another type of land holding available to foreigners living in Indonesia. Lease agreements should be written and authenticated by a competent Indonesian authority. Long lease rights for large estates and housing could be valid for not longer than 20 years and can be renewed for a further 25 to 30 years. A long lease can be renewed to a maximum cumulative period of 65 years.

Restrictions in Indonesia do not deter foreign investment since holders of the right of use can engage in legal activities towards the land, the house or unit of apartment. Foreigners holding any form of right of use can sell, buy, mortgage, posses, rent, donate and use the right on land, house or apartment.

Acquisition of land rights by foreigners in Indonesia

Application to buy a right of use is lodged with the land officials. In the case of privately owned land, the owner releases his/her ownership to the state. Once satisfied that the applicant meets the criteria for foreigners, the state authorises that the right can be registered. Registration of the right acquired then is finalized at the relevant registration office. In the case of a lease, a written lease agreement between the foreigner and owners should be drawn by a competent authority. For such lease to be valid it should be registered in the regional land office. Land use change should be authorised by the land office. No direct transfer of right can take place between two private persons and change of ownership of rights on land should be reported within two weeks to the land office.

Singapore

About 90 percent of the land in Singapore is state-controlled and eight percent of housing stock is privately owned. For both citizens and foreigners land is held either in freehold or in leasehold. Land can be leased for up to 30 years renewable for industrial purposes, whilst state land can be leased for 99 years. Ownership of land and property is regulated by the Residential Property Act (PRA) of 1973. The Act restricts foreign ownership of landed residential property such as detached houses, semidetached or terrace houses. Unrestricted residential properties and commercial or industrial property are not restricted for foreign ownership. Therefore foreign persons can freely buy non-residential properties and non-restricted residential properties.

In order to buy restricted residential properties foreigners require prior approval. Foreigners who wish to buy residential land for development must apply far a qualifying certificate under the PRA. A qualifying certificate imposes on the developer conditions such as completion and disposal of the developed properties within a specified period. The certificate further requires the developer to provide a bank guarantee as security for compliance with the conditions. Developers may apply for variation of the conditions and approval is granted on the merits of each case.

The Residential Property Act set criteria for qualification to purchase restricted residential properties. Foreign individuals who wish to buy such properties must be permanent residents. The criterion signifies the individual's intention to live and work in Singapore thereby making an adequate economic contribution to Singapore. This criterion can also be complied with in the form of professional or other qualifications or experience, which is of value to Singapore. Foreign companies must meet the economic contribution requirement. Singaporeans impose limitations on foreign ownership in terms of the size of land. The property purchased by foreigners may not exceed a land area of 1393 square metres. Foreigners can also gain access to land by means of a 30- or 99-years lease for industrial purposes.

Process of land acquisition by foreigners in Singapore

The following are steps followed when purchasing land or residential properties:

Information on the purchaser's identity, including citizenship, and the details of the property are disclosed by the conveyansor (solicitor) with the registrar of deeds (known as controller of residential property in Singapore) on lodgement. All conditions and limitations relating to foreign owners are checked at this stage.

In the case of a foreigner purchasing restricted residential property, *approval by the Minister of Law is required*. The request for approval is first lodged with the SLA, which considers it in consultation with other relevant department such as Trade and Industry and Home Affairs. The SLA then submits the application with their recommendations to an interdepartmentol committee comprising of the Ministries of Trade and Industry, Home Affairs and of Law. The committee is chaired by the permanent secretary form the Ministry of Law under which Land Affairs falls. The committee's decision making process is required to be transparent all times. Once considered by this committee an application for approval is open for objections for a specified period after which a recommendation for approval or otherwise will be made to the Minster of Law. Approval is granted at the Minister's discretion.

England and Scotland

At this stage ownership of land by foreigners in both countries of the United Kingdom is unrestricted and is, in fact, encouraged in order to attract direct foreign investment. Therefore lessons learnt from these countries were largely on their lond registration systems. Scotland presents also a fascinating example of land reform in an economically-advanced society.

Land Registration in England and Wales

Land registration in these countries takes place in terms of the Land Registration Act of 2002, which came into operation on 13 October 2003. It replaced all previous legislation on land registration. It introduced a new system of conveyancing.

The Act envisages changing the philosophy of registration. It creates a system whereby registration confers title rather than merely capturing what has already being created. It is the outcome of a joint project between His Majesty's Land Registry and the Law Commission which started in 1995. The two bodies produced a report, which was in three parts.

The aim of the project was to introduce for the first time a conclusive register that would facilitate conveyancing by reducing a number of enquiries that would have to be made before registration could finally take place.

It also created a platform for the introduction of e-conveyancing in England and Wales. In the past the turn-around times for registration could take up to two months depending on the circumstances present in each transaction. It is envisaged that registration and titling will be done simultaneously once e-conveyancing is implemented.

Land Registration – Scotland

Scotland presents a anachronism in the modern age: on the one hand it is highly advanced in economic and political terms, while on the other hand, until recently it still entertained a feudal system. Firstly, we shall look at their registration system of those who managed to become property owners.

Scotland is known for its successful deeds registration system until quite recently when the Scottish embraced titling. The Scottish and South African systems were similar until titling was introduced in Scotland. Registration of land in Scotland takes place in terms of the Land Registration (Scotland) 1979. The deeds registration system is still used in Scotland in respect of titles that remain unregistered.

Title registration consists of a tabular and not a genealogical record of ownership, where the title can be seen without further investigation. It is not an index of traditional documents, but it creates a new form of record in the sense that anyone interested in a piece of land need not look behind the new record in order to check whether there are existing rights which attach to the title.

This system encapsulates three principles: the mirror, the curtain and the insurance principles. The mirror reflects the state of the title, the curtain covers up other interests in land and the prospective buyer need not concern himself or herself with underlying interests in that land. Lastly, the insurance principle guarantees payment of damages in the event that an error occurred when registration of title took place.

The Scottish land tenure system had until recently a strong feudal character, which in some respects relate to the Swedish "torp" phenomenon. Scottish land issues are intimately linked to the "Highland Clearances". When the Scottish clan system was destroyed after their defeat by the English in 1745, their clan chiefs were encouraged by the English to consider themselves as the owners of the land, and not the clans. Much of the land was converted into sheep pasture and therefore many clan members were dispossessed or had to provide their labour to the landlords without the possibility of owning the land. This feudal system continued until 1974 when legislation terminated the feu duties that the peasants had to pay to the land owners. Only after the Scottish Parliament was established in 1999 did it really address the issue. It adopted a set of legislation: the Abolition of Feudal Tenure (Scotland) Act 2000, which removed the feudal system of landholding; the Title Conditions (Scotland) Act 2003 for the use of land titles; and the Tenements (Scotland) Act 2004 to codify the laws relating to flatted property (condominium). The Land Reform (Scotland) Act 2003 created a framework for rural or croft communities to buy land in their areas.

Scotland provides therefore an example of a state generally considered to be economically advanced and part of the European Union, in which large-scale land reform is happening. They have to contend with the pressure and competition far prime land in the Scottish Highlands and other areas, and balance it with the indigenous expectations of persons dispossessed of land for generations.

ASSESSMENT

The Panel has discovered a wide range of policies and practices on an international scale with which states regulate their land. Regulation of land-ownership, as the examples indicate, is not a phenomenon of developing states only, but include also developed states (such as Canada, USA, Singapore, Australia and New Zealand). It is also not typical of states in the process of a political transition, but also a policy instrument for established democracies.

It is also not characteristic of a particular macro-economic orientation, but is used in all forms of economies. Evidence also made it clear that regulation of land-ownership does not undermine investor confidence. It is confirmed by the fact that states with high levels of FDI, such as Australia and Singapore, apply such policies.

Section 2 Part 4:

Revision, harmonization and rationalization of legislation about development planning and land use

The analysis of legislation applicable to development planning and land use (see Appendix 7) clearly demonstrates that there is a need for new comprehensive and overarching national legislation that can provide a standard framework for the regulation of development planning and land use at all the three spheres of government. The multiplicity of legislation at national and provincial levels, in addition to local government by-laws and ordinances, lead to very different, and sometimes contradictory and confusing, practices when it comes to development planning for residential, industrial, agricultural and recreational purposes. The situation lends itself to abuse and manipulation. It explains why land use can be changed without any centralised official notification or approval.

In the next sections the Report provides an overview of the most relevant legislation pertaining to development planning and land use. The Panel is not aware of any reference to foreign ownership in anyone of them. Their inclusion in the Report is motivated by the Panel's observation that regulation of foreign ownership of land or their land use will not be effective without also improving coordination of the legislative dimension in a common legislative framework.

Legislation by local authorities are not included here. They are too many to be listed. Municipalities do not have exclusive constitutional powers in this respect, and therefore can only legislated in terms of enabling national and provincial legislation, which are included here. Municipal autonomy is derived from the fact that municipal land is still categorized as "private land", otherwise it is subject to the legislative framework listed in this section.

Section 1: National legislation directly or indirectly applicable to land use and planning

Apart from Article 25 and Schedules 4 and 5 of the Constitution, the following statutes are important to development planning and land use:

- Physical Planning Act 88 of 1967
- Urban Transport Act 78 of 1977
- Physical Planning Act 125 of 1991
- Local Government Transition Act 209 of 1993
- Development Facilitation Act 67 of 1995
- Housing Act 107 of 1997
- Local Government: Municipal Demarcation Act 27 of 1998
- Local Government: Municipal Structures Act 117 of 1998
- Local Government: Municipal Systems Act 32 of 2000

Section 2: The tables below summarise the applicable provincial legislation

WESTERN CAPE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Proc R 1897 of 1986 *Regulations Relating to Township Establishment and Land Use*
- PN 733 of 1989 *Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope*
- GN 1886 of 1990 *Township Development Regulations for Towns*
- GN 1888 of 1990 *Land Use and Planning Regulations*
- Western Cape Planning and Development Act, 1999(Act no. 7 of 1999

EASTERN CAPE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Ciskei Land Use Regulations Act 15/1987
- Proc R 293 of 1962 *Regulations for the Administration and Control of Townships in Black Areas*
- Proc R 188 of 1969 *Black Areas Land Regulations*
- Proc R 1897 of 1986 *Regulations Relating to Township Establishment and Land Use*
- PN 733 of 1989 *Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope*
- GN 1886 of 1990 *Township Development Regulations for Towns*
- GN 1888 of 1990 *Land Use and Planning Regulations*

NORTHERN CAPE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Proc R 1897 of 1986 *Regulations Relating to Township Establishment and Land Use*
- N 733 of 1989 *Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope*
- GN 1886 of 1990 *Township Development Regulations for Towns*
- GN 1888 of 1990 *Land Use and Planning Regulations*
- Northern Cape Planning and Development Act | 1998

NORTH WEST PROVINCE

- Townships Ordinance 33 of 1934
- Land Use Planning Ordinance of 15 of 1985
- Town-planning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Proc R 293 of 1962 *Regulations for the Administration and Control of Townships in Black Areas*
- Proc R 188 of 1969 *Black Areas Land Regulations*
- Proc R 1897 of 1986 *Regulations Relating to Township Establishment and Land Use*
- PN 733 of 1989 *Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope*
- GN 1886 of 1990 *Township Development Regulations for Towns*
- GN 1888 of 1990 *Land Use and Planning Regulations*

MPUMALANGA PROVINCE

- Town-plonning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Venda Land Affairs Proc 45 of 1990
- KwaNdebele Town Planning Act 10 of 1992
- Proc R 293 of 1962 *Regulations for the Administration and Control of Townships in Black Areas*
- Proc R 188 of 1969 *Black Areas Land Regulations*
- Proc R 1897 of 1986 *Regulations Relating to Township Establishment and Land Use*
- PN 733 of 1989 *Regulations Relating to the Establishment and Amendment of Town Planning Schemes for the Province of the Cape of Good Hope*
- GN 1886 of 1990 *Township Development Regulations for Towns*
- GN 1888 of 1990 *Land Use and Planning Regulations*

MPUMULANGA

- Town-planning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Bophuthatswana Township Regulation Amendment Act 21 of 1981

- KwaNdebele Town Planning Act 11 of 1991
- KwaNdebele Town Planning Act 10 of 1992
- Proc R 293 of 1962 *Regulations for the Administration and Control of Townships in Black Areas*
- Proc R 188 of 1969 *Black Areas Land Regulations*
- Proc R 1897 of 1986 *Regulations Relating to Township Establishment and Land Use*
- GN 1886 of 1990 *Township Development Regulations for Towns*
- GN 1888 of 1990 *Land Use and Planning Regulations*

GAUTENG

- Town-planning and Townships Ordinance 15 of 1986 (T)
- Division of Land Ordinance 20/1985 (T)
- Proc R 1897 of 1986 *Regulations Reloting to Township Establishment and Land Use*
- GN 1888 of 1990 *Land Use and Planning Regulations*

FREE STATE

- Townships Ordinance 9 of 1969 (O)
- Bophuthatswana Township Regulation Amendment Act 21 of 1981
- Bophuthatswana Township Regulation Amendment Act 21 of 1981

KWAZULU-NATAL

- Town Planning Ordinance 27 of 1949 (N)
- KwaZulu Land Affairs Act 11 of 1992
- Proc R 188 of 1969 *Black Areas Land Regulations*
- Proc R 1897 of 1986 *Regulations Relating to Township Establishment and Land Use*
- GN 1886 of 1990 *Township Development Regulations for Towns*
- GN 1888 of 1990 *Land Use and Planning Regulations*
- Kwazulu-Natal Planning and Development Act, 1998

ASSESSMENT AND CONCLUSION

The lack of minimum basic national standards has contributed to the disparate practices by the provinces and local authorities (municipalities). The latter, according to the Green Paper on Development and Planning, constitute the cutting edge of the spatial development planning system, especially in the form of the Integrated Development Plans (IDP)

The Panel identified the need for urgent rationalization and harmonization of the legislative framework for development planning. In this respect the idea of a new national framework law and requiring of provinces and local authorities to revise, rationalize and harmonise their legislation in order to bring them in tandem with the national legislative framework, is mooted. The constitutional basis for such an approach is Schedule 4 (parts A and B – functional areas of concurrent national and provincial legislative competence) and Schedule 5 (parts A and B – functional areas of exclusive provincial legislative competence).

The Panel is of the opinion that during the process of rationalization and harmonization the President might be able to invoke the presidential proclamation powers under Section 97 of the Constitution to assign (as a transitional measure while new legislation is prepared) the administration of the multitude of legislation that currently reside with different ministries, to the Minister of Agriculture and Land Affairs. The Minister would be required to work through the Inter-Ministerial/-Departmental Oversight Committee, which is recommended by the Panel.

Section 2 Part 5:

Recommendations

5. 1 Foreigners, non-citizens and foreign interest

The Panel noted the widespread local concern about the purchase and ownership of South African assets by foreigners and therefore considered it imperative to define very clearly who will be viewed as a foreigner and, in respect of juristic persons, how foreign interests should be defined. The Panel was guided by two legal frameworks in this regard: firstly, the manner in which a South African citizen is defined in the Constitution and secondly, in relation more specifically to the various categories of residents and non-residents in South Africa as defined by immigration legislation. In defining who is a foreigner or what is foreign interest the Panel furthermore differentiated between natural persons, corporations and trusts.

Recommendations

- In the case of corporations (businesses that are incorporated in terms of the Closed Corporations statute and other statutes) the Panel recommends that consideration be given to lowering the 50%+1 shareholding by a non-resident as constituting a foreign-owned entity or a foreign interest and should be treated as such in the regulatory framework developed[16].
- In the case of trusts, information on the citizenship and residence of both the trustees and the beneficiaries of such trusts needs to be obtained. The same goes for partnerships and joint ownership by individuals, some who may be non-citizens and/or non residents.
- Given some of the long-term objectives of SADC, the panel recommends that citizens from SADC countries or SADC corporations should either be exempted from the regulations or be given preferential treatment.
- Permanent residents should also enjoy preferential treatment.

5. 2 Compulsory Disclosure/Declaration Requirements

Under the current policy and practice, including the system of registration of deeds, it is impossible to ascertain the precise extent of foreign and/or non-resident ownership and use of land in South Africa, because the disclosure of nationality is not a prerequisite for the transfer of property. Anybody can buy land in South Africa without declaring their nationality. Consequently, the Deeds Registries Office has neither any record nor a register of the nationality of the land-owners in the country. The Panel is of the opinion that this is o very serious omission which requires immediate attention since it is clearly in the public interest to know the nationality of those who own land. The endeavour by the Panel to provide a provisional analysis of the available information and a spatial mapping of land ownership by citizens and non-citizens in this report is necessarily compromised by the nature of the information available in the Deeds Registries Office. The Panel is therefore strongly convinced that a system of compulsory disclosure/declaration of nationality should be introduced immediately.

[16] This has to be aligned with the Companies Bill that is under consideration

Purpose of disclosure

Such disclosure shall serve the following purposes:

- It will enable Government to establish at any given moment the extent of ownership of South Africa's land and landed property by South African citizens and non-citizens, women and men, different racial groups, state and private persons, and natural and juristic persons;
- It will enable Government to have basic, reliable and accurate data and information for informed development and other planning;
- It will enable Government to have basic, reliable and accurate data and information for monitoring progress in the implementation of land policies and the impact of these on critical sectors of society, especially women and all those who were excluded and disenfranchised by colonial and apartheid policies, laws and practices;
- It will contribute to transparent governance; and
- It will contribute to improving the system of land and property registration in the country.

Recommendations:
A two-pronged approach is recommended for existing and future disclosure by registered owners: (a) amending Regulation 18 of the Deeds Registries Act, No. 47 of 1937 and (b) amending the Act itself.

(a) Amendment to Regulation 18 can be effected immediately by the Deeds Registration Regulation Board which, subject to the approval by the Minister, is empowered under section 10(j) of the Act to make regulations prescribing "the manner and form of identity of persons". It is consequent to such authority that Regulation 18(2) in its present form provides for "The name of a person, the relevant identity number, date of birth or registered number as the case may be .... shall be recorded in the relevant records of the Deeds Registry". The Panel recommends that Regulation 18 be amended to have a comprehensive disclosure including:

- Citizenship (including dual citizenship)
- Nationality
- Permanent resident's status
- Gender
- Race
- South African national identification number
- Foreign passport number

In the case of juristic persons (businesses, corporations, etc) also –

- Company registration number
- Income tax registration number
- VAT registration number
- Nature of shareholders (name and place of ordinary residence of all substantial shareholders and their race, gender and citizenship and nationality)

In the case of trusts, also -

- Trust registration number
- Citizenship and nationalities of trustees
- Citizenship of beneficiaries
- The nature of beneficiaries (their race, gender and place of ordinary residence).

The object of Regulation 18 is for disclosure and statistical purposes and not for causing any unfair discrimination. A number of pieces of legislation providing for various types of distinctions and differentiations have been passed under the democratic constitutional regime. Examples include the Employment Equity Act, Promotion of Equality and Prevention of Unfair Discrimination Act, Preferential Procurement Policy Framework Act and the broad based Black Economic Empowerment Act.

(b) Amendments to the Deeds Registries Act will require an enactment by Parliament, because they will expect of the existing owners to make a Declaration/Disclosure similar to those required of all future owners under the amended Regulation 18 (see above). The thrust for the provisions of the envisaged amendment must, amongst other things, be:

a. Compulsory identification of land owners
b. A verification system of land owners
c. Accurate and reliable record keeping of land owners in S.A.
d. Admissibility of records for legal purposes.
e. Source of finance of land acquisition

f. Monitoring mechanism.
g. Prohibition of transfers that do not conform to the regulatory regime
h. Procedure for forfeiture of land to the state where there is non-compliance
i. Protection of confidential information
j. Records of current land use.

It is further recommended that the proposed disclosure by companies also be considered for the new Companies Bill, which is under consideration.

The Panel is of the view that the Financial Intelligence Centre Act (FICA) provides a comparable and effective mechanism for disclosures and declarations. It can serve as a model for implementing the proposed recommendations on disclosure.

Affected owners

The Panel recommends that the disclosure requirements should apply to all natural and juristic persons who currently own or have a registerable interest in land and landed property, as well as to the registration of all future acquisitions or disposals of land or landed property. In order to measure progress on the transformation of the South African land holding patterns, disclosure on the basis of race should apply only to South African citizens and permanent residents.

The Panel recommends that individual owners of property are individually responsible for complying with the regulations. The legal right of ceding power of attorney is applicable. Corporate or juristic persons must assign a person who is legally responsible to act on behalf of the juristic person in all respects of this regulation.

Phases and timeframes for disclosure, and penalties for failure to disclose

It is recommended that after the recommended legislative amendments have been made, disclosure should be implemented in the following two phases:

First phase

The Panel recommends that with immediate effect any new transfer of fixed property or any first-time registration of newly-developed fixed property should include all the recommended requirements for disclosure. In pursuance of this end, the Deeds Office must ensure that the relevant forms and documents are revised accordingly.

Second phase

The Panel recommends that the disclosure and declaration by existing owners or interest-holders should be in the second phase, starting in January 2008. Two options are proposed to implement this phase:

(a) a one-off process, like the initial disclosure procedure of FICA, based on a period of declaration of 18 or 24 months; or
(b) a staged process (such as the one for the driver's licences) by dividing the process in alphabetical blocs according to the surname or name of the juristic person. Such a process will take longer but can be managed better. For example: A-B: during March – May; C-D: during June – August, etc.

In respect of both options, two administrative considerations shall be borne in mind:
(1) decentralisation of the disclosure/declaration process to appointed agencies of the Deeds Registries Office, such as the local government offices, Post Office branches, Magistrate's Courts, police stations, etc., and
(2) disclosure done electronically (e-government) similar to the UIF registration of domestic workers and the IEC's use of it for its voters' roll.

Proposed penalties for failure to disclose

Four possible penalties are suggested:

(i) no transfer of property ownership may take place in the absence of the required information being disclosed, and the use of old registration documents without the required updated information will be immediately curtailed.
(ii) adaptation of some of the FICA penalties[17]
(iii) a compulsory fine for the defaulter of up to 20% of the value of the property in question.
(iv) an appropriate penalty for the official not complying with the requirements.

[17] To be developed further

Disclosure of changes in the owner's details

The Panel recommends that within three months after a change in any of the declared details, the individual or entity responsible for such a declaration or declarations must file amendments to the prescribed documentation in the Office of the Registrar of Deeds. Failure to comply shall render the owner liable to a penalty as prescribed.

5. 3 Ministerial Approval

The Panel recommends that special Ministerial Approval (with or without conditions) be introduced for certain changes in land use in general and for disposal of certain categories of land to foreigners – especially where such change in use or disposal to foreigners have the potential to negatively impact on the state's constitutional obligations of land reform (land which is subject to restitution claims or which is earmarked for redistribution or integrated human settlement). Special Ministerial Approval should also apply to acquisition of land or changes to land use by South African citizens which may have the same negative impact. The decision whether land falls within such a category or categories should be determined by, amongst others, the mechanisms of the Inter-Ministerial/ -Departmental Oversight Committee (see below in 5.4).

It is recommended that the Minister of Agriculture and Land Affairs should have the power of discretion and approval in the following instances:

i. Urban land

There should be guidelines on the size, value and the number of properties a foreigner can own. The guidelines should take into consideration the value of foreign direct investment represented by the prospective foreign purchaser. Ministerial approval should be necessary if a purchase goes beyond these guidelines.

ii. Agricultural and rural land

The acquisition of agricultural (rural) land in excess of a certain value and /or a certain size by foreign individuals/ interest (as defined in 1 above) and/or non-residents should require ministerial approval. The Panel recommends that guidelines regarding size, value and intended land use should be developed.

iii. Land Earmarked for Restitution or Redistribution

Purchase of land (by foreigners or South African citizens) over which there is an established claim for the purposes of either restitution or redistribution, should require ministerial approval.

iv. Development of Golf Estates, Polo Estates and Game Farms

Bearing in mind the social, spatial and environmental consequences of these properties, the Panel recommends that the development of golf estates, polo fields and game farms should require the approval of the Minister in consultation with the relevant provincial and/or local authorities.

5.4 Inter-Ministerial/-Departmental Oversight Committee

The Panel noted that there are many interested parties involved in the question of ownership and use of land by foreigners. It also considered that foreign direct investment is a crucial component of the development agenda of South Africa:

The Panel recommends effective, high-level inter-governmental coordination and co-operation for implementation and oversight through the establishment of a permanent committee comprising the following Ministries/Departments: Agriculture, Land Affairs, Provincial and Local Government, Housing and Environmental Affairs and Tourism. The Committee should be convened by the Minister of Agriculture and Land Affairs. Its responsibility should be to monitor trends in foreign ownership of land and changes in land use, and to recommend to Government appropriate corrective interventions. The suggestion that the existing Cabinet Clusters should be used for this purpose is not supported, because the dedicated purpose of this Committee will then be lost.

5.5 Leaseholds

In line with the practice in some of the countries studied, the Government may consider medium- and long-term leases of public land as a viable alternative for foreigners in future to acquire land and interests in land. Leasehold rights have time-limits and may be an acceptable alternative for full ownership rights, though in practice they still exclude South Africans citizens from acquiring ownership and land use. At the same time leasehold rights provide the type of security of tenure that would be acceptable for many genuine foreign investors.

5.6 Outright prohibition on foreign ownership in classified/protected areas

Policy is recommended regarding prohibition of private ownership of land by foreigners (and in some cases South African citizens) in certain areas (to be classified) within the territorial jurisdiction of the Republic on grounds of national interest, environmental considerations and national security[18]. Examples of such land include the National Key Points[19], coastal areas[20], conservation areas, areas of historical and cultural significance, land close to military installations, water catchment areas and land along borders/international boundaries.

5.7 Disposal of State Land

The State Land Disposal Committee and provincial committees have no jurisdiction over municipal lands which (in the view of the Panel) continue to be incorrectly and unconstitutionally categorized as "private land". This is a convention or practice inherited from the past. The three spheres of government are institutions and organs of one sovereign democratic state and Schedules 4 and 5 of the Constitution do not categorise state land ownership and disposal as an exclusive competence of municipalities (sections 1 read with Chapter 3 and Schedules 4 and 5 of the Constitution). It is therefore recommended that all the three spheres of government should be covered by all the recommendations in this Report. It is also recommended that all the provinces should become part of the system of land disposal committees. Government and all the organs of state ought to lead by example in implementing the regulatory regime on foreign landownership and should refrain from disposing or changing land ownership which may undermine land reform and compromise the sovereignty of the state.

5.8 Limited temporary moratorium on the disposal of state land to foreigners

A limited temporary moratorium of (more or less) two years prohibiting the disposal of state land, including land held by any organ of state, state-owned enterprises and any of the three spheres of government, to foreigners[21] - and, in limited cases, to South African nationals who do not qualify for redress under the national land reform policies. This is not a blanket prohibition. It is meant to prevent certain spheres of government and organs of state from disposing land that may be used for land reform and human settlements for the dispossessed and marginalized individuals and communities. Naturally, special exemptions could be considered. The limited temporary moratorium could be lifted, once the Ministerial Approval process and the Inter-Ministerial/-Departmental Oversight Committee recommended above, have been established and are operational.

Since the recommendation is limited to broadly-defined state/public land (including municipal land), it should be expected that the entities that own the affected land would comply with national policy even in the absence of a statutory prohibition.

5.9 Zoning, land use and planning legislation

The Panel recommends that there should be rationalisation and harmonisation of laws affecting land use planning and zoning of land through the enactment of overarching national legislation to provide some certainty, minimum standards and order. Approval for new developments or rezoning of land for other usages is currently not coordinated between the different spheres of government. A developer, for example, can approach one government (such as a province) for approval of a new development without the knowledge of another sphere of government (such as the local municipality where the development will happen). Alternatively, the local government can approve it without the province's knowledge. Therefore the current Land Use Management Bill should be revisited and activated. The absence of overarching national standards leads to disparate and confusing practices in land use, especially at local government level. Foreigners and powerful "developers" seem to exploit the situation, thus leading to public resentment and perceptions of corruption. A review of current practices in the zoning and rezoning procedures, especially with regard to the development of golf estates, lifestyle farming, polo estates and game farming[22] ought to be brought under the purview of ministerial and intergovernmental oversight.

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[18] Reporting obligations on existing ownership by foreigners on the designated areas within a prescribed period should be imposed via the Full Disclosure Regulations. Thereafter, Government may exercise the constitutional power of expropriation, subject to the "just and equitable" compensation, of such land and either hold the same as state land or allocate the land to authorized nationals.

[19] National Key Points Act, No 102 of 1980

[20] The Coastal Management Bill covers aspects of this.

[21] The Constitutional Court may be approached for an order under section 167(5) of the Constitution asking for a declaration that any legislation or other law, including municipal by-laws and ordinances, is unconstitutional should it categorises land owned by any organ of state or sphere of government as "private land".

[22] The country is already sitting with a case of murder of a farm manager connected to the conversion of land use to game farming (see, W Hlongwa, "Make Way for Wild Animals" ***City Press***, 28 January 2007 at p. 21).

5.10 Fronting

Fronting has been identified as an issue that can undermine the Government's policy on land reform and regulation of foreign land ownership. It is also a practice which can distort the statistics gained from the compulsory disclosures/ declarations recommended in 5.2. It is therefore recommended that measures should be included in any new policy which will regulate foreign landownership. Measures already in place in other legislation regulating companies and broad-based Black Economic Empowerment, as well as taxation, should be considered for inclusion in this policy.

5.11 Enabling omnibus legislative amendments to give effect to some of the recommendations

The Panel recommends a comprehensive General Laws or Land Matters Amendment Bill, similar to the Judicial Matters Amendment Bill, for enacting the recommendations which may require legislative amendments. It will avoid the need for entirely new legislation or subsidiary legislation (regulations), such as the recommended amendment to Regulation 18. The advantage of such an approach is that the consequences of amendments to a specific Act(s) to other legislation are easily accommodated in a single Bill.