ADVISORY PANEL ON
LAND REFORM
AND AGRICULTURE



FINAL REPORT OF THE PRESIDENTIAL ADVISORY PANEL ON LAND REFORM AND AGRICULTURE

04 MAY 2019

FOR HIS EXCELLENCY THE PRESIDENT OF SOUTH AFRICA

REPUBLIC OF SOUTH AFRICA

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Whereas His Excellency The President of South Africa, Mr Cyril Matamela Ramaphosa, appointed the Expert Advisory Panel on Land Reform and Agriculture on 18 September 2018 comprising:

- Dr Vuyokazi (Vuyo) Mahlati (Chairperson)
- Professor Ruth Hall
- Professor Mohammad Karaan
- Mr Dan Kriek
- Ms Bulelwa Mabasa
- Ms Thato Moagi
- Ms Thandi Ngcobo
- Advocate Tembeka Ngcukaitobi
- Mr Nic Serfontein
- Mr Wandile Sihlobo

I am honoured to present this report as a response to the Terms of Reference of the Panel from the Presidency, as well as an account of proceedings and relevant developments that took place towards the finalisation of the report.

Sincerely yours,

Dr Vuyo Mahlati, Chairperson



Back row, L-R: Mohammad Karaan, Tembeka Ngcukaitobi, Thandi Ngcobo, Dan Kriek, Nic Serfontein, Ruth Hall;
Front row, L-R: Thato Moagi, Deputy President David Mabuza, Vuyo Mahlati, President Cyril Ramaphosa, Bulelwa Mabasa
Insert: Wandile Sihlobo

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FOREWORD



"The vulnerability of farm dwellers and the increasing number of evictions even after the dawn of democracy is concerning to the Panel. The December 2018 Colloquium called for a moratorium on evictions".

Dr Vuyokazi Mahlati
Chairperson
The Advisory Panel on Land Reform and Agriculture

Mr President,

First and foremost we as the Advisory Panel on Land Reform and Agriculture (the expert panel) would like to express our sincere gratitude for the opportunity to be of service to you, the Deputy President our government and our beloved South Africa. We believe that the decision by President Ramaphosa to appoint an Expert Panel was commendable as it was timely and insightful to insist on independent scrutiny beyond the political processes and emotive discourse. The Panel was given clear terms of reference that referred to the Parliamentary Constitutional Review process and instructed us to consider the conditions for Expropriation without Compensation (EWC). The brief extended to agriculture, rural and urban land reform including spatial transformation. Critical was the Panel's role in interacting with and advising the InterMinisterial Committee (IMC) on Land Reform chaired by the Deputy President, The Deputy President' office provided secretariat support. As Chair of IMC and our host Deputy President Mabuza always emphasized the importance of our independence and diversity of views.

Mr President, this Panel Report is solutions-focused as various diagnostic documents, reports and publications were thoroughly considered. It attempts to capture the diverse voices during consultations, harvesting from the State's research, policy and implementation reports, as well as intensive analysis of Constitutional jurisprudence, an in-depth historical research, academic literature and international experiences.

Mr President the message the Report carries is loud and clear: the urgency and Constitutional imperative of land reform in South Africa can neither be taken lightly nor postponed. The people have voiced their impatience and the inequalities are threatening peace and stability in our country. The incoming Time Magazine May 2019 cover titled: 'The World's Most Unequal Country' displays a picture of the posh suburb of Primrose in Ekurhuleni on one side and Makause informal settlement on the other, highlighting the extent of South Africa's glaring inequality and spatial injustice. Whilst this is known, the concern is having the supremacy of the South African Constitution that is based on human dignity, freedom and equality, also deemed transformative, whilst having 25 years of democracy celebrations tainted by the reality and extent of stubborn and growing inequality. The Time Magazine picture could be Alexandra Township and Sandton Suburb. It reflects the reality that the Report expands on of 83% of urban/peri-urban dwellers who reside on 2% of the land. We know from experience, and as confirmed by research, that such circumstances are detrimental to Health and Survival, Crime, Social cohesion, family and social stability, political stability, with negative impact on the economy and environment. Of relevance here is the centrality of land inequality to South Africa's inequality. This, **Mr President** is what compelled the Panel to dig deeper into analyzing the Constitutional, legislative and Institutional frameworks that led to the present situation.

As Panel members with diverse experiences and expertise, we grounded our approach within the Constitution, contextualising the land reform agenda within social justice, human development, and spatial transformation objectives. The approach affirms

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restitution whilst identifying the gaps that need to be addressed, with emphasis on strengthening redistribution as a corrective measure critical for nation-building (unification). The latter is based on the importance of acknowledging historical injustice and deprivation. It recognizes the Constitutional Imperative to heal the divisions of the past and establish a society based on democratic values, social justice, equality and fundamental human rights. This process is critical and fundamental in leading and driving real change and also provides a solid foundation for state reform and nation building. The 25 years experience of slow land reform has shown us that tinkering does not work, and reconciliation efforts within an environment of inequality, poverty and unemployment cannot bear fruits. The Panel therefore advocates for clarity of vision and outcomes and a future where land ownership must approximate the demographic of the country informed by critical levers such as coherent, co-ordinated good governance, and capable and well-resourced institutions supported by skilled and capable officials who are focused and determined to implement policies for the benefit of the people.

A central component of inequality within land inequality is insecurity of tenure that results in economic exclusion of the majority of South Africans, particularly women and youth in rural and urban areas. South Africa currently has over 60% citizens whose land/property rights are not recorded nor registered. The 2012 World Bank Report on Agricultural Land Redistribution emphasizes the link between economic efficiency and property rights of infinite duration that are fully tradable. This we have witnessed in our dualistic economy, particularly agriculture primary production and value chains mainly owned by white commercial farmers. Through collateralization of the land with access to finance and established farmer support systems, this group of farmers have managed to be globally competitive boasting a trade balance of R42 billion and contributing significantly to the country's GDP. Sadly this has not been possible for black farmers whose contribution to commercial food production remains quite small with underdeveloped farmer support systems, productive land inaccessibility, insecure tenure, as well as problems of access to finance and markets.

We have also appreciated food insecurity and the economic exclusion of the landless and those whose communal rights are not recorded or legally recognised. Whilst we export food, back home we are faced with 41.6% of people in rural areas with severely inadequate access to food. In urban areas the figure has risen to 59.4% (StatsSA 2017 GHS). The Report makes proposals on addressing these issues, including through public private collaborations.

Mr President, as the Panel we believe that our country has to face the reality that our colonial and apartheid past, as well as the current inequality-perpetuating economic trajectory, has excluded many from the mainstream. The majority of South Africans are either asset-poor, or sit with unrecorded or devalued assets, faced with information and credit market imperfections. The decisive action this Report proposes can be summarized as follows:

1. Restore human dignity and social justice by enabling and resourcing restitution, redistribution and securing tenure in rural and peri-urban areas. A mixed tenure model is proposed, accommodating a continuum of rights from freehold and communal, as well as multilevel ownership arrangements. The Panel supports the position that it is incorrect to view freehold systems of tenure and common property systems as polar opposites of one another, and the assumption that freehold systems of property are the only forms of tenure amenable to capital investment growth. To this end the Panel has advised on an immediate process of recordal of rights in rural and per-urban areas with legislative amendments to accommodate forms of collective ownership as currently only freehold is accommodated by Registry. This galvanised for the recommendation to establish Land Administration as the fourth pillar of Land Reform (Restitution, Redistribution and Tenure being the other pillars).

2. With the failure of "willing buyer willing seller" method of compensation, we explored more effective land acquisition methods, which include a Proactive and Targeted commodity and area-based approaches with production capacity informed by Agro ecological and land use analysis. This is aligned with proposed Beneficiary Selection methods to address the rampant corruption that characterized land acquisition and allocation.

3. In response to emerging interest to donate land by Private owners and in recognition of the potentially unifying role, the Panel has recognised the goodwill that land donations by Churches, Mining Houses, Commercial Farmers etc. has in terms of nation building. The panel further advised the IMC to commence a process of developing a Land Donations Policy. To this end

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a draft Voluntary Land Donations Policy is being completed with inputs from Treasury, DTI and DAFF. The outstanding work awaited is with regards tax exemptions as well as correlations in terms of empowerment legislation.

4. In terms of Expropriation without Compensation (EWC), the majority of the panel acknowledge that there are circumstances and cases that may warrant EWC. More importantly is the recognition that the current framing of Section 25 of the Constitution is compensation-centric and focused, a fact which is hardly surprising given the fact that expropriation as a concept is imported from foreign and international law that does not separate compensation from expropriation. However, the uniqueness of our Constitution and jurisprudence is that it recognises that compensation may not be solely market-based but rather, envisages that compensation may be significantly less than the market value in some instances, and even exceed market-based compensation in other instances. Part and parcel of the enquiry and the terms of reference, entailed the panel assisting and giving guidance on a constitutional amendment which would assist in making explicit, those instances that may give rise to EWC. The panel recognised that there are a plethora of divergent and scholarly views both in support of and against a constitutional amendment. The panel has, however, in line with its terms of reference, also given guidance on the possible ways in which Section 25 may be amended in order to make provision for zero compensation in certain instances.

5. The vulnerability of farm dwellers and the increasing number of evictions even after the dawn of democracy is concerning to the Panel. The December 2018 Colloquium called for a moratorium on evictions. However, an analysis of the legislation by the Panel pointed to the fact that Section 25(1) of the Constitution protects current landowners from arbitrary deprivation of property. The latter means that a landowner is able to utilise legally recognised mechanisms and processes to protect property from harm by third parties. The latter includes the right of landowners to access courts for relief against illegal occupations and for courts to finally decide on the legalities. A blanket call for a moratorium on evictions is likely to offend against the current framing of Section 25(1) of the Constitution. The panel has however also ventured a possible amendment to Section 25 aimed at strengthening and securing farmdwellers from the plight of inhumane and widescale evictions.

6. It is critical however, for the panel to reiterate that constitutional amendments are not on their own, the only tools available in order to bring redress to the people. The panel therefore emphasises the critical importance of government's political will and ability to implement policies for the benefit of the people.

Mr President, the Proposals in the Panel report are viewed to be critical in creating an enabling environment for higher rate of investment and more productive use of domestic investments. The Panel's view is that swift action for policy certainty is key. with improved governance, anti-corruption and transparency. Prioritizing State capability and skills development across the board is important. The proposed shifts in property structure and land acquisition strategies opens possibilities for inclusive development and maximizes opportunities for a diversified industrial base. This accommodates new players and encourages more labour-absorbing activities with empowerment of women, youth and people with disabilities. Most importantly, the proposals in this Report push for planning approaches as emphasized in the National Development Plan that enhance rural urban linkages, and a space economy that integrates living and work critical for inclusive growth.

Mr. President, Former President Mandela once warned that it looks impossible until it's done. South Africans have taken the first steps and continue to show commitment and resilience. As witnessed within the Panel, we agree on the imperative but not always on how to address the challenges. We remain convinced that maturity and collective wisdom is required for leadership across the societal spectrum (Government, Civil Society, Business, Labour and Political Parties).

Siyabonga Thank You Enkosi Dankie Ndza nkensa Ndo



Dr Vuyo Mahlati, Chairperson
On behalf of The Advisory Panel on Land Reform and Agriculture
May 2019

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ACKNOWLEDGEMENTS

The Advisory Panel on Land Reform and Agriculture wishes to acknowledge a number of contributors who made this mammoth task possible. They include, but are not limited to:

The Chairperson and members of the IMC for Land Reform for support and cooperation. The appreciation extends to the members of IMC who participated in the Panel's colloquia and one-on-one interviews. They include Minister in the Presidency for Planning, Monitoring and Evaluation, Dr Nkosazana Dlamini-Zuma; Minister Maite Nkoana-Mashabane of Rural Development and Land Reform and her Deputy Minister Mcebisi Skhwatsha, Minister of Justice and Correctional Services, Mr Michael Masutha, the Deputy Minister Andries Nel of Cooperative Governance and Traditional Affairs, and Deputy Minister Sindisiwe Chikunga of Transport. We also appreciate the invitation by Dr Zweli Mkize, Minister of Cooperative Governance and Traditional Affairs to engage with diverse ministers and provincial leaders on traditional leadership policy issues.

The Technical IMC Chairperson Ms Mpumi Mpofu, Director General of the Department of Planning. Monitoring and Evaluation for guidance, and members who are directors-general of various departments for overall support, particularly information sharing, presentations and engagements. A special thanks to the Department of Rural Development and Land Reform for making it possible to engage with various directorates.

Office of the Deputy President Head Mr Thulani Mdakane and his team for providing guidance, and affording us the technical and secretariat services. The latter team included Mr Siyabonga Hadebe, Ms Lethabo Matlala-Khalo, Mr Ivanhoe Mapeling and Mr Siphiwe Ndaba.

We are grateful to the Environmental Affairs (DEA) Minister and the Director General for availing the support of the Deputy Director General for Climate Change and Air Quality, Dr Tsakani Ngomane and staff to complement the Secretariat by providing the services of the technical resource team comprised of Dr Maureen Tong and Dr Geci Karuri–Sebina who worked tirelessly towards the finalisation of the Report. The Panel thanks the Department of Planning, Monitoring and Evaluation (DPME) for collaborating with the Centre of Evidence at the University of Johannesburg to develop the evidence map for land reform and agriculture. The database and the evidence map developed through this collaboration is a legacy that the panel hopes that government will use effectively in the future.

The Panel is also humbled by the positive responses through submissions and participation in consultative events by non-governmental organisations, academic institutions, government departments, state owned enterprises, the private sector, civil society, farmers' unions and professional bodies.

We also are thankful to all speakers, facilitators and discussants at our consultative colloquia, roundtables and other fora. Special thanks goes to Mr Sydney Soundy, the Land Bank executive who served as programme director at both colloquia, and Professor Mandi Rukuni from Zimbabwe who availed himself beyond the events. The participation of the judiciary was also welcome, particularly the contribution of Honourable Judge Jody Kollapen and Honourable Judge Sardiwalla at the February 2019 Colloquium.

A special thanks goes to a number of organisations who made it possible to reach critical stakeholders recognising limited time and budget constraints. They were generous to share their resources, provide venues and invite participants. They include:

- The South African Council of Churches meeting of church leaders hosted by its President Bishop Siwa, who is also Presiding Bishop of Methodist Church of Southern Africa. Bishop Siwa also addressed the Panel's December 2018 colloquium.
- The roundtable discussion on rural land tenure models in South Africa co-hosted by the University of KwaZulu-Natal's Dr John Langalibalele Dube (JLD) Institute, Howard College and the National House of Traditional Leaders (NHTL) where traditional leaders with representatives from all provinces participated. We would like to extend our gratitude to Nkosi Mahlangu, chair of NHTL and his team as well as the chair of JLD.
- The National Planning Commission for co-hosting Urban Land Tenure Roundtable with South African Cities Network held at

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ACKNOWLEDGEMENTS (CONTINUED)

Werksmans Attorneys, as well as the Climate Change Roundtable co-hosted with DEA and University of Witwatersrand held at the Union Buildings.

- The Institute for Poverty, Land and Agrarian Studies (PLAAS) for hosting the Panel's Roundtable Planning Session. A special thanks to Professor Ben Cousins for availing the venue and participating as a speaker at the Panel's colloquium.

- United Nations (UN) Women and South African Women in Dialogue (SAWID) who co-hosted the Women's Land Rights and Land Reform Roundtable. A special thanks goes to Ms Anne Githuku-Shongwe, representative of South Africa's Multi Country Office.

- The Department of Human Settlements hosting the Land Administration Roundtable with the Department of Rural Development and Rural Development and LandNNES (NGO).

- Beneficiary Selection Roundtable between the Panel and Honorable Members of Parliamentary Portfolio Committees of Rural Development and Land Reform, Agriculture, Forestry and Fisheries, and Water and Sanitation. We would like to express our gratitude to the chairs of the portfolio committees.

- Nelson Mandela Foundation for mobilising a Civil Society Roundtable with grassroots voices on urban and rural land reform. A special thanks to CEO Mr Sello Hatang and Ms Sumaya Hendricks.

- Industrial Development Corporation (IDC) for hosting the Role of Finance Institutions in Land Reform Roundtable. A special thanks to CEO Mr TP Nchocho.

- The University of KwaZulu-Natal's JLD Institute at Howard College for hosting the Rural Women Roundtable.

- Food and Agriculture Organization of the United Nations (FAO) for cohosting the Agriculture and Land Reform Roundtable with Agriculture Research Council (ARC) and Department of Agriculture, Forestry and Fisheries (DAFF). A special thanks to the FAO Representative Dr F. Pierri.

- Finally, we would like to thank the media for the coverage of our events from appointment. A special thanks to the Presidency and GCIS for guidance and all forms of media.

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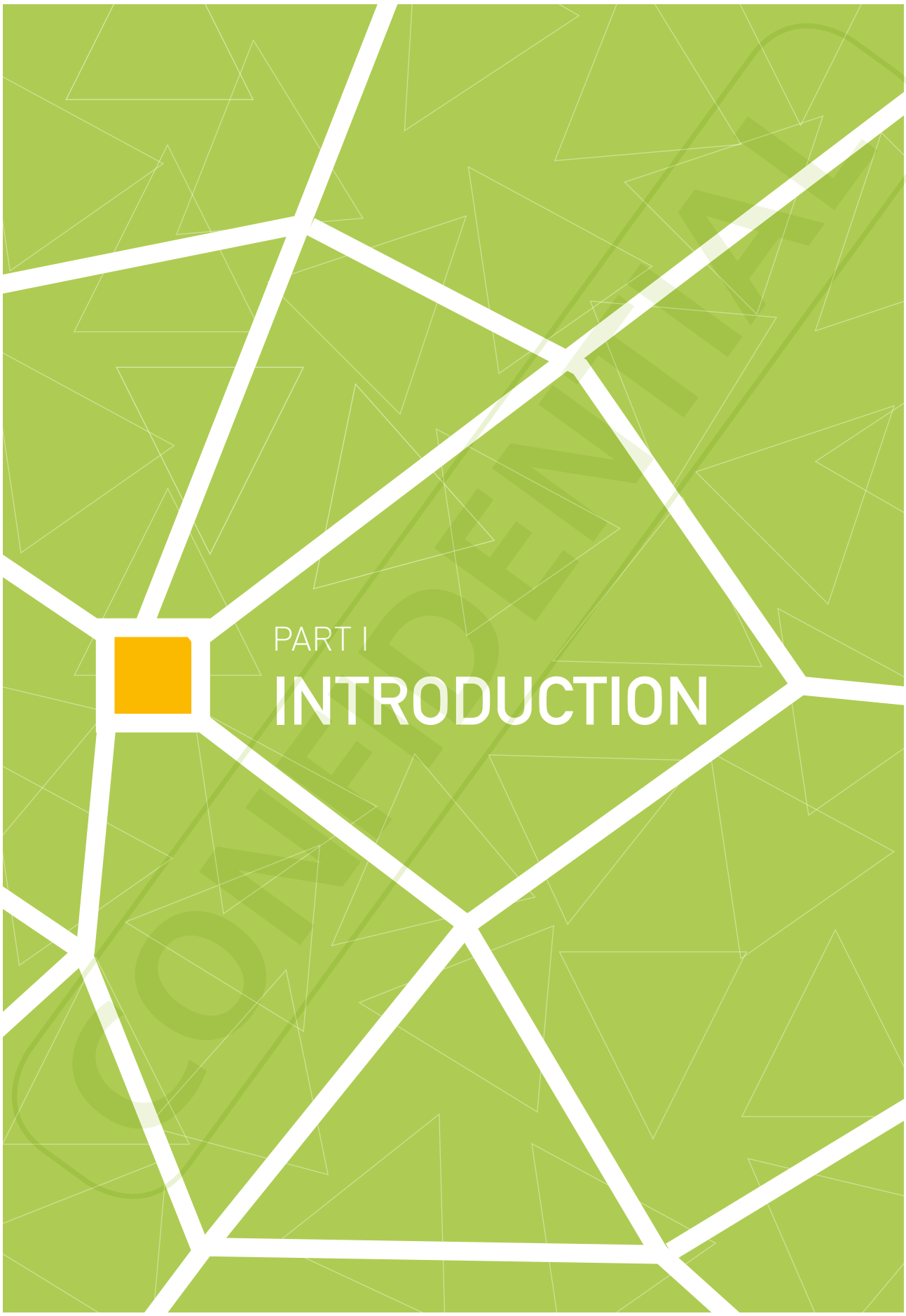
LIST OF ACRONYMS AND ABBREVIATIONS

ACHPR	African Charter on Human and People's Rights
AgriBiz	Agricultural Business Chamber
AgriSA	Agriculture South Africa
ANC	African National Congress
ARC	Agricultural Research Council
BBBEE	Broad-Based Black Economic Empowerment
CLaRA	Communal Land Rights Act
CLCC	Chief Land Claims Commissioner
CLTB	Communal Land Tenure Bill
CoGTA	Department of Cooperative Governance and Traditional Affairs
CPA	Communal Property Associations
CRLR	Commission on Restitution of Land Rights
DAFF	Department of Agriculture, Fisheries and Forestry
DEIC	Dutch East India Company
DHS	Department of Human Settlements
DRDLR	Department of Rural Development and Land Reform
DPME	Department of Planning, Monitoring and Evaluation
DPW	Department of Public Works
DWS	Department of Water and Sanitation
ESTA	Extension of Security of Tenure Act
EWC	Expropriation Without Compensation
FAO	Food and Agricultural Organization (of the United Nations)
FES	Farm Equity Schemes
GIAMA	Government Immovable Asset Management Act
HLP	High-Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change
HSRC	Human Sciences Research Council
IDC	Industrial Development Corporation
IDPs	Integrated Development Plans
IMC	Inter-Ministerial Committee
IPILRA	Interim Protection of Informal Land Rights Act
IUDF	Integrated Urban Development Framework
JLDI	John Langalibelele Dube Institute
KZN	KwaZulu-Natal

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LAPC	Land and Agriculture Policy Centre
LARA	Land and Agrarian Reform Agency
LTA	Labour Tenants Act
LTIS	Land Tenure Information Management System
MDG	Millenium Development Goals
MPRDA	Mineral and Petroleum Resources Development Act
NAMC	National Agricultural Marketing Council
NDP	National Development Plan
NHTL	National House of Traditional Leaders
OGD	Open Government Data
OVG	Office of the Valuer-General
PDI	Previously Disadvantaged Individual
PIE	Prevention of Illegal Eviction Act
PLAS	Proactive Land Acquisition Strategy
PTO	Permission To Occupy
RDP	Reconstruction and Develpment Programme
RECAP	Recapitalisation and Development Programme
SAGI	South African Geoscience Institute
SAHRC	South African Human Rights Commission
SAIBPP	South African Institute of Black Property Practitioners
SANNC	South African Native National Congress
SAPS	South African Police Service
SAWID	South African Women in Dialogue
SDF	Spatial Development Frameworks
SDG	Sustainable Development Goals
SIU	Special Investigation Unit of the South African Police Service
SPLUMA	Spatial Planning and Land Use Management Act
TBVC	Transkei, Bophuthatswana, Venda, Ciskei
TRANCRAA	Transformation of Certain Rural Areas Act
UCT	University of Cape Town
ULTRA	Upgrading of Land Tenure Rights Act
UN Women	United Nations Women
UWC	University of Western Cape

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PART I
INTRODUCTION

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INTRODUCTION

As we celebrate 25 years of democracy, it is regrettable that the legacy of land dispossession has yet to be redressed, and social exclusion and economic inequality persist. The promises made and the expectations of our people have not been fulfilled.

> *Nelson Mandela would have reminded us that the last colonial question is land. If you don't tackle the issue of land, you shall never know peace.*
>
> *- Kenyan scholar, Prof Patrick Lumumba, 18 July 2018, Nelson Mandela memorial lecture, Walter Sisulu University, Mthatha campus*

Democratic South Africa, a constitutional sovereign state, has been founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, as well as non-racialism and non-sexism as contained in the Constitution of the Republic of South Africa Act 108 of 1996. These are further elaborated upon in the The Bill of Rights as contained in Section 7-39. Of particular importance is section 25 of the Constitution, which protects existing property rights from arbitrary deprivation while at the same time making provision expropriation of land subject to the payment of compensation. Section 25 also obligates the State to ensure equitable redress. It also provides for the protection of tenure rights of farm dwellers and people living on communal land. The Presidential Advisory Panel on Land Reform and Agriculture (the panel), grounds its report and its recommendations within this context. The driving imperative of social justice and human development for social change and economic prosperity strives to redress injustices and imbalances of the past towards an equitable and sustainable development.

This report introduces a comprehensive approach to land reform emphasising rural-urban linkages, while addressing the unique territorial characteristics. Land reform in South Africa has somewhat neglected urban realities and focused on agriculture. Therefore, the consideration of an integrated urban development framework, spatial transformation, and a system based on a unitary, equitable tenure system as strong components of land reform marks a significant and integrating focus compared to the agricultural land focus that earmarked farmland exclusively in its land targets for redistribution.

The recommendations contained in this report are grounded on national and global development frameworks. This includes the 2016 UN General Assembly adopted New Urban Agenda as endorsed by the United Nations Conference on Housing and Sustainable Urban Development (Habitat III). The New Urban Agenda offers a shared vision for ending poverty, addressing inequality, and sustainability through the planning and management of human settlements of all sizes. It elaborates on the requirements of the Sustainable Development Goal (SDG) 11 in more than 60 action areas). South Africa's National Development Plan (NDP), particularly Chapter Eight on 'Transforming Human Settlement and the National Space Economy' also provides a framework to, "respond systematically, to entrenched spatial patterns across all geographic scales that exacerbate social inequality and economic inefficiency". The Integrated Urban Development Framework (IUDF) also guides the urban land agenda and recommendations of this report.

In terms of agriculture, the report prioritises the alignment of land reform with agrarian reform, food security, and broader economic development. This considers the racialised dualism and gendered bias that persists. Of significance in this alignment, is the overall performance of the sector with declining share of GDP, which fell from 4.2% in the 1996 to 2.4% in 2018. Notwithstanding, the value of the agricultural sector has grown by almost 50%, from R50.5 billion to R74.2 billion over the same period. This translates to a fairly modest average annual growth rate of 3.1% per annum over the past two decades. Other considerations include the climate change that continues to have a negative impact on the agricultural sector and the global trade developments where there is rising protectionism in some key markets – even in countries with which South Africa has trade agreements. The land reform agenda thus goes beyond the transfer of land for social and economic outcomes, but ensures equitable distribution aligned to a transformed and thriving agricultural sector.

The Report of Presidential Advisory Panel on Land Reform and Agriculture engages with the technical aspects of land, but is grounded in the appreciation of the spiritual nature of land as well as the conception of land as identity (at an individual and collective level), and the restoration of dignity for the landless. The corrective measures proposed are

based on the principles of nation-building for unity and stability. The social change agenda mooted here acknowledges the historical injustice, deprivation and a future where land ownership must approximate the demographics of the country. Most importantly, the success of land reform must be linked to South Africa's productive and sustainable use of land, and the vibrancy and competitiveness of the economy, open to all to participate and benefit at all levels. The approach should align with the African Union (AU) Framework and Guidelines on Land Policy in Africa which define 'land reform' as a process which involves comprehensive restructuring or redesign of at least three components of the land system; namely its property structure, use and production structure and the support services infrastructure.

The summary that follows in the next pages, expands on the panel's approach to land reform, including the highly debated expropriation of land without compensation (EWC), and also provides a synopsis of the panel's recommendations.

MS DUDU KHUZWAYO'S FAILED LAND ACQUISITION EFFORT

Dudu, a 56-year old single mother of five adult children and grandmother of a few grandchildren, hails from rural KwaHlathi Village under Chief Kunene within the UThukela District Municipality, where she grew up and established herself as a communal farmer. She was a fairly successful mixed-crop and poultry subsistence farmer who generated income for her family. Dudu invested some of her income over a period of time to improve her farming skills and learn other productive skills (sewing and beadwork) for income generation. With the assistance of the municipality she spent a month in Limpopo for agricultural skills training, (mainly broilers). uThukela Municipality derives its name from one of the major rivers in KwaZulu-Natal (KZN) Province. It rises from the Drakensberg Mountains and supplies water to a large portion of KZN as well as Gauteng. However, the poor infrastructure, poor maintenance and under-development of the district saw Dudu having to abandon her farming enterprise because of a lack of access to water. This was further exacerbated by drought in 2014. She decided to move closer to the urban centre and was allocated a one-bedroom RDP house at Steadville Township in Ladysmith. There she tried to productively use the limited peri-urban space by setting up her backyard vegetable garden and started selling produce, as well as sewing and beadwork products to her neighbours.

She pursued the matter of allocation of better land for farming and was instructed to find a white farmer keen to sell land to her and thereafter alert the Provincial Department of Agriculture and Rural Development. Luckily, she identified a Wasbank white farming family and after several visits and interviews – producing training certificates and convincing them of her credentials – they agreed to sign a letter of intent to sell to her in 2014. Hopeful that her problems were solved, she took the letter to the Department of Agriculture and Rural Development. But the process stalled after her initial interview there. She was also told that the letter of intent does not guarantee her suitability for allocation on the farm as the department might place someone else there. Concerned about this possibility, she raised income and visited His Majesty King Goodwill Zwelithini's place in KwaNongoma to seek assistance from his office. The office linked her with senior government officials, but that did not help. In 2015, she managed to meet with the minister of Rural Development and Land Reform at a farmers' conference in Pretoria. The minister referred her to national officials to sort out her problem. Unfortunately, all these efforts and money spent, did not yield any fruitful results. Dudu was never allocated the farm, she continues with her vegetable farming on her township backyard, as well as jam and juice-making.



Dudu showing the sweet potatoes that she grew in the backyard of her RDP house.

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PART II
BACKGROUND

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BACKGROUND

The expert Presidential Advisory Panel on Land Reform and Agriculture was appointed by President Cyril Ramaphosa in September 2018, to provide independent advice to the Inter-Ministerial Committee (IMC) on Land Reform – a committee chaired by Deputy President David Mabuza and consisting of eleven Cabinet ministers.

The panel's mandate was to provide a unified policy perspective on land reform in respect of restitution, redistribution and tenure reform. The work of the panel was partly informed by the resolution of Parliament to consider expropriation of land without compensation; the focus being on the circumstances under which the policy will be applied; the procedures to be followed and the institutions that are to implement and enforce the policy.

ABOUT THE ADVISORY PANEL

The panel comprises 10 members who are eminently qualified by virtue of academic background, professional experience, social entrepreneurship or activism related to the agricultural economy and land policy. The panel is chaired by Dr Vuyo Mahlati, a member of the National Planning Commission and president of the African Farmers Association of South Africa (AFASA). Other members are:

1. Professor Ruth Hall of the University of the Western Cape
2. Professor Mohammad Karaan of Stellenbosch University
3. Mr Dan Kriek, who is president of Agri South Africa
4. Ms Bulelwa Mabasa, Director and Head of Land Reform and Practice Area at Werksmans Attorneys
5. Ms Thato Moagi, who is a farmer in the Western Cape and Limpopo
6. Ms Thandi Ngcobo from the Dr JL Dube Institute of the University of KwaZulu-Natal
7. Advocate Tembeka Ngcukaitobi, who is at the Johannesburg Bar
8. Mr Nick Serfontein, who is a farmer in the Free State and chairman of the Sernick Group
9. Mr Wandile Sihlobo, who is an agricultural economist with the Agricultural Business Chamber of South Africa

The panel's terms of reference (TOR) cover a broad spectrum of land reform issues in rural and urban areas. These include the consideration of agrarian reform and addressing spatial inequality. Its role is distinct from and does not duplicate the role of Parliament's Constitutional Review Committee which is considering an amendment to the Constitution in order to make provision for expropriation without compensation to take place, by proposing an amendment clarifying the latter in explicit terms.

TERMS OF REFERENCE OF THE PRESIDENTIAL ADVISORY PANEL ON LAND REFORM AND AGRICULTURE

The functions of the panel are as follows:

1. Providing a unified policy perspective on land reform under the Constitution and applicable legislation in respect of the following pillars:
   a. Land restitution;
   b. Land redistribution; and
   c. Land tenure reform

2. In respect of expropriation without compensation, the panel will consider:
   a. The circumstances in which the policy will be applied;
   b. The procedures to be followed when the policy is applied;
   c. The institutions to enforce and give effect to the policy; and
   d. The rights of any affected persons, including the rights to judicial review.

3. With regards to diagnosis of problems, assessment of progress and limitations with laws, policies and their implementation to date, the panel will consider any existing studies and work towards a uniform policy position in the following areas of land reform:
   a. A policy on redistribution of land which takes into account race, class and gender imbalances;
   b. A policy on compensation for land acquired by the state for public purposes and in the public interest; and
   c. A policy on institutional reforms which re-examines the mandate for the institutions for land reform, including the Commission for Restitution of Land Rights, the Land Claims Court and the Department of Rural Development and Land Reform.

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THE PROBLEM STATEMENT

In general, the panel's report provides a unitary view in terms of urgency and the required shifts necessary to make land reform a possibility. There are however specific areas of disagreement as highlighted under Areas of Panel Disagreement on page 102.

To articulate and expand the problem statement, the panel commenced with research analysis and engaged in a diagnostic process to establish a sound base for recommendations. A systematic mapping of evidence (database) consisting of hundreds of documents of scholarship and literature on the subject of land reform was compiled with the assistance of the Department of Planning, Monitoring and Evaluation (DPME) as a resource for and beyond the panel's work.

Diagnostics included analysing the diverse voices of South Africans in previous and current consultative processes. The analysis included the processes towards the White Paper on South African Land Policy of 1997; the National Summit on Land and Agrarian Reform held between 27 and 30 July 2005; and the National Land Tenure Summit held between 4 and 6 September 2014. Other useful sources were the recent public hearings as part of the Parliamentary Review Process on the Amendment of section 25 of the Constitution. The panel considered these in developing a diagnosis of the problems of land reform.

The panel also interrogated the High-Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) appointed by the Speakers' Forum of the National Assembly and National Council of Provinces. The HLP process provided a useful extensive review of land reform to date, in terms of the diagnosis of its progress and challenges, informed by numerous commissioned research studies, national roundtable events and public hearings in all provinces.

In line with its terms of reference, the panel built on the rich diagnosis with further consultations – it hosted two national colloquia on land reform (December 2018 and February 2019). where a variety of stakeholders concerned with land issues attended, made inputs and surfaced various perspectives, challenges and opportunities relating to revisiting the land reform question. Other consultations include direct engagements with key departments, dozens of written submissions which were received from various sources, both individual and organisational, and a series of roundtables with targeted groups that were deemed to require further attention.

The series of roundtables that were held around the country allowed for focused, sectoral or stakeholder-based conversations on land reform from. These included the following sessions, summaries for which are included Annexure 2.

1. National House of Traditional Leaders – 14 January 2019
2. Urban land and human settlements, spatial strategies, property markets, land governance and administration – 8 February 2019
3. Women's land rights and land reform – 11 February 2019
4. Land Reform and Climate change – 11 February 2019
5. Land Administration – 12 February 2019
6. Parliamentary Portfolio Committees – 20 February 2019
7. Grassroots Voices on Urban and Rural Land Reform – 21 February 2019
8. Banking Sector – 21 February 2019
9. Rural Women – 8 March 2019
10. Food and Agriculture Organisation (FAO) and Advisory Panel Roundtable – 27 March 2019

THE PANEL PROCESS

The panel's terms of reference in asserting the problem statement commences with the acknowledgement that colonialism and apartheid had a overwhelmingly devastating impact on South Africa, leaving the country with highly unequal patterns of land and property ownership, and a spatial legacy that locks the majority of the population into poverty traps. This is linked to the perpetuation of chronic under development. The panel unequivocally acknowledges the wrongs of the past, and simultaneously recognises the need to determine a collective way forward towards a better future for all South Africans.

Opening the panel's National Land Reform Colloquium held on 7 December 2018, the Minister in the Presidency for Planning, Monitoring and Evaluation, Dr Nkosazana Dlamini-Zuma, emphasised the imperative to address social injustice, and the consequences of poverty and inequality. This emphasis is significant seeing that part of the problem is that until recently, there has been a focus on addressing the consequences (symptoms) of poverty and inequality without strategically tackling

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the underlying structural impact of dispossession, which includes continued ownership of land by the white minority, as well as poor redistribution of state land. The panel's problem statement also touches on the failure to meet targets set by government, for eample transfer of 30% of total productive land by 2014 and settlement of all restitution claims by 2009.

To expand on the problem statement, the panel commenced with research analysis and engaged in a diagnostic process to establish a sound base for recommendations. An extensive evidence mapping of scholarship and literature on the subject of land reform was also completed to support the process.

Diagnostics included analysing the diverse voices of South Africans in previous and current consultative processes. The analysis included the processes towards the White Paper on South African Land Policy of 1997; the National Summit on Land and Agrarian Reform held between 27 and 30 July 2005; and the National Land Tenure Summit held between 4 and 6 September 2014. Other useful sources were the recent public hearings as part of the Parliamentary Review Process on the Amendment of section 25 of the Constitution. The panel considered these in developing a diagnosis of the problems of land reform.

The panel also interrogated the High-Level Panel Report on the Assessment of Key Legislation and the Acceleration of Fundamental Change (HLP) appointed by the Speakers' Forum of the National Assembly and National Council of Provinces. The HLP process provided a useful extensive review of land reform to date, in terms of the diagnosis of its progress and challenges, informed by numerous commissioned research studies, national roundtable events and public hearings in all provinces.

CONSULTATION PROCESS

In line with its terms of reference, the panel built on the rich diagnosis with further consultations – it hosted two national colloquia on land reform (December 2018 and February 2019). Other consultations include direct engagements with key departments, a series of roundtables on specific topics/issues and engagements with targeted groups that were deemed to require further attention.

Common problem themes addressed by this report as instructed by the terms of reference, include the fact that land reform in South Africa has yielded little success in establishing a new generation of sustainable household, small scale and commercial black farmers. The reasons cited include a dearth or absence of security of tenure and a lack transfer of title deeds of the acquired portions of land to beneficiaries and the poor post-settlement support system. At the heart of the problem is the poor capability of the State which is characterised by deficient coordination, limited and misaligned allocated resources (both public resources and private resources, particularly the finance sector), and further complicated by corruption. This extends to the inefficiencies in the process of land acquisition, including 'willing buyer, willing seller' and systemic challenges faced in pre- and post-settlement that result in the collapse of schemes. Other problems relate to the poor land administration that exacerbates problems of tenure in communal areas and peri-urban areas, resulting in a large portion of the population not being registered and therefore excluded from effectively participating in the mainstream economy.

The panel has paid special attention to the territorial aspects of land reform, particularly the unstructured and disjointed rural-urban linkages, the poorly planned and governed urban land, perpetuating spatial inequalities within an environment of rapid urbanisation, demographic changes and landlessness. Of concern, is how rural and urban spaces define people's identities, social standing and the participation in the mainstream economy.

> *"South Africa's rural space was shaped by colonialism and apartheid, and still carries that legacy of dualism – it is sometimes difficult to envisage a single rural space in this country because of the stark differences between the commercial farming areas and the 'communal' areas."*
>
> *- Prof Nick Vink, Stellenbosch University*

The text box on the Problem Statement unpacks the problems more systematically.

LAND REFORM PROBLEM STATEMENT

Landlessness: Access to secure rights to land continue to be the preserve of a small minority within South Africa. Many citizens remain functionally landless, occupying land owned by others – whether state institutions or private owners. This landlessness forms the basis for wider deprivations, including access to basic services and shelter.

Slow pace: The pace of land reform has been slow. The state has delivered 8.4 million hectares (ha) of land in terms of government's land reform programme between 1994 and March 2018. This represents: 4.9 million ha of land acquired through 5 407 projects, and transferred to previously disadvantaged individuals (PDIs) to date, for land distribution; and 3.5 million ha of land transferred through the finalisation of 62 475 claims, contributing 37% of land transferred to PDIs to date, for land restitution (DRDLR 25 year review report, 2019). It is estimated that the progress amounts to under 10% of all commercial farmland, over 23 years, compared to the initial target of 30% by 2014. The contribution of farmland prices is also somewhat unknown as the DRDLR has not commissioned any studies on price trends since 2009.

Gender inequality: Despite policy pronouncements of prioritising women applicants, official data shows that women are marginalised within the land redistribution programme, constituting less than a quarter of the beneficiaries nationally. In practice, women have been marginalised within the land reform programme. This is not only due to discrimination against women, but also the bias in the programme towards full-time commercial farming, which is not a feasible option for the majority of women smallholders who already farm on the margins of the agricultural sector.

Corruption and ineptitude: There is growing evidence of corruption of various kinds in land reform. Some of this information is in the public realm. This pattern has been confirmed by Special Investigating Unit (SIU) investigations and proclamations. One official of the Department of Rural Development and Land Reform (DRDLR) has been successfully prosecuted and convicted, and others suspended with investigations pending. Many allegations of corruption, nepotism and abuse of power have come to the attention of the panel and its members. Land policy and implementation modalities need more stringent conditions and oversight to stem these practices, and the institutional constraints that enable corrupt practices to flourish need to be identified and addressed head-on.

Tenure security issues: Despite constitutional provisions, tenure insecurity remains a pervasive occurrence. People living in informal settlements, backyard shacks, inner-city buildings, on commercial farms and in communal areas face challenges due to weak, informal, and 'un-registrable' tenure rights in law and in practice due to governance failures. This also applies to beneficiaries of land reform, who have acquired land through redistribution and restitution, and often have tenuous rights to the land allocated to them. The panel has conducted an in-depth constitutional and legislative framework review in so far as tenure is concerned, and makes proposals, including but not limited to the amendment of what constitutes a "real right" to include a continuum of rights.

Illegal Occupations On Land: Illegal occupations by presumedly unemployed, landless people on urban and rural land have seen an upsurge amidst political party calls for vulnerable members to "occupy land illegally". This upsurge has also been evidenced by a significant number of illegal eviction applications heard in our various courts, mainly in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998. The fragmented, disjointed, haphazard and unclear lack of policy implementation, including an absence of an adequate redistribution policy, combined with the densification of our urban areas, and the need for people to access services, infrastructure, and economic opportunities in peri and urban areas, has led to a stark increase in people occupying land illegally.

Land administration failures: With the end of the 'Bantustan' governments and state institutions, land administration in the communal areas has effectively collapsed. Meanwhile, there are failings to record land rights across other tenure regimes. **An estimated 60% of South Africans have no recorded land** or property rights, and this reflects the ongoing legacy of apartheid, with only a small minority of black South Africans acquiring secure tenure – whether through land reform or private mechanisms. For the majority, the erosion of land administration functions and means insecure tenure. The panel conducted a round-table specifically dealing with the collapse of land administration and makes specific proposals in this regard.

Landholding models: There are severe problems with the leasehold model in redistribution. Since 2011, the state has stopped giving people land purchase grants or subsidies with which to buy land. Instead, government buys land and retains ownership, while allocating leases. In terms of the State Land Lease and Disposal Policy of 2013, these are meant to be 30-year leases, for which lessees are meant to pay 5% of net annual turnover as rent. The State's ability to conduct the state land administration required to provide tenure security to land beneficiaries. Beneficiaries are typically afforded conditional use rights and in many cases do not have recorded rights – which means that even in cases where the State has bought land, it has failed to redistribute land rights.

Access to water: It is undeniable that land and water are connected concepts both biologically and spiritually. There has been a historical omission, which persists, which separates the linkage between land and water both in law and in policy. Section 25(8) of the Constitution includes an obligation directing the State to take legislative steps to achieve, amongst others, water reform. The latter means that as land policy is reframed, so too, should focus be placed on the interconnectedness of land and water in the context of land reform. This means that justice in land reform should include not only redress in terms of land, but connected to it, must be consideration and provision of water to those in need of land. This must include strengthened

co-ordination amongst the government departments and institutions involved. As with all other socio-economic rights, access to water in South Africa, has historically been linked to race. The lack of access to water amongst those who are landless persists, and any policies to reform land policy, must as of necessity, include the provision of access to water to urban, rural, farming and agricultural communities.

Impacts on livelihoods: There is inadequate evidence on the livelihood impacts of land redistribution. It becomes crucial for the State to determine indicators of success in so far as poverty alleviation is concerned. The DRDLR does not have a functional monitoring and evaluation programme that is aimed at measuring successes and failures thereof. DRDLR has in the past, commissioned several quality of life reports that provided such evidence. The last such study was conducted in 2006 and published in 2009. Continuous data collection and panel data are lacking, as are clear 'outcomes indicators' that specify what criteria constitute 'success' and how this can be measured.

Production and post-settlement support: There is no law that obliges the State to provide post-settlement support in redistribution and restitution projects. There is a lack of nationally-available information on production support provided in redistribution projects. There is evidence that many projects lack farming or production implements or even basic forms of support. The main mechanism for production support is Recapitalisation and Development Programme (Recap) funding, but this is typically delayed and only a small proportion of projects receive it. The Department of Performance, Monitoring and Evaluation (DPME) review of Recap proposed that it be scrapped in its entirety. There is weak coordination between the DRDLR and the Department of Agriculture, Forestry and Fisheries (DAFF), and the provincial departments of agriculture, as well as misalignment of their mandates and budgets.

Misalignment and lack of co-ordination between government departments: There is weak coordination between DRDLR, DAFF, Department of Water and Sanitation (DWS) and Department of Cooperative Governance and Traditional Affairs (COGTA), all of which make decisions regarding land and land management. The misalignment is with regards to budgeting and decision-making.

Under-resourcing of land reform: The marked decline in the pace of land redistribution, from a peak in 2008, has been largely due to the decline in budgets (in real and nominal terms) to 0.2% of the national budget in 2016/17, and the diversion of budget away from land acquisition towards RECAP; AgriParks; National Rural Youth Service Corps (Narysec); and other purposes.

Changing policy agendas: Whether land reform is to prioritise the poor, smallholder, emerging or commercial farmers, or a combination of competing interests, is unclear. Ideological positions have shifted, and policy is vague and open to diverse interpretations by different administrations, officials, consultants and strategic partners. Land reform has thus not only fallen short of official government targets and public expectations, but its focus, criteria and modus operandi have also changed substantially, and is inconsistent across different parts of the country.

No system for rationing public resources: In the absence of a means test and leveraged grant, there is no way to assess the degree to which the purported target beneficiaries are in fact being priotised. There are thus no measures in place for government or the public to assess whether the right to equitable access to land is being realised, or the land reform budget is instead being diverted to politically connected elites. The DRDLR has also failed to establish a database of applicants at district level, as the basis for transparent decision-making and allocation processes.

Lack of redistribution law: Parliament has failed to enact legislation pursuant to section 25(5) of the Constitution, which directs the state to enact legislation in order to foster conditions that will enable citizens to gain access to land. This failure has led to the state relying on discretionary, unclear and haphazard application of policies.

No political will to expropriate land for land reform purposes: There has been limited expropriation effort or experience within existing legislative frameworks. Furthermore, the existing legislative framework (the Expropriation Act 1975) is inconsistent with the Constitution, and the correction of this has been long delayed. Even in cases where there was expropriation with compensation, the State has not utilised section 25(3) to align with the just and equitable compensation requirements.

Lack of a national land-focused vision and plan: South Africa lacks a co-ordinated approach to dealing with all land for land reform purposes.



PART III

VISION AND DRIVING AGENDA: LAND REFORM FOR WHAT?

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VISION AND DRIVING AGENDA: LAND REFORM FOR WHAT?

There is no doubt that many South Africans appreciate the unsustainability of the current land ownership patterns and the threat to our democracy, stability, growth and development. Of critical importance however, is the clarity of purpose and outcomes of land reform to address the diverse interests and land demands of the majority of South Africans that remain landless, marginalised, unable to access productive land, and is growing increasingly impatient yet hopeful that land reform can address their needs.

As highlighted earlier, the panel's view is that the vision and intended outcomes must build on the Constitution and its values of "human dignity, achievement of equality and the advancement of human rights and freedoms", as well as the National Development Plan's focus on poverty eradication, employment and equality. It is crucial to go beyond the broad principles of redress and social justice and tackle specifically the fundamental change drivers. The strategic goals and vision of the White Paper on South African Land Policy capture these:

> *Our land is a precious resource. We build our homes on it; it feeds us; it sustains animal and plant life and stores our water. It contains our mineral wealth and is an essential resource for investment in our economy. Land does not only form the basis of our wealth, but also our security, pride and history.*
>
> *- Department of Land Affairs, 1997*

KEY CONSIDERATIONS FOR VISIONING AND AGENDA SETTING

A. LAND AS A SOCIAL, CULTURAL AND ONTOLOGICAL RESOURCE

Societies and cultures regard land not only as an economic or environmental asset, but as a social, cultural and ontological resource. Land remains an important factor in the construction of social identity of Africans as well as, the organisation of religious life and the production and reproduction of culture. These are dimensions which land policy development must address if prescriptions for change are to be internalised. It is important to identify the values in which the people have for the land in order to identify a central value system in terms of land. This central land value system will dictate the current needs of the people and the trajectory in which policies must head to ensure that indeed the rights of the indigenous people are restored and where productive communities will be produced for future generations.

B. DISPOSSESSION AND DISPLACEMENT WERE PRIMARILY RACIAL AND GENERALLY ANTI-AFRICAN

Whilst the focus on the urban and rural poor as promoted by post-apartheid policies is important in addressing the consequences of social injustice, it is crucial to underscore the fact that the Natives Land Act 27 of 1913, Group Areas Act of 1950 and other laws affected all Africans. Sol Plaatjie, founder of the South African Native National Congress (SANNC), the predecessor of the African National Congress (ANC), points to the enterprising nature that was rudely curbed by dispossession and unjust laws, pushing Africans into intergenerational poverty and vulnerability. In 1923, Sol Plaatjie wrote:

> *In the harvest of 1911, there was panic among white farmers because an African had garnered 3000 bags of maize and one thousand six hundred of wheat… where their neighbours reaped only 300 to 400 bags. African produce kept the mills busy at Ficksburg, Klerksdorp, Zeerust and other places.*

John Langalibalele Dube, together with Sol Plaatjie, R Bubusana, Thomas Mapikela and Saul Msane went to England following the Natives Land Act 27 of 1913, after five million Africans were allocated 7% of their own land and 349 9737 colonial settlers were given 93% of the land.

The analysis and redress of the land question should acknowledge the patterns of invasions and allocation which to a large extent remain unchanged. Commencing

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with Khoi and San land under the leadership of Gonnema and Klaas marking the establishment of the Cape Winelands, the conquest expanded into the interior of the country in search for more productive land and markets as they had begun to exceed the productive requirements of the Dutch East India Company (DEIC) by early 1700s. The arrival of the British in the Cape further increased the push for the conquest of land in the interior of South Africa as the descendants of the Dutch (the *Boers*) embarked on the search for more farmland, to the extent that good land became a rather rare commodity by the 1870s. The British interests in South Africa on the other hand focused on mineral resources in general, particularly gold, diamond, platinum and coal.

C. LAND AND POLITICS

Land has been the source of conflict and wars from time immemorial. Conflict occurs at small scale (household and community level), as well as at large scale (regional and national level). The premise of contestation varies from ownership to land use; allocation of rights; land invasions; and dispossession. It is thus critical to acknowledge that land reform is a political process. Of importance however, is the establishment of structures and processes that follow the rule of law. These have to be transparent to give confidence to all, especially in cases of opposing views. In terms of outcomes, land has human, economic, social and environmental dimensions. The reality is that the realisation of these outcomes depends on the management of the political process.

With South African elections taking place on the eve of the submission of this report, the panel can see the different ideologies and approaches displayed on the various parties' manifestos. The challenge lies in catalysing political leadership and the electorate towards a common vision and outcomes that are aligned to the principles and preamble of the Constitution.

D. AGRARIAN REFORM

Agrarian reform is a much wider concept than land reform. It includes changing access to land (redistribution) and the terms of access (tenure) but goes much further. Agrarian reform involves restructuring patterns of landholding; access to other natural resources like water, as well as capital, inputs, support services; and markets. Agrarian reform should change the size distribution of landholdings; land uses and types of crops / livestock; production technologies including more sustainable alternatives; inputs and labour-intensive alternatives to capital-intensive production systems; power relations in the agricultural value chains; and market structures and incentives, including to promote smallholder market access on preferential terms, both through preferential procurement by public institutions and incentives for private sector buyers. It also requires accountability of the state to the majority of rural people.
Ultimately, agrarian reform is about changing social relations, including class, race and gender relations, which includes intervention in South Africa's highly skewed and inequitable sector. The purpose is to integrate South Africa's agricultural system, and to make it more diverse and demographically representative of the national population.

South Africa's agrarian structure is dualistic in that it is marked by a divide between commercial farming areas and communal areas. Colonial and apartheid land dispossession and the complex architecture of laws, regulations, ordinances, institutions, taxes, subsidies, and other measures created South Africa's agrarian structure.

Despite reform efforts over the past 25 years, the agrarian structure remains divided in terms of resources and services, including access to water, and excludes large numbers of poor black rural people, except as poorly paid farm workers, and reproduces older patterns of poverty, largely along racial lines, but also gender inequality, and reproduces spatial inequality.

Incorporating a small number of black farmers within this overall structure will not by itself address the perverse outcomes of the system – continued inequality and even rising concentration of ownership and control – nor will it stem the political demand for land and the ongoing grievances surrounding the colonial and apartheid legacy.

E. LAND AND GENDER RELATIONS

The system of patriarchy which dominates social organisation has tended to discriminate against women when it comes to ownership and control of land resources. This has been re-enforced by imported land law that has tended to cement the system of patriarchy by conferring title and inheritance rights upon male family members on the theory that women, especially married women can only access land through their husbands or male children.

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If policy is to redress gender imbalances in land holding and use, it is necessary to deconstruct, reconstruct and reconceptualise existing rules of property in land under both customary and statutory law in ways that strengthen women's access and control of land – while respecting family and other social networks. Commitments made at the AU 2003 Maputo protocol to the African Charter on Human and Peoples' Rights (ACHPR) on the Rights of Women in Africa and the 2004 Solemn Declaration on Gender Equality in Africa, both of which call for action to address gender inequalities including women's unequal access to land, must be delivered upon. This is important as women remain the primary users of agricultural land in rural communities.

F. YOUTH

There are no active policies that are aimed at engaging South Africa's youth (adult population under 35 years of age) into ownership of land. Young people have diverse social needs, policies should aim to realise access and security of land rights. Young people need security in order to ensure social stability, food security to prevent nutritional disorders, stunting and support mental health, and a safe space on which they are able to explore and experience their economic potential. To ensure this social framework for development policies, institutions and the private sector need to safeguard the youth and ensure constant development, support and a refocus on financing development .

Youth are, however, the future stewards of land and it is important that, as South Africa, youth are seen as synonymous with development and deployment in order to unlock the economic and social potential of the largest demographic group in the country. The future land-bearers require education and development that is aimed at developing and maintaining key sectors that will support future generations. As the 4th industrial revolution phases into the fifth, key sectors around land and natural resource management should be elevated in their importance in seeding economic development. Key sectors such as agriculture, mining, engineering, infrastructure, communication, science and technology, climate change, and innovation should be targeted for the youth to drive the future economic and development agendas. The ideas of conscription and deployment are identified as key strategies for mobilising youth on land as key assets that can contribute to innovation, reformed governance structures, experiential learning, and preparation for reforms in the natural resource sectors.

G. CORRUPTION

Corruption has affected land reform in a variety of ways. The net effect of corruption has been to redirect benefits from the intended beneficiaries and the poor.

We identify five ways in which corruption has manifested in land reform:

1. Pure market opportunism (bribery and manipulation of land prices and beneficiary selection)
2. Asymmetrical joint ventures and fronting
3. Government officials meddling in projects
4. Political interference
5. Illegitimate, undemocratic and unaccountable transacting of community land

In 2011, the president ordered a Special Investigating Unit (SIU) investigation into corruption in the land reform process, in a proclamation in the Government Gazette. By November of 2016, on the basis of the SIU investigations, and with the assistance of the Asset Forfeiture Unit (AFU), government announced that R390 million in properties acquired for land reform were returned to the State. The final report of the SIU investigation was submitted to the president and to the director of the SIU in March 2018, but not released to the public. Since then, there has been one successful prosecution of an official from the Department of Rural Development and Land Reform in connection with corruption.

The panel has concluded that the patterns of corruption are not merely due to ethical lapses by individuals. Our view is that the land reform process, as it currently configured in law, policy and institutions, is prone to corruption. In fact, the design and implementation of policy lends itself to corruption.

H. CROSS-CUTTING CONSIDERATIONS

The land reform agenda should deal with the reality that 80% of the South African population is mainly black and currently resides in urban areas, peri-urban areas and townships. Over 80% of the urban population, which is again mainly black, occupies 2% of the land as a result of the colonial and apartheid policies which displaced Africans into 'Native Reserves' (rural homelands and urban locations/townships) and 'Cheap Native Labour' (migrant labour). It has been argued that it is not possible to address issues of land reform without taking into account the influence of the mining

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industry, especially in terms of the pervasive migrant labour system which is also intricately interrelated with small farmer production and farm labour on commercial farms.

Change therefore must be comprehensive and specific, rooted in transformation across the board. Key outcomes should be in a form of recorded ownership and access rights, a shift in the current property structure with spatial transformation, and adequately supported beneficiaries to be active participants in productive enterprise for the growth and sustainable development of South Africa.

In conclusion, the historical foundation of land dispossession, the invasion and the conquest of South African land was deliberate, methodical and enabled by the promulgation of laws on the part of the Europeans. A more systematic approach is needed to redress and correct the ills within a democratic dispensation. The following section expands on this followed by the panel's recommendations.

REVIEWING THE LAND REFORM CLASS AGENDA AND UNPACKING LAND REFORM STRATIFICATION

It is key to focus on the class agenda as South Africa is a country burdened with high inequality, unemployment, poverty, food insecurity, landlessness with evidence of continuing oppressive treatment of those in informal settlement, farm labourers and dwellers.

The White Paper on South African Land Policy of 1997 states that:

> *The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods… Land redistribution is intended to assist the urban and rural poor, farmworkers, labour tenants, as well as emergent farmers.*
> *- DLA 1997*

It also argued that among 'the poor' priority should be given to certain groups:

> *The most critical and desperate needs will command government's most urgent attention. Priority will be given to the marginalised and to the needs of women in particular.*
> *- DLA 1997*

The panel supports the focus on the poor, however we motivate for a well-defined strategy that includes both urban and rural vulnerable groups with targeted interventions and opportunities for growth and graduation out of vulnerability and poverty. The identified groups include the landless or semi-landless (in both rural and urban areas), farmworkers and farm dwellers, household, small-scale as well as aspiring farmers and entrepreneurs. The focus is on women and youth, as well as people with disabilities.

Land Reform Beneficiary Stratification should be based on a clear identification, registration and characterisation of each individual in each category. This calls for alignment and inter-operability of state information systems, for example, Department of Agriculture, Forestry and Fisheries (DAFF) Farmer Register and the Department of Social Development's National Integrated Social Protection System.

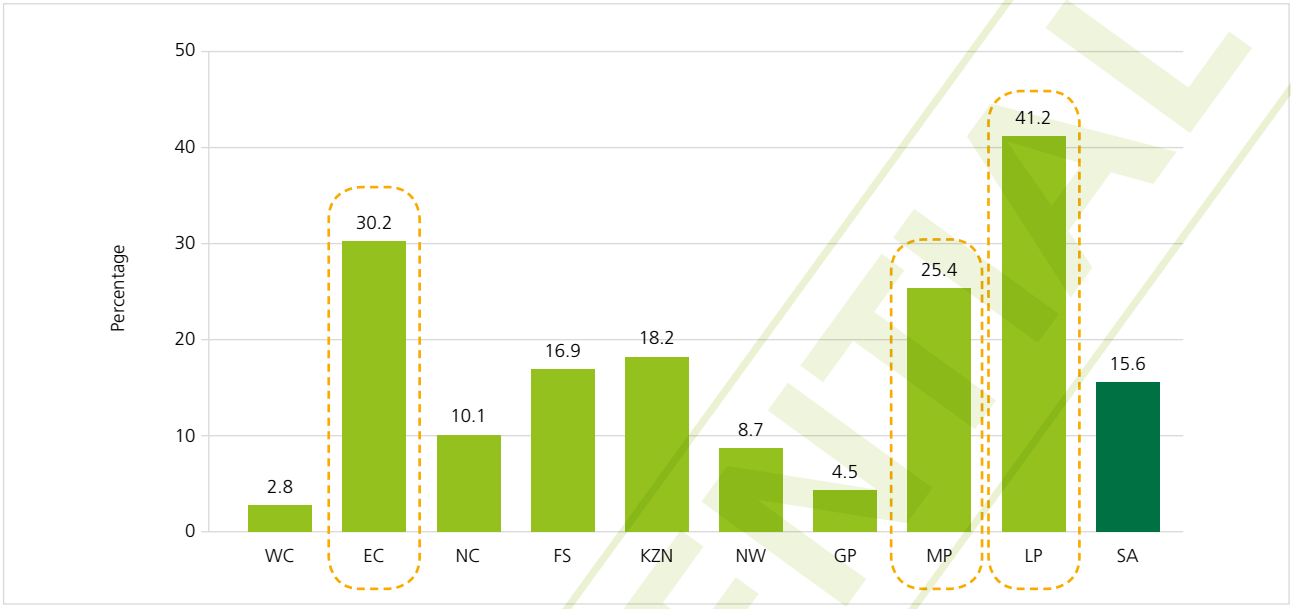
The targeted groups should include social grant beneficiaries with potential to graduate from social protection to self-reliance. It should also target the food insecure in rural and urban areas with special attention to supporting agricultural households. The 2016 Agricultural Households Survey by Statistics SA indicates that 2.3 million households were engaged in agriculture compared with 2.9 million in 2011. The decrease of 19.1% between the two years was mainly due to the drought experienced in the country during 2014/15. Of interest, in 2016:

1. 34,6% of household heads were in the 20-44 age group
2. 47% of households were led by women (household heads)
3. 84% of households said their 'backyard' was the main place of agricultural activity
4. For 44% of households, agriculture was the main source of food

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The 2017 General Household Survey (GHS) further assists with useful baselines for targeting. (See Figures below, Source DAFF 2019).

Figure 1: Percentage of Households involved in Agricultural Activities by Province, 2017 (GHS 2017)



Proportion of households involved in agricultural activities in 2017 was highest in Limpopo Province (41.2%); Eastern Cape (30.2%) and Mpumalanga (25.4%).

Table 1: Summary of the General Household Survey 2017

Finding	Number	Percentage	Source
Total population of RSA	56 521 948	-	General Household Survey - 2017
Total number of households	16 199 000	-	
Number of households with inadequate and severely inadequate access to food	3 450 387	21.3%	
Number of people with inadequate and severely inadequate access to food	13 930 354	24.7%	
Number of people with severely inadequate access to food	3 552 749	25.5%	
Number of people with inadequate access to food	10 377 605	74.5%	
Number of people with severely inadequate access to food in Rural Areas	5 792 905	41.0%	
Number of people with inadequate access to food in Urban Areas	8 137 440	58.4%	

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On 18 December 2018, the United Nations adopted the Peasant Declaration. According to the UN, close to 80% of the people suffering from hunger and chronic malnutrition live in rural areas. It is important for South Africa to take this declaration in consideration, as was recommended during the Civil Society Roundtable with the panel. However, urban poverty in South Africa with rapid urbanisation is an increasing problem. Access to productive resources is crucial for this group. The working class around the world also face increasing constraints from natural resources degradation and climate change.

Other problems include price volatility, lack of proper support for peasant's agriculture, dumping of agriculture products on local markets, severe weather-related events and increasing pressures on natural resources put peasants in an increasingly dire situation.

Critical in addressing the class agenda is the development of a continuum of milestone outcomes. This is deemed important as most vulnerable groups are victims of exploitation, persistent exclusion from land access and land rights, and market failure. In other words, recognising and recording informal rights of the landless, semi-landless (in informal settlements and communal areas), as well as farm dwellers should not be an end, but the beginning of breaking patterns of the intergenerational poverty and exclusion. The panel also emphasises the point that dispossession is not merely about loss of land, but also about the loss of livelihoods and opportunities.

The panel acknowledges the need to set out a summary of historical dispossessions, that have led to the current landownership patterns. The next section details a timeline which culminated to the current landownership patterns.



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PART IV
THE CONTEXT

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HISTORICAL CONTEXT: The Conquest of the land of the African people by Europeans in South Africa

TIMELINES OF LAND DISPOSSESSION

The first land to be confiscated by the Europeans in South Africa was part of what later became known as the Western Cape. In 1652, Jan van Riebeeck of the Dutch East India Company arrived in the Cape of Good Hope (Cape Town) to establish a 'refreshment station' that provided fresh produce to the ships sailing from the Netherlands to India. In 1655, the Dutch decided to turn the refreshment station into a fully-fledged colony and this resulted in wars of land dispossession. On invading the Cape peninsula, the Dutch waged war with the Khoi and San under the leadership of their Amakhosi, Gonnema and Klaas. Despite their fearless resistance, the Khoi and San were defeated.

Great Britain took the Cape of Good Hope by force from the Dutch in 1795. The British 'returned' the Cape to the Dutch between 1803 and 1806, only to reoccupy and take permanent administrative control of the Cape after the signing of the Anglo-Dutch Treaty of 1814. The first official British immigrants or 'settlers' arrived in Table Bay in March 1820. The British interests in South Africa can be narrowed down to mineral resources in general, but four main ones gold, diamonds, platinum and coal in particular. The discovery of minerals strengthened British interest and drove the British agenda in this country in the 19th century – to the extent of waging wars against descendants of fellow Europeans, namely the Dutch who became an autonomous group known as *Boers* (with no real ties with the Netherlands). The present day Afrikaners include former French Huguenots and the *Boers*.

A. THE SAND RIVER CONVENTION OF 1852

In the Transvaal, consisting today of the whole of Limpopo, North-West, Gauteng and part of the Mpumalanga provinces, the African land was confiscated by the Boers through invasion and the establishment of the so-called Zuid Afrikanse Republiek (ZAR) from 1852 onwards. In that year, England signed the Sand River Convention with the Boers which stipulated that all African land north of the Lekwa/Igwa (Vaal) River belonged to the Boers. All Africans, including their Amakhosi and iziNduna were subjected to the strict supervision of the Native and Native Sub-Commissioners in terms of Law no. 4 of 1885. The convention therefore had the effect of automatically turning Africans (Natives) into tenants and labour tenants on land that they had lived on for many generations. The letting of land to Africans in the Transvaal was further prohibited by the Squatter's Act no. 11 of 1887, although there was insufficient land to dump surplus Natives who had been forcibly removed from the now European farms. After the Boers of the ZAR were defeated by England in the Anglo-Boer War of 1899-1902, the Transvaal Republic became the Transvaal Colony of England represented by a British governor. The laws applying in the Cape and Natal British Colonies were enforced in the Transvaal Colony and the traditional leaders were recognised in the locations/native reserves only.

B. THE CONFISCATION OF AFRICAN LAND IN THE ORANGE FREE STATE IN 1854

England signed the Bloemfontein Convention with the Boers on 23 February 1854. According to this convention all the African land north of the Orange river except that under Adam Kok of the Griquas, was granted to the Boers. Consequently, the Africans were driven out of their arable agricultural and pastoral lands by force of arms and driven to the barren, broken, hilly and mountainous areas. Those who lived on the so-called "European farms" became tenants and labour tenants. The baSotho under King Moshoeshoe I, who lived in what became known as the Orange Free State Republic, were driven into the barren mountains after bloody wars of resistance, where they were later placed under the so-called British Protectorate. Two African locations were created after the Anglo-Boer War, namely at the impoverished Thaba Nchu and stony, hilly and mountainous Witsieshoek. The Republic of the Orange Free State Squatters Law was strictly enforced to restrict the number of Africans on the so-called European farms.[1] After the Anglo-Boer War, the Orange Free State Republic became known as the Orange River Colony under the British governor.

C. THE EUROPEAN INVASION OF KWAXHOSA TERRITORY (EASTERN CAPE) 1778-1878

The African land kwaXhosa was invaded by Europeans from 1778 onwards. Prof T R H Davenport describes

1 Davenport TRH: South Africa, A Modern History, third edition, Macmillan, Johannesburg, 1987, pp. 126-127

how European invaders used military tactics to defeat the Xhosa people who were descendants of King Mnguni kaNtu in that 100 years of invasion.[2] The Africans were eventually defeated, mainly through the British tactics of divide-and-conquer, and their arable agricultural and pastoral land divided among European farmers. The Africans were driven into the barren, mimosa ridden and hilly areas where they were placed in Native Reserves under Amakhosi and iziNduna. All the land around Port St. Johns also ended up being usurped by the British from the amaMpondo.[3]

D. THE BOER/VOORTREKKER INVASION OF THE ZULU KINGDOM

The first invasion of KwaZulu Kingdom was by the Boers under the leadership of Piet Retief and assisted by the British settlers who were the first Europeans given residential sites by King Shaka eSibubulungu (Port Natal) in 1824.[4] The invasion took place at kwaNobamba (Weenen) in November 1837. The army of King Dingane (1830-1840) resisted the Boer invasion, but were repulsed at eNcome (Bloedrivier) on 16 December 1838. Following this war, the Boers confiscated the whole Zulu Kingdom south of the Thukela to the Mzimvubu Rivers. Thus, the Zulu Kingdom came to be divided into two parts, with the Boers establishing the so-called Republic of Natalia with its capital kwaMachibisa which had formerly been under the rule of Princess Machibisa. She was the sister of Prince Madzikana Zulu. Machibisa was renamed to 'Pietermaritzburg' after Piet Retief and Gerrit Maritz - two *Boer* leaders in 1838-1842.

In 1846, the Land Boundary Commission of Lt. Governor Martin West was established and tasked with assisting the Secretary of Native Affairs, Theophilus Shepstone [1845-1877] to allocate land to the Zulu people. The 2 000 000 acres of land set aside for the Zulu people by this commission was impoverished, mountainous, barren, hilly and mimosa-ridden. The Zulu people were subsequently ordered to leave their private lands (their former arable fertile grazing lands) and the neighbourhood of towns, where no squatting was allowed. These orders were given in 1846.[5] The land tenure of the Zulu people in Natal was first limited to locations under Amakhosi, controlled by European magistrates and under the Secretary for Native Affairs. Secondly, Zulu tenure was limited to living on the so-called 'European private lands' as tenants, mostly giving labour in lieu of rent.

E. THE BRITISH INVASION OF THE ZULU KINGDOM NORTH OF THE THUKELA AND MZINYATHI RIVERS - 1879

The Zulu Kingdom under King Cetshwayo was the only independent African country remaining in South Africa when it was invaded by the British on 22 January 1879. Although the Zulu warriors bravely defended their kingdom, wiping out the entire British army at eSandlwana, they were eventually defeated when the British army burnt down their capital at oNdini on 4 July 1879. King Cetshwayo was captured at eNcome on 31 August 1879 and incarcerated at the Cape Castle and on the Oude Moulen farm. In 1887, England signed a convention with the Boers, ceding the whole Zulu territory, later known as the New Republic or the Vryheid district, which was 700 sq. miles, to the Boers. This was the best agricultural and pastoral land in the Zulu Kingdom. The rest of what was remaining of the Zulu Kingdom was annexed by England in the same year by Zululand proclamation No. 2 of 1887. The Boers were also allowed by England to confiscate all the land of eMakhosini near Babanango, the sacred burial site for most of the Zulu kings, to be turned into farms of the Boers. The Boers were also allowed to occupy most of the fertile arable land along the Mhlathuze river in what became known as Proviso B.

F. THE ZULULAND LANDS DELIMITATION COMMISSION 1902-1904

The Zulu Kingdom north of the Thukela and Mzinyathi rivers was according to J L Masson, the surveyor-general 10 000 to 11 000 sq. miles.[6] Before the establishment of the Zululand Lands Delimitation Commission of 1902-1904 under the chairmanship of Charles Saunders, the British in the former Kingdom of KwaZulu, north of the Thukela and Mzinyathi rivers besides occupying Proviso B, lived in the townships of eShowe and at Nondweni which was presumed to be a goldfield.[7] The rest of the former Zulu Kingdom was under King Dinuzulu, Amakhosi and iziNduna.

2 Ibid. Archival Material: Secretary for Native Affairs SNA 2/4/1, G H Turvey's evidence 1904
3 Archival Material: Secretary for Native Affairs: SANAC Report 1903-5, Vol. 3: Sir Elliot evidence, 19 April, 1904, p.190
4 R.C. Beck: The History of South Africa: The Greenwood Histories of the Modern Nations, Greenwood Press USA, p25
5 Ibid.
6 Footnote 1. SANAC Report 1903-5, Vol. 3 Minutes of Evidence p. 141: J L Masson evidence
7 Ibid. SANAC Report 1903-5, Vol. 3 Minutes of Evidence, P. 127 H C Koch evidence, 14 April 1904

The British wanted Zululand to be opened up for British occupation similar to the demarcation of native reserves in Natal during the Land Boundary Commission of 1846. Charles Saunders told the commission that the land of the Zulu people would be cut smaller by his commission on demarcating Zulu Reserves, thus giving arable lands to the British (Europeans).[8] He was nicknamed Mashiqela (a person who disrespects proper procedures) by the Zulu people because of his forceful manner of removing them from their ancestral lands. The report of this commission resulted in the establishment of 22 Zululand Reserves on dry unproductive land, for the sole occupation of the Zulu people.

The Second Anglo-Boer War (Oct 1899 - May 1902) resulted in victory for the British against the Boers and lead to the formation of the Union of South Africa in 1910. The union, which consisted of the Cape, Natal, Transvaal and Orange Free State colonies, was a unitary state under the British crown and under dominion of the local white minority. The British and the Boers united for the sake of their survival and to face in a united manner what they, years later, called the Swart Gevaar (African danger). In 1912, the Union Parliament introduced the Draft Native Settlement Bill. The Secretary for Native Affairs called upon all magistrates in the Union of South Africa in Circular No.4 to submit estimates of the number of 'squatters' and 'servants' who were to be evicted when the Draft Native Settlement Bill of 1912 became law on 30 June 1913. The Natives Act of June 30 1913 was the cornerstone of territorial segregation in South Africa. This Act prohibited all Africans from purchasing land already usurped by Europeans. Furthermore, it gave European farmers the right to eject Africans from land on which they had been living for generations.[9]

G. CONCLUSION

The above summary has attempted to show how European nations (Britain and the Netherlands) invaded and confiscated African land. It should be remembered that the European nations did not buy the land. The land was subsequently distributed to European settlers as private farms without any payment by the beneficiaries.[10] Ungqingetshe esibhekene nawo (The stalemate facing us) on claiming the indigenous African land is the fact that on the confiscation of African land, the Europeans erased most evidence which Africans seek to use to prove lawful customary ownership of their ancestral lands. Graves and residential sites of Africans on some European farms were deliberately destroyed to wipe out evidence in many cases.

The ancestors of Africans who were evicted from their lands could neither read nor write. Therefore, it is very difficult for their descendants to prove that they ever lived on the so-called 'European farms'. There is, however abundant proof that the Europeans invaded and confiscated the land of the African people from 1652 onwards; a process which was comprehensively concluded with the annexation of KwaZulu, the last independent African State, through the promulgation of the Zulu Annexation Act of 1897.

The Natives Land Act of 1913 merely legitimised the dispossessions that happened during the colonial era and acted as a catalyst for massive forced removal of Africans from the European 'private farms'. Therefore, the restoration of land to its aboriginal owners must be speeded up and not complicated by placing obstacles on the way.

8 Ibid. SANAC Report 1903-5, Vol. 3 Minutes of Evidence, P. 758 CJR Saunders evidence, 25 May 1904
9 Muller CFJ [ed.]: 500 Years A History of South Africa, Academica, Pretoria, 1984, p. 396
10 Land Register of 1885 – 1887, land grant to Daniel Kritzinger and Gert Hendrick Muller

LEGISLATIVE REVIEW:
The Historical Context and Basis of South African Property Law

Land reform is framed by a range of laws and policies. This section briefly reviews these laws, drawing attention to some of the controversies regarding their provisions, interpretation and enforcement.

THE LEGAL FRAMEWORK FOR LAND REDISTRIBUTION

The **Prohibition Subdivision of Agricultural Land Act No. 70 of 1970** is an apartheid-era law that remains enforceable. It prohibits the subdivision of agricultural land and was intended to protect and promote viable production capacity for the agricultural sector. This objective is based on archaic views that regarded small farms as unviable. This act is also antithetical to the land reform agenda; it is potentially unconstitutional in so far as it flies in the face of the principles of co-operative government, legislated in terms of the Intergovernmental Framework Act. Although the Provision of Land and Assistance Act 126 of 1993 empowers the minister to waive the prohibition on subdivision, in practice few subdivisions have been facilitated for land reform purposes. The Act was repealed by section 1 repeal Act No. 64 of 1998, but no president has since signed the repeal into law. The Act must therefore be repealed, within the wider context of a unitary, National Land Framework Act proposed by the panel.

The **Provision of Land and Assistance Act No. 126 of 1993 (Act 126)** was enacted in order to give effect to land and land related reform obligations of the State pursuant to section 25(5) of the Constitution, which mandates land redistribution. The Minister of Rural Development and Land Reform is empowered in terms of this Act to acquire, designate State land under her control and to develop such land for purposes of small-scale farming, residential, public, community, business or similar purposes, by way of providing financial assistance to persons settled on land. Section 10 states that the minister shall rely on money appropriated from Parliament in order to provide financial assistance.

The **Provision of Land and Assistance Act (Act 126)** is highly inadequate as a means to effect redistribution of land contemplated in section 25(5) of the Constitution, which requires the state to take reasonable legislative and other measures, within its available resources, to provide citizens with access to land on an equitable basis. The Act fails to identity with sufficient particularity the categories of persons who would be eligible and prioritised for the provision of land and/or financial assistance to obtain land. The wide powers afforded to the minister to, without any set criteria on potential land beneficiaries, in a manner that is not transparent, with unknown identification of beneficiaries and targeted land, undermines section 33 of the Constitution, which is a right to administrative action that is procedurally fair, reasonable and lawful. Act 126 does not invoke any mechanisms to ensure that the minister is accountable on any decision she makes on the acquisition of land and subsequent grant of land.

Further, the Act places the redistribution agenda inappropriately and wholly within the DRDLR, with no co-ordination, reference to, other key departments, such as the DAFF, the DWS, COGTA the Department of Public Works (DPW) – all of which are significant departments involved one way or the other with land decisions regarding the acquisition of land and State assets. Act 126 inappropriately anticipates that the minister will develop or appoint a developer for purposes of subdivision of the land, in isolation from the provisions of the Prohibition Subdivision of Agricultural Land Act 70 of 1970, a disjuncture which may present challenges between the priorities of DRDLR and DAFF.

Redistribution has the potential to deliver access to land to the wider population, because, unlike restitution, it does not place the arduous and often burdensome onus of proof on claimants to prove dispossession and a pre-existing right to land. Redistribution is a crucial policy lever and potentially a powerful tool that may unlock citizen's ability to access land to reflect the demographics of the country, and a class agenda, in favour of the landless and the gap market. However, the declining budget allocated to the Department of Rural Development and Land Reform over the years, makes it inappropriate that the important redistribution agenda for the nation, is expected to be implemented by a department that is not supported financially and adequately.

In practice, the DRDLR has relied heavily on its various internal policies on redistribution that have changed over the last 20 years, without clear, coherent policy direction, and often, contradictory outcomes in relation to the type of land tenure redistribution beneficiaries are entitled to. The policies on redistribution do not have a specified purpose in relation to gender and class considerations in particular.

Redistribution warrants an overhaul and an introduction of a coherent, co-ordinated, and comprehensive framework that will empower the government to deliver on its obligations in 25(5). It is proposed that a National Land Reform Framework Bill (or 'Redistribution Bill') be prepared for such a purpose. Such a bill must include the criteria which will be set in order to identify redistribution applicants and to prioritise among competing needs for land, whether for the purposes of housing, farming, business, multiple livelihoods. In order to meet the constitutional requirement that access to land is provided 'on an equitable basis', the bill must emphasise the need to give priority to those in greatest need. It should prefer vulnerable groups in our society, prioritising black people, people who are homeless, landless or land-poor, women, youth and people with disabilities. The bill must deal with accessing land in both urban and rural areas.

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THE LEGAL FRAMEWORK FOR RESTITUTION

The **Restitution of Land Rights Act No. 22 of 1994** has been analysed at length and the challenges with the Act have been widely stated. The State has focused most resources on restitution. Most urban land claims have been far easier to settle given that urban areas have been developed and resettled, and are mainly non-restorable, thereby leading individual and/or family claimants having no option but to receive financial compensation. Restitution seeks to deliver justice to those who were dispossessed of land after 19 June 1913. However, it places the onus on claiming lost land on current claimants, while they would not in most cases, have the requisite relationship with the land claimed, knowledge and skill to prove a pre-existing right on land.

It is also well-documented that in many respects, the dispossessed lost rights in land long before 19 June 1913, which means that the Restitution Act excludes countless communities that lost land before this date. In addition, given centuries of forceful dispossessions, by the time that 19 June 1913 occurred, most claimants did not have rights on land that may be claimed akin to ownership. In this regard, the Restitution Act, in its formulation has the unintended consequence that lost "rights in land" are invariably lesser rights such as labour tenancy or occupier rights, as opposed to ownership or freehold title.

The Restitution Act in its current framing will not and has not delivered substantive justice for those persons that lost land long before 19 June 1913, and also the ones that lost land after this date, because by the time that 1913 came, the black majority had acquired "tenant" and occupier status in the land of their birth. The institutional challenges of the Commission of Restitution of Land Rights (Land Claims Commission) are manifold. They range from lack of adequate and fiscal support to assist claimants to investigate and settle claims, and it has also been complicit in the application of 'willing buyer, willing seller' in the acquisition of property for land reform purposes, and the methodology of compensation that is contained in the draconian and archaic Expropriation Act No. 63 of 1975.

The Restitution Act fails to ring-fence land that has been restored against any future overlapping claims. This was evidenced by the fact that after the reopening of land claims in 2014, the Commission of the Restitution of Land Rights received more than triple the number of land claims received before the 31 December 1998 cut-off date. It has been reported that most of the post 1998 land claims received, are on land claims which were in fact, settled before the 2014 amendment which was declared unconstitutional.

The Land Claims Court, which is the court established in terms of the Restitution of Land Rights Act has developed jurisprudence, which instead of it developing and enriching the discourse of democratising landlessness, it has in fact, by in large, served to solidify the 'willing buyer, willing seller' notions of compensation, as opposed to assisting in the development of jurisprudence that brings to life, the meaning and import of 'just and equitable' compensation. The Restitution Act does not contain any statutory obligation for the State to provide post-settlement support for the restitution claimants once their claim is successful, which has proven to be highly problematic, given the reports of projects where land has been restored which have subsequently failed, given the lack of post-settlement support.

On 19 March 2019 the Constitutional Court in the matter of *Speaker of National Assembly and another v Land Access Movement of South Africa and others CCT 40/15A*, handed down a judgment in terms of which the Speaker of the National Assembly and Chairperson of the National Council for Provinces had applied for an extension of an interdict issued by the Constitutional Court against the processing of land claims lodged between 1 July 2014 and 28 July 2016. The first LAMOSA judgement of the Constitutional Court declared as unconstitutional, Parliament's Amendment Act seeking to enact an Amendment Act aimed at the re-opening the lodgement of claims after 31 December 1998. The first LAMOSA judgment afforded Parliament 24 months within which to enact a new Amendment Act.

The application launched by Parliament was to seek an extension of the interdict against the processing of interdicted claims until 29 March 2019. In a unanimous judgment, the Court noted that it has wide discretionary powers and is required to make an order which is just and equitable. The Court found that Parliament had delayed in bringing the application to Court, and its application was therefore dismissed. The Chief Land Claims Commissioner was also directed to file a report with the Land Claims Court at six-monthly intervals setting out the number of outstanding old claims, for each region, and the anticipated date of completion in each region, including short-term targets for the number of old claims to be processed; the nature of budgetary constraints that the commission is facing, including the solutions that have been implemented in order to deal with any such challenges.

The first and second LAMOSA judgments are indicative of the failure of Parliament to respond adequately to the need for finalising outstanding claims before starting the process of investigating new claims.

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THE LEGAL FRAMEWORK FOR TENURE

The **Upgrading of Land Tenure Rights Act No. 112 of 1991** (ULTRA) provides for, inter alia, the conversion of permissions to occupy (PTOs) from old order rights which may be "upgraded" to freehold. The upgrading of rights may occur mostly where land has been cadastrally surveyed. The lack of surveying of land which was previously regarded by the apartheid government as Bantustans, limits and constrains the extent to which communal land rights may be upgraded. On land that has been surveyed, there are title deeds of quitrent rights and deed of grants that are out of date. In cases of quitrent settlements, there are overlapping rights by owners, tenants and occupiers.

CC 39/10 (2010) ZACC is authority for principle that communities on land are granted preferrent rights on land in terms of which communities are afforded an opportunity to participate in benefit-sharing made possible by the payment of royalties payable directly to communities.

The **Land Titles Adjustment Act No. 111 of 1993** allows for administrative measures to 'update' title deeds where the relevant ownership details in the deeds registry are not up to date. 'Ownership' requires that the land must be registered in the name of the living owner. The cadastral system formed pre-democracy, has persisted, thereby continuing to exclude the majority of the population from the property law legal system.

The **Ingonyama Trust Act 3 of 1994** (ITA) established the Ingonyama Trust and vested ownership of 2.8 million ha of communal land in the trust, on behalf of King Goodwill Zwelithini, who is its sole trustee. The Legal Resources Centre filed an application in the Pietermaritzburg High Court in November 2018 on behalf of the Council for the Advancement of the Constitution, the Rural Women's Movement and several informal rights holders. The Ingonyama Trust Board was established in 1994 to be the custodian of land previously administered by the former KwaZulu-Natal government. The court application seeks to challenge the conversion of permissions to occupy (PTOs) or informal land rights to long-term leases by the Trust. The constitutional dispensation that is applicable in post democratic South Africa is set out in the Traditional Leadership Framework Act, as read together with Chapter 12 of the Constitution. The Ingonyama Trust Act and the unlawful practices that persist especially in so far as gender discrimination is concerned, are clear violations of the Constitution. Of note, are vulnerable groups who are often having to pay sums of money to traditional leaders, for the administration of the land, and in particular the Ingonyama Trust.

The **Land Reform (Land Tenants) Act No. 3 of 1996** (LTA) seeks to secure the tenure rights of labour tenants and former labour tenants, including by regulating their tenure and prohibiting illegal evictions. Tenants can claim and acquire full ownership on land which they occupy. Government's failure to implement the Act is widely known. Meanwhile, a significant number of evictions has taken place. Thousands of unprocessed labour tenancy applications remain unresolved. This was a breach of the Constitution as the Minister of Rural Development and Land Reform and the director-general failed to comply with an important statute. In the matter of Mwelase and others v Director-General for the Department of Land Reform and others (107/2013) [2016] ZALCC 23, the Land Claims Court held that they failed to process applications for awards in land by labour tenants. The applicants in this case were compelled to launch an application for the appointment of a special master to monitor the processing of labour tenant claims.

The **Communal Property Associations Act No. 28 of 1996** was enacted in order to create a mechanism by which those acquiring land via land reform could form a 'juristic person' that is able to hold and manage the land jointly in terms of a written constitution. The State has failed to provide the necessary support and assistance in the administration of communal property associations (CPAs) and dispute resolution. The obligations of the DRDLR and CRLR to register, provide support and oversight of CPAs have not been realised in practice, and the state has been in violation of the Act's requirements over many years. Problems arising within CPAs in terms of land allocation and governance among CPA members have been rife, arising in part from the design of projects and the amalgamation of different groups and communities within CPAs. CPAs and traditional councils have battled to coexist, often leading in contestation over issues of control and land governance. The Constitutional Court however, in the matter of Bakgatla Ba-Kgafela Tribal Authority and others 2015 (60) SA (CC) has significantly elevated the legal standing and registration of CPAs.

The **Interim Protection of Informal Rights Act No. 31 of 1996** (IPILRA) recognises informal rights to land and stipulates under what conditions people may be deprived of such rights. It was intended as an interim measure to secure the rights of people occupying land without formal documented rights, pending the promulgation of more comprehensive law but, in the absence of such law, has been renewed annually. IPILRA is applicable to residents of the communal areas of the former Bantustans. Informal rights to land such as household plots, homesteads, cropping fields and grazing land, as well as rights to common property resources, are protected. It provides that no person may be deprived of an informal right to land without his or her consent, except where this is in accordance with the custom and usage of that community, and subjective to appropriate compensation. A decision to dispose of any informal right to land may only be taken by a majority of the holders of such rights present or represented at a meeting.

THE LEGAL FRAMEWORK FOR TENURE (CONTINUED)

The **Extension of Security of Tenure Act No. 62 of 1997** (ESTA) regulates the tenure of occupiers of agricultural land, provides them with legal protection against illegal and arbitrary evictions, and provides measures to secure their long-term tenure rights, either on-site or off-site. ESTA applies to those who occupy farms with the consent of the landowner. Landowners, who have better access to courts and legal representation than farm dwellers and farmworkers, have used ESTA mainly in order to evict workers legally, though there is research evidence that the vast majority of farm evictions take place illegally, without a court order. There has been no national survey of farm evictions since 2005, but legal and civic organisations have continued to monitor and intervene in evictions. There has been a plethora of case law and jurisprudence emanating from ESTA. The Land Claims Court has been tasked mainly with applications for evictions in terms of ESTA. The Court has become a court that takes into account public policy considerations in light of the constitutional dimensions within ESTA.

The **Prevention of Illegal Eviction and Unlawful Occupation Land Act No. 19 of 1998** (PIE) gives effect to the constitutional provision in section 26(3) that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances, and that no legislation may permit arbitrary evictions. PIE seeks to protect occupiers who do not have consent to reside on land, or have had consent withdrawn. PIE is aimed especially at protecting vulnerable persons such a female-headed households, children and the elderly by having them provided with alternative accommodation by the State when an eviction order is granted. This means that the rights of property owners are now offset by the rights of occupiers to housing and protection against eviction.

The issue of evictions under both ESTA and PIE have received public attention with calls from civil society organisations for a moratorium on evictions. The challenge with the latter is that lawful evictions form part of parcel of our constitutional framework. In other words, there is no law that outlaws evictions, rather ESTA and PIE provide procedural and substantive guidance as to the manner in which evictions may occur. With the recent spate of the taking over of unoccupied land and the political insurgence and incidents of political parties encouraging landless communities to "grab" land, provinces, municipalities, individual, corporate and communal landowners may not be denied the ability to seek lawful eviction orders. Any moratorium on evictions would therefore be unconstitutional, as it would serve to undermine the provisions of section 25(1) of the Constitution which protects against the arbitrary deprivation of property rights.

The **Traditional Leadership and Governance Framework Act 41 of 2003** (TLGFA) solidifies the institution of traditional leaders and traditional leadership in South Africa and provides for the transition from tribal councils to traditional councils, with 40 percent elected members and one-third women members. The TLGFA aimed to democratise these institutions and to enable a pragmatic way to give effect to the institution of traditional authority while making it compatible with the Constitution. The TLGFA requires adaptation of 'living' customary law and customs to prevent unfair discrimination and promote gender equality. The existence of unscrupulous traditional leaders and any practices that undermine women and children's rights, does not in itself, delegitimise the constitutional recognition of traditional leadership. The continued and widespread unfair discrimination against women, particularly female-headed households, girls, and child-headed households requires urgent and dedicated attention. However, the TLGFA constitutes an apartheid distortion of customary law, and resuscitates apartheid geography by entrenching the boundaries of the old tribal authorities, resulting in divided citizenship and economic inequality. In practice, 14 years after the law was enacted, most traditional councils are not legally constituted and are thus legally invalid. Some are charging illegal tribal levies. The Commission on Traditional Disputes and Claims which addresses contested claims by traditional leaders is overwhelmed and cannot manage the extent of disputes. There is evidence that traditional authorities are accused of unilaterally selling land without the consent of affected members of their communities.

The **Communal Land Rights Act No. 11 of 2004** (CLARA) was declared unconstitutional on 11 May 2010 by the Constitutional Court. CLARA recognised a traditional council as a land administration committee, established in terms of the Traditional Leadership Framework Act No. 41 of 2003. Since CLARA was declared unconstitutional, the Communal Land Tenure Policy asserts having a single land title that is to be held by traditional councils as title holders, and the traditional councils would also include land allocation and adjudicate disputes. The Communal Land Policy applies to the former Transkei, Bophuthatswana, Venda and Ciskei (TBVC) states, as well as land acquired by communities, held in trust by the State.

THE LEGAL FRAMEWORK FOR TENURE (CONTINUED)

The **Mineral and Petroleum Resources Development Act 28 of 2002** (MPRDA) made the State the custodian of all mineral and petroleum resources. It seeks to promote local and rural development and the social upliftment of communities affected by mining. The MPRDA is a legislative and constitutional response to section 25(4)(a) of the Constitution that states that the public interest includes "the nation's commitment to bring reforms in order to bring about equitable access to all South Africa's natural resources". Past mining legislation prevented black people from acquiring access to mineral resources. Prior to the promulgation of the MPRDA, the operation of mineral rights on land, were owned by the landowner. These rights were easily transferrable and the holder of the rights, had no obligation or time frame within which to explore the mining right. Custodianship involved a shift from private law to public law, in terms of which anyone who wishes to apply for a mining or prospecting right would have to apply for a mining or prospective right from the Minister of Mineral Resources. The matter of Bengwenyama Minerals v Genorah Resources CC 39/10 (2010) ZACC is authority for principle that communities on land are granted preferrent rights on land in terms of which communities are afforded an opportunity to participate in benefit-sharing made possible by the payment of royalties payable directly to communities.

In the context of mining, the distinction between expropriation, deprivation and custodianship was dealt with in the Constitutional Court decision of AgriSA v Minister of Minerals and Energy CCT 51/12 [2013] ZACC 9. This matter entailed a claim by an entity that it was entitled to compensation as a result of the promulgation of the MPRDA which changed the law into the State having custodianship over the minerals. The entity argued that the MPRDA expropriated its mineral rights. The entity's lodgement of a claim for compensation coincided with AgriSA's decision to seek clarity from a court of law on its view that the MPRDA amounted to expropriation by the holders of the minerals rights. The court held that deprivation within the context of section 25 includes extinguishing a right previously enjoyed, and expropriation is a subset thereof.

Deprivation take places when property or rights are either taken away or significantly interfered with. On the other hand, expropriation entails State acquisition of property in the public interest and must always be accompanied by compensation. The latter is in accordance the matter of Reflect-All 1025 CC and others v MEC for Public Transport, Roads and Works and Another [2009] ZACC 24, 2009 (6) SA 391, where the court held that there can be no expropriation in circumstances where deprivation does not result in property being acquired by the State. The court also held that:

"A one-size-fits-all determination of what acquisition entails is not only elusive but also inappropriate particularly when an alleged expropriation of incorporeal rights, like mineral rights, is considered. A case by case determination of whether acquisition has in fact taken place presents itself as the more appropriate way of dealing with these matters…"

The court referred to the German Constitution which allows for the deprivation of property without payment of compensation in certain circumstances. In the case of Jahn v Germany 2005 E C H R 444, (2006) 42 E.H.R R. 49, the European Court of Human Rights was called upon to decide whether the failure to pay compensation to the applicants breached the provisions of article 1 of Protocol 1 to the European Convention of Human Rights. The ECHR held that a total lack of compensation can be considered justifiable only in exceptional circumstances.

The Constitutional Court in the matter of First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service and Another [2002] ZACC 5, 2002 (4) SA 768 (CC) indicated that there are cases that may warrant expropriation without compensation in certain circumstances. These issues regarding expropriation, deprivation and compensation lead to the assessment and analysis of the Expropriation Act No. 63 of 1975, and the question of whether or not the current formulation of section 25 allows for expropriation without compensation.

The effect of making IPILRA permanent is that it will be a legal mechanism to protect "informal rights" which would be considered as a real right. In the matter of Baleni and Others v Minister of Mineral Resources and Others (73768/2016) [2018] ZAGPPHC 829; [2019] 1 All SA 358 (GP) (22 November 2018) the court had to decide whether it is necessary for the Minister of Mineral Resources to obtain the consent of landowners prior to granting a mining right in terms of section 23 of the Mineral of Petroleum Resources Development Act No 28 of 2002 (the MPRDA). Central to the argument was whether IPILRA has equal weighting or overrides the MPRDA, which allows the Department of Mineral Resources to grant mining rights over land without the consent of land owners. To this end, the court held that 'free, prior and informed consent' from a community who will be affected by a mining right is required before the Department of Mineral Resources grants mining rights in relation to the particular area. This judgement has accordingly emphasised the rights of holders of informal rights to land in terms of IPILRA and has the effect that the Department of Mineral Resources is now prohibited from granting any prospecting and mining right to a new entrant in the mining industry without the free, prior and informed consent of such communities. Although the Constitutional Court judgment serves to affirm and elevate the importance of giving voice to communities with insecure tenure rights, Parliament has failed to give comprehensive and permanent protection to land insecure communities. It is therefore reiterated that Parliament must utilise its powers to reform the current property law system in order to make, legally recognisable and registrable, land rights and continuum of land rights of the black majority, and in particular, the most vulnerable.

THE LEGAL FRAMEWORK FOR STATE LAND

The **Distribution and Transfer of Certain State Land Act No. 119 of 1993**, as amended (the State Land Act) was introduced in 1993 in order to regulate the distribution and transfer of land belonging to the State and designates the Minister of Rural Development and Land Reform as the responsible minister. It applies to land belonging to the State (including land registered in the name of the minister, premier and a former administrator) and land belonging to a local authority or development body, designated by the minister as land to be dealt with in accordance with the State Land Act.

The **Government Immovable Asset Management Act No. 19 of 2007** (GIAMA) is aimed at providing a uniform immovable asset management framework in order to promote accountability and transparency within government; ensure effective immovable asset assessment within government and to ensure co-ordination of the use of the immovable assets with service delivery objects in mind. This Act, if implemented and enforced optimally could assist the State in the quest for the determination of the amount of land owned by the State within the context of redistribution.

There remains a tension between GIAMA and the land reform agenda, in that GIAMA requires that best value be realised for public land, whereas the land reform agenda requires that the social value and social function of land be realised, for the purposes of transformation.

THE LEGAL FRAMEWORK FOR SPATIAL PLANNING

The **Less Formal Township Establishment Act No. 113 of 1991** (the repealed LFTEA) was a planning law, implemented by the provincial sphere of government, which was repealed by the Spatial Planning and Land Use Management Act (SPLUMA) No. 16 of 2013. The repealed LFTEA had as its objective, the formalisation of existing settlements or the creation of new settlements in the low cost housing sector. The Act did not make provision for the creation of alternative modes of tenure, and only made provision for freehold title. In this regard, research has proven that land titling and particularly land titling, on its own, is not necessarily the most appropriate manner in which to protect those that are tenure insecure.

The **Spatial Data Infrastructure Act No. 54 of 2003** applies to all organs of State that hold spatial information and to users of spatial information and establishes the South African Spatial Data Infrastructure as the national, technical, institutional and policy framework to facilitate the capture, management, maintenance, integration, distribution, and use of spatial information. The effective, efficient and strengthening, evaluation and monitoring of this Act is crucial for purposes of assisting the State towards a National Land Framework, and in particular to inform the functions of determining which land is required for what purposes, by whom and in which region.

The **Spatial Planning and Land Use Management Act No. 16 of 2013** (SPLUMA), came into effect in 2015. It is aimed at addressing the fragmented, unsustainable, spatial development patterns caused by the legacy of apartheid's racially separatist development. SPLUMA seeks to create a single, integrated legal system dealing with planning in a holistic and consolidated manner. It also seeks to specify the role of each sphere of government in planning. A single and inclusive land use scheme for each municipality is to be developed, each province may pass planning laws. Municipalities must establish municipal panning tribunals and appeal structures to determine and decide on land development applications. All spheres of government must prepare Spatial Development Frameworks (SDFs) based on norms and principles guided by developmental goals. In urban areas, the definitions of land management should be amended and restructured in order to include a range of spatial units, cadastral and non-cadastral in order to improve land management.

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PART V
REFOCUSING LAND REFORM

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REFOCUSING LAND REFORM

The panel has recognised that the land question in our country, as presented in the 1997 White Paper on South African Land Policy, and in recent political debates, including the ruling party's resolutiontaken during its 54th elective conference in December 2017, has not adequately addressed the distinct spatial contrasts and differentiation, as well as the alignment between historical, social, economic and environmental aspects. This remains true despite the strategic goals and vision of the Land Policy in the 1997 White Paper highlighting that land is a precious resource.

The three elements of the land reform programme, Redistribution, Restitution and Land Tenure, are deemed as critical mechanisms of land acquisition and allocation. Their fragmented and challenged application has perpetuated a costly transactional perspective of land reform fraught with corruption and inefficiencies.

While relevant, they should be guided by a clear policy framework with clear strategies and transformational outcomes addressing the issues raised above. This must be coupled with an institutional framework and land administration and governance framework and plan that enforce alignment and complementarity.

With this purpose in mind, the panel analysed the key constraints in acquiring land for land restitution and redistribution. They included land prices particularly when using a 'willing buyer, willing seller' approach. State capacity was a major constraint and the determination of land price – valuations done without taking constitutional provisions into account.

The Land Reform budget and post-settlement investment by key departments (e.g. DAFF, Human Settlements and CoGTA) also remain at the core of failure. The budget for the DRDLR (and its predecessor the Department of Land Affairs) has consistently been below 1% of the total budget (except for two years 2006-2007) and for redistribution (Referred to as Land Reform in the Budget) has "generally been between 0.15% and 0.4%, reaching a peak of 0.44% of the national expenditure in 2008/09 and then declining to 0.2% in the current financial year". Presentations by the Department of Rural Development and Land Reform to the panel in 2018 referred to R27 billion required for the remaining settlement of farm claims.

Other constraints point to poor infrastructure investment and alignment.The non-transformation of the water sector – with farms acquired that have no water rights and access, basic service and energy supply – is undermining land reform.

The erosion of social capital due to poor policy implementation and post settlement support is reaching dangerous proportions and disadvantaging poor communities. Communities and families are at loggerheads. Community property associations (CPAs) are deemed ineffective as they are viewed to be zones of conflict within, and with traditional authorities, government and the private sector.

Since the 1997 White Paper, there has been poor implementation and policy shifts as well as changes in socio-economic dynamics, climate change and demographics which necessitate a new Land Reform Policy Framework. Examples include consideration of alternative land acquisition strategies and land tenure models, the failure of 'willing buyer, willing seller', reviewing beneficiary eligibility and landholding entities, the shift from the Development Facilitation Act to SPLUMA, and the introduction of a national urban policy.

Section 25(5) of the Constitution places an obligation on the State to foster conditions that would enable citizens to gain access to land on an equitable basis, yet no law or policy has been enacted in order to define the right. Furthermore:

1. Legislation has failed to meet the objectives outlined in the Constitution and in policy documents.
2. Redistribution has been slow transferring 5.46% of commercial agricultural land to date.
3. Redistribution has mainly focused on agriculture and has had little focus on urban needs and rapid urbanisation.
4. The pace has declined since 2008.
5. There has been shifting policy positions.
6. Evidence that land redistribution is increasingly benefitting elites with no monitoring mechanisms to prevent this.
7. Women constitute only 23% of programme beneficiaries.
8. Lack of clarity about tenure rights of programme beneficiaries.
9. Failure of current leasehold model to record rights, issue and manage leases.
10. Lack of programme impact monitoring.
11. Weak intergovernmental co-ordination and misalignment of budgets.

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Given all of this, the panel has had to consider that there is a need to develop a coherent policy response, grounded in historical, financial, and economic research, also considering social aspects and climate change issues in both urban and rural areas. This matter has become urgent following the adoption, in the National Assembly, of a motion mandating Parliament's Joint Constitutional Review Committee to investigate mechanisms through which land can be expropriated without compensation. The following sections assess key dimensions of this overarching consideration.

URBAN TENURE AND PROPERTY RIGHTS

Chapter 8 of the National Development Plan 2030 (NDP) dealing with, "transforming human settlements and the national space economy" has as its vision for urban South Africa, meaningful and measurable progress in reviving rural areas and the creation of integrated, balanced and vibrant urban settlements. The NDP therefore directs the State to clarify and pursue a national vision for spatial development, to sharpen the instruments for achieving the latter vision and to build the required capacity in the State and among its citizens.

However, South Africa's land reform discourse and focus has tended to focus much less on the urban dimension than on rural land and agrarian reform. Without dichotomising the urban and the rural (which are acknowledged as an interdependent continuum), it is argued that consideration of the prevailing statistics and trends of widespread urbanisation, not only in South Africa but across the globe, suggests that the failure to deal with urban land and urbanisation within the discourse of land reform will not lead to the constitutional realisation of a successful land reform that delivers justice, unity, economic advancement and a dignified existence for the landless majority.

Section 25 of the Constitution deals with and codifies the 1997 National Policy on Land (National Policy), and directs the State to take positive steps in relation to ensuring that restitution, redistribution and tenure security are delivered. Legislation and policies that have been developed emanating from section 25 of the Constitution, have had as their major areas of focus, agriculture, farming and rural development in the main, and less if not at all, in relation to urban land planning as a means to resolving issues concerning overcrowding, homelessness and a lack of basic services in urban areas, with the lens of land reform and in particular land redistribution.

Urban planning land and land use management, housing, spatial planning and spatial integration, although regulated in terms of legislation and policy, have therefore not been placed at the forefront and centre of land reform and land reform objectives. They therefore have not, in the past 24 years, been interpreted and implemented as means or tools to achieve redistribution of land and access to land in urban areas. The implementation of land use management and spatial planning has not occurred in an integrated manner, which have the constitutional imperatives set out in section 25 and section 26 (which deals with the State's obligation to provide access to adequate housing) of the Constitution in mind. Instead, they have been regulated and implemented as if they are distinct from land reform objectives.

Current existing housing, urban and spatially-linked laws, policies and instruments have been occurring without the lens of land reform and land reform objectives as stipulated in section 25. As such, an overhaul seems to be required of the current fractured and unintegrated manner in which decisions are made in relation to land generally, and more specifically with regard to where housing developments are located, where investments in developments are located, the identification of which sectors of the economy benefit from State investments on land and whether or not such decisions, have in mind the objectives of section 25 of the Constitution.

The Integrated Urban Development Framework (IUDF) is recognised as a national policy framework which sets out the manner in which the urban system can be reorganised, with its main purposes, being centred around cities and towns that are inclusive, resource efficient and where citizens can live a safe, dignified existence near places of work and play. While the IUDF boldly aspires to the achievement of spatial transformation in South Africa, there are four factors that continue to perpetuate existing social, economic and spatial patterns in South Africa:

1. The existing property markets and land use patterns that undermine access to urban opportunity and reinforce highly inefficient urban spatial forms;
2. Unsustainable infrastructure networks and consumption patterns, with car-dependent cities and suburban lifestyles that produce resource-intensive and inefficient forms of settlement;

3. Segregated urban settlements marked by social divisions emanating from apartheid spatial planning patterns; and
4. Unequal income levels and lack of access to services which have dogged the urban poor since the dawn of apartheid. A significant number of households do not have access to services and are concentrated in informal settlements and townships in cities and in peri-urban areas.

Addressing the urban spatial and developmental challenges requires that land reform objectives must become a key consideration in the manner in which urban plans, housing projects and land-use management are planned and implemented, and must be linked with ensuring that those who remain landless have legally recognisable, protectable and registrable tenure rights. Urban insecurity of tenure has been pervasive particularly among persons and communities whose tenure rights remain unrecognised in law. It is reported that approximately 80% of the South African population in urban areas has "off-register" rights or no rights to land tenure that are recognised in law.

The urban land reform consideration therefore motivates for a unitary, revised land reform policy which must seek, at its core, to incorporate human settlement planning, basic services and infrastructure delivery, urban land planning, land-use management, and spatial planning in the centre of land reform objectives. It also promotes the need for a reformed national framework on land, housing and town and city planning, which involves the rethinking of institutional arrangements, informed by a unified, coherent, comprehensive and coordinated national policy and vision for all land. The legal protection and recognition of insecure rights, and in particular those of vulnerable persons, must also be central in determining the future of land reform in South Africa.

The interpretation of section 25 as only dealing with rural development, agriculture, to the exclusion of urban land and urbanisation and the need to utilise section 26 as a lever to deliver accessible redistribution of land, must also be corrected.

Astute and robust co-operative governance and intergovernmental relations principles merging the goals and objectives of urban land reform, spatial transformation, inclusive municipal planning, adequate, sage and secure human settlements, linked with a dignified existence for the previously disenfranchised, must be cumulatively and jointly merged both in law, policy and implementation, as crucial levers to achieve land reform generally, and particularly in order to deal with densification and an equitable redistribution of land in South Africa.

RURAL TENURE AND PROPERTY RIGHTS

Rural land tenure is laced with contested philosophies and practices on the use, development, transfer and inheritance of land and property, as well as the issue of land tenure security. It is noted that the current debate around rural land tenure is dominated by discussions around traditional communal land administration systems, which are under the jurisdiction and control of Amakhosi and their traditional councils. These have generally been portrayed as self-serving, unilateral decision makers who rely on the whim of self-serving elite within the patriarchal hierarchies. However, an in-depth engagement with the country's traditional leadership structures has brought forth a different narrative that is worthy of note.

The traditional leadership framework, the role of traditional leaders and the recognition of customary law are protected and recognised in South African law. Chapter 12 section 211 of the Constitution recognises the institution of traditional leadership and traditional councils in accordance with customary law, subject to the Constitution. Section 212 calls for the enactment of legislation providing for the role of traditional leadership.

Traditional leadership in most of the country's provinces emphatically dismiss the image that society ascribes to them with considerable contempt. They debunk the notion that they are undemocratic, or that they are imposed on communities. They readily provide details of their land management systems as well as of their African Parliament (ibandla/lekgotla, etc) which are deeply rooted in African communalism.

There is a strong feeling that there is a general lack of understanding of current and historical communal land tenure. As a result pre-eminence has been given to individual land rights over communal rights, thus undermining the communal land tenure systems. Put sharply, the traditional leaders argue that the current Western-imposed legislative framework fails to appreciate the interplay of individual and group rights; how these live side by side in a mutually beneficial, inclusive and harmonious fashion rather than in a competitive manner.

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The primacy of private property rights and the privileging of individual rights asserted in South Africa's Roman Dutch Law governance framework, wrongfully side-lines the principles and practices of communalism practised successfully over many generations within African societies. To avoid an inevitable conflict with rural communities, land tenure reform should build on customary African traditional systems and not rely solely on perspectives that bear little reality to the lived experience of rural communities. There is a need to secure and protect customary and informal land rights; a right that the traditional leaders felt that the imposed Roman Dutch Law may be structurally incapable of effecting. In as much as land tenure reform must secure and protect customary land rights, it must also ensure that security of tenure is provided with respect to communal land.

The big question, according to traditional leadership, is how to effect a constitutional injunction on tenure security while at the same time remaining respectful of, or without upending the traditional system. This, in essence, is the real crux and challenge.

There are two divergent perspectives in the public discourse on rural land tenure and tenure security. On the one hand there is a viewpoint that strongly advocates for land tenure security to be fully provided for in the communal land system under traditional leaders. On the other hand, there is a view that security of tenure can only be effected through titling (provision of title deeds).

The view that land titling will lead to land security is strongly opposed by traditional leaders. Their perspective is that, land titling can only lead to further vulnerability of individuals and communities instead of providing them with tenure and economic security. In the rural setting, land is an indivisible and inalienable sacred heritage to be passed on from one generation to the next. This is the foundation of customary land security. Titling threatens this by creating the situation where individuals can borrow against land as a commodity, and may consequently lose land in the event that they default in servicing their loan obligations. Furthermore, it is noteworthy that the prospect of eviction in the communal land environment is virtually non-existent.

Traditional leaders contend that non-endogenous measures such as land titling, which are imposed by financial institutions, contribute to the current economic insecurity of the African majority, especially those in rural areas. Requirements by financial institutions make participation in the economy expensive, laborious for the poorest and most marginalised African people. The malady of working within the parameters of an imposed and historically oppressive Dutch Reform Law framework has meant that the African majority has had to endure on a daily basis financial restrictions and constraints in opening bank accounts, securing loans or obtaining insurance.

Communities should not have to reconcile themselves to the financial requirements and dictates of banks, which place them in a precarious position. Rather it is incumbent on financial institutions to modify and transform their financial instruments and measures in accordance with the needs of rural communities and to take cognisance of the workings of the communal system that has stood the test of time.

The enquiry on historical and contemporary rural land issues and arrangements demonstrates that there is both a need and an opportunity to advance African solutions to the land question in the new democratic landscape. This will require an earnest appreciation and assertion of the value and functional ecology of both pre-colonial and contemporary rural land allocation, management and administration principles and practices.

There needs to be a recognition of how the value systems inherent in the customary land administration were deliberately broken down by colonialists, and replaced with westernised land rights models which prioritise and serve individual ownership and property rights over communal relationships. The failure to resolve the contending philosophies around land tenure and the supremacy of the Roman Dutch Law in the shaping of land policy in contemporary South Africa remains a critical roadblock in forging out sustainable land reform. There is a need to champion and advance a land tenure formula which ensures that communal land tenure rights are not subservient to private property rights ownership. The logic of a new framework of land tenure in a democratic South Africa must move out of the constraints of the past if it is to offer a really meaningful solution.

A progressive outcome would see the framework around land tenure move away from the spatial and cultural impositions, models, reference points and even language of apartheid and colonialism. The expectation from traditional leaders is that a solution to equitable land tenure should start by first addressing the current realities of rural life; its challenges, possibilities and place in South Africa.

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Traditional leaders and indeed Africans, expect that the government will develop land reform and agricultural policies that restore the rights and dignity of black South Africans. Currently the raft of legislation and its flawed administrative processes are seen by the majority to be maintaining suppression. There is an expectation among traditional leaders that the democratic government develops and enforces legislation that enables and empowers black rural development and economic success. The development of new approaches and rural land tenure models must advance sustainable economic development of rural communities in a manner that will intensify successful agricultural production and food security. A progressive land resolution would also ensure that the communal land systems are well geared to current socio-economic realities including shifting migratory patterns, issues of gender and climatic and environmental dynamics.

One of the major shortcomings of South Africa's land reform programme is the need for effective implementation. Although significant tenure reform laws have been enacted since the new government assumed office, the country has not resolved the contending philosophies around land tenure effectively. On the one hand, there is the propagation of individual rights pertaining to land. This finds expression in the notions of private property rights of the privileged classes. On the other hand, we are faced with a situation where communalism is at the centre of African lived experience, therefore necessitating a different approach to the land tenure question.

The Constitution envisages a security of tenure system that is biased in favour of private ownership, and farm dwellers residing on private land live a precarious existence that is constantly threatened by the possibility of evictions. Current (post-1994) laws merely make it more difficult to evict them, but fail to protect them from harassment and eventual eviction altogether. Tenure reform must, therefore, provide for effective implementation of the new rights-based laws.

With regard to communal land, the Constitution makes provision for the democratisation of land tenure security, which should be addressing the challenge of patriarchy in the manner in which land is owned, managed, transacted and inherited.

South Africa will have to resolve the contending philosophies around land tenure security in a coordinated and coherent manner. The haphazard and piece-meal approach is failing the urban and rural poor. We are at a critical juncture which provides an opportunity to advance Afrocentric solutions for, with and by the people of South Africa. Interventions proposed by the panel must thus contribute to bringing land tenure reform in line with the pressing requirements for justice and prosperity for all.

WOMEN AND ACCESS TO LAND

Rights to control and use land are central to the lives of rural women, whose lives and livelihoods are derived from the land and its natural resources. The lack of land rights for women and girls threatens their living conditions, their economic empowerment, their physical well-being and their struggle for equality within a patriarchal society. Although women in South Africa's rural societies are responsible for the majority of the agricultural food production and household labour, the patriarchal nature of African society precludes them from owning land and putting it up as collateral to secure funding for expanding their farming operations or for debt management. While it is true that in its purest form the decision-making unit in any society is the family, where women are included in the process, the fact is that in rural communities, women are often overlooked when it comes to issues regarding land ownership although they are the ones that work it. Rules of access and inheritance in rural societies favour men over women and women with children over those without.

In 1998, the government passed the Customary Marriages Act 120 of 1998 which provides that a wife in a customary marriage has full status and capacity, based on equality with her husband and subject to the matrimonial property system governing the marriage. This includes the capacity to acquire and dispose of assets. However, by 2003, there was still no law that provided for women's independent access to land.

Case Studies: Rural Women

A round table discussion was convened by the Presidential Advisory Panel on Land Reform and Agriculture on Friday 08 March 2019 to solicit women's views on their plight with regards to access to land, particularly in marginalised rural communities. Various eminent speakers from both community stakeholders and ordinary women made their inputs to the dialogue. Some of the main points to come out from the discussion are the following:

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Ms Sizani Ngubane: Rural Women's Movement[1]

She focused on the main theme Women vs Amakhosi. Ms Sizani's story serves as a case study that reflects on the plight of women when it comes to access to land. Her upbringing brings to the fore the issue of gender based discrimination against women that eventually affected the whole generation adversely. Sizani Ngubane, the leader of the Rural Women's Movement shared her own traumatic story of land dispossession at age ten and related how sixty years later she remained in the injustice of landlessness.[2] Her own struggle and suffering motivated her to form a movement to shield and fight for women's land rights. She spoke of the dire circumstances of rural women, especially widows, divorcees and unmarried women who were hounded off the land and prohibited from land access or ownership.

In 2013 the United Nations released a report declaring women's land rights as a human right. But in the contemporary South African landscape, this is hardly a reality. Many of the stories told by the rural women in attendance pirouetted around the oppressive hand of patriarchy. One of woman spoke of the daily torment of women at the hands of traditional leaders. Of how taxes are demanded for services that are either scant or totally non-existent, of how traditional leaders charge young employment seekers for proof of residence letters, of the prevalence of sexual violence against women and of the code of silence from herdsmen and religious leaders. Many women spoke of how they felt betrayed by traditional leaders who were entrusted to take care of the community but were not serving or protecting women. Patriarchy has stamped out land rights and tenure for women who are also compromised not only legally but through systemic unequal power relations in rural communities. Women's access to land is dependent on males, and their status is that of minors. Women cannot be treated as heads of family. This means they cannot have audience with the traditional leaders. It is within this oppressive framework that rural women are economically incapacitated.

Participants spoke of how even in the face of more female traditional leaders, the plight and lot of rural women had not improved. The struggle even under women leadership continues unabated. The traditional leader representative spoke of land reclamation and women land rights as an urgent imperative. She acknowledged that there were traditional leaders that had failed women but spoke of how many others were working hard to empower rural women. She spoke of the fact that their strong presence at the Roundtable was indicative of the transformation of the sector and the growing support for rural women and of initiatives which will advance these rights.

A story was told by **Mama Ngenzeni Chiliza** of how she was exchanged at age 15 for cows and how, when her husband passed away, she and her children were unable to inherit or occupy land due to the lack of rights of women in her rural community.

The status of rural women is as workers of the land, not owners of the land. Land is parcelled out to men while women till the land without rights or benefit. Women, treated as minors, are caught in an inescapable cycle of landlessness when single, widowed or divorced. For many rural women, they are not property owners, in their own right but the property of men, without rights.

Inheritance never passed to women – this is consequence of the contorted customary ecosystem in existence today; perhaps a bastardised version of the original endogenous traditional social structure. There was much said about criminal cases that go unresolved, of the spate of rapes and murders of women, of the lack of dignity in everyday life. A participant spoke of the suffering of her parents, who worked the land as labour tenants without payment. In the view of the rural women present at the roundtable, the genesis of the collapse of social fabric was linked to land dispossession. The social maladies, according to participants, are the result of landlessness. In the words of one woman, "'Some of us are broken spirits, we are the walking dead because of this oppression and abuse that is now experienced by our children, The law enforcement agencies are unable to deal with the crime that has been spawned by poverty."

The displacement from land as well as the fostering of social maladies as a factor of landlessness was given an interesting perspective through the lens of a young researcher Ms **Fundi Skweyiya** who has studied land dispossession, with a special focus on the Eastern Cape. It was clear that some laws that discriminate against women and girls should be repealed and amended accordingly and that families who have lost their land through dispossession perpetrated by Amakhosi who flout traditional laws should be compensated. Amakhosi must be transparent when

1 Rural Women Roundtable 8 March 2019, Durban
2 Sizani Ngubane: RWM Executive Director

they bring in businesses to the communities and/or when negotiating investment projects in rural areas
Social barriers and attitudes are at the core of obstacles where rural women in particular have low self-esteem and are timid and unwilling to challenge men's authority. Evidence from several research studies show that women are reluctant to speak up in meetings because they feel intimidated by men who use obstructive behaviour to resist women's attempts to participate in land reform. The controversial structures that claim to be reformed are still led by people who are unwilling to change. There has been little paradigm shift from male control of land which makes it difficult for women to access land. Rural communities in particular are still governed by traditional authorities, such as chiefs (Amakhosi), headmen (Izinduna) and informal committees who exercise power and authority in spite of election of democratic local government structures. It is under these customary laws that women are prevented from taking full control of land, thus increasing their vulnerability, marginality and dependency.

The rights to control and use land are central to the lives of rural women, whose livelihoods and that of their families are derived from the land and its natural resources. The lack of access to land for women and girls threatens their living conditions, their economic empowerment, their physical well-being and their struggle for equality within a patriarchal society. Although women in South Africa's rural societies are responsible for the majority of the agricultural food production and household labour, the patriarchal nature of African society excludes them from owning land. Whilst it is true that in its purest form the decision-making unit in any society is the family, where women are central to the process, the fact is that in rural communities, women are often overlooked when it comes to issues regarding land ownership although they are the ones that work it. Rules of access and inheritance in rural societies favour men over women and women with children over those without. Also, it is assumed that female children are at some stage going to be married hence there is a reluctance to entrust family property particularly land to them. The assumption is that they will take the property to their respective marital homes where they are tied by marriage. After the loss of a spouse, divorce, separation women are vulnerable to eviction or loss of access to resources as their rights are tied to men (husbands, fathers, and brothers). The patriarchal nature of institutions that support communal land tenure strengthen the control of land resources in the hands of men.

A personal story that came from an elderly lady who lodged a land claim in accordance with the Restitution of Land Rights Act of 1994 found that the Act does not provide for the restitution of her land or eligibility for just and equitable compensation due to the fact that although she complied with all the legal requirements for restitution, she was however dispossessed just before the cut-off date provided for by the Constitution and hence the Act. This is clear that section 25(7) of the Constitution which puts the cut off point for validity of claims at 19 June 1913, must be amended.

Lastly, land is considered by the institution of traditional leadership as a sacred inheritance of all members of that community and all should abide by the rules and practices agreed upon at the People's Parliament (Ibandla/Legotla) of the community. The traditional institution should acknowledge that all members of the community must have access to land and be protected equally. Land must not only be a status symbol but a commodity that affirms unified nationhood, maintain the interconnectedness between the ancestors, the living as well as the unborn; in addition to bringing about wealth and food. The hallmark of a true community is the submission to traditional beliefs and customs. All those pockets of discrimination that still exist in our communities but more so in the families must be adequately addressed. The people's inheritance and heritage must always be protected from negative external forces such as loan sharks and financial institutions. The Presidential Advisory Panel should ensure that the community and in particular women's interests, are brought back into national focus if the country is to preserve the integrity of its communities. Development must come and adapt to the communal way of life of the people. Development must not introduce greed and self- enrichment, but must ensure that members of the community develop yet maintain their heritage.

In summary the following key issues emerged from the roundtable discussion with rural women on 8 March 2019:

1. Historically and presently, land dispossession, is a total onslaught, brutalising the daily lives of black South Africans, economically, culturally and spiritually.
2. Prevention by the Restitution of Land Rights Act No. 22 1994, to claim land dispossessed before 1913 is discriminatory and section 25(7) must be reviewed and amended to remove reference to 19 June 1913.

3. Rural black women, have been and remain at the receiving end of patriarchal practices and brutality brought on by landlessness.
4. The roundtable gave voice to the heart-wrenching experiences of land dispossession, and its ever-present ravage, centuries later.
5. The tragic saga of land dispossession in South Africa cannot be told without giving ample voice to rural women.
6. The oppressive hand of patriarchy weighted heavily on rural women.
7. Patriarchy has stamped out land rights and tenure for women who are also compromised not only legally but through systemic unequal power relations in rural communities.
8. Traditional leaders, entrusted to take care of their communities are seen, in general, as hampering, rather than serving or protecting women and their rights.
9. The collapse of the social fabric of society and the prevalence of societal ills are viewed as a result of landlessness.

TENURE REFORM

Land tenure is a historically and culturally complex concept. Consequently, today the right to tenure can be established through a range of processes: statutory, customary, religious and informal. These processes all influence attitudes towards the use, development, transfer and inheritance of land and property. The various ways in which land tenure is held also means that some forms of land tenure do not provide tenure holders with formal documentation and/or recognition of their legal status; comply only in part to legally stated norms (as when land is legally held, but developed for uses that are not officially sanctioned), or are subject to dispute.

A further consideration in many countries is that more than one legal tenure regime may exist in the same country at the same time, and policies for reform may be in varying stages of development, creating further degrees of uncertainty. For example, in many countries such as South Africa, statutory law may apply in urban areas and customary law in rural areas, making land tenure status ambiguous in peri-urban locations. Also, different forms of tenure may exist within a given locality and even on the same plot of land, thus posing considerable challenges for land administrators, who in the main, have been described as deficient in their land administration capacity.

Persisting inequalities in the manner in which land is owned, managed and transacted in South Africa, remains one of the most contentious issues in the country today. Land is an asset whose ownership is often viewed in terms of different defined notions of security. More than 60% of the active population of southern Africa depend on land for their livelihoods, whereas rural and urban poor communities depend almost entirely on land as a source of food. Forms of tenure fall into four broad categories, namely: (i) Open Access tenure, (ii) Communal tenure, (iii) Private Ownership and (iv) State Ownership.

It should be noted that one of the largest drivers of land tenure insecurity in South Africa is the country's lack of a clear and comprehensive land administration system to achieve the goals of the National Development Plan. Instead, it is still more pre-occupied and grappling with the complexities surrounding the transfer of titles from the State to local communities and how these rights can be secured to individuals and communities.

REGIONAL PERSPECTIVES OF LAND TENURE

South Africa, much like its neighbours in Southern Africa, has two main forms of land tenure, viz:

- **Statutory tenure:** consisting of documented title deeds and lease agreements which can withstand legal scrutiny, and
- **Customary Tenure:** This is largely unwritten and does not enjoy recognition in law and money lending institutions. This type of tenure affords very limited rights particularly to women and is open to abuse and corrupt activity by some chiefs, who are the customary custodians of the land.

Various studies have shown that there is a direct correlation between security of tenure and agricultural production. Having conducted land claims research since 2015, the JLD Institute has noted that investment in agriculture on private farms waned significantly upon notification of titled landowners that the farms were the target of land claims. Conversely, it was also noted that secure tenure is always a catalyst for intensifying agricultural production as well as natural resource management and sustainable development. This peculiarity was observed on both private and newly acquired farms that enjoyed secure tenure, thus debunking the myth that black landowners either lacked agricultural productive capacity or were just plain 'lazy' to work the land in the interest of contributing towards the country's food security. With equal access to secure land tenure for all farmers, whether black

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or white, food security will be maintained, if not significantly enhanced.

A classic successful example of land tenure is Mozambique which has, over the years, proved to be a successful land tenure model based more on user rights as opposed to conventional ownership rights. Through this tenure system, the user rights are registered by individuals and communities who work the land, and have established their own structures through which they manage their land independently of governing or traditional authorities. Similar systems of tenure in Uganda, Zimbabwe and Eritrea illustrate that freehold rights are not the only workable models that provide the requisite stimulus for agricultural production. Secure land tenure with or without time limits gives the user security guarantees to manage their land for maximum agricultural production.

Titling, on its own, has also not been proven to be the "be-all and end-all" especially in societies where customary and communal forms of tenure are particularly pervasive. Titling, whilst an exorbitant and expensive process, cannot be implemented glibly, without commensurate effort in, for example, ensuring that there is access to finance, support in terms of infrastructure, and surveying of the land. Mozambique is an example of how titling can be ignored, if imposed paternalistically on land and areas where communal and customary forms of tenure are dominant.

LAND TENURE REFORM IN SOUTH AFRICA

The dispossession of the land of native South Africans by European settlers caused devastating poverty and fractured economic well-being for African families and their communities. Centuries later, landlessness, deep structural inequality and poverty remain the everyday reality for the African majority.

Upon taking political office in 1994, South Africa's first democratically elected government, under the leadership of the ANC, embarked on initiatives aimed at addressing the historical injustices of land dispossession and to herald in a new era of land reclamation and justice. This reform is mandated by Section 25(6) of the Constitution, which reads:

"A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled to the extent provided by an act of parliament, either to tenure which is legally secure or to comparable redress".

- The Constitution, 1996

The key pillars of land reform have been (i.) Restitution, (ii.) Redistribution and (iii.) Security of Land Tenure. On the issue of land tenure, a raft of ley legislation was introduced with the intention of restoring and securing tenure rights of dispossessed indigenous South Africans.

The most important these pieces of legislation are the following:

1. The **Extension of Security of Tenure Act (62 of 1997), (ESTA)**
2. The **Land Reform (Labour Tenants) Act (3 of 1996**) – This act sought to provide for security of tenure of labour-tenants and those persons occupying or using land as a result of their association with labour tenants. It also sought to provide for the acquisition of land and rights in land by labour tenants. The Act recognises labour tenancy rights as at 2 June 1995.
3. The **Prevention of Illegal Eviction and Occupation of Land Act (19 of 1998) (PIE)** – This act provided for the regulation of the eviction of unlawful occupiers from land in a fair manner, while recognising the right of land owners to apply to a court for an eviction order in appropriate circumstances.
4. The **Interim Protection of Informal Rights Act (31 of 1996)** – This act provided for the temporary recognition of informal rights to land by individuals, families and tribal groups who had been in occupation of the said land for a period not less than five years. The act also states that its provisions shall lapse on 31 December 1997; provided that the minister may from time to time by notice in the Gazette extend the application of such provisions for a period of not more than 12 months at a time.
5. The **Communal Property Association Act (28 of 1996)** – This act is discussed in detail below.

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6. **Communal Land Rights Act** – This bill was enacted into law in 2004 but was subsequently repealed in 2010 (See below).
7. A possible **Redistribution Bill** – mainly to address the urban land hunger.

The current legislative framework, underpinned by an insufficiently resilient and inefficient land administration system has yielded limited results in redressing the land issue. As a result, Africans remain 'outsiders' and 'second-class' citizens, in the country of their birth. The African majority is largely landless, and with minimal economic opportunity and security.

There is an honest and frank acknowledgement by the ruling party of the slow pace of land reform in the first 25 years of democracy. This has now given rise to calls for an accelerated programme of land and agricultural reform. Parliament has embarked on a process to fast-track land reform which includes consideration of legislation and/or Constitutional amendment aimed at enabling land expropriation without compensation.

By 1997, population distribution patterns showed that 32% of South Africa's population lived in the former TBVC independent states (the homelands), where 63.6% of them lived on the lands through permissions to occupy (PTOs), while 26.8% did not hold PTOs and a further 9.6% were not sure if they had PTOs or not.[3] Labourers and tenants on private farms have always been vulnerable to forced evictions by landowners without clear plans for their relocation to alternative and legal settlement areas, thus exacerbating the influx of poor unskilled and landless people into already overcrowded urban areas. Although there is no formal system for tracking human migration patterns in place, the available evidence indicates that most evicted families land up in urban informal settlements, backyards in towns and cities or at worst, homeless and destitute on the streets.

The dire situation and terrible hardships that the victims of evictions experience are recognised in the White Paper on Land Policy (1997) which states:

"If no mercy is shown, land invasion is an unavoidable outcome. Because the root cause of this problem….is a structural one, it requires a structural solution"

- White Paper on Land Policy, 1997

The new tenure laws together with new labour and other post-1994 laws, signalled the Government's serious intention to correct the injustices of the past in terms of securing tenure rights of people living on farms, but it was hampered by its preoccupation with trying to balance the interests of the people living on the farms with those of landowners. The main achievement of the tenure reform programme has been to pass a number of pieces of legislation that **regulate** people's occupation and eviction from other peoples' land. It should however be noted that these laws did not necessarily provide a framework for stopping farm evictions, or grant farm dwellers secure tenure.

Apart from the labour tenants in Mpumalanga and KwaZulu-Natal, the most important of these laws for most farm dwellers is the Extension of Security of Tenure Act (ESTA). These pieces of legislation have brought new rights to many, but they have considerable weaknesses especially in the area of providing long-term tenure security. Farm dweller tenure remains a poor relation within land reform policy. Farm dwellers on commercial farms including farm workers and their dependents and labour tenants particularly in KwaZulu-Natal and Mpumalanga have been neglected and face continuing threats of evictions.

ESTA sets out a procedure to be followed in order to evict people from the land, making it fairly difficult to legally evict people, but by no means impossible. Even long-term occupiers of the land, who have the strongest links to it, can still be evicted under circumstances where they are found to have breached certain sections of the Act or there is a fundamental breakdown of their relationship with the land owner. The biggest weakness has been the failure of the Act to move farm dwellers out of an inferior tenancy arrangement to a situation of having their own land. Section 4 of ESTA empowers the minister to appropriate funds for "on-site and off-site developments." However, the provisions of section 4 make it very difficult to enforce an on-site settlement when the landowner is not willing to allocate a portion of his land for this purpose. There is also no provision in the legislation for a farm dweller to claim security of tenure if the government is failing to provide it for them.

COMMUNAL LAND TENURE AND LEGISLATION

Before the advent of colonialism in Africa, the prevailing land tenure systems were based on communal use, under the custodianship of

3 National Land Committee (2003): Land tenure Reforms in South Africa

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Amakhosi/dikgosi and traditional councils. According to customary law, land was considered indivisible and a sacred heritage. It also did not belong to the chiefs or traditional leaders who held it in trust on behalf of the people. It could also not be alienated and divided into farms for private ownership. These are the value systems that European settlers found when they occupied African native lands and which they set out to break down and replace with European land rights based on worldviews founded on individual ownership and control of property. Currently, approximately 72% of land is held privately in freehold and leasehold, whilst 14% is held by the state and a further 14% held in terms of the customary law.[4]

A minority of people living in the former TBVC States have freehold rights obtained before 1913, although these lands are administered as communal lands. After the promulgation of the Development Trust and Land Act No. 18 of 1936, African land came under the administration of the South African Bantu Trust (later renamed South African Development Trust). When the Development Trust and Land Act was repealed in the early 1990's most of its land was transferred to the Department of Land Affairs with the exception of the land under the homeland of KwaZulu. A special dispensation was negotiated in respect of this land through the Ingonyama Trust Act of 1994 to transfer the land to the newly created Ingonyama Trust, with the Zulu King Zwelithini as the sole trustee. This was done in order to persuade the Zulu monarch and Mangosuthu Buthelezi's Inkatha Freedom Party to participate in the 1994 elections. Although several provisions of the Act state clearly that the Ingonyama Trust Board was to administer the land for the benefit, material welfare and social well-being of the members of the tribes and communities under its jurisdiction, it shall not, during the dispensing of its mandate, infringe upon any existing rights or interests, including tenure security; the Ingonyama Trust has unilaterally assumed the role of a landowner by converting the people's permission to occupy certificates (PTOs), to leases and charging them escalating rentals for occupying the same land on which they had lived for many generations.

They now face eviction from the land, in much the same way as in the white privately-owned land, if they fail to pay their rental dues, or are in breach of trust in their relationship with the landowner (Ingonyama Trust).

Section 25 (6) of the Constitution requires that an act of Parliament be passed to provide for persons or communities with tenure that is legally secure. The **Communal Land Rights Act of 2004** intended to fulfil that obligation. Among its objectives, the Act sought to:

1. legally recognise the African traditional system of communally held land;
2. legally secure land tenure rights of communities and people (including women, the disabled and the youth within the tenure system of their choice;
3. provide for the transfer and registration of communal land and rights in and to that land;
4. create a uniform national registration system for all tenure rights whether held individually or communally;
5. recognise and secure women's and children's rights to land in the land allocated for common use and land alienated to individuals, households and communities.

The main thrust of the Act was to improve security of tenure of landholders, giving communities on communal land the right to acquire title to the land as a group or as individuals. With ownership comes the power to deal with the land as owner and includes the power to encumber by mortgage or to dispose of the land. This law was enacted in 2004 as the Communal Land Rights Act (CLARA). However, a significant section of the rural people, who were to be directly affected by the Act argued that the Act was unconstitutional in that it gave traditional councils (who were tribal authorities under apartheid) wide ranging powers, including control of occupation, use and administration of communal land, thereby undermining their security of tenure. After concerted opposition to this Act (CLARA), the Constitutional Court eventually struck it down in its entirety in 2010. The Communal Land Tenure Right Bill is currently uder consideration.

THE URBAN LAND QUESTION

At the current rate of rural to urban migration, it is estimated that approximately 65% of South Africa's population are currently living in urban areas, where the demand for land is the highest. Government's past focus on rural land reform has meant that its response to urban and property markets has been limited to sector or zoning concerns. Current legislation applicable to urban land, does not deal

4 Land Audit Report (Department of Rural Development and Land Reform), 2017

with the Constitutional imperative to ensure that there is equitable access to land. The Spatial Planning and Land Use Management Act No. 16 of 2013 (SPLUMA), a framework law which mainly seeks to provide a standard land development process for spatial and land use planning.[5] Urban role players such as investors, financiers, developers, tenants, buyers, landlords and government (national, provincial and local) need to be brought into the framework for provision of low-cost housing settlements for the urban poor. To this end, municipalities and provinces have over the last two decades; purchased or obtained large tracts of land for low income and informal settlement upgrading, mostly on peri-urban land.

A more coherent land development process should be implemented, involving the above mentioned stakeholders in line with the provisions of a revised Expropriation Bill as well as a possible Redistribution Bill that has been mooted in Parliament.

THE FOCUS ON TRIBAL LAND: A DISTRACTION FROM REAL ISSUES?

The Advisory Panel on Land Reform and Agriculture hosted a round table on 14 January 2019 jointly with the JLD Institute and the National House of Traditional Leaders (NHTL). There was consensus that it is imperative for the current land discussion to pivot on historical truths and grounded facts, and not be disorientated by agendas that may not be fully invested in ensuring authentic land reform and justice. The historical truth is that the liberation struggle in South Africa is based on land, which was taken away forcibly, in spite of brave battles waged by Africans. The lived experience today is that the lion's share of arable land, taken by force, still remains in white hands, while Africans are cramped in stony and unproductive land.

Discussion must also focus on the fact that approximately 72% of land is held privately in freehold and leasehold, whilst 14% is held by the state and a further 14% held in terms of the customary law. The focus needs to vest on the 72% of land (held by whites, and often by absentee landowners) rather than on the small share of land held by the traditional leaders and the State. This has given rise to a simmering impatience and frustration among ordinary people on the slow pace of land reform.

THE ISSUE OF LAND TITLING AND PROVISION OF RURAL TITLE DEEDS

Traditional leaders argue that titling was posed as a solution by those who have a lack of understanding and regard of African traditional systems and practices, and the value within contemporary rural communities. Given the limited land that was traditionally held, and the ongoing and increasing socio-economic reality of overcrowding and insufficient land. They, therefore regard the issue of title deeds as a side-issue rather than an issue of primary concern. The traditional leaders have a problem with the one-size-fits-all solution and discounted the thesis that the answer to rural tenure security is title deeds. Instead of the focus on provision of title deeds, traditional leaders called for the focus to be on the provision of additional land. The challenges that government has encountered in the implementation of title deeds and the current backlog in delivery, speak to lack of capacity to extend titling. Titling has not worked even within the urban areas where millions who live in RDP houses have yet to receive titles; a consequence of administrative inefficiencies. It is estimated that close to 60% of South Africans, lived on land or in dwellings held outside of the land titling system (Cousins:2017).

LAND ADMINISTRATION AND MANAGEMENT

The traditional leaders expressed frustration about the lack of understanding of communal land principles, protocols and practices with regard to land administration and management. Traditional leaders speak of a general level of ignorance on how land is allocated and on how their governance system is geared to ensure fair and optimal land allocation. In addition, there is a lack of awareness of the monitoring process that is inherent in the system to ensure that land is not used for individual profitability at the expense of the interests of the community. There is a call for a total overhaul of the entire land administration system to allow for a non-discriminatory system that accommodates the land rights of every individual and communities. There was also a view that South Africa can benefit from some of the lessons from the continent. In particular, the manner in which Kenya addressed its own land challenges was indicative of how indigenous systems could be applied.

5 The repeal of many apartheid era laws has left South Africa's planning laws fragmented, complicated and inconsistent. Section 3 of SPLUMA states that the law tries to develop a uniform, effective and comprehensive system of planning that promotes social and economic inclusion.

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EMERGING RECOMMENDATIONS

From the historical significance of traditional leaders in the land administration space, as detailed above, it clearly stands to reason that there is both a need and an opportunity to advance African solutions to the land question in the new democratic landscape. This will require an earnest appreciation and assertion of the value and functional ecology of both pre-colonial and contemporary rural land allocation, management and administration principles and practices.

There needs to be a recognition of how the value systems inherent in the customary land administration were deliberately broken down by colonialists, and replaced with Westernised land rights models which prioritise and serve individual ownership and property rights over communal relationships. The failure to resolve the contending philosophies around land tenure and the supremacy of the Roman Dutch Law in the shaping of land policy in contemporary South Africa remains a critical roadblock in forging out sustainable land reform. There is a need to champion and advance a land tenure formula which ensures that communal land tenure rights are not subservient to private property rights ownership. The logic of a new framework of land tenure in a democratic South Africa must move out of the constraints of the past if it is to offer a really meaningful solution.

A progressive outcome would see the framework around land tenure move away from the spatial and cultural impositions, models, reference points and even language of apartheid and colonialism. The expectation from traditional leaders is that a solution to equitable land tenure should start by first addressing the current realities of rural life as they are; its challenges, possibilities and place in South Africa. Traditional leaders and indeed Africans, expect that the government will develop land reform and agricultural policies that restore the rights and dignity of black South Africans. Currently the raft of legislation and its flawed administrative processes are seen by the majority to be maintaining suppression. There is an expectation among traditional leaders that the democratic government develops and enforces legislation that enable and empower black rural development and economic success. The development of new approaches and rural land tenure models must advance sustainable economic development of rural communities in a manner that will intensify successful agricultural production and food security. A progressive land resolution would also ensure that the communal land systems are well geared to current socio-economic realities including shifting migratory patterns, issues of gender and climatic and environmental dynamics.

Land tenure reform has an important contribution to make in realising meaningful land reform in South Africa. One of the major shortcomings of South Africa's land reform is the need for effective implementation. Although significant tenure reform laws have been enacted since the new government assumed office, the country has not resolved the contending philosophies around land tenure effectively. On the one hand, there is the propagation of individual rights pertaining to land. This finds expression in the notions of private property rights of the privileged classes. On the other hand, we are faced with a situation where communalism is at the centre of African lived experience, therefore necessitating a different approach to the land tenure question. The Constitution envisages a security of tenure system that is biased towards private ownership, and farm dwellers residing on private land live a precarious existence that is constantly threatened by the possibility of evictions. Current (post-1994) laws merely make it more difficult to evict them, but fail to protect them from harassment and eventual eviction altogether. Tenure reform must, therefore, provide for effective implementation of the new rights-based laws.

With regard to communal land, the Constitution makes provision for the democratisation of land tenure security, which should be addressing the challenge of patriarchy in the manner in which land is owned, managed, transacted and inherited. Finally, the country will have to resolve the contending philosophies around land tenure security in a coordinated and coherent manner. The haphazard and piece-meal approach is failing the urban and rural poor. We are at a critical juncture now which provides an opportunity to advance Afrocentric solutions for, with and by the people of South Africa. Some of the interventions recommended to bring land tenure reform in line with the pressing requirements for justice and prosperity for all, should include the interventions mentioned below.

At national administration level:

1. Conduct a comprehensive **land audit** to identify all unused State land that is not earmarked for particular developments. This includes land that belongs to the National, Provincial and Local Governments.
2. Define state-owned land within municipalities' jurisdiction for **peri-urban resettlement**.

3. Define areas of **urban expansion** for the purpose of settling urban landless people under secure tenure.
4. **Define possible public private partnerships** that can expedite the process of urban human settlement under secure tenure.
5. Design and implement **training programmes** to educate communities on possible changes in tenure systems.
6. **Disseminate** and educate tenure security **information to** the public.
7. Provide **land management training** for chiefs and traditional leaders.
8. **Transfer ownership** of land acquired by the State **to communities**, once governance issues are resolved.
9. **Develop transparent** and accountable rural land **institutions**.

At national legislative level:

1. In as much as **customary law** is adaptable and resilient, it **should be developed** to suit modern-day challenges and to eradicate patriarchy.
2. Ensure that the land law r**ecognises individual women's rights.**
3. **Document** customary law tenure systems.
4. Make statutory provision for the **joint registration of customary land rights** where this will be to the benefit of women.
5. **Merge marriage and inheritance laws** so that they do not place women at a disadvantage.
6. **Streamline the surveying** and **registration** of unallocated and un-surveyed land.

At local government level:

1. **Municipalities** must **maximise resource allocation** and provide bulk infrastructure and a range of zonings that include the poor.
2. Link low-income land provision to city expansion and **promote inclusionary housing**.
3. Ensure that **decision-making** in municipal councils and tribal authorities allow for **equal representation.**
4. **Include women** in decision making processes and provide them with technical assistance.

Finally, Government should keep in mind that the above recommendations are not offered in isolation to the other pillars of land reform i.e. land restitution, land redistribution and land development. For land to form the true basis on which all South Africans can assume full citizenship, Government should also embrace the notion of having to redistribute the country's 72% of land which is in private ownership.

THE INGONYAMA TRUST

It can be seen right from the outset, that the legislation around the Ingonyama Trust should have been the subject of consultation between the national and provincial government and traditional authorities. The then Minister of Land Affairs, Mr Derek Hanekom admitted that the goals for establishing the Trust were to ensure that land occupied or owned by Tribal communities and Traditional Authorities should continue to vest with them when the new South African constitution became effective . In other words the intention was to create a mechanism to preserve tribal interests in the land. There was no intention to give the Ingonyama Trust Board the powers of government.

Apart from it structural deficiency inherent in the current structure, which does not allow for democratic expression of the will of the people living on Trust land (discussed above), There are many instances of the lack of public accountability by the Ingonyama Trust Board regarding its finances, the top-down imposition of lease system on land that people already own. The above show that the decay has set in very deep at the ITB and Government should act immediately and decisively to facilitate equitable access to land. It is therefore, recommended that:

1. **The Ingonyama Trust Act be Reviewed or possibly Repealed:** This Act has perpetuated the existence of KwaZulu Natal as a homeland within a unitary state 25 years into a new democratic order.
2. **Administration of the Land:** Government should immediately assume responsibility and custodianship of the Trust land and administer it on behalf of its citizens. This can be realised through appropriately constituted land boards. This will ensure that the administration of this land is brought in line with the land administration in the rest of the country
3. **Grant Secure Tenure Rights** as African people have a long history of using their land to take care of their needs.

FARM DWELLER TENURE RIGHTS AND EVICTIONS

The enormous scale of land dispossession in South Africa produced, over time, a 'surplus population' of landless people who held neither formal nor customary rights to land. Racist legislation and the Bantustan policy limited where people could live and converted

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many former customary owners of land into tenants and workers on white-owned land. This included, over time, sharecroppers who worked the land and shared a portion (typically 50%) of their crop with the owner in return for land access; labour tenants who provided free labour, typically for six months of the year, in return for land access; and farm dwellers who resided on privately-owned land with their families, some members of whom might be employed on a part-time or full-time basis (Keegan 1983, Crush and Jeeves 1997).

We therefore need to understand farm dwellers as not merely 'farm workers' who happen to live on farms because this is their place of employment, but as people for whom farms are often their only home, to which they have historical and multi-generational links, where family graves are located, where social reproduction happens, and some of whom can trace their own families' ties with the land to prior to the demarcation of farms. All this varies greatly across the country, reflecting the gradual process of conquest and dispossession over centuries, starting from the Cape and moving northwards and eastwards over time. Some farming sectors in the Western Cape, for instance, are relatively proletarianised, with farm dwellers living in compounds or owner-built houses, or have been evicted and employed largely on a part-time or seasonal basis, without residing on the farm; while elsewhere in KwaZulu-Natal and Mpumalanga in particular, there is a larger proportion of farm dwellers who have lived on particular farms for generations, in self-built homes and homesteads. Across all these sites and circumstances, however, there has been a long-term chronic problem of insecure tenure rights that undermines the human rights, security and livelihoods of farm dwellers.

The Surplus People Project, which was a national investigation into apartheid land dispossession focused on the period 1960-1983. It categorised dispossession across the different places and tenure conditions from which people lost land, and the laws that were invoked to dispossess them. Among all those dispossessed – in towns and cities under the Group Areas Act, in the process of the creation of white commercial farms and in the consolidation of the Bantustans and eradication of 'black spots' – black farm workers and tenants were the largest category of people dispossessed.

At the time of political transition, negotiations about how to address the 'land question' centered on the redistribution of white-owned land in what was termed 'White RSA' to black South Africans. The focus would fall on decongesting the Bantustans and enabling farmers there to acquire more, and better, land in order to expand their operations and improve their livelihoods. Those who had been subject to forced removals and at the forefront of resistance to dispossession in the last few decades of apartheid also called for a 'right to return' to their stolen land and for restitution of their land rights.

The farm tenure reform policy developed during the 1990s centered on three elements: regulating tenure relations between owners and occupiers; confronting forced evictions and limiting when and under what circumstances and through what processes these would be allowed; and enabling farm workers and dwellers to acquire their own land including upgrading their tenure to full ownership on portions of land.

A major cause of instability in rural areas are the millions of people who live in insecure arrangements on land belonging to other people. They had and have simply no alternative place to live and no alternative means of survival. The evicted have nowhere else to go and suffer terrible hardships. The victims swell the ranks of the absolute landless and the destitute. They find themselves at the mercy of other landowners for refuge. If no mercy is shown, land invasion is an unavoidable outcome. Because the root cause of the problem of insecurity of tenure under these circumstances is a structural one it requires a structural solution.

- DLA, 1997

The Extension of Security of Tenure Act 62 of 1997 was enacted to provide such a structural solution. It did not aim to stop evictions but to severely curb them. It was crafted as a compromise that recognised the tenure rights of both owners and occupiers, outlawed unilateral changes in tenure conditions, and prohibited any eviction unless authorised by a court order. ESTA implementation and enforcement is

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widely agreed to have failed miserably. The reasons are numerous and are recorded in detail – along with wide-ranging recommendations – in two reports emanating from inquiries by the SA Human Rights Commission (SAHRC), published in 2003 and 2008. These reports located farm tenure insecurity and evictions within a much wider range of human rights violations affecting farming and farm dweller communities.

Farm worker organisations and their allies drew attention in the 1990s to the widespread evictions that continued, even after the promulgation of ESTA. By the early 2000s it had become apparent that evictions from farms were happening on a very substantial scale, and that enforcement of ESTA was ineffectual in the face of this.

The first, and only, national survey of evictions after 1994 was conducted in 2003-4 by a research organisation, Social Surveys, and a land NGO, Nkuzi Development Association, with a reference group comprising of government representatives, academics and farmer associations, among others.

The survey confirmed the very large scale of displacements from farms: over 2.3 million people had left their homes on farms in the prior 10 years. These included cases where people left farms because they no longer had jobs there and so felt they had no option but to leave. However, the survey also examined the circumstances under which people left the farms, and showed that nearly half of these people were forcibly removed from their homes on farms, against their will. Based on the survey, and extrapolated of the national population, this figure was estimated at 940 000 people forcibly removed via farm evictions.

What this shows is that more black people were forcibly evicted from farms in the first 10 years of democracy than in the last 10 years of apartheid. This means that land dispossession actually accelerated in the post-apartheid era.

Various factors, including pending political change, new labour and tenure laws, agricultural deregulation and the restructuring of farming (including the growth of mechanisation), and the adaptations that farmers made to reduce their reliance on full-time workers, all contributed to job shedding and therefore also to evictions. The timing of the evictions reflects these changes, including peaks in 1994 coinciding with political transition and the expectation of land claims based on long-term occupation, and the introduction for the first time of a minimum wage through the Sectoral Determination for farm workers in 2003.

There is a dearth of data in relation to the status quo since 2004. Farm worker organisations and those organisations working with farm workers and dwellers have indicated that evictions continue. There have been several further spikes in the rate of evictions, for instance at the time of the farm worker strike in 2012-13. A further spike in pre-emptive evictions was noted in 2014, when Minister Nkwinti proposed a '50-50' policy that farmers understood to mean that the State would take away half of their land and give it to their long-term workers. Evictions at this time were noted in several provinces, particularly the Western Cape, but also Northern Cape, North West and Limpopo, among others, at the National Land Tenure Summit held in September 2014.

All ESTA eviction orders from magistrates' courts are sent to the Land Claims Court on automatic review, to be approved or set aside. This provides some procedural safeguards. However, the evictions survey of 2005 found that only 1 percent of those forcibly evicted had gone through a legal process (Wegerif et al. 2005). In other words, the vast majority of evictees were either unaware of their rights under ESTA, or were aware but unable to challenge their eviction through the justice system. Further, many encountered 'constructive evictions' where circumstances were made intolerable and they had no choice but to leave the farm – for instance where water was cut off, or roofs removed, or access roads blocked.

A promise to 'stop farm evictions' or to place a moratorium on evictions has been repeated by political leaders over the past decade or more, and a campaign by farm dwellers and their allies in civil society and has called for President Ramaphosa to honour the commitment he made in 2014 to this effect.

Various summits and consultation meetings over time have brought together farm worker organisations and trade unions, farm dwellers, labour tenants, commercial farmers and government representatives and politicians. At these, lists of demands have been presented, declarations made, and roadmaps outlined. These have had limited, if any, impact. While there are initiatives in some parts of the country to secure farm dwellers' tenure, there has been no national impetus to confront the ongoing tenure insecurity and evictions, nor to proactively provide farm dwellers with land and land-based livelihood opportunities of their own.

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Table 2: Number of forced removals according to the 1983 Surplus Peoples Project Report (1960-1983)

Type of Removal	Numbers affected
FARM - Eviction of black tenants from white farms; and redundant workers	1 129 000
BLACK SPOTS AND CONSOLIDATION - clearing black-owned property outside homelands and fragments of reserves surrounded by 'white' land	674 000
URBAN RELOCATION - moving townships in 'white areas' to homelands	670 000
INFORMAL SETTLEMENTS - removal from unauthorised urban settlements	112 000
GROUP AREAS - usually intra-city removals due to racial rezoning	834 400
INFRASTRUCTURAL - relocation due to development schemes: and STRATEGIC-clearing sensitive area	23 500
POLITICAL - imposed moves, such as banishment, and flight from oppression.	50 000
OTHER -moving resettlement areas	30 000
TOTAL	3 522 900

Source: Platzky, Laureen and Cherryl Walker. 1985. The Surplus People: Forced Removals in South Africa. Johannesburg: Ravan Press.

Table 3: People displaced and evicted from farms

Period	Displaced from farms	Evicted from farms
1984 to end 1993	1 832 341	737 114
1994 to end 2004	2 351 086	942 303
Total	4 183 427	1 679 417

Source: Wegerif et al. 2005. Still Searching for Security: The reality of farm dweller evictions in South Africa. Polokwane and Johannesburg: Nkuzi Development Association and Social Surveys.

Table 4: Eviction trends

Year	% of Evictees	No. Evictees	Context
1994	7.4%	122 626	Political uncertainty and trade liberalisation
1995	5.0%	83 575	Labour Relations Act (LRA)
1996	6.8%	111 651	Land Reform (Labour Tenants) Act (LTA)
1997	7.7%	126 196	ESTA and new Basic Conditions of Employment Act (BCEA)
1998	3.8%	63 771	
1999	5.4%	87 503	
2000	3.4%	57 030	
2001	1.5%	22 924	
2002	3.6%	59 878	
2003	8.2%	138 308	Minimum Wage
2004	3.4%	56 813	

Source: Wegerif et al. 2005. Still Searching for Security: The reality of farm dweller evictions in South Africa. Polokwane and Johannesburg: Nkuzi Development Association and Social Surveys.

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AGRARIAN REFORM

The past two decades of land reform in South Africa have yielded little success in establishing a new generation of commercial black farmers for a number of reasons, ranging from the slow pace of acquiring land, government reluctance to transfer ownership of the acquired portions of land to beneficiaries, and the poor post-transfer support system. The extent to which the land reform programmes have met their respective targets remains contested, however, there is broad consensus that land redistribution and restitution has not progressed at the rate originally envisaged.[6] These challenges show that, to a certain extent, the failure of land reform thus far has largely not been because of a scarcity of land, but due to inefficiencies in the process of acquisition and systemic challenges faced post-transfer as the land acquired by government has also not shown an increase in production.

The NDP proposes to move land reform forward, however does not provide a plan for agrarian reform. There is also a need to explore the possible farm redistribution (and business) models that would be necessary to operationalise the land reform programme to deal with the full spectrum of land needs. Furthermore, there are also historical lessons that can be drawn from the previous dispensation's farmer settlement programmes to benefit white farmers, which could ensure the success of the land reform recipients.

The unsatisfactory performance of land reform thus far has had less to do with the Constitution or broader policy design, but more with implementation inefficiencies and a failure to continuously improve on existing policies. Therefore, if appropriate models could be implemented efficiently (see Annexure 1 on Farming Models), there should be good progress in ensuring the success of the South African farming sector. There has been a concerning trend in South African land reform to abandon entire programmes where challenges have occurred instead of tweaking the system to make corrections. We need to utilise the existing models, mechanisms and systems to efficiently operationalise land reform policies and make structural amendments only where necessary.

The poor performance of land reform in terms of agricultural growth, self-employment and employment is primarily attributed to the highly inadequate participation of beneficiaries in identifying, planning and implementation of the farms and the investments; the absence, late arrival or poor quality of the post-settlement support, and the capacity problems in the key institutions (DRDLR, CRLR, and DAFF) that results from the silo-based nature of the programmes in support of land reform and their beneficiaries, and from the top-down involvement of the staff of these organisations in all aspects of planning and implementation of the land transfers and investments, and the associated contracting and disbursement functions. This approach leads to an overwhelmingly large number of transactions to be performed that the staff cannot cope with.

To remedy the situation, a reformed programme should be **based on intensive participation of beneficiaries or their groups in the identification, planning, implementation and financial management of their projects**. Based on detailed discussions of various farm models, beneficiary groups would decide whether or not to subdivide the acquired land, whether or not to use a strategic partner or mentor, and their selection. Such an approach would allow the staff of the three organisations (DRDLR, CRLR, and DAFF) or the Proposed Land and Agrarian Reform Agency (LARA) to focus on the acquisition of land, the approval of land acquisition and investment plans, and the supervision of financial management and implementation of the projects, thereby greatly relieving their capacity constraints. They would therefore be able to manage much larger groups of beneficiaries than they have thus far.

BIODIVERSITY

The current pressures on land are huge and expected to continue growing: there is rapidly escalating competition between the demand for land functions that provide food, water, and energy, and those services that support and regulate all life cycles on Earth.

Our ability to manage trade-offs at a landscape scale will ultimately decide the future of land resources – soil, water, and biodiversity – and determine success or failure in delivering poverty reduction, food and water security, and climate change mitigation and adaptation. Indeed, integrated land and water management is recognised as an accelerator for achieving most of the Sustainable Development Goals.

Small-scale farmers, the backbone of rural livelihoods and food production are under immense strain from land degradation, insecure tenure, and a globalised

6 The original target set by the RDP was to transfer 30% of agricultural land to black beneficiaries by 1999.

food system that favours concentrated, large-scale, and highly mechanised agribusiness. These farmers often have limited options to pursue alternative livelihoods.

We need to consider farming for multiple benefits that would entail optimising the most desirable suite of ecosystem services from food production activities. This requires a fundamental shift in agriculture practices to support a wider array of social, environmental, and economic benefits from managing land-based natural capital. The biodiversity economy provides an opportunity to create new value chains in marginal production areas or in restored degraded lands.

LAND REFORM AND CLIMATE CHANGE

The Intergovernmental Panel Special Report on Global Warming impacts released in October 2018 informs us that climate change is the greatest threat facing humankind in modern times and that climate change threatens to reverse all development gains in a biosphere with temperatures above 1.5C to pre-industrial levels. And that the negative impacts on ecosystems and human health will be immeasurable. South Africa is currently heading towards a 3.0C in the eastern regions with escalating water challenges across the country. The report calls for drastic change and rapid transition in land, energy, industry, construction/ buildings, transport systems and in cities. The message is clear. No one should sit on the fence as the global community and the nation transition to an inclusive, equitable, climate resilient and lower carbon economy and society.

In contrast, the narrative on climate change has become too scientific, and too specialised to be easily relatable. It is a narrative robustly deliberated upon within the confines of eco-chambers, which are often exclusionary to those most impacted by climate change. In addition, the least contributors to carbon emissions are also the most vulnerable to the devastating impacts of pollution and global warming. These are the poor in rural, peri-urban and urban informal settlements, the small farmers, and other vulnerable societal groups such as women and youth. Climate induced erratic flash floods, fires, extended droughts have been negatively impacting lives across the country.

The importance of repositioning climate science in the sustainable global development agenda, of sharing localised climate-resilient best practices as learning platforms, and of using accessible language and practical experiences in conveying the climate message, may not be over-emphasised. The devastating impacts of climate change and its associated vulnerabilities must be communicated from diverse contexts that broadly represent the whole of society.

Africa has the fastest growing population. According to the United Nations Regional Population Projection, 2015- 2100, the African continent will have by end century 4.39 billion people out of the 11.2 billions projected for the whole world. Such exponential growth in the African population will lead to rapid urbanisation, raising the demand on land, water, energy and food systems. The poverty of property and hunger for land and water will rise with intensity. Adopting long term planning horisons for sustainable development, protection of natural resource depletion and designation of public carbon spaces, is imperative. To this end, sub-division of land and sustainable use of existing land including land restoration efforts may be a starting point at this time.

Key sectors that are vulnerable to the impacts of climate change must develop sector response strategies. The sectors include agriculture, transport, water, industry and energy, and should be encouraged to further elevate their response action and enhance ambition.

The nature of human settlements in South Africa resulting from apartheid legacy, spatial variabilities, planned and unplanned growth and dispersion patterns, topography and numerous socioeconomic factors, makes the country particularly vulnerable to the potential impacts of climate change. The integration of scientific evidence into land reform process, including development of tools such decision-making and spatially referenced tools and information, will be useful to inform the process. Mainstreaming of ecosystem-based adaptation in the land reform process will provide the much-needed ecosystem services and climate regulations to future resettlement. Greater coherence between land policy and sectoral policies on climate change will also be required. The current development of the National Climate Change Bill provides an important opportunity to foster alignment to future policy development on the land reform.

Improved land and natural resource information including improved inventories of land occupation in urban and rural areas including the informal sector; improved analysis and mapping of natural hazard risks for settlements; and better inventories of land available for resettlement are all necessary. This could

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be done through the development and use of the climate support tools such early warning system as well as the climate projections tools.

There are known land-based climate-change mitigation opportunities: a) those that increase and maintain the size of the national terrestrial carbon stock (reducing tillage, bio-char application to soil, restoration and management of grasslands, subtropical thicket, woodlands and forests) and b) those that lead to a net decrease in greenhouse gas emissions (biomass to energy and anaerobic biogas digesters). These must embed consideration of conserving and enhancing carbon sinks in the policy perspectives on land reform.

The Spatial Land Use Management Act (SPLUMA), as a key national policy guiding future development, recognises the importance of maintaining and enhancing ecosystem service infrastructure, including maintenance of water resources and terrestrial carbon storage functions. As part of implementing a land reform process, DRDLR can be brought on board to implement this policy through an integrated approach whereby provincial planning frameworks are developed taking cognisance of mining and land use in relation to water, food and energy priorities of the country.

Experts indicate that unless the issues of climate change and the policies on land reform are considered simultaneously, the outcome will be strongly negative on both sides. On the other hand, if the two issues are addressed collectively, the prospects of successful outcomes are greatly increased, and the risks are reduced. Related to this, land reform must also be linked to initiatives on transition to a lower carbon future.

LAND AND WATER

Water is the primary medium through which the impacts of climate change are being felt in South Africa according to the National Water Resource Strategy (Department of Water Affairs, 2013). Of concern however is the impact on land reform of climate change, the water crisis and the poor transformation of the water sector.

As the climate change is addressed in other sections of the report, focus here will be on the water crisis, that is, the water shortage due to poor infrastructure, deployment of relevant skills, inefficiencies, poor management, etc. An equally concerning factor is household access to water. The Department of Water Affairs and Sanitation (DWS Masterplan 2018) indicates that only 10,3 million households (64%) have access to reliable water supply. Rural and peri-urban areas (particularly informal settlements) are mostly affected by problems of access and poor quality of water. The poor capacity at municipal level is another contributing factor to water problems. DWS (2019) highlights that.

> *Approximately 56% of the over 1 150 municipal wastewater treatment works (WWTWs) and approximately 44% of the 962 water treatment works (WTWs) in the country are in a poor or critical condition and in need of urgent rehabilitation and skilled operators. Some 11% of this infrastructure is completely dysfunctional.*

Another area is the poor transformation of the water sector, particularly in the agricultural sector (e.g. water rights and access for black farmers). Presentations to the Panel by DAFF and DRDLR, as well as consultative processes, gave examples of land transferred with no water access, where water rights still resided with the seller. DWS Masterplan (2018) confirmed that only 5% of the water that is used in agriculture is used by black farmers, out of a total of 61% of water used for agricultural irrigation. This is partly attributed to untransformed and ineffective water sector institutions, non-compliance by some white commercial farmers, as well as the poor or non-implementation of legislation with DWS not exercising its regulatory responsibility. The water sector remains the sector that is constitutionally enabled to expropriate, but very little action has occured. The NDP (2012) has paved the way for the revival of defunct irrigation schemes in former homelands as part of agrarian reform, but little progress has been achieved in this regard.

The Bill of Rights in section 27 of the Constitution provides for healthcare food, water and social security. Specifically:

1. Section 27(1)(b) provides that everyone has access to sufficient food and water;
2. Section 27(2) provides that the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights; and

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3. Section 25(8) which forms part of the "land reform" or "property clause" provides that: "no provision in this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination…".

The panel therefore agitates for a holistic interpretation, focus, policy direction and policy implementation that seeks at its core, to recognise and implement policies that view land and water, not as separate from one another, but as complementary, and that as policy is reformed, that institutional arrangements are also aimed at a harmonious approach to land and water. The Panel also recognises that further work and studies must be conducted for the realisation of land and water, being regulated, managed, monitored and evaluated in a holistic manner.

SOCIAL ASPECTS AND INFRASTRUCTURE ENABLERS

It is important to highlight the social conditions that have moulded South Africa into the country that it is, 25 years into democracy. Social and economic issues such as the high unemployment rate, access to quality and affordable education, women's rights, and the marginalised youth demographic are current topics of debate in 2019. It is evident that the social fabric has great influence on how policy is implemented at the local level and how the communities interpret policies that affect their lives. Without social reform and a sensitivity to the issues that plague the general population, the land reform policy and process will fall short and will not be effective.

In order to galvanise positive and directed support for the land reform process, policymakers must prioritise which social conditions can be addressed through the redistribution and reallocation of land to communities. The social implications of land affect communities directly. If social issues are not addressed through land reform, the population will likely reject any programmes that are purportedly aimed to benefit them. Communities support initiatives that have a tangible and direct change or difference in the quality of their lives.

Public infrastructure is an enabler of change and development, especially in rural and semi-urban areas where communities have a desire to unlock value of the rural environment. Investment into public goods that will link the rural environment to the 4th industrial revolution is key. This is done by ensuring areas that are key for production or industrialisation have access to basic enablers such as electricity, connectivity, water management, roads, health institutions, basic and higher education institutions, government institutions, banking institutions, social centres, trade centres and centres of technology transfer.

It is important to recognise that societies and cultures regard land not only as an economic or environmental asset, but as a social, cultural and collective wealth resource. Land remains an important factor in the construction of social identity of Africans as well as, the organisation of religious life and the production and reproduction of culture. These are dimensions which land policy development must address if prescriptions for change are to be implemented in a holistic manner. It is important to identify the values which the people ascribe to the land in order to identify a central value system with regards to the land issue. This central land value system will dictate the current needs of the people and the trajectory in which policies must head to ensure that indeed the rights of the indigenous people are restored and where productive communities will be sustained for future generations.

There are numerous, important social considerations that are identified for deliberate consideration in the land reform agenda. These include:

1. **Land and gender relations –** Addressing the system of patriarchy which dominates social organisation and has tended to discriminate against women when it comes to ownership and control of land resources. For the policy to redress gender imbalances in land holding and use, it will be necessary to deconstruct, reconstruct and reconceptualise existing rules of property in land under both customary and statutory law in ways that strengthen women's access and control of land while respecting family and other social networks.
2. **A diversified land redistribution programme –** Scoping for a number of redistribution 'products', addressing for example the communal needs of some rural dwellers on commonages, commercial farming needs, and the residential and commercial needs of rural, peri-urban and urban dwellers.
3. **Land for the landless in South Africa –** It is important for all South Africans to be offered a secure form of land rights, and a secure way of acquiring land regardless of their wealth bracket. This must particularly address land

rights for previously disadvantaged and presently marginalised populations

4. **Socio-economic empowerment of women –** Women and men organise their lives in different ways (largely due to their reproductive and productive roles) their priorities are not always the same. Women may require access to land for a variety of purposes including social and economic security, food security and health benefits. Women must have access to land if land reform is to realise its developmental goals.
5. **Introducing new ways to legally acknowledge land use to relatives or spouses –** Allow the transfer of interest or leasing within families that will secure the rights to guarantee social equity where land is used for household and commercial uses.
6. **Raising women's awareness of their rights and opportunities –** Due to the socially defined sex roles, women are often not aware of the opportunities that exist for them. A gender sensitive communication strategy is essential to incorporate into the strategy of key departments that affect women's information, rights, access, and decision-making role.
7. **Adopting gender-sensitive methods –** Project planning should be viewed as an opportunity for building women's capacity to participate in the actions necessary to satisfy their needs especially in an economy which compromises of 53% of women. Gender analysis techniques should be used systematically to examine roles, power dynamics, and processes which affect women in relation to land.
8. **Adopting a 'gender equity' approach –** A commitment to substantive equality recognises that differential (not equal) treatment of women and men, and of different groups of women may be necessary to ensure equal outcomes in land reform.
9. **Targeted monitoring mechanisms –** The collection, compilation, analysis and presentation of gender- and youth-disaggregated land reform statistics can play an important role in raising consciousness, promoting change, providing an unbiased basis for policies and measures, and monitoring and evaluating their impact.
10. **Access to credit –** Extension services, protective clothing and agricultural machinery as well as financial packages are mostly tailored to male users. Efforts need to be extended to changing attitudes in financing institutions and agricultural inputs sector in the way they offer products and services to women land users.
11. **Land use intensity and productivity –** Land Reform products should consider that there is a need to balance the need for large scale farming to maintain output however there is still a need for low input farming which will increase employment opportunities and be a platform to leapfrog small holders into commercial farmers. It is important that the nation deploys more people onto land for various reasons, not only will this be a community building exercise but also allow communities to start informing themselves on land tenure systems and thus will become more productive with increasing experience.
12. **Co-ordinating support services for land reform farmers and settlers –** An agrarian reform-focused programme founded on fundamental rights, and incorporating concrete measures to ensure that farmers and settlers are supported sufficiently, especially in areas of production.
13. **Transparency in funding and support –** All allocations must be properly administered and tracked so they are accounted for using an open based system that complies with public finance regulations. This is vital to prevent corrupt and deals that undermine the positive approach of reform.
14. **Different types and forms of tenure rights –** The forms of tenure should align with the basic and economic rights of citizens and explore agendas such as; the right for a land occupier to modify their dwelling or to accommodate a family member, or have access to basics such as water, electricity and connectivity and have a right to grow food for personal or commercial purposes.
15. **Youth unemployment –** Orientate land reform process towards development and capacity development through by coupling an incubation approach and a deployment mechanism to develop and deploy high-skilled individuals into critical sectors and value chains (e.g. agrifood, forestry, fisheries, textiles, service, defence and manufacturing industries).
16. **Basic education –** There needs to be a reform of the current basic education system to ensure universal quality and access as well as to accommodate topics that arise from the Land Reform process. This is vital if the country aims to have a centralised land value systems that each and every citizen understands and is familiar with.
17. **A social value system –** The land reform process has a role in the social and overall wellbeing of people. The social drive of land reform should be centred around a central land tenure value system

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which will have key objectives that includes the promotion of behaviour that contribute to the holistic wellbeing of the general population, and that addresses the social issues that people suffer from especially behaviour that degrade society (e.g. systems of abuse). Even though these social issues may pertain to sensitive matters such as the family unit or the community structure, it emphasises the importance of instilling a central land tenure value system that will inspire individuals to strive to conform to a new social agenda of development and support.

LAND DEMAND AND BENEFICIARY SELECTION

Decisions about which land to acquire can only be taken on the basis of an understanding of who wants and needs land, what kind of land, where, and for what purposes. Land reform in South Africa is described in policy as a 'demand-led' programme. However, demand for land is not self-evident. Demand or need or desire for land is expressed in a variety of ways, many of which do not elicit effective responses from the State.

Land demand, or need, is differentiated and geographically distinct – people in different areas need different types of land in different sized parcels, for different purposes. In addition, land need does not exist in isolation from demand for other assets and social goods and services, though the phrasing of survey questions can make it seem so. While some may argue that what most poor people want is jobs, rather than land, securing access to land and rights to remain on that land may be a route to addressing other needs, such as getting access to schools, clinics and jobs, where these exist. Finally, research also shows that land need does not exist in isolation from opportunities for that demand to be met. In other words, people are more likely to frame their demands in terms of land if it seems likely that this demand might be met. Present articulated demand for land therefore may also be constrained by the very evidently limited opportunities to acquire and use land effectively under current circumstances.

While the focus of recent debate has tended to fall on how to get the land – the supply of land and the mode of acquisition, whether through expropriation or the market – a new policy approach should take land need and the intended nature of land use as its starting point. It is not appropriate or adequate to ask whether or not people have a desire for land, in order to assess and to understand need We should also look at the conditions in which people are living and actions they take in order to gain access to land. Those who proactively seek out land and express their demands, including through land occupations, clearly have land demand. Those who approach state offices with land demands are often unclear how to pursue these demands or told to 'go and find a farm'. There is clearly no adequate system for engaging with land demand.

The overcrowding in previously black townships, proliferation of informal settlements, and the densification of rural areas are evidence of widespread land demand. It is logical that people want to be on land where there is access to job opportunities, resources and infrastructure, and hence the need for including an urban focus in considering land need. People need to be close to transport, infrastructure and social amenities such as schools and hospitals. The alternative is that people want serviced land where they are currently, however regard must be given to spatial and demographic considerations across cities, townships and suburbs. This suggests that there is a need to categorise land need. The emerging black entrepreneur and small business owner (salons, restaurants, factories in townships, etc.) also need land. The growing black middle class and commercial sector must also be considered, across sectors. A segmented approach should consider land from the perspectives of dignity and settlement and poverty alleviation point of view, all the way to unlocking opportunities for small business and supporting the black commercial sector.

People show they need land in a range of ways besides approaching a DRDLR office. They might take action to gain access to land, legally or illegally. Occupation of land, in rural or peri-urban areas, demonstrates need expressed by people voting with their feet. Sporadic occupations of agricultural land, unsanctioned use of grazing, and widespread encroachment on public and private agricultural land, particularly in KwaZulu-Natal, also denotes a demand for land for productive as well as residential purposes. Unmet demands for land can and do lead to conflict, such as land disputes in formal and informal courts.

There is a variety of people wanting or needing access to land, including:

1. evictees from farms and from other settlements;
2. farm dwellers;

3. labour tenants;
4. landless livestock owners;
5. commonage users on overstocked commonage land;
6. residents of informal settlements and backyard shacks;
7. people occupying or encroaching on public or private land;
8. the gap market - young, employed black youth unable to access property markets;
9. the black unemployed and urban dwellers;
10. small emerging entrepreneurs; and
11. aspirant black commercial players.

Land need is evident, for instance, where access to land has been withdrawn, as in the case of farm worker evictions, which often lead not only to the loss of a home but also to a loss of land-based livelihoods, including access to small parcels of arable land, as well as the loss of livestock. In addition, there exists widespread agreement that there is heightened land need among the landless or near landless in the overcrowded former Bantustans for access to land in their vicinity and along the borders and that this must be a priority area to target for proactive land reform. The proliferation of informal settlements and backyard shacks similarly demonstrates urban land demand.

A national land demand survey seems necessary in order to investigate and categorise different categories of land demand, map these across different regions and localities, and identify areas of greatest demand. The survey should include participatory events at local level where people can express their demands for land. This should be done in a democratic manner, including civil society organisations, social movements, urban land players, property developers, farmers groups and local government, through a 'people-centred methodology' that is open, transparent and inclusive. Time frames are important here as the requirement for land restoration must be weighed against the desperation and desperate hunger for land.

BENEFICIARY SELECTION

Policy names specific categories of people as priority groups to be targeted, namely the four 'marginalised groups' of women, farm workers, urban and city dwellers ,the disabled and the youth (35 years and below). These are apparently a proxy for the 'poor', introduced after the removal of the income-based criterion that limited eligibility on the basis of a means-test. Whether they do in fact predominate among beneficiaries is far from clear; available data do not show whether or not this is the case. These groups may be preferred in evaluation of project proposals, but there is no differentiated strategy to seek out these groups and then give them priority.

The panel is proposing a demand-driven land reform process in which citizens are encouraged and supported to articulate their land demands, and for open, democratic and transparent processes through which the State will respond to citizen's demands. Such response must be informed by clear policy and legal frameworks. The State must solicit expressions of interest and applications for land; categorise and prioritise potential beneficiaries according to clear criteria; ration the limited public resources available, both land, budget for land acquisition, and budget for land use and farmer support; and select beneficiaries via open, democratic and transparent processes.

The vast majority of South Africans are eligible for land reform, but few are provided with actual access to land. Therefore, the question of who should be selected as beneficiaries, and what they are eligible to get, is of central importance. There is a need to specify policy on who is to be prioritised, who is not, how scarce resources are rationed and spread across competing needs, and how beneficiary selection from a pool of applicants is decided.

The panel endorses the key recommendation of the HLP which was:

> *'A key gap in the legislative framework for land reform, and especially in relation to land redistribution, is the absence of an overarching framework law that guides and directs the programme as a whole, as well as its various sub-programmes. No such law exists at present. A key object of a framework law would be to clarify who the key beneficiaries of land reform should be, so that the goal of ensuring equitable access is achieved.'*

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-HLP 2017: 220

In light of this, a new Redistribution Bill (also referred to by some as a Land Reform Framework Bill) is proposed – similar to an idea that was proposed by the High Level Panel. Among the purposes of the Bill will be to operationalise and define the right of equitable access to land, determine the responsibilities of different spheres of the State, and demand open and transparent processes for selecting beneficiaries.

Given that the state has limited resources, the panel proposes that available budget be rationed across different priority needs. While urban land reform will be financed through a variety of mechanisms, rural and agrarian reform should distinguish between four categories of landholders and farmers as set out in the State Land Lease and Disposal Policy of 2013. We propose that over half of the available budget for land reform for agricultural purposes should be rationed as illustrated in this Table. The rationale for this distribution is to prioritise the most needy, while giving less to those who can leverage private resources (see Finance section).

To match supply with demand, it will be necessary that, informed by the identification of areas where there is high demand for land, there must be state-driven processes to map land – including privately-owned land – that could meet identified needs. This can be broad categories of land, or even specific properties. Inclusion of the landless in identifying such land is a crucial part of democratising the land reform process.

WHERE SHOULD THE LAND COME FROM

A key question is how the system can avail land for immediate use for land reform recipients, in addition to the broader questions of land acquisition and allocation. The premise is that every South African realises the impact of landlessness and the need to reform land ownership patterns through various models, as a conscientious contributor, or a responsible recipient. The options that can be followed are diverse and can be tailor-made for each persons' unique circumstances, but most importantly, the State must implement mechanisms where all contributions to this critical 'restoration' process are directly or indirectly incentivised.

CONCEPTUALISING A LAND DEPOSITORY

The panel proposes a **voluntary release of underutilised land** by mines, churches, municipalities, SOEs, government departments ,absentee landlords and general landowners, **directly to beneficiary households, communities, individuals,** or to the **proposed Land Depository**, which may or may not be linked to the Land Bank). The Land Depository is proposed to keep a proper record of all of land parcels contributed and provide a certificate for recognition to the donor or institutions availing land. The certificate must entitle the holder to benefits such as procurement preferences, or a wide range of preferential financial arrangements, which may include tax and zoning incentives. The **Land Depository** will, in collaboration with communities, local farmers' associations, financiers, and commodity organisations **allocate the land to beneficiaries in a decentralised manner** in collaboration with government and without patronage, using the recommendations of **District Land Committees** envisaged in the National Development Plan. A key driver that would enable the effective and efficient process of land transfer would be to transform current sub-division laws (the sub-division of Agricultural Act discussed previously).

At the same time, **clear criteria for beneficiary selection** should be in place. As discussed in a separate section of this report, it is vital that a demand-led programme be followed that places the beneficiaries' needs and aspirations at the forefront. If beneficiaries are paired with land parcels that are not aligned to their needs and aspirations, then they are being set up to fail. A **needs assessment**, followed by a **means test** must be placed at the forefront before a **beneficiary is paired** with a **land parcel. Support systems** through agribusinesses, commercial farmers, mining companies, property developers, churches, and municipalities should be **instrumental in operationalising these newly established farming enterprises** or housing developments.

The financial contribution to kick-start this process is proposed to be funded through the envisaged **Land Reform Fund** (discussed in a separate section of this report). These financial arrangements should happen on **preferential terms** (such as deferred interest payments and subsidised interest). In addition, a **state guarantee** for these on-lended funds could act as collateral to ease the access to finance for new entrants in the land reform space.

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Commodities and **agribusinesses**, specifically the input suppliers, could also **play a role in terms of training and mentoring** new farmers on farm land released through this process. The success of the new farmers would be in the agribusinesses' best interest because they will be potential clients, especially in terms of the National Development Plan's promotion of farming development that prioritises labour intensive crops that are also seeing growing demand in the global market, and also export led agricultural economic growth.

From an agricultural perspective, the panel envisages:

Subdividing land and allocating viable portions of land to workers (for farming or housing), tenants and potential beneficiaries. Again, **ease of subdivision is key** and efficient and quick registration of new owners should be possible.

Joint ventures with privately identified beneficiaries (according to the criteria established by the panel). These joint ventures could access subsidised capital, water rights, market contracts, etc. At the same time, agribusiness should provide well-integrated support services for these new entrants.

This approach largely operationalises the opportunity for commercial farming unions to offer land for the land reform programme in a pro-active manner. The commercial farming sector should create a process whereby well-located farmland is identified and committed for land reform, beneficiaries selected, and finance, mentorship and support put in place, as envisaged in the National Development Plan.

Commercial farmers who participate in this manner should also receive a **certificate of recognition** whereby their contribution is recorded and recognised. **Incentives** should be created **for participation. Guarantees** regarding **future tenure security** for **contributing farmers** will go a long way in attracting more commercial farmers to participate.

URBAN PROPERTY

Here, the panel refers to **underutilised, vandalised, abandoned, state-owned unmaintained buildings** as well **as vacant and unoccupied urban land owned** by the government, municipalities, private owners, and SOEs. The principle of donation of land and property to an entity possibly linked to COGTA and Human Settlements with supportive finance and urban and spatial planners and developers, can immediately relieve the pressure on land needed for housing and shelter. This also creates an ideal opportunity to **deal with the legacy of apartheid spatial planning.**

Most municipalities own land often in urban and peri-urban areas that is leased to tenants – which presents a potential immediate source of redistribution by introducing certain requirements/conditions in terms

Table 5: Categories of farmers

Categories	Description of beneficiaries	% of budget
Category 1	Households with no or very limited access to land, even for subsistence purposes, including farm dwellers	30%
Category 2	Small-scale farmers who have been farming for subsistence purposes and selling part of their produce on local markets. This may be land in communal areas, on commercial farms, on municipal commonage or on church land.	30%
Category 3	Medium-scale commercial farmers who have already been farming commercially at a small scale and with aptitude to expand, but are constrained by land and other resources.	30%
Category 4	Large-scale or well-established farmers who have been farming at a reasonable commercial scale, but are disadvantaged by location, size of land and other resources or circumstances, and with real potential to grow.	10%

Source: State Land Lease and Disposal Policy 2013: 15 (categories and descriptions) plus % of budget (Panel proposal)

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of housing development and peri-urban agriculture for black commercial farmers and for housing projects in the inner-city buildings. The government should instruct **municipalities to ensure that tenants provide housing development or farming activities** for black farmers on at least 50% of the land they lease from the municipality.

Housing developers and local government must to join forces by using this opportunity to **renovate buildings** and invest in bulk infrastructure on vacant land. In essence developers and **municipalities will 'donate' their expertise and skills and co-finance** to relieve the housing backlog by being proactive. This will, if implemented with rapid speed and at large scale, ease the land pressure and contestation in urban areas and bring people closer to their workplaces. More importantly, this could **improve living standards and reduce transport costs for poor and lower-middle-class families.**

STATE-OWNED LAND

The processes to identify land for redistribution should include **an effective mapping of available state land**. The Department of Public Works (DPW) has already identified its properties, both rural and urban, that are potentially available for redistribution for agricultural and non-agricultural purposes. Assistance from DPW, DRDLR, DWAF, DAFF, COGTA should be given to other state institutions to undertake similar exercises.

HOW SA CHURCHES COULD CONTRIBUTE TO LAND REFORM

Missionary bodies of various churches made their first appearance in southern Africa during the mid-19th century. This was during a time when the colonial administration was being entrenched within the British Colony of Natal. These proliferated in the 20th century, with about 19 mission reserves being established within the Natal colony alone; covering some 58,000ha of land[7]. This earned the colony the dubious honour of being the most evangelised region in the whole of the African continent.

The colonial government gave the missionaries special recognition and support because they were perceived to have a calming effect on the militancy of Africans as well as a positive impact on their moral and intellectual development through evangelisation and schooling; hence the encouragement of the establishment of mission stations within African locations/reserves[8]. In this respect the government promulgated Ordinance 6 of 1856, which entrusted the Lieutenant Governor in the Colony of Natal with powers to issue land grants, initially to the American Board of Commissioners for Foreign Missions. Through this ordinance, missionaries acquired significant portions of land within the District of Natal as though they were naturalised subjects of the district. By 1903 the missionaries had been allotted some 17 mission stations (52,000ha) in Natal through the Mission Reserves Act 49 of 1903, and this was increased to 19 (58,000ha) by the promulgation of the Natives Land Act of 1913.

The Missionaries acquired the reserves through grants from the government, although the ownership remained vested in the Natal Native Trust, currently referred to as the Department of Regional and Land Affairs. An example of this mode of acquisition is illustrated in the land registers and title deed records of the Ifafa Mission Reserve. It is therefore important to note that missionaries in South Africa played an important strategic role in Government's agenda of dispossession and impoverishment of the African people in that the mission stations were established almost exclusively on African Reserves, and only converted Africans were allowed to stay and practise agriculture on this land. This points to a racial agenda perpetrated by the missionaries as covert agents of the State.

Legal Framework

There is recognition of the historical impact and involvement of the missionaries. This recognition understands that missionaries are complicit in the taking of land from indigenous South Africans on one hand, and have also facilitated and made available on the other hand. The panel therefore recognises the historical complexity of the relationship between the formalised, mission churches and the people of South Africa.

The panel, having engaged with the South African Council of Churches, and indigenous churches steeped in African, traditional religions, have noted that churches are not one-dimensional and homogenous. Whilst the traditional missionaries and mission churches are holder and owners of land, indigenous African-based churches form part of those in need for land in order to practice their right to practise

7 This value is extracted from the schedules of Mission Reserves Act 49 0f 1903 as well as the Natives Land Act 27 of 1913
8 Prof J. Maphalala's Paper : The Invasion of Land of the African People by Europeans

religion and culture recognised in section 30 and section 31 of the Constitution. A further layer to the dichotomous nature of religious practises and land, is the insurgence of the new- age, charismatic churches, headed predominantly in other parts of Africa and locally, whom, due to heavy capital injection, are able to access, occupy and use old and derelict buildings in the city centres, for purposes of worship.

Part and parcel of the new redistribution agenda and policy should therefore be linked to the provisions of section 25(5) of the Constitution, which obliges the State to foster conditions which will enable citizens to gain access to land on an equitable basis.

Possible contributions of South African missionaries to land reform

Through the modes of land acquisitions described above, some missionaries became large landowners in South Africa. Furthermore, registered churches do not pay any form of tax nor do they pay municipal property rates as they are exempted under the Local Government: Municipal Property Rates Act 6 of 2004. As such, there is really a very little financial incentive for them to get rid of unused land since it incurs no cost to them. However, in the politically charged atmosphere that has characterised the post-1976 era, their economic viability has continuously hung in the balance as their parent churches and benefactors abroad have become increasingly reluctant to invest further resources in them. This has led to a mass recall of their senior clergy and skilled personnel back to Europe and the West, leaving their less skilled local counterparts to their own devices. A case in point is the Catholic Diocese of Eshowe in Northern KZN, which has experienced critical challenges since the recall of its skilled personnel back to Germany. The once thriving mission station possesses vast tracts of land which it is unable to use productively due to lack of resources, hence their decision to approach the Dr. JL Dube Institute to partner with them as they seek to re-activate economic activity on these lands. An alternative to the above intended action is to recognise that there vulnerable people of our society who already reside on this land – either as farmers, farm dwellers or village communities. Finding mechanisms to transfer land rights to them and create economic opportunities with the land asset would be important; and one which would considerably sanitise their image as agents of dispossession and deliberate impoverishment of the Africans.

There are a number of recorded cases where some churches have, of their own free will, resolved to donate portions of their land to Government to aid land reform. Whether this is done out of a genuine desire to advance the Land Reform agenda or out of the fear of inevitable invasions by land-hungry informal occupiers, the end result is a show of goodwill for the sake of justice and shared prosperity. The noble gestures are widely acknowledged as they demonstrate abundantly that when a good society is faced with brazen injustice, it will develop a strong inclination towards addressing the injustice. The efforts, however are still grossly insufficient to address landlessness among the black people and marginalised groups; and more churches are urged to donate land in greater measures so as to create the necessary momentum for other sectors to emulate their example and contribute substantively to land reform by voluntarily making land available for the settlement of vulnerable groups. The State, with all its good intentions, will readily facilitate the planning, subdivision and infrastructure development (municipal connections, registration, service delivery etc.), as well as the systematic and orderly transfer of those properties to the deserving beneficiaries. In this way, the churches will have played the vital role of good corporate citizens by contributing meaningfully to land reform; one of the most patriotic and nation-building imperatives of the new democratic dispensation.

FOREIGN-OWNED LAND

In 2004, a Panel of Experts on the Development of Policy regarding Foreign Land Ownership (the FL Panel) was established several months before the National Land Summit held in July 2005. The summit urged Government to impose a moratorium on the acquisition of land by foreigners in South Africa. The panel carried on to working on through 2006 until an intermediate report was handed to Minister Didiza on 17 February 2006. The interim report was also published for public comment. This panel's terms of reference asked questions about who owns South Africa and how much they own, specifically in relation to foreigners, impact on property markets, and investigating international policies. The panel recommendations, among other things, indicated that the State should "protect and prevent the purchase of foreign landownership by foreigners in areas of historical and cultural significance, areas of national security, coastal areas, areas of national interest, conservation areas and water catchment areas, and

land required for land reform." The panel therefore echoes the recommendations of the FL Panel.

The panel has considered the reports of the FL Panel, and the following recommendations are aligned to the outcome of the work conducted by the panel -

1. that government must determine the exact size of land owned by foreigners, and the purpose for which the land is used, prior to introducing policy that is aimed at a "blanket ban" on foreign landownership;

2. that a process and policy is introduced aimed at obliging corporations and trusts to disclose the land owned and related information such as the nationality, race, gender of shareholders, directors and members of persons of trusts and corporations, given that pertinent information of land owned by trusts and corporations are not publicly available;

3. the FL Panel found that in accordance to publicly obtainable information which was highly inadequate, foreign natural persons owned around 3% of land and a significantly higher percentage in coastal and game farming areas of land categories of land used for residential housing, agricultural holdings, farm land and sectional title. The panel recognises that the value and size of foreign landownership may be much be higher once the process of analysing information regarding corporations, trusts and Section 21 companies is completed, pending disclosures;

4. section 25(5) of the Constitution is a right specifically given to citizens to enable citizens to gain access to land and directs the State to take steps to foster conditions that would enable citizens to gain access to land. The protection of citizens's ability to gain access to land may arise from this right, and as such, policy may be developed pursuant to section 25(5) which must be geared towards availing land to citizens and protecting key and strategic land from foreign ownership;

5. it is is important that any process, policy and legislation geared towards compulsory land ownership disclosures is aimed all owners of properties – not only foreigners for all past, present and future registrations of titles similar to FICA legislation;

6. an amendment to Regulation 18 of the Deeds Registries Act No. 47 of 1937 and the amendment of the Act itself. Regulation 18 enables the Registration Regulation Board, upon approval by the Minister to make regulations prescribing "the manner and form of identity of persons". Currently the Act makes provision for the "name, ID number, date of birth or registered number…to be recorded Deeds Registry. The FL Panel recommended that the status of citizenship, nationality, permanent residence status and gender, race, SA ID number, foreign passport number, company registration number, income tax number, VAT registration number, nature of shareholders, Trust registration number and nature of beneficiaries to be disclosed. The Panel aligns itself with this recommendation;

7. amendments to the Deeds Registries Act will require an enactment by Parliament as it will require existing owners to make declarations/ disclosures similar to what is expected of future owners under regulated Regulation 18. The amendment must deal with the following –
   - 7.1. compulsory identification of owners;
   - 7.2. a verification system of land owners;
   - 7.3. accurate and reliable record keeping;
   - 7.4. monitoring mechanism;
   - 7.5. procedure for forfeiture of land to the State where there is non-compliance;

8. FICA provides comparable and effective mechanism for disclosures and declarations which can provide guidance for proposed recommendations;

9. the creation of a permanent Inter-Ministerial Committee consisting of Agriculture, Land Affairs, COGTA, Human Settlements, Environmental Affairs to monitor trends in the foreign landownership of land and changes in land use and to recommend corrective measures;

10. policy is recommended to protect and prevent the purchase of land by foreigners in areas of historical and cultural significance, areas of national security, coastal areas, areas of national interest, conservation areas and water catchment areas, and land required for land reform;

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11. an implementation of a two-year moratorium prohibiting the disposal of State land, including land held by an organ of State and any of the three spheres of government to foreigners, and in limited cases, South Africans who qualify for redress under land reform policies. This is meant to prevent certain spheres of government and organs of State from disposing land that may be used for land reform purposes and the homeless;

12. the harmonisation and rationalisation of laws affecting land use and planning. All spheres of government should lead by example in implementing the regulatory regime in the foreign ownership of land;

13. government to consider medium and long-term leases of public land as a viable mechanism for future acquisition of land use by foreigners.

The Department of Rural Development published a Draft Regulation of Agricultural Land Holdings Bill published a Bill on 17 March 2017, which Bill sought to, amongst other things, build a mechanism whereby all owners of agricultural land and owners of land of a specified size would be required to disclose the details of such ownership. The difficulty with the Bill was that it has retrospective effect, and that it focused only on agricultural land. The Bill was never re-introduced, and had a myriad of shortcomings, and had at its focus "agricultural land" and introduced the concept of "land ceilings" and the taking away of excess land beyond the ceilings by the State. It is recommended that further studies are undertaken in this regard.

FINANCING LAND REFORM

There are limited government resources to accelerate land acquisitions at a desired pace, notwithstanding bureaucratic inefficiencies. Expropriation of land without compensation will not, on its own, lead to a widescale release of land for land reform purposes. It has been recognised by the panel that EWC is only but one mechanism that may enable land reform. However, regardless of the outcome, there is technical argument to be made regarding **funding for compensation of farm improvements**.

Therefore, it will be necessary to explore other means of acquiring land through **open market purchases**, under the auspices of a Land Reform Fund. The panel proposes that the sources of capital could include the following:

1. **Land Reform Bonds** issued by the Land Bank with the necessary state guarantees. Investments into these bonds will be by domestic and foreign investors, multilateral and bilateral donors and private social investment entities.
2. **Capital donations** by both South Africans, and foreign organisations.
3. **Consolidation** of government's land-related **budgets**.
4. **Joint venture financing models**, particularly implemented by agribusinesses, large commercial farmers, property developers and the commercial banks, amongst others. The agribusinesses and commercial banks, through the Agricultural Business Chamber and the Banking Association of South Africa, have already committed to matching the State's budget for land reform in the interest of fast-tracking the progress in the form of a loan at a preferential rate over a set period. This could be done through the so-called Agbiz/BASA land reform model.

The Land Reform Fund as envisaged may have limitations for urban land reform. Therefore, the panel recommends that here must be **further exploration on how equivalent urban land reform funds might be secured**.

Above all, this fund provides a unique opportunity for South Africans to build social and financial capital by creating an investment opportunity for individual and corporate capital market participants to make a meaningful contribution to land reform. This scenario decentralises the land reform process by leveraging private sector expertise and capital and stands in support of President Ramaphosa's intention to create jobs and boost investor confidence in the country.

While the housing and agricultural sectors are at the forefront of land reform, the capital required for such a programme far outstrips the capacity of these sectors; hence, opportunities will be created for other investors to contribute to the challenge of restoring social justice, equitable land ownership, decent housing, and equitable economic opportunities. White farmers were not the only beneficiaries of the old regime, and most of those who benefited from apartheid live in urban areas while still benefitting from the injustices of the past. Therefore, this also includes a call for voluntary financial donations from the financial services industry, the mining and manufacturing and another non-

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agricultural sectors. This is specifically relevant to businesses that do not own any landed property.

The end goal of this process is to unlock economic growth and employment opportunities and to create a vision of a dynamic and vibrant rural and urban economies in order, to restore decent life and economic opportunities in the urban areas created through a better-serviced local community and much more integrated and improved spatial dispensation of urban areas.

FINANCIAL ASSETS

The personal wealth of the **elite**, including business leaders and urban professionals vests in various financial assets and is substantial. This could be a valuable source from which voluntary contributions can be requested to fund the implementation of land reform in all its dimensions. Donations to the Land Reform Fund by individuals or asset managers should also be incentivised through incentives such as **relief from tax**. The main vehicle for such investments will be the envisaged **land reform bonds**.

In essence this will be the main element of a **blended financing model** for land reform whereby state funds, donor funds and the private sector contributions will facilitate the funding of land reform in a much quicker way without any additional fiscal burden.

The land reform bonds can be issued by **Land Bank**, DFIs or Treasury. The private sector should also be called upon to make financial and non-financial contributions to ensure the success of land reform, but with clear rules to check undue opportunism.
For this process to occur, there must also be a set of enablers that will encourage participation. A potential list of enablers includes:

1. Capital (to be accessed at preferential terms for contributors and beneficiaries)
2. Real land rights with tenure security
3. Water rights
4. Preferential market access contracts (e.g. in the form of export permits)
5. Reduced reliance on bureaucracy and red tape in approval and implementation processes,
6. Incubators for aspirant farmers

This list could potentially include more enablers, but we argue that there could, in essence, be four big 'tickets' to activate the voluntary contribution of land by commercial farmers and support the settlement of beneficiaries on this land in private decentralised fashion.

1. An easy process and one-stop shop to submit the record of the transaction for recognition (we can call this the **'land reform rainbow register'**).
2. The **recognition mechanism** should bring about an important benefit to the former owner. This could be in the form of some 'empowerment' recognition level or financial or other inducement. [The recent decision about "once empowered always empowered" might be a particularly important commercial incentive for current farmers and owners of land to participate. At certain thresholds (still to be determined), either cash or quantity, the property and its owners might be deemed fully empowered. This status remains with the property as an enhancement and has significant commercial value. In attaching the status to the property it become generally applicable so would pass constitutional scrutiny and would most probably be value enhancing].
3. The **speedy transfer of title deeds**/long term and tradable leases to beneficiaries of land reform, including those who occupy land already procured for land reform purposes
4. The **allocation of new water rights to** the existing and new enterprises (owned by the beneficiary). This will again allow the existing farmer to dispose of land and at the same time ensure the successful establishment of smaller farms on irrigated land.
5. **Restructure of the Land Bank** and establishment of a **Land Reform Fund** where acquisition grants, subsidised loans and subsidies for on-farm improvements can be accessed. Utilise the access to the land reform fund to leverage the donation of land by existing owners. This capital allows farmers to dispose of land for land reform purposes but at the same time provide them with finance to expand their existing business and employ more workers.

INSTITUTIONAL ARRANGEMENTS

Over the past 25 years, land reform has been designed and implemented through three different sets of institutional arrangements. First, a Department of Land Affairs was established in 1994, under its own ministry, taking over the responsibilities of the former Department of Land and Regional Affairs, and with a new mandate to embark on land reforms. The various

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departments of agriculture were amalgamated into the National Department of Agriculture, with provincial departments alongside its own ministry at the national level. Second, at the end of the Government of National Unity in 1996, the two departments were incorporated into one Ministry of Agriculture and Land Affairs. Third, in 2009, a new Department of Rural Development and Land Reform took over from the Department of Land Affairs, now with the additional mandate for rural development, and under its own ministry. Simultaneously, the National Department of Agriculture joined together with forestry and fisheries to become DAFF.

Research and analysis available to the panel leads us to conclude that neither having separate ministries, nor separate departments within one ministry, have enabled adequate coordination and collaboration between these two departments in order to drive agriculturally-focused land reform. Each institution has its own capacity limitations in terms of a skills deficit, staff turnover, mismanagement. Yet the problems run deeper. Land reform projects are often left without production support. Land acquisition often leads to a long hiatus before beneficiaries are able to settle on the land or gain the materials, skills and markets to use it effectively to improve their livelihoods. Because of the absence of a monitoring and evaluation system, it is not possible to determine the exact scale of land reform without agricultural support, but case study research and some provincial studies suggest that the DPME's review of the Recapitalisation and Development Programme of 2014 found that the available funds from DRDLR for production support were severely skewed towards a few commercial projects, leaving most beneficiaries with limited or zero support. Other empirical findings from research show that, constrained by its own mandate, provincial departments of agriculture are often reluctant to support land reform projects. Missing in all this has been joint policy development, systems, implementation and monitoring.

New institutional reforms will need to address the misalignment in policy, planning, implementation modalities, budgets and monitoring and evaluation between the departments of Rural Development and Land Reform and Agriculture, Forestry and Fisheries. **Broader alignment** across state institutions is needed. The panel makes specific recommendations in this regard.



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PART VI

SUMMARY OF VIEWS REGARDING EXPROPRIATION WITHOUT COMPENSATION

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THE CONSTITUTIONAL PROTECTION OF PROPERTY RIGHTS AND LAND REFORM

As South Africa navigates the land question, it must be borne in mind that the outcome of a unitary, coherent, coordinated land reform project, must have as its object, the promotion and safeguarding of dignity, non-racialism, the supremacy of the Constitution and the rule of law at all times.

The Constitution strikes a balance between the protection against arbitrary deprivation of property and the need to implement land reform. The framework for land reform in South Africa is contained in section 25 of the Constitution of the Republic of South Africa Act 108 of 1996. By placing section 25 within the Bill of Rights the Constitution ensures that any changes to the land reform framework through an amendment to section 25 must be done by two thirds majority of members of Parliament agreeing to the amendment.

The so-called three legs of land reform are stipulated for in section 25 of the Constitution. For example, section 25(5) makes provision for the distribution; section 25(6) stipulates the framework for tenure reform; and section 25(7) stipulates the framework for restitution including fixing the date for the validity of claim to 19 June 1913 and the cut-off point for submitting claims to 31 December 1998.

Parliament passed legislation to give effect to section 25(5), namely Provision of Land and Assistance Act 126 of 1993. Parliament passed the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997 to give effect to section 25(6). As far as restitution is concerned Parliament gave effect to section 25(7) by passing the Restitution of Land Rights Act 22 of 1995. The Land Claims Court and the Commission on Restitution of Land Rights (Land Claims Commission) were established in terms of the Restitution Act.

The Land Claims Court contributed to the development of policy, guidelines and procedures. This in turn led to several amendments of the Restitution Act to be in line with the policy.

Section 25 of the Constitution of the Republic of South Africa Act 108 of 1996 provides that –

"25 (1) no one may be deprived of property except in terms of a law of general application.

(2) Property may be expropriated only in terms of a law of general application -
   (a) for a public purpose or in the public interest; and
   (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –
   (a) the current use of the property;
   (b) the history of the acquisition and use of the property;
   (c) the market value of the property;
   (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
   (e) the purpose of the expropriation.

(4) For the purposes of this section –
   (a) the public interest includes the nation's commitment to land reform, and to reforms that bring about equitable access to all South Africa's natural resources and
   (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by the Act of Parliament, either to tenure which is legally secure or to comparable redress

(7) A person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to

restitution of that property or to equitable redress;

(8) No provision of this section may impede the state from taking legislative or other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact legislation referred to in (6)."

Section 36(1) referred to in section 25(8) provides that –

"the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

(a) the nature of the right;
(b) the importance of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose;
(e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit ant right entrenched in the Bill of Rights".

Section 39 (3) of the Constitution provides that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation to the extent that they are consistent with the Bill of Rights, of which section 25 forms a part.

Section 232 binds the republic to customary international law, which is considered law in the republic, subject to it being consistent with the Constitution or an Act of Parliament. Section 233 enjoins the courts to prefer any reasonable interpretation of legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

Within land reform, the State must be mindful of its constitutional obligations in so far as international law is concerned. The latter, must however, not be interpreted to constrain the nation's commitment to land reform, including the sovereign nature of the republic. Section 25(8) of the Constitution, which is set out above, reinforces the idea that no provision or law may be interpreted to impede the nation's commitment to land, water and related reform.

Land reform and land reform objectives therefore enjoy prominence within the Bill of Rights which is contained in Section 1-39.

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WHAT CONSTITUTES "PROPERTY" IN SOUTH AFRICAN LAW?

The focus on property and what constitutes "property" and land reform provides an opportune moment to delve deeper into the foundational values and principles that inform property law today and in the context of the Constitution.

The word "property" is mentioned six times in section 25 of the Constitution. The Panel has therefore deemed it fit to assess underlying principles which may either serve to develop and/or constrain the developmental agenda and aspirations of a society that protects and secures the achievement of dignity, equality, non-racialism and non-sexism for all South Africans, through land reform.

It is the historical foundations of the South African legal system, subsequent legislation and common law principles, that have historically enabled mass dispossession and conquest over the majority for a period spanning over a century, with the blessing of the then Parliament. The promulgation and dedicated implementation of oppressive legislation ensured that the majority of South Africans, being Africans, were stripped off their citizenship, identity, dignity, land and possessions.

Although the judiciary has successfully developed a rich tapestry of post-democratic jurisprudence in the advancement of equality, dignity and freedom, and although its role cannot be understated, it is imperative that Parliament plays an active and leading role in infusing African-based value systems at the heart of the South African legal system.

The compulsion has thus far either been an attempt to retain Roman, Roman-Dutch and English law influences and tweaking it almost superficially in order to suit the majority's lived experiences, relationship and conception about what constitutes property, and at worst, it has been the persistence of a dichotomous legal system that excludes the majority from legal recognition and protection.

This Panel advocates for the elevation and development of a property legal system that recognises not only plurality in South African society, but which also seeks to address persistent landlessness by the black majority.

The Panel therefore recognises that constitutional values and principles must be infused into the common law, and in how we analyse, view and ultimately protect "property" encompassing how the majority of the population interacts and relates to "property" in a holistic manner.

According to Silberberg and Schoeman's The Law of Property Third Edition on paragraph 6 page 9:

> *"Although Roman-Dutch law was derived from two main sources, namely Roman law and Germanic customary law, the former rather than the latter forms the basis of our law of property. Yet various traces of Germanic customary law can still be found in our law. Thus our law regarding land registration falls back upon Germanic customary law".*

Silberberg and Schoeman go further to point out that our law of property has also, to a limited extent been influenced by English law which was adopted in our case law.

English law had also to a great extent, influenced our old Water Act No. 54 of 1956, whereby riparian owners were entitled to use normal flow water and surplus water. Similarly, the current Expropriation Act No. 63 of 1975, is borrowed from English law in so far as the methodology of calculation compensation for expropriation is concerned.

Another example is the Deeds Registry Act No. 47 of 1937, as amended, which only recognises as registrable and legally recognisable, the mortgaging of real rights to land and rights of real security over leases, personal servitudes and mineral rights. The latter has meant that an overwhelming majority of the South African population's (mainly Africans) conception, understanding and relationship with land and property, is not catered for in the Deed Registries Act.

Research conducted by Urban Landmark 2010, estimates that 31 million South Africans hold land and dwellings outside the formal property system, 17 million of the 31 million are Africans in communal areas, 2 million consisting of farmworkers, 3.3 million people in informal settlements, 1.9 million in backyard shacks, 200 000 in inner city buildings, 5 million in RDP houses with no title and 1.5 million with either outdated or inaccurate titles.

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In terms of section 2(1) of the Alienation of Land Act No. 68 of 1981, as amended, no person may buy or sell land unless such sale is reduced in writing in a deed of sale, and signed by the parties and/or their authorised agents.

In addition, the Alienation of Land Act makes it a mandatory requirement that the sale and/or alienation of land agreements must be in registered in the Deeds Registry.

These requirements have meant that the overwhelming majority are not the subjects and/or recipients of current legislation in so far as legal protection and recognition of land and property rights are concerned.

In the matter of Frye's (Pty) Ltd v Ries 1957 3 SA 557 (A), Hoexter JA stated that –

> *"it is quite clear…that registration is intended to protect the real rights of those persons in whose names such rights are registered in the Deeds Office. It is obvious that the Deeds Office is a source of information concerning such rights, but the function of registration is the protection of the persons in whose names real rights have been registered. Such rights are maintained against the whole world…"*

The current position in law is that only real rights (formal) in the form of ownership, use, pledge, usufruct, mortgages are capable of being registered, recognised and protected by law.

It is trite that the informal property sector, which is mainly comprised of African people, engages in sale of land and sale of property agreements outside of the Alienation of Land Act.

Private ownership is generally upheld as almost sacrosanct in most western civilisations. The ownership of land differs in content and in function, having been influenced by social, economic and political circumstances. As already mentioned, African indigenous notions and understanding of a relationship between a person and land and/or property differs in form, function and purpose from those of South African law, influenced and imported from Roman, Roman-Dutch, French and Germanic law.

In so far as South African legal theory is concerned, there are two definitions that constitute "ownership" which are based on Hugo Grotius and Bartolus de Saxoferrato's conceptions. Ownership is the real right that confers the most comprehensive control over a thing subject to limitations imposed by public or private law, as confirmed in the matter of Johannesburg Municipal Council v Rand Township Registrar 1910 TPD 1314 1319. There is therefore an element of individualism that the owner may enforce against the whole world. The notions of ownership that form the foundation of South African law are shaped by influences from Roman and Roman-Dutch law. Ownership in unlimited in duration and is not subject to a time limit. Ownership is the most comprehensive and highest form of a real right recognised in law.

Other forms of entitlements that are lesser than the right to absolute ownership, are linked to the power to use, the power to the fruits or income deriving from a property, the power to consume, destroy, sell or borrow, the power to claim the property from another, and the power to resist unlawful invasions.

Given the aforementioned, although section 25(1) seeks to protect persons with formal, registered and recognised rights, it fails to protect those with informal and unregistered rights, regard being had to the inherent definition of what constitutes real rights.

The complexity of the relationship between custom and customary law in indigenous African societies is well-documented. Customary practices and the use of land is based on principles of negotiation, has its own form of dispute resolution, in terms of which access to land is linked with livelihood, and layers of rights and layers of different users.

The Panel therefore calls for the elevation and possible amendment of pre-democratic laws that will ultimately have the effect of bringing into the legal framework, the ability of customary and communal land holding to be included in the classic definition of what constitutes "property" capable of legal recognition and equal protection by the law.

Expropriation of Property without Compensation

The starting point to this enquiry about expropriation without compensation is that there must be a law of

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general application that exists, which law must set out the circumstances under which expropriation must take place.

Such law of general application being applied is currently the Expropriation Act No. 63 of 1975 ("the Expropriation Act"). It is trite that the Expropriation Act predates the Constitution, and that it is the current law that determines the manner in which expropriation takes place. Besides the fact that it endorses the market value-based principle of compensation, contrary to section 25(3) of the Constitution and that it undermines the constitutionally enshrined principles of lawful, procedurally fair and reasonable administrative justice, it remains current law, and to a large degree, has and continues to inform the manner and method of compensation. It is not clear why the Expropriation Act was not amended when the Constitution came into force in 1996, in order to bring it in line with section 25 of the Constitution. The Parliamentary failure to repeal the Expropriation Act in the last 23 years and to enact a law which complies with the Constitution, has had untold consequences.

The second enquiry is that expropriation may only take place for a public purpose or in the public interest. Section 25(4)(a) further provides that the public interest includes the nation's commitment to land reform…" In this regard, the Constitution is explicit about the fact that expropriating property in pursuit of land reform, is acceptable.

Section 25(2)(b) explicitly states that: "property may be expropriated only in terms of a law of general application subject to compensation, the amount of which and manner of payment of which have either been agreed to by those affected." The words "subject to compensation" and the presence of the word "amount" denote that compensation is indivisible from expropriation.

In light of the above, for lawful expropriation to take place, there must be a law which sets out the manner in which expropriation must take place, in line with the Constitution. Secondly, the expropriation may not be arbitrary, and land reform is legitimised as something of being in the public interest. The third requirement is that of compensation, which may be negotiated between the State and the expropriated entity, failing which the court will adjudicate over the amount of compensation being dispute.

The original conception of expropriation is explained by L Verstappen in *Rethinking Expropriation Law I* on page 16 where he refers to two requirements that have been identified as constitutive of expropriation: the existence of a public purpose underlying the State's act of expropriation on one hand, and the payment of just compensation to reward the owner for the loss. Verstappen sets out the origins of expropriation law principles which are to be traced to Hugo de Groot who distinguished between two forms of expropriation, being extreme circumstances and ordinary circumstances. It is therefore not surprising that section 25 would stipulate compensation as a requirement for expropriation.

The Constitution assists parties on factors that must be taken into account when determining compensation. It is arguable that the factors below serve as guidelines in assisting the parties in the determination of compensation. There may be other relevant factors, which are not stated below, looking at each case based on its merits:

"the amount of the compensation and the time of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including –

(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation.

It is also important to reiterate that whilst section 25 of the Constitution requires that compensation must be paid, it provides guidelines and those issues that must be taken into account in arriving to an amount of compensation that is just and equitable. Compensation should therefore not be determined purely on the basis of market value. The Supreme Court of Appeal, in *Haakdoornbult Boedery CC and others v Mphela and others* [2008] JOL 2007 (5) SA 596 held that –

> *"Fair compensation is not always the same as the market value of the property taken, it is but one of the items which must be taken into when determining what would be fair compensation."*

Based on the aforegoing, the Panel report posits that expropriation without compensation would be unconstitutional. Notwithstanding the latter, it must be reiterated that "just and equitable" which could be significantly lower than market, is constitutional.

Without a constitutional amendment to section 25, the State is currently able and within its powers to expropriate land for land reform purposes, based on just and equitable compensation.

Opposing views are that it is possible for the State to expropriate land without compensation based on the current framing of the Constitution. Notwithstanding the reasoning provided herein that section 25 is a compensation-based clause expressed above, even if we were to adopt the view that zero compensation is permitted in certain circumstance, it is highly unlikely and improbable that there could be a plethora of circumstances that would lead to zero compensation.

Applying the 25(3) methodology, only properties that have the following features would result in zero compensation –

1. where the property is not used for any particular purpose;
2. where the owner did not acquire the property, or where no value was paid in lieu of the property;
3. where the property has a market value on R0;
4. where the State has invested in the property and where there was no capital improvement of the property;
5. where the expropriation is in the public interest or for a public purpose.

Taking the aforegoing into account, if the purpose of the constitutional amendment is to move away from the mandatory compensation-based requirement in certain circumstances, then it may be necessary to amend the constitution by inserting a new section 25(2)(c) which may read as follows:

"(c)Parliament must enact legislation determining instances that warrant expropriation without compensation for purposes of land reform envisaged in section 25(8).

If, however, the purpose of the expropriation is to implement expropriation without compensation wholescale and without conditions, then such a motion would offend against section 1 of the Constitution and would in effect, collapse the core underlying values of our Constitution.

The uniqueness of the South African property clause is that, it – unlike many other Constitutions - specifically mentions that land reform as being in the public interest and section 25(8) further elevates land reform, indicating that that nothing in the Constitution should impede the delivery thereof.

Taking into account the prohibition and protection of existing property rights, it is necessary that the Constitution makes it explicit that there are exceptional circumstances that warrant expropriation without compensation and that the detail and content is dealt with in a new Expropriation Act. The Expropriation Amendment Bill contains the following formulation:

(3) It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:
   (f) Where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);
   (g) where the land is held for purely speculative purposes;
   (h) where the land is owned by a state-owned corporation or other state-owned entity;
   (i) where the owner of the land has abandoned the land;
   (j) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.

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AN EXTERNAL VIEW ON ISSUES REGARDING EXPROPRIATION WITHOUT COMPENSATION

The following is a summary of the legal opinion received from Prof Elmien du Plessis of North-West University, as presented to the panel on 6 February 2019, with further amendments:

The legal framework of expropriation

i) Constitutional framework

Section 25 of the Constitution both protects holders of rights in property[1] (section 25(1) – (3)), and initiates reformist imperatives (section 25(5) – (8)). In the one-system-of-law view, the two parts don't stand opposite each other, but form part of the same constitutional goal and should as such be read together.

Section 25(1) refers deprivation of property for regulatory purposes. A deprivation must take place in terms of a law of general application and no law may permit arbitrary deprivation. Deprivations do not require compensation. In the context of EWC, the *AgriSA case* [2] becomes important. The case dealt with the question whether certain deprivations, namely deprivations caused by a regime change in rights in certain resources, amounted to an expropriation. The Constitutional Court found that, on the specific facts in front of it, such a deprivation of property does not amount to a compensable expropriation, since the state does not acquire any property.

Section 25(2) allows for expropriation in terms of law of general application, for a public purpose or in the public interest,[3] and subject to compensation.[4] Compensation is paid for various reasons, where arguably the most important reason is that an individual land owner cannot be expected to bear the burden of an expropriation that is for the benefit of the whole public.

Section 25(3) that deals with compensation sets the compensation standard on "just and equitable", and it requires a balance between the person whose property is expropriated and the public interest. This balancing is central to the determination of compensation. All relevant circumstances must be considered, including but not limited to the factors listed in section 25(3)(a)-(e). Market value is listed as only one factor to be taken into account. In *Ex Parte Former Highlands Residents*,[5] (called the Possit Guiede approach) Gildenhuys J formulated a two-step approach when calculating compensation: first determine the market value of the property (since it is easily quantifiable),[6] and then, based on the list of factors in section 25(3), adjust the amount either upwards or downwards.[7] This placed market value at the centre of the compensation inquiry.

The *Harvey case*[8] ruled that compensation need not be determined at expropriation, and can be determined afterwards, if it is just and equitable to do so.[9]

The reformist imperatives in section 25(5) – (8) allow the state to infringe on existing property rights for land reform purposes. The power to infringe on private property rights[10] developed from a specific historical context in South Africa. This historical context and the aim to redress should be kept in mind when interpreting the property clause, or where the state limits private property. The reformist imperatives stand alongside the protection of existing private property, and should be balanced.

Section 25(8) allows for deprivations, expropriations, and the determination of compensation, in the cases of land reform, and will warrant a more tolerant review because of the provisions in section 25(8).

1 In terms of the Constitution property has a fairly wide meaning. *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a/ Wesbank v Minister of Finance* paragraph 51 stated that "judicially unwise to attempt a comprehensive definition of property for purposes of section 25". Reflect-all *1025cc v MEC for Public Transport, Roads and works, Gauteng Provincial Government* paragraph 32 requires "property" to be understood in its specific historical land social framework.
2 *Agri South Africa v Minister for Minerals and Energy* note 1 above
3 And in terms of section 25(4), this includes the nation's commitment to land reform.
4 Compensation is an integral part of expropriation as a legal instrument of acquiring land, and a requirement in terms of international law – see the main opinion.
5 *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC) paragraphs 34 – 35.
6 Budlender (1998) Budlender G, Latsky J and Roux T Juta's *New Land Law* (Juta Cape Town 1998) Chapter 1 – 60. See also the discussion on the Department's guidelines below.
7 *Ex Parte Former Highland Residents; In Re: Ash v Department of Land Affairs* paragraphs 34 – 35.
8 Land Reform (Labour Tenants) Act 3 of 1996.
9 In terms of clause 17 (1) of the Expropriation Bill, the holder is entitled to payment of compensation "by no later than the date on which the right to possession passes". Clause 17 (3), however, makes it clear that a dispute about the payment of compensation will not prevent the passing of the right to possession.
10 Within the bounds of sections 25(1) – (3).

A deprivation, for instance, in terms of section 25(1) that might ordinarily be arbitrary, might be subject to lesser scrutiny, although it must still be reasonable and justifiable in terms of section 36(1). It still requires a balancing, as any infringement of a right in terms of the Constitution, will only be constitutional if it complies with the limitation clause, namely section 36(1).

ii) Legislative framework

When land is expropriated for land reform purposes, it requires a statute that authorises the expropriation (eg. Restitution of Land Rights Act[11] that usually also provides the purpose for the expropriation), it needs to be done in terms of an Act that sets the procedure and the method of calculation of compensation (currently still the Expropriation Act of 1975)[12] and remains subject to the Constitutional framework.

iii) International law framework

Section 39 of the Constitution states that in the interpretation of section 25, international law must be taken into account.

International law is fairly clear on the requirement that compensation must be paid at expropriation unless it is aimed at nationalising a resource. Compensation need not be market value, but must be "appropriate".

iv) Foreign law

When interpreting section 25, foreign law may be taken into account. Some jurisdictions allow for compensation to be less than market value, especially during times of social and economic changes, but does not provide for no compensation (unless, in limited circumstances, when it was followed by nationalisation).

Implications in the current EWC conversation

From this short summary, just the following remarks:

1. International law does not allow expropriation of property without the payment of compensation on a large scale.
2. Some commentators[13] are of the opinion that the *AgriSA* case will allow the state to enact redistribution legislation that will enable the transfer of land from one private beneficiary to another, and since the State is not acquiring land, this will not be an expropriation that requires compensation. This is an over-simplification of the legal position. The *AgriSA* case is an example of a regime change, where a scarce resource was taken from the realm of private property, into the realm of state regulation of the resource. It therefore precluded anyone from being the private owner of a mineral right. Such a regime change might be constitutionally permissible, but only in limited circumstances. Legislation that is promulgated to effect such a regime change of a particular resource, must therefore delineate the rights appropriately, must have a legitimate aim in line with the Constitution, cannot conflict with the rules of natural justice or just administrative action and must provide for the payment of compensation (or financial loss), in the instances where such a regime change affects an individual harshly.
3. Section 25(3) requires a balancing of rights. It is also in this context that the argument can be made that such a balancing of rights might in very limited circumstances justify nil or nominal compensation. The argument that the compensation inquiry should be distinguished from the determination of value. Section 25(3)(c) focusses on value, as does the Property Valuation Act. The compensation principle in section 25(3) is "just and equitable", and this can differ from value in certain circumstances. It is my suggestion that the discretion to determine "compensation" should be limited to the minister and the courts, who must base their discretion on certain facts placed of them.
4. Such questions of justice and equity are contextual questions, it will be difficult to argue for a policy or legislative intervention that lays down hard and fast rules for the determination of "just and equitable" compensation. The legislature can, by inserting an interpretation clause in the Expropriation Bill, for instance, give guidance to the decision-makers what they have to consider when determining compensation.

11 Restitution of Land Rights Act 22 of 1994.
12 Soon to be replaced with the *Harvey v Umhlatuze Municipality*. In this context, the Property Valuation Act 17 of 2014 is also important, although the interaction between the Expropriation legislation and the Property Valuation legislation is not set out in the legislation itself.
13 See the opinion of Wim Tengrove, made to the Ad Hoc Committee for the amendment of section 25, 8 March 2019, and an unplublished draft paper by Tembeka Ngcukaitobi & Michael Bishop entitled "*The Constitutionality of Expropriation Without Compensation*" Presented at the Constitutional Court Review IX Conference held on 2-3 August 2018 at the Human Rights Room, Old Fort, Constitution Hill, Braamfontein, Johannesburg.

Since the inquiry is contextual, it is best left for a judicial tribunal like a court, to, based on concrete facts before it to crystallise guidelines as to what is just and equitable. This will in turn guide other decision-makers.

5. There are situations where the state can invoke section 25(8) for reform purposes, in order to limit the payment of compensation in section 25(2). The government will have to show that the payment of compensation will impede land reform. This limitation will be subject to section 36(1) of the Constitution its proportionality analysis.
6. The alternative view is that the Constitution does not stand in the way in implementing land reform. The alternative asserts that there is no legal reason for an amendment, however, this view is mindful of the political necessity for an amendment to "make explicit that which is implicit."... as explained above. In case of an amendment, these are my suggestions:
   (a). Section 25 (8) No provision of this section, nor compensation , may impede the state […]; or
   (b). Section 25(2)(b) to read […] subject to compensation which may be nil compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court; or
   (c). Section 25(4), generally regarded as the "interpretation clause" for section 25, can make it clear that "just and equitable" can also amount to R0.
7. For any proposed amendment to be Constitutional, it cannot interfere with the proportionality principle. This principle will be applicable in terms of administrative law and section 36(1) in any case, it can lead to interpretative conundrums. The possible argument that proportionality is integral to the rule of law, and therefore a founding provision of the Constitution that requires a 75% majority to amend, should also be taken into account.



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PART VII

THE PANEL'S RECOMMENDATIONS

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PANEL RECOMMENDATIONS

It is now 22 years since the White Paper on South African Land Policy was adopted in 1997. In the intervening period, poor implementation, policy shifts, dwindling budgets, institutional weaknesses, corruption, socio-economic dynamics, climate change and demographics are pointing to a need for a new land reform policy framework. There is also an incomplete legislative framework. Existing policy, law and implementation have not adequately addressed spatial inequality in either rural or urban areas. This report considers alternative land acquisition strategies and land tenure models, reviews beneficiary eligibility and selection processes, landholding entities, and notes the significance of new legal and other frameworks. The panel proposes a clear policy framework with clear strategies and transformation outcomes. This must be coupled with a reformed institutional framework as well as land administration and governance framework that enforce alignment and complementarity.

RECOMMENDATIONS FOR IMMEDIATE ACTION

1. CONSOLIDATED INTEGRATED PLANNING AND LAND INFORMATION SYSTEM

The establishment of the Inter-Ministerial Committee (IMC) chaired by the deputy president has demonstrated the value of joint planning and coordination. The resolution of the Mkhwanazi Land Claim (among others), in a short space of time following hurdles, is a clear indication of an urgent need for an enforceable coordinated and integrated planning system for alignment of strategy, planning, budgeting, and monitoring and evaluation. The Mkhwanazi Community title which was handed over by President Cyril Ramaphosa on 14 October 2018 cuts across different departments including Rural Development and Land Reform (DRDLR), Department of Agriculture, Forestry and Fisheries (DAFF) and Department of Public Works (DPW). Of significance as well, was the role played by the Department of Planning, Monitoring and Evaluation (DPME) in debottlenecking, facilitating and coordinating across spheres of government. To shift from a transactional approach to a transformational approach of land reform, there is a need to **develop a Consolidated Planning System with Best Practice Guidelines for Aligning Planning, Budgeting and Implementation**. The IMC lessons must be analysed to move beyond case by case and issues to a more formal planning system. The institutionalisation is not about centralisation of responsibility of planning or policy-making; rather the focus is on coordination, problem solving and strategic leadership. This also involves technical quality control with planning happening at different levels.

Develop a single, national data portal (Land Repository or Observatory) for all land related information as the first step towards developing infrastructure for the ultimate integration, holding and maintaining of all land rights records. Through this, begin to populate an integrated land e-cadastre with all other land-based information contained in separate government registers (water rights, land claims, mineral rights etc.). This establishes the foundation for a comprehensive land recordal and administration system, linked with a need for a reliable land audit discussed in more detail below.

2. ALLOCATION OF ALREADY ACQUIRED LAND

The allocation of already acquired land by the State provides an opportunity of advancing land reform immediately, whilst experimenting for better and improved reform with lessons for policy and programme improvement. The targeted areas include:

2.1. **Fast-tracking the conclusion of restitution cases and transfer of legally secure and legally registrable tenure to communities with settlement packages.** This process offers an opportunity of using the IMC to address complexities surrounding the transfer of recognised tenure from the State to local communities and how these rights can be secured to individuals and communities. It also offers space to review and refine landholding entities, (e.g. the use of Communal Property Associations (CPA).

2.2. **The conferment of tenure rights** in land allocated to beneficiaries through the land reform program as envisaged by sections 25(6) and 25(9) of the Constitution. This will seek to confer various forms of legally secure tenure that respond to the needs of beneficiaries in rural and urban spaces.

2.3. Review lessons learnt from DRDLR's PLAS farms process following the appointment of a service provider (Agriculture Research Council (ARC) /Entsika) and utilise lessons in refining the allocation and settlement of land reform beneficiaries. The service providers have evaluated 1438 out of approximately 2200 PLAS farms utilising different tools from the land's agroecological assessment to feasibility and business plans formulation, market and finance facilitation in some cases. Whilst this exercise has been valuable, the panel is concerned about the cost of upscaling in establishing a permanent system.

2.4. Create strong and enforceable duties on the DRDLR and on other departments and spheres of government to **provide a full range of technical, financial, resource, administrative, accounting and other support to claimants who receive restoration of land.**

2.5. **Review and Reallocation of dysfunctional** farms from previous Land Reform Schemes (LRAD, PLAS and Equity Schemes).

3. AVAILING LAND IN THE MEDIUM TERM

The land question is not only an agricultural land problem, but also relates to urban and peri-urban land. What we propose here is to **deal with the land question in an integrated and all-encompassing way.** So where should the land come from to help solve this fundamental question confronting post-apartheid South Africa? The **different sources of land to address the different demands for land** will include different acquisition methods as well as (voluntary) 'donations' from the following:

(a) Churches
(b) The mining houses
(c) Land expropriated from absentee landlords
(d) Municipal land and commonages
(e) Government land not under beneficial use, including land owned by state owned enterprises
(f) Urban landlords
(g) Commercial farmers, including game farmers and foresters
(h) Agribusinesses
(i) Land redistribution farms in distress and close to failure

Arrangements for the inventory of this land is to be aligned to the panel's proposals for **Donations Policy** and Land Administration discussed later in detail. The design of the conditions under which land is to be transferred to beneficiaries should also follow beneficiary selection recommendations with revived land structures at local level. This creates space for previous owners to offer time and expertise to mentor new entrants into the farming sector, invest in Land Reform bonds, or to contribute some combination of these, as the case may be.

4. DEVELOPMENT OF A PROACTIVE TARGETED LAND ACQUISITION AND ALLOCATION PROGRAMME

Problems with land acquisition have been at the centre of land reform failure (refer to Duduzile Khuzwayo Case Study). The proposed **Proactive Targeted Land Acquisition** programme marks a shift from a reactive land acquisition approach which has been market- and allocation based, and colloquially referred to as "willing buyer, willing seller." It is open to different forms of land acquisition aligned to section 25 of the Constitution as is, and will also accommodate amendments (expropriation without compensation) should they materialise. The 'willing buyer, willing seller' approach to land reform was a policy choice made in the 1990s. The Land Summit of 2005 resolved to abandon the 'willing buyer, willing seller' approach, and this led to the State becoming the 'willing buyer' and buying up properties for with limited success, and much less on the State utilising its powers to expropriate. The State has mainly used its expropriation powers for a public purpose as opposed in the public interest. As mentioned in this report, land reform is specifically stated as a means for the State to acquire property in the public interest. In practice, then, land reform has continued to rely on properties offered on the market, or on negotiated sales, usually at market price. The African National Congress (ANC) at its 2012 Mangaung Conference also resolved to remove the 'willing buyer, willing seller' principle to align with the 'just and equitable' compensation clause in the Constitution.

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The 'willing buyer, willing seller' approach, combined with institutional dysfunction and poor governance and leadership contributed to slow, corruption-ridden land reform process with inflated land prices, haphazard and unstructured land acquisitions and allocations that continue to perpetuate inequalities.

The proposed targeted land acquisition and allocation strategy involves **both public and private land owned** by commercial farmers, agribusinesses, mining companies, churches, financial institutions and other landowners. Its outcomes will be focused on the **acquisition and transfer of well-located land for specific identified individuals, groups and communities**. This would mean more suitable and quality land holdings. It will also include the **reinvigoration of the municipal commonage programme**.

The panel proposes that the starting point for redistribution must be serious engagement with the **nature of demand** – who wants what land, where, **for what purposes**. This requires a land demand assessment, and opportunities for meaningful and democratic consultation at local level. Land identification needs to consider data and spatial planning frameworks, as well as the criteria established in participatory planning, including the location, water availability, soil types, infrastructure and other features of the land.

The panel proposes that a **range of land acquisition methods be used**. The approaches should target both private and public land, and give consideration to:

(a) A territorial approach (area-based) to land identification and acquisition. This advocates for the use of scientifically-based planning and decision-making using appropriate tools for agroecological analysis of land suitability, capability, as well as grazing capacity. The Agricultural Research Council (ARC), is a State-owned entity with these capabilities. Its mandate includes updating relevant foundational datasets through research and monitoring programme tools (including maps), and to calculate indicators with higher confidence. This has enabled the ARC to map 90% of soils in South Africa with the gap in the former homelands. The next step is to digitise and make this information accessible. This territorial approach is also proposed in chapter 6 of the National Development Plan which has the following key elements: agroecological realities, area-based, local participation, focused on priority commodity sectors, and product and financial markets integration. The panel proposes the link of this supply-led process with demand, based on a clear and transparent selection of suitable beneficiaries. To this end, a review and revamp of the District Land Reform Committees is proposed, to be replaced by trained area-based structures, with clear operation guidelines and aligned to the objectives and approach. It is suggested that a public-private partnership approach be considered for such structures with consideration of prior experience and relevance.

(b) Openness to land donations with a clear donations policy that avoids the distortion of the land reform objectives and principles (discussed further in following section).

(c) Expropriation, which should be used to acquire specific identified properties needed for redistribution or restitution (also further discussed after this section).

(d) Where feasible, negotiated acquisitions can be pursued where agreement can be reached on compensation, based on the new Compensation Policy (see below), and not based on market value, as this is contrary to the Constitution.

(d) Purchasing land on the open market for land reform purposes should obviously be acknowledged as an option when reasonable to do so.

The following are critical to consider **before** developing a land acquisition strategy:

(a) Clarification of vision, intended outcomes, targeted beneficiaries and acquisition approach.

(b) Build capable structures and teams with integrity (acquisition is a source of power and has been a source of corruption).

(c) Familiarise with relevant legal framework and identify risks and mitigation strategies.

(d) Identify and source the instruments for the strategy adopted.

(e) Build the required capabilities including communication strategy.

These ought to be guided by an objective process of identifying suitable beneficiaries. This includes the facilitated expressions of land need with clear intended use per targeted area or district. This process must be planned and ensure participation. A **land demand analysis** is key in assisting this process.

The panel proposes that such a process should build on and consolidate the current initiatives like

the Land Acquisition Masterplan of the DRDLR, National Land Assembly Strategy of the Department Human Settlements (DHS), DAFF (protection of high-quality agricultural land), and other departments. Engagements with DRDLR point to some relevant initiatives like the **Strategic Land Locator** based on objective criteria such as quality of land, access to water, bulk and other infrastructure etc. Furthermore, over the last four years the department, in planning and implementing the Spatial Planning and Land Use Management Act 16 of 2013, has supported, amongst others, the development of District Spatial Development Frameworks and District Rural Development Plans that indicate how land will be used and how spatial integration will be targeted.

The Panel supports the Annual Performance Plan of DRDLR which includes the establishment of a Land Reform Masterplan and the facilitated development of a land needs assessment to be jointly developed with the HSRC from May 2019. It will initially target 23 districts and consult with key informants and beneficiary representatives in the other 21 for applicability of and/or improvement on findings. It is targeted to also be completed in June 2020.

The objectives of the master-plan are to:

(a) Clarify the nature and scale of land use and land needs in the district and nationally;
(b) Identify areas where the expressed demand for land redistribution can best be met;
(c) Establish a framework for acquiring, allocating and developing the land for targeted uses and beneficiaries; and
(d) Ensure effectively planning for the intergovernmental and capacity building considerations implied.

5. LAND EXPROPRIATION

Section 25 of the Constitution states that expropriation is subject to compensation and requires that compensation must be just and equitable, taking into account all relevant factors, including but not limited to five criteria that are listed. Property is not limited to land. All this is contained in section 25(1-4). In other words, the current Constitution does mandate expropriation as the method of land acquisition, and the state should use its powers. Except for a few cases in restitution, the State has opted not to use its powers to expropriate property for land reform purposes, and instead has bought properties offered on the open market or engaged in negotiated purchases. The panel draws attention to the continued alignment of the Restitution Act to, and the use of the Expropriation Act 63 of 1975. As this Act precedes the 1996 Constitution of South Africa, its use does not align with the transformative mandate of the Constitution. Of further concern is that Act 63 of 1975 uses market-based compensation with an added solatium. To resolve this, the panel proposes speedy replacement of Act 65 of 1975, thus the finalisation of the Expropriation Bill of 2019 is key.

Section 12 of the Expropriation Bill of 2019

(3) It may be just and equitable for nil compensation to be paid where land is expropriated in the public interest, having regard to all relevant circumstances, including but not limited to:

(f) Where the land is occupied or used by a labour tenant, as defined in the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);
(g) where the land is held for purely speculative purposes;
(h) where the land is owned by a state-owned corporation or other state-owned entity;
(i) where the owner of the land has abandoned the land;
(j) where the market value of the land is equivalent to, or less than, the present value of direct state investment or subsidy in the acquisition and beneficial capital improvement of the land.

The panel recommends that, in line with the TORs, in respect of expropriation without compensation:

5.1 Regarding the circumstances in which the EWC policy will be applied:

That EWC is understood to be one of several targeted land acquisition strategies, and that it may commence immediately under specified conditions identified for "nil" compensation, including but not limited to:

(a) abandoned land;
(b) hopelessly indebted land;
(c) land held purely for speculative purposes;
(d) unutilised land held by state entities;
(e) land obtained through criminal activity;
(f) land already occupied and used by labour tenants and former labour tenants;
(g) informal settlements areas;
(h) inner city buildings with absentee landlords;
(i) land donations (as a form of EWC); and
(j) farm equity schemes.

5.2 Regarding the procedures and institutions to give effect to the EWC policy direction:

5.2.1 Expropriation Bill

The panel proposes the finalisation of the Expropriation Bill of 2019. It is important that the Bill must specify much more clearly the meaning of instances that would amount to "nil" compensation, e.g. land held for "speculative reasons," and the meaning and import of "abandoned land." Alternatively, this could be a matter for clarity by the courts.

5.2.2 OVG

The Office of the Valuer-General (OVG) has been established in terms of the Property Valuation Act No. 17 of 2014 to provide for the regulation of the valuation of property that has been identified for land reform, as well as property that has been identified for acquisition or disposal by a government department. The Preamble to the Act acknowledges that expropriation of property for a public purpose or in the public interest must be done subject to just and equitable compensation as required by the Constitution. In line with section 25(5) of the Constitution, the Property Valuation Act of 2011 also acknowledges that the State must take measures within its available resources to foster conditions for equitable distribution of land to facilitate land reform and restitution. One of the responsibilities of the OVG should therefore be to determine value towards just and equitable compensation. Whereas the Act defines "value" for purposes of land reform that it must reflect an equitable balance between the public interest and the interests of those affected by the acquisition of land, having regard to all the factors listed in section 25(c) of the Constitution, the approach from the OVG has been to narrowly determine value in terms of market value alone. This defeats the very purpose for which the OVG was established and has not made a positive contribution towards effecting affordable land reform.

We recommend that the **role and function of the OVG be reviewed to be in line with the Act** to ensure that the compensation determined in the event of expropriation for land reform purposes is just and equitable, and not purely market value based. This must be aligned with the Compensation Policy being proposed by the panel.

5.2.3 Expropriation Body

Institutionally, as an efficiency measure, the Panel proposes that an agency could be tasked to sit separately from the OVG as an expropriation body. One institution that already functionally understands the processes is the Land Claims Court, which the panel proposes be conferred into a new **Land Court** to adjudicate on all land related matters, and not only restitution. This Land Court could be given additional responsibilities, both judicial and extra functions. Consistent that the Land Court Bill which already advocates conflict resolution and mediation, the proposed EWC functional approach should also be modelled towards negotiation before litigation.

5.2.4 Strengthening the Land Court

The Land Claims Court (to become the Land Court) must also be strengthened. The Panel recommends that this include the appointment of a permanent judge president and four permanent judges to the Land Court, as required by the Act, so that its capacity to deal expeditiously with restitution claims and other land matters is strengthened. Stronger judicial oversight over claims will lead to better settlements, reduce the scope for corruption and avert the bundling of claims into dysfunctional mega-claims that lead to conflict. The Land Court should also be required to check that settlement agreements give just and equitable compensation to landowners, in line with section 25 and the new Expropriation Act, when enacted.

Ultimately, the efficacy of the procedures and arrangements could be tested and evolved through jurisprudence.

5.3 Regarding the rights of any person affected by EWC

The expropriating body (Land Court), must develop guidelines on how to calculate value in terms of the Property Valuation Act and Compensation Policy. Further, the guidelines must address how to consider the rights of affected persons. These guidelines must be in line with the Constitutional requirement of "just and equitable" compensation.

6. DEVELOPMENT OF BENEFICIARY SELECTION GUIDELINES

The global **Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests** were adopted by member states in the Committee on World Food Security at the Food and Agricultural Organization (FAO) of the United Nations in 2012. It states, on the issue of beneficiary selection, that:

Beneficiaries should be selected through open processes, and they should receive secure tenure rights that are publicly recorded… States should endeavour to prevent corruption in redistributive reform programmes, particularly through greater transparency and participation. (FAO 2012: 24)

However, there has been inadequate land redistribution legislation and Provision of Land and Assistance Act 126 of 1993 has been an insufficient guide. The panel recommends that a Land Redistribution Bill should be developed to replace Act 126 of 1993. The Bill should reflect the FAO's Voluntary Guidelines.

The panel further recommends the development of Beneficiary Guidelines that cover both rural and urban settings across the wide spectrum of land reform, and which guidelines will assist in contributing towards a sound land redistribution programme. These guidelines should consider:

(a) who should benefit
(b) how prioritisation of beneficiaries should take place
(c) how rationing of public resources should take place.

There need to be strong criteria for eligibility, prioritisation and selection.

Categorisation of applicants needs to be linked to a baseline survey and a longitudinal study to track change over time to show the benefits of land redistribution to people's livelihoods.

7. FINALISATION OF THE NATIONAL SPATIAL DEVELOPMENT FRAMEWORK AND ESTABLISHMENT OF SPATIAL TRANSFORMATION FUND

The National Spatial Development Framework (NSDF) is currently being prepared in terms of the Spatial Planning and Land Use Management Act (SPLUMA). A key proposal in the National Development Plan was to create a National Spatial Fund that would direct funding in an integrated way in terms of the NSDF. The preparation of the framework was delayed but is currently underway.

The National Spatial Fund was never implemented, however, National Treasury did streamline some of the funding grants to municipalities, introducing an Integrated City Development Framework in the 2013/14 financial year[1]. But this is only a very partial response to the intentions of the NDP. The achievement of meaningful urban land reform will certainly require dedicated resources for land acquisition and development in well-located areas and so we need to return to the intentions of chapter 8 of the NDP and ensure the implementation of the National Spatial Fund.

Current state programmes such as the National Housing Subsidy effectively incentivise the acquisition and use of the most affordable portions of land, which tend to perpetuate spatial marginalisation. A National Spatial Fund aimed at meaningful spatial restructuring must be aimed at achieving spatial reform and integration. Its mandate must be the acquisition of well-located land that will bring the marginalised into the urban mainstream. There should be a direct prohibition on land which does not achieve this objective.

8. ESTABLISHMENT OF A LAND REFORM FUND

Financing land reform is increasingly posing a threat to the ideal that so many lost their lives for. Hall and Kepe (2016) point to the reality that the budget for the Department of Rural Development and Land Reform (and its predecessor the Department of Land Affairs) has consistently been below 1% of the total budget (except for two years 2006-2007). For redistribution referred to as "Land Reform" in the total budget has "generally been between 0.15% and 0.4%, reaching a peak of 0.44% of the national expenditure in 2008/09 and then declining to 0.2% in the current financial year".

We see finance as a key pillar and enabler of land reform outcomes. The conception of a Land Reform Fund is multi-dimensional and multi-sectoral with public and private sector contributions. The proposed Fund will use different instruments with grant, low interest-rate loans and equity portfolios. It will also support land acquisition, asset-building, and commercial enterprise post-settlement. In the agricultural sector, the Fund will ensure inclusion of the emerging, black commercial farmers. The fund is aimed at bridging the gap by de-risking the extension of credit to small-

1 See https://csp.treasury.gov.za/Projectdocuments/ICDG%20Guidelines%20v6.pdf

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scale farmers who need access to capital to build their enterprises. The establishment of a Land Reform Fund should commence with the review and strategic consolidation of the budget, particularly land related grants in different departments. It should also review the Land Bank's performance in financing black small-scale farmers and provide solutions. According to an African Farmers Association of South Africa (AFASA) Concept Paper on Alternative Finance (AFASA 2019):

> *The Land Bank, which was established at the same time the notorious Natives Land Act of 1913 was crafted, is the primary development finance institution that provides financial services to the agricultural sector. The Land Bank is mandated to support both 'established commercial' and 'emerging/ developmental' farmers and agri-enterprises towards developing the agricultural sector while also making it more inclusive. Despite this dual mandate, up to 80% of the Land Bank's loan book is geared towards large-scale commercial farmers. Furthermore, the Bank broadly defines development (as used in terms of 'development impact' or increased investment in agricultural transformation) as loans to historically disadvantaged individuals and commercial/ corporate operations that are more than 50% black-owned and/or with a BBBEE level of 4 or better. Hence, much of the R5.14 billion dedicated to 'transformational' lending has gone to emerging commercial farming firms, not subsistence farmers.*

A strong focus of the proposed fund should be the development of black financial intermediaries and support of microfinance and cooperative banking for production and enterprise development. This will help improve access to finance and contribute to capital formation and asset-building in rural and peri-urban areas.

The panel recognises that the building and strengthening of alternative finance is necessary. However, this should not shift focus away from the desperate need to transform South Africa's finance sector. The panel proposes a specific drive to mobilise private sector, namely commercial banks, asset managers and pension funds to respond to the urgency of financing the excluded majority across sectors. This drive should also mobilise land reform related funding.

Overall, the panel proposes a specific drive to mobilise private sector to respond to the urgency of financing the excluded majority across sectors. This drive should also mobilise land reform-related funding.

What will this achieve?

(a) Financing of open market transactions
(b) De-risking and enabling blended financing (state-assisted land acquisition)
(c) Crowding-in of private sector financing

How can this be capitalised?

(a) Capital donations
(b) Developmental finance at preferential rates
(c) Joint-venture funding

9. REVIEW AND REFOCUSING OF EMPOWERMENT PRIVATE PARTNERSHIPS

The agriculture sector has over time experimented with diverse private partnerships, most of these were catalysed by government for example Farmer Equity Scheme (FES) and 50/50, whilst others were initiated by private players as part of Broad-Based Black Economic Empowerment (BBBEE). The difference however is that the Department of Land Affairs from conception (1996) had embarked on these not only to acquire shares for farmworkers in agricultural companies and farms, but also as a commodity-focused means for land redistribution in the deciduous fruit and high value agricultural sectors. It was seen as a transformative scheme at industry level. By 2009, the scheme had disbursed R500 million. However, the implementation of the policy did not yield the intended results. Following an investigation there was a moratorium on the scheme in June 2009. The report pointed out that landholding for farmworkers was as little as 9%, whilst in many instances the former owners continued to retain their dominant position (DRDLR 2010). Failure of FES was also attributed to lack of formal procedures to assist implantation. An added issue was the lack of clarity in the interpretation of Act 126 of 1993. (Land Reform Policy Committee 1998).

Notwithstanding the negative experiences of FES and 50/50 policies, there is evidence of more successful joint ventures. Evidence from Bela-Bela and Komga Land Summits highlights some interesting cases that need to be reviewed for lessons. According to reports from the Bela-Bela and Komga Land Summit

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Figure 2: Dynamics of Agricultural Trade, R Billion

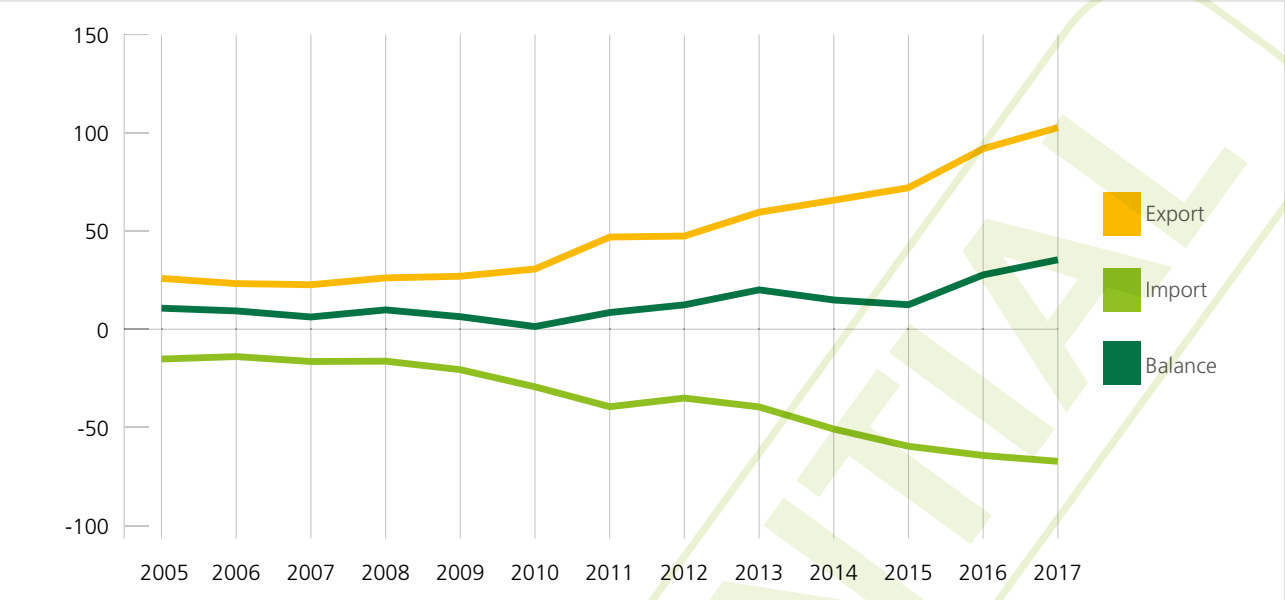


Figure: Agricultural trade

(2018), "the purpose of the summits was to present existing solutions to the land reform and development challenges facing the country. Many farmers and other stakeholders in the agricultural sector are already successfully involved in sustainable alternatives and the summits offered them an opportunity to share their experiences within the industry." Joint venture case studies presented included Rietvlei Farm, Matshibele Dairy Farm, Eden Agri Services, Witzenberg Partners in Agri Land Solutions (Pals), Amadlelo Agri etc.

The review of empowerment private partnerships therefore should:

(a) Analyse the potential of these private partnerships or joint ventures as a means for land redistribution
(b) Analyse the transactional methods and link with transformational imperatives
(c) Assess benefits to targeted beneficiaries
(d) Assess enterprise performance
(e) Analyse active participation by the new partners

10. STRENGTHENING FOOD SYSTEMS AND ENHANCING RURAL-URBAN LINKAGES

The National Development Plan identifies food insecurity and nutrition as both a consequence of poverty and inequality as well as a cause thereof. In 2013 Cabinet approved the National Policy on Food and Nutrition Security with a goal "to ensure availability, accessibility and affordability of safe and nutritious food at national and household levels" (DAFF 2019). The Statistics SA 2017 General Household Survey (GHS) points to the negative impact of badly managed food systems and poor rural urban linkages. The Survey indicates that 41.6% of people with severely inadequate access to food are in rural areas, while 59.4% are in urban areas. This is concerning because the survey was done in 2017 after the approval of the National Food Policy in 2013. Food security is about achieving the triple objectives of food being available, accessible, and nutritious to all the citizens of the country. As a country, South Africa compares poorly with other parts of the world in achieving food security at a national level, albeit being ranked the most food secure country in Africa, according to The Economist Global Food Security Index's results of 2018,[2] with too many people going hungry, too many diseases that come from malnutrition and have severe an impact on children.

Commercial agriculture presents a different and rosy picture in as far as food production and trade is concerned. The figure below illustrates South Africa's import export trade balance. Considering that the food system employs more than 850 000 workers in primary agriculture alone, when secondary agriculture is added, the sector contributes between 15% - 20% of the country's GDP. This sector also boasts a positive trade balance of approximately R42 billion (AgriSA 2019).

2 The Economist, 2018. Global Food Security Index. Available: https://foodsecurityindex.eiu.com/

South Africa is in a fortunate position that food is available. Unfortunately, however, too large a proportion of the population do not have the means to buy food, and when they do, many poor people must subsist on relatively cheap starchy staples because they cannot afford a balanced and healthy diet. Both the private sector and the state currently play key roles in ensuring food security. However, there is poor alignment between these sectors strategically and operationally. On the one hand, farmers across the spectrum from large to small provide the raw materials that food processors, distributors and retailers need to feed the nation, while on the other the state provides social grants that are known to be beneficial in the fight against food insecurity. The Competition Commission recently exposed monopoly behaviour within the food production chain (Competition Commission 2018).

The other challenge is that food production and trade has continued to perpetuate racial inequalities. Black farmers are insignificantly involved in commercial agriculture. The success of white farmers is based on the collateralisation of the land, a privilege and right most black farmers do not have. The land reform program therefore has to deal with these inconsistencies and imbalances whilst building on the good performance.

The panel proposes the following:

(a) An establishment of a public-private **Food Systems Committee** to cover food production and distribution systems, as well as all processes and infrastructure involved in feeding the nation, and the alignment of public and private approaches. The Committee should also develop a Governance Model to orient the industrial commodity chains and state interventions towards national priorities and sustainability.

(b) **Structural change to transform household and commercial food production** and deepen diversity in the agro-food systems.

(c) **Align Land Reform with food security** in both rural and urban areas with focus on the needs of the poor, both as historically subordinated producers and consumers (Greenberg 2010).

(d) **Enhancing commodity chain rural-urban linkages** for more effective and inclusive food systems, for ending poverty, hunger and all forms of malnutrition, as well improving income opportunities.

(e) **Special interventions to support household and smallholder farmers (including community enterprises)** to improve rural and urban incomes through their employment multipliers and make food that is more nutritious and accessible. Such support will help counter the exclusionary tendencies and structural impediments (like poor infrastructure and markets, access to finance, capital-intensive concentration, land consolidation, and the general exclusion from expanding value chains.

(f) **Preferential Procurement** should be employed by the State in the food sector so as to support access to markets by household and small-scale farmers and community enterprises. Targeted sectors should include school feeding schemes, prisons, hospitals and the defense sector.

11. LAND ALLOCATION AND SETTLEMENT POLICY

The need for a Land Allocation and Settlement Policy arises as a result of inconsistency and incoherent policy and approaches from one minister to the other. This also impacts on budget allocation and the question of the driving rationale for the settlement schemes chosen. In earlier sections of this report, the Panel emphasises the importance of the vision of land reform with focus on clear outcomes.The incoherence is evidenced by the allocation and post-settlement support that moved from small grants for the poor with a means test in 1994, to the recent Recapitalization and Development Program (Recap Fund), PLAS and Agriparks as farmer support mechanisms. Whilst the programmes were intended to fill a gap not addressed by the relevant departments (especially DAFF and provincial agriculture departments), the sustainability under DRDLR was questionable (mandate, budget and capability). The small Recap fund could only support a small proportion of farmers, and there were also issues of inefficient management of the scheme with poor coordination and misalignment with DAFF. A DPME review of Recap proposed that it be scrapped entirely. Of significance, is that all these efforts over 25 years fell short of meeting the target to redistribute 30% of land to the landless blacks, whilst the estimated cost to the department is over R50 billion. Black farmers remain currently frustrated by policy uncertainty on support programmes. Both DRDLR and DAFF presented a proposed shift to blended finance for farmers in collaboration with the Land Bank. Unfortunately thus far this has not materialised leaving a big gap and potentially compromising the planting season.

This background has to be compared with the systematic approach of the colonial and apartheid governments

in supporting white farmers after the recession that followed the First World War with the exclusion of black farmers (Kirsten 2013). The approach was about establishing institutions, formulating enabling legislation and support programmes. This led to the establishment of the Land Bank in 1912 and later, the establishment of the Farmers Assistance Board in 1925 (the predecessor of the Agricultural Credit Board). The latter was established to assist farmers with soft loans in the aftermath of the recession of the early 1920s. Kirsten (2013:1) indicates that:

> *This was followed by the establishment of irrigation schemes, tenant farmer support programs and the development of the local agricultural market infrastructure and organised agricultural marketing arrangements. Many of these programs were in place in various forms up to the 1990s, such as the Farmer Settlement program, subsidised loan programs to farmers, and controlled marketing schemes.*

The support to farmers included purchases of land, infrastructure development in a broad sense, production credit and subsidized soil conservation works. "Beginning in the late 1950s and continuing through to the 1980s industry support subsidies were introduced, examples of which were the stockpiling of butter, guaranteed minimum prices and, public funding of export losses which together with support provided through the Credit Board dominated public spending on agriculture from the 1970s through to the late 1980s. Substantially increased public investment in agricultural research and development preceded industry support and continued to grow until the mid-1970's where after it stagnated."

RECOMMENDATIONS

1. The land allocation and settlement policy has to be driven by a clear redistributive agenda following the territorial approach proposed for land acquisition in sections above. The economic rationale and related structural transformation has to be explicit and appropriately supported, as well as the advancement of equitable food systems (ecological, production and income inequality). There needs to be a clear alignment between supply side measures with demand side. This extends to accommodating labor intensive value chains within a technologically-advancing economy.
2. In terms of agriculture the starting point is policy clarity on agrarian reform or revolution as referred to by different players. Currently at national level, various departments have different approaches and different misaligned support programmes. These include DRDLR, DAFF, COGTA on agrarian revolution in rural areas under traditional leaders (former homelands), and the Department of Small Business Development that supports cooperatives and small businesses. An Agrarian Reform Summit is urgent. This will assist with clarity of purpose and roles, disaggregation of farmer levels and support required, as well as alignment of resources and approaches.
3. The land allocation and settlement policy clarity extends to human settlements and infrastructure development for productive and integrated settlements. This includes incentives for spatial transformation and rural urban linkages. Similarly the alignment of approaches among government departments and state agencies is key.
4. The shift should be towards clear and coherent settlement or post-settlement schemes that address different needs and come from different sources. These should be transparent and accessible at local level.
5. The settlement patterns should also consider socio-cultural and environmental realities.
6. Critical here is training and skills development with incubation. In terms of agriculture revamping extension office support for local demand, improving agricultural colleges and strengthening research capacity of Agricultural Research Council (ARC) is key. For sustainability the introduction of agriculture at basic education level must get special attention.
7. The support therefore includes financing different levels in both urban and rural settings, as well as non-finance support. New forms of financing for the economically excluded should be explored by state organs as this is critical for capital formation and revival of rural and peri-urban (township) economies. Mobilisation of private sector support is crucial.

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RECOMMENDATIONS TO REFOCUS LAND REFORM POLICY

1. TENURE REFORM: RECOGNISING DIVERSE TENURE SYSTEMS AND RIGHTS

Persisting inequalities in the manner in which land is owned, managed and transacted in South Africa, remains one of the most contentious issues. Land is an asset whose ownership is often viewed in terms of different defined notions of security. More than 60% of the active population of southern Africa depend on land for their livelihoods, whereas rural and urban poor communities depend almost entirely on land as a source of food. Forms of tenure fall into four broad categories, namely: (i) Open Access tenure, (ii) Communal tenure, (iii) Private Ownership and (iv) State Ownership.

It should be noted that one of the largest drivers of land tenure insecurity in South Africa is the country's lack of a clear and comprehensive land administration system to achieve the goals of the NDP.

The panel proposes a bold new approach to recognising and recording the diverse range of tenure rights that exist within South Africa. While apartheid laws and regulations created a racialised hierarchy of rights, the panel endorses the perspective in the White Paper of 1997 that certain principles should underpin tenure reform:

(a) Tenure reform must move towards rights and away from permits so that rights to land are legally enforceable.
(b) Tenure reform must build a unitary non-racial system of land rights for all South Africans, with a system of land registration, support, and administration which accommodates flexible and diverse systems of land rights within a unitary framework.
(c) Tenure reform must allow people to choose the tenure system which is appropriate to their circumstances.
(d) All tenure systems must be consistent with the Constitution's commitment to basic human rights and equality, and group-based tenure systems must deliver the rights of equality and due process to their members.
(e) In order to deliver security of tenure, a rights-based approach must be adopted.
(f) All tenure reform processes must recognise and accommodate the de facto vested rights which exist on the ground (DLA 1997).

In pursuit of the above principles, the panel recommends that:

(a) The **Land Records Bill** is a priority legislative process to enable the majority of citizens, who hold property 'off-register', to record and register their property. An estimated 60% of all South Africans occupy land to which they have no recorded rights – including residents of informal settlements, farm dwellers, labour tenants, residents of communal areas, and others.
(b) The panel proposes that well-managed **widespread consultations** should be initiated to inform a drafting process, all of which should be overseen by **a working group** with expertise and appropriate representation. Following this, it should be prioritised to be tabled in the next Parliament.
(c) The process should **draw on lessons from experiments and pilots already underway** in South Africa and in other African countries. These include low-cost technologies and block-chain options that will over time enable locally-registered rights to be subject to arbitration and reflected in the Deeds Registry.
(d) This will require an **amendment to the Deeds Registry Act** and/or to the **Electronic Deeds Registration Systems Bill**.
(e) The Land Records Bill should provide for **local and accessible recordal** of existing land rights, including those rights held as individuals, households, extended families and communities.
(f) The state will support **local public institutions**, building on experiences of the Land Boards of Botswana, to administer this system of land rights and to provide for local dispute resolution.
(g) A **separate Tenure Reform budget line** be created, as already exists for r estitution, so that support for land rights recordal, registration and administration is ring-fenced.

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2. URBAN LAND REFORM: INCLUSIVE CITIES WITH EQUITABLE AND SECURE ACCESS TO LAND

Most South Africans now live in towns and cities. Yet, urban land reform has not featured on the policy agenda since the 1990s. Instead, land reform became equated with rural land and specifically with agriculture. Section 9(3) of the Housing Act 107 of 1997 sets out the means by which the state may purchase or expropriate land for the purposes of subsidised housing. Land can be acquired via donations (including from state-owned enterprises), via negotiated purchase or expropriation. Urban demand for land is growing, for housing as well as for other land uses. The apartheid geography of our towns and cities remains entrenched. The urban poor are vulnerable to evictions, most often by the state.

2.1 Urban Land Policy

The panel recommends that an **urban land reform policy** be developed that has a dual focus on equitable access and tenure reform. We note that sections 25(5-6) of the Constitution which mandate redistribution and tenure reform apply to urban areas, and need to be read alongside section 26 which deals with housing.

2.2 Equitable Access

Equitable access: We do not have an adequate vehicle in the urban context to give effect to section 25(5) of the Constitution. The housing programme has made some inroads, but the poor location of RDP projects means that it is not doing enough to overcome spatial apartheid and foster inclusive cities. It also entrenches inequality and exclusion from economic opportunities, particularly given the cost of transport. More needs to be done. The state needs to take:

(a) Proactive measures: audit and redistribute well-located vacant, underutilised or inefficiently used urban land and buildings (including state-owned and state-leased land) that can contribute to overcoming apartheid spatial inequality; prioritise the social, historic and transformative value of land over its capital asset value in decisions relating to the use, lease, transfer and disposal of state and SOE owned land so that socio-economic objectives, including land reform, black economic empowerment, alleviation of poverty, job creation and the redistribution of wealth can be achieved; and review section 14 of the Municipal Finance Management Act and the regulations promulgated thereunder that govern asset management with a view to treat immovable state owned assets (land and buildings) separately from other capital municipal assets in order to properly give effect to local government's obligations to redistribute land and advance spatial justice through the use of municipal land continue the housing programme using the housing subsidy instrument and prioritising the financing thereof; promote inclusionary housing through regulating the private sector to deliver affordable housing and prioritise the development of policy to implement this and expanding the social housing programme to achieve this (as mandated in SPLUMA); use existing zoning and planning mechanisms such as planning approvals for developers that can enable value capture for the public interest such as affordable accommodation; anticipate and plan for land occupations and the displacement of the urban poor by identifying undeveloped well-located land parcels and buildings for new and alternative accommodation, and putting in place approved basic infrastructure and services – as managed land settlements – and work with landless and homeless people's organisations and other social movements in doing this; rationalising land use management and spatial planning legislation and policy to ensure consistency at all levels of government that specifically requires and prioritises the use of state land for land reform where this is suitable is required.

(b) Responsive measures: respond to informal settlements and inner city occupations where land or property is already settled by recording off-register, less 'formal' rights rights (through the use of technology to map these) and providing occupiers with proof of residence; prioritise the implementation of the Upgrading of informal Settlement Programme; regularise informal settlement land use using SPLUMA provisions; and develop and implement alternative accommodation programmes where eviction leads to homelessness and affordable rental programmes in well located areas.

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2.3 Tenure Reform

Tenure reform: The main initiative to protect against arbitrary evictions is the Prevention of Illegal Eviction and Unlawful Occupation of Land Act of 1998. However this requires people to go to court to claim their rights. Even where people have obtained RDP houses, 50% of beneficiaries are without title or their titles are inaccurate or outdated. Meanwhile occupation arrangements on the ground have changed, so 'rectification' requires a major overhaul of the system or process. The panel advises against private titling where there are competing and multiple tenure rights, given that there is compelling evidence that titling creates problems, as titles often are not kept updated, conflicts arise and titling often excludes the poor, women and youth from property rights. The state should more proactively embrace its obligations in respect of section 26 on the right to housing, and provide alternative accommodation to support municipalities – rather than resorting to evictions that would lead to homelessness. Furthermore, the state should ensure that off-register land rights in urban areas are recorded, linked to land information systems and their holders provided with evidence to secure their rights.

The Panel proposes significant measures to unlock urban state land for affordable housing and the creation of more inclusive towns and cities, and proposes the following:

(a) A comprehensive audit of urban state land and buildings, including a mapping and tracking of underutilised and vacant land and buildings with a consideration of a moratorium on the disposal of state land to private entities (without conditions to use those parcels of land and/or buildings for redistributive purposes) pending the finalisation of this process and compliance with land management requirements, including the Custodian Immovable Asset Management Plans and User Immovable Asset Management Plans under GIAMA (and the provision of monitoring and compliance support where this is needed);

(b) Training and capacity support for officials and decision makers on the relevant legislation, including for example, GIAMA and the Spatial Planning and Land Use Management Act, 16 of 2014 (SPLUMA), including a clarification and confirmation on the requirements on decision makers to prioritise land reform through redistribution (in contrast to a market-value and revenue generating centred approach to state land) where this is possible and suitable. This will require due recognition by the state of the social, transformative and historic value of land particularly when land value is determined;

(c) A review of section 14 of the MFMA and the regulations promulgated thereunder that govern asset management with a view to treat immovable state owned assets (land and buildings) separately from other capital municipal assets in order to properly give effect to local government's obligations to redistribute land and advance spatial justice through the use of municipal land;

(d) Make state land disposal more transparent by allowing for better intergovernmental and interdepartmental processes of review when decisions are made to alienate state land, for instance to developers;

(e) Establish or delegate a central authority with clear powers and responsibilities to proactively manage state land and ensure that such an authority meets it broad obligations and balances the interests of potentially competing departments (for example, officials finance and asset management officials should ensure compliance with the MFMA and/or GIAMA (as the case may be) however, such officials should engage in more deliberative and public decision making processes with regard to the acquisition, use, transfer and disposal of state land;

(f) A rationalisation of land use management and spatial planning legislation and policy to ensure consistency at all levels of government that specifically requires and prioritises the use of state land for land reform where this is suitable is required.

The Panel further proposes specific interventions to halt the leasing out of well-located state land for elite and luxury purposes, and to redirect this strategic land towards the public good, including the constitutional imperative of providing access to land to citizens on an equitable basis. For this reason, the Panel proposes:

(g) An effective review of leased state land with a view to proactively rezone the largest and most well-located parcels, negotiate the termination of the leases, and decline to renew leases where the land is need and well suited for redistribution purposes, including for affordable housing and our viable mixed income communities;

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(h) Tendering currently leased state land at a nominal fee to social housing companies or private companies which can develop the greatest proportion of affordable housing for households earning between R3,500 and R18,000 per month, and ensure that housing remains affordable;

(i) Considering cross-subsidisation with market rate homes, offices or shops and should be encouraged to ensure that development is feasible and managed sustainably; and

(j) Intergovernmental expropriation of state land that has been leased for exclusive purposes, particularly at a nominal fee, for the purposes of meeting housing needs.

The Panel also proposes measures that seek to address urban tenure insecurity and displacement, specifically:

(k) More flexible and responsive land rights recognition processes and mechanisms that do not only regard ownership of land as a primary right. These mechanisms should include, for example legal and administrative recognition of residents' right to occupy, develop, inherit and transfer land. This is especially critical in the informal settlement context where non-recognition has had implications for whether further basic services (including water, sanitation and electricity) may be received, and the nature of those services (i.e. temporary or permanent / communal or on a household basis);

(l) Use of technology to map and recognise alternative, less formal rights;

(m) Proactively build alternative accommodation on land in well-located areas that can be readily accessed for evictees and vulnerably housed persons; and

(n) An end to the criminalisation of unlawful occupation by the poor, and the re-orientation of the SAPS and/or metro law enforcement's role in enforcing illegal evictions. Unlawful occupation is not, in and of itself, a crime, as contemplated by the PIE Act, and authorities including the Anti-Land Invasion Units and 'Red Ants' need to protect the rights of vulnerably housed residents and occupiers.

We call for the **state** to shift its perspective and **to support municipalities to work in inclusive and democratic ways with social movements and organisations of the landless, homeless, backyard and shack dwellers**.

3. LAND ADMINISTRATION: RECORDED, REGISTERED AND SECURE LAND RIGHTS FOR ALL

The panel has found that the state land administration system is excessively fragmented and disjointed, and in some contexts broken down completely. Land Administration has thus surfaced as a distinct and critical area for both land reform and coherent land governance. Land administration is particularly malfunctioning where people have unregistered (what we call 'off-register') rights that are not publicly regulated in a systematic sense. This applies both to long-term pre-existing land rights – such as in the communal areas and informal settlements – but also to land reform contexts where newly allocated rights are not effectively registered or administered.

A key high-level problem is the institutional dichotomy between: (1) the management and regulation of formally registered rights, which are closely regulated by formalised policies, laws and institutional arrangements, and are readily judiciable and enforceable through all tiers of government and the private sector; and (2) unregistered and unrecorded rights that are recognised by the Constitution and land rights laws, but are unregulated and managed mainly at the local (community) level or controlled by highly contested or disjointed local systems of authority or by ambiguous institutional arrangements, with little recourse to state institutions for conflict resolution and adjudication. This renders land rights at the individual family level vulnerable and invisible to the law and property institutions.

This dualistic and inequitable institutional framework fragments land governance and land management and heightens the vulnerability of land rights that are subject to third party interventions such as mining licenses or land development, or compromises rights in contexts that require servicing or upgrading especially in urban areas. This exacerbates an already existing institutional silo culture of land administration, particularly data systems that are disconnected and duplicated, impairing administrative and cost effectiveness.

In the short term, over the coming 1-2 years, we recommend that the State must take certain defined steps to drive change and institute pilot studies through:

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(a) Appoint a **Reference Group or Technical Working Group on Land Administration** to drive a general process of land administration restructuring that is aimed at policies, laws and institutional arrangements to begin a process of change towards inclusive land administration. This will include state officials from the Surveyor General Chief Deeds Registrar, e-Cadastre, and others. Collaboration with civil society will be critical for planning and rollout.
(b) Include a **chapter on land administration** in the forthcoming process towards a new Green Paper and a White Paper on South African Land Policy.
(c) Conduct a study to **identify specific sites for priority intervention**, where land administration interventions are urgently needed, including where there are misaligned planning frameworks, laws and land use management processes and fragmented land information and data management systems.
(d) Set up **an integrated land information system** ('Land Repository' or 'Land Observatory') supported by a national data infrastructure to enable compatibility and consolidation of all land-related data, including land rights records.
(e) Set up **institutional arrangements to test new approaches** to, and tools for, land administration in these selected pilots. Examples of priority testing sites are: informal settlements, farms and former homelands, as well as thematic areas such as small businesses and early childhood educational centres in townships and informal settlements that suffer from various land administration constraints.
(f) Set up **institutional arrangements to monitor and evaluate the results** of these piloting interventions.

In the medium and long term, over the coming 2-5 years, we recommend new legislation and new institutions:

(a) The Technical Working Group will **evaluate the evidence from pilots and commissioned studies**.
(b) It will develop a **twenty-year vision** for Land Administration.
(c) It will drive enabling legislation which we recommend should be called the **Land Administration Framework Act** which allows for (a) a system of land recordal or a separate Land Records Act; (b) new system of adjudicating rights that allows for customary and other generally accepted local norms possibly in the form of a separate regulatory law on Land Rights Adjudication; (c) conflict and dispute resolution regulations; (d) regulations for a national Land Rights Protector.
(d) Institutionalise conflict and **dispute resolution mechanisms** at local level.
(e) **Establish a national Land Rights Protector** for managing higher-level conflict especially between the state and citizens, or corporate liability/responsibility, and to manage state accountability for enforcement and implementation of policies and laws.

The intended outcome of these initiatives is a revitalised, integrated and unified Land Administration system that provides a legal and institutional infrastructure for all land-related management and rights. It includes an integrated land tenure information system and data management system capable of recording all legitimate land rights in a way that recognises and accommodates normative diversity and a continuum of rights.

4. INSTITUTIONAL REFORM: A NEW AGENCY, REFORMED COURT AND CHANGED MANDATES

Land reform has been beset by severe institutional challenges. The panel has engaged extensively with key state institutions and deliberated on their mandates and efficacy, as well as contradictions and tensions between their approaches to and roles in land reform. We have focused on:

(a) DRDLR
(b) Commission on Restitution of Land Rights (CRLR)
(c) DAFF
(d) OVG
(e) Land Bank

In view of the information received and our discussions and analysis, we recommend the following significant institutional changes:

Transfer responsibility for Rural Development: The panel recommends that the mandate for rural development be removed from the DRDLR. Rural development is a coordination function that requires working transversally across government, both horizontally across departments and line functions, and vertically between national, provincial and local spheres of government. Rural development cannot be effectively implemented by a single department. How coordination of rural development, in terms of policy and implementation, can be achieved, must be further

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considered. Options include locating coordination functions within the Presidency, and specifically within the DPME.

The panel has carefully considered three possible options, weighing up the relative merits and demerits of each, including the coherence of policy and implementation modalities, as well as the time required for institutional restructuring, and possible delays in land reform that may result:

(a) Merging the DRDLR and DAFF
(b) Combining the DRDLR and DAFF in one ministry
(c) Establishing a Land and Agrarian Reform Agency

It is also necessary for other key state institutions to coordinate, including COGTA, which has oversight over municipalities as well as over traditional authorities; and Department of Water and Sanitation (DWS) which is tasked with water reform.

Establish a Land and Agrarian Reform Agency: The panel recommends that the president should consider the latter option, and establish a Land and Agrarian Reform Agency. This would constitute a single institution that would combine land reform directorates within the DRDLR together with directorates dealing with farming support within DAFF.

Retain two departments: The panel recommends that non-land and agrarian reform functions should remain with DRDLR and DAFF, as outlined in Table 6 below.

Transfer settled restitution claims to Land and Agrarian Reform Agency (LARA): The Commission on the Restitution of Land Rights should be responsible for all restitution processes up to and including settlement of claims, either via Section 42D agreements or by court order, as outlined in Table 1 above. Its role should end there. Implementation of settlement agreements, including land acquisition and transfer, establishment of legal entities, settlement planning and post-transfer land use support will all be the responsibility of the LARA.

Rename DRDLR: In view of the above proposals, we recommend that the DRDLR should be renamed. One option is to rename it the 'Department for Land Affairs' as it was in the past.

Table 6: New institutional arrangements for land reform

Institution	Land & Agrarian Reform Agency	Department of Land Affairs	Department of Agriculture, Forestry and Fisheries	Commission on the Restitution of Land Rights	Land and Agricultural Bank
Functions	Incorporating all land reform functions of DRDLR and DAFF, from policy and planning, valuations, beneficiary selection, land identification and acquisition, implementation, post-settlement support, monitoring and evaluation	Policy Land administration Surveyor General Deeds Registry Geomatics	Biosecurity Veterinary training International trade NAMC ARC Plant protection and improvement	Receive, investigate, validate claims, verify claimants, consult claimants on settlement options, and prepare claims for settlement or adjudication by the court.	Financing and managing a Land Reform Fund, in partnership with LARA.

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RECOMMENDATIONS TOWARDS A CONSOLIDATED LAND REFORM POLICY FRAMEWORK

The policy framework and implementation has not adequately addressed the distinct spatial contrast and differentiation as well as the alignment between historical, social, economic and environmental aspects. The proposal is for a clear policy framework with clear strategies and transformation outcomes. This must be coupled with a reformed institutional framework as well as land administration and governance framework that enforce alignment and complementarity.

A new White Paper on South African Land Policy by 2021: The panel recommends that South Africa needs a new White Paper to guide the land reform process. The current White Paper was initiated in 1995, released in draft as a Green Paper in 1996, and finalised in 1997. There was also a three-year Green Paper process between 2011 and 2014 that was never concluded. Given the extensive changes in law, policy and implementation modalities over the past 22 years, neither Paper reflects or guides our land reform process adequately. Instead, fragmented, incoherent and contradictory elements of policy have emerged. What is needed is a new, well-managed national consensus and direction for land reform, driven by a clear vision, specific policy direction across all aspects of the programme. This should not hold up progress with other recommendations emerging from this report, but can happen in parallel. We propose that the President requests the minister to initiative an inclusive process to inform a Green Paper to be published in 2020 and that the new White Paper on South African Land Policy be finalised by 2021.

Agrarian Reform: The panel proposes that land reform must be informed by an agreed vision for Agrarian Reform. We are agreed that agrarian reform should produce a greater variety of type, scale and forms of land use and production which is dynamic, and allows growth and accumulation along the spectrum of land holders and land users. However, where agrarian reform should focus, who should benefit, and what the new structure of agriculture should look like, are contentious issues. The panel is not agreed on what the vision should be for transformative Agrarian Reform. The panel proposes that options be widely debated in the public consultations in the process towards developing a new White Paper, which should address both land and agrarian reform.

National Land Reform Framework Bill: The panel recommends a National Land Reform Framework Bill, as recommended by the HLP, to operationalise 'equitable access' and provide a transversal frameworks for all aspects of land reform; to establish guiding principles for redistribution, restitution and tenure with land administration included as the fourth element of land reform; to set legal criteria for beneficiary selection; land acquisition and the choice of land for redistribution; to set in place measures to ensure transparency and accountability; enable allocation of secure long-term use and benefit rights, to provide for alternative dispute resolution and to establish a Land Rights Protector as an ombudsperson with a broad mandate across all land rights issues.

The Panel endorses the illustrative Bill produced by the HLP[3] and urges that the Bill should be gazetted and debated in Parliament urgently, to address the absence of adequate legislation on the right of equitable access to land.

Land Restitution: The Commission must prioritise the settlement of old order claims that were submitted by the first deadline of 31 December 1998, as required by the Constitutional Court, and provide options for claimants to opt for land redistribution or tenure security options to avoid the onerous requirements of proving past dispossession. The panel calls on the minister to use her authority to address legitimate claims which fall outside the eligibility criteria of the Act, such as Khoi-San and other pre-1913 claims, via land redistribution.

3 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Illustrative_National_Land_Reform_Framework_Bill_of_2017_with_Land_Rights_Protector.pdf

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It is important to note that there was a call that the Constitution, as a bearer of the aspirations of human rights and justice for all its citizens, cannot be seen to be excluding, preventing or neglecting the right of sections of its population to claim rightful ownership of their ancestral land, regardless of when it was dispossessed. Therefore, that section 25(7) of the Constitution needs to be urgently removed. It must however be noted that this was not agreed by the panel as a whole.

Strengthening the Land Claims Commission's capacity: The commission requires strengthening, with more skilled officials, and intensive training. Regional land claims commissioners should be appointed, and responsibility for implementation of settlement agreements and court orders transferred to the department. The panel recommends the commission convene a suitably-skilled panel of researchers to review the database, screen and investigate claims. Further, a permanent Judge President and four permanent judges must be appointed to the future Land Claims Court. The panel recommends fixing the legislative framework by pursuing the two laws proposed by the HLP: the Restitution of Land Rights (General) Amendment Bill[4] to define 'community' better, to require the referral of section 42D agreements to the court for approval and oversight, to improve reporting by the Commission to Parliament, to expedite transfer of restored land to the claimants, and to ensure greater transparency via a National Land Restitution Register. Second, promote the Restitution of Land Rights Judicial Amendment Bill[5] to strengthen the capacity of the Land Claims Court. Finally, more robust landholding entities are needed, and the department must fulfil its obligations to support communal property associations and report to Parliament. The commission should stop amalgamating claims, improve research and oversight as well as allow claimants to opt in or out of agreements, and distinguish landholding entities like CPAs from business entities operating on CPA land.

Land Redistribution: The panel recommends that land reform moves towards a targeted approach based on just and equitable compensation in which the state will work with those needing land and those holding land to identify where and to whom land will be redistributed. The key elements of the new approach will be: **area-based planning for land reform;** a **national land demand survey** to inform planning; the **localisation and democratisation of planning processes** that put the needs of landless and land-hungry people at the centre; identification of land to meet specific needs; land acquisition via land donations, negotiations and expropriation. The new approach must be people-driven, with a responsive state and supported by the private sector.

Beneficiary selection: Whose needs for land should take priority, and how should they be selected? Since the abandonment of land purchase grants and subsidies in 2011, there has been no system for rationing state funds, which opens opportunities for corruption. Beneficiary selection has not been transparent and there is evidence of so-called "elite capture" as businesspeople or those with personal or political connections acquire land ahead of farmers from communal areas or farm dwellers who have experience. The panel recommends that the majority portion (to be determined) of the available budget for land reform be focused on two categories – (a) farm dwellers, labour tenants and subsistence farmers, and (b) smallholder farmers producing for local markets. The remainder of state funds can be directed to medium- and large-scale commercial farmers, who are better situated to contribute their own capital and leverage finance from the Land Bank, commercial banks and other financing institutions.

Land Identification and Acquisition: Each municipality needs to identify which land is to be redistributed, with the input of local residents and the support of DRDLR, taking into consideration the capacity and corruption concerns at municipal level as raised in the Operation Phakisa reports. Area-based planning and beneficiary selection processes will determine whose land needs are to be prioritised and therefore what categories of land are required. To identify specific land parcels, or parts thereof, that meet these criteria will require mapping exercises that should be inclusive of the intended beneficiaries, taking into account the availability of water, relevant infrastructure and other factors. This local land reform plan should be embedded in Integrated Development Plans (IDPs), reviewed regularly, and be publicly available as maps, showing which properties are to be acquired for redistribution. Individual owners of properties that meet the criteria of land required

4 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Restitution_of_Land_Rights_General_Amendment_Bill.pdf
5 https://www.parliament.gov.za/storage/app/media/Pages/2017/october/High_Level_Panel/Commissioned_reports_for_triple_challenges_of_poverty_unemployment_and_inequality/Restitution-Judicial_Amendment_Bill.pdf

for redistribution, or for tenure upgrades for farm dwellers, may offer their land as donations, or enter into negotiations with the state, failing which the state may proceed to expropriate.

Climate Change: Land reform must contribute towards the achievement of a 'just transition' to a low-carbon and climate-resilient economy, by promoting sustainable land-use practices in ways that create jobs and livelihoods as well as responding to climate variability. The consideration of climate risks and vulnerability assessments should be central to land reform process. To this end, the state, private and non-profit sectors must assist land reform beneficiaries to, among other things, adopt climate-smart agricultural practices, including through specialised extension services. Small-scale farmers must be supported to access climate information services and adopt conservation agriculture practices which are low-input, low-emission and also cheaper, like low-tillage methods of crop production, which are more resilient to climate change and water scarcity. Extension services should also promote agroecological farming methods, and training programmes in agroecology must be developed and delivered at scale. All this requires the urgent reskilling of our agricultural extension services in climate-smart agriculture, agroecology and conservation agriculture. In addition, South Africa needs to shift away from feedlot production and towards grassfed livestock production; the potential to increase jobs and self-employment in grassfed livestock production must be a focus of land reform. Transitions towards climate-smart agriculture will require new financing mechanisms to assist farmers to cope with the adjustment, and it is proposed that the Land Reform Fund advance financing options to incentivise agroecological and conservation agriculture. Each land reform project must be assessed against criteria for low-carbon and climate-resilient land use prior to approval, and support must be given to land applicants to adopt conservation agriculture and agroecology methods.

Water Rights: Water allocation reform must re-allocate water rights to smallholder farmers, giving priority to those who pursue alternative production methods. Priority must be given to initiatives that demonstrate biodiversity restoration and rebuilding, the restoration of natural flows of water, and promotion of water harvesting and water retention strategies.

Land donations: The Panel proposes that a Donations Policy be developed as part of the new White Paper. This should specify the exemption from donations tax of any land donated to land reform and, once appropriate beneficiaries are identified, the state should carry the conveyancing costs of land transfer. Specific procedures to respond to offers of donation must be created so that the DRDLR becomes responsive and expedites acquisition and transfer. To expedite large donations from big institutional owners, we propose that the President call on the churches, mining companies, financial institutions, agribusinesses and others, to audit their own landholdings and identify their size, location, land use, as well as any long-term occupiers on these lands. Following this, we call on the Minister to convene, within the coming year, talks across these sectors to identify land to be donated and to open discussion with potential beneficiaries, including existing land occupiers.

Spatial Planning: Alter the spatial planning approach to settlement patterns by investing in settlement on redistributed land, the process must allow for more dispersed settlement on the urban fringe to support urban agriculture and part-time farming, and formalise and service small rural settlements. Densification needs to be part of urban land reform. In rural areas, planning at scale – rather than farm by farm – is needed to acquire and redistribute well-located land, subdivide these and provide appropriate infrastructure.

Subdivision: The panel calls on the President to assent to the Subdivision of Agricultural Land Act 64 of 1998 and sign it into law forthwith. Further, the President should explicitly call on all organs of state to work together to expedite subdivisions of agricultural and non-agricultural land to make available smallholdings for poor people, for residential, business and productive processes. Subdivision of large holdings, for the purposes of land reform, is essential if it is to benefit the poor and contribute to a less concentrate and unequal pattern of landholding.

Expropriation Without Compensation: The Panel endorses the proposed policy shift towards using the provisions of the Constitution to expropriate land without compensation. This need not, and should not, be applied in every case. Parliament will determine the nature of the Constitutional amendment, and will consider the latest version of the Expropriation Bill, which provides in section 12(3) for expropriation with 'nil compensation' in five specified instances . The policy question is when and how expropriation without compensation should be applied. The panel recommends that a compensation policy be developed for this purpose.

Compensation Policy: The panel recommends that a Compensation Policy be developed and that its key elements be formalised as regulations to the Expropriation Act. This should outline a compensation spectrum, ranging from zero compensation to minimal compensation, to substantial compensation, to market-related compensation. It should provide a typology of situations and indicate how compensation should be approached in each. For instance, property owners who bought land since 1994 should not be treated the same as those who inherited property. Big institutional owners who have large property portfolios should not be treated the same as families whose land is their primary livelihood asset. The panel proposes that the Expropriation Bill plus its regulations should be referred to the Constitutional Court for confirmation that they are consistent with the Constitution.

Tenure Reform: The panel proposes a bold new approach to recognising and recording the diverse range of tenure rights that exist within South Africa. While apartheid laws and regulations created a racialised hierarchy of rights, we endorse the principles underpinning tenure reform in the White Paper 1997, including legally enforceable rights, a unitary system of land registration and administration that is flexible, allowing people to choose their preferred tenure system, members of group-based tenure systems must be equal and enjoy due process, and tenure reform must recognise the de facto vested rights that exist on the ground. The **panel warns against private titling of communal land**. Rather, the panel **recommends a Land Records Bill** to enable the majority of citizens, who hold property 'off-register', to record and register their property – including residents of informal settlements, farm dwellers, labour tenants residents of communal areas, and others. This process should draw on lessons from experiments and pilots already underway in South Africa and in other African countries, including low-cost technologies and block-chain options that will over time enable locally-registered rights to be subject to arbitration and reflected in the Deeds Registry. The Bill should provide for local and accessible recordal of existing land rights, including those rights held as individuals, households, extended families and communities. The panel recommends that the state establish **local land boards**, building on experiences of the Land Boards of Botswana, to administer this system of land rights and to provide for local dispute resolution. A separate Tenure Reform budget line be created, as already exists for Restitution, so that support for land rights recordal, registration and administration is ring-fenced.

Financing Land Reform: Land reform is a government mandate and the state will fund it, but requires co-financing from the private sector. In terms of agriculture, the state should prioritise smallholders, especially smallholders who produce for their own basic livelihood needs and those who produce partly or wholly for markets, including informal markets. They will be the primary focus of the available state resources. The state should contribute towards medium- and large-scale farmers, but should use its contributions to leverage private sector support and use public subsidies to carry some of the risk of funding medium- and large-scale commercial black farmers. Overall, South Africa's land reform should focus on supporting all farming models which are geared towards achieving food security, increased production and export-led growth. From a housing perspective, the state should play a major role, while tapping into the envisaged Land Reform Fund.

Foreign Owned Land: The panel echoes the recommendations of the Panel of Experts on Foreign Land Ownership of 2006, including the motivations for a land ownership audit; compulsory land ownership disclosures with registrations of titles similar to FICA legislation; supporting amendments to the Deeds Registries Act and its regulations; and the development of policies purposed with availing land to citizens and protecting key and strategic land from foreign ownership.

Municipal Commonage: The panel recommends that the Municipal Commonage programme be **reinstated** and **reinvigorated**, including provision of funds for land acquisition and for infrastructure, maintenance and management. Each SDF should identify all land owned by municipalities and its current use; investigate and make publicly available information about the status and leasing out of commonage land (including duration and rent paid to the municipality); indicate whether there is a need to acquire further land as commonage, what purpose this will serve and how it will be managed. IDPs should identify and list people seeking access to commonage for grazing and for cultivation allotments and prioritise projects, indicating where and for what purpose additional commonage can be acquired.

Women Rights and Gender Equity: Women must have access to land if land reform is to realise its developmental goals. The Panel insists that the policy approach must purposefully redress gender imbalances in land holding by revising the existing rules of property in land under both customary and

statutory law in ways that strengthen women's access to and control of land, while respecting family and other social networks. Commitments made at the AU 2003 Maputo protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, as well as the 2004 Solemn Declaration on Gender Equality in Africa, must be delivered upon.

Farm Dwellers: The panel has received calls from various roundtables that there should be a moratorium placed on all farm evictions. We call on the President to make a public call for an end to farm evictions and to urgently expedite mechanisms to secure farm dwellers tenure rights in line with the law.

It must be acknowledged that the call for a moratorium on evictions presents both a constitutional and rule of law dilemma, in contravention of section 25(1) of the Constitution which provides that no person may be deprived of their property arbitrarily. The latter means that once a blanket pause to evictions is implemented, owners of property and lawful occupiers may be deprived from accessing their rights to courts, in defending against illegal occupations of land. The moratorium may result in the watering down of the protection of property against arbitrary deprivation wholesale, without recourse to courts and law enforcement agencies, thereby rendering the proposal unconstitutional.

The State may rather consider introducing categories of persons, and circumstances which may warrant stronger protection for vulnerable farm dwellers against illegal evictions, by utilising cogent and decisive monitoring and evaluating mechanisms in so far as farm evictions are concerned. The panel recommends that the Department of Rural Development and Land Reform (future Department of Land Affairs) urgently create an application system for farm dwellers to upgrade their tenure and expand their land occupation, as provided in section 4 of ESTA. Municipalities must include proposals for on-site settlement options in IDPs, SDFs and in SPLUMA processes, and national government must review the farm schools policy. The SAPS system must be reformed so that illegal evictions and violations of section 23 of ESTA are registered as criminal offences. Police, prosecutors, magistrates and attorneys in the Land Rights Management Facility panel all need training, and mentoring, by a dedicated training team, emphasising alternative dispute resolution, in relation both to ESTA and the LTA (see below). To guide all this, to monitor trends, to respond to cases and popularise the law, the panel proposes that a **widely-representative ESTA Task Team be reconstituted**.

Another possible manner in which the scourge of illegal evictions may be dealt with is a Constitutional amendment which may be required. In section 25(6) of the Constitution, it is provided that: "a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally insecure or to comparable redress. A possible amendment may include an added sentence which reads: "A person or community envisaged in this paragraph is protected from arbitrary eviction whilst in the process of upgrading their right to registrable and/or registered secure tenure". Although this is a possible proposal for an amendment, it is the Panel's view that it is not the advisable course of action in light of the reasons mentioned above.

Labour Tenants: The panel recommends that (former) labour tenants should be prioritised in the land reform process, including via expropriation, as these are black farmers already on the land but whose rights need to be upgraded and secured. The department must finalise its database of applications and prepare a proper, time-bound, costed and publicly available plan for implementation of the Land Reform (Labour Tenants) Act 3 of 1996. Parliament must monitor implementation of this plan; regulations to the Act need to be amended to address overlapping labour tenant and restitution claims; and those whose claims have been lost must have the opportunity to re-submit. The Land Reform (Labour Tenants) Act of 1993 requires amendment to provide for inheritance, to increase tenants' land access, to make mediation compulsory.

Land Audit: 25 years into democratic rule, there remains incomplete information regarding the question of who owns what land in South Africa. The panel therefore recommends that the minister for DRDLR engage with the Deeds Registry and Department of Public Works, and existing private sector-driven audits, e.g. the Agri-Development Solutions (ADS) audit, among others, to determine whether a national audit of both public and privately-owned land is feasible. There must be a determination of what mechanisms can be put in place so that this information can be regularly updated, disaggregated geographically and made publicly available.

Communal Land Tenure: Five laws affecting communal land tenure and governance at the Traditional and Khoi-San Leadership Bill, Traditional Leadership Governance Framework Amendment Bill, Indigenous Knowledge Bill, Communal Property

Associations Amendment Bill and Traditional Courts Bill – are inconsistent with one another, irrational and possibly unconstitutional. Although there is a view that these laws individually and collectively entrench the Bantustans by removing the right to equal citizenship in a unitary state, violating the principle of free, prior and informed consent, and reinforcing the powers of traditional authorities over customary and family land and resource rights. It is therefore crucial that government consults and engages directly, widely, meaningfully and adequately with rural communities and inhabitants of the former 'Bantustants' whose lived experiences and relationship and interaction between land, culture and heritage must inform government policy. Government must resist the temptation of being paternalistic and imposing notions of life and reality only through the eyes of western dominant culture. The panel therefore calls on the State to embark of the above-mentioned drive directly with the communities involved, prior to signing the Bills into law, pending clarity on traditional governance and communal land rights in the new White Paper. The panel is agreed that reforms are needed to the Ingonyama Trust. Either the Ingonyama Trust Act must be repealed and the Trust disbanded entirely, or land governance must be devolved to the local level, with rights vested in occupiers and governance functions resting with Traditional Councils. Meanwhile, the panel urges the state to start drafting permanent statutory protection, in a Protection of Informal Land Rights Bill, which will clarify the substantive forms and procedural safeguards for informal and customary land rights. This must provide statutory recognition of informal and customary land rights as constituting real property rights – registered or not.

Mining and informal land rights: The Minerals and Petroleum Resources Development Act and the Marine Living Resources Act both need to be amended to clarify that customary rights co-exist with rights awarded under these laws, and that customary law rights are not extinguished by regulatory property rights regimes. Instead, there must be free, prior and informed consent from people and communities directly affected before any change to their land rights for mining, commercial farming, conservation or other purposes.

Tenure reform in the former 'Coloured' reserves: In most of these areas, residents have indicated via referenda whether they wish their land to be vested in a municipality or transferred under private ownership to a Communal Property Association. The panel calls on the minister to expedite implementation of these choices, as required in the Transformation of Certain Rural Areas Act of 1998, and expeditiously transfer this communal land either to municipalities or CPAs. The panel therefore recommends that the **TRANCRAA process be re-initiated**, and calls on the minister to transfer the land to these communities or municipalities, according to the outcomes of the referenda and consultations already completed. This should be done **within one year**.

Land Tax Inquiry: The panel recommends that the minister appoints a Land Tax Inquiry to consider a national policy or regulations to the Municipal Property Rates Act of 2004, to impose rates on agricultural land so as to disincentivise the retention of large and unproductive landholdings. The tax system must be premised on the recognition that land must serve a social function that is of public benefit. The relative merits and potential demerits of such a tax, its design, thresholds, exemptions and use of revenue, should form part of the terms of reference of the inquiry.

Land ceilings: The Panel further recommends an in-depth assessment into the conditions for application of land ceilings. Consideration should be given the imposition of land ceilings to limit the total area of land that any one individual or company may own, so as to limit and reverse the trend towards concentration of land ownership, which is antithetical to land reform. Such ceilings must be varied across agro-ecological zones. The state must be empowered in law to compulsorily acquire surplus land and to determine which land is required for redistribution. Because land ceilings are generally difficult to enforce, we propose that the land ceiling issue be addressed alongside the land tax inquiry, so that large landholdings beyond a prescribed threshold may either be directly acquired by the state or be punitively taxed.

Corruption: The panel recommends improved oversight and more investigations and prosecutions to stop land-related corruption in all its forms. First, the Department must tighten up the beneficiary selection process to reduce the scope for corruption in land allocation, by rationing its available budget across different types of land demand and land users. Second, selection and allocation processes must be more transparent and there must be greater openness and accountability as to how these decisions were arrived at. Third, a **Land Rights Protector** must investigate allegations of corruption and refer cases to the NPA for prosecution. These three proposals are all addressed in the outline for a **Land Redistribution Bill** or **Land Reform Framework Bill**. In addition to

these measures, opportunities for political parties or traditional authorities to profit from transacting public or communal land must be curbed. **Vesting rights in residents of communal areas, rather than in traditional councils or leaders, is essential**, and the proposed **Protection of Land Rights Act** (a permanent and stronger version of IPILRA) is a starting point. Court cases, like the Bakgatla ba Kgafela and Xolobeni cases, confirm these rights of communities to 'free, prior and informed consent' and, where they agree to transact their land rights, to transparent and equitable processes of beneficiation. Finally, there must be better oversight over urban land owned by national, provincial and local government, and by state-owned enterprises, the demarcation of well-located and undeveloped land for low-cost, social and mixed-income housing, and the involvement of civil society organisations, social movements like shack dwellers, Reclaim the City and Abahlali baseMjondolo in consultations and decision-making regarding the use of such land for urban land reform.

Institutional Arrangements for Implementation: Major institutional changes are needed to advance a land and agrarian reform agenda. The mandate for rural development needs to be removed from the department as it is a coordination function and not a line function, and relocated in the Presidency, and possibly in the DPME specifically. To reflect this change, the **Department will need to be renamed**. To overcome the longstanding challenge of alignment between land reform, spatial planning and integration and agricultural development, the panel proposes the creation of a Land and Agrarian Reform Agency, which would combine land reform directorates in the DRDLR together with farming support directorates within DAFF and co-ordination and decision-making on all land by COGTA. Other departmental functions will remain within their respective departments. Responsibility for implementation of settlement agreements and court orders will move from the Commission on the Restitution of Land Rights to the department. Implementation of settlement agreements, including land acquisition and transfer, establishment of legal entities, settlement planning and post-transfer land use support will all be the responsibility of the LARA. The alternative is that all responsibilities by the state department in relation to land and property decisions involving land and property identification, acquisition, sale and development, be consolidated from DRDLR, DAFF, DWS, DEA, DPW, COGTA and DMR into a singular "Land Affairs" department, having consolidated budgets in so far as land and land reform is concerned.

Develop outcome indicators for land reform monitoring and evaluation: Government will work with other stakeholders to define what constitutes 'success' for different land reform objectives and identify 'outcomes indicators.' This will be the basis for the Department to reconstitute its monitoring and evaluation system, including baseline surveys of beneficiaries, longitudinal monitoring over time, and a control group of people who are not part of the land reform programme. A single national land classification system will need to be developed for the whole country; agricultural data collection improved to include production in communal areas and in land reform in the agricultural census and annual statistics; and multiplier effects of land reform on the local economy must be evaluated.





PART VIII

CRITICAL SUCCESS FACTORS

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CRITICAL SUCCESS FACTORS

The following critical success factors are identified by the panel as underpinning an effective land reform approach:

1. A shared vision for land reform
2. A capable state
3. Enabling participation, where the government works with communities and the private sector
4. A commitment to implementation
5. Curbing corruption
6. Managing social and economic risks to allay negative impacts and fears
7. Communicating to manage mis-perceptions and build solidarity



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PART IX

AREAS OF PANEL DISAGREEMENT

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On 18 September 2018, President Cyril Ramaphosa appointed the 10-member Advisory Panel on Land Reform and Agriculture. However, the conclusion and report-writing process was carried out by nine panellists following the non-participation by Adv. Tembeka Ngcukaitobi.

The panel approached the assignment with vigour, characterised by robust evidence-based arguments. Each member appreciated the diversity and different perspectives of the panel and every effort was made to accommodate and respect the different views. In general, the report provides a unitary view in terms of urgency and the required shifts necessary to make land reform a possibility. There are however specific areas of disagreement as highlighted below.

In terms of expropriation without compensation, the majority of the panellists supported the view including the amendment of the Constitution. However, Messrs Dan Kriek and Nick Serfontein registered their disagreement with expropriation without compensation and amendment of the Constitution.

The following is a summary of Mr Kriek's areas of disagreement:

1. Any mention of expropriation without compensation;
2. Any proposed amendment of section 25 of the Constitution;
3. The targeting of labour tenants for expropriation without compensation;
4. The proposal of a moratorium on evictions;
5. Any mention of a compensation policy;
6. Any forced on-farm settlements in terms of Extension of Security of Tenure Act (ESTA);
7. Any attempt to forcefully turn informal rights on farms into permanent rights that can be exercised in competition with the landowner;
8. Any attempt to do expropriation without compensation in respect of absentee landlords or landowners that have abandoned land unless the terms are very clearly defined;
9. Any targeting of a particular commodity such as game; and
10. The anti-titling approach to communal land.

Although Mr Serfontein agrees with the targeted land acquisition approach, he raised concerns regarding the abandoning of 'willing buyer, willing seller' method which he believes should be retained for strategic land parcels that may be offered. Other disagreements tabled by Mr Serfontein include proposals regarding a compensation policy and forging informal rights into permanent rights on farms.

Other areas of disagreement or differing opinions, mainly different approaches and perspectives on subject-specific areas, will be covered in the relevant sections of the main document. Annexure 2 also provides further reference in this regard. The panel remains grateful for the opportunity to contribute towards such a valuable process.

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PART X
CONCLUSION

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The Presidential Advisory Panel on Land Reform and Agriculture was entrusted with an enormous task to give recommendations that reflect the views of society as well as the needs of the country. The issues and previous problems of the land reform process have been greatly explored by other panels, reports and events. These guided the Panel in starting to identify solutions to these problems in order for South Africa and its government to use the Constitution to execute the Land Reform process.

The panel has also identified various areas of contention which highlight the complexities of the historical damage that is to be repaired in order for our society to realise economic development and security for all citizens. There has been a balancing act between understanding the needs of society, the views from private sector, understanding the capacity of government institutions, hearing the opinions and voices of rural and urban citizens and dissecting case studies and stories of land reform projects in South Africa.

It is clear that South Africans need to undergo an exercise which will galvanise amongst citizens a central land value system that will message a unified voice on the land reform process. This central land value system should reflect the needs and hopes of society in terms of their economic, social and spiritual attachment to land. Citizens need to understand the responsibilities associated with being custodians and stewards of land in order for the country to realise development and deal with the pressures of a growing population in a developing country. The aim of land as an economic tool should be a catalyst that shifts South Africa from a developing country into a developed country and to cope with the rising pressures of industrialisation and migration. The land reform process should also be seen as a tool for social reform if it has an aim to benefit those that are marginalised and previously disadvantaged. The land value system should also capture the spiritual needs associated with cultures and religions in order for policies to respect the customs and traditions of communities that view themselves as custodians and stewards while keeping the integrity and spiritual connection that land offers our citizens. It is important that one reflects on the social, spiritual and cultural importance on the implications of land and the access to security.

Policies and laws cannot reach their potential without the political will to implement and a state that has the capacity and heart to function and deliver to its people. It is important that the land reform process is not captured by individuals or families, monopolies or private sector corporations. Hence why corruption has been an area that was well discussed and researched as it is a major risk that can derail and dishearten citizens who desperately need solutions. Frameworks and policies should have feedback mechanisms that are open and transparent. These have to be shared with citizens so they can have access to the information and be able to make decisions on how they interact with the process. This element of openness and transparency is important to discourage corruption and capture and to message to citizens and foreign investors that the process and system is formal. The state needs to understand the importance of data as this will be the premise to develop the land reform systems in years to come and will be able to give feedback on whether certain programmes were successful and whether there needs to be a change or modification within the system to realise the needs of society as they change over time.

It is important that we understand how land is associated with race and class and how land reform may be one tool to bring those who are marginalised and continue to wallow in poverty into the forefront of inclusive development. The panel recognises the social elements that are associated with a process of rearranging the ownership patterns of land and how land reform has become an emotive topic to the people of South Africa. This has led to debates around the property clause and the protection the constitution has for land owners.

The message of the land reform process is not to undermine the property rights of individuals but to realise the constitution's mandate to deliver land reform as a corrective and restorative measure to historical issues. The underlying message should be: what is the responsibility of those who have property to those that do not? The constitution is the blueprint on how South Africans should conduct themselves. It is not fair on society when individuals seek the protection of the constitution without understanding their responsibility to the constitution. Even if Land Reform is the mandate of government to framework and implement, it is upon citizens who are in a privileged position to find ways in their own control and understanding for how land can be redistributed and shared. Citizens and land owners should come forward with their wishes and ways on how they can in their personal capacity assist the communities in which they reside. The constitution has given citizens a clear mandate to realise equality and socio-economic inclusivity and citizens have left the process to government. Government cannot act

on its own and would need the support of the private sector, NGOs and society to see the land reform process to its success.

Beneficiaries of the process should be those that society has identified as important and urgent for an intervention. The land reform system should benefit those that need it most and should not be captured by individuals, entities and organisations that want to benefit from the accumulation of land and wealth. It was important for the panel to have deep rooted discussion and explore research that could guide beneficiary frameworks that will highlight the importance of identifying marginalised communities and individuals who are in dire need of land rights, land security and access to land.

It is clear that citizens of South Africa require a government that is clear in messaging and is willing to implement the land reform process at a pace that matches the socio-economic developmental needs of society.

Our engagements and consultations have emphasized the need for urgency for land reform implementation. The capability of the state and the adequacy of its delivery systems remains a serious concern. Through this report the Panel has explored options that can assist government in reconfiguring the state machinery to deliver relevant programmes enabled by clear legislation and policies. Of importance is the recognition that land reform is everyone's responsibility, public and private sector including civil society, NGOs and communities.



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PART XI

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ANNEXURES

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ANNEXURE 1: FARMING MODELS

The panel's exploration of agrarian reform options assessed the merits and likely success of different farming models. The models ranged from individual farming models to group farming models.

Individual smallholder models are the most successful in the developing world as well as in Europe and Japan. Individual commercial farming on the other hand will help with the growth objectives, but not with the employment objectives of the National Development Plan, unless it creates small commercial farms. Meanwhile, group farming models are universally unsuccessful In group farming models, there is room for corruption as evidenced by a number of cases reported in the media recently.

This annexure primarily discusses farming models in terms of agricultural production and income growth. The focus falls mainly on the viability and the conditions for the viability of the different models. The conclusion summarised in the matrix below will be discussed under each model heading.

Merits and Viability of Different Land Reform Models

		OWNERSHIP OF THE FARMING OPERATION		
		Group	Individual small-scale commercial farms	Individual large-scale commercial farms
OWNERSHIP OF THE LAND	Government (DRDLR) PLAS Model Leaseholders rarely got ownership or got it late	Unviable (Model 1)	Requires ex-ante identification of beneficiaries and immediate, secure long-term leases (Model 2)	Requires ex-ante identification of beneficiaries and immediate, secure long-term leases
	Commonage land Is probably mostly grazing land	Viable for livestock farms with individually owned animals (Model 3a)	Viable if animals individually owned but grazed on common pasture (Model 4a)	Viable with secure long-term leases (Model 5a)
	Group/community Group ownership has often been successful, including in communal tenure	Group farming unviable and strategic partnerships rarely successful (Model 3b)	Highly viable for arable land, grazing and forest land often communally owned (Model 4b)	Requires leasing out of land, or strategic partner (rarely successful) (Model 5b)
	Private (corporate ownership?)	Group farming unviable and strategic partnerships rarely successful (Model 3c)	Highly viable (Model 4c)	Highly viable (Model 5c)
	Self	X	Highly viable (Model 4d)	Highly viable (Model 5d)

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Model 1 and Model 3: group operations on government-owned land and on land not owned by the government

While the group model, if successful, would create significant employment and livelihoods, in our discussion in Part II we highlighted the experiences and weaknesses with the group operations model – often implemented in the form of Communal Property Associations (CPA) or community trusts. In many of the earlier land reform projects, communities owned the land through CPAs or community trusts and then also worked the land collectively. In later years the land would be owned by the state under the State Land Lease and Disposal Policy, with tenure rights afforded to CPAs. As the weaknesses of the group operation model is evident no matter what the ownership of land is, it is probably sensible to combine all options of group operations in this discussion.

Both CPA's and Co-operatives can work well, and many people prefer not only to hold their land jointly but also to farm in groups. Yet many of the Communal Property Associations and Co-operatives struggle to farm successfully. While these are appropriate ways for groups to own the land, difficulties emerge due to lack of state support for these institutions, for instance as required by the CPA Act. However, when projects are poorly designed, problems arise with managing labour, input, and investment. This leads to many conflicts; within communities, with strategic partners, and with DRDLR officials. To the extent that CPA's and Co-operatives experience these problems, it is both due to poor design and a failure of state support. Fixing group projects and designing and supporting new ones better is essential.

A review of land reform projects in the North West Province in 2005 and again in 2010 (Kirsten et al., 2014) confirm some of the theoretical problems with group operations per se (whether on government or group owned land). The evidence from the two waves of surveys suggests that the group operation of smaller groups (<5) are most successful. It was established that the projects with five members or less had the greatest proportion (78%) of projects in which production was either stable or increasing. Furthermore, there is a steady decline in the proportion of successful projects as the sizes of the groups increase. In groups with 6-10 members, 50% of them are successful. Fewer (44% and 38%) are successful in projects with between 11-20 and 21-50 members respectively and only a third (33%) of the projects with more than 50 members was successful. It was observed that conflict between group members was an important reason for failure because in more than half (56%) of the projects with no conflicts production is either increasing or stable.

The evidence of a high failure rate amongst group based operations confirms our theoretical arguments made earlier as well as confirming the global evidence. For the sake of brevity we will not repeat all our arguments presented earlier. Efforts have been implemented by the state to revitalise many of these failed group operations. One such process was the RECAP program often implemented in collaboration with strategic partners. Even if successful, the model of strategic partners often disempowers the beneficiaries, generates little employment and leads to little skills transfers. Yet subdivision of farms continues to be discouraged. It is often not even discussed as an option.

What we have presented here largely falls within the category of Models 3b and 3c – group operations on private owned land or land owned by community trusts. Our conclusion in the table on the previous page is therefore confirmed by the evidence showing the unviability of many group operations on transferred land. The poor incentives to work hard and invest in group ventures, the intricacies of large farming operations, and the need for critical and timely decisions put any group operation at risk of failure. It is however our view that group operations on commonage land – mostly grazing could be viable provided that community rules/institutions are intact and well enforced by community leaders.

Group ownership of land can be a viable ownership model. Poor performance by some Communal Property Associations is largely due to poor design and lack of support, rather than due to the model itself. Cooperatives are also a legal entity preferred by some beneficiaries and can be well suited to groups with similar objectives. Communal tenure all over Africa and the rest of the world vests the property rights for land either in the state and the chief allocates the land to households, who normally have secure and inheritable user rights. Land reform programs in Mexico, Brazil, and Malawi, for example, provide ownership of land to the land reform communities, who subdivide the land used for housing and for crops into individual holdings, and often keep pasture and forests under communal use. The communal ownership is known to provide a safety net for poor community members. However, communal land cannot be used as collateral, which reduces access to credit. The model is therefore a second-best compromise between the safety features of the model and access to credit.

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Due to the high prevalence of failed group operations it is unlikely that the model will contribute to the increased household income as well as improved food security objectives. In addition the declining agricultural output and revenue makes it impossible for members of the group to secure full employment or a decent livelihood and are thus forced to find employment elsewhere. This is usually difficult and the result is increased unemployment and increased poverty. Low output from these projects has an impact on total agricultural output and agricultural value-add and negatively impacts on economic growth.

Model 2: Individual smallholders on land owned by government

This model links up with the scenario where the State buys land under the PLAS programme and then leases the land to individual smallholders under the conditions of the State Land Lease and Disposal Policy.

Land acquisition via PLAS has proven to be very inefficient as land has often been bought at rates far exceeding a fair market value. A compulsory right of first refusal in favour of the state based on the Namibian model can assist in this regard. Whenever private sales are negotiated and concluded, the State should be offered the opportunity to intervene and purchase the land on the same terms agreed by the parties. Only when the State expresses no interest within a given timeframe, can the private sale go through. This will ensure that the State does not receive inflated offers. The Office of the Valuer-General (OVG) also needs to be capacitated and its legal mandate clarified. The OVG should be able to make use of mass valuation techniques used to assess municipal property rates. Where expropriation is contemplated, the Expropriation Bill should clearly outline the role which the OVG plays in determining the 'value' of the property using quantifiable factors and recognised valuation methodology suited to different types of land and agricultural commodities. The State should then be able to consider this report and apply qualitative factors relevant to the owner's own circumstances, to offer an amount of compensation which it deems just and equitable.

The difficulty with this model is brought about by the dilemma in accessing production finance. Most formal financial institutions implement strict collateral requirements for production loans. As the ownership of the land is not linked to the operator of the land access to production finance is not in place and at the same time CASP funds or access to MAFISA loans are not necessarily available in time shortly after the lease is awarded to the smallholder.

This model is therefore unlikely to be successful unless operation funds are made available immediately as the lease is awarded. In addition, it is important that the lease is long enough for the farmer to obtain commercial production loans after the first three successful seasons. Such funds should be provided to the farmer with a solid state guarantee in place. In addition the success of this model requires ex-ante identification of beneficiaries, and the immediate securing of long term leases. As a minimum requirements, all beneficiaries should receive written lease agreements no shorter than 5 years. The practise of short-term leases as 'care takers' should be scrapped immediately.

Model 4: Individual smallholders on land not owned by government

From international and South African experiences, it can be seen that smallholders can contribute to both self-employment and employment as well as to agricultural production and growth. There are in essence four options under model 4, largely shaped by the nature of the ownership of the land.

In model 4(a) we have individual smallholders on commonage land. In this case, the most viable option would be where individuals own their own animals but grazed on common pasture. In cases where the traditional authorities manage the grazing system effectively, it will introduce sustainable production. The role of the state in providing veterinary services as well as basic animal infrastructure (kraals, sheds, auction pens, etc.) and marketing opportunities could effectively deal with some of the important challenges preventing these farmers from earning a livelihood from their meagre agricultural assets.

This conclusion is well supported by two case studies in the Eastern Cape. In the first case, the National Wool Growers' Association is supporting communal sheep farmers in the former Transkei and Ciskei with mentorship programmes, training in basic shearing and wool classing, the building of shearing sheds and linking the better classed and better produced wool to the export market. This intervention increased the wool revenue in these production areas from R1 million in 2000/01 to R113 million in 2012/13. This is an illustration of how individual smallholders can make a decent living on commonage land provided that certain key aspects are in place.

In the second case, the National Emerging Red Meat Development Programme was implemented by the NAMC and some private partners to introduce auction pens, feed lots and livestock auctions in many remote areas of the Eastern Cape. This programme improved market access, improved incentives and led to an improvement in the numbers and quality of animals offered for sale. Again, sale numbers and revenue increased rapidly as a result of this intervention.

Both case studies illustrate that individual smallholders on commonage land could provide a viable option provided that institutions, infrastructures and vital support services are in place.

Model 4 (b) is an option where individual smallholders farm on group-owned land. We argue that this option could be viable for arable land, grazing and forest land often communally owned. The level of production of crops and animals will again depend on the availability of key support services as illustrated above. Local institutions dealing with land allocation and management will however also be critical to ensure some form of security of tenure that could incentivise investment and improvements.

Model 4 (c) refers to individual smallholders on privately owned land by renting or leasing the land form a private or corporate owner (perhaps, corporates or private persons that lease land at preferential rates to black farmers get BBBEE recognition). In this case there will be private contracts in place defining the rights to land. It is likely to be a viable option provided that the possible constraints to production finance are dealt with. Credit arrangements with the landlord, or interlocking contracts with retail or processing companies could provide viable options for smallholders. Some mentorship arrangements or contract farming operations could also be relevant here to assist with potential price and other risks.

In model 4 (d) the smallholder is the individual operator and also the landowner. This is the most prevalent and successful small farmer model around the world. Again this is a viable option given that access to finance could be less problematic due to available collateral. Although this could increase vulnerability and risk of the farmer it could be overcome by string links with agribusinesses, input companies, financiers as well as solid off-take agreements. This model has been seen to be successful in many parts of the world where smallholder farming operations dominate.

Model 5: Individual commercial operations on land not owned by government

This model is well placed to contribute to agricultural growth. Under this model the land would be either (a) owned by the private operator or (b) owned by the government and leased to an individual private operator. The private operator could be a corporation or an individual beneficiary of land reform. Global experience is that model 5 (a) is a highly appropriate model for commercial farms of very small to very large land sizes. The reason is that work, management and investment incentives are all aligned because of the private profit objective of the model and the farmers who use it. It is also the model of the large scale commercial farming sector in South Africa which has been a high performing sector in the past 20 years, even though all programs and policies that provided it with special benefits, have been abolished.

Model 5 (b) would also be a viable option if land leases were issued immediately upon purchase to beneficiaries who would have been identified prior to the land purchase and presented initial plans on what they would want to do with the land. As discussed, probationary leases should not be used because they undermine investment incentives, and even under poor performance, are almost never revoked. It is therefore hard to see what the benefits of such a system would be. Instead leases should be long term, renewable, and transferrable after a certain period.

Land and banking legislation would need to be put in place so that the leases would be so secure that banks would be willing to accept them as collateral. However, experience so far under PLAS and the State Land Lease and Disposal Policy have not been encouraging; leases have often been delayed and have not yet been accepted as collateral for loans. Farm development is therefore often seriously delayed, reducing the return on the government's and the farmer's investment.

The amount of post-settlement support needed under this model depends on the size and beneficiaries of the commercial operation. Small farms settled with poor beneficiaries will need support with extension, marketing, and startup and investment grants, which they may supplement with credit. If instead the land transfer is to middle or upper class beneficiaries, they should be expected to finance startup and investment costs by themselves, as otherwise such a model becomes an extreme case of elite capture.

COMMENT

ANNEXURE 2: PANEL CONSULTATION SUMMARIES

National Land Colloquium 1: 6 - 7 December 2018

The Advisory Panel hosted a colloquium on 7-8 December 2018 at Birchwood Hotel, Boksburg, Gauteng. The colloquium was attended by close to 200 delegates from across the public sector (including parliamentarians), private sector, civil society, academia, and other concerned citizens. In attendance were also members of the Inter-Ministerial Committee (IMC) on Land Reform - Minister in the Presidency for Planning, Monitoring and Evaluation, Dr Nkosazana Dlamini-Zuma and Minister Maite Nkoana-Mashabane of Rural Development and Land Reform. Deputy Minister Andries Nel of Cooperative Governance and Traditional Affairs, and Deputy Minister Sindisiwe Chikunga of Transport were also present. Minister Dlamini-Zuma acknowledged that the work of the Panel will be an important contribution towards refining the modalities of an effective Land Reform process to secure the dignity of the landless and restoring the birth right of all South Africans.

The colloquium was used to solicit responses to these, and learn more about international experiences, as well as fill-in data gaps. It was timely as it happened around advanced discussions on Expropriation Draft Bill by Cabinet, and processes towards the Constitution amendment for EWC in Parliament. These were acknowledged, with focus also on other land reform implementation gaps identified by the Panel. These include Beneficiary Selection, Rural and Urban Tenure Models, Land and Agrarian Models, Sources of Land for Reform. The following critical areas were recommended by the colloquium:

Land rights and Tenure Models

1. Land Reform Policies with effective and efficient Land Administration Framework and Land Governance Systems. This includes the establishment of the Land Observatory that must record a continuum of rights, land use, water, minerals, leases, and usufruct.
2. More work to focus on compensation models (including zero compensation) in line with developments on expropriation without compensation.

Private Land Acquisition Strategy

1. The strategy needs to be urgently developed to fast-track redistribution.
2. The willingness of churches, the mining industry and white commercial farmers to donate land, must be guided by a clear policy to avoid unintended consequences.
3. Prioritise the Redistribution Policy and National Spatial Development.

Framework - Agricultural and Urban Land Models

1. A clear beneficiary selection strategy with review of structures like the Communal Property Associations (CPAs), and addressing women ownership in rural and urban areas.
2. Land evictions to be stopped.

UNWomen Women's Land Rights and Land Reform Roundtable: 11 February 2019

The Expert Advisory Panel on Land Reform in collaboration with the United Nations (UN) Women South Africa Multi-Country Office (SAMCO) and the South African Women in Dialogue (SAWID) convened a roundtable discussion at the Birchwood Hotel, Boksburg, on 11 February 2019. The participants were drawn from government, development partners, academic organisations and civil society.

Public hearings have highlighted that although the government has done a lot for women, more needs to be done to address the concerns of women in land expropriation and land reform. the report from this roundtable provides a basis for identifying the challenges women have, and recommendations for addressing them were also generated.

In the context of the consultations on the land reform and public hearings on the Land Expropriation Bill and the recommendations generated, the report will be used to inform the gender review of the legislation. The recommendations presented will be used to inform the gender sensitivity of the legislation. This will not only remind the decision-makers of the situation of women, but will also compel them to involve issues of women into Land Reform and Land Expropriation.

The report will contribute to the finalisation of the respective legislation and inform the review of other

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policies for gender sensitivity. To that end, this report will be a resource for not just the women, but the policy makers and other stakeholders interested in improving the lives of women in South Africa.

A list of recommendations were made to improve women's land tenure security in South Africa:

1. Harmonisation of laws and practices
2. Informal land rights
3. Gender sensitive information dissemination
4. Enhancing gender sensitive land administration
5. Tackling gender-based violence
6. Relevant empowerment packages
7. Using tenure and land reform to facilitate inclusion of women
8. Empowerment of women

National Land Colloquium 2: 22 - 23 February 2019

Following the first successful colloquium, the Panel formulated policy proposals to be presented to a bigger, more representative audience in February 2019, prior to the preparation and submission of the final report to the Presidency. The Second Land Reform Colloquium built on the December 2018 colloquium discussions with participants from all spheres of government, civil society, academics and private sector. In attendance were members of the Inter-Ministerial Committee on Land Reform, namely the Minister in the Presidency for Planning, Monitoring and Evaluation, Dr Nkosazana Dlamini-Zuma and Minister Maite Nkoana-Mashabane of Rural Development and Land Reform, Minister Michael Masutha of Justice and Correctional Services, and Deputy Minister Mcebisi Skwatsha of Rural Development and Land Reform.

Minister Dlamini-Zuma in her opening speech applauded the Panel for the progress and consultation efforts, highlighting the urgency as people are becoming increasingly impatient. She reminded the gathering that "We emerged from the first colloquium with a general consensus that land, as well as its accompanying flora, fauna and waters are at the centre of our collective growth and development as a nation." She emphasised the need for good land governance and to address women's rights to land. Having emphasised that addressing the land question would, beyond resolving issues of settlement, also touch importantly on all forms of justice and human rights, she closed with the words of American civil rights leader Frederick Douglass who cautioned that "Where justice is denied, where poverty is enforced, where ignorance prevails, and where any one class is made to feel that society is an organised conspiracy to oppress, rob and degrade them, neither persons nor property will be safe."

Acting Constitutional Judge, and former Chair of Human Rights Commission, Judge Jody Kollapen spoke about how land reform is about achieving social justice and realising the vision contained in the Constitution. He warned against the over-judicialisation of land reform, since land reform delivery is an executive function of government, and courts should only play the role of ensuring that procedural and substantive rights are safeguarded in the delivery of land reform processes. He proposed the inclusion of mandatory mediation in the Panel's report.

The discussions were intense and vibrant, key issues raised including:

Learn from the Land Restitution process

Chief Land Claims Commissioner Nomfundo Gobodo-Ntloko provided updated information on the land restitution process (wherein 3.5 million ha of land at a land cost of R21 billion, and financial compensations totalling R14 billion to an overall beneficiaries count of 2,117,644), including key lessons learned from it. She noted the continued reliance on use of Expropriation Act of 1975, which does not factor South Africa's current Constitution. Minister Masutha further gave a brief on government's efforts to review the Land Claims Court to address capacity constraints, introduce enabling legislation and mediation mechanisms.

Shift from a Transactional to Transformational Approach

The importance of prioritizing restorative justice was emphasised. Land reform should be used to transform racial inequality and contribute to reducing poverty.

Clarify Land Reform Class Agenda

The elements of a class agenda were highly debated. Social movements of the landless and those in informal settlements cautioned against disregarding their voice and structures in favour of traditional structures. The case of farm dwellers and labour tenants was also highlighted. The debate extended further to the classification of farmers (subsistence, small scale/smallholder, emerging and commercial) and prioritisation of support. There was a demand for clarity of the driving agenda (household food security, commercial production, etc.) and determination of transparent, suitable interventions.

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The role and capacity of the State in leading Land Reform

The role of the State was emphasised with recognition of the critical role of private sector and civil society. The concerns raised were about capacity and the trust deficit as barriers to forging effective partnerships across the board. It was deemed important to sensitively guide the principles of cooperation towards land reform and transformation.

Private sector commitment through financial institutions

Banking and asset managers were called upon for innovative financing for agricultural land reform and other land uses using different instruments including 'blended financing' - combining private and public finance. The conference highlighted the important consideration of land as an asset class for financial institutions, versus a human rights view and peoples' livelihoods. Also the current reality is that most beneficiaries are locked out of opportunities to access production credit.

Establishing Land Administration

Land administration for unregistered rights is virtually non-existent, badly coordinated and in most cases in former homelands and informal settlements collapsed. Most citizens have no registered land rights – in informal settlements, communal areas, farm dwellers, family owned township homes and elsewhere. An urgent need was identified for government to mobilise communities using localised, accessible systems to enable people to record their land rights. Land administration should therefore be adopted as the fourth leg of land reform.

National House of Traditional Leaders: 14 January 2019

The John Langalibalele Dube Institute at the University of KwaZulu-Natal partnered with the National House of Traditional Leaders (NHTL) to host the roundtable on Rural Land Tenure Models on 14 January 2019 in Durban. The roundtable took place prior to the policy formulation meetings of the different provincial houses.

Traditional leaders who attended the meeting expressed strong opposition to issuing of title deeds in communal areas as it is based on a lack of understanding of African traditional systems and has had the unintended consequence of bonded properties being lost to financial institutions upon default on loan repayments.

They expressed the view that the land administration system should respect and acknowledge the lived experience of traditional communities in various areas. This requires more than one land administration system, each tailor-made for localised rural life and land tenure systems.

Furthermore, traditional leaders did not support the role of the tribunal established in terms of the Spatial and Land Use Management Act (SPLUMA) as it usurps their role in land administration.

They noted that collapse of the Communal Property Associations (CPAs) and land holding trusts often lead to traditional leaders having to mediate when disagreements emerge among members.

The Traditional Leaders expressed the need to make more land available for communal areas to address the problem of congestion.

They also expressed a strong view that discussions on availability of land for land reform purposes should focus on the 87% of land that was historically set aside for white occupation, access and ownership. They therefore hold the view that the 13% of land that was set aside for occupation by Africans should not be considered at all.

They further express the strong view that the preoccupation with the Ingonyama Trust land misses the point that the amount of land held by the Ingonyama Trust only amounts to 3 million hectares; it is of poor quality as it is dry, rocky and mimosa ridden. The discussion on Ingonyama Trust land is therefore not helpful in the broader context of addressing the land needs of Africans.

Urban Land Reform Roundtable: 8 February 2019

A variety of urban stakeholders were invited to participate in an Urban Land Reform Roundtable in Johannesburg which was co-convened on 8 February 2019 with the National Planning Commission and South African Cities Network, and hosted by Werksmans Attorneys. The objectives of this event were: to stimulate informed discussion and debate on different policy options and models for land redistribution in urban South Africa; to clarify the trade-offs involved in policy making and the costs and benefits of different choices; to develop a range of indicators of the outcomes of different land redistribution models; and to feed ideas about different policy and action options into official policy-making, planning and

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implementation processes at various levels. The focus was on urban land and human settlements, spatial strategies, property markets, land governance and administration.

The roundtable advanced several recommendations for the land reform agenda:

1. A strong normative statement about urban land is required, including recognition that the city is a place of spatial, economic, social and democratic concentration and this presents opportunities for citizenship; that affirming that the city allows citizens to see and have experiences helps to realise the promise of The Constitution; and that exclusionary forces are at work, therefore we need to increase equitable access to land tenure and use for equitable economic gain.
2. The public sector can make several immediate interventions such as:
   (a) Utilising existing capacity towards reform, e.g. the cadastre and title deeds.
   (b) Focussing on areas of privilege, conducting demonstrator projects with existing actors / partners, supporting SME's to operate buildings, and issuing national directives towards a target of fair share (neighbourhoods).
   (c) Insisting that all new developments will be inclusive, where necessary expropriating valuable land for low cost housing (and demonstrating that this is viable). However, also developing the townships to the standard of wealthy suburbs.
   (d) Expropriating private unused land in the suburbs and city for redistribution.
   (e) Proclaiming unproclaimed land.
   (f) Make land available for sites and services.
   (g) Concluding a national housing policy.
   (h) Giving everyone a sense of security, and accommodating diverse tenure systems.
   (i) Using section 25 process to negotiate with owners to transfer bad buildings to city ownership, and run inclusive processes of upgrade and development.
   (j) Identifying parts of the city for social housing.
   (k) Registering people outside of the current system.
   (l) Obligating stakeholders to implement policy where this has been slow.
3. Corporate /private sector-related interventions could include :
   (a) Developing a blended funding model for sustainable access to urban land;
   (b) Extending property code (Charter?) to apply not only to commercial or industrial property, but to residential property too.
   (c) Offering tax incentives (J12) to donate valuable land, funding.
4. "Unsticking" and leveraging existing policies and mechanisms should be an immediate priority, e.g. NEMA, PFMA & MFMA, SPLUMA, ISUP, IUDF, inclusionary housing policies, etc.
5. Mapping and review of case-based interventions so that we can learn from experience; learn from success stories and interrogate why certain interventions have not worked as intended.
6. Issues with the property system and tenure must be addressed – off-register rights; government titling of housing that they administered (2.8 million properties); recognition of what is happening on urban land; the need for an effective and modern (use new technologies) public property administration (and general land administration) system.

Roundtable: Women's Land Rights and Land Reform: 11 February 2019

The Expert Advisory Panel on Land Reform in collaboration with the United Nations (UN) Women South Africa Multi-Country Office (SAMCO) and the South African Women in Dialogue (SAWID) convened a roundtable discussion at the Birchwood Hotel, Boksburg, on 11 February 2019.

Attended by individual and organised women from across South Africa, the key objective of the roundtable discussion was to provide a platform for women to input into the Land Expropriation Draft Bill with a specific focus on how access and ownership of land by women contributes to gender equality and empowerment of women. Inputs included a presentation on the Expropriation Bill by the Department of Public Works (DPW); Global Trends and International Lessons by UN Women; and Social Aspects Enabling Land Reform by the Advisory Panel on Land Reform.

Critical issues for a land bill or policy to address women issues identified from the Roundtable event included:

1. An audit, baseline and/or map of existing law on customary/ principal/ national/ regional/ international approaches focused on women land issues.
2. Harmonise/align with regional and global frameworks (for example, SDGs 1, 5 and so on).

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3. Mainstream gender within the Bill (inter-sectionality).
4. Ensure inter-departmental collaboration on women and land issues.
5. Review lessons learnt from other countries on addressing gender and land issues including those within the Southern African Development Community (SADC).
6. Facilitate broader public participation and constitution on the bill, and ensure accessibility of the bill.

Priority interventions and recommendations for effective implementation:

1. Government should start allocating available land and the land should cover all components in the economic landscape, not just agriculture.
2. Capacitation should include Resource and mobilisation, mind-set change – CSO support, skilling, information dissemination (all media platforms).
3. Put in place monitoring and evaluation systems to measure progress and to ensure accountability, consequence management, and blueprint of success stories.
4. Women must mobilise other women and organise themselves.
5. Create own accessible market.
6. Promote local land produce and consumption (make it fashionable).
7. Solidifying procurement from government.
8. Quotas should be informed by portion of women population.
9. Ensure balanced representation in all decision making bodies.
10. Create new bodies that will participate within existing structures dealing specifically with women and land issues.
11. Protection of individual rights within polygamous marriages.
12. Sufficient budget should be allocated for education and awareness building for women and land issues.
13. Mobilisation and advocacy.
14. Make special effort to include youth and young women in all engagements.
15. Clear and transparent processes for applications to acquire/access land.
16. Implement systems that will last until completion – transparent, accountable.
17. Sufficient time and resources should be allocated to consultative processes.
18. Ensure buy-in by communities.
19. Establish clarity on rules and legislation governing distribution of expropriated land.
20. Capacity building and support should go hand in hand with appropriation (there must be transparency and qualifying criteria).
21. Employ technology (to mitigate human factors) systems to aid transparency and efficiency.
22. Put in place a technical task team for harmonisation of laws.
23. Apply best practice. For example, ask the question: What would China do? – Training first and then land allocation?
24. Raise awareness covering all different women including through mechanisms such as campaigns, workshops and roadshows.
25. Establish forums consisting of all relevant non-governmental organisations (NGOs) (NB all women), that is, women-based organisations such as SAWID, South African Women in Farming (SAWIF) and so forth.
26. Capacitate, educate, train.
27. When women are resourced (money, land) they need to be empowered with psychotherapy, life coaching, and business mentorship.
28. Appropriate financial instruments for women (different models, different needs, short vs. long, de-risk, off-take driven market linkage).
29. Adopt a "sunflower model" (Use commercial farms to unlock out grower programmes (multi-cropping), bulk-buying, bulk-selling, resource access).
30. Capacity building (technology) and market access.
31. African Farmers' Association of South Africa (AFASA) representing women from grassroots come together around the table to ensure effective implementation for the benefit of women – driven by the office of the ministry of women, it will also advise on the issue of South African women being represented at SADC and Africa level. Call for a meeting by end of February 2019.
32. Black women should start buying from other black women so that money circulates among women.
33. Government should ensure accountability with respect to procurement of goods by big players, government and big business should buy locally.
34. Unlock small producers using big enterprises so that they supply local and international markets, and to ensure that they produce quality in order to get a better rate for their produce.
35. Responsibility should go hand-in-hand with rights, there is a need to use land optimally once transferred.

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36. The export market should be maximised.
37. Education and awareness raising that is inclusive including NGOs and women at the grassroots level for them to take advantage of expropriation of land without compensation.
38. Women's voice should be amplified at policy level.

The session was closed with an acknowledgement that women need to be at the table where land issues are being deliberated on. There is a need to do this not only for current generations, but also for future generations. The issue of land is about the future of all South Africans.

Land Reform and Climate change Roundtable: 11 February 2019

The Advisory Panel on Land Reform and Agriculture recognised that the land question in SA, especially since the ruling party's historic resolution of the 54th elective conference in December 2017, has not adequately addressed climate change issues for both urban and rural areas. As such, on 11 February 2019 stakeholders were invited by the Advisory Panel on Land Reform and Agriculture, the National Planning Commission and the National Department of Environmental Affairs to participate in a Land Reform and Climate Change Roundtable to contribute to the Panel's report.

If the Panel's work will contribute to revisiting the National Land Reform Framework Bill which is meant to supplement the 1997 White Paper, then it must have climate change as one of its key drivers. Within the context of equity, justice and fairness, land justice and human settlement must also consider climate change and climate justice.

Projected climate change figures over Africa show us that the climate trends are more intense than ever before, and the southern Africa region is heating up faster than other regions (twice the global rate of temperature increases). This means that when the 1.5 threshold is reached, Southern Africa will be at 3 in fact. The IPCC 2018 report indicates that we will have to reduce CO2 emissions by 45% compared to Year 2000 levels and get to net zero emissions by 2050 if we are to avoid the 1.5 threshold (and by 2070 if we go for 2 threshold). Southern Africa is recognised as a hotspot in the report.

Climate change and land reform are thus necessarily interrelated and need to inform each other. Chapter 8 of the NDP speaks to this in relation to settlement patterns and dealing with issues of sustainability. It is important that we are linking land reform with spatial transformation, linking land reform to the transition to low-carbon economy, and linking all of this to financing mechanisms. This would be a progressive sustainability agenda driven through land reform, and can change the way South Africa operates and works. There are numerous other interrelated considerations that were raised in the dialogue, from food security (South Africa's highly concentrated food production system; climate adaptation; carbon footprint; sustainable ecosystems; protecting ecosystems (high-value agriculture land and water catchments); climate smart agriculture approach; climate service support; failures of reform in water use licensing; unavailability of data at the relevant resolution. Consideration must also be given to agriculture, urbanisation, fairness in distribution, and mitigation policies of the country. And this consideration must include urban contexts where the land issue presents itself through property which comes in the form of serviced land.

The following were the priority policy proposals made:

1. Integrated policy and inter-governmental (vertical and horizontal) approach, noting trade-offs and constraints.
2. A vision for what a just and equitable transition means, but (space and place) specific policy responses.
3. Review biofuel strategy (to align to climate change response).
4. Integration of climate change response and land reform policies, with inclusive participation – state prescriptive damaging use of land (land use regulation where necessary) but enable innovation.
5. Comprehensive resource & vulnerability assessment to understand what land we have and its future capabilities.
6. Post-settlement support to enhance climate-smart/resilient agricultural approaches.
7. Step-change / elevation in agricultural R&D and extension services.
8. Climate mitigation policy tailored for the agricultural sector – renewable energy enabled through policies, regulation, financing incentives.
9. The roundtable observed that prioritising climate change will require re-considering its institutional location in government. It will also be important to understand and learn from what has already happened – e.g. looking at people who have already received land and whether any of their failures been attributable to climate change.

"Climate change will not make our land issues disappear, or fund them, or create food security. Land reform will not make emissions problems and future of climate change disappear. The goal should be to minimise the downside: do less badly. Maybe do magically better. But there is golden pathway to a bright future here. SA contributes less than 1% to global climate change. What we do here will not prevent overshooting 2. That makes much of our existing agriculture unviable. That is a reality. What we need to do is avoid falling too deeply into that hole."

Land Administration Roundtable: 12 February 2019

The Presidential Advisory Panel on Land Reform and Agriculture, in collaboration with the Department of Rural Development and Land Reform, with the support of LandNNES, invited stakeholders to attend a roundtable discussion on land administration on 12 February 2019 in Gauteng.

The following key issues were raised by the roundtable:

1. A Land Administration Act.
2. Link with other pieces of legislation – SDIs etc.
3. Documents to be submitted by Salga and others
4. Practical perspectives were given by the Deeds Registrar, and others.
5. Eskom has agreed that they will contribute to helping to pull things together.
6. Institutional arrangements require focus around the Land Observatory. Modalities for this are a big issue.
7. Complications in registering various forms of rights, especially as affecting the excluded. Pilots were suggested, but there are concerns about this.
8. Phasing was raised. The Panel appreciates that some things are going to take time (legislation and participatory processes). However, it will also look into faster interventions that will give people the appreciation that things are happening. Registering and recordal of rights is an area where change can be made sooner to create security of tenure, and we could mobilise a process. We can start and fail, but we must try so that people feel like something is happening. COGTA and Salga are being looked to so as to help find the areas where society can be mobilised to start recording their rights.
9. Informal settlements is another important area where we need guidance. What can we begin in these areas? Government has acquired land – let us start with what they have. The land must be allocated and recorded / registered. DRDLR to assist in this regard.

Parliamentary Portfolio Committees: 20 February 2019

A roundtable of Advisory Panel and Parliamentary Portfolio Committees was held between the President's Advisory Panel on Land Reform and Agriculture and Portfolio Committees led by Chairs of: Rural Development and Land Reform, Agriculture, Forestry and Fisheries, Water and Sanitation.

The purpose of the meeting was for the Panel was to share and discuss the emerging ideas and lessons learnt; and to further engage committee members on specific land reform proposals, particularly tenure models, beneficiary selection and water implications stakeholders.

The Panel presented on its work, and highlighted that they had engaged widely with the CPAs, NGOs CBOS, traditional leaders, women's organizations and churches to ensure a cross-cutting in approach. The Panel noted emphasis on People with Disabilities.

The committee made their inputs, and the following points were then made:

1. The Panel also revisited previous documents (Land Summits, Parliamentary Hearings, and High-Level Panel) to deepen the appreciation of diverse and look at any gaps that remain.
2. In response to the question on Mining Land- the Panel highlighted that mining land is looked at from an ownership, landlords and land use perspective, recognizing that there are specific laws that govern mining (MPRDA). The chair of the Panel highlighted that the Panel has engaged with mining houses through the Mineral Council. (Former Chamber of Mines).
3. Land reform acquisition and allocation / distribution is primarily a state issue, but there is room and need for civil society and private participation.
4. The panel took detailed notes of all questions and concerns raised and these will incorporate in the final report.
5. The Panel emphasised the importance of accelerating water reform as the continuing transfer of land without water contributes to land reform failure. There is also a need to review

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water licensing processes and procedures and the transformation of water structures. The Panel is proposing a packaged land transfer approach and review of legislation alignment.
6. Proposals for Land Records Bill, Land Administration Act, with Land Administration as the 4th leg of land reform. The Panel also proposes the prioritisation of the Land Redistribution Bill.
7. Panel acknowledges that Land Reform is part of nation building and necessary to address injustices of the past. The Constitutional imperative of restorative justice and equality remains the driving force. Panel members highlighted the problem of conflict-ridden processes (a result of disrupted and divided societies), that can contribute to erosion of social capital in communities and the importance of honourable members to pay attention to mediation mechanism at community levels.
8. Comprehensive strategy is being dealt with by the Panel.

Grassroots Voices on Urban and Rural Land Reform: 21 February 2019

A roundtable with grass roots organisations on urban and rural land reform was held on Thursday, 21 February 2019 at the Nelson Mandela Foundation. The Nelson Mandela Foundation hosted based on The foundation hosted the roundtable as part of its commitment to elevating grassroots organisations and voices. The foundation believes that people who are affected by policy must be included in the making of said policy. On these grounds, they organised a roundtable bringing together 18 organisations from different parts of the country to engage with the Panel and its work.

The representatives of organisations in attendance registered some principle concerns:

1. About the composition of the Advisory Panel. They felt the panel is not representative of the people most affected by land deprivation and spatial inequality - "If I am not at the table, it means that I am on the menu!" was the remark of one of the participants. They also felt that dedicated and focused on-the-ground expertise on the panel was lacking, particularly urban land specialists. Segregation was also a concern in terms of how the panel conducted roundtables, given that while they were meeting at the foundation, the banking sector were meeting elsewhere and were not part of their discussions.
2. There was frustration as to why the recommendations of the High Level Panel, previously convened by former President Motlanthe, were not being taken seriously. Some of the people present, who were involved in that process, expressed 'panel fatigue' and there was a sense that government was wasting their time by setting up yet another panel whose recommendations would gather dust. They listed numerous other consultations with government over the years that amounted to talk shops without anything materialising and no accountability for a lack of implementation. They do not think dialogue is futile but rather that it must go hand in hand with action. In the face of a lack of action, those who are meant to be benefitting are growing up in informal settlements while they look at land lying fallow.
3. The overall impression is that government does not seem to want to confront the problem of land. The Panel is seen to be taking over the problems that government has failed to act upon, and there was a lack of trust in government's capacity to act decisively on land. As a result, some organisations feel that land occupations are the only solution in the face of slow delivery on land reform.
4. People also questioned how seriously the President takes the panel. They raised concerns as to why the President was making pronouncements about land to the National House of Traditional Leaders before The Panel had concluded its work. For them, it demonstrates that the process is not taken seriously by him.

The recommendations made by participants at the roundtable have been divided into the following areas, for the purposes of this written submission:

1. Make the Interim Protection of Informal Land Rights Act (IPILRA) permanent and put a moratorium on evictions
2. Effect a land administration system
3. Prioritise the social value of public land
4. Redistribute land
5. Give people tenure security

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Banking Sector Roundtable: 21 February 2019

The Banking and Financing Roundtable was held in Johannesburg and included all of the major banks – FNB, Standard Bank, Nedbank, ABSA; and development finance institutions (DFIs) the Land Bank and the Industrial Development Corporation (IDC). The purpose of the session was to engage with the stakeholders on the land reform models which had been developed as part of the Land Panel working groups.

The session included presentation of the why the land reform model was needed. Essentially making that case that government does not have all of the financial resources to acquire all of the land required to meet the land demand and needs of the South African people. Therefore, there need to be other financial instrument(s) that could be used to acquire the land regardless of whether EWC is pursued or not. Any which way, capital will be required to get the land to be fully functional.

The financial institutions welcomed the approach, and indicated that they had been looking forward to something like the blended financing model which they could work with the government on. However, they expressed major concerns about:

1. Where will the seed capital funds will come from for the land reform model? The Panel thus far envisages the aggregation of existing budgets, and tapping into instruments such as land reform bonds which could be issued by the Land Bank, if National Treasury could provide guarantees for such instruments.
2. Land arrangements: What will the arrangements for the land ownership? Yes, a land reform fund buy land to provide access, but the Banks prefer private ownership and title deeds be given to people.
3. Farming systems / Bankability: What funding instruments will there be? Can people who get the land be enabled to farm so that they can be bankable? How to ensure that envisaged beneficiaries of land reform can farm successfully and be able to do all of the activities in a sustainable way.

Overall, the concept of a land reform fund was welcomed and taken on board by the financial institutions. They hoped that the Panel would include this in its Report, and also help to clarify the space where private banks and other financial institutions actors can play a role in land reform (e.g. through blended finance models, etc.).

Rural Women Roundtable: 8 March 2019

A roundtable discussion was convened by the President's Advisory Panel on Land Reform and Agriculture on Friday 08 March 2019 to solicit women's views on their plight with regards to access to land, particularly in marginalised rural communities. The roundtable, hosted by the John Langalibalele Dube Institute (JLD), at the University of KwaZulu Natal's Howard College, was constituted largely by rural women from KwaZulu-Natal, but also included many women and several female traditional leaders who had travelled from other parts of the country to attend and be heard at this important discussion.

In summary, the following key issues emerged from the roundtable discussion with rural women:

1. Historically and presently, land dispossession, is a total onslaught, brutalising the daily lives of black South Africans, economically, culturally and spiritually.
2. Rural black women, have been and remain at the forefront of this brutality.
3. The roundtable gave voice to the heart-wrenching experiences of land dispossession, and its ever-present ravage, centuries later
4. The tragic saga of land dispossession in South Africa cannot be told without giving ample voice to rural women.
5. The oppressive hand of patriarchy weighted heavily on rural women.
6. Patriarchy has stamped out land rights and tenure for women who are also compromised not only legally but through systemic unequal power relations in rural communities.
7. Traditional leaders, entrusted to take care of their communities are seen, in general, as hampering, rather than serving or protecting women and their rights.
8. The collapse of the social fabric of society and the prevalence of societal ills are viewed as a result of landlessness.

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FAO and Advisory Panel Roundtable: 27 March 2019

The Food and Agriculture Organization (FAO) of the United Nations and the Presidential Advisory Panel on Land Reform and Agriculture organised a roundtable meeting at St Georges Hotel, Pretoria on 29 March 2019. The roundtable meeting was attended by stakeholders from various institutions including government departments, state owned entities, UN agencies and farmer representative organisations. The meeting was chaired by Dr Vuyo Mahlati, the Chair of the Presidential Advisory Panel on Land Reform and Agriculture and facilitated by Dr Simba Sibanda of Food Agriculture Natural Resources Policy Analysis Network. This meeting was a follow up to the meeting held by FAO representative, Dr Francesco Pierri, the Chair of the Advisory Panel on Land Reform ad Agriculture Dr Vuyo Mahlati, and the Chief Executive Officer of the Agricultural Research Council, Dr Shadreck Moephuli. The objectives of the meeting were to explore FAO and UN support inputs, leverage opportunities, and programming that could support the panel's work.

The key issues raised for discussion were:

1. Preservation of high potential land: It could be important for the country to speed up an strengthen its process of preserving high potential land as a long term food security strategy learning e.g. from China's experience.
2. What went wrong with all the efforts in land reform in South Africa: Proposing that a holistic evaluation of land reform programmes and post settlement support systems could be needed.
3. Customary land ownership: How to deal with the contentious issue of customary land ownership, in particular addressing the challenges and impacts on women's access to land.
4. The issue of culture of farming: It may be critical for government to invest in addressing the issue of mindset towards farming under the land reform process.
5. Extension support: Rural Advisory Services should be pluralistic and participatory. Extension is much broader than technology, as it includes markets, naturals resources management and farmers' knowledge. Despite technology, RAS officers are still needed on the ground.
6. Government procurement: What would it take to make it possible for smallholder farmers particularly women to consistently efficiently supply Government food purchase programmes? Deep understanding and structured analysis of value chains, adjustment of conditions/ market requirements to make them special for smallholders, as they cannot be on the same footing with large-scale farmers.
7. The issue of finance/funding and credit for new farmers: The Government should relook the role of state institutions that provide financial services particularly to smallholder farmers with a purpose to facilitate access to subsidized finance (with low interest rates). Also, will the government ask all banks to lend to smallholder farmers?
8. Support for restitution farmers: Government should look into the support that is provided to land restitution beneficiaries especially in cases where the land may not be quite suitable for agricultural purposes.
9. Monitoring mechanism for new technologies such as GMOs: These may be needed as such technologies may be a threat to smallholders.

The key concluding recommendations from the FAO Roundtable were:

1. FAO and all UN to embark in the formulation of the new 2020-2025 Strategic Cooperation Framework (SCF) with the SA government, aligning to the new 5-year NDP plan and implementation framework. Expectation is that land reform and transformation features centrally in the SCF.
2. Subsequent to the SCF, FAO and SA government are to embark in the formulation of the new FAO/SA Country Programming Framework (CPF). Expectations are that Rural Poverty Reduction and Inclusive Food Systems and Value Chains should feature centrally in the CPF.
3. A second International Conference on Agrarian Reform and Rural Development to be convened.
4. Enhance multi-actor policy dialogue platforms for strategic thinking and collaboration on land transformation.

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