LAND REFORM POLICY DISCUSSION DOCUMENT

JUNE 2012

1. LAND REFORM ISSUES

1.1 The key issues to be addressed in Land Reform and Rural Development revolve around:

(a) With the extent of the historic dispossession and transformation of the majority of the dispossessed into wage-workers, how can the demand for land in South Africa, thus the place of prospective land reform beneficiaries of land reform, be advanced to ensure economic development, food security and improved livelihoods;

(b) Land reform must represent a radical and rapid break from the past without significantly disrupting agricultural production and food security; and

(c) The State must mobilise resources to reverse both the human and material conditions of those displaced by previous land policies.

1.2 The **previous Resolutions** (including Polokwane and the July 2011 ANC Lekgotla) addressing these historic issues include:

(a) A Comprehensive Rural Development Plan should be completed and supported with dedicated funding for social, economic, agricultural and non-agricultural infrastructure together with a spatial development component;

(b) That the Land Bank must be strengthened and transformed;

(c) That there is a need to enhance and deepen skills development, infrastructure development, service provision and credit access to ensure that smallholders are well supported;

(d) To support the immediate creation of the Office of the Valuer-General, the Land Management Commission and the Land Rights Management Board, to ensure better support for land reform and rural development;

(e) To establish a Valuer-General's Office and land valuation services with the responsibility for independent oversight of valuations for rating and taxing purposes, and to serve as government's independent and expert adviser in respect of valuation matters;

(f) That government should finalise without delay the Expropriation Bill, in line with the Constitution;

(g) That government should finalise without delay the Spatial Planning and Land Use Management Bill;

(h) That government should finalise without delay the Land Protection Bill; and

(i) To regulate the conditions access, usage and ownership SA land by non South Africans;

(j) To consider the call to re-open the Restitution lodgment and cut-off dates;

(k) To urge better coordination and planning between the department of Rural Development and Land Reform (DRDLR) and of Agriculture, Forestry and Fisheries (DAFF) to ensure coherent delivery of land reform, rural development and agricultural programmes;

(l) That renewed emphasis is placed on overcoming food insecurity through support for smallholder farmers and by stimulating market opportunities for smallholder farmers for instance through targeted state procurement;

(m) That government should ensure that the Land Audit is conducted and finalised by 2012;

(n) That government should ensure the better use of existing irrigation facilities, to extend irrigation schemes and to enhance water access by rural dwellers;

(o) To urge government to explore the possibility of a state-supported initiative for the massive production of inexpensive fencing; and

(p) To ensure, together with popular organisations and civil society, the mass mobilisation of the people to attain increased participation in agriculture and rural development.

1.3 *Way forward*

To assess the progress on these issues, this document addresses the context, the historical evolution, the post-1994 policies and the weaknesses in their implementation. Proposals are made for both substantive and institutional reforms to address some of these limitations in the implementation of previous policies and resolutions

2. LAND REFORM CONTEXT

2.1 *Autonomy-Fostering Service Delivery*

Land Reform is not just another social transfer where benefitting citizens receive government largesse. It is and should be seen as autonomy-fostering service delivery. This view of land reform projects service delivery as a key site at which the assumptions and stigmas associated with vulnerability in our society may be challenged and the appropriate resources for developing the capacity for autonomy provided. Service delivery via land reform should play an important role in clearing the way for disadvantaged previously marginalized individuals to exercise their capacity to act autonomously, to be full economic and social participants in the South African Project.

2.2 *The Structure of the Society*

The current task faced by the State in reforming land relations via land reform and agrarian transformation may be understood from the hallmarks of the *agrarian structure*. These hallmarks include:

- Though the poverty rate is on the decline since the advent of democracy, rural South Africa remains the region of greatest poverty concentration;

- The former homeland areas have a disproportionate share of households that fall below the poverty line; and
- There is a marked shift away from agricultural employment and incomes including a declining number of commercial farms which equally are becoming larger and more capital intensive thus the number of workers per hectare steadily on the decline.

These factors are the net effect of the conversion over the years of the property systems of indigenous South Africans (from common, collective, state, etc into exclusive private property rights), commodification and privatization of land and the forceful expulsion of peasant populations, commodification of labour power and the suppression of alternative forms of production and consumption, and the colonial, neo-colonial and imperial processes of appropriation of assets. These practices have played a major recurrent role in processes of the economic structure of South Africa and certainly key in undermining the conditions for successful development of those previously dispossessed.

That South Africa is not primarily an agrarian society, or in order to contextualise the demand for land, thus classifying the purpose and character of prospective beneficiaries of land reform, we must locate the search for solutions within the historical background of what has been described as "accumulation by dispossession"[1].

2.3 *Current State of "the Land"*

As evident from reported and unreported cases of evictions, land invasions, irregular land uses and other activities, majority of South Africans continue to be landless or with insecure land rights. These include those who live in communal areas especially in the former homelands and Self Governing Territories. These people generally correspond to those in poverty traps, welfare-dependent, least educated, resource-poor, inhabiting poor quality land, and often in poor performing municipalities.

Land dispossession in South Africa produced negative consequences such as consignment of the majority to the most unproductive land, inequitable distribution of land ownership largely in favour of a minority racial group, dislocation of the social and economic systems of the indigenous people in relation to land use, and *tenantization* through labour tenancy, sharecropper and other slave-like forms of erstwhile owners. It is hard to disagree with the thesis that the net effect on development of this accumulation by dispossession is that it generally undermines the conditions for successful development.

3. NEW TRAJECTORY FOR LAND REFORM – THE CHANGE AGENDA

3.1 *Legacy*

Confronted by the stark reality of delivering a land reform programme which represents break from the past without significantly disrupting agricultural production and food security, we seek in the pursuit of our goals to avoid redistributions and restitutions that do not generate forms of farming with aggregate net benefits in terms of livelihoods, employment and incomes. A clear purpose of both redistribution and restitution will be to continue offering the landless with access to land for residential and productive uses, in order to improve their income and quality of

[1] Arrighi G, Aschoff N & Scully B. *Accumulation by Dispossession and Its Limits: The Southern Africa Paradigm Revisited*. St Comp Int Dev (2010) 45:410–438)

life. The rationale and purpose should be to avoid underutilization of land as a result of land reform, offer planning and post-settlement support and devise sustainability programmes aimed at reducing inequality and poverty, bridging the gap between the first and second economies.

We acknowledge that colonialism and apartheid systematically undermined African agriculture when the white farmers, through substantial state subsidies and the availability of cheap black labour, developed a model of large-scale commercial farming in South Africa. This has led to two forms of agriculture in South Africa: so-called subsistence farming in the communal areas, and white commercial farming. With the extent of the dispossession of the land of indigenous people resulting into many already converted into wage-workers, the State aims to create an environment conducive to facilitating and ensuring the success of new entrants into the land market. The policy proposal revolves around active state support for new entrants into the land market for agriculture. Model black commercial farmers must be consciously created and supported by our plans and programmes. Model middle-level farmers who may graduate into commercial farmers must be recognised as such and supported. In efforts to increase productivity and at the same time maintain subsistence, the small landholder will receive state support in land acquisition, planning, extension services, disaster and environmental management, technology research and development, and related services. Management capacity to institute an incubator system for these classes of land beneficiaries are to be put in place in conjunction with the Departments responsible for Agriculture, Water, and Environment.

With the experience in implementing the land reform programme since 1994 till date, the focus should continue to be on the realization of the constitutional injunction that “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.” Our policy options, including institutional, legal and administrative structures must de designed and re-shaped to respond to the challenges faced in the years before now. These policy options must be equally conscious of the rider that no provision of section 25 of the Constitution “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, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

3.2 *Principles, Objectives & Vision of “Land Reform”*

Land Reform is located within and informed by our Comprehensive Rural Development Programme (CRDP) which is in turn hinged on a three-pronged strategy. The strategy is based on coordinated and integrated broad-based agrarian transformation, an improved land reform programme, and through strategic investments in economic and social infrastructure that will benefit entire rural communities. While separate, *rural development* and *land reform* are aligned at policy, programme and institutional levels to ensure coordinated service delivery. In the pursuit of agrarian transformation via the redirection of the agrarian system we acknowledge the link between the land question and agriculture as the basis for the search for an economic rationale and a vision of a post-reform agrarian structure.

The principles that underpin this new approach towards sustainable land reform are:

- Deracialisation of the rural economy for shared and sustained growth;
- Democratization and equitable land allocation and use across gender, race and class;

and
- Strict production discipline for guaranteed national food security

Our **objectives and vision** of Land Reform thus includes:

- Proper configuration of the multi-form land tenure system into a single and coherent four-tier system, whilst improving the existing customary and statutory tenures to become drivers of economic development;
- Ensure that all South Africans, especially the poor, women, youth have a reasonable opportunity to gain access to land with secure rights, in order to fulfill their basic needs for housing and productive livelihoods;
- Ensure clearly defined property rights supported by an effective judicial and 'governance' system, which ensures that all citizens have access to a fair, equitable and accountable land administration system;
- Enable secure forms of long-term land tenure for resident non-citizens engaged in approved investments which enhance livelihood security, reduced food imports, expanded agricultural exports and improved agro-industrial development;
- Enhance effective land use planning and regulation systems which promotes optimal land utilization in all areas and sectors; and
- Promote the effective management of urban lands, rural production and social support centres for the development of sustainable infrastructures and other approved developments within the centres and hinterlands.

4. RESHAPING THE FUTURE OF LAND REFORM

4.1 The Post-1994 South African Land Policy

4.1.1 Tenure Reform

The land tenure reform is one of the three legs of the Land Reform Programme (LRP) as described in the 1997 White Paper. Tenure reform is directed towards two distinct objectives. The first is to address the state of land administration in the communal areas of the former homelands and coloured reserves. The communal areas make up most of the land in the former homelands and amount to approximately 17 million hectares, including Ingonyama Trust land in KwaZulu-Natal, as well as the former 'self-governing territories' of KwaZulu, Gazankulu, Lebowa, KaNgwane, KwaNdebele and QwaQwa as well as the former 'independent' homeland states: Transkei, Bophuthatswana, Venda and Ciskei (TBVC). The communal areas are home to nearly one third of all South Africans and the site of the deepest concentrations of poverty in the country. Many residents have insecure or illegal forms of tenure, which is both a potential source of conflict and an impediment to investment and development. The second objective is to strengthen the security of tenure of farm dwellers living on commercial farms. Most farm dwellers have access to residential land only, but a minority are labour tenants who also have access to grazing land for their own livestock or to arable land for cultivation, in return for which they are required to provide (unpaid) labour to the landowner. There are also a large number of farm evictions (numbers are contradictory and contentious in the literature) and the Department has been severely criticised for weak legislation and policies around evictions.

The Interim Protection of Informal Land Rights Act No. 31 of 1996 (IPILRA), is a short term measure to protect people with insecure tenure from losing their rights to land. The majority of the population in provinces such as Limpopo lives and farm on tribal land held under communal

tenure. Their land is registered in the name of the state. Demands for the transfer of the land predate the 1996 Constitution. In terms of section 25 (6) of the Constitution the demand for restoration of this land and mineral rights constitutes the majority of tenure cases. With the declaration of constitutional invalidity of the Communal Land Rights Act, the IPILRA remains as the main legislative instrument to deal with development decisions in the communal areas. From the onset it was realised the fact that defining a policy for tenure reform in the communal areas would take longer to finalise than that of the other components of the land reform programme, because of the possible complexity of tenure reform in the communal areas.

4.1.2 Redistribution

The land redistribution sub-programme aimed to address the divide between the 87% of the land, dominated by white commercial farming, and the 13% in the former 'homelands' by way of diversifying the ownership structure of commercial farmland. The sub-programme was minimally successful, redistributing about 7% of land to the landless poor, labour tenants, farm workers and emerging farmers productive for uses, as to improve their livelihoods and quality of life as well as to stimulate growth in the agricultural sector. This was executed through grant-based mechanisms (settlement/land acquisition grant of R16000 per household from 1995-2000 and then the Land redistribution for agricultural development grant of R20 000- R100 000 per individual based on own contribution). Currently most of the farms redistributed are struggling financially, faced with huge debts, poor infrastructure, lack of adequate support, conflicts within the large group projects, poor skills development and numerous other problems. This prompted the Department to actively utilise the proactive land acquisition strategy (or more state-led approach) coupled with a recapitalisation strategy from 2010.

In addition, while redistribution was based on a market-assisted approach (willing-buyer-willing-seller approach), the land market itself was not restructured. The cost of completing the land reform has a huge fiscal implication. The target of achieving the redistribution of 30% of land to the previously disadvantaged has been painfully slow due to this problem of land prices. The thrust of the rationale for the review of the willing-buyer-willing-seller principle remains a State priority so as to ensure that the "land market" functions in a manner that satisfies both the "public" and "private" interests. It may be stated that the willing-buyer-willing-seller principle constrained the pace and efficacy of land reform and that the market is unable to effectively alter the patterns of land ownership in favour of an equitable and efficient distribution of land. In addition to creating conditions that manages the negative consequences of the imperfections in the land market, a distinct policy option is the use of expropriation "where necessary" in accordance with the Constitution. The policy proposal is to institute a land valuation service including the office of a valuer-general who, in addition to robust monitoring of the land market, is empowered to introduce guidelines and standards for valuation of land including standards based on the constitutional matrix for just and equitable compensation.

Whilst most of the policy reforms have laid a solid foundation for the agricultural sector to operate on a high growth path, with primary agriculture accounting for 4.5% of the GDP for South Africa, some components of the sector have not benefited to full capacity. Deregulation took place in the once over-regulated sector and some of the existing services and grants were cancelled. These measures left gaps in providing the necessary financial support to the targeted beneficiaries and resulted in the collapse of services especially in the former homelands.

4.1.3 Restitution

The land restitution sub-programme gave effect to the constitutional provision that people unfairly dispossessed after the 1913 Land Act are entitled either to restitution of that property or to compensation. The Restitution Land Rights Act 22 of 1994 established a Commission on the Restitution of Land Rights (CRLR) to solicit and investigate claims for land restitution and to prepare them for settlement, and a Land Claims Court to adjudicate claims and make orders on the form of restitution or redress that should be provided to claimants. From 1995, the CRLR, together with partners both in and outside government, advertised the restitution process and invited those eligible to submit claims to do so by the end of December 1998. Some of the challenges experienced during the implementation of this programme:

- Exorbitant land prices and protracted negotiations to settle claims;
- Complexities of settling rural land claims in the absence of documented evidence;
- Fraudulent claims;
- Non-disclosure by claimants; and
- Competing claims on the same piece of property.

There has been continuous pressure on the Commission to address the issue of allowing a further period for the lodgement of claims (the cut-off date for lodgement was 31 December 1998), and also to amend the cut-off date of 19 June 1913 to include pre-1913 claims. 19 June 1913 is the date when the Native Land Act was promulgated. The 1913 cut-off date recognises that systematic dispossession predated the post-1948 grand apartheid era of legally sanctioned removals.

It appears that there are many people who did not lodge their claims timeously due to various reasons. In some cases people did not believe that this restitution promise would be met. Others simply submitted their claims after the cut-off date. People removed in terms of betterment policy were ostensibly prevented from doing so because policy as stipulated in the White paper stated that "*claims of those dispossessed under betterment policies, which involved removal and loss of land rights for millions of inhabitants of the former Bantustans, should be addressed through tenure security programmes, land administration reform and land redistribution support programmes."* There has been no active targeting of betterment claimants through any of these programmes and it is not known how many claimants were channelled through these programmes after they were prevented from lodging restitution claims.

There is therefore an ongoing pressure that there should be another period of lodgement of claims for restitution. The Commission cannot reopen the lodgement period since it is bound by the Restitution Land Rights Act 22 of 1994. Furthermore, a number of claims involved protected areas, which are assets of national and international significance and whose continued protection remains a priority. The challenge in resolving these claims that mechanisms will have to developed that will promote sustainable utilization of natural resources in these areas while at the same time preserving the ecologies concerned.

4.1.4 Challenges in the post 1994 Land Reform Policy

The post 1994 policies provided a set of market driven land reform proposals with the following gaps:

- No proposals on foreign land ownership, land ceilings and land/rural tax;
- No proposals on proactive, supply-driven approach to land reform;
- Provides very little direction in terms of institutional reforms to support land reform; and

- Commitment to freehold title or unitary land registration system.

4.2 The Tenure Issue

The general problem of tenure reform is that of extending a regulatory framework over all land and tenure systems in the country. This is in recognition that a large percentage of South Africans continue to hold land outside the official systems. The question of tenure requires new attention and must support economic development. It is critical that the tenure system integrates well with the cultural, social and political heritage of South Africa, as well as the projected national strategic direction. Tenure forms evolve over centuries and cannot be said to be immutably fixed. Documented instances of tenure forms which existed amongst South Africans including the danger of mistaken analysis from prisms of foreign tenure concepts abound. For instance, the primacy of *use* rights over freehold titles as well as communal over individual titles to land existed in many communities in South Africa. Regarding the nature of tenure which existed amongst the Richtersveld people of Northern Cape before the imposition of western titling systems, the Court[2] stated:

> "*One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of this land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources. All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay. There are a number of telling examples: A non-member using communal grazing without permission would be fined 'a couple of heads of cattle*;"

JRL Milton[3], writing on *Ownership,* narrated some of the historical tenure forms crafted largely to satisfy the new entrants- the White settlers- in South Africa between 1652 – 1910 as including g*rants in eigendom; loan tenure – leeningsplaaten; loan ownership – leenings eigendom; emphyteusis – erfpacht; the Cradock Proclamation;* and *quitrent tenure*. A number of these land acquisitions and subsequent formalisation bear close semblance to regularised land invasions, tenure order having been created to bolster initial unlawful or irregular occupations. In order to craft a new tenure system for the next generation the position is to take from the past and retain the current only in so far as they advance the cause of fundamental change in power relations over land. The policy proposals will touch on both private (citizens and non-citizens) and public (State) Lands with the overriding theme of leasehold and freehold rights to land as objects of change.

While various forms of *official* tenures were crafted to institute a property rights regime for one aspect of the South African society, the African majority had no right to such tenure. In turn, a paternalistic approach was adopted in respect of the land occupied by the majority by vesting in the State the titles to their land. The origin lay in the Development Trust and Land Act, No 18 of 1936 which provided for the establishment of the South African Native Trust (the Trust) and the release of land for occupation by African people. In terms of section 6 of this Act, all land "which

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[2] The view of the Supreme Court of Appeal in *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) BCLR 583 (SCA) at para 18 was so affirmed by the Constitutional Court on appeal.

[3] At page 654 *infra* in Zimmermann, Reinhard and Visser, Daniel P. (1996) Southern Cross: Civil Law and Common Law in South Africa Clarendon Press, Oxford

[was] reserved or set aside for the occupation of natives" and "land within the scheduled native areas, and . . . within the released areas" vested in the Trust. The land that vested in the Trust was "held for the exclusive use and benefit of natives". In terms of section 10(1) of the Development Trust and Land Act, land to be acquired for African people could not exceed seven and one-quarter million morgen in extent. The result was that the majority of people were confined to 13% of South African land while the minority occupied the remaining 87% of land. The Trustee had the power to "grant, sell, lease or otherwise dispose of land . . . to natives" and "on such conditions as he [deemed] fit". Further, the Governor- General had the power to make regulations, among other things, "prescribing the conditions upon which natives may purchase, hire or occupy land held by the Trust". Importantly, two forms of tenure of lesser significance, namely, *quitrent tenure* and *permission to occupy* were the only *official* tenure forms available to the African majority. Although quitrent title was defined to mean a "title deed relating to land", it did not confer full ownership on the holder.

4.3 Ownership and Use Rights: Freehold & Leaseholds

The overriding principle is that the land tenure system of South Africa must facilitate efficient land use while, at the same time, eradicating established inequalities and unequal opportunities. In this text, conceptions of land-ownership and land-use have implications for land holdings by both citizens and non-citizens. While these policy proposals are not to strip citizens of freehold rights in land, it should be noted that on account of national political direction, some other countries do not, in parts or in whole, accommodate private freehold land ownership even for their nationals. In this case of total or partial absence of private land ownership, it would be fortuitous to categorise those national systems as precluding foreigners from land ownership in so far as the distinction is not based on nationality considerations. In Zambia, Malawi, Ethiopia and Nigeria, an executive authority, usually the State President, on behalf of the people, *owns* the land and may only extend leasehold rights evidenced by a certificate of occupancy. A slight variant of this trend is found in those countries where large proportions of their land mass are state owned with prohibition on sale even to nationals. In Israel, which typifies this latter stance, private ownership of land is available for only about 7% of the country's land, since approximately 93% of the land is owned by the State by virtue of Basic Law. Restrictions based on ethnic considerations are found in Fiji where about 90% of land is held in trust for native Fijians according to native custom and tradition. Such land cannot be owned by people who are not native Fijians, unless a whole community dies out, after which the land reverts to the State. Only lease of land is possible to non-Fijians.[4]

Two scenarios present themselves in relation to the treatment of land-ownership and land-use vis-à-vis regulation of foreign-owned land. The first is the argument against extending full right of ownership[5] to non-citizens on account of their supposed time-limited interest in the land. This position argues that there exists no socially rational basis to accord more than tenancy (use) rights to non-citizens. Proponents of this approach regulate foreign land ownership to grant not more than leasehold rights over limited periods with or without right of renewal. The problem with foreign land ownership is not the *sale or purchase* of land by non-citizens *per se* but the

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[4] Stephen Hodgson, Cormac Cullinan, Karen Campbell *Land Ownership and Foreigners: A Comparative Analysis Of Regulatory Approaches to the Acquisition and Use Of Land by Foreigners* (FAO, December 1999)

[5] Some of the entitlements of the property "owner" are: (a) use of the thing (*ius utendi*); (b) reap the fruits, including the income from the thing (*ius fruendi*); (c) consume and destroy the thing (*ius abutendi*); (d) possess the thing (*ius possidendi*); (e) dispose of the thing (*ius disponendi*); (f) claim the thing from any unlawful possessor (*ius vindicandi*); and (g) resist any unlawful invasion (*ius negandi*). *Silberberg & Schoeman: Law of Property* 4th Ed. Butterworths November 2002

use of the land. This view shifts the debate to the realm of the effectiveness of measures designed to assuage the ill-effects of foreign land ownership (such as rising land values, distortion of the land market, perpetuation of segregation and legacy of fragmentation initially created by apartheid land planning, etc). Regulation, in this view, should include measures such as extra property taxation on non-residents or absentee landlords.

4.4 Communal Tenure

It is not assumed without questioning that the tenure development in areas with customary landholdings will *naturally* be in the form of individual land titling. Hence the Constitution refers to "tenure which is legally secure or to comparable redress" as a solution without confinement to a particular form of tenure. A prime consideration is that sustainable development of the land in these areas must still recognize the communal character, as opposed to individual landholdings. Undoing the legacies of the past necessarily include the completion of the task to institute a predictable, certain and legally secure tenure form or forms for communal land. The previous attempt to address this was through the Communal Land Rights Act, No 11 of 2004 ("CLaRA").

With the introduction by Section 151(1) of the 1996 Constitution of the local sphere of government consisting of municipalities for the whole of the territory of the Republic with important land administration powers as part of the *municipal planning* powers, the institutional design of an appropriate land governance model in the communal/customary areas acquire critical importance. Whatever is proposed must address the issues of accountability and efficiency. The underlying schema of the Communal Land Rights Act, 2004 may therefore not sufficiently attend to these policy propositions. While we propose that land tenure reform policy should be flexible and gradualist with regard to the role of traditional authorities, other issues that require consideration are:

- the role of local government in the administration and regulation of land in communal land areas; and
- the measures facilitating the provision of services to communities on communal land.

The other issues of concern to be addressed in the design of a land governance model are:

- the effective discharge of the developmental obligation of local government in communal areas;
- the roles and responsibility of traditional authorities in relation to those of municipal councils in communal areas;
- the liability for property rates;
- the responsibility for collection of property rates;
- the enforcement of payment of property rates in cases where the rate payers default on their payment; and
- the sanction to impose on defaulters.

Due to its complexity (including, *inter alia*, embedded claims to certain portions of land in some communal areas, the need for extensive consultations and constitutional compliance, especially in the light of the recent Constitutional Court judgment which nullified the Communal Land Rights Act), the communal land tenure will be dealt with separately.

4.5 Urban Tenure

To date, implementation of the land reform programme is mainly rural in focus, although there are large numbers of former homeland towns in which land rights are unclear, overlapping and at times conflicting. The key issues requiring attention include:

- the existence of a range of tenure types, many of which are inferior and prejudice the holders;
- the absence of laws and mechanisms to upgrade tenure types, particularly the absence of uniform laws;
- the low levels of local knowledge of the rights people hold in land and the lack of documentary proof of their rights;
- the disjuncture between national policy and implementation by the provincial and municipal spheres;
- the fragmented administrative systems, due to different laws applying in different parts of the country;
- the uncertain legal status of these laws in former homelands; and
- the legal procedures for obtaining administrative control over urban land in former homelands and other parts of the country.

While the Development Facilitation Act No 67 of 1995 partially attempted to deal with most of these urban tenure issues, we acknowledge the deficiencies in the current regulatory framework. The Spatial Planning and Land Use Management Bill which has just been introduced in Parliament will further address these issues.

4.6 The 4-Tier Tenure System

4.6.1 In a nutshell it is proposed that:

- South Africans continue to exercise freehold rights over land;
- Regulatory limitations in deserving cases be placed on the freehold titles held by South Africans in respect of:
    - Regulatory limitations designed to ensure protection of prime and unique agricultural land, sustainable utilisation of land, subdivision of rural/agricultural land, etc may be imposed on freehold titles of South Africans; and
    - *controlled transactions* such as transactions valued at a prescribed threshold, non-resident 'absent-landlord' properties, and land quantity restrictions be subject of special consent and approval regimes;
- Regulatory limitations be placed on the titles held by foreigners in respect of:
    - Strict compliance with obligations and conditions;
    - Partnership by foreigners with South Africans in respect of specified land-based investments in the country;
    - *sensitive* and *national security* land such as communal, coastal, heritage, rural, agricultural, environmentally-sensitive, security-sensitive, and border lands; and,
    - *controlled transactions* such as transactions valued at a prescribed threshold, non-resident 'absent-landlord' properties, and land quantity restrictions be subject of special consent and approval regimes;
- For purposes of equitable redistribution, land quantity restrictions/land ceilings, pre-emption rights and rights of first refusal are imposed on freehold titles of both South Africans and foreigners.

4.6.2 Private Landholdings by South Africans

Right of First Refusal, Pre-emption Rights & Land Ceiling

Adverse consequences such as low land utilisation, land speculation and hoarding which are often generated by the phenomenon of non-resident absentee landlords may justify the imposition of land quantity restrictions (land ceiling). A pre-emption right is a right to acquire certain property in preference to any other person. It usually refers to property newly coming into existence. A right to acquire existing property in preference to any other person is usually referred to as a *right of first refusal*. It is proposed that the State combines the use of both pre-emption right and right of first refusal over certain types of land transactions. Both pre-emption right and right of first refusal will be used to regulate land owned by citizens and foreigners. This is in accordance with what exists in many countries. The policy proposal is not to impose land ceiling, right of pre-emption or right of first refusal on all South African land, but on selected sensitive land or those in national interest, it may be an option that the State retains the right to control the quantity a person may hold, or where land is already held – to offer the State the opportunity to acquire before such is placed in the market.

4.6.3 Public & State Land

The creation of a separate and different public land management dispensation for local government and the absence of statutory mechanisms to compel the three spheres of government to consult one another in the event of intended disposals, have given rise to a paralysing fragmentation which impacts negatively on service delivery and accountability. The current fragmentation makes it possible for any sphere of government, or any custodian in any sphere of government, to dispose of any property which could have been utilized to achieve service delivery objectives by another. Whilst there is a mechanism to avoid this at national level, the same cannot be said in relation to a national-provincial interface. The local sphere is totally isolated from the other spheres and it seems unlikely that an administrative solution in this regard is possible in the existing framework. The other threat is that land belonging to one sphere can be sold by another without the knowledge of the legitimate one. Whilst there is a requirement to have vesting of the land confirmed by the custodian, before disposal, there have been instances where transactions have gone through without such vesting having been conferred. It is submitted that an institutional mechanism is required to compel all custodians in all spheres to share information on land that is no longer required for their service delivery objectives, before disposing such land. The immediate thrust of leasehold tenure on State and Public land is that the State be able to keep land in State hand.

4.6.4 Land Ownership by Foreigners

Section 25 (5) of the Constitution proclaims that: *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.* In order to fulfil the Constitutional obligation imposed by section 25 the Government must be able to answer the questions:

- *To what extent are policies of the State conducive to enabling "citizens gain access to land"?*
- *Who owns the land of South Africa?*
- *Are those owning the land using the land for the greater interest of South Africa? and*

- *Are the current ownership patterns sustainable to guarantee national interest including food security?*

It is proposed that:

- The Government's policy approach is to encourage foreign investment in land consistent with national interests.
- *Land* for the purpose of this policy will include the physical land as well as other land based resources like buildings, farms, fishing, mining, etc.
- *Non-South Africans* will include all natural persons without South African citizenship and all persons not permanently resident in South Africa.
- *Juristic persons* will be treated as non-South Africans where such corporate bodies are controlled by natural persons who are not South Africans or permanent residents of South Africa.
- It is assumed that there is national consensus and acknowledgement that it is a privilege for non-South Africans to own sensitive South African land and landed assets, and to therefore, it is appropriate to impose conditions on them in respect of those assets.
- *Sensitive* and *national security* land such as communal, coastal, heritage, rural, agricultural, environmentally-sensitive, security-sensitive, and border lands, and *controlled transactions* such as transactions valued at a prescribed threshold, non-resident 'absent-landlord' properties, and land quantity restrictions will be subject of special consent and approval regimes.
- All new land acquisitions by foreigners should be subjected to leaseholds with the land owner taking the reversionary interest.
- Freehold titles by foreigners on sensitive and controlled land and those deemed in national interest should be converted to leaseholds with other conditions of use imposed.
- Right of first refusal will be instituted within the proposed legislation to enable the State acquire sensitive and controlled land on the market before foreigners are able to acquire same.
- A Land Protection Advisory Unit within the proposed Land Management Commission will advise the Minister on the matters covered by the proposed legislation. Key departments and other agencies of Government and the general public will be represented on this supervisory component of this Unit. It will play an advisory role and also consider and recommend guidelines for decision-making in terms of the proposed legislation.
- A Registrar of Landholdings will take charge of the monitoring and information gathering mandates to be offered by the proposed legislation. The information generated and gathered by the Registrar will inform a range of policy choices in terms of the proposed legislation.
- General administration of the proposed legislation and broad decision making powers rests with the Minister of Rural Development and Land Reform. The Minister will act in consultation with other Ministers on matters affecting their functions. As such, with the Minister of Finance and with the Minister of Trade and Industry for business decisions; the Ministers of Environmental Affairs for coastal land; and with the Ministers of Finance, Trade and Industry, Environmental Affairs, Minerals, and Rural Development and Land Reform for other decisions as the subject matter may dictate.
- In order to deal with possible non-compliance with the policy directives, sanctions will be applied to transgressors. The possibility of forfeiture of property acquired in contravention of policy will be instituted.

4.7 Sustainable Rural Settlements

There is widespread belief that there is limited productive use of lands gained from redistribution and restitution, and in areas where land tenure has been strengthened. Livelihoods and social welfare on such "projects' also remain precarious with inadequate infrastructure and social services support. The approach to settlement and development support on land reform projects has evolved through various products within the land reform programme. Integration with other government programmes has been inadequate consequently limiting their efficiencies and effectiveness. Beneficiaries of land reform programmes have only had marginal economic benefits. Agricultural productivity has been restricted by numerous factors including inadequate state support. Another factor is liberalized economic policy framework which withdrew significant agricultural support to all farmers, including cheap credit, market protection, extension and infrastructural services, such that new farmers only get small grants largely intended to "start-up" or "kick-start" a narrow range of their investments.

The search for an economic rationale for the land reform programme, strengthened by the imperative of food security and job creation necessitate a policy redirection. The coordination of agricultural support services between the department responsible for land reform and others such as of Agriculture, Water, Economic Development, and of related infrastructural support will be strengthened. The planning support for effective land use and settlements, including the development of sustainable rural settlements (agri-villages, residential lands, etc) for the provision of social, productive and infrastructural services will be instituted. Such plans and support need to be more speedily implemented and better coordinated within the provinces and municipalities. The legislation on financial and other assistance to achieve this will be re-looked.

Social cohesion and development within rural and peri-urban areas are also limited. There are few integrated rural centres which have adequate social services, residential lands, commercial and small industrial sites to cater for the broader population that could live and be gainfully employed in the rural areas where land has been redistributed. All this requires a major overhaul to integrate development services provision. The Comprehensive Rural Development Programme (CRDP) will be used to deepen support to land reform products and beneficiary support to enable implementation of an encompassing and a nationally coordinated plan.

One class of beneficiaries to be targeted for support under the proposed sustainable rural settlements to be introduced is current farm-workers, farm-dwellers and labour tenants. Currently, occupiers of farms have weak and precarious *use* rights. It is expected in the long run that a mix of both onsite and offsite resettlement will be utilised to deal with the issue of livelihoods and tenure security of the vulnerable groups on farms. Intended beneficiaries will include those covered and not covered by the Extension of Security of Tenure Act and the Land Reform (Labour Tenants) Act. We propose that those evicted, or prone to eviction, and others be afforded the opportunity to opt for resettlement in the proposed sustainable rural settlements. Current land owners are critical stakeholders in the proposed approach. This may be achieved through situations such as one large farm or several farms providing land either through sale or donation to a farm-worker's grouping, who could initially be the title deed holder of the land. The State will also have the option to acquire farms primarily through voluntary purchase, or where State land exists to use such, and as a last resort to acquire within the legal framework of expropriation with due compensation being paid.

Social organisation of the proposed sustainable rural settlements will be regulated and local rules to govern the establishment and operation of such a settlement are to be worked out and agreed upon jointly by the participants namely the 'village community', the financier and the respective municipalities. Issues such as: community levies, repayment conditions, transfer of

ownership, if one wants to leave the area, change of place of work, standard of housing and financing conditions for the individuals, maintenance of communal facilities, where they exist or are planned, and other aspects relevant to the local conditions, are to be addressed and regulated.

Positive aspects of proposed sustainable rural settlements include individuals having security of tenure, allowing the individual to build-up equity, depending on the size of such a village, government services such as schooling, kindergartens, health care, etc. can be provided not only to the village community but also to other families living in the vicinity, and allows the provision of better basic infrastructure: water, electricity, sanitation, roads, etc. Suitable land will be acquired to resettle persons on transferable long term lease. Land in resettlement areas may be held under a temporary permit system, which confers land rights to the permit holder. Each settler is given permits such as to pasture livestock on a communal basis, to reside on a given plot and to cultivate arable plots. The period over which the permits are valid will be specified and beneficiaries will have the right of use of land for as long as he does not violate the provisions of the permits. Rules will be instituted to afford the transfer in freehold title to those who make better use of allotted land. In the absence of secure tenure, the inheritance procedures in the event of a death of beneficiary will be instituted. Land may be taken away from non-performers.

We will ensure the strengthening of public institutions and improvement in the provision of public goods and services (e.g. extension, credit, market information and quality public services) which are considered essential for successful agricultural production. Since a significant number of labour tenant claims have been resolved by resettlement, the key proposal is that in cases where groups are allotted land purchased by the State, increased level of support and organisation will be offered to ensure that land allocated are subdivided in the manner proposed for resettlement initiatives.

4.8 Land Restitution

The restitution policy issues relate to:

- limited time framework within which claims were lodged;
- general exclusion of pre-1913 claims and those on former betterment schemes and others without written documents;
- claims being made on state lands;
- bureaucratic inefficiencies and long litigation processes constraining the administration of the restitution process; and
- restituted land not being productively and sustainably utilized.

Since the land restitution sub-programme is within the general land reform programme the future implementation of restitution in line with the constitutional injunction will be informed by the general principles and vision for land reform as presented in this Green Paper. The main policy proposals here is around extending the restitution programmes time framework and opening up the scope of dominant qualification and re-engineering the support processes and institutions.

4.9 Strategic Land Reform Interventions

Sustainable land reform is a key strategy in achieving national food security. Production, income and the high price of food are the variables that contribute to hunger in rural areas. It is for this reason that the Department has taken the conscious decision to establish a unit with the specific mandate of ensuring that land reform is both sustainable and strategically placed to ensure national food security. The purpose is to identify and implement strategic interventions in terms of land reform, acquire strategically located land, to recapitalise failing projects and develop current and future projects as part of the Department's commitment to sustainable land reform. To respond to the challenges of the collapsing land reform projects and defunct irrigation schemes in the former homelands, the Department has introduced two strategic interventions: strategic land acquisitions and the recapitalisation and development programme. The objectives are to:

- increase production;
- acquire strategically located land and land above the prescribed ceilings in a given district
- guarantee food security;
- graduate small farmers into commercial farmers; and
- create employment opportunities within the agricultural sector.

4.10 Planning Framework for Land Reform

While the land reform programme is to be implemented within the overall framework of the Comprehensive Rural Development Programme (CRDP) it is significant to recognize its effect in space and in relation to the programmes and plans of other organs of state including the municipalities where they are located. We will seek to integrate the delivery of land reform projects within the Integrated Development Plans and the Spatial Development Frameworks of Municipalities. Where required and especially to accommodate our land development measures including the proposed sustainable rural settlements like agri-villages and rural smart centres, we will develop a "precinct planning" approach.

A rural precinct will be established to accommodate our preferred future dominant land uses and associated ancillary or compatible land uses such as agriculture; intensive animal production; nature conservation; sport and recreation; forestry; water supply catchments and other water supply sources; rural or eco-tourism; extractive resources; and combinations of compatible land uses. Within laws governing local planning, our proposed precinct plan will be a planning tool that sets out a vision for the future development trajectory of an area and establish a planning and management framework to guide development and land-use change and aims to achieve environmental, social and economic objectives. The land reform precinct plan will inform interventions by both the public and private sectors in order to facilitate economic growth and development through social, spatial and economic development or regeneration. The aim is to initiate, stabilize, consolidate and promote economic development in the precinct and to enhance business efficiencies and opportunities as a response to various government initiatives by proposing appropriate land use interventions or densities within the nodal area.

5. INSTITUTIONAL CAPACITY TO DRIVE LAND REFORM

5.1 Department of Rural Development & Land Reform

The common denominator between land reform and rural development is the vulnerability and deprivation of their targeted beneficiaries. The poor and deprived in need of rural development

programmes are usually landless and land-poor with inadequate access to land as well as weak and insecure tenure. If the tenure and access to land issues are addressed, the ability of the poor to engage meaningfully as active economic citizens becomes improved. The implementation of the land reform will be driven within the CRDP Strategic Framework.

5.2 Land Management Commission

5.2.1 Functions of the LMC

- *Advisory* – issues advisory opinions, research reports and guidelines on land management to all land related departments and organs of state;
- *Coordination* – ensures alignment, inter-linkage and coherence of disparate land management agencies, departments, spheres of government and all organs of state;
- *Regulatory* – manages the regulatory environment that ensures that land is managed in a manner that will protect its quality and value;
- *Auditing* – assures the integrity of the inventory of state and public land, including monitoring its uses and transactions; and,
- Working with the Surveyor-General, and in support of, the Registrar of Deeds, it will serve as one of the reference points on land-related matters.

5.2.2 Powers of the LMC

- subpoena anyone and any entity (private or public), to appear before it and answer any question relating to its landholding and, or, interest in land;
- enquire about any land question, out of its own initiative or at the instance of interested parties;
- verify and, or, validate/invalidate individual or corporate title deeds;
- demand a declaration of any landholding, with all the necessary documentation relevant to such declaration;
- grant amnesty and, or, initiate prosecution, whichever the case might be, at its own discretion; and,
- seize or confiscate land obtained through fraudulent or corrupt means.

5.3 *Office of the Land Valuer-General (OVG)*

The OVG will account to an Inter-ministerial Committee (IMC) of Ministers who have land vested in their Departments, which will be convened and chaired by the Minister for Rural Development and Land Reform. The rationale for the establishment of the OVG is, among other things, that:

- South Africa lacks a nationwide comprehensive, reliable and collated hub of property values;
- there is an absence of legislative framework to determine when ‘market value’ is one of the
- variables in determining values as opposed to ‘market value’ being the only criterion;
- the probity of some valuations is questionable;
- instances of conflict of interest and/or malpractices have been identified;
- instances have been identified of improper or hurried valuations in order to meet deadlines or compliance planning; and,
- instances have been identified of ahistorical or mechanical approach to valuation.

Responsibilities of the OVG

- the provision of fair and consistent land values for rating and taxing purposes;
- determining financial compensation in cases of land expropriation, ensuring constitutional and other legislative compliance;
- the provision of specialist valuation and property-related advice to government;
- setting norms and standards, and monitoring service delivery;
- undertaking market and sales analysis;
- setting guidelines, norms and standards required to validate the integrity of valuation data; and,
- creating and maintaining a data-base of valuation information.

5.4 Land Rights Management Board

Recognising the imperatives of economic participation, inclusiveness and ensuring food security, and that the farming community are critical stakeholders in achieving these, the Land Rights Management Board (LRMB) is proposed as the institutional platform to address the relational nature of the parties involved (owners, tenants, farmworkers and farmdwellers). The policy proposal is to seek efficiency and effectiveness in the protection mechanism for the vulnerable groups of occupants (tenants, farmworkers and farmdwellers) on agricultural undertakings.

The current environment is bedevilled by:

- Inadequate responses to complaints;
- Institutional weakness in law enforcement;
- Ineffective monitoring system;
- Adversarial legal system, less power for court to be pro-poor;
- Scaled-down activities of Social movement ; and
- Lack or inadequate legal representation/legal aid to the poor

It is proposed that the Land Rights Management Board will offer the institutional climate for redressing many of the inadequacies in the current regulatory environment and to manage the issues of compliance and enforcement. The Board is expected to be composed of representatives of affected and interested communities – farmers and occupiers. The Land Rights Management Board will be established in terms of the proposed legislation on land tenure security to manage:

- effective communication of legal reforms to farm owners and to potential beneficiaries;
- institutional capacity (inside and outside government) to advise and support rights-holders and facilitate their active use of the law;
- accessible and efficient systems to record and register rights;
- in case of disputes, alternative conflict resolution mechanisms or access to the courts;
- legal representation; and
- an integrated state support, civil society and private participation on development measures in the proposed sustainable rural settlements

5.5 The Cadastre

The effectiveness of the cadastre system until now has mainly been measured in the context of its ability to manage a small percentage of land parcels in South Africa. Land reform initiatives to date and the proposed new land tenure system would in effect substantially increase volumes of transactions. The current system was mainly geared to manage a specific kind of ownership and will have to be able to support the envisaged land tenure arrangements. The system would have to be diversified to cater for the additional proposals with regard to leasehold, limited freehold extent and other landholding forms. Some of the aspects that would need to be reviewed include declaration and registration of citizenship, identification and registration of forbidden zones, warning systems in case of non-compliance, registration of different types and periods of leases, security of various forms of tenure used as collateral, effective transformation, continuous transfer of land held in terms of Permission to Occupy and Grants, and ensuring fairness and equity in terms of gender.

The capacity in terms of human resource and administrative systems to ensure alignment would be considered, also with respect to finalizing the land audit to ensure availability of information about who owns what property in terms of state, public and private land. The Deeds Registries Act and Sectional Titles Act would be further amended. All other relevant legislation with regard to conveyancing, surveying and deeds registration would also be reviewed in line to the proposed Land Management Commission and 3-tier tenure system. The cadastre should support a single land administration system.

6. CONCLUSION

For the land reform programme to proceed rapidly and succeed, as it must, a number of challenges and constraints have to be confronted and overcome. The main challenge is that of entrenched vested interests, in both commercial and communal land spaces and the main constraint is the poor capacity of organs of state to deliver on mandates. Yet undoing the social, economic and cultural effects of centuries of discrimination and exclusion, on the basis of race, will take time and an enduring national political effort. Challenges and constraints experienced over the last seventeen years, and lessons drawn from other countries across the world, show clearly that there are no silver bullets to solving post-colonial land questions. A systems approach seems necessary and appropriate in addressing complex and emotive challenges such land reform. The failure to protect the rights and security of tenure of farm workers and dwellers is a good illustration of this point.

The key components of the review of current land reform policy revolve around the following themes:

- the acquisition of land for redistribution;
- the definition and qualification of beneficiaries,
- land rights and tenure in various contexts for citizens and non-citizens;
- land settlement and production models; and
- State support to productive land.