

South African Institute of Race Relations NPC
Submission to the
Department of Rural Development and Land Reform
regarding the
Restitution of Land Rights Amendment Bill of 2013
Johannesburg, 21st June 2013

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Introduction

Even before the National Party government came to power, the Natives Land Act of 1913 and the Natives Trust and Land Act of 1936 prohibited Africans from acquiring land outside the rural 'reserves', most of which were later incorporated into the country's ten 'homelands'. Since the reserves made up only 13% of rural land, Africans were thus barred from acquiring land in the remaining 87% of the country. [Muriel Horrell, *action, reaction and counteraction*, South African Institute of Race Relations (SAIRR), Johannesburg, 1971, p7; John Kane-Berman, 'Population Removal, Displacement and Divestment in South Africa', *Social Dynamics*, University of Cape Town, pp28-46, at pp30, 32-33; M Festenstein and C Pickard-Cambridge, *Land and Race: South Africa's Group Areas and Land Acts*, SAIRR, Johannesburg, 1987]

As John Kane-Berman, chief executive of the South African Institute of Race Relations (the Institute) notes, the 1913 Act was introduced after an order of the Transvaal Supreme Court in

1905 had compelled the Registrar of Deeds to transfer title to one Mr Tsewu, an African who had purchased land. The judgment encouraged Africans to buy land collectively from whites ruined by the Boer War, and it was not long before some 1.2 million morgen had been acquired by Africans outside the homelands on a willing seller/willing buyer basis. A government commission found that farms and land owned by Africans were scattered across the country and that only 'wholesale removals' could change this. Those removals were later implemented, hundreds of thousands of Africans being evicted from so-called 'black spots' some two decades after the National Party had come to power in 1948. [*Business Day* 5 March 2012]

Even before these removals were effected, the 1913 Act (which entered into force in June that year) had caused great damage. It destroyed a class of African farmers, who had previously competed effectively against their white counterparts, turning many of them into sharecroppers or labour tenants on white-owned farms. Others, no longer able to earn a living by supplying food to Johannesburg and other towns and cities, were forced to work on the mines or elsewhere as migrant labourers. [*Business Day* 21, 24 January, 25 March 2013]

At the same time, land in homeland areas was held mainly in communal ownership and administered by traditional chiefs, which prevented Africans there from obtaining individual title and this foundation for upward mobility. Moreover, influx control and other restrictions on black ownership or occupation of 'white' urban land kept millions of Africans penned up in the homelands, which became increasingly overcrowded and incapable of offering a livelihood to their inhabitants.

Things began to change in the mid-1980s, when the pass laws were abolished and Africans in urban areas were allowed freehold title. In June 1991 the National Party government followed up by repealing the Land Acts, making it possible for Africans to own rural land outside the homelands for the first time in close on 80 years. [1986 Part 1 *South Africa Survey*, SAIRR, Johannesburg, p95; 1987/88 *Survey*, p504-505; 1988/89 *Survey*, p87; 1991/92 *Survey*, pp385-386]

The Institute has always condemned the race discrimination which unjustly restricted African land ownership prior to 1991, and which underpinned the forced removal and resettlement by the National Party government of some 2m black people within the so-called 'homelands'. It also supports constructive initiatives to redress the historical injustice regarding land and to bring about an effective process of land reform which contributes to the success of African farmers.

This makes the Institute all the more concerned at the negative impact the Restitution of Land Rights Amendment Bill of 2013 (the Restitution Bill) – especially in combination with the Expropriation Bill of 2013 (the Expropriation Bill) and the Property Valuation Bill of 2013 (the Valuation Bill) – is likely to have.

Land restitution to date

Against this historical background, the Government in 1994 embarked on a three-pronged process of land reform, embracing restitution, redistribution, and tenure reform. [2010/11 *Survey*, p614]

Restitution involves the return of land to black people who were wrongly dispossessed of it after 1913 under the Land Acts, the Group Areas Act of 1950, and other racial laws. This leg of land reform is essential to redress a deep historical injustice, and the objective here is broadly endorsed. Redistribution is more controversial, for it aims at transferring large amounts of commercial farmland to black South Africans with little experience or desire to farm. [2010/11 *Survey*, p614; Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, South African Institute of Race Relations, Johannesburg, 2013, p289]

The Government's aim is to transfer 30% of commercial farmland (equivalent to 26m hectares) to black people, whether by restitution or redistribution. The deadline for achieving this target, initially set at 1999, was later revised to 2014. Given financial and operational constraints, the Government has since said that 2025 seems 'a more realistic deadline for the realisation of land reform objectives'. [2010/11 *Survey*, p614]

The Restitution of Land Rights Act of 1994 (the Act) provides for the return of land rights to people deprived of these under apartheid laws dating back to 1913. Some 79 700 valid land claims have been lodged, of which some 76 200, according to the Land Claims Commission (the statutory body responsible for investigating and adjudicating restitution claims) had been settled by March 2011. Though 96% of restitution claims have thus been settled, some 3 450 claims remain to be resolved. [2012 *Survey*, p600] These claims are largely in rural areas and settling them will not be easy, as the most difficult cases have been left until last.

[Jeffery, *Chasing the Rainbow*, p99; 2012 *Survey*, p600]

By the end of March 2011, according to the latest figures from the Presidency, some 2.8m hectares of land had been restored to 1.6m black South Africans at a cost of roughly R13bn. By then, some R6bn had also been paid out in financial compensation to claimants whose land (perhaps because of subsequent urban development) could not easily be restored, or who preferred to accept cash payments. Some R4.2bn in various post-settlement grants has also been provided, bringing the total spent on restitution since 1994 to some R23bn. If the R6bn paid out in cash had been used to buy more land at the prices then prevailing, a further 1.3m hectares of land could also have been transferred to black South Africans. [2012 *Survey*, pp600-603]

Despite the high proportion of claims already settled, problems in the restitution process have been legion. Some of the claims made have no historical foundation, while sometimes the same

parcel of land has been claimed by more than one community, making the verification of competing claims a difficult exercise. Officials in the Land Claims Commission have also inflated claims on occasion, perhaps most notably in Magoebaskloof (Limpopo), where the six claims in fact lodged by local communities spiralled to more than 600 as gazetted by bureaucrats. In other instances, officials have used vague property descriptions from claimants to enlarge areas under claim, or have gazetted claims for which no clear basis exists. [*Farmer's Weekly* 15 May 2009] Partly because of such mistakes, land claims have expanded to embrace 70% of Limpopo province, half of all sugar farms, and between 30% and 40% of all land under timber. [Jeffery, *Chasing the Rainbow*, p291; *Business Day* 31 July 2009]

In 2009 the Land Claims Commission acknowledged that its officials had falsely inflated some claims. It also admitted that some claims had been gazetted against properties without sufficient prior investigation. [*Business Day* 29 July 2009] The Government has pledged to rectify these mistakes, chief land claims commissioner Blessing Mphela saying: 'Where there is no evidence of dispossession, we will degazette. It's not the role of the commission to make claims out of non-claims.' He declined to say when the first delisting would take place or to speculate on the number of farms which might be delisted, but pledged that the matter was being treated 'as extremely urgent'. [*Farmer's Weekly* 15 May 2009] However, by October 2009 only 29 farms had been delisted, [*Business Day* 7 October 2009; 2010/11 *Survey*, p615] and little progress has since been made. [Annelize Crosby, Legal and Policy Adviser, Agri SA, e-mail communication, 10 April 2012]

According to organised agriculture, thousands of farms qualify for delisting. However, the expectations of claimants have now been aroused and the dashing of their hopes could lead to conflict. The degazetting of claims is also likely to be a major additional burden on bureaucrats already battling to do a proper job. [*Business Day* 26 May 2009] Yet, in the words of the Legal Resources Centre (LRC), a civil society organisation that provides legal advice and sometimes also litigates in the public interest, it is vital that the commission should find a way of 'fixing the colossal errors that have been made in the claims verification process'. [*Business Day* 26 May 2009]

Another major problem has arisen from a clause in the Restitution Act stating that land restored to a community does not vest in community members as co-owners but rather in the community itself. The community becomes the sole owner and must then decide how its members should be allowed to use the land. [*Business Day* 31 July 2009] Not surprisingly – and especially where relative outsiders have been included in communities – the upshot has often been 'massive conflict', as the LRC puts it. [*Business Day* 26 May 2009]

Mangaliso Kubheka, leader of the Land People's Movement, sees this as a major blunder. Instead of the commission spelling out the rights and duties of community members, 'they just

say: here is your land, sort it out yourselves,' he notes. By contrast, 'millions of landless peasants in Brazil were given title to individual plots', says Mr Kubheka. [*Business Day* 6 August 2009] The vesting of land in communities rather than in individuals has also been criticised by some new black farmers. In May 2011, for instance, Andy Tlali – the only black farmer in a group of 45 South African farmers planning to move to the Republic of Congo (Brazzaville) – said: 'The Government lets new black farmers down. They give land to a community, not to individual farmers. You can't farm commercially if you have more than 200 people living on a farm.' [*City Press* 22 May 2011]

Mismanagement within the commission and the relevant government department (renamed the Department for Rural Development and Land Reform in 2009) has compounded the difficulties. Organised agriculture cites dozens of cases where farmers have agreed to transfer part of their land to claimants and then mentor them to help them make a success of their new farming operations. But these agreements have to be endorsed by officials – and sometimes their consent has taken so many years to secure that agreements have simply foundered along the way. Revenue constraints also play a part in the malaise, but long delays (says Agri SA, the voice of organised commercial agriculture) have mostly occurred 'because we sit with activists and revolutionaries in senior positions, who do not make good administrators'. [*Farmer's Weekly* 22 June 2012]

Some officials have also acted fraudulently, inflating the prices which farmers are in fact prepared to accept for their land and then, when the State pays out the larger sums, pocketing the difference. (In one instance, the difference amounted to R12m, for the farmer's asking price was R8m while the inflated claim put forward by officials was R20m.) [*Business Report* 29 June 2011] In addition, the processing of restitution claims has often been dogged by gross inefficiency. Writes journalist Stephan Höfstätter: 'A community leader who had to wait eight years for a reply to a fax sums it up for me.' [*Business Day* 15 October 2009]

Even where farmers have reached agreement with the State on the purchase of their farms, they often face further delays in obtaining payment for their property. Some have waited as long as six years. [*Farmer's Weekly* 9 September 2011] In one case in Mpumalanga, the State was so slow in making payment that the North Gauteng High Court ordered it to pay out an additional R23m in interest on an original selling price of R200m. [*Farmer's Weekly* 12 October 2012]

By September 2011 a backlog of R5.3bn in approved land restitution claims had developed, which the land department lacked sufficient funds to settle and showed little urgency in addressing. [*Business Day* 5 September 2011] A year later, said Agri SA, the problem of late payments remained widespread, for many officials 'persisted in...not paying in full what was legally owed to the landowners'. [*Farmer's Weekly* 12 October 2012]

In addition, by the Government's own admission, between 50% and 90% of all land reform projects have failed, the recipients of formerly successful farms failing to produce any marketable surplus. [*Business Report* 29 June 2011] Such failure stems from a lack of farming experience, a shortage of capital, inadequate mentoring and support, and the difficulty of joint decision-making in the many instances where land has been transferred to communities rather than individuals. It also means (writes Mr Höfstätter) that the Government, 'by its own admission, has spent billions in taxpayers' money to take hundreds of farms out of production, costing thousands of jobs and billions more in lost revenue'. [*Business Day* 12 November 2009]

After all the problems generated by the restitution process, it also now emerges that very few claimants want land at all. In April 2013 the minister of rural development and land reform, Gugile Nkwinti, finally acknowledged that few claimants wanted land. Said Mr Nkwinti: 'We thought everybody when they got a chance to get land, they would jump for it. Now only 5 856 have opted for land restoration.' People had chosen money instead because of poverty and unemployment, but also because they had become 'urbanised' and 'de-culturised' in terms of tilling land. 'We no longer have a peasantry; we have wage earners now,' he said. [*Mail & Guardian* 5 April 2013] These figures, combined with those provided by the Presidency in December 2011, show that 92% of successful land claimants – some 70 370 out of the 76 230 whose claims have been settled [2012 *Survey*, p600] – have opted for financial compensation rather than for land to farm.

Despite this admission (which confirms what some commentators have long been saying), the Government nevertheless remains intent on re-opening the land restitution process so as to allow many more land claims to be lodged. This is to be done under the Restitution Bill, which was gazetted on 23rd May 2013 for comment within 30 days.

Key clauses in the Restitution Bill

Extension of deadline to claim

The main purpose of the Restitution Bill is to re-open the existing land restitution process. Its main change is thus to extend the deadline for lodging land restitution claims from December 1998 to December 2018. [See, for example, Section 1, Restitution Bill, Section 2, amended Act]. This is intended to assist: [Explanatory Memorandum on the...Restitution of Land Rights Amendment Bill, 2013, paras 1 and 2]

- those who did not know about the existing restitution process or found the 1998 deadline too tight;
- people dispossessed of land under 'betterment schemes' in the former homelands; and
- those who lost their land prior to 19 June 1913, the cut-off date in the Bill of Rights.

Those who missed the 1998 deadline

According to Mr Nkwinti, the Government needs to reopen the land claims process to help the many prospective claimants who say the earlier deadline (December 1998) was unreasonably short. According to Theo de Jager, deputy president of Agri SA, the true reason for recent pressure on the State to reopen the process is that would-be claimants have realised that the Land Claims Commission will no longer even attempt to verify their claims. In the past, when they expected the commission to do a proper job, such individuals would have hesitated to put forward bogus claims. But it has now become apparent that the commission has 'given up altogether' on investigating the validity of claims, he says. This has turned the land claims process into 'a free-for-all, in which the only criterion is a claim form in a file'. [*Farmer's Weekly* 22 June 2012]

So absurd has the situation become that the land department had substantially more outstanding claims before it in 2012 than the number it reported in 2009 or received before the 1998 cut-off date. It also cannot account for this anomaly (though re-opening the claims process would in time help provide an explanation). In addition, so chaotic are its administrative processes that it does not know how many claims have been gazetted, how many have been processed in full, or how many have been degazetted as invalid, says Dr de Jager. [*Farmer's Weekly* 22 June 2012]

Victims of betterment

Betterment was largely a National Party policy which aimed at halting soil erosion, rehabilitating land, and improving crop yields within the homelands. This was mainly done by culling cattle and dividing communal land into residential, arable, and grazing zones. Often the result was to reduce the plots allotted households to one or two morgen, leaving families with too little land to sustain themselves through subsistence farming. Many households were also left landless altogether. Land deprivation added greatly to suffering within the overcrowded homelands, and evoked significant resistance. [Joanne Yawitch, *Betterment*, SAIRR, Johannesburg, 1982, pp48-51, 94, 9-15, 50-51, 18, 22-24, 27, 42]

Under earlier land reform policy, victims of betterment were to be helped via land redistribution rather than restitution. [Department of Land Affairs, *White Paper on South African Land Policy*, April 1997, p79] This made sense, as restitution would have involved the taking of land from other former homeland residents who themselves had probably experienced great hardship. How the wrongs of betterment are now to be rectified via restitution is not explained in the Restitution Bill.

Those dispossessed before the 1913 cut-off date

According to the Explanatory Memorandum on the Restitution Bill, the State now seeks to include within the restitution process those people who were dispossessed before 1913. At present, restitution to such individuals is barred by the property clause (Section 25) in the Bill of Rights, which mandates the return of land solely to those who were 'dispossessed of property

after 19th June 1913 as a result of past racially discriminatory laws and practices’. [Section 25(7), Constitution of the Republic of South Africa of 1996 (the Constitution)]

The land department says ‘the biggest beneficiaries of the new policy will be Khoi and San communities, who will be able to reclaim heritage sites they lost before 1913’. According to the deputy minister of rural development and land reform, Lechesa Tsenoli, the Government is obliged to help these communities, which have been excluded from redress thus far: ‘They were saying to us, “what you did in the past (the first round of claims) though correct, excluded us!” And the risk of ignoring the plight of these South Africans who feel excluded from our country is something we have to deal with head-on.’ [City Press 2 June 2013]

However, as opposition parties have stated, changing the 1913 cut-off date could also be ‘a politically motivated bid to get votes [for the ruling African National Congress (ANC)] ahead of next year’s general election’. Many of the descendants of the Khoi and San live in the Western Cape, which the ANC has already lost to the Democratic Alliance (DA), the official opposition, while many others live in the Northern Cape, which the DA hopes to win in the 2014 elections. [City Press 2 June 2013]

The Restitution Bill does not itself attempt to change the 1913 cut-off date, as this will require a constitutional amendment. Hence, this will be dealt with in due course in a separate measure. There is thus no certainty as to what the new cut-off date will be. In addition, amending one part of Section 25 (to change the cut-off date) could also facilitate demands that other changes to Section 25 be made at the same time. Two major unions allied to the ANC – the National Union of Metalworkers of South Africa (Numsa) and the Food and Allied Workers’ Union (Fawu) – have already begun demanding such changes on the basis that the current wording of Section 25 has prevented successful land reform, [Business Day 14 June 2013] even though the real reasons for the failure of the programme lie elsewhere.

Fraudulent land claims

The Restitution Bill makes it an offence to ‘lodge a fraudulent claim’ for land restitution. [Section 4, Bill, Section 17, amended Act] However, the penalty laid down seems too limited to provide much of a deterrent, for under Section 17 of the Act the maximum punishment that can be imposed for such fraudulent conduct is ‘a fine or imprisonment for a period not exceeding three months’. [Section 4, Bill, Section 17, amended Act]

This three-month prison term seems derisory, especially when compared to the ten-year prison terms being introduced, under other bills in the policy pipeline, for those who misrepresent the black economic empowerment (BEE) credentials of their companies, fail to promote the beneficiation of minerals within the country, or hawk goods by the roadside without a licence to do so from their local municipality. [See the Broad-Based Black Economic Empowerment

Amendment Bill of 2013, the Mineral and Petroleum Resources Development Amendment Bill of 2013, and the Licensing of Businesses Bill of 2013, now being redrafted] If this statutory penalty is intended to replace common law penalties for fraud, which are likely to be more severe, the upshot could be to encourage fraudulent land claims rather than reduce them.

Costs and productivity of transferred land

The Restitution Bill also introduces two more factors that must be taken into account by the Land Claims Court in deciding whether land should be restored to a land claimant, or whether other equitable compensation should instead be provided. These two factors are: [Section 9, Bill, Section 33, amended Act]

- ‘the feasibility and cost of such restoration’; and
- ‘the ability of the claimant to use the land productively’.

These factors are clearly vital to decisions on restitution and should have been included in the statute from the start. However, the ability of claimants to use land productively will depend on a complex range of factors which may also vary over time. Such factors are not easily assessed on the papers before a court. Hence, the provision is unlikely in itself to make much practical difference to the high failure rate of land reform projects.

Ramifications of the Restitution Bill

The Restitution Bill has major and wide-ranging ramifications, raising many vital socio-economic issues that need to be taken fully into account rather than brushed aside.

Little demand for farming land

The restitution policy assumes a widespread hunger for land to farm, which the Government has repeatedly asserted but done little to substantiate. The Restitution Bill is also premised on a huge unmet demand for the return of farming land, its explanatory memorandum emphasising that only some 80 000 claims have been lodged (many, of course, on a community basis), whereas: [Explanatory Memorandum, para 2.3]

- 3.5m people (more accurately, some 2m) [John Kane-Berman, ‘Population Removal, Displacement and Divestment in South Africa’, *Social Dynamics*, University of Cape Town, pp28-46, at pp30, 32-33] were forcibly evicted from their land or otherwise shifted to the homelands in the apartheid era; and
- about another 4m (a figure not substantiated) lost land under ‘betterment’ schemes.

The Restitution Bill thus overlooks:

- research carried out by the Centre for Development and Enterprise (CDE) in 2005, which showed that only 9% of black South Africans wanted land to farm; [CDE Executive Summary, *Land Reform in South Africa: Getting Back on Track*, May 2008, p3] and

- a warning issued in 2009 by Mondli Makhanya, then editor of the *Sunday Times*, who wrote: ‘We have been labouring under the myth that there is a land-hungry mass out there dying to get its hand on a piece of soil. We have formulated policies and development plans around this distorted notion of what South Africans want... At the risk of being lynched, tarred and feathered by ideologues, I will posit that South Africans have very little interest in land’.

In addition, a recent claim that 45% of South Africans want land to farm [*The New Age* 21 June 2013] is belied by Mr Nkwinti’s own admission in April 2013 that only 92% of successful land claimants have wanted land to farm, the rest preferring cash compensation. As Mr Nkwinti noted, South Africa has urbanised and ‘we have wage earners now’, rather than people who want to till the land. [*Mail & Guardian* 5 April 2013]

‘A hornet’s nest’

The Restitution Bill is likely to give rise to thousands of new claims, not all of them well founded. Some of them are also likely to be fraudulent, especially as the penalty for fraud will be so limited and the Land Claims Commission is now making little attempt to verify the accuracy of such claims.

In addition, land which has already been returned to land reform beneficiaries could readily be claimed again, as the land department foresees. Says Mr Tsenoli: ‘People are saying we are stirring up a hornet’s nest. If we know that it is a hornet’s nest, it is better that it is opened by us. We don’t want it to explode in our face because we did not attend to it.’ [*City Press* 2 June 2013]

However, the consequences of stirring up this hornet’s nest need to be thought through, not waved away. At the very least, it will mean five years of additional tenure uncertainty for both commercial farmers and the 1.86m beneficiaries to whom land has already been transferred via restitution or redistribution [2012 *Survey*, pp600, 604] before the new deadline expires in December 2018. In addition, on past experience of restitution claims, it will take at least another 15 years, if not longer, before all the new claims are dealt with. Tenure insecurity, for many commercial and emergent farmers, will thus persist for a minimum of two more decades.

More land out of productive use

The Restitution Bill seeks to ensure that land will be restored only to those able to use it productively. However, as earlier noted, this capacity cannot easily be assessed in advance on the papers before a court when it in fact depends on a vast range of often shifting factors.

The more likely outcome, based on experience to date, is that much of the land returned to inexperienced emergent farmers will cease to generate any marketable surplus. As earlier noted, between 50% and 90% of land reform projects have failed. This means that between 3.5m and

6.3m hectares of farm land have been lost to agricultural production. More claims and more land transfers are likely to result in still more ‘assets dying in the hands of the poor’, as the then director general of land affairs, Tozi Gwanya, warned in 2007. [John Kane-Berman, ‘Bad-faith Expropriation Bill not grounded in South Africa’s land realities’, *Fast Facts*, May 2008, p7]

Such an outcome will do nothing to redress past injustice or help those earlier dispossessed of land. As *Business Day* commented in an editorial in June 2013: ‘The warm glow that comes from having your ancestral land restored fades fast when crops fail, animals die, bills start mounting, and your family is going hungry.’ [*Business Day* 4 June 2013]

Lost agricultural production also means lost jobs on farms that used to be thriving concerns but have since collapsed. Already, some 331 000 agricultural jobs have been lost (in the period from 2001 and 2012) – and some at least of these job losses have resulted from failed land reform initiatives. The loss of these jobs has already worsened rural poverty, while more land transfers are likely to put an end to more farm jobs – with few compensatory benefits to others – and add to destitution.

Though the Government is now trying to return failed farms to production, the costs of recapitalisation are high while the results to date have been limited. According to Mr Nkwinti, the Government has spent some R2.14bn in the past three years on recapitalising dysfunctional farms. By December 2012 restored farms had thus reportedly generated a net income of R126m, [*Business Report* 3 June 2013] but this is hardly a substantial return on the State’s investment.

These figures underscore the difficulty of returning failed farms to production and profitability, especially when many of them have been stripped of irrigation systems and other key equipment or livestock. In addition, the DA alleges, some of the money that has been set aside for recapitalisation is instead being ‘pillaged by unscrupulous officials’. Said Athol Trollip, the DA’s former spokesman on land reform, in June 2013: ‘[Recapitalisation] has provided those that prey on the resources of the State easy access to a source of ready cash.’ [*Business Day* 3 June 2013]

In addition, imparting necessary skills to emergent farmers is no easy task, as Mr Nkwinti recently acknowledged when he said: ‘New black farm owners were given the land without the necessary skills to maintain its productivity... They were just labourers. There’s a big difference between being a labourer and being a manager of a farm, so really that’s the big gap we are trying to close with the recap strategy.’ [*Business Report* 3 June 2013] However, state officials with no knowledge of farming cannot impart the necessary managerial and financial skills. For this, the Government must rely on experienced commercial farmers to guide and mentor newcomers. It depends on such farmers having the goodwill to do all they can to help – yet it continues to put that goodwill at risk by trussing farmers up in additional red tape, exposing them to thousands of

additional land claims, and threatening them with large-scale expropriation for less than adequate compensation (see *An impetus to expropriation*, below).

Moreover, unless the effective agricultural extension officer system South Africa used to have can be revived, emergent farmers will be left without essential guidance and practical advice on how best to use their land and cope with challenges such as drought or disease. In addition, money spent on recapitalisation is unlikely to make a lasting difference to profitability unless and until the many other challenges confronting small farmers – ranging from soaring input costs to limited infrastructure and high crime rates – can be overcome.

Food security at increased risk

South Africa is a modern industrialised country that needs commercial farming to feed the millions of its people who live in urban areas. At present, some 90% of food produced within the country comes from the country's 37 000 commercial farmers – many of whom are likely to find their land under claim once the process is re-opened under the Restitution Bill. Yet land under claim may not be worked as productively as in the past, as farmers have little incentive to invest in it. [*Business Day* 2 April 2013] In addition, as earlier noted, land which is transferred to new claimants could fall out of production altogether.

The Government seems to think it matters little if domestic food production declines, as the country's food needs can always be met via imports. However, food imports could become more costly if the rand weakens further. This could also happen, as South Africa already has a yawning trade deficit amounting to some 5.8% of GDP, which is almost double the 3% figure generally regarded as prudent, and which could widen further if agricultural production and exports falter. In addition, relatively few countries in the world have food surpluses, and competition for these surpluses is likely to increase as the global population expands. Such factors could make it difficult for South Africa to import the food it needs. At the very least, food inflation is likely to accelerate, putting further pressure on the poor, in particular. Since the poor spend a higher proportion of their income on food than those who are better off, it is they who will primarily bear the brunt of rising food costs. Hence, the Restitution Bill is likely to increase rural hunger and poverty rather than contribute to rural development and wellbeing.

More time and money for restitution

As noted, the effect of the Restitution Bill will be to drag the country's land reform process out for at least another two decades – and probably, depending on the number of claims received, for longer still.

Already, some 3 500 of the claims lodged before the 1998 deadline remain unresolved despite the passage of close on 15 years. [2012 *Survey*, p600] Even where farmers have reached agreement with the State on the sale of their farms for land reform purposes, obtaining promised

payments has sometimes taken as long as six years. Adding thousands of new claims to those already needing to be resolved will inevitably clog up administrative processes still further.

In addition, the land department has often cited a lack of revenue for land reform, saying it cannot make progress in paying agreed amounts or finalising outstanding land claims because the Treasury has failed to vote it sufficient funds. How then will it foot the bill for the reopening of the land claims process? [*Business Day* 3 June 2013] A shortage of money is likely to result in yet more delays. It is also likely to give impetus to the expropriation of land under claim for less than adequate compensation.

An impetus to expropriation

The Restitution Bill cannot be viewed in isolation, for it forms part of a trilogy of bills released by the land department since March 2013. The re-opening of the land claims process is likely to result in much more land being targeted for expropriation. The Expropriation and Valuation Bills will then kick in, making it quicker and cheaper for the State to expropriate such land for less than market value – and without reference to further loss suffered, including loss of income.

The Expropriation Bill seeks to empower the State to take ownership and possession of farms (as well as property of other kinds) by notice to the owner. In addition, the expropriating authority will be able to stipulate that compensation will be paid only at ‘a later date’ decided by it. Moreover, under the Valuation Bill, the amount of compensation payable will be decided by a state official, the new ‘valuer general’, who will be appointed by the minister and accountable to him. Disputes over compensation will not be allowed to delay the transfer of ownership and possession to the State, while objections to the valuer general’s decision will have to be lodged initially with his office and thereafter with a ‘valuation review committee’ – also to be appointed by the minister and operating largely under his control. Only after this committee has handed down its decision (for which it need not give reasons) will expropriated owners be able to approach the courts for relief. In practice, this option will be available only to those wealthy enough to embark on costly litigation after a lengthy review process and despite the loss of their property – perhaps their only source of income – to the State.

Both the Expropriation Bill and the Valuation Bill seek to circumvent the property clause (Section 25 of the Constitution), which means they are unlikely to pass constitutional muster. Both thus also contradict a key founding provision of the Constitution (Section 2), which states: ‘The Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and that the obligations imposed by it must be fulfilled.’ [Section 2, 1996 Constitution]

Though both Bills need to be withdrawn, the ruling ANC seems more likely to press ahead with enacting them into law in this centenary year of the 1913 Act. This may well encourage the State

to resort to expropriation as a first, rather than a last resort – and especially where land is under claim under the re-opened process made possible by the Restitution Bill.

Conflict with the National Development Plan

By reopening the land claims process, the Restitution Bill will generate prolonged uncertainty over title as regards all land that has already, or may in future, be claimed. This is in conflict with the National Development Plan (NDP), which emphasises the need for tenure security for both commercial farmers and emergent ones. As the NDP says: ‘Farmers will only invest...if they believe that their income streams from agriculture are secure. Tenure security will secure incomes for existing farmers at all scales, for new entrants into agriculture, and for the investment required to grow incomes.’ [National Planning Commission, *National Development Plan*, August 2012, p145]

Instead of enhancing tenure security, the Restitution Bill will generate major uncertainty – for both commercial and emergent farmers – for two decades and more. This will inevitably deter investment in land, undermine the generation of the 1 million new agricultural jobs which the NDP envisages, and put further pressure on the NDP’s overall goals of raising the growth rate to 5.4% a year on average and thereby reducing unemployment to 6%.

Yet the NDP has been approved by the Cabinet and endorsed by the ANC at its national conference at Mangaung (Bloemfontein) in December 2012. It is supposed to be the ruling party’s ‘overriding policy blueprint’. Speaking in Parliament a week ago, Trevor Manuel, minister in the presidency: national planning commission, thus warned that ‘history will judge government leaders and MPs harshly if they fail to implement the NDP’. President Jacob Zuma also called on MPs and the nation to rally behind the plan.

Mr Manuel also emphasised that as many as 70% of young South Africans are unemployed – and that the responsibility for addressing this crisis of unemployment lies with the country’s leaders, including the ruling party’s MPs. Added Mr Manuel: ‘Are we able to face the unemployed young people and the thousands living in poverty and say: “We are not treading on your dreams?” Will we be able to hold on to our integrity when they remain locked outside the labour market by the actions we take or fail to take? Will they believe us when our actions sometimes close rather than open opportunities?’ [Business Day, *The Times* 13 June 2013]

If economic growth is to accelerate and unemployment to decline, the land department needs to heed what President Zuma and Mr Manuel have said. The conflict between the Restitution Bill and the NDP is reason enough to withdraw the Bill in its entirety – and this is what the land department should now do.