South African Institute of Race Relations NPC (IRR)
SUBMISSION
to the
The Valuer General
regarding the
Draft Regulations of 2017
gazetted under the Property Valuation Act of 2014
Johannesburg, 19th June 2017

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1 Introduction

The Minister of Rural Development and Land Reform (the minister) has invited interested people and organisations to submit written comments to the Valuer General, by 19th June 2017, on the Draft Regulations (the Regulations) gazetted under the Property Valuation Act of 2014 (the Act).

This submission on the Regulations is made by the South African Institute of Race Relations NPC (IRR), a non-profit organisation formed in 1929 to oppose racial discrimination and promote racial goodwill. Its current objects are to promote democracy, human rights, development, and reconciliation between the peoples of South Africa.

The IRR's appreciates the fact that 60 days has been allowed for public comment. However, to facilitate more meaningful public participation, the Regulations should have been

accompanied by comprehensive socio-economic assessments of their likely economic and other ramifications, as required by the government's Socio-Economic Impact Assessment System (SEIAS).

2 Content of the Regulations

2.1 Clause 1: Definitions

Many of the definitions in the Regulations are impermissibly vague, in conflict with the Constitution, and/or *ultra vires* the Act under which they have been gazetted. The problems wth these definitions will be discussed further in the sections which follow.

2.2 Clause 2: Powers of the Valuer General

Some of the powers of the Valuer General, as set out in the Regulations, are *ultra vires* the Act. These include the powers supposedly given him to establish and maintain a data base of 'property and land market information' under Clause 2(1)(a), for the Act confers no such authority on him.

The objects of the Act are rather to: [Section 2, Act]

(a) 'give effect to the provisions of the Constitution which provide for land reform and to facilitate land reform through the regulation of the valuation of property';
(b) 'provide for the valuation of property that has been identified for purposes of land reform';
(c) 'provide a voluntary valuation service to departments'; and
(d) 'provide for the setting of criteria and procedures and the monitoring of valuations'.

The functions of the Valuer General, as set out in the Act, are: [Section 6, Act]

(a) to 'value any property contemplated in Section 12(1)(a)', ie, property which has been 'identified for purposes of land reform';
(b) 'at the request of a department, to value property contemplated in section 12(1)(b)', ie property which a department wishes to acquire or dispose of;
(c) to 'make recommendations to the minister' on the 'criteria' for the determination of property values, the 'procedures and guidelines' to be used, and 'a system to monitor compliance'; and
(d) to 'determine the matters that must be reflected in a valuation report'.

Nowhere does the Act give the Valuer General the power to 'establish and maintain a database of property and land market information', as stated in Clause 2(1)(a) of the Regulations. This power is clearly *ultra vires* the Act. So too is the power given to the Valuer General to 'request a body or person to disclose...any information that may be relevant for inclusion in the database' or to 'question any person about such information', as stated in Clause 2(1)(b) of the Regulations. These broad and intrusive powers are clearly *ultra vires* the Act. So too are the further sub-clauses dealing with the proposed database: viz, Clause 2(1)(c) and Clause 2(1)(d).

Some of the powers conferred on the Valuer General by Clause 2(1)(e) of the Regulations are also *ultra vires* the Act and/or inconsistent with the Constitution. For example, the Regulations authorise him to demand from property owners 'itemised annual revenues and expenses' (item *vi*), financial statements (item *vii*), and 'capital and maintenance costs' (item *x*). This information is clearly intended to be used in determining 'current use value', and then applying this value in the manner envisaged in Clause 6 (as described below). However, this proposed reliance on 'current use value' is contrary to generally recognised valuation practices and methods. It is also *ultra vires* the Act and inconsistent with the Constitution, as further described below.

The power given to the Valuer General under Clause 2(1)(e) to require 'details of any acquisition benefits' (item *xii*) is similarly flawed, as further explained in *Section 2.5.3* of this submission.

The Valuer General's powers to obtain information should be confined to the data required to conduct valuations that are in keeping with generally recognised valuation practices and methods. These powers must also be confined to what is 'reasonably required for the purposes of valuing the property', as stated in Section 13(1)(c) of the Act.

2.3 Clause 4: Valuation practices, methods, standards, and procedures

Clause 4(1) states that 'all valuations in terms of the Act and these Regulations must be conducted in accordance with generally recognised valuation practices and methods'. This is the correct approach for the Valuer General to follow. However, the obligation must be upheld in every aspect of the valuation process and cannot simply be disregarded at various points.

There is also a problematic provision in Clause 4 (2), which begins by stating that an instructing authority wanting a valuation of property targeted for land reform must submit a written request to this effect to the Valuer General. According to Clause 4(2)(g), the instructing authority must include in this written request 'the effective date of the valuation'. However, the instructing authority cannot foresee how long it may take for the Valuer General to carry out his valuation, as this will depend on many factors – including whether a court order is needed to give him access to the relevant property, as required under Section 13(4)(b) of the Act. The 'effective date of the valuation' is also *prima facie* different from 'the valuation date' contemplated in Clause 5(1) of the Regulations. This anomaly must be resolved.

Clause 4(4) of the Regulations states that the 'authorised valuer' must give the owner of the property 'written notice...at least 7 days prior to the proposed date of inspection'. In practice, this period may often be unreasonably short, especially given the volume of data which the authorised valuer may 'require' the owner to produce at the same time. The Regulations should also echo the Act in reaffirming that the authorised valuer cannot enter the property without the consent of the owner or, in the absence of such consent, without a court order authorising him to do so. [Clause 4(4), Regulations; read with Section 13, Act]

2.4 Clause 5: Procedures for valuation of property identified for purposes of land reform

Various provisions in Clause 5 are *ultra vires* the Act and/or inconsistent with the Constitution. Why this is so is further described in *Section 2.5* of this submission.

2.5 Clause 6: Determination of the value of subject property

2.5.1 'Current use value'

Under Clause 6, the authorised valuer, in deciding the value of a property targeted for land reform, must start by 'adding the current use value and market value of the subject property as at the date of valuation...and dividing the resulting figure by two'. (The Regulations use the word 'diving', rather than dividing, but this is clearly a typographical error. This is made clear by Clause 6(b), which talks of 'the division referred to in paragraph (a)'.)

The wording in Clause 6(a) makes it clear that both the 'current use value' and the 'market value' must be determined, as both stand on the particular valuation date, that these two values must be added together, and that the resulting total must be divided by two.

What then does 'current use value' mean? It is defined in the Regulations as 'the net present value, as at the date of valuation, of cash inflows and other benefits that the subject property generates for the specific owner under lawful use, and without regard to its highest or best use or the monetary amount that might be realised upon its sale'. [Clause 1, Regulations]

What then does 'net present value' mean? It is defined in the regulations as 'the difference between the net present value of cash inflows or other benefits and the net present value of cash outflows or other costs.' [Clause 1, Regulations]

This wording suggests that it is solely the difference between inflows and outflows at the *present* time, ie on the valuation date, that is relevant. There is nothing in the regulations which obliges the Valuer General to look at inflows versus outflows over a longer period.

The way this would work in practice is best illustrated by an example. Say, for instance, that a farm which has been targeted for land reform has a market value of R1 million. However, adverse conditions (stemming from a recent drought and a loan taken out to provide working capital) mean that the farm has a net profit, on the valuation date, of only R10 000. This then is its 'current use value'. This amount must be added to its market value of R1m and the total must be divided by two. Under this formula, the farm must thus be valued at R1 010 000 divided by 2, or R505 000. This is roughly half its market value.

The same result is likely to follow in very many instances. If the net profit from the property on the valuation date is significantly below market value – and this will very often be the case – then the formula will generally result in valuations that are roughly half of market value. This is irrational and unreasonable.

If the farm in our example were then to be expropriated in return for compensation set at R505 000, this would not be the 'just and equitable' outcome that is required by Section 25(3) of the Constitution. On the contrary, it would in practice require the individual farmer to bear a major part of the costs of land reform. This in turn would breach the constitutional requirement that the compensation paid should reflect an 'equitable balance between the public interest and the interests of those affected'. [Section 25(3), Constitution]

More seriously still, there is no reference in the Constitution to 'current use value'. Rather, the Constitution refers to the 'current use of the property' as a factor to be taken into account in deciding on 'just and equitable' compensation. [Section 25(3)(a), Constitution] The 'current use of the property' is also a factor recognised in the Act. This is evident from Section 15 of the Act, which says that a valuation report explaining how a particular property has been valued must incorporate 'all relevant information, including...the current use of the property'. [Section 15(2), Act]

'Current use value' is ***not*** the same as the 'current use of the property'. The reference to 'current use value' in the Regulations (in Clauses 1 and 5, and particularly in Clause 6) is thus inconsistent with the Constitution and *ultra vires* the Act. It must therefore be deleted.

The definition of 'current use value' is also ***not*** in accordance with the 'generally recognised valuation practices and methods' which the Regulations require to be applied. Under the Regulations, 'current use value' is essentially the net profit of the property on the valuation date, and there is no requirement that this figure should be capitalised. Because there is no reference to capitalisation, the 'current use value' will generally be considerably lower (20 times lower at a capitalisation rate of 5%) than it should be. This valuation method is profoundly flawed and will generally lead to valuations that are too low to meet constitutional criteria. This method is also contrary to 'generally recognised valuation practices and methods', despite the commitment in the Regulations to apply these.

2.5.2 The treatment of movables, annual crops, growing timber

If the instructing authority has requested that 'the value of movable property, annual crops or growing timber' on the property should be included in the valuation, then the provisions of Clause 6(b) come into play. Under this sub-clause, 'the value' of such movable property, crops, or timber 'must be added to market value before the division referred to in paragraph (a) is performed'. [Clause 6(b), Regulations]

Again, the meaning of this provision is best illustrated via our example of the farm with a market value of R1m, as earlier described. Say that the farmer has 50 head of cattle, with a market value of R500 000, which the instructing authority has also identified for purposes of land reform. This R500 000 must be added to the R1m, giving a sum of R1.5m. To this, net profit of R10 000 must be added. The resulting total of R1 510 000 must then be divided by two. This yields a value for both the farm and the cattle of R755 000.

This amount is not 'just and equitable'. Moreover, since it derives from a flawed reliance on 'current use value', as earlier described, it is also *ultra vires* the Act, inconsistent with the Constitution, and contrary to the 'generally recognised valuation practices and methods' which the Regulations require the Valuer General to follow.

Where the farm has growing timber which has also been targeted for land reform, the results of this formula could be even more anomalous. Say the timber in question is pine which is nearing the end of its 25-year growing period. The market value of this standing timber could easily be R150 000 per hectare. Assuming that our farm is 100 hectares in extent, the total market value of the timber would be R15m. Under the formula in Clause 6(b), this value (R15m) must be added to the market value of the farm (R1m), to yield a total of R16m. To this must be added the net profit on the valuation date (R10 000), while the resulting total must be divided by two. On this basis, the value of both the farm and the growing timber will be set at R16 010 000 divided by two, or R8 005 000.

Again, this is roughly half the market value of the farm and its standing timber and is neither just nor equitable. Since it derives from a flawed reliance on 'current use value', as earlier described, it is again *ultra vires* the Act, inconsistent with the Constitution, and at odds with the obligation on the Valuer General to apply 'generally recognised valuation practices and methods'. Moreover, since the state will obtain the full value (R15m) of the standing timber on the expropriation of the farm, this outcome is entirely at odds with the 'equitable balance' which the Constitution requires between the public interest in land reform and the interests of those affected.

The examples set out here are based on an assumption that it is the *market* value of movables, crops and growing timber that Clause 6(b) of the Regulations requires the authorised value to use. However, this is not clearly stated in the sub-clause, which simply refers to 'the value' of such property. The sub-clause is thus impermissibly vague, as other interpretations are plausible and no clear guidance is provided as to which is correct.

2.5.3 The treatment of 'acquisition benefits'

'Acquisition benefits' are defined in Clause 1 of the Regulations as meaning 'any benefits that accrued to the owner of the subject property because of the manner of acquisition and where such benefits did not arise from normal market transactions, including that they did not acquire the property on the open market from a willing seller'. [Clause 1, Regulations]

This definition is poorly worded and difficult to understand. It suggests, however, that the owner will have had an 'acquisition benefit' if he did not buy the property on the open market at a normal market price, but rather acquired it in some other way: for example, by inheritance from his father.

Under the Regulations, where the owner has had an acquisition benefit, the value of that benefit must be determined in the manner laid down in Clause 5(1)(b). Under this sub-clause, the authorised valuer must 'determine the historical value of any acquisition benefits and

escalate the value of these benefits to the valuation date, using an appropriate cost or price index'. [Clause 5(1)(b), Regulations]

Once this value has been determined, it must be taken into account in the manner required by Clause 6(c). According to this sub-clause, the authorised valuer must 'subtract from the value arrived at in paragraph (b) the value to the owner, as at the date of valuation, of acquisition benefits'. [Clause 6(c), Regulations]

Again, the meaning of this sub-clause is best explained by means of an example. If we go back to the example of the farm with 50 head of cattle, its value – as determined under Clause 6(b) – is R755 000. Say, however, that the farmer had inherited his farm from his father ten years ago, when it had a market value of R300 000. This acquisition benefit must then also be taken into account under Clause 6(c).

If the farm's market value was R300 000 when the farmer inherited it, then this is 'the historical value' of his acquisition benefit. Under Clause 5(1)(b), this value must be 'escalated...to the valuation date' using a price index which reflects the impact of inflation over the intervening period. Hence, if inflation has brought the market value of the farm from R300 000 ten years ago to R1m as at the date of valuation, then it is the R1m that must be taken into account.

Under Clause 6(c), this R1m must now be subtracted from the value of the farm as determined under Clause 6(b). Since that value was R755 000, it follows that the overall value of the farm is R755 000 minus R1 000 000, giving it a negative or minus value of - R245 000.

If the farm were then to be expropriated by the instructing authority, it would doubtless take the view that no compensation is payable as the farm has a negative value. Again, this outcome is not the 'just and equitable' one which the Constitution requires. Nor does it strike 'an equitable balance' between the public interest and the interests of those affected by the expropriation.

There is also no reference to 'acquisition benefits' in either the Act or the Constitution. The Constitution identifies 'the history of the acquisition and use of the property' as a factor to be taken into account in deciding what compensation is 'just and equitable'. [Section 25(3), Constitution] The Act echoes this wording in saying that the valuation report, in explaining how a property has been valued, must include 'the history of the acquisition and use of the property'. [Section 15(2), Act]

This phrase was included in the Constitution largely because of the forced removals which had been carried out in the apartheid era, and which had witnessed the eviction of some 1m black people from so-called 'black spots' in supposedly 'white' rural areas. The idea was that, if the government later expropriated a farm from which people had been forcibly removed, this 'history of the acquisition' of the property would be taken into account in

deciding what compensation would be 'just and equitable' overall. However, it was never intended that a benefit from *private inheritance* should also be taken into account. And it was certainly never intended that the full current value of such a benefit – which may have been greatly increased by the impact of inflation over many years – should be subtracted from the value of the property.

The subtraction of 'acquisition benefits' from the value of a subject property is *ultra vires* the Act and inconsistent with the Constitution. All provisions relating to such benefits must thus be deleted.

Clause 6(c) is also impermissibly vague in another way. It says that the current value of acquisition benefits must be 'subtracted from the figure arrived at in paragraph (b)', but it says nothing about how acquisition benefits are to be treated if no movable property has been identified for land reform and the value of the property must thus be determined under Clause 6(a) rather than under Clause 6(b).

It is contrary to the principle of equality before the law for acquisition benefits to be subtracted in the first situation but not in the second, and yet there is nothing in the Regulations to cater for the second situation. However, the way to fix this anomaly is not to extend the ambit of the unlawful provisions in Clause 6(c), but rather to delete them.

2.5.4 The treatment of any 'direct state investment or subsidy'

Clause 6(c) further requires that the current value of any 'direct state investment and subsidy in the acquisition and beneficial capital improvement of the property' should be subtracted 'from the figure arrived at in paragraph (b)'. [Clause 6(b), Regulations] Under Clause 5(1)(g)(iii) of the Regulations, if 'relevant current information' on the 'current cost' of any prior state subsidy is lacking, the authorised valuer must 'determine the historical cost of state investments and subsidies, and escalate the said cost to the date of valuation using an appropriate cost or price index'. [Clause 5(1)(g)(ii) and (iii), Regulations]

Again, an example will help to illustrate the practical significance of these provisions. Say that the farm in our example had been bought 30 years ago with the help of a state subsidy then amounting to R10 000. Given high rates of inflation over the preceding three decades, the equivalent amount at the date of valuation might now be R900 000. This amount must then be 'subtracted from the figure arrived at in paragraph (b)', which was R755 000 in our example. The value of the farm is thus calculated by subtracting R900 000 from R755 000, which yields a negative or minus value of –R145 000.

If the farm were then to be expropriated by the instructing authority, it would again doubtless state that no compensation is payable as the farm has a negative value. Again, this outcome is not the 'just and equitable' one that the Constitution requires. Nor does it strike an 'equitable balance' between the public interest and the interests of the affected owner.

Under the Constitution, one of the factors to be taken into account in deciding what amount of compensation would be 'just and equitable' is 'the extent of direct state investment and subsidy in the acquisition and capital improvement of the property'. [Clause 25(3)(d), Constitution] This wording is not, however, included in the Act. In speaking of the information that must be included in a valuation report, the Act expressly mentions three of the five criteria listed in Section 25 of the Constitution. However, it does not include this one. Any reference to such 'direct state investment and subsidy' is thus *ultra vires* the Act, even though it is sanctioned by the Constitution.

What is ***not*** sanctioned by the Constitution, however, is the way the Regulations require any direct state investment or subsidy to be treated. Because the National Party government may have helped white farmers to buy or make capital improvements to their farms at a time when black South Africans were denied the opportunity to buy farms at all, it is 'just and equitable' that 'the extent' of any such subsidy should be taken into account in deciding the compensation due on expropriation. The Constitution does not, however, envisage that the full current value of such a subsidy, as boosted by inflation over many years, should be subtracted from the market value of a farm.

There is no authority in either the Constitution or the Act that authorises the treatment of previous state subsidies in this way. This aspect of Clause 6(c) must thus be fundamentally rewritten. This rewrite must also cure the anomaly identified above: that the wording of Clause 6(c) fails to recognise that the value of a farm alone (without accompanying movables) will fall to be determined under Clause 6(a) – rather than Clause 6(b) – and that this situation must also be taken into account.

2.6 Clause 7: Directives for the valuation of subject property

Clause 7 states that 'all valuations in terms of the Act shall be conducted subject to such directives as may be issued by the Valuer General generally or in respect of a particular valuation'. However, the Act does not authorise the Valuer General to issue any such directives. Rather, as earlier described, it empowers him to 'make recommendations' to the minister on 'the criteria for the determination of the value of the property' and on 'procedures and guidelines' regarding 'the manner in which a valuation must be performed'. [Section 6, Act] Clause 7 is thus *ultra vires* the Act and should be deleted.

2.7 Clause 8: Valuation reports

This Clause sets out the information which must be included in the valuation reports required by Section 15 of the Act. The Clause includes many disturbing provisions, for it suggests that authorised valuers will be able to rely on:

- 'assumptions, special assumptions, reservations, special instructions or departures', [Clause 8(i), Regulations] even though this *prima facie* contracts the equality principle and the Constitution's guarantee of the 'supremacy' of the 'rule of law';
- the 'current use value' of the property, [Clause 8(p), Regulations] when this concept is unconstitutional and *ultra vires* the Act, for all the reasons earlier outlined;

- 'the historical and present values of any acquisition and use benefits accruing to the owner' [Clause 8(q), Regulations] when this methodology is also unconstitutional and *ultra vires* the Act, as earlier explained;
- both the historical 'and present values' of direct state subsidies in the purchase and capital improvement of properties, [Clause 8(s), Regulations] when this approach is not authorised by either the Constitution or the Act.

2.8 Clause 9: Representations by owner or persons in charge of property

According to the Regulations, the Valuer General, 'on receipt of the valuation report from an authorised valuer', must 'provide the owner...of the property with a copy of the valuation certificate', which will be regarded as a 'provisional' one. [Clause 9(1), Regulations] 'The owner…shall have 30 days in which to make written representations' to the Valuer General on this provisional valuation certificate. [Clause 9(2), Regulations] This sub-clause is vague, however, for it does not specify when the 30 days is to begin: on the owner's receipt of the provisional valuation certificate, or at some other time.

If the owner does make written representations, the Valuer General, 'within 14 days of their receipt', must submit the representations to the authorised valuer concerned. [Clause 9(3), Regulations] No period is specified within which the authorised valuer must respond. Instead, the Regulations simply state that 'the Valuer General must consider the representations of the owner...and the response of the authorised valuer to those representations'. The Valuer General may then 'adjust the valuation and certify the valuation certificate as final'. [Clause 9(4), Regulations]

However, the Valuer General will generally lack the detailed knowledge of the property which the authorised valuer will have acquired. The Valuer General is also appointed by the minister and is at all times 'accountable' to him, which may in practice undermine his institutional autonomy and his capacity to perform his functions impartially. There is also no obligation on the Valuer General to give reasons for adjusting the valuation. A better and less potentially partisan review process is thus needed if the Constitution's guarantee of just administrative action is to be upheld. [Section 33, Constitution]

3 Ramifications of the Regulations

For many years the government has blamed the slow pace of land reform on the 'willing-buyer/willing seller' principle, which requires the payment of market value when the state buys land. The government has often also claimed that farmers, when they know that the state is the prospective buyer, respond by artificially inflating their prices. However, there is little evidence of such price inflation.

On the contrary, Agri SA (the voice of organised agriculture) has long maintained that the government pays significantly less than market value and that farmers, faced with the coercive powers of the state, have little choice but to accept such prices. There are also indications that land officials have at times boosted and misrepresented the prices that farmers are willing to accept, so that they can pocket the difference between what the state

ends up by paying and what the farmer expects to receive. Inflation rates have also been high in most years since 1994 – and this has significantly increased the current market value of farming land, just as it has raised the prices of residential and other properties.

The Regulations overlook factors of this kind. Instead, both the Regulations and the Act are premised on the assumption that land reform will proceed more rapidly and more successfully if the properties targeted for such intervention are valued at very much less than market prices. The Regulations thus seek to reduce property values to roughly half of market value and sometimes all the way down to zero.

Though what they propose is clearly *ultra vires* the Act and inconsistent with the Constitution, the Regulations will certainly make it much cheaper for the state to expropriate large swathes of farming land (and a host of other properties). However, this will do little to help the disadvantaged, or to prevent the land transferred in this way from falling out of production, as has often happened in the past.

According to the minister of rural development and land reform, Mr Gugile Nkwinti, at least 70% of transferred farms have collapsed and now fail to produce any marketable surplus. Beneficiaries have thus gained little in terms of income or jobs, while people who previously worked on transferred farms have generally lost their jobs.

In these circumstances, simply to reduce the cost of land and so speed up the pace of land reform will do little to help anyone. Rather, as a former director general of land, Tozi Gwanya, stressed ten years ago, the government needs to rethink its targets. Land reform targets should look beyond the number of hectares transferred and should focus instead on jobs created, income earned, and overall productivity. There is little point, as Mr Gwanya stressed, in dishing out land and 'ending up with assets that are dying in the hands of the poor'. [John Kane-Berman, 'Bad-faith Expropriation Bill not grounded in South Africa's land realities', *Fast Facts*, May 2008, p7]

The ruling African National Congress (ANC) also needs to acknowledge that its oft-repeated assertion that access to land will help overcome unemployment, poverty, and inequality has no basis in reality. Access to land means little on its own. If such access is indeed to have a positive impact, it must be accompanied by all the other factors that are needed for success in farming. These include entrepreneurship and experience, along with 'working capital, know-how, machinery, labour, fuel, electricity, seed, chemicals, feed for livestock, and water'. Agriculture is also a uniquely difficult sector in which to prosper because farmers, in addition to all the usual barriers to success in any business, must often cope with drought and disease, along with high levels of stock theft and other crimes. [John Kane-Berman, 'From Land to Farming: Bringing land reform down to earth', @*Liberty*, IRR, Johannesburg, Issue 25, May 2015, p7]

To put poor people on the land without ensuring that all these needs are met is to set them up for failure. This helps explain why (in the words of Professor Ben Cousins, chair of the

Institute for Poverty, Land and Agrarian Studies or Plaas at the University of the Western Cape) 'more than R80bn has been spent on land reform since 1994' and yet the country has 'nothing to show for it'. [*Farmer's Weekly* 13 January 2017] However, like many other land reform measures in the past, the Regulations brush aside these key issues.

Rapid urbanisation also means that most South Africans have little desire for farming land. Mondli Makhanya, then editor of the *Sunday Times*, emphasised this point back in 2009 when he 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... At the risk of being lynched, tarred and feathered by ideologues, I will posit that South Africans have very little interest in land... Should we be expending so much energy and effort on land redistribution when the instinct of rural South Africans is to head to the city to seek employment and upward mobility there?' [*Sunday Times* 18 October 2009]

Mr Makhanya, now editor of *City Press*, has recently reiterated that urbanisation is proceeding apace and that the real demand in South Africa is for urban land for housing, not rural land for farming. Wrote Mr Makhanya in March 2017: 'Black South Africans are not as romantic and sentimental about land as Zimbabweans and some of our other neighbours. Mentally, they have long moved on, and those with sentimental attachments have them because there is a recent history of rural to urban migration in the family. Hunger for land is in the urban areas, where people are living on top of each other in informal settlements. And that is a totally different headache, which requires the kind of energy that is being spent obsessing about impractical fantasies.' [*City Press* 5 March 2017]

That most South Africans have little interest in farming land has been further confirmed via comprehensive surveys of public opinion recently commissioned by the IRR. Whereas the ANC often suggests that a public clamour for land is forcing it to embark on expropriation for little or no compensation, the IRR's 2016 field survey shows that: [Anthea Jeffery, 'EED is for real empowerment, whereas BEE has failed', @*Liberty*, April 2017, pp20, 14]

- 0.6% of blacks regard slow progress with land reform as an important unresolved problem;
- 0.3% identify skewed land ownership as a key cause of inequality; and
- 1% think 'more land reform' would best help them get ahead.

Fortunately, what this also means is that demand for farming land is relatively limited; and that this demand can be met without the radical redistribution the Regulations seek to facilitate. The demand could thus be met via transfers of state land, and by ensuring that high-value agricultural land along the eastern seaboard – much of which is currently under-utilised – is made fully productive.

Though the Regulations will not help achieve success in land reform, they will undoubtedly have many adverse and unintended consequences. If they are adopted in their current form, every farmer who fears that his farm might soon be expropriated for land reform purposes will have an incentive to maximise his inflows and reduce his outflows, so as to generate the

highest possible 'current use value' on the valuation date. Farmers will thus have reason to cut their staff, reduce maintenance, and stop reinvesting in their farms. This in itself could be negative for agricultural production and food inflation. It would also be very negative for the rural economy, for it would have a major impact on the upstream and downstream suppliers who would normally benefit from annual re-investment in farms.

Farming debt is also already very high. Given the severity of the recent drought, farming debt has increased sharply over the past four years. In 2012 total farming debt amounted to some R88bn, but by 2015 it had soared to R133bn. In 2015 the ratio of total farm debt to gross farm income thus stood at 59%, while the ratio of total farm debt to net farm income stood at a staggering 170%. [Department of Agriculture, Forestry, and Fisheries, *Abstract of Agricultural Statistics,* 2016] Given particularly adverse drought conditions in 2016, total farm debt has since risen even higher – and many farmers are battling to pay down what they owe.

At the same time, the valuation methodology proposed in the Regulations will often result in land values that are half (or less) of current market values. In combination with the ruling party's escalating threats to expropriate ever more farming land, this is likely to distort the market and push down land prices in general. However, if land prices decrease in this way, farmers will have less collateral on which to borrow working capital. Many may battle to raise the sums they need to continue with their farming operations, which means that production will decline. This in turn will have major implications for agricultural employment, the agri-processing industry the government is seeking to promote, the price of food (especially for the poor), the current account deficit, and the value of the rand.

If farm values do indeed decline sharply in this way, many farmers who already have high levels of debt could go insolvent. Production on their farms will then cease altogether, while yet more farming jobs will be lost. It will also be difficult to find new owners with the business confidence, the financial capacity, the experience, and the skills to take on the task of restoring production on these farms.

Decreased farm values will also reduce the rates' income of rural municipalities, making it harder for them to provide services to residents and adding to the demands on the central fiscus. But South Africa is now in recession, which means that overall tax revenues are likely to decline, even as the needs of an expanding population for social grants, education, health care, sanitation, housing, and other vital goods and services continue to increase. This situation is likely to push public debt upwards and worsen the risk of further sovereign credit downgrades to sub-investment (junk) status.

4 No socio-economic assessment conducted

Since September 2015 it has been government policy that all legislation and regulation must be subjected to a 'socio-economic impact assessment' before it is adopted. This must be done in terms of the Guidelines for the Socio-Economic Impact Assessment System (SEIAS) developed by the Department of Planning, Monitoring, and Evaluation in May 2015. The aim

of this system is to ensure that 'the full costs of regulations and especially the impact on the economy' are fully understood before new rules are introduced. [SEIAS Guidelines, p3, May 2015]

According to the May 2015 Guidelines (the Guidelines), SEIAS is also intended to ensure that 'government policies do more to support [four] core national priorities'. These are 'social cohesion, economic inclusion, economic growth, and environmental sustainability', [Guidelines, p6] and all four need to be taken into proper account. Yet what often happens, as the Guidelines warn, is that 'policy/law makers focus on achieving one priority without assessing the impact on other national ones'. In addition, as the document goes on to stress: 'A balance has to be struck between protecting the vulnerable and supporting a growing economy that will ultimately provide them with more opportunities.' [Guidelines, p6]

The Guidelines deal specifically with proposed new rules that aim to 'achieve a more equitable and inclusive society', but which 'inevitably impose some burdens on those who benefited from the pre-existing laws and structures'. The document posits that 'relatively small sacrifices on the part [of past beneficiaries] can lead to a significant improvement in the conditions of the majority'. However, 'the challenge is to identify when the burdens of change loom so large that they could lead to excessive costs to society, for instance through disinvestment by business or a loss of skills to emigration'. [Guidelines, p11] It is, of course, precisely such major economic risks that the Regulations raise.

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new regulations (or other rules) have been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and make 'a rough evaluation' of their respective costs and benefits. Thereafter, 'appropriate consultation' is needed, along with 'a continual review of the impact assessment as the proposals evolve'. [Guidelines, p7]

A 'final impact assessment' must then be developed that 'provides a detailed evaluation of the likely effects of the [proposed regulation] in terms of implementation and compliance costs as well as the anticipated outcome'. When the regulation is published 'for public comment and consultation with stakeholders', the final assessment must be attached to it. Both the draft regulation and the final assessment must then be revised as required, based on the comments obtained from the public and other stakeholders. Thereafter, when the draft regulation is submitted for approval (in this case to the minister of rural development and land reform), the final assessment, as thus amended, must be attached to it. [Guidelines, p7]

The Guidelines stress that SEIAS must be applied not only to legislation, but also to 'significant regulations'. In addition, where 'legislation provides an enabling framework for more detailed regulations', as the Property Valuation Act does, then 'the subordinate regulations should be the main subject of the assessment process'. [Guidelines, p8]

However, no SEIAS assessment of these Regulations has seemingly been conducted. The outcomes of preliminary and final assessments have certainly not been made public in the way that the Guidelines require. The Regulations thus cannot be approved by Mr Gugile until these steps have been taken. In addition, if the SEIAS assessment still to be conducted is to deal with all the key socio-economic issues, it must address all the points raised above.

5 Finding effective solutions to poverty

Though major progress has been made in many spheres since 1994, South Africa still has high levels of unemployment, poverty, and inequality. These need urgently to be addressed. Often, these evils have been made worse by the government's own policies – and particularly by the ANC's commitment to a 'national democratic revolution' (NDR) which aims to take the country to a socialist and then communist future. These NDR policy interventions must be reversed if unemployment, poverty, and inequality are to be overcome.

These triple ills will be made worse if land values are eroded in the way the Regulations are likely to usher in. They will be exacerbated even further if a deeply flawed process of land reform is simply speeded up without its many inherent problems first being addressed and overcome. Experience with land reform to date makes it clear that, unless very much more is done to promote successful farming on transferred land, a faster pace of land redistribution will bring no benefits to the disadvantaged. Instead, it will simply result in more assets 'dying in the hands of the poor', as Mr Gwanya earlier warned.

The ANC also needs to acknowledge that few South Africans want land to farm. Rather, they want jobs and houses in the towns and cities. This provides yet further reason why the ruling party should shift its focus from bringing about ever more land redistribution to promoting investment, employment, and economic growth.

As is increasingly evident, a different way of dividing up a stagnant economic pie will never be enough to meet the needs of an expanding population. By contrast, if the growth rate could be pushed up to 5.4% of GDP, as the National Development Plan envisages, the size of the economy would double in roughly a decade. Nothing could be more effective in expanding opportunities for the disadvantaged and helping them to climb the economic ladder.

By contrast, if the land claims process is simply speeded up under these Regulations, without its present problems first being overcome, then all the negative outcomes outlined in *Section 3* are likely to materialise. Property rights will be further eroded, which will deter investment, reduce growth, and add to unemployment. Agricultural production will falter, leading to higher food prices and worsening hunger, especially for the poor. Destitution will increase, and the ANC could pay a price for this in lost electoral support. At the same time, there will be few compensating benefits for anyone and little effective redress for past wrongs. Overall, the Regulations should thus be abandoned, rather than adopted.

South African Institute of Race Relations NPC **19th June 2017**