South African Institute of Race Relations NPC (IRR)
SUBMISSION
to the
Department of Rural Development and Land Reform
regarding the
Regulation of Agricultural Land Holdings Bill of 2017 [B - 2017]
Johannesburg, 17th May 2017

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1 Introduction

The Minister for Rural Development and Land Reform (the minister) has invited interested people and stakeholders to submit written comments, by 17th May 2017, on the Regulation of Land Holdings Bill of 2017 [B-2017] (the Bill).

The period for public comment has been extended from the 30 days initially allowed. This has helped to 'facilitate public involvement in the legislative processes' of the National Assembly, as required by Section 59(1) of the Constitution. However, to facilitate more meaningful public participation, the Bill should have been accompanied by comprehensive initial and final socio-economic assessments of its likely economic and other ramifications, as required by the government's Socio-Economic Impact Assessment System (SEIAS).

This submission on the Bill 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.

2 Memorandum on the Objects of the Bill

According to the Memorandum on the Objects of the Bill, its key aim is 'to reverse the legacy of colonialism and apartheid' and 'ensure a just and equitable distribution of agricultural land to Africans'. [Clause 1.5, Memorandum on the Objects of the Regulation of Land Holdings Bill (Memorandum]

An ancillary aim is to establish 'an accurate record of all public agricultural land', as critics of land reform often urge that the state should start with its own 'large property portfolio'. It is also necessary, the Memorandum states, to gather 'reliable information regarding the extent of agricultural land holdings owned by South Africans in terms of race and gender, as well as the use and size of the land in question'. In addition, though 'the decade from 1997 to 2007 was characterised by...[the] increasing acquisition of agricultural properties by foreign nationals in certain regions', the extent and impact of such foreign ownership remains unknown. A Land Commission is thus to be created to collect and disseminate information on all public and private agricultural land. [Clauses 1.3, 1.6, 1.7, Memorandum]

According to the Memorandum, 'the estimated cost for the operation of the Land Commission, as well as the acquisition of redistribution agricultural land, is R21.3m per

annum'. [Clause 4, Memorandum] This is a miniscule amount, especially given the amount of land which may fall to be acquired by the state, whether by purchase or expropriation.

The Memorandum is confusing in adding that the R21.3m sum it cites 'excludes the cost of the acquisition of redistribution agricultural land that will be funded within the baseline of the relevant programmes of the Department'. [Clause 4, Memorandum] This suggests that the R1.2bn currently budgeted for 'land reform' (presumably, in the form of acquiring land for redistribution purposes, [National Treasury, *2017 Budget Review*, p66] is also to be directed to the acquisition of land in excess of the relevant ceilings. If this indeed the intention, it needs to be clearly stated.

Moreover, even with the help of this R1.2bn for land acquisition, the sum of R21.3m, as set out in the Memorandum, will be far too little to cover all the costs arising from the Bill. Land acquisition costs are likely to be considerable. There will also be major costs in providing salaries and benefits for the commission and its staff, as well as in gathering and analysing all the complex and shifting data relevant to the setting of land ceilings. All these costs are highly relevant to the Bill and should not simply be ignored.

3 Content of the Bill

3.1 Definitions

Some of the definitions in the Bill are inordinately vague. Often, these provisions also give the minister discretionary powers which are overly broad and untrammelled.

"agricultural land" is effectively defined as 'all land' other than land which: [Clause 1(1)(d), Bill]

(a) falls within a proclaimed township,
(b) has formally been zoned for non-agricultural purposes by a competent state authority; or
(c) 'has been excluded from the provisions of [the Bill] by the minister by notice in the *Gazette*'.

As regards point (c) above, the relevant sub-clause fails to provide substantive guidelines or procedural guardrails for the exercise of the minister's discretion. This sub-clause is thus inconsistent with the Constitution, as further described in due course (see *Unconstitutionality of the Bill* in *Section 8* of this submission).

"redistribution agricultural land" is defined as meaning 'all agricultural land that falls between or exceeds any category of agricultural land holdings contemplated in Section 25' of the Bill. [Clause 1(1), Bill] This wording is unintelligibly vague, which renders this sub-clause unconstitutional as well.

In addition, there is no definition, either in the Bill or in any other legislation, of what is meant by 'Black, Indian, Coloured, or White' people. [Clause 1 (4)(a), Bill] Under Clause 1(3) of the Bill, a juristic person will be 'deemed to be Black' if 'Black people as defined in

the Employment Equity Act (EE Act) of 1998, who are citizens, own and control 50% or more of such juristic person'. [Clause 1(3), Bill] However, as further described in *Section 3.10* below, there is no clear definition of 'black people' in the EE Act, which means that this sub-clause is also impermissibly vague.

3.2 Stated objects

According to the Bill, the stated objects of the measure are, among other things, to 'promote productive employment and income to poor and efficient small scale farmers'; 'ensure redress for past imbalances in access to agricultural land'; 'promote food security'; and "provide certainty regarding the ownership of public and private agricultural land'. [Clause 2 (a),(b), (c), and (e), Bill]

However, the provisions of the Bill are unlikely to achieve these objectives. On the contrary, they will generally prevent these goals from being fulfilled, as further described below.

3.3 Land Commission

The Bill seeks to establish a Land Commission (the commission), which will have 'jurisdiction throughout the Republic' and will be 'accountable to the minister'. [Clause 4(1), Bill] All members of the commission will be appointed by the minister. [Clause 5(1), Bill; Clause 2.2(b), Memorandum] They will hold office for a period of five years, which will be renewable once at the discretion of the minister. [Clause 5(4), Bill] The minister (with the concurrence of the finance minister) will also determine the 'remuneration and allowances' to be paid to all members of the commission. [Clause 7, Bill] These provisions are calculated to erode the institutional independence of the commission, [See *Glenister* v *President of the Republic and others*, 2011 (3) SA 347 (CC)] and will undermine its capacity to operate in an impartial and objective manner.

This lack of institutional independence will also taint any administrative action the commission may take in 'enquiring into the correctness and accuracy' of the 'race' and other 'disclosures' made to it by landowners (see below). [Clause 9(a), Bill] It will similarly taint any decision by the commission to 'amend any document' submitted to it, [Clause 13(1)b), Bill] as further described in *Section 8.1* below.

According to the Bill, the main function of the commission is to 'establish and maintain a register of all agricultural land in respect of all private and public agricultural land holdings'. It will also have the power to subpoena people and information, and will advise the minister on the implementation of land ceilings and other matters. [Clause 8, Bill]

3.4 Notifications by private owners

Where an agricultural land holding is privately owned, its owner must, within 12 months of the Bill's commencement, 'lodge a duly completed notification of ownership' with the commission. [Clause 15(1), Bill] This notification must disclose 'the race, gender, and nationality' of the owner and 'the size and use of the agricultural land holdings'. It must also identify 'any real right' (such as a right of way from adjoining land), which has been

registered against the land, as well as any relevant 'licence' (including, perhaps, a water use licence) which applies. [Clause 15(2), Bill] (The obligation to disclose race and gender does not apply where the owner is a foreign person.) [Clause 15(4), Bill]

Once the Bill has been enacted into law, any person who subsequently acquires ownership of a private agricultural land holding must lodge essentially the same information with the commission within 90 days of the acquisition. The registrar of deeds may not register the transfer of the land in question until this has been done. [Clause 16(1), (2), Bill]

As earlier noted, the commission is empowered to 'enquire into the correctness and accuracy of the disclosures' made by owners regarding their nationality, race, and gender, among other things. [Clause 9(a), Bill] However, the Bill is silent as to how a dispute as to the race of an owner is to be resolved.

The National Party government had legislation (the Population Registration Act of 1950) setting out relevant classification criteria and providing for race classification tribunals and appeals to the courts. However, the ANC government cannot overtly espouse such laws, especially under a Constitution committed to non-racialism as a founding value of the democratic order. The Bill thus expects the commission to decide on racial identity on a basis which it fails to explain (see *Section 3.10* below). It also gives the commission the power unilaterally to 'amend' the information supplied by land owners, provided it gives them '14 days to respond...before it exercises its authority'. [Clause 13(1)(b), Bill] Whether such administrative decisions would comply with the guarantee of administrative justice in Section 33 of the Bill of Rights is doubtful.

3.5 Notifications regarding public land

Where agricultural land holdings are publicly owned, different rules apply. Here, the accounting officer of each government department, public entity, municipality, or municipal entity must provide the commission with 'such details of all public agricultural land holdings administered by [it] as the commission may determine'. The relevant accounting officer must also inform the commission of all 'acquisitions and disposals' of its public agricultural land holdings. [Clause 17, Bill]

According to Gugile Nkwinti, minister of rural development and land reform, the state is often urged to start with its own extensive property portfolio, when it comes to land reform. However, says Mr Nkwinti: 'The true extent of this portfolio and its development potential remains debatable. Land audits by the Department of Rural Development and Land Reform (the Department) have not been able to reveal who owns and uses the agricultural land of South Africa. There is therefore a need for an accurate record of all public agricultural land.' [*Business Day* 10 April 2017]

However, the minister fails to explain why the new commission will be more successful in prising this information out of relevant officials than his Department has been. What is needed to complete this task is not a complex new bureaucratic body, but simply increased

efficiency among all relevant officials. Not all these officials would fall directly under Mr Nkwinti's control, but co-operation and co-ordination among relevant cabinet ministers should suffice to overcome this hurdle.

Since the establishment of the commission will do nothing to increase administrative efficiency, accounting officials are likely to remain dilatory and/or inaccurate in submitting the required information. Hence, it may thus be just as difficult for the government to identify the land it owns under the Bill as it has been over the past 23 years. (Here, it is worth recalling that the World Economic Forum, in its *2016/17 Global Competitiveness Report*, has again identified 'an inefficient government bureaucracy' in South Africa as the most serious barrier to doing business in the country. It thus rates this obstacle as even more problematic than the 14 others it assesses.) [World Economic Forum, *Global Competitiveness Index 2016-17*, p324]

3.6 Investigation by the commission

If the commission is 'of the view' that the information provided to it by an owner may be false, it may 'conduct an investigation' aimed at 'obtaining evidence to determine the correctness or otherwise' of the relevant information. Towards this end, it may subpoena a person to appear and give evidence before it, or to produce any specified document. [Clause 27, Bill]

The commission, though wholly a creature of the executive, thus has important investigative and adjudicative functions. Yet the Bill provides no safeguards against any possible abuse of these powers. Nor does it clarify what rules and criteria are to be taken into account in deciding on the 'race' and 'gender' of owners, or the size and use of agricultural land.

3.7 A shift in the onus of proof

Under Clause 31, 'in any prosecution' for the offences created by the Bill – which include a failure to notify the commission, the inclusion of false information in a notification, and a failure to appear before the commission when subpoenaed to do so – the commission need only issue a certificate signed by it to shift the burden of proof on to the accused.

Hence, if the alleged offence consists, for example, in lodging 'false information' in the necessary notification, the commission may issue a certificate 'certifying that the owner has not complied with such provisions of the Act as are specified in the certificate'. Under the Bill, this certificate 'shall be received in evidence without proof of the signature or the official character of the person who appears to have signed the certificate and shall be prima facie proof of the fact stated'. [Clause 31, Bill]

Effectively, this will reverse the normal onus of proof, in terms of which he who alleges a fact must prove it. Instead, any official of the commission will be able to claim, despite having no evidence of this, that a notification falsely under-states the size of a farm, for example. If the official then signs a certificate to this effect, this certificate 'must be received in evidence' in any prosecution of the relevant owner and will stand as 'prima facie proof' of

his guilt unless he can show the contrary. This provision is thus likely to place a heavy evidentiary burden on all private owners of agricultural land.

3.8 Register of agricultural land holdings

The commission will be obliged to establish and maintain a 'register of public and private agricultural land'. It will draw this up on the basis of the information submitted to it by both private and public owners of agricultural land. The register will be open for inspection 'at such place and time as may be prescribed'. [Clause 12(1)(a)(b), Bill]

The commission will be empowered to correct 'any clerical error' or 'error in translation' which may appear in the register. It will also be able (in words that make little sense) to 'authorise the amendment of any document, the amendment of which no express provision is made in this Act'. [Clause 13(1)(b), Bill] Though some words are clearly missing from this sub-clause, what is particularly disturbing is the untrammelled discretion apparently to be given to the commission to amend key documents as it sees fit. The wording also suggests that the commission is to be empowered to amend documents in circumstances going beyond the statutory authority conferred on it. Yet any such amendment would be *ultra vires* the Bill and should be regarded as invalid.

According to the Bill, any 'person' (including a company or trust) will be able to obtain particulars of the information recorded in the register on payment of the prescribed fee. However, the commission may not provide information which is protected under Chapter 4 of Part 2 of the Promotion of Access to Information Act of 2000 (which deals with the grounds on which access to records may be refused). [Clause 14(1), (2), Bill]

3.9 Ceilings for agricultural land holdings

The Bill empowers the minister to 'determine the categories of ceilings for agricultural land holdings' in every relevant municipal district. [Clause 25(1), Bill] The Bill does not define what it means by 'categories of ceilings' and this wording is far from clear. The minister 'may' also use his regulatory powers to lay down 'the criteria and factors that must be considered in the determination of categories of ceilings of agricultural land'. However, there is nothing in the Bill that compels him to stipulate such criteria – and so to provide at least some guidelines for the exercise of his discretion. [Clause 37(1)(h), Bill]

Before laying down such 'categories of ceilings', the minister must consult the commission and the minister for agriculture, forestry, and fisheries. However, the wording used in the Bill ('after consultation') allows him to disregard their views. [Clause 25(1), Bill] On the other hand, the minister must also 'publish a draft of the proposed determination' in the *Gazette* and in 'the media circulating nationally and in the relevant district'. In doing so, he must 'call on interested persons to comment on the draft in writing' within 30 days. [Clause 25(3), Bill] However, there is nothing in the Bill itself to oblige him to give reasons for rejecting any comments he might receive.

According to the Bill, the minister may determine 'different categories of ceilings', but this power is not further explained. The minister may also 'determine special categories ceilings' (sic), and may 'exempt a particular category of agricultural land' from having any categories of ceilings determined for it at all. [Clause 25(1)(b), (c), Bill] Again, the discretionary powers thus given to the minister are impermissibly broad.

Within the framework of the 'categories' decided by the minister, the Bill lays down the criteria to be used in 'determining the ceilings for agricultural land holdings for each district'. [Clause 25(2), Bill] The Bill is silent as to who should make these decisions, for the determination of ceilings is clearly different from the determination of 'categories of ceilings', for which the minister is responsible. This gap in the Bill is likely to generate great confusion and uncertainty as to where the power to decide on ceilings lies.

Under the Bill, the relevant criteria to be used in deciding on ceilings in each district include 'land capability factors'. These in turn depend, among other things, on 'farm size', 'farm viability', 'economies of scale', and variations in 'soil type' and 'soil depth'. Also relevant are 'distances from markets', along with 'water availability and quality' and 'available infrastructure'. [Clause 25(2)(a), Bill]

Other criteria to be taken into account, in addition to land capability factors, are listed as 'capital requirements for different enterprises'; expected income; annual turnover; 'the relationship between product prices and price margins'; and 'any other matter that may be prescribed'. [Clause 25(2)(b), Bill]

The Bill glosses over the complex bureaucratic tasks that will be needed to gather information on all these issues. It also overlooks the degree of expertise that will be needed in evaluating all this data, some of which (for example, product prices) is likely to change from day to day. Moreover, the data needed here goes well beyond the information that must be included in every private owner's 'notification' to the commission (see *Section 3.4*, above). How then is the agency responsible for deciding on land ceilings at the district level (whether the minister, the commission, or perhaps the relevant district municipality) to collect all the information that will be needed in determining appropriate ceilings for all privately-owned agricultural land holdings within that district? The scale of the exercise is simply enormous.

Gathering all this data is also only the start. Information on all these factors must also be verified, sifted, and analysed. In addition, some of the variables to be taken into account may be difficult to assess. To name but one example, the 'availability' of water will depend, among other things, on rainfall, the availability of dams and irrigation systems, and whether relevant water use licences remain in force. Moreover, the 'quality' of the water available will depend, among other things, on the efficiency of sewage management at nearby municipal waste water plants, which may improve, stay the same, or deteriorate. (If it deteriorates, then so too will the quality of the water which farmers can draw from the rivers affected by the discharge of insufficiently treated sewage.) Water quality will also be affected

by the presence of mining and other pollution, and the extent to which such effluent can be treated or contained.

Analysing all this data for every private agricultural land holding in every district municipality will be an enormously difficult and time-consuming task, often requiring high levels of expertise. The task will also have to be re-done every couple of years so as to take account of shifting water availability and quality, for example, as well as likely changes in a host of other variables.

3.10 'Redistribution agricultural land'

In dealing with 'redistribution agricultural land', the Bill draws no clear distinction between agricultural land which is privately or publicly owned. Instead, it simply defines 'redistribution agricultural land' as meaning 'all agricultural land that falls between or exceeds any category of agricultural land holdings', as contemplated in Clause 25. [Clause 1, definitions, Bill, read together with Clause 26, Bill]

However, the Bill adds that every owner of an agricultural land holding must, in sending in his notification of ownership to the commission under Clause 15, also 'notify...the commission of the identity of the portion of such agricultural land holdings which constitutes redistribution agricultural land'. [Clause 26(1), Bill] This wording suggests that the obligation to notify the commission of such 'excess' land applies only to private owners. Yet other provisions in the Bill are so broadly phrased as to cover public agricultural land as well, which also makes for uncertainty.

Affected owners may have little choice as to which portions of their farms are to be taken as 'redistribution' land. They may start by 'identifying' what they see as the 'excess' portions, but if the commission does not agree, the matter must be referred to arbitration under the Arbitration Act of 1965. The arbitrator selected will then either be 'in the full-time service of the state' or will have his 'remuneration and allowances' decided by the minister (in consultation with the Treasury). [Clause 26(3), Bill] These provisions may save current owners from having to pay for the costs of arbitration, but they also cast doubt on the impartiality of any arbitration process. In practice, they could allow the commission to insist that the most valuable portions of a given farm must be the ones set aside for redistribution.

Once the identity of the redistribution land has been settled, 'black people, as defined in the Employment Equity (EE) Act of 1998, must be offered the right of first refusal' as regards its acquisition. This right will apply for 'a prescribed period', which the minister will be able to set (and also vary) by means of regulation. [Clause 26(2)(a), Bill]

This clause is inconsistent with the Memorandum on the Objects of the Bill, which says that 'the minister must be offered the first right of refusal of redistribution agricultural land'. [Clause 2.8(c), Memorandum] This raises questions as to whether the current wording in the Bill will be retained, especially when the overall thrust in most land 'reform' initiatives is towards ownership and control by the state, rather than black individuals.

As earlier noted, there is also no clear definition of 'black' people in the EE Act, which simply states that 'black people is a generic term which means Africans, coloureds, and Indians'. [Section 1, Employment Equity Act of 1998] This definition lacks content, for it fails to set out the basis on which people are to be classified as 'Africans', as 'coloureds', or as 'Indians'.

The Bill is also silent as to the terms on which 'redistribution' land is to be offered to 'black' people. It certainly does not require the payment of market value. The current market value of all agricultural land is also likely to be greatly depressed by the erosion of property rights implicit in the Bill, coupled with the likelihood of a host of forced sales of 'excess' farming land. Moreover, if the owner is unwilling to agree to a price that may be well below market value (even on this depressed basis), then the redistribution land must instead be acquired by the minister. [Clause 2(b), Bill]

According to the Bill, if the owner and the minister are 'unable to reach an agreement on the purchase price', then the minister may 'expropriate the redistribution agricultural land in question' under any relevant legislation regulating expropriation. [Clause 26(2) (c), Bill] Again, there is no requirement that the purchase price should reflect market value – and if the owner is unwilling to accept a price far below this, then expropriation will follow.

Most expropriations are likely to take place under the terms of the Expropriation Bill of 2015, which is currently back before Parliament for re-enactment (because of a lack of proper public consultation in its adoption). Under this Bill, which is intended to provide a legal framework with which all other expropriation provisions must comply, market price is simply one out of five factors that must be taken into account in deciding on 'just and equitable' compensation. If (already depressed) market value is taken as a starting point, this amount is likely to be much reduced on the basis of the four other listed factors. These are the 'history of the acquisition' of the land, the extent of direct state investment or subsidy in its acquisition or capital improvement, the 'current use' of the property, and the 'purpose' of the expropriation. Overall, the owners of excess redistribution land are thus likely to receive, on either the purchase or the expropriation of their property, an amount which is well below the present market value of their land.

According to the Bill, 'institutional funds that own agricultural land holdings' which include redistribution land may 'apply to the minister for exemption' from the ceilings to be set under Clause 25 of the Bill. [Clause 26(4)(a), Bill] 'Institutional funds' are defined as 'including investment funds, pension funds, and hedge funds that invest or trade in agricultural land and related derivatives in their use of agricultural land as an asset class'. [Clause 1, definitions, Bill] The Bill again gives the minister a broad and largely unfettered discretion in deciding whether or not to exempt institutional funds. According to the Bill, he must act 'on good cause shown and in furtherance of the objects' of the measure. He must also take into account 'other relevant and applicable legislations (sic) of the Republic, or international instruments

assented to by the Republic'. [Clause 26(4)(b), Bill] However, these provisions are too broad to provide any clear guidance as to how the minister's discretion is to be exercised.

3.11 Prohibition on acquisition of agricultural land by foreigners

Under the Bill, 'no foreign person shall...acquire ownership of agricultural land', from the date the measure comes into effect. [Clause 19(1), Bill] From this date, a foreign person may instead 'conclude a long term lease of agricultural land holdings' for a period which will generally begin with 30 years and may be renewed for an overall period not exceeding 50 years. [Clause 20(1), Clause 1, definitions, Bill]

A foreign person wanting to dispose of an agricultural land holding must offer the minister the right of first refusal. The minister must indicate 'within 90 days or less' whether he intends to acquire the land, failing which the foreign owner 'must make the land available for acquisition to the citizens'. [Clause 21(1), (2), Bill] Once the foreign person has disposed of such land, he must inform the commission accordingly. [Clause 22(1), Bill] The commission must also be notified of any relevant changes in nationality: in other words, if a foreign owner of agricultural land 'ceases to be a foreign person', or if a South African owner of such land 'becomes a foreign person'. [Clauses 23, 24, Bill]

A 'foreign person' is defined as 'a natural person who is not a citizen, or is not ordinarily resident here, or 'whose continued presence in South Africa is subject to a [time limit] imposed by law'. [Clause 1, definitions, Bill] The definition includes 'a juristic person' in which a foreign person, natural or juristic, holds a controlling interest. [Clause 1, definitions, Bill]

3.12 Unlawful acquisition of land

According to the Bill, 'any acquisition of land in any manner which is inconsistent with...[its] provisions is unlawful'. Hence, 'a court may make an order for the forfeiture of such land to the State'. [Clause 35, Bill] Though the Bill does not spell this out, it is unlikely that any compensation would be paid for land thus forfeit to the government. The Bill is also silent as to the procedures and safeguards to be applied in such instances. However, any such forfeiture would prima facie give rise to an 'arbitrary' deprivation of property, which is contrary to Section 25(1) of the Constitution.

3.13 Regulations and guidelines

According to the Bill, the minister 'may', by notice in the *Gazette*, make 'regulations not inconsistent with the Act' on 'any matter that may or must be prescribed' under the measure. He is expressly empowered to make regulations on: [Clause 37(1), Bill]

(a) the information to be included in a private land owner's notification to the commission;
(b) the information to be reflected in the land register;
(c) the times when this register must be open for inspection; and
(d) the information to be provided regarding public agricultural land.

The minister 'may' also make regulations regarding 'the criteria and factors to be considered in the determination of categories of ceilings of agricultural land holdings, as contemplated in Section 25'. [Clause 37(1)(h), Bill] This wording shows that the minister is not bound by the criteria for the determination of land ceilings in Clause 25, which is a different matter from the determination of 'categories of ceilings'. As earlier noted, the minister's discretion in this key sphere is too broad and unfettered to pass constitutional muster.

In addition, the minister is empowered to make regulations dealing with 'the referral of a matter to arbitration as contemplated in [Clause] 21'. [Clause 37(1)(f), Bill] The reference to Clause 21 is mistaken, as it is Clause 26(3)(b) that provides for arbitration when the owner of redistribution land and the commission cannot agree on the 'identification' of the redistribution land to be disposed of.

Disputes of this kind are likely to arise when an owner deemed to have 'excess' land seeks to limit the land to be excised to the portions least damaging to the maintenance of his farming operations. By contrast, the commission may want the portions of land which the farmer most needs for his farming enterprise to survive. The fair arbitration of such disputes is vital to the rule of law. However, such fairness is unlikely to be achieved when the minister's regulations control key aspects of the arbitration process and the arbitrator (as earlier described) is either in the pay or the employ of the state.

The Bill also gives the commission wide powers to 'prepare any manual or guidelines' as regards 'any matter of an administrative nature related to the work of the commission'. This must be done whenever the commission deems it necessary, or if the minister requests it. [Clause 33, Bill]

4 Ramifications of the land ceilings envisaged in the Bill

4.1 Risks in setting and enforcing ceilings

The ANC's idea that ceilings should be imposed on land can be traced back to the *Green Paper on Land Reform* of 2011. This identified 'freehold title with limited extent' as one of the four forms of land tenure that would be permitted in the future. However, the *Green Paper* did not attempt to specify how much land farmers would be permitted to own. [Anthea Jeffery, *BEE: Helping or Hurting?* Tafelberg, Cape Town, 2014, pp334-335]

In February 2015 President Jacob Zuma said in his State of the Nation Address (SONA) that farms were to be capped at a maximum size of 12 000 hectares. Soon afterwards, however, Mr Nkwinti stated that the 12 000-hectare maximum would be a 'special category' that would apply to only 'three categories of land use: forestry, game farms, and renewable energy farms, especially wind energy'. [Gugile Nkwinti, 'Rural Development and Land Reform Budget Vote 2015/2016', 8 May 2015, p4]

In other instances, the minister went on, his 'policy proposals on the ceilings, for both natural and juristic persons', were: [Nkwinti, Budget Vote 2015/16, p4]

(a) ‘small-scale farms’, where ‘the ceiling for a viable commercial small-scale farm should be 1 000 hectares’;
(b) ‘medium scale farms’, where the relevant ceiling should be 2 500 hectares; and
(c) ‘large scale farms’, where the ceiling should be 5 000 hectares.

As Mr Nkwinti put it, ‘any excess land portions between each of these categories – small scale and medium scale; medium scale and large scale, and above the 12 000 hectare maximum – shall be expropriated and redistributed’. [Nkwinti, Budget Vote 2015/16, p4] The Bill reflects a similar approach, for it defines ‘redistribution agricultural land’ as land that ‘falls between or exceeds any category of agricultural land holdings’. [Clause 1, definitions, Bill]

The implication is that a farmer with 1 200 hectares of land, an amount which falls between 1 000 and 2 500 hectares, will have to surrender 200 excess ‘redistribution’ hectares to the state. According to this logic, a farmer with 2 400 hectares will have to surrender 1 400 hectares. Similarly, a farmer with 2 700 hectares, an amount which falls between 2 500 and 5 000 hectares, will have to give up 200 hectares, whereas one with 4 900 hectares will have to surrender 2 400 hectares. Farmers with more than 5 000 hectares will presumably have to give up any excess amount, unless they can show that they are engaged in forestry, game farming or the provision of renewable energy, in which event they will be able to retain up to 12 000 hectares of land.

The land ceilings idea, as Mr Nkwinti told *City Press* in February 2017, is truly ‘radical’. It is also in line with the emphasis that Mr Zuma put on ‘radical economic redistribution’ in his State of the Nation address this year. As *City Press* reports, the relevant ceilings to be introduced under the Bill may remain the same as those which Mr Nkwinti set out in 2015. However, it is also possible that ‘these proposed ceilings may change, and that district municipalities may even determine their own ceilings’. [*City Press* 12 February 2017]

Despite the tabling of the Bill, there is still no certainty as to what the relevant land ceilings will be, or even as to how or by whom they will be determined (see *Section 3.9*, above). There is also no certainty that the ceilings, as initially decided, will not be revised downwards after a year or two, which would require owners to surrender even more excess ‘redistribution’ land. (This is what has happened with various black economic empowerment (BEE) rules, which have repeatedly been tightened up in recent years.)

The Bill also seems to assume that, once the relevant ceilings in each district have been decided, then this determination will conclude the matter – at least until such time as the ceilings are revised by the state. But land experts point out that the number of hectares needed for viability largely depends on the type of farming being practised, and that this may change from time to time. Writes Professor Nick Vink of the University of Stellenbosch: ‘You can’t impose the same land ceiling on a sheep farm in the Karoo as you could on one in Mpumalanga. And what if the sheep farmer decides to switch over to cattle? Keeping tabs on such questions will require an annual audit.’ [Jeffery, *BEE: Helping or Hurting?* pp334-335]

4.2 Administrative costs in deciding the ceilings

The bureaucratic costs of gathering and analysing all the necessary information will be huge. Writes Agri SA, an organisation representing commercial farmers: 'The system of land ceilings presupposes that a single, integrated land information system exists where cadastral data is captured outlining the physical details and legal ownership of each private land parcel in South Africa, [but] this is not so. The policy recognises this and proposes to establish a "land commission" to receive compulsory disclosures of all landholdings, but will the costs involved in running this commission be worth it? The land commission will be chaired by a retired judge and will need to employ a panel of highly educated experts to achieve this, not to mention a large contingent of support staff. One cannot help but wonder how many hectares of farm land could be bought and redistributed each year with the funds required to run this establishment.' [Agri SA, 'The problem with land ceilings', *Politicsweb.co.za*, 15 December 2016, p4]

In addition, the notifications to be sent in by private land owners will cover only their race, gender, and nationality, as well as the 'size' and 'use' of their agricultural land holdings. By contrast, the determination of land ceilings will rest on many other factors, ranging from land capability to 'capital requirements', 'annual turnover', and 'the relationship between product prices and price margins'. [Clause 25(2), Bill]

If the commission is to be made responsible for gathering all this additional information – an issue on which the Bill is silent – then the notification requirements to be imposed on private owners will probably have to be greatly increased from what is now contained in the Bill. Alternatively, some other means of collecting and capturing the relevant information will have to be devised. In addition, the commission will have to employ a host of agricultural, water, and other experts to analyse and assess all this information. The annual costs of collecting and sifting all this data, for every private land holding in South Africa, will be enormous. It will surely far exceed the R21.3m mooted in the Memorandum on the Objects of the Bill as sufficient to cover all the commission's expenses – and fund land acquisition as well (see *Section 2* above).

4.3 Viability of commercial farms

In 1996, when the results of a comprehensive agricultural survey were released, South Africa had some 61 000 commercial farming units covering some 86 million hectares of farming land. Average farm sizes at that time were roughly 1 390 hectares each. However, some 52 million hectares of the total were located in the arid western regions of the country, where farm sizes would generally have to be bigger than the average to make farming viable. [Jeffery, *BEE: Helping or Hurting?* p304; A Makenete and H D van Schalkwyk, Land Ceiling Policy and Legislation: Implications for the Agricultural Economy, PowerPoint presentation, p3]

Since 1994 the ANC government has slashed the agricultural subsidies previously provided to commercial farmers, reducing these to around 2.7% of output. This makes South Africa's

farming subsidies among the lowest in the world. By contrast, farming subsidies have remained substantial in many other countries: amounting to 22% of output in the United States and to 45% in the European Union, for instance. This shift in itself has contributed to a steady diminution in the number of commercial farmers, which thus decreased to some 39 000 by 2011. [Jeffery, *BEE: Helping or Hurting?* p322]

At the same time, the total area used for agricultural production has increased, from some 82.4 million hectares in the 1990s to some 94.5 million hectares in 2011. By 2011, average farm sizes thus stood at some 2 365 hectares. [Makenete and Van Schalkwyk, p3] Since then, however, the government has put the total number of commercial farmers at 35 000. [John Kane-Berman, 'From Land to Farming: Bringing land reform down to earth', *@Liberty*, IRR, Johannesburg, Issue 25, May 2015, p3] This suggests that average farm sizes now stand at roughly 2 700 hectares.

The trend towards bigger farms has been driven not only by the slashing of farm subsidies, but also by a range of other factors. As input costs have risen on imported fertilisers and agrichemicals, among other things, so economies of scale have been needed to help maintain profitability. The benefit of larger operations is that fixed costs – such as the costs of permanent staff and administration – can then be spread over more production units. This helps them to retain profitability when smaller operations might not be able to survive. [*Mail & Guardian* 21 April 2017]

Larger farmers also find it easier to gain access to finance, insurance, and markets. At the same time, changes in technology have made it feasible both to manage bulk production and to increase crop yields. In addition, larger farmers can more easily meet strict quality standards, and cope with onerous requirements regarding certification and traceability. [Makenete and Van Schalkwyk, pp5, 7]

Despite these pressures, most commercial farms in South Africa remain relatively small. Most of them still belong to white families, and most of them have an annual turnover of less than R1 million. This, in the words of Agri SA, means that their net income is lower than that of the average civil servant. [Kane Berman, 'From Land to Farming', p3] Other assessments put the earnings of 51% of the country's white commercial farmers at some R300 000 a year. [Makenete and van Schalkwyk, p3]

Some commercial farmers are black, but their actual number remains uncertain. They include some 320 large growers of sugar cane, plus some 700 producers belonging to Agri SA. The African Farmers' Association of South Africa (Afasa) says a third of its 10 000 members are 'farming for the market', but that only 2% of them (some 200 people) are doing so successfully. Grain SA, which runs a farmer development programme for maize, wheat, and other grain farmers, says its members include 3 500 white commercial farmers and 123 'new era' black commercial farmers who commonly harvest more than 250 tonnes a year. [Kane-Berman, 'From Land to Farming', pp3, 4]

As earlier noted, the number of commercial farmers has dropped over the past two decades from roughly 61 000 to around 35 000, a decline of some 40%. As IRR policy fellow John Kane-Berman points out, 'the number of commercial farmers is on a long-term shrinking trend'. The decrease is particularly marked among small commercial farmers. Such farmers are disappearing 'at an alarming rate', according to a confidential Agricultural Policy Action Plan (APAP) approved by the cabinet in March 2015. (The number of dairy producers, for example, has decreased from some 3 900 in 2007 to roughly 1 800 in 2015. This is largely because struggling small farmers have been taken over by larger producers, who manage to survive through economies of scale.) [Kane-Berman, 'From Land to Farming', p5]

If land ceilings ranging in general from 1 000 hectares to 5 000 hectares are introduced, as Mr Nkwinti has suggested, many commercial farms may be small enough to escape their impact. But hundreds, if not thousands, of commercial farmers will also find themselves affected. Some may be expected to surrender large portions of their land. As earlier noted, a farmer with 4 900 hectares has too much land for a 'medium-sized' farm and will presumably have to surrender 2 400 of them. But this is almost half the size of his farm. He will also have little choice as to which portion of his farm is to be surrendered, for this issue (in the event of a dispute) will be decided by arbitrators in the pay or the employment of the state. These arbitrators could decide, for instance, that the portion with the best infrastructure, water supply, buildings, and access to markets must be surrendered and that the farmer must retain the less valuable remainder. Any such outcome could fatally erode the viability of many farming operations.

In addition, once the principle of land ceilings has been established, the government will always be able to reduce the stipulated ceilings at a future time. All commercial farmers, including those with farms smaller than the lowest ceilings initially set, will thus experience a fundamental erosion of their property rights when the Bill takes effect. Those wanting to expand their farms in the future, so as to achieve greater economies of scale, may also be prevented from doing so.

The Bill will thus inhibit fresh investment in the agricultural sector. Already, as *Business Day* reported in March 2017, farmers and other players are 'becoming more reluctant to invest' in the sector. According to surveys conducted by the agriculture business chamber (Agbiz), overall confidence in the farming sector has risen over the past three quarters, following an end to the crippling 2016 drought. However, in the first quarter of 2017, confidence regarding capital investment among agribusinesses declined significantly. According to Wandile Sihlobo, head of economic and agribusiness research at Agbiz, the survey suggests that 'industry players are holding back in terms of long-term investment in the sector because of [concerns] about land reform' and its impact on property rights. [*Business Day* 7 March, *Farmer's Weekly* 31 March 2017]

These concerns have no doubt been further fuelled by recent statements – emanating both from the minister and from Mr Zuma – that the Constitution might yet be changed to allow expropriation without compensation. [*Business Day* 7 March 2017] Any such amendment

would make the Bill still more damaging. Even without such an amendment, the Bill will trigger a significant drop in the value of commercial farmland – much of which is likely to become subject either to forced sales or to ministerial expropriation. Diminished land values and resulting reduced collateral could in turn make it more difficult for many farmers to borrow working capital from the commercial banks currently responsible for making some 60% of agricultural loans. (Overall agricultural debt currently stands at some R133bn, of which R80bn is owed to commercial banks.) Yet if working capital becomes harder to secure, this is likely to erode agricultural production and undermine the country's food security. [*Mail & Guardian* 31 March 2017]

4.4 Impact of the Bill on food security

South Africa currently remains food secure, in that it generally produces enough staple foods to meet the basic nutritional requirements of its population and has the capacity to import food if necessary. [D C du Toit, 'Food Security', report by the Production Economics unit of the Directorate Economic Services in the Department of Agriculture, Forestry and Fisheries, March 2011, p4] However, if production on land targeted for redistribution under the Bill declines, as is likely to be the case, then food security will diminish.

It might still be possible for South Africa to import the extra food it needs, but food prices are likely to rise significantly – and especially so if the rand weakens further. Yet if food prices increase in this way, then so too will the proportion of households lacking adequate access to food. That proportion already stands at a worrying 23%. [2017 *South Africa Survey*, IRR, Johannesburg, p630] Population growth will add to the challenge of feeding the nation, for South Africa's population is expected to reach 67 million in 2030. By then, some 71% of South Africans will also be urbanised, up from roughly 65% today. [*Landbouweekblad* 31 March 2017]

Combined with significant population growth, this level of urbanisation will make it more difficult to feed the cities in the absence of large and highly productive commercial farms. Moreover, as Johann Bornman, chairman of Agri Development Solutions, a consultancy, has pointed out, in the period from 2000 to 2016, the volume of food products generated increased at an average rate of some 1.4% a year. With the population growing at 1.6% a year, this rate of increase in food production is already insufficient. [*Landbouweekblad* 31 March 2017; 2017 *South Africa Survey*, p13] Yet the Bill will make it harder to maintain even the 1.4% production growth rate of previous years. This is partly because economies of scale will be more difficult to achieve once many farms are divided up. In addition, many of the people given access to this redistribution land may be too inexperienced in farming to be able to produce commercially. Much redistribution land is thus likely to revert to subsistence production – which will not help to feed the cities.

ANC secretary Gwede Mantashe has warned against this, saying: 'It is important not to undervalue the importance of agriculture and producing food when debating the land issue, as Zimbabwe did... De-emphasising food production and dealing with the emotional aspect [of land reform] translates into starvation.' [*Mail & Guardian* 24 March 2017]

4.5 Difficulties likely to confront many would-be black buyers

According to the Bill, black people (whether African, coloured or Indian) will have a right of first refusal over excess 'redistribution' land. This will give them an opportunity to buy such land, within whatever period the minister might prescribe, at what will effectively be artificially low prices. [Clause 26(2), Bill] However, since the Bill will also erode property rights and reduce the value of farm land as collateral, this provision will primarily benefit those with deep pockets, who are able to buy without obtaining much mortgage finance.

Many of these people are likely to be wealthy 'BEE types' (as the ANC has described them), who have strong connections to the ruling party and have previously used their political connectivity to secure lucrative BEE ownership deals and/or procurement tenders. They might also be friends or acquaintances of the minister, as allegedly happened in the case of the Bekendvlei Farm in Limpopo, which was bought by the Department in 2011 for R97m and then leased to two men with no farming experience.

As the *Sunday Times* reported in February 2017, Errol Velile Present, who had been working for the ANC at Luthuli House for more than ten years, approached Mr Nkwinti at a land summit in March 2011. He said that he and his partner, businessman Moses Boshomane, had identified a farm called Bekendvlei, outside Modimolle in Limpopo, which the owners were willing to sell. However, he needed the minister's assistance. According to Mr Present, Mr Nkwinti then introduced him to his deputy director general, Vusi Mahlangu, and asked this senior official to work on Mr Present's 'project'. Disregarding normal procedures, Mr Mahlangu soon bought the Bekendvlei farm for R97m. The farm was then leased to Mr Present and his partner, even though the two had no farming experience and were not listed on the Department's data base of possible land reform beneficiaries. [*Sunday Times* 12 February 2017]

According to the newspaper's report, Mr Nkwinti allegedly received a R2m fee to 'facilitate' the deal. He was also a guest speaker at Mr Present's wedding, which took place soon after the purchase had been finalised. Adds the newspaper report: 'Soon after the men took over, there was no money to pay 31 workers on the farm. No wages were paid for five months and the farm became run down. Despite the Department also bankrolling an additional R30m for machinery, salaries, and construction, the once-thriving farm quickly fell into disrepair. About 3 000 cattle, worth R18m, were sold off, machinery disappeared and crops died... After four years of lavish spending and regularly failing to pay farm workers or make lease-agreement payments, Mr Nkwinti was forced to take legal action to evict the men in March 2016.' [*Sunday Times* 12 February 2017]

Auditing firm Deloitte was hired to investigate the transaction. Its draft report, dated May 2016, found that 'Mr Nkwinti should be charged with possible corruption'. The draft report also said: 'Nkwinti is guilty of abusing his position as minister to influence the acquisition of Bekendvlei for the purpose of allocating it to Boshomane and Present, which resulted in irregular expenditure amounting to R97.6m'. However, Deloitte's final report, which was

released in November 2016, makes no mention of any culpability on Mr Nkwinti's part. Nor does it recommend any action against him. [*Sunday Times* 12 February 2017]

The minister has admitted introducing Mr Present to Mr Mahlangu (who has been dismissed for his role in the transaction), but denies putting pressure on his director general to help Mr Present obtain his desired farm. Mr Nkwinti also acknowledges that the R2m fee allegedly paid to him is being investigated internally, but stresses that he 'never asked a bribe from anybody'. [*Sunday Times* 12 February 2017]

Like Mr Present, many of the people who buy redistribution land under the Bill are likely to have little of the entrepreneurship and experience vital to success in farming. Hence, the land that they acquire could soon fall out of production. By contrast, emergent African farmers who are already successfully working small farms and want to expand into commercial production may be barred from buying because they cannot raise mortgage finance within the time the minister allows.

4.6 State ownership in most instances

Since black people will often be unable to exercise their right of first refusal, most redistribution land is likely to be acquired by the state. According to the Bill, the minister must first offer to buy such land, but if the owner refuses the purchase price offered, the minister will have the right to expropriate it. Compensation on expropriation, according to the current Constitution, must be 'just and equitable' but could be significantly less than current market value.

Having acquired the bulk of all redistribution land, the minister is unlikely to transfer any of it into the ownership of emergent black farmers as this would conflict with the *State Land Lease and Disposal Policy (SLLDP)* of 2013. Under this policy, emergent black farmers on land acquired by the state for redistribution are confined to leasehold tenure and cannot easily obtain individual title.

Small black subsistence farmers are expected to remain perpetual tenants of the government. Bigger farmers with the capacity for commercial production must lease their farms for 30 years, and thereafter for another two decades. Only after 50 years have passed may these farmers purchase these farms. In the interim, their leases may be terminated at any time for what the *SLLDP* describes as a lack of 'production discipline'. Any fixed improvements made on the land may then go to the government without any compensation being payable. [Department of Rural Development and Land Reform, State Land Lease and Disposal Policy, 25 February 2013; Ruth Hall, , 'What's wrong with government's state land lease & disposal policy, and how can it be remedied?' Institute for Poverty, Land, and Agrarian Studies, Plaas Position for National Land Tenure Summit, 2014: State Land Lease and Disposal Policy, 8 September 2014]

Far from helping to restore land to 'the people' in any meaningful sense, the Bill – in combination with the *SLLDP* – will thus bring about creeping land nationalisation.

4.7 Little popular demand for farming land

The government often claims that a public 'clamour' for access to land is forcing it to step up the pace and extent of land reform. It also claims (in the *Green Paper on Land Reform* of 2011, on which the Bill is based) that black South Africans have a strong desire to return to peasant farming; that their whole way of life (in the words of the *Green Paper*) is 'integrally linked to land'; and that 'the very foundation of their existence' depends on their having access to farming land. [Department of Rural Development and Land Reform, *Green Paper on Land Reform*, 2011, pp1-3]

These ideas are incorrect. In 2005 research by the Centre for Development and Enterprise (CDE), a civil society organisation, found that only 9% of Africans wanted land to farm. The remaining 91% were keen to leave the harsh demands of farming to find easier jobs in the towns and cities. They thus had no interest in farmland, but instead wanted urban land suitable for housing and the building of communities. [CDE Executive Summary, *Land Reform in South Africa: Getting Back on Track*, May 2008, p3]

In 2013 it also emerged that only some 8% of successful land claimants wanted to have the land of which they had previously been dispossessed returned to them. The remaining 92% preferred to be compensated in cash. Said Mr Nkwinti: 'We thought that everybody, when they got a chance to get land, they would jump for it, but [very few] have opted for land restoration.' People wanted money because of poverty and unemployment, but they had also become urbanised and 'deculturised' in terms of tilling land. 'We no longer have a peasantry; we have wage earners now,' he said. [*Mail & Guardian* 5 April 2013]

Two comprehensive opinion surveys commissioned by the IRR have since confirmed that few people want land to farm. Both of these field surveys (the first conducted in September 2015 and the second a year later, in September 2016) began by asking respondents to identify 'the two most serious problems unresolved since 1994'. In 2015, a mere 0.4% identified skewed land ownership as a problem of this kind. In 2016, the proportion flagging this issue as a serious unresolved problem was much the same, at 0.6%. In addition, when people were asked to list 'the two main causes of inequality', only 1% of the respondents canvassed in 2015 identified land ownership as such a cause. In 2016, that proportion was (again) lower still, at 0.3%. [Anthea Jeffery, 'BEE doesn't work, but EED would', *@Liberty*, April 2016; Anthea Jeffery, 'EED is for real empowerment, whereas BEE has failed', *@Liberty*, April 2017]

Moreover, when those participating in the 2015 survey were thereafter expressly asked whether 'more land reform' was 'the most important thing that the government could do to improve the lives of people in their communities, a mere 2% endorsed this option. In 2016, this proportion was lower still, at 1%. Both the 2015 and 2016 field surveys also concurred in showing that only some 15% of respondents have benefited personally from land reform, whereas 85% have not. In addition, many of these beneficiaries may have been thinking of the cash payments the government has paid out in lieu of land. [Ibid]

In pushing for land ceilings on farms, the Bill ignores this lack of demand. It is also based on a romanticised view of peasant farming, which overlooks the need for economies of scale and disregards the impetus to urbanisation among most black South Africans. Writes Dr de Jager of Agri SA: 'There is a place for the smallholder farmer if they can fit into a value chain, knowing exactly what their inputs will come from and how they will market their produce. Without a clearly defined place in a value chain, smallholder farming is nothing but a poverty trap. Farmers [confront] the reality of the economies of scale all over the world. Our profitability is directly linked to the advantages of scale. Large farmers are getting bigger all the time, while small farmers are dropping out of the industry. In Europe, the family farm is maintained by vast subsidies to agriculture, a luxury which South Africa cannot afford.' [Theo de Jager, 'Legacy of the 1913 Natives Land Act – taking up the challenge', *Focus*, Helen Suzman Foundation, No 70, October 2013, p43]

Moreover, if the government is to help the 10% of black people who genuinely want land to farm, it should start by recognising how much farming land has already been acquired by black South Africans – mostly by buying it on the open market. The government should also listen to what emergent farmers say they need, instead of basing its interventions on romanticised notions and outdated ideology.

4.8 Land already in black ownership

The government often suggests that there has been no change in land ownership and that whites still own 87% of the land, as they did in the apartheid era. This is not so. When the political transition took place in 1994, the 13% of land falling within the ten former homelands, along with other state land amounting to some 12% of South Africa's total land area passed into the hands of the new government. In 1996, moreover, the Department of Land Affairs estimated that national and provincial departments owned some 32 million hectares, or 26% of the country's total land area of some 122 million hectares. This assessment excluded land owned by local authorities, which was not defined as 'state land' but which nevertheless fell within public ownership and amounted to some 2.1 million hectares. [James Myburgh, 'The land question revisited (1), *Politicsweb.co.za*, 24 October 2013]

If this municipal land is taken into account, it follows that some 34 million hectares (or 28% of the country's total land area) have been owned or controlled by the state – and hence by all South African citizens – since 1994. In addition, some 8.2 million hectares have been transferred via the land reform programme. Moreover, a number of black people have bought land on the open market since 1991, when the notorious Land Acts (which barred blacks from buying land in 'white' areas) were repealed by the National Party government. [Minister Gugile Nkwinti, 'Debate of the State of the Nation Address, *Politicsweb.co.za*, 14 February 2017, p2]

The ANC promised in 2007 to carry out a comprehensive land audit, but this has yet to be concluded. The results of an initial audit of state land were released in 2013 and put the

amount of land owned by the government at 14%. However, this proportion is at odds with the information earlier assembled by the ANC government, and clearly understates the extent of state and communal land. [Jeffery, *BEE: Helping or Hurting?* pp306-308; *City Press* 8 September 2013] Mr Nkwinti has promised a further audit of privately owned land, but little has been done by his department. In the interim, however, land experts have put great effort into identifying the extent of black land ownership and have generated important data on this issue.

One such audit has been conducted by Agri Development Solutions, a consultancy, together with Afrikaans agricultural journal *Landbouweekblad*. Their analysis shows a significant increase in black land ownership in the period from 1993 to 2016. In 2016, according to their figures, estimated black land ownership (including state, communal, and privately owned land) stood at 63.4% of total land ownership in KwaZulu-Natal, 49.3% in Limpopo, 47.5% in North West province, 43.4% in Gauteng, and at 28.5% in Mpumalanga. Only in three provinces was black land ownership very much lower: at 6.8% in the Free State, 5.7% in the Northern Cape, and 3.6% in the Western Cape. Overall, the proportion of workable agricultural land in the ownership of white commercial farmers has decreased from 85% in 1993 to 65% in 2016. At the same time, the proportion of such land in black ownership has gone up from 15% to 35% over the same period. [*Landbouweekblad* 31 March, *Rapport* 23 April 2017]

These figures, which are supported by significant research, are far more convincing than the government's ideologically driven assertion that black ownership or control of land has remained unchanged since the apartheid era. Yet in January 2017 this view was once again put forward by Mr Zuma, who falsely claimed (in his speech to mark the ANC's 105th anniversary) that black South Africans still occupied only 13% of the land. [*The Times* 9 January 2017]

At the same time, emergent black farmers who have bought their own land, or are busy working the redistribution land the state has leased to them, have little interest in the government's grand ideological interventions. Rather, they want practical help from the state to help them prosper and expand their operations. As Mr Kane-Berman reports, the 1 000 or so black farmers present at a conference convened by the African Farmers' Association of South Africa (Afasa) in October 2015 had little interest in the promises of 'radical land reform' made by ministers and senior officials. Instead, these farmers wanted practical assistance, such as increased access to electricity and better local roads to help them get their produce to market. Writes Mr Kane-Berman: [Kane-Berman, 'From land to farming', pp1-2]

> Speakers from the floor at the conference...complained that despite 'enormous' investment by the South African government and international development agencies, there had been 'no real breakthrough' in helping African farmers to move from subsistence to commercial. They also wanted to know why the government was not supporting farmers who had bought farms out of their own pockets and proved they could farm.

One of the issues debated at the conference was the government's proposal to impose ceilings on the size of commercial farms, as the Bill now provides. But many of the farmers present opposed such ceilings, saying they could inhibit their own growth into commercial producers. [Kane-Berman, 'From land to farming', p2] The Bill ignores these concerns.

The Bill also largely overlooks the demand for individual ownership among emergent farmers on land already acquired by the government for redistribution purposes. In keeping with the *State Land Lease and Disposal Policy* (*SLLDP*), as earlier described, these farmers are generally confined to leasehold title. What they want, however, is individual ownership, backed by title deeds, which will give them security of tenure and help them raise working capital from banks. They also want effective post-settlement support, which the government has generally failed to provide. Most are also well aware that the most effective assistance comes from white farmers, rather than the state – a fact which the ANC's ideologically-driven propaganda generally refuses to acknowledge.

According to Salam Abram, an ANC MP who is himself a farmer and who served on the parliamentary committee for agriculture for twelve years, land reform has been a 'dismal failure' because no proper 'after-settlement' support has been provided to beneficiaries. Says Mr Abram: 'The best mentors in South Africa are commercial farmers, but their support, which they have freely offered, has never really been accepted by the government.' [Kane-Berman, 'From land to farming', p14]

Considerations of this kind are vitally important, but are nevertheless ignored by the Bill. Among other things, they once again confirm that the demand for farming land among black South Africans is far more limited than the government is willing to acknowledge. This in turn means that the necessary additional farming land can be made available without resorting to the widespread farm splittings and expropriations that the Bill will require. Instead of taking this damaging path, the land needed can be sourced either from the state's own land holdings – or by buying up the farms that are offered up for sale each year, often by ageing and/or distressed farmers. [Kane-Berman, 'From land to farming', p19]

4.9 Conflict between the Bill and the National Development Plan

The National Development Plan (NDP) was approved by the ANC at its national conference at Mangaung (Bloemfontein) in December 2012 and remains the ruling party's overarching policy blueprint. All new policies and laws are thus expected to comply with the NDP, not contradict it. However, the Bill conflicts with the NDP in a number of important ways.

The NDP stresses, in particular, the importance of secure tenure, saying 'tenure security is vital to secure incomes for all existing farmers as well as for new entrants'. [Anthea Jeffery, 'The National Development Plan v The Green Paper', *Fast Facts*, December 2011] Yet the Bill will rob existing farmers of much of their tenure security. At the same time, under the *State Land Lease and Disposal Policy* (*SLLDP*), all redistribution land acquired by the

minister under the Bill will remain in the state's ownership, while those given access to it will be confined to limited and insecure leasehold rights. This is fundamentally at odds with what the NDP envisages.

The NDP also acknowledges that 'a large number of land reform beneficiaries...have not been able to...use land productively'. It thus urges 'a workable and pragmatic' approach in which: [Jeffery, 'The National Development Plan v The Green Paper', 2011, emphasis supplied by the IRR]

- land reform is implemented 'without distorting land markets';
- land transfer targets are 'brought into line with fiscal and economic realities';
- 'human capabilities' are developed *before* land transfers take place; and
- commercial farmers are encouraged to help black farmers succeed.

The Bill is in direct conflict with the NDP on all these points. The new law will greatly distort land markets. It also ignores 'fiscal and economic realities', and makes no attempt to increase the skills and experience of new farmers before further land transfers take place. In addition, the Bill is more likely to drive existing commercial farmers out of agriculture (or out of the country) than to encourage them to mentor new entrants.

The NDP further suggests that a very different approach should be used in identifying and acquiring land for redistribution. Each district municipality, it says, should establish a 'district lands committee' representing all significant stakeholders. This committee should identify 20% of commercial agricultural land within the district which is 'readily available' for redistribution. Land within this category would include land already up for sale, land where farmers are 'under severe financial pressure', land held by 'absentee landlords willing to exit', and land in deceased estates. [Jeffery, *Fast Facts*, ibid]

The state should buy the land so identified for 50% of its market value, while the other 50% would be 'made up by cash or in-kind contributions from commercial farmers who volunteered to participate'. In exchange, these commercial farmers would be 'protected from losing their land in the future and would gain black economic empowerment status'. Effectively, commercial farmers who are willing to sell a portion of their land would be asked to give up 10% of the value of their land to promote land reform. [Jeffery, *Fast Facts*, ibid]

Agri SA has put considerable effort into refining these proposals and developing them into an affordable and workable strategy. The Bill cuts across those efforts for no good reason. It also fundamentally contradicts the NDP in suggesting forced sales and expropriations as key mechanisms for land acquisition. Yet this is sure to cause enormous and unnecessary damage to commercial agriculture and the wider economy. Moreover, since most land reform projects have failed, the beneficiaries of the land redistributed under the Bill are unlikely to fare any better. This raises important questions as to what practical benefits the Bill is likely to bring to the poor – if that is indeed its intention.

4.10 Land reform failures to date

Since 1994, some 8.2 million hectares of land have been transferred to black South Africans, under either the redistribution or restitution legs of land reform. However, the results have largely been disastrous. As Mr Nkwinti himself has acknowledged, some 90% of land reform projects have failed, beneficiaries being unable to produce any marketable surplus. What this means, as journalist Stephan Hofstatter notes, is that the government, 'by its own admission, has spent billions of rands in taxpayers' money to take hundreds of farms out of production, costing thousands of jobs and billions more in lost revenue'. [Minister Gugile Nkwinti, 'Debate of the State of the Nation Address, *Politicsweb.co.za*, 14 February 2017, p2; *Business Report* 29 June 2011]

The government is now putting billions of rand (R3.8bn in the current financial year) into recapitalising dysfunctional farms, but with limited success. Small farmers find it difficult to cope with rapidly rising input costs, for labour costs have doubled in the past decade and so too have transport fees and tariffs for electricity, diesel, and water. Small farmers also battle to find markets, as agro-processors and supermarkets generally prefer to deal with a limited number of big producers with high yields and a consistent capacity to meet their exacting quality standards. [National Treasury, 2017 *Budget Review*, p66; Jeffery, *BEE: Helping or Hurting?* p321]

In addition, farming infrastructure is often poor, even for commercial farmers. Stock theft and other crimes have also reached levels that are crippling, especially to small farmers. At the same time, many of the people to whom land has been transferred have little knowledge of agriculture, and have effectively been dumped on farms with little effective support from the state. Agricultural extension services are still provided – with South Africa spending three times the global average on these – but extension officers have little relevant knowledge and manage to visit only 13% to 14% of small farmers, according to APAP and other official assessments. [Kane-Berman, 'From land to farming', p10]

Most new small farmers also battle to borrow working capital, largely because the government insists on confining them to leasehold tenure, rather than giving them title to their land. This means they have no collateral to offer the banks. In the words of Dr de Jager of Agri SA: 'Beneficiaries [of land redistribution] only have relatively short-term leases and very little security of tenure. They are delivered to the state and all its administrative bungling for production financing. This is bound to lead us into a future where we will once again have two categories of farmers: white ones who are land owners, financed by the financial institutions on the open market, and black ones who are, at best, *bywoners* [sharecroppers] on leased state land, financed on an ad hoc basis by the state.' [De Jager, 'Legacy of the 1913 Natives Land Act, p45; see also Jeffery, *BEE: Helping or Hurting?* pp324-327] This is a key problem in current state policy, which the Bill does little to address.

Present land reform policy is also based on the ideologically-driven fallacy that providing access to farming land will provide secure livelihoods to the poor, so reducing what the ANC often describes as 'the triple evils' of inequality, poverty, and unemployment. But this

ignores the fact, as Mr Kane-Berman writes, that land is only one out of a host of factors that are needed for success in farming. No less important are experience and entrepreneurship, along with 'working capital, know-how, machinery, labour, fuel, electricity, seed, chemicals, feed for livestock, security, and water'. [Kane-Berman, 'From land to farming', p7]

To put poor people on the land without ensuring that all these other 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] Like other land reform measures in the past, the Bill ignores these key issues.

4.11 Negative experience of land ceilings in other countries

The *Green Paper on Land Reform* of 2011 provides a potted summary of land reform initiatives in other developing countries. Though it notes that China has embarked on various free market reforms, including 'the transformation of the single collective ownership of land into various private ownerships, where the farmer can dispose of assets', it seems to put more emphasis on statist interventions. Among other things, it refers to land reforms in India which included 'the institution of a land ceiling Act'. It also refers to similar legislation in Egypt, under which farm sizes were capped at a maximum of 42 hectares per individual. [*Green Paper*, pp 8-9]

However, there are few similarities between these countries and South Africa. In addition, experience in India, in particular, shows that many of the anticipated benefits of land ceilings have not in fact materialised.

According to research commissioned by the Department and carried out by Samuel Kariuki, an associate professor and head of the Development Studies Programme in the Sociology Department of the University of the Witwatersrand, India provides 'the cardinal case study'. Land ceilings were introduced there in the 1960s and the 1970s to make more land available to small farmers, save them from having to pay rent to large landowners, and improve agricultural productivity. The ceilings introduced varied from one state to another. However, they generally failed to yield much 'surplus' land: a mere 0.5 million hectares of land in the first phase, which lasted from 1960 to 1972. Landowners often contested the ceilings laid down or the compensation offered, while the system gave impetus to circumvention and corruption. Land records were often also outdated and incomplete, making it difficult to identify 'excess' land or to enforce the ceilings. [Samuel Kariuki, 'Land Ceiling International Review and Policy Implications for South Africa', PowerPoint presentation, 18 October 2012]

In some states, where more than 5% of operational arable land was redistributed, the ceilings had a positive impact on the livelihoods of poor people, says Professor Kariuki. However, many of those who benefited, notes Ruth Hall of Plaas, were experienced small-scale tenant farmers, who were already working the land and were now saved from having to pay rent.

Professor Kariuki adds that the ceilings also had the benefit of dispersing land ownership more broadly and making it less concentrated. [Kariuki, ibid; Ruth Hall, e-mail to the IRR, 20 April 2017] The corollary, however, is that they prevented people with relatively large holdings from purchasing more land, which seemingly made it more difficult to generate economies of scale.

As Professor Kariuki further points out, in all the countries where land ceilings have been introduced, landowners have often resorted to litigation to challenge the loss of some of their land. In addition, the emphasis has been 'more on ensuring access to land than on focusing on the efficiency of land usage'. This problem has been compounded by 'a lack of supporting programmes'. [Kariuki, ibid] (This latter assessment should sound warning bells for South Africa, where a lack of support for land reform beneficiaries has already seen production on most transferred farms collapse.)

Professor Kariuki also points to various other problems. In several countries (and particularly in those, such as Egypt and Taiwan, where ceilings were set at low levels), land fragmentation has become a significant problem. An absence of reliable land records has also often made implementation difficult. In addition, considerable political will is needed to enforce land ceilings, which 'involve a realignment of economic and political power' (as Professor Kariuki puts it). The legislation laying down the ceilings must thus be clear, while implementation must be adequately funded. An effective process to resolve disputes must also be established. 'Unanticipated outcomes' are nevertheless likely to arise. A particularly challenging question is how the ceilings are to be decided, for it is vital to 'have limits which are neither too big nor too small'. In addition, the importance of economies of scale and commercial viability must not be overlooked. [Kariuki, ibid]

Professor Kariuki's analysis correctly identifies some of the problems that have arisen in enforcing land ceilings in other countries. But he tends to brush these problems aside and to assume that land ceilings will nevertheless have positive impacts in expanding land ownership and helping the poor. He also fails adequately to acknowledge that conditions in India, his 'cardinal' case study, are very different from those in South Africa. India had a large group of tenant farmers who were already successfully producing for the market and who would clearly benefit from not having to pay rent to landowners. It was thus obvious to whom 'excess' land should go and what the potential benefits would be. By contrast, South Africa lacks such a group of tenant farmers. It is also a highly urbanised society, in which few people want land to farm and economies of scale are vital to feed the cities. [Hall, e-mail to IRR, ibid]

Other research (not commissioned by the Department) concludes that the land ceilings imposed in India have in fact had negative effects. Maitreesh Ghatak and Sanchari Roy, in an article entitled 'Land reform and agricultural productivity in India: a review of evidence' and published in the *Oxford Review of Economic Policy* in 2007, say the following: 'In this paper we review as well as contribute to the empirical literature on the impact of land reform on agricultural productivity in India. We find that, overall for all states, land-reform legislation

had a negative and significant effect on agricultural productivity. However, this hides considerable variation across types of land reform, as well as variation across states. Decomposing by type of land reform, the main driver for this negative effect seems to be land-ceiling legislation.' [Maitreesh Ghatak and Sanchari Roy, 'Land reform and agricultural productivity in India: a review of evidence', Abstract, in *Oxford Review of Economic Policy*, 23(2): 251-269, February 2007; also cited in Agri SA, 'The problem with land ceilings', *Politicsweb.co.za*, 15 December 2016]

According to Agri SA, international experience with land ceilings also reveals a host of other problems which Professor Kariuki glosses over. This is evident, among other things, from a study of land ceilings conducted by agricultural economist Professor Herman van Schalkwyk of North West University and Andrew Makenete, economic adviser to Afasa. [A Makenete and H D van Schalkwyk, 'Land Ceiling Policy and Legislation: Implications for the Agricultural Economy', undated PowerPoint presentation; Agri SA, 'The problem with land ceilings', *Politicsweb.co.za*, 15 December 2016] Based on their research, Ernest Pringle, chairman of Agri SA's policy committee on agricultural development, identifies likely negative consequences as including: [*Business Report* 24 March 2017]

- the fragmentation of agricultural land;
- reduced productivity; and
- the high costs and administrative difficulties in setting land ceilings and then enforcing them.

Land ceilings have also made agriculture an unattractive and 'low-profit venture' in several parts of the world, notes Mr Pringle. In addition, ceilings have undermined tenure security and discouraged land-related investment, while doing little to overcome poverty. In South Africa, moreover, where economies of scale are often vital, the enforcement of land ceilings would probably 'leave both farmers and beneficiaries with uneconomical units'. [*Business Report* 24 March 2017]

4.12 Conflict with other land reform initiatives in South Africa

Redistribution of 'excess' land under the Bill is likely to conflict with other land reform initiatives in South Africa. Under the 'restitution' leg of land reform, black South Africans who were dispossessed of land under the Natives Land Act of 1913 or subsequent racially discriminatory laws are entitled to the return of their land. Some 79 000 land restitution claims were lodged in the first window period, which ended in December 1998. However, an estimated 8 500 to 20 500 of these claims remain outstanding, and must still be investigated and resolved. [Cherryl Walker, 'Land claims a Sisyphean task for the state', 19March 2015, https://mg.co.za/article/2015-03-19]

In addition, another 75 000 to 80 000 claims were lodged in the period from July 2014, when the land claims process was re-opened, to July 2016, when the legislation providing for the re-opening was struck down by the Constitutional Court for a lack of proper public consultation in its enactment. No additional claims may be submitted until the legislation

providing for this has been re-enacted, which is expected to take until July 2018. Once the new statute is in place, the government (on the basis of a regulatory impact analysis it commissioned in 2012) expects at least another 300 000 claims to be lodged. [*Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others*, Case CCT 40/15, 28 July 2016 (*Land Access* judgment); Jeffery, *BEE: Helping or Hurting?* pp313-316]

There are thus roughly 90 000 land claims which already been lodged and will have to be resolved. Many of these claims are likely to affect farms which exceed the stipulated ceilings and from which 'redistribution' land is to be excised under the Bill. If such redistribution land is already subject to land claims, how is this conundrum to be resolved? It cannot simply be assumed that the claims on such land are valid, as this may not be so. In addition, claims often compete with one another and thus need investigation and adjudication to resolve.

If another 300 000 or so claims are indeed lodged, it could take some 230 years for all these new claims to be settled. [Walker, 'Land claims a Sisyphean task for the state', p5] This means that excess 'redistribution' land is sure to be parcelled out under the Bill while this process is still under way. If a claim on the same land is subsequently upheld, the resulting conflict could be difficult to resolve. The Bill suggests that its provisions will have to take precedence, for it expressly states: 'In the event of a conflict between the provisions of this [Bill] and any other law relating to the acquisition and disposal of agricultural land, the provisions of the [Bill] prevail'. [Clause 3(3), Bill] However, to give primacy to the Bill in this situation would be inconsistent with Section 25(7) of the Constitution, which guarantees a right of restitution to all those dispossessed of land through racial laws in the apartheid era. [Section 25(7), Constitution]

The government is also pressing on with various pilot schemes aimed at assessing the benefits of its 50:50 land reform proposal. This proposal aims at 'strengthening the relative rights of people working the land' by dividing farms on a 50:50 basis between the farmer on the one hand and his long-standing farm workers on the other. The government will supposedly pay for the 50% stake to be shared among farm workers, but the money will not go to the farmer. Rather, it will be paid into an 'investment and development fund', which will be 'jointly owned by the parties to the new ownership regime'. [Jeffery, *BEE: Helping or Hurting?* pp345-347] Again, however, the more this proposal is implemented, the more it is likely to conflict with the division of farming land envisaged by the Bill.

5 Ramifications of other aspects of the Bill

5.1 Prohibition of foreign ownership of agricultural land

As earlier noted, once the Bill comes into operation, it will bar foreign persons (both natural and juristic) from acquiring ownership of agricultural land. Foreigners will instead be confined to long leases ranging from 30 to 50 years. Foreigners who already own agricultural land and want to dispose of it will have to start by offering it to the minister, who will have a right of first refusal. The minister will not, however, be obliged offer a price based on the market value of the land. According to the Bill, if the minister indicates that he intends to

acquire the land, even at a price well below its market value, the foreigner will apparently have little choice but to proceed with the sale. [Clauses 19-21, Bill]

If the minister fails to take up his right of first refusal within 90 days, then the foreigner may offer the land to South Africa's own citizens. [Clause 21(2), Bill] However, only those citizens whose land holdings fall sufficiently below the relevant ceilings will be able to buy. This could make it difficult in practice for foreigners to sell to locals.

These restrictions are likely to send an adverse message to those considering foreign direct investment (FDI) into South Africa. Yet the country urgently needs very much more FDI if it is to be able to grow the economy and avoid further downgrades to sub-investment or junk status by international ratings agencies. The Bill overlooks both this need and the fact that FDI into South Africa has already dropped sharply.

Figures compiled by the United Nations Conference on Trade and Investment (Unctad) show that South Africa has suffered a precipitous decline in FDI inflows in recent years. In 2015, in particular, South Africa's investment inflows fell to their lowest level in ten years. FDI inflows then totalled $1.77bn, which was 69% lower than in 2014 ($5.77bn) and 79% lower than in 2013 ($8.3bn). [Peter Leon, Achilles heel of investment in SA, *Business Day* 25 January 2017]

FDI into South Africa increased in 2016 to some $2.6bn or R33.5bn, but this is still far too little to meet the country's needs. The fact that South Africa has been downgraded to junk status in recent weeks by two international ratings agencies (Standard & Poor's and Fitch) [*Financial Mail* 13 April 2017] will also now make it harder to increase FDI inflows any further. In addition, figures compiled by the Reserve Bank of South Africa show that, though the country recorded an inflow of R33.5bn in direct investment in 2016, this was exceeded by outward FDI by South African companies totalling R49.7bn in 2016. [*Business Day* 25 April 2017] The net outflow thus exceeded R16bn over the year.

However, very much higher net inflows of FDI into South Africa are essential to compensate for the country's low domestic savings rate. Expressed as a ratio of gross domestic savings to GDP, South Africa's savings rate stood at 16.4% in 2015. [2017 *South Africa Survey*, p124] Domestic savings are thus insufficient to fund the much higher rate of fixed investment (30% of GDP) recommended by the National Development Plan (NDP). Domestic savings must be supplemented by major inflows from elsewhere in the world if the development of infrastructure is to expand to the extent required – and if current government expenditure on social grants and public service wages (among other things) is also to be maintained.

If South Africa is to succeed in attracting much more FDI inflows, it must give potential investors increased confidence in the security of their investments. Instead, however, the cancellation of British and European bilateral investment treaties (BITs) has already undermined that confidence. So too has the failure of the Department of Trade and Industry (DTI) to include within the Protection of Investment Act of 2015 the standard protections for

foreign investors that are commonly found in BITs, which the DTI had earlier pledged to do. [IRR, Submission to the portfolio committee on trade and industry on the Promotion and Protection of Investment Bill of 2015 [B18-2015]]

Confidence in South Africa as an investment destination has already been badly shaken by these developments, as well as by the government's ever-intensifying BEE requirements. [*Financial Mail* 21 April 2017] In these circumstances, the country cannot afford to deter FDI inflows any further. Yet the Bill ignores this in barring any acquisition of agricultural land (as broadly defined) by foreigners – and by making it more difficult for foreigners to dispose of their existing land holdings on reasonable terms.

5.2 Administrative and other costs of the new Land Commission

As earlier noted, the Bill provides for the establishment of a land commission whose main task will be to establish and maintain a register of all agricultural land holdings in the country that are both publicly and privately owned. Maintaining this register will in itself be a massive bureaucratic exercise, costing far more than the R21.3m per annum reflected in the Memorandum on the Objects of the Bill. [Para 4, Memorandum]

There is also no good reason why such an additional bureaucratic body should be needed. The government has been trying for years to draw up an accurate inventory of its own land holdings. The Bill is supposed to cure this problem by compelling the accounting officers of all relevant departments, municipalities, and state entities to submit the required information to the commission. Why, however, should this instruction be any more successful than previous ones have been?

Instead of setting up a whole new bureaucratic entity – and this at a time when tax revenues are stagnant and the government is finding it hard to sustain even the existing public service – the minister should seek the co-operation of his cabinet colleagues in ensuring that the necessary data is collected from all relevant departments and other state entities. In addition, a great deal of information about private land holdings has already been collected by Agri SA, *Landbouweekblad*, and other experts (as earlier outlined). This information needs to be taken into careful account, not disregarded by the government.

Moreover, if accurate information on land ownership by race is to be gathered, the task should be given to a competent and independent private agency. It should not be entrusted to a state-controlled commission when the ruling party has a strong ideological determination to deny the extent to which black land ownership has already expanded. False assertions by Mr Zuma and other ANC leaders that black people still own a mere 13% of the land disqualify the government from carrying out this task.

5.3 Ramifications for black South Africans

By playing up the historical land injustice, the ANC has created the misleading impression that the Bill will affect only white commercial farmers. This is not so, for the Bill will also have many negative consequences for black South Africans.

Among other things, it will prevent emergent black commercial farmers from expanding their land holdings and attaining necessary economies of scale. By fragmenting farms – and simultaneously taking much land out of commercial use – the Bill is likely to erode agricultural production, undermine food security, and add to food inflation. The recent drought has demonstrated how much food prices increase when production is curtailed. But the drought was a temporary aberration from which recovery is possible and is now being achieved. By contrast, the decline in production resulting from the Bill will be permanent. With the inflation rate already exceeding 6% a year, the impact is likely to be severe. All South Africans will suffer from this, but the poor and the emergent middle class will suffer most of all.

The Bill is also likely to have major ramifications for the 2.8 million hectares of land currently vested in the Zulu monarch as the trustee of the Ingonyama Trust. The Ingonyama Trust was established in 1994 in terms of an agreement between the outgoing National Party government and the administration of the KwaZulu homeland. Under this agreement, all customary land then owned by the KwaZulu administration became vested in King Goodwill Zwelithini, as the sole trustee of the Ingonyama Trust. [*Business Day* 7 June 2016]

Prima facie, the Bill applies just as much to these 2.8 million hectares of mainly agricultural land as it does to land owned by white commercial farmers. In addition, under the legislation establishing the Trust, any national land reform measure clearly applies to the land vested in the Zulu king. [Centre for Law and Society, Rural Women's Action Research Programme, 'Land Rights under the Ingonyama Trust, February 2015, p2, citing Section 2(7) Ingonyama Trust Act of 1994]

Under the Bill, the maximum ceilings for agricultural land holdings could be set at 12 000 hectares, as both the president and Mr Nkwinti have mooted. If Mr Nkwinti has his way, an even lower maximum ceiling of 5 000 hectares could well apply. On this basis, most of the land now vested in the Ingonyama Trust could be identified as excess 'redistribution' land under the Bill and targeted for expropriation by the state.

Unless the minister can be persuaded to exempt the Ingonyama Trust from the operation of the Bill, millions of people now living on customary plots which have been handed down from one generation to the next could find themselves living on land either bought up by wealthy BEE businesspeople or acquired by the state. Either way, they will have less security of tenure than they do now – and will depend on the grace and favour of the new land owners to remain in occupation of their plots.

Despite this danger, the state law advisers have said that the Bill has no impact on 'customary law or the customs of traditional communities' and so need not be referred to the National House of Traditional Leaders. This is a surprising assessment when the Bill could allow the state to expropriate millions of hectares of land now vested in the Ingonyama Trust.

6 Incorrect procedural 'tagging' of the Bill

The Memorandum on the Objects of the Bill states that the Bill must be dealt with by Parliament under 'the procedure established by Section 75 of the Constitution', as it contains 'no provision to which the procedure set out in...section 76 of the Constitution applies'. [Para 6.1, Memorandum] The Section 75 procedure applies to 'ordinary bills not affecting provinces', whereas the Section 76 procedure is required for ordinary bills that do affect the provinces. [Sections 75, 76, Constitution]

The Bill has major implications for agriculture, which is a matter of concurrent national and provincial jurisdiction under Schedule 4 of the Constitution. It is thus an ordinary Bill which affects the provinces and must be dealt with under Section 76 of the Constitution. Tagging it as a Section 75 measure is incorrect. This is a further procedural flaw which is serious enough to warrant the striking down of the Bill in its entirety.

The Bill has also been incorrectly tagged as having no 'provisions pertaining to customary law or customs of traditional communities' and hence as not needing to be referred to the National House of Traditional Leaders under Section 18(1)(a) of the Traditional Leadership and Government Framework Act of 2003. [Para 6.2, Memorandum] However, this is clearly incorrect. As noted in *Section 5* above, the Bill will apply to most of the 2.8 million hectares of land now vested in the Zulu monarch as trustee of the Ingonyama Trust. It will thus regard most of this land as excess 'redistribution' land to be excised from the Trust and (in general) acquired by the state. The Bill thus has major implications for customary law and the customs of traditional communities and needs to be referred to the National House of Traditional Leaders for comment before Parliament may lawfully adopt it.

7 No socio-economic assessment of the Bill

Since 1st September 2015 all new legislation in South Africa has to 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 new 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] The Guidelines state: 'A common risk is that policy/law makers focus on achieving one priority without assessing the impact on other national ones.' However, it adds, '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 notes 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 Bill raises.

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation (or other rules) have been proposed, 'an initial assessment' must be conducted to identify different 'options for addressing the problem' and making '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, which must 'provide a detailed evaluation of the likely effects of the [new law] in terms of implementation and compliance costs as well as the anticipated outcome'. When a bill is published 'for public comment and consultation with stakeholders', this final assessment must be attached to it. Both the bill and the final assessment must then be revised as required, based on the comments obtained from the public and other stakeholders. Thereafter, when the bill is submitted for approval to the cabinet, the final assessment, as thus amended, must be attached to it. [Guidelines, p7]

However, no initial or final SEIAS assessment of the Bill has been made available to help inform and guide public comment, as the Guidelines require. The Bill thus cannot proceed until these defects have been rectified. An initial assessment which sets out and weighs up the pros and cons of different possible ways of meeting the aims set out in the Bill must first be conducted and published for comment. This initial assessment must examine all the risks involved in enforcing land ceilings, as set out above. It must also properly weigh alternative policies aimed at overcoming past land injustices and helping commercial farmers, both black and white, to succeed.

Any accurate and objective assessment of the evidence thus assembled is likely to lead to the rejection of the core ideas now contained in the Bill (land ceilings and restrictions on foreign ownership). If the Department nevertheless insists on drawing up a new bill modelled on the present one, then it must ensure that this new bill is accompanied by a final SEIAS assessment which sets out all its likely costs and consequences. This final assessment must also be revised in the light of public comments warning against its likely negative impact, while this revised assessment must be made available to the cabinet before it approves any such new bill.

The current Bill has not been accompanied by the necessary SEIAS assessments. It must thus be abandoned, while a new SEIAS process for a possible new bill must instead commence, as outlined above. The initial and final SEIAS assessments must cover all the points identified in this submission, all of which have an important bearing on likely costs and outcomes.

Failure to follow the necessary steps will not only breach the government's SEIAS rules but also fatally undermine the constitutional imperative to 'facilitate public involvement in the legislative process'. This in itself would provide good reason for the Bill to be struck down in its entirety by the Constitutional Court. [See Section 59(1)(a), 1996 Constitution and relevant Constitutional Court judgments, including *Matatiele Municipality and others* v *President of the Republic of South Africa and others*; (CCT73/05A) [2006] ZACC 12; 2007 (1) BCLR 47 (CC); *Doctors for Life International* v *Speaker of the National Assembly and others*; 2006 (6) SA 416 (CC), and *Land Access Movement of South Africa and others* v *Chairperson of the National Council of Provinces and others.* [2016] ZACC 22]

8 Unconstitutionality of the Bill

As the Constitutional Court stressed in the *Certification* case in 1996: 'Under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament… Parliament "must act in accordance with, and within the limits of, the Constitution"'. [*Certification of the Constitution of the Republic of South Africa*, 1996, 1996 (10) BCLR 1253 (CC), at para 109]

Parliament thus cannot lawfully adopt legislation without ensuring that all its provisions comply with the Constitution. Yet the Bill is inconsistent with the Constitution in two key spheres. First, many of its provisions are too vague to comply with the rule of law, while it also gives the minister excessively broad discretionary powers. Second, it allows for arbitrary deprivations of land which are contrary to the property clause in the Constitution and cannot be saved under Section 36, the limitations clause.

8.1 Vague provisions and unfettered ministerial discretion

Many of the provisions in the Bill are too vague to comply with the rule of law. This requires certainty of law, among other things, so that rules are not vulnerable to arbitrary interpretation and uneven application by bureaucrats or ministers. The supremacy of the rule of law is also one of the founding values of the Constitution, [Section 1(c), 1996 Constitution] which means that its requirements are binding and cannot be overlooked.

The rule of law is breached by provisions which are either intrinsically uncertain or which fail adequately to guide and constrain the exercise of administrative discretion. In the words of Judge Richard Goldstone in *Janse van Rensburg* v *Minister of Trade and Industry*: 'It is inappropriate that [any] minister should be able to exercise an unfettered and unguided discretion in situations [which are] fraught with potentially irreversible and prejudicial consequences to business people and others who may be affected.' [*Janse van Rensburg* v *Minister of Trade and Industry*, 2001 (1) SA 29 (CC), para 29] However, there are various provisions in the Bill which give Mr Nkwinti precisely such an 'unfettered and unguided discretion' – and which could indeed have 'potentially irreversible and prejudicial consequences' to commercial farmers and other people.

The Bill is impermissibly vague in many of its key provisions. Its definition of 'redistribution agricultural land' is ambiguous at best, for it defines this as meaning all agricultural land

which ‘falls between or exceeds any category of agricultural land holdings’. [Clause 1, definitions, Bill] This wording has no clearly intelligible meaning.

Equally vague and difficult to understand is the power given to the commission to authorise ‘the amendment of any document, the amendment of which no express provision is made in this [Bill]’. [Clause 13(1)(b), Bill]

At the same time, the Bill provides no clarity on:

(a) what ‘criteria and factors’ the minister is to take into account in deciding on ‘the categories of ceilings for agricultural land holdings in each district’; [Clause 25(1)(a), Bill, read together with Clause 37(1)(h), Bill]
(b) who is to decide on the ceilings for agricultural land holdings for each district, presumably within the ‘categories of ceilings’ decided by the minister; [Clause 25(2), Bill, read together with Clause 25(1), Bill]
(c) how information relevant to the ‘criteria and factors’ to be taken into account in deciding on land ceilings under Clause 25(2) of the Bill is to be gathered, verified, and analysed; [See Clause 25(2), Bill]
(d) how ‘matters pertaining to...farm size, farm viability and economies of scale’ are accurately to be assessed; [See Clause 25(2)(a)(ii), Bill]
(e) how ‘water availability and quality’ is to be determined, when (as earlier noted) this depends on a host of variables, ranging from average rainfall patterns and the likelihood of drought to the capacity of municipal waste water plants to treat sewage and other effluent effectively; [See Clause 25(2)(a)(iii), Bill]
(f) what the Bill means when it calls (in language which is simply unintelligible) for a consideration of ‘the relationship between resources, such as between cultivated land and natural pasture, dry land and irrigated land, soil types on crop land and any other relevant factor that will have an influence in determining the economic size within an area’; [See Clause 25(2)(a)(iv), Bill]
(g) how ‘the capital requirements of different enterprises’ are to be calculated; [See Clause 25(2)(b), Bill]
(h) what the Bill means when it speaks of the ‘measure of expected household and agro-enterprise income’, how such income is to be calculated, and whether relevant data is to be gathered for the past year, the past three years, the past five years, or for a longer period, bearing in mind that data extracted from too short a period is unlikely to provide an accurate measure; [See Clause 25(2)(c), Bill]
(i) for what period ‘annual turnover’ is to be determined, as a single year’s data would not suffice and the Bill is silent as to what period should be taken into account; [See Clause 25(2)(c), Bill] and
(j) what the Bill means when it refers to ‘the relationship between product prices and price margins’ and for what period this relationship is to be assessed, for product prices change on a daily basis and are often greatly influenced by global factors. [See Clause 25(2)(d), Bill]

All these provisions are impermissibly vague because they are open to a number of different interpretations and are likely to be applied by different officials in different ways at different times. They thus offend against what the Constitutional Court has described as 'the doctrine against vagueness of laws'. According to the court, this doctrine 'requires that laws must be written in a clear and accessible manner'. Legislation is not sufficiently clear if administrative officials can give the same provision different meanings, all of which are plausible. [*Affordable Medicines Trust and others* v *Minister of Health and others*, 2005 BCLR 529 (CC) at para 108; *Land Access* judgment, para 4, note 6]

The Bill also gives the minister too wide a discretion in various spheres. For example, it allows the minister to 'exclude' any land from its provisions, simply by publishing a notice in the *Government Gazette*. [Clause 1, definitions, Bill] It further allows the minister to 'exempt a particular category of agricultural land holdings' from the 'categories of ceilings' to be decided by the minister under Clause 25(1) of the Bill. [See Clause 25(1)(c), Bill]

The Bill fails to provide any substantive guidelines or procedural guardrails for the exercise of the minister's discretion in deciding on exemptions in these spheres. This is impermissibly vague, and is likely to make for arbitrary decision-making with uneven impact. This in turn will contradict a further vital aspect of the rule of law – the need for equality before the law. [Sections 1(c), 9(1), 1996 Constitution]

Equally impermissibly broad – and commensurately unconstitutional – are the minister's powers to:

(i) 'determine special categories ceilings' (sic); [See Clause 25(1)(b), Bill] and
(ii) exempt institutional funds owning agricultural land holdings from having to excise the 'redistribution' land they thus own. [See Clause 26(4), Bill]

Again, arbitrary decision-making is sure to result, while the Constitution's guarantee of equality before the law will again be eroded. [Section 9(1), 1996 Constitution]

8.2 Arbitrary deprivation of land

The Constitutional Court has already ruled (in the *First National Bank* or *FNB* case) that any interference with the use, enjoyment or exploitation of private property is a 'deprivation' of that property. At the same time, the Constitution prohibits any 'arbitrary' deprivation of property. A deprivation is 'arbitrary' if the law in question does not provide sufficient reason for the deprivation, or if it is procedurally unfair. In considering whether an interference with property is arbitrary, the courts will, among other things, examine the relationship between the means employed and the ends sought by the legislative scheme. [Section 25(1), 1996 Constitution; *First National Bank of SA Ltd t/aWesbank* v *Commissioner of the South African Revenue Service and another, First National Bank of SA Ltd t/a Wesbank* v *Minister of Finance*, 2002 (4) SA 768 (CC), 2002 (7) BCLR 702, [2002] ZACC 5, at para 57; see also Agri SA, 'The problem with land ceilings', 15 December 2016]

As earlier noted, the stated aims of the Bill are to '(a) obtain agricultural land to promote productive employment and income to poor and efficient small-scale farmers; (b) ensure

redress for past imbalances in access to agricultural land; (c) promote food security; (d) provide...a regulatory framework for the generation and utilisation of policy-relevant information on agricultural land ownership and usage...; (e) provide certainty regarding the ownership of public and private agricultural land; and (f) enable to State to effectively deliberate on matters of land, natural resource economics, property market and extent of land use to meet the policy and legislative intent of the State...'. [Clause 2, Bill]

However, there are far better ways – including the provision of title deeds and effective extension services – of helping small-scale farmers to generate income, as point (a) envisages. There will also be little effective redress for past injustices, as envisaged in point (b), as the Bill empowers the state to buy or expropriate most 'redistribution' land, while the *SLLDP* will then prevent small-scale farmers from ever gaining ownership of it. In addition, the Bill will undermine, rather than advance, the country's food security, contrary to point (c). The commission may help gather information about the ownership of agricultural land, as envisaged in points (d) and (e), but this objective could easily be met in other and more cost-effective ways. Though point (f) is largely incoherent, the Bill will do little to help the state 'effectively deliberate' on land issues. On the contrary, the Bill will facilitate creeping land nationalisation. This in turn will make it more difficult to develop practical land reform measures that meet key needs and help expand commercial farming by both black and white producers.

Also relevant is Section 36 of the Constitution. This allows the government to limit guaranteed rights, provided the limitation is 'reasonable and justifiable' in an open and democratic society based on human dignity, equality and freedom. In assessing whether a limitation of the right against arbitrary deprivation of property is justifiable in this way, the courts must consider (among other things) whether 'less restrictive means' could be used to achieve the purpose of the limitation. There are clearly 'less restrictive means' available to help small-scale farmers, provide redress for past land injustices, and promote food security – especially as this Bill will undermine, rather than advance, the attainment of these objectives.

9 Better ways to achieve the Bill's objectives

The Bill's key objectives – of helping small-scale farmers earn an income from their land, provide redress for past injustice, and promote food security – can successfully be met in very different ways. In devising a workable alternative, the first essential need is to shift away from statist and ideologically-driven interventions and to focus instead on realistic assessments and practical measures to expand land ownership and agricultural production.

As earlier noted, government policy should recognise that access to land is not in itself enough to alleviate poverty or generate jobs and incomes. Instead, land is only one out of a host of key requirements. As Mr Kane-Berman writes: 'A new policy must recognise that land is only the starting point for agriculture. Without all the other inputs – from finance for seeds and fertiliser and implements, to water rights, to access to markets and know-how – no farmer will produce anything.' [Kane-Berman, 'From land to farming', p19]

In devising new policy, it is also vital to learn from past failures. Since most transferred farms have fallen out of production, most land reform 'beneficiaries' have not gained from the land made available to them. As a former director general of land affairs, Tozi Gwanya, commented in 2007, land reform targets should thus look beyond the number of hectares transferred and should focus instead on jobs created, income earned, and 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]

Policy must also recognise the vital importance of food security in a country that is already 65% urbanised. By 2030, as earlier noted, the population will have reached 67 million people, of whom 71% or 48 million (not far off the country's current population of 56 million), will be living in the towns and cities. [*Landbouweekblad* 31 March 2017] Only capital-intensive commercial farming, on farms large enough to benefit from economies of scale, will be able to produce enough to meet the needs of this large urban population. Subsistence farmers and small commercial farming should still be helped in various ways, but policy must recognise that their contributions to national food production will inevitably remain small. [Kane-Berman, 'From land to farming', p18]

Rapid urbanisation also means that most South Africans, as earlier noted, 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 the comprehensive opinion surveys recently commissioned by the IRR. Whereas the ANC claims 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: [Jeffery, 'EED is for real empowerment', 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.

The field survey also asked if people would ‘prefer a political party which focuses on faster growth and more jobs, or one which focuses on land expropriation to redress past wrongs’. In reply, 84% of blacks opted for the former and a mere 7% for the latter. [Jeffery, ‘EED is for real empowerment’, p31]

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 envisaged by the Bill. Revised policy must take this into account. It must also cater for four different categories among farmers: (1) emergent commercial farmers who are already on the land; (2) people who would like to have farming land so that they can join their ranks; (3) small-scale farmers in peri-urban areas and in communal areas; and (4) large-scale commercial farmers. [Kane-Berman, ‘From land to farming’, p19]

What farmers in all four categories critically require is individual ownership, backed by title deeds, and security of tenure. This is one of the key messages from the National Development Plan (NDP), as earlier outlined. The NDP stresses that secure tenure is ‘important in communal areas’, that land reform beneficiaries should quickly move from leasehold to ‘full title’, and that ‘tenure security is vital for secure incomes for all existing farmers as well as new entrants’. The National Emergent Red Meat Producers’ Association (Nerpa) agrees, saying that without tenure security ‘there is little hope of ever developing smallholder farmers to competent commercial farmers’. [Jeffery, ‘The National Development Plan v The Green Paper,’ p6; Kane-Berman, ‘From land to farming’, p19]

Members of the African Farmers’ Association of South Africa (Afasa) have also repeatedly called for individual ownership for black farmers working on land already redistributed by the state. As Afasa stresses, these farmers cannot obtain bank loans or risk fixed improvements without such title, and thus see individual ownership as a vital requirement for success.

Revised policy should focusing on sustaining and expanding successful farming, rather than on transferring productive farms into state ownership. Policy should also be ‘demand-led’, in that it should focus solely on meeting the demand for farming land that already exists. [Agri SA, The trouble with land ceilings, 15 December 2016]

Overall, thus, policy should begin by granting black farmers individual ownership and title deeds to the land they farm. If emergent or prospective commercial farmers need additional land, the state should sell them some of the land it already owns, with the purchase to be financed by the banks against secure title. (New farmers could start by leasing from the state,

but should have an option to buy as soon as they can afford to put down a deposit.) [Kane-Berman, 'From land to farming', p19]

The state should concentrate its efforts on improving rural infrastructure, particularly in the form of roads, railways, dams, and the like. The government must fund this expenditure out of tax revenues, but construction and day-to-day operation should generally be outsourced to the private sector via public-private partnerships. These agreements should be concluded via an open and competitive tendering process shorn of costly and often damaging procurement BEE requirements. Other essential infrastructure, including abattoirs, produce markets, milling, and storage facilities should be provided in the same way, or via private firms investing their own capital. [Kane-Berman, 'From land to farming', pp19-20]

Effective extension services must also be made available, especially to emergent commercial farmers. Since the state is clearly unable to provide such services, the necessary mentoring and support should come from established commercial farmers, both black and white. Emergent farmers should be provided with tax-funded vouchers, which they would use to buy support services from the providers of their choice. These vouchers would enable the transfer of skills on a significant scale. They could be financed (in part at least) by the training levies currently collected by the South African Revenue Service on behalf of AgriSETA. [Kane-Berman, 'From land to farming', p20]

Emergent farmers may also need the government's help in obtaining working capital from the banks. This can be provided by the state's guaranteeing such loans. This would be a much better investment than spending R2bn on the grandiose agri-parks project or continually providing guarantees to failing state-owned enterprises (SOEs) such as South African Airways (SAA). As Mr Kane-Berman urges, at least some of the country's failing SOEs should be sold off to entrepreneurs with the capacity to turn them around. This would be a good way to raise the funds to help small farmers make a go of it. [Kane-Berman, 'From land to farming', p20]

Given the vital importance of maintaining food security, established commercial farmers, both large and small, should be left in peace to continue feeding the nation. Land claims which have already been lodged against their farms must be investigated and resolved, in general by providing cash to claimants (unless they have a genuine desire and capacity to embark on the difficult business of farming). A bill now seeking to re-open the land claims process should be abandoned, as it will further harm commercial farmers by undermining their security of title for 320 years or more. The administrative and other costs of dealing with 300 000 or so additional land claims will also very high. Overall, the money involved in the land claims process could be far better spent in helping existing emergent farmers expand into successful commercial production. [Kane-Berman, 'From land to farming', pp20-21]

As regards the millions of hectares of land still held in communal tenure, the first requirement is to give people individual title to their customary plots. Unless this is done, as the NDP recognises, people cannot easily invest in increasing their production. Hence, much of the

land in these areas – often well-watered and potentially highly productive land – will remain under-utilised. Infrastructure should also be provided, along with effective extension services and access to working capital. Those people who rely on social grants rather than farming could be bought out by people who actually want to farm. Consolidation into larger units will be needed to generate economies of scale. [Kane-Berman, 'From land to farming', p21]

As Mr Kane-Berman writes: 'This would mean the displacement of people from traditional areas. One of South Africa's major problems is that it is unable to compensate for the loss of jobs in agriculture by employment in other sectors. Part of the process of economic development around the world is that people move off the land and into jobs in commerce and industry in the cities. This is not happening in South Africa on anything like the scale required.'

Adds John Kane-Berman: 'In essence, policy should focus not on land but on farming. Instead of redistributing more land, land currently underutilised should be brought into full production. Instead of seeking to create many more small farmers, those already in existence should be helped to succeed. This necessitates not only a shift in focus from land reform to farming, but a recognition that individual entrepreneurship is the key to success. It further necessitates acknowledging the enormous challenges facing farming in South Africa, and that agriculture is not the answer to poverty and unemployment that the government seems to think it is. [Kane-Berman, 'From land to farming', p1]

He goes on: 'The wider problem [lies in] anaemic investment, tepid growth, and exploding unemployment. The view in the ANC that land is the answer to poverty, inequality, and unemployment has no basis in reality. Ordinary people have long since voted with their feet against this idea by moving to town. Money earmarked for [acquiring redistribution land under the Bill] would be better spent on buying land for housing in the cities and towns. South Africa can only solve its triple challenges of poverty, inequality, and unemployment by taking all the necessary policy decisions to push up the economic growth rate.' [Kane-Berman, 'From land to farming', p21]

If the Bill is enacted into law, it will become yet another measure on the Statute Book which undermines business confidence, deters investment, and reduces growth. Unless its wording is substantially changed, it will also be unconstitutional and invalid in its key provisions. In addition, its adoption without proper public consultation, the required SEIAS assessments, and the correct parliamentary procedure (under Section 76 of the Constitution) will be profoundly flawed. The Bill should therefore be abandoned, rather than enacted into law.

South African Institute of Race Relations NPC (IRR) **17th May 2017**