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

SYNOPSIS

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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).

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 Contents of the Bill

2.1 Stated aims

According to the Bill, the stated aims 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 Bill is more likely to hinder than help the achievement of these objectives.

2.2 New 'land commission'

The Bill will established a new Land Commission (the Commission), in addition to the Land Claims Commission already in place. All members of the new Commission will be appointed by and accountable to the minister of rural development and land reform, Mr Gugile Nkwinti. The Commission's main function will be 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]

2.3 Notifications by private owners

Within 12 months of the Bill's commencement, all private owners must notify the Commission of their race, gender, and nationality, as well as 'the size and use of their agricultural land holdings'. The commission will be able to investigate 'the correctness and accuracy' of these disclosures and to 'amend' the information submitted to it. Criminal penalties will apply if false information is provided, while the commission will also be able to shift the burden of disproof on to the land owner. [Clauses 15, 16, 27, 9, 31, Bill]

2.4 Notifications regarding public land

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

Mr Nkwinti says this is necessary to help the state identify all the land it owns. However, he fails to explain why the new commission will be any more successful in prising this information out of relevant officials than his own prior efforts at a land audit have been.

2.5 Register of agricultural land holdings

The commission must 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]

2.6 Ceilings for agricultural land holdings

The minister is empowered 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 to compel him to provide such guidelines. [Clause 37(1)(h), Bill]

The minister must decide on these 'categories' of ceilings 'after consultation' with the commission and the minister for agriculture, forestry, and fisheries. He must also invite written comment from interested parties. [Clause 25(1) (3), Bill]

Within the framework of the 'categories' decided by the minister, 'the ceilings for agricultural land holdings' must be decided for each district. The Bill is silent as to who is to make this determination. Whether this task is to be carried out by the minister, the commission, or the district municipality is thus uncertain.

Relevant criteria to be used in deciding these ceilings include 'land capability factors'. These in turn depend 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] Also to be taken into account are '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 in gathering, verifying, sifting, and analysing information on all these issues. The scale of the exercise is simply enormous – especially as many of the variables will be difficult to assess. In addition, the data required goes far beyond the information that must be included in every private owner's 'notification' to the commission. This raises further questions as to how this very wide range of information is to be obtained.

2.7 ‘Redistribution agricultural land’

The Bill defines ‘redistribution agricultural land’ as ‘all agricultural land that falls between or exceeds any category of agricultural land holdings’. It also says that every private land owner, in submitting his notification of ownership to the commission, must further ‘notify...the commission of the identity of the portion of such agricultural land holdings which constitutes redistribution agricultural land’. [Clause 26(1), Bill]

However, if the commission does not agree with the owner’s identification of this supposedly excess land, the matter must be referred to arbitration before an arbitrator who will be either in the pay or the employment of the state. [Clause 26(3), Bill] These provisions cast doubt on the impartiality of any arbitration process. In practice, they could also allow the commission to insist that the most valuable portions of a 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. [Clause 26(2)(a), Bill] However, this provision 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] The conflict raises doubts as to whether the current wording in the Bill will be retained, especially as the overall thrust in land policy is towards state ownership and control.

If the owner is unwilling to accept a proffered price that may be well below market value, then the redistribution land must instead be acquired by the minister. If the owner and the minister cannot agree on the price, then the minister may ‘expropriate the redistribution agricultural land in question’. [Clause 26(2) (c), Bill]

Under the current Expropriation Bill of 2015 (which is currently back before Parliament for re-enactment because of procedural flaws in its initial adoption), compensation on expropriation may be significantly less than market value. The current market value of farming land will, of course, also be greatly depressed by the Bill – which not only threatens property rights but is also likely to trigger a host of forced sales.

2.8 Prohibition on acquisition of agricultural land by foreigners

From the time the Bill becomes operative, foreigners will no longer be allowed to buy agricultural land but will instead be confined to long-term leases: initially for 30 years, and then perhaps for another 20. A foreigner wanting to sell farming land which he already owns must first offer it to the minister and thereafter to South African citizens. [Clauses 19, 20, 21, Bill]

2.9 Forfeiture of land unlawfully acquired

According to the Bill, ‘any acquisition of land in any manner which is inconsistent with...[its] provisions is unlawful’ and a court may order its ‘forfeiture’ to the state. [Clause 35, Bill] Though the Bill does not spell this out, it seems doubtful whether any compensation would be paid for land thus forfeited to the government. This, however, would be unconstitutional.

3 Ramifications of the land ceilings envisaged in the Bill

3.1 Risks in setting and enforcing ceilings

Mr Nkwinti has previously proposed land ceilings of 1 000 hectares for 'small-scale' farms; 2 500 hectares for 'medium-scale' ones; and 5 000 hectares for 'large-scale farms'. As an exception, he says, an overall limit of 12 000 hectares may apply to 'forestry, game farms, and renewable energy farms, especially wind farms'. According to the Bill, any land that 'falls between or exceeds any category of agricultural land holdings' is 'redistribution agricultural land' to be acquired (in most instances) by the state. [Gugile Nkwinti, 'Rural Development and Land Reform Budget Vote 2015/2016', 8 May 2015, p4; Clause 1, definitions, Bill]

This suggests 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. In the same way, a farmer with 2 400 hectares will have to surrender 1 400 hectares (which is more than half of what he currently owns). In the same way, 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 may be able to retain up to 12 000 hectares of land.

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. 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 yet more 'redistribution' land. (This is what has happened with various black economic empowerment or BEE rules, which have repeatedly been tightened up in recent years.)

3.2 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]

The Memorandum on the Objects of the Bill puts 'the estimated cost for the operation of the Land Commission, as well as the acquisition of redistribution agricultural land, [at] R21.3m per annum'. However, this is clearly unrealistic. Even with the help of the R1.2bn currently budgeted for 'land reform' (presumably, the acquisition of land for redistribution), the mooted R21.3m is a miniscule amount. It overlooks the complexity of deciding on land ceilings, as well as the quantity of excess land that may in time be acquired by the state. [Clause 4, Memorandum; National Treasury, *2017 Budget Review*, p66]

3.3 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. More recently, however, the government has put the total number of commercial farmers at 35 000. On this basis, and with more land now in production than before, average farm sizes currently stand at roughly 2 700 hectares. [John Kane-Berman, 'From Land to Farming: Bringing land reform down to earth', *@Liberty*, IRR, Johannesburg, Issue 25, May 2015, p3; A Makenete and H D van Schalkwyk, 'Land Ceiling Policy and Legislation: Implications for the Agricultural Economy', (undated) PowerPoint presentation, p3]

The number of commercial farmers has dropped substantially since 1996. According to a confidential Agricultural Policy Action Plan (APAP) approved by the cabinet in March 2015, small commercial farmers are disappearing 'at an alarming rate'. 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. [Kane-Berman, 'From Land to Farming', p5; *Mail & Guardian* 21 April 2017]

Despite these pressures, most commercial farms are still small. Most of them also still belong to white families, and 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. Other assessments put the earnings of 51% of the country's white commercial farmers at some R300 000 a year. Some commercial farmers are black, but their number is unknown – and the total seems (from the data available) to stand at around 1 300. [Kane Berman, 'From Land to Farming', p3; Makenete and van Schalkwyk, p3]

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.

They will also have little choice as to which portions of their farms are to be surrendered, as such issues (in the event of disputes) will be decided by arbitrators in the pay or the employment of the state. These arbitrators could decide, for instance, that the portions with the best infrastructure, water supply, buildings, and access to markets must be surrendered

and that farmers must retain the less valuable remainders. Such outcomes 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 ceiling 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 further discourage 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, mainly because the crippling three-year drought has now ended. 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]

3.4 Impact on food security

If production on land targeted for redistribution under the Bill declines – as is likely to be the case – then the country's overall food security will diminish. It may be possible to increase food imports to compensate for lost domestic production, but the costs are likely to be high – and especially so if the rand weakens further. Moreover, if food prices do indeed increase significantly, then so too will the proportion of households lacking adequate access to food. That proportion already stands at a worrying 23%. 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. [2017 *South Africa Survey*, IRR, Johannesburg, p630; *Landbouweekblad* 31 March 2017] These factors will make it more difficult to feed the cities – and the nation as a whole – in the absence of a sufficient number of large and highly productive commercial farms.

3.5 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 prescribes, 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 mortgage finance. Many of these people are likely to be wealthy 'BEE types' (as the ANC has described them), who have close connections to the ruling party and

have previously used their political connectivity to secure lucrative BEE ownership deals and/or procurement tenders.

Successful buyers may also be friends or acquaintances of the minister. Such a connection is allegedly the reason why the thriving Bekendvlei Farm in Limpopo was bought by the Department of Rural Development and Land Reform (the Department) in 2011 for R97m, and then leased to two men with significant ties to the ANC but no farming experience. Mr Nkwinti has denied having received a 'facilitation' fee of R2m in return, and this alleged payment is currently under internal investigation. [*Sunday Times* 12 February 2017]

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.

3.6 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 Constitution, must be 'just and equitable' – but could be 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 ownership.

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]

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.

3.7 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. In 2013 it also emerged that only some 8% of successful land claimants wanted the return of the land of which they had previously been dispossessed. The remaining 92% preferred to be compensated in cash. [CDE Executive Summary, *Land Reform in South Africa: Getting Back on Track*, May 2008, p3; *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 as such a cause. In 2016, that proportion was 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.

3.8 Land already in black ownership

The government often suggests that there has been no change in land ownership since 1994 – and that whites still own 87% of the land, as they did in the apartheid era. This is not so. 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 were repealed by the National Party government. [James Myburgh, 'The land question revisited (1), *Politicsweb.co.za*, 24 October 2013; Minister Gugile Nkwinti, 'Debate of the State of the Nation Address, *Politicsweb.co.za*, 14 February 2017, p2]

A further analysis recently conducted by Agri Development Solutions, a consultancy, and *Landbouweekblad* shows that the overall increase in black land ownership since 1993 has been significant. At the end of 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 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]

Moreover, many of the black farmers who have bought their own land oppose the introduction of land ceilings, saying these could inhibit their own growth into commercial producers. [Kane-Berman, 'From land to farming', p2] The Bill ignores these factors.

3.9 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 takes place; and
- commercial farmers are encouraged to help black farmers succeed.

However, the Bill is in direct conflict with the NDP on all these points. The Bill also contradicts the NDP's proposals for land acquisition. The NDP recommends that each district municipality 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 by suggesting forced sales and expropriations as key mechanisms for land acquisition. Yet this approach is sure to cause enormous and unnecessary damage to commercial agriculture and the wider economy.

3.10 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 manage to visit only 13% to 14% of small farmers, according to APAP and other official assessments. Most new small farmers also battle to borrow working capital, largely because the government insists on confining them to leasehold tenure and they have no collateral to offer the banks. [Kane-Berman, 'From land to farming', p10]

The Bill 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 many factors 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'. To put poor people on the land without ensuring that all these other needs are met is to set them up for failure. [Kane-Berman, 'From land to farming', p7]

3.11 Negative experience of land ceilings in other countries

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' of land ceilings in other countries.

India's land ceilings were introduced 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]

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.' [See Agri SA, 'The problem with land ceilings', *Politicsweb.co.za*, 15 December 2016]

Land ceilings have also made agriculture an unattractive and 'low-profit venture' in several parts of the world, as Agri SA notes. 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]

3.12 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. In particular, 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. In addition, some 75 000 to 80 000 land claims were lodged in the second window period, which began in July 2014 and ended two years later when the Constitutional Court struck down the relevant statute. However, a bill to re-open the land claims process until June 2021 has recently been put forward and could, on its adoption, witness the lodging of another 300 000 or so claims. [Cheryl Walker, 'Land claims a Sisyphean task for the state', 19 March 2015, https://mg.co.za/article/2015-03-19; *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)]

If another 300 000 or so claims are indeed lodged, it could take a further 230 years for all these claims to be settled. This means that excess 'redistribution' land will surely 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 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]

4 Ramifications of other aspects of the Bill

4.1 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. This restriction is 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. In addition, 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 that year. [*Business Day* 25 April 2017] The net outflow was thus was more than R16bn in 2016.

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 if the development of infrastructure is to expand to the extent required, and if current state expenditure is also to be maintained.

4.2 Ramifications for black South Africans

By playing up the historical land injustice, the ruling party 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, as earlier noted, 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 will also 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. Under the Bill, the maximum ceilings for agricultural land holdings could be set at 12 000 hectares, as Mr Nkwinti has 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 'redistribution' land under the Bill and will have to be excised from the Trust.

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 long 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.

5 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 does indeed affect the provinces – and it 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 incorrect when the Bill will clearly apply to the Ingonyama Trust and could result in it having to divest itself of most of its 2.8 million hectares of customary land.

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.

According to the Guidelines, SEIAS must be applied at various stages in the policy process. Once new legislation has 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 [proposed legislation] 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 current Bill must thus be abandoned, while a new SEIAS process for a possible new bill must instead commence. 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'. [See for example Section 59(1)(a), 1996 Constitution, *Doctors for Life International* v *Speaker of the National Assembly and others*; 2006 (6) SA 416 (CC), and the *Land Access* judgment]

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 the discretionary powers given to the minister are too broad and untrammelled. Second, it allows for arbitrary deprivations of land which are contrary to Section 25(1) of the Constitution and cannot be saved under Section 36 of the Constitution, 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 must be upheld and cannot be overlooked.

The Bill is impermissibly vague on many key issues, including the definition of 'redistribution' land; what criteria are to be used in deciding on 'categories of ceilings'; who is to be responsible for determining land ceilings within these categories; and how the criteria that are listed in the Bill are to be interpreted and applied. All these provisions are open to a number of equally plausible interpretations and are thus likely to be applied by different officials in different ways. They thus offend against what the Constitutional Court has described as 'the doctrine against vagueness of laws'. [*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 is also impermissibly vague in allowing the minister to 'exclude' any land from its provisions, simply by publishing a notice in the *Government Gazette*. [Clause 1, definitions, Bill] It is similarly vague in allowing the minister to 'exempt a particular category of agricultural land holdings' from the 'categories of ceilings' to be decided by him Clause 25 of the 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. [See Clause 25(1)(c), Bill; Sections 1(c), 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. The Constitution also prohibits any 'arbitrary' deprivation of property. A deprivation is 'arbitrary' if the law in question does not provide sufficient reason for the deprivation or 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; Agri SA, The problem with land ceilings, 15 December 2016]

However, the terms of the Bill are such as to obstruct, rather than advance, its stated aims of helping small-scale farmers, providing redress for past land injustices, and promoting food security. The Bill also cannot be saved under the limitations clause (Section 36 of the Constitution), which allows derogations from guaranteed rights in certain circumstances. The Bill fails the necessary proportionality test relevant here, as there are clearly 'less restrictive means' available to meet its stated aims. [Agri SA, ibid]

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.

Government policy should recognise that access to land is not in itself enough to alleviate poverty or generate incomes, but is simply the starting point for success in agriculture. It must also ensure that transferred land no longer falls out of production. It must further

recognise that large commercial farms are essential to feed a rapidly growing and urbanising population – and that relatively few people (about 10%) truly want land to farm.

Fortunately, this limited demand for farming land can be met without the radical redistribution envisaged by the Bill. The additional land required can readily be sourced from the state's own land holdings. At the same time, all farmers must have individual ownership supported by title deeds, working capital (backed where necessary by state guarantees), essential infrastructure (from roads and dams to milling and storage facilities), and effective mentoring, to be provided by commercial farmers and funded through a voucher system.

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. Emergent farmers wanting to expand into commercial operation should be given practical assistance (of the kind outlined) to help them attain this goal.

As IRR policy fellow John Kane-Berman has written: '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 the government seems to think it is. [Kane-Berman, 'From land to farming', p1]

Adds Mr Kane-Berman: '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.'

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 greatly changed, it will also be unconstitutional and invalid in its key provisions. In addition, its adoption without proper public consultation, 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**