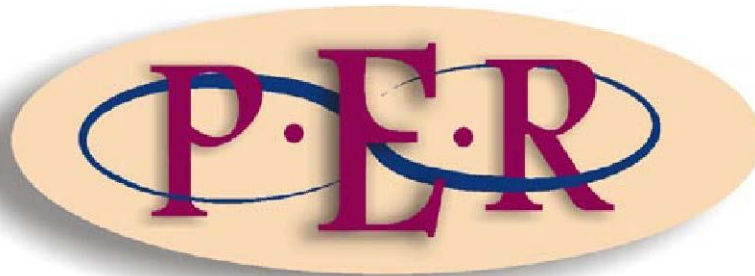


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Green Paper on Land Reform: Overview and Challenges¹

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1. Introduction

The latest *Green Paper on Land Reform*² was published on 16 September 2011 and is commonly referred to as the *Green Paper on Land Reform, 2011*. This *Green Paper* represents the latest development in a long history of land reform in South Africa.³ Unfortunately, despite all the developments and legislative industriousness

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¹ Paper presented at the KAS/NWU Colloquium on the *Green Paper in Land Reform: Challenges and Opportunities* held on 27 July 2012 in Muldersdrift, South Africa. Paper is based on a submission written by W Erlank and N de Havilland on behalf of the Centre for Constitutional Rights (CFRC) to the Department of Rural Development and Land Reform in 2011.

² Department of Rural Development and Land Reform (DRDLR), *Green Paper on Land Reform, 2011*. GN 639 in GG 34607 of 16 September 2011 (Hereafter referred to as the *Green Paper*).

³ See in general Pienaar 2014 *PER* 642, Kloppers and Pienaar 2014 *PER* 677, Mostert 2014 *PER* 760-762. Since the advent of South Africa's new democratic dispensation, quite a large body of legislation dealing with land (reform) issues has been enacted. These include the following: *Abolition of Racially Based Land Measures Act* 108 of 1991; *Upgrading of Land Tenure Rights Act* 112 of 1991 and the *Less Formal Township Establishment Act* 113 of 1991. Sections 8 and 120-122 of the (interim) *Constitution of the Republic of South Africa* 200 of 1993 dealt with issues relating to land, while Section 28 was criticised due to its specific lack of dealing with land reform matters. After 1993 the following acts followed: *Distribution and Transfer of Certain Land Act* 119 of 1993; *State Land Disposal Act* 48 of 1961; *Provision of Certain Land for Settlement Act* 126 of 1993; *Land Titles Adjustment Act* 111 of 1993; *Restitution of Land Rights Act* 22 of 1994; *Land Administration Act* 2 of 1995; *Development Facilitation Act* 67 of 1995; *Land Reform (Labour Tenants) Act* 2 of 1996; *Deeds Registries Amendment Act* 11 of 1996; *Communal Properties Association Act* 28 of 1996; and the *Interim Protection of Land Rights Act* 31 of 1996. In 1996, the *Constitution of the Republic of South Africa, 1996* followed, where especially section 25 (the property clause) set out the rights and obligations of both private owners as well as the state for the protection of property on the one hand, and the procedure for land reform on the other. Therefore, a new land policy was issued after a consultative process (referred to as the *White Paper on Land Reform, 1996*). After 1996 new legislation enacted to ensure land reform, include inter alia the *Extension of Security of Tenure Act* 62 of 1997 (ESTA); *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE); *Housing Act* 107 of 1997; *National Water Act* 36 of 1998; *Water Services Act* 108 of 1997; and the *Communal Land Rights Act* 11 of 1994 (CLaRA – which has in the meantime been found to be unconstitutional). For an extensive analysis and discussion of the South African Land Reform Programme and issues relating to it see Badenhorst, Pienaar and Mostert *Law of Property* 585-665; Carey Miller and Pope *Land Title* 313-455.

since 1991, the fragmented land tenure system that resulted from Apartheid has not been successfully rectified.⁴

The *Green Paper* makes the following proposals. It states that the vision for land reform consists of four aspects.⁵ The first is a new four-tier system of land tenure⁶ (leasehold for public land; freehold with limited extent for privately owned land, freehold with precarious tenure and obligations for foreign owned land; and communal tenure for communally owned land). The second is clearly defined property rights⁷ governed by a land administration system. The third is creating secure forms of long-term land tenure for resident non-citizens who invest in food sovereignty and livelihood security.⁸ The fourth is facilitating effective land use planning and regulatory systems.⁹

With this vision in mind, the *Green Paper* states that there are three principles that underpin land reform.¹⁰ These are the de-racialising of the rural economy, democratic and equitable land allocation and lastly a sustained production discipline for food security. It is further suggested by the *Green Paper* that amongst others, a Land Management Commission;¹¹ a Land-Valuer General¹² and a Land Rights Management Board¹³ with local management committees should be created as programmes and institutions where applicable.

⁴ See Kloppers and Pienaar 2014 *PER* 678; Du Plessis 2014 *PER* 834-836; Mostert 2014 *PER* 799-800. See especially Mostert 2014 *PER* 796-798 for a discussion of *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) as well as *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC).

⁵ DRDLR *Green Paper* 6.

⁶ DRDLR *Green Paper* para 3.1 6, para 6.4 7-8. Pienaar 2014 *PER* 561.

⁷ DRDLR *Green Paper* para 3.2 6.

⁸ DRDLR *Green Paper* para 3.3 6, para 6.4(c) 8.

⁹ DRDLR *Green Paper* para 3.4 6, para 6.5-7.2.

¹⁰ DRDLR *Green Paper* para 4.1 6.

¹¹ DRDLR *Green Paper* para 6.2(c).

¹² DRDLR *Green Paper* para 6.2(d).

¹³ DRDLR *Green Paper* para 6.2(e).

While the *Green Paper* contains some excellent proposals and ideas,¹⁴ it is also extremely vague, contains a lot of florid political rhetoric¹⁵ and creates a lot of uncertainty about the implementation and possible unconstitutionality of some of the proposals.¹⁶ The following are the main issues that have been identified by stakeholders (economists, commercial farmers, unions and emerging farmers) as problematic:¹⁷ Firstly, the possible cap on the size of commercial farmland is deemed to be undesirable since it would entail that commercial products would be produced on leased property. This would result in the fact that farmers would be unable to secure funding since they would not be able to use the leased land as security. Secondly, the proposal that the Land Management Commission would have the power to bypass the jurisdiction of the courts is identified as a clearly unconstitutional suggestion. Thirdly, the implementation of the Land-Valuer General as the institution that would determine the value of land for taxation; rating and for land expropriation purposes seems problematic. This could possibly be unconstitutional since Section 25 of the *Constitution* states that the compensation for expropriation must be determined by a court of law in the absence of an agreement between the affected parties. In the fourth place, the issue that seems to

¹⁴ Such as the concept of the Land Management Commission, the Land-Valuer General and the Land Rights Management Board – however, the actual implementation and some of the envisaged powers that these institutions are given creates uncertainty and in some cases appear to be clearly unconstitutional.

¹⁵ Found throughout the introduction as well as the final clause. *Green Paper* 3-5, 12-13. See also Steward 2011 http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=111897&cat_id=1596.

¹⁶ These issues are discussed in detail in other articles in this issue and as such will only be looked at in passing in this article. See Mostert 2014 *PER* 760-763,805,809-816; Pienaar 2014 *PER* 662-664.

¹⁷ See Child 2011 <http://mg.co.za/article/2011-09-21-green-paper-on-land-reform-offers-no-guidance>; SAPA 2011 <http://www.news24.com/SouthAfrica/News/SAIRR-slams-land-reform-green-paper-20110902>; AFP 2011 <http://www.news24.com/SouthAfrica/Politics/Black-farmers-selling-land-back-to-whites-20110831>; Du Toit 2011 <http://anothercountryside.wordpress.com/2011/09/26/comment-on-the-newly-released-green-paper-on-land-reform/>; Hall 2011 <http://www.timeslive.co.za/opinion/commentary/2011/09/25/grey-fog-in-a-green-paper>; Hartley 2012 <http://www.bdlive.co.za/articles/2011/09/01/land-reform-proposals-run-into-heavy-fire;jsessionid=23A948BECF96FDFE5FB52F8EF0216467.present2.bdfm>; SAPA 2012 <http://mg.co.za/article/2012-05-31-land-reform-green-paper-is-an-attack-on-white-farmers>; Steward 2012 <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=303370&sn=Detail&pid=71616>; Steward 2011 http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=111897&cat_id=1596; Farmer's Weekly 2011 <http://www.farmersweekly.co.za/article.aspx?id=10490&h=Unpacking-the-Green-Paper>. See also Matlala 2014 *PER* 854 - 858.

create a lot of concern is the fact that the land tenure system does not seem to address the needs and expectations of the population with regard to land reform. It would seem as if foreigners and wealthy land owners would be able to have ownership (albeit in freehold terms – harking back to the feudal system), while emerging black farmers will not be getting ownership and will only get leasehold on property.¹⁸ This appears to be discriminatory. It also does not address the needs of people who live on communal land and eventually want to acquire ownership of the land.

It should also be borne in mind that South Africa has to adhere to both the constitutional as well as international obligations with regard to the protection of property, land and ownership.¹⁹ With this in mind, the most prominent features of the *Green Paper* will be set out below and the more problematically issues highlighted.²⁰

The *Green Paper*

Clause²¹ 1 (Introduction)

The introduction²² to the *Green Paper* reads like a political manifesto,²³ making bold superfluous claims that creates more uncertainty and doubt about the rest of the document than all the substantive contents combined inside.

¹⁸ Pienaar 2014 *PER* 653-655.

¹⁹ Section 39 of the Constitution determines that when interpreting the Bill of Rights (which contains the so-called property clause in Section 25) international law must be considered and foreign law may be considered. "39. Interpretation of Bill of Rights (1) When interpreting the Bill of Rights, a court, tribunal or forum – (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law." S 39 of the *Constitution of the Republic of South Africa*, 1996. For an in depth discussion of this issue see Van der Walt *Constitutional Property Law* 22-56.

²⁰ Since this article also serves to tie together the rest of the articles in this special edition of the journal, I will quote the sections of the *Green Paper* in the footnotes for reference purposes – even where there are no serious issues identified in the main text.

²¹ Both clause and paragraph are used to denote the sections in the *Green Paper*, and should be regarded as interchangeable.

²² DRDLR *Green Paper* Clause 1 (Introduction) 3-5.

²³ Mostert 2014 *PER* 760-761, 769.

The continued reference to both anti-colonial and anti-apartheid struggles muddles the issue by creating uncertainty with regard to the scope of the problems to be addressed. The current land reform programme focuses on the effects of and injustices created by apartheid after 1913.²⁴ However, the continued reference to "anti-colonial struggles" creates the impression that the *Green Paper* might wish to address all shifts in the ownership and control of land since the inception of colonialism in South Africa. This might reach back to 1652 when South Africa's colonisation began. As such, stating that: "(a)ll anti-colonial struggles are at the core about two things: repossession of land lost through force or deceit; and, restoring the centrality of indigenous culture";²⁵ and then continuing by referring to colonialists in general and colonialisms' effect on culture in particular, creates uncertainty about the direction of land reform rather than providing guidelines. With reference to this issue, the following questions come to mind.²⁶ Firstly, is the focus of land reform now shifted to addressing all imbalances created by colonialism since 1652? Secondly, since the struggle to rectify such imbalances of colonialism focuses on the "repossession of land lost through force or deceit ...", will this reference to "force" also be used to rectify the change of territory and land ownership between the indigenous tribes/nations²⁷ themselves?²⁸ Thirdly, will this take into account the concerns and claims of the aboriginal residents of Southern Africa? These are not questions that are unique to South Africa and the struggle for access to and

²⁴ See in general Kloppers and Pienaar 2014 *PER* 679-687 for a discussion of the *Natives Land Act* 27 of 1913; the *Natives Trust and Land Act* 18 of 1936; *The Group Areas Act* 41 of 1950; *The Group Areas Act* 36 of 1966; the *Abolition of Racially Based Land Measures Act* 108 of 1991 and how this effected the current problematical situation created by Apartheid. See also Matlala 2014 *PER* 833-834.

²⁵ DRDLR *Green Paper* 3.

²⁶ Cf Steward 2011 http://www.givengain.com/cgi-bin/giga.cgi?cmd=cause_dir_news_item&cause_id=2137&news_id=111897&cat_id=1596.

²⁷ I make use of the word "tribes", however, as an illustration of the new phenomenon of micro-aggression, this terminology was slated as being racist. However, after conferring with a number of colleagues who feel that "tribes" is the correct word, I will keep it in the text. The proposed non-racist term was suggested to be "nations". However, as with all terminology in law – the use of "nation" has a very narrow meaning and is usually applied to the field of international law as to denote a country with fixed borders.

²⁸ This can also be referred to as "indigenous colonisation". The fact that many of the indigenous tribes of Southern Africa constantly and forcefully changed the ownership and land use patterns amongst themselves by means of war and conflict did not immediately change after the inception of colonialism. See especially the period referred to as the Difaqane or Mfecane in the early 19th century. Hamilton *The Mfecane Aftermath*; Omer-Cooper *The Zulu Aftermath*.

ownership of land has been a key aspect throughout history.²⁹ However, due to these constantly changing systems and patterns of land ownership and control, a line has to be drawn somewhere to promote legal certainty and facilitate, rather than hinder productive land reform. Rhetoric of the continuing anti-colonialist struggles is futile if not properly and equitably addressed so as to redress all the wrongs caused by colonisation, both from within and without Southern Africa.

It should also be borne in mind that the historical connotations of land use and ownership over the past few hundred years have to keep track of the change in technology, social and economic development and the industrial revolution. One needs to acknowledge that all South African citizens are also "South Africans" - without a need to reference culture, colour or creed. All South Africans live in a modern South Africa, which is indeed a modern nation state and needs to both fit into and compete with the rest of the modernised world. In order to do so, one cannot continuously hark back to the sentiments of the good old days of yonder, when land was deemed to be an unlimited resource and many of the indigenous peoples in South Africa spanned and migrated without hindrance across current national boundaries. One needs to acknowledge that one must adapt to change and use it to the advantage of everyone in the country. There is, of course, a need to focus on imbalances in ownership patterns and the wrongs of the past, but this must not be done to the tune of insubstantial, unsustainable and unproductive political rhetoric as contained in the first section of the *Green Paper*.

The order in which the key parameters for measuring development are listed creates doubts about the vision and ultimate success of the land reform programme. It is listed as "social, political, administrative, cultural, institutional and economic".³⁰ It is deeply concerning that the economic parameter is placed last in the list, since without economic competitiveness, participation and development, South Africa faces the future of its neighbours who chose to ignore the economic parameters in favour of overtly idealistic political ideals. Without economic development and

²⁹ Mostert 2014 *PER* 764-765.

³⁰ DRDLR *Green Paper* 4.

stability, none of the other ideals will be sustainable and this will be to the detriment of everyone in South Africa.

It is also unfortunate that the introduction to the substantive part of the *Green Paper* ends with an unnecessary reference to the capacity of the disposed to forgive and the threat that "this goodwill should not be taken for granted".³¹ This reference does not take into account the efforts and progress that all South Africans have made since 1994 to create a new Ubuntu between all members of the Rainbow Nation. It also does not acknowledge the fact that many white South Africans have bona fide strong historic, legal and moral claims to the land that they farm on, or take into account the fact that a substantial proportion of agricultural land has changed hands from white to black since 1994.

Against this background, I now comment on the specific substantive clauses of the *Green Paper*.

Clause 2 (Problem statement)³²

Even though Clause 2 is described as the problem statement, it is not clear how the three sub-clauses in the problem statement contribute to defining the problem, since they do not in fact set forth a clear problem statement. Sub-clauses 2.1 and 2.2 seem to provide a justification for state investment in land reform, while this is clearly not the central issue at stake in this *Green Paper*. Sub-clause 2.3 is also extremely vague and does not in fact contain a clearly identifiable problem statement. It is suggested that the current content of the problem statement should be removed and replaced with clear and concise content that actually contains the real problem statement.

³¹ DRDLR *Green Paper* 5.

³² "The need to instill (sic) *national identity, shared citizenship and autonomy-fostering service delivery* are the primary reasons why the State must continue to invest in the transformation of land relations (systems and patterns of land control and ownership) in our country. 2.2 The rationale behind state investment in, and the enduring demand for, land in South Africa is to be found in the historical background of what has been described by some scholars as 'accumulation by dispossession'. 2.3 The current economic structure of South Africa, as a result of this historical process and phenomenon, has produced, and continues to produce, net factors which combine to undermine the creation of conditions which are conducive to fostering social cohesion and development amongst those historically dispossessed of their land." DRDLR *Green Paper* para 2.1..

Clause 3 (Vision for Land Reform)³³

Clause 3 sets out the government's vision for land reform. In clause 3.1³⁴ the proposed four-tier system of land tenure remains vague as to how it would affect the current system of tenure and ownership.³⁵ This should be clarified, since the implications are that current vested ownership that is protected by the Constitution might be affected in such a way as to be unconstitutional.³⁶ It is also unclear whether a restriction of ownership in terms of the size of a farm will be one of the consequences with the resultant unknown effect that this will have on food production (which makes use of production methods of scale to be economically viable).³⁷

It is unclear why the focus seems to be on subsistence living in a rural environment.³⁸ Even if people who live in rural areas are given more secure rights in terms of the proposed system of tenure, these rights will promote security of housing but not necessarily result in productive livelihoods (or food security). This is due to the fact that the ability to be productive in the rural environment usually equates to being productive in the agricultural industry.³⁹ In order to be productive and be able to develop and make beneficial use of rural (usually agricultural) land, a person would normally need to obtain financing for such development.⁴⁰ These so-called more secure rights will in all probability not be sufficient to satisfy the reasonable economic security (real security) expectations of financial institutions. Financial institutions are able to provide loans because they can get secure property rights over the property of the lender by means of a bond.⁴¹ If the lender defaults on the loan repayment, the bondholder can eventually effect the sale of the bonded

³³ See Pienaar 2014 *PER* 653; Mostert 2014 *PER* 765, 770-773; Matlala 2014 *PER* 848-849.

³⁴ "A re-configured single, coherent *four-tier system of land tenure*, which ensures that all South Africans, particularly rural blacks, have a *reasonable access to land with secure rights*, in order to fulfil their basic needs for housing and productive livelihoods." DRDLR *Green Paper* para 3.1.

³⁵ Mostert 2014 *PER* 770-771.

³⁶ See in general Mostert as to why the *Green Paper* is not necessarily unconstitutional.

³⁷ Mostert 2014 *PER* 779.

³⁸ Mostert 2014 *PER* 779-780.

³⁹ See in general Matlala 2014 *PER* 834-835.

⁴⁰ For the amount of debt tied to agriculture, see Matlala 2014 *PER* 847.

⁴¹ See also Matlala 2014 *PER* 850.

property to recover its costs.⁴² The current worldwide financial crisis stems from the problem that financial institutions did not have enough collateral when debtors defaulted on their loan repayments.⁴³ In the context of the focus on development that the *Green Paper* seems to promote, this will result in the holders of these "secure" tenure rights not being able to do anything with these rights, apart from having secure housing rights and maybe being able to practice basic subsistence farming. For credit security purposes, a financial institution will not be able to acquire any value from such proposed tenure rights. It could be equated to a person who is renting a property and then trying to use the right to live in the house as collateral for obtaining finance. Because of these problems with the security contained in the proposed tenure system it is suggested that the whole system, as well as the justifications for the creation of such a system, be re-evaluated.

In itself, Clause 3.2⁴⁴ does not contain any problems and the concept of clearly defined property rights is supported. However, it should be noted that when keeping in mind the current state of land reform, the capacity of government to administer and govern land issues is severely in doubt. As such it should be approached with circumspection.

Clause 3.3⁴⁵ is problematic, since it is vague and creates uncertainty with regard to the possible limitations on ownership by foreigners. It is also deeply concerning that food sovereignty,⁴⁶ livelihood security and agro-industrial development for South Africa are only addressed in terms of how foreigners will contribute.⁴⁷ As such it

⁴² This is of course a very simplified explanation, with numerous preceding steps leading to the final court-ordered sale in execution of the property.

⁴³ This is also sometimes referred to as the subprime crises. See in general Schiller *The Subprime Solution* 1-5; Eichengreen *et al* 2012 *Journal of International Money and Finance* 1299-1318.

⁴⁴ "Clearly defined property rights sustained by a fair, equitable and accountable land administration system within an effective judicial and 'governance' system." DRDLR *Green Paper* para 3.2.

⁴⁵ "Secure forms of long-term land tenure for resident non-citizens engaged in appropriate investments which enhance food sovereignty and livelihood security, and improved agro-industrial development." DRDLR *Green Paper* para 3.3.

⁴⁶ See Matlala 2014 *PER* 837-838.

⁴⁷ Ironically, this is in contrast to the support that South African farmers get from other African (and now European) governments to farm outside South Africa.

creates the perceptions that government is not serious about these issues as a vision for land reform; that government is putting the responsibility of food production and security for South Africa in the hands of foreigners; and that government is promoting the interests of non-citizens to the detriment of citizens.⁴⁸ It is clear that the purpose of land reform is firstly to place land back in the hands of South Africans. The current perception that is created is that this could lead to corporatisation of the agricultural sector, with the result that foreign agribusinesses would buy and operate large farms and then distribute the produce to their countries of origin.⁴⁹ This clause should be changed so as to remove references to foreign ownership and to focus on the need for the promotion and maintenance of food sovereignty, livelihood security and improved agro-industrial development to be the responsibility and privilege of South African citizens.⁵⁰

Clause 3.4⁵¹ states that there is a central vision of effective land use planning and regulatory systems.

Clause 4 (Principles Underlying Land Reform)

Clause 4.1⁵² enumerates a number of principles, being the de-racialising of the rural economy;⁵³ democratic and equitable land allocation and use across race, gender and class; and a sustained production discipline for food security. The clause does not seem to raise any red flags and should in general be supported. However, it is proposed that due to the importance of food security, it should be the first rather than last principle to be mentioned. In its current form it creates the impression that

⁴⁸ See also Matlala 2014 *PER* 838-843 on the migration of both white and black farmers out of South Africa.

⁴⁹ Mdluli 2011 <http://www.iol.co.za/business/news/land-reform-proposals-under-attack-1.1129918>.

⁵⁰ See Matlala 839.

⁵¹ "Effective land use planning and regulatory systems which promote optimal land utilization in all areas and sectors; and, effectively administered rural and urban lands, and sustainable rural production systems." DRDLR *Green Paper* para 3.4.

⁵² "The principles which underpin land reform are three-fold: (a) de-racialising the rural economy; (b) democratic and equitable land allocation and use across race, gender and class; and, (c) a sustained production discipline for food security". DRDLR *Green Paper* para 4.1. See Matlala 2014 *PER* 845-846.

⁵³ Matlala suggests that the land reform discourse also has to be deracialised. See Matlala 2014 *PER* 854.

it is the last consideration to be taken into account while implementing land reform, whilst it should be the first. I would also like to highlight the fact that while these principles are contained in this sub-clause, the main body of the *Green Paper* does not in fact seem to support these principles.

Clause 4.2⁵⁴ states that the long-term goal of land reform is social cohesion and development.

Clause 5 (Current Challenges and Weaknesses: Rationale for Change)⁵⁵

In general, the content of this clause is unproblematic. However, it is proposed that less emphasis should be placed on the weaknesses of the current land acquisition strategy and especially on the willing buyer, willing seller⁵⁶ model. It seems as if it is accurate to say that the system is not working.⁵⁷ However, the causes of the failure of the current land reform system should not be placed solely at the feet of some of the problems created by the willing-buyer willing-seller model.⁵⁸ This is especially clear when taking into account the lack of capacity and performance by the government as acknowledged in Clause 9 of the *Green Paper* in general.⁵⁹ Taking into account the broad-scale failure of government in the successful implementation and administration of the current land reform programme, the focus should rather be on the administration and governance failures in the current responsible government departments.⁶⁰ Examples include the outstanding claims against the

⁵⁴ "The long-term goal of land reform is social cohesion and development. In this text, the concept '**development**' refers to shared growth and prosperity, relative income equality, full employment and cultural progress. '**Underdevelopment**' is the other side of this proverbial coin - poverty, relative income inequality, unemployment and cultural backwardness." DRDLR *Green Paper* para 4.2.

⁵⁵ "(a) The land acquisition strategy / willing-buyer willing-seller model (a distorted land market); (b) a fragmented beneficiary support system; (c) beneficiary selection for land redistribution; (d) land administration / governance, especially in communal areas; (e) meeting the 30% redistribution target by 2014; (f) declining agricultural contribution to the GDP; (g) unrelenting increase in rural unemployment; and, (h) a problematic restitution model and its support system (communal property institutions and management)". DRDLR *Green Paper* para 5. See Pienaar 2014 *PER* 652-653.

⁵⁶ Du Plessis 2014 *PER* 800.

⁵⁷ Du Plessis 2014 *PER* 798-800.

⁵⁸ Du Plessis 2014 *PER* 803-806.

⁵⁹ Kloppers 2014 *PER* 709-713.

⁶⁰ Kloppers 2014 *PER* 711.

Department of Rural Development and Land Reform of R1.7bn and the backlog in commitments of R6.5bn; the backlog in the payment of restitution claims of more than R883m; the fruitless and wasteful expenditure of R73m; the failure of the Department to get a clean financial audit bill for the sixth year in a row; and the failure of government to complete the land audit.⁶¹ This points to a systemic failure of administration and governance of the current system and not the programme itself. As such, it seems convenient to place the blame on the acquisition strategy while ignoring the fact that due to mismanagement the current strategy has been set up for failure from the beginning. Regarding the meeting of the 30% redistribution target by 2014,⁶² it is impossible to gage the success or failure of reaching this target until such time as government is able to produce an accurate and up to date land audit. It has even been estimated by the responsible minister that government owns between 20% and 30% of the country's land. If this is the case, then it can be argued that aside from the results of the land reform programme, between 20% and 30% of the land in the country has already moved out of the ownership and control of whites and as such the 2014 target has already been reached.⁶³

Clause 6 (An Improved Trajectory for Land Reform)

Clause 6.1⁶⁴ states that land reform should be improved with the goal of disrupting food security as little as possible as well as to minimise reform that leads to unsustainable benefits for the targeted beneficiaries. Clause 6.2⁶⁵ sets out the envisioned supporting programmes and institutions envisaged for the trajectory of

⁶¹ Mkhwanazi 2011 http://www.thenewage.co.za/30129-1007-53-Land_Affairs_'in_sorry_state'.

⁶² Kloppers and Pienaar 2014 *PER* 677-679.

⁶³ See in general Kloppers 2014 *PER* 711-713.

⁶⁴ "In articulating this improved trajectory for land reform, a set of proposals is advanced, which attempts to: (a) improve on past and current land reform perspectives, without significantly disrupting agricultural production and food security; and, (b) to avoid or minimise land redistribution and restitution which do not generate sustainable livelihoods, employment and incomes." DRDLR *Green Paper* para 6.1.

⁶⁵ "This trajectory is supported by the following programmes and institutions: (a) a recapitalisation and development programme; (b) a single land tenure system with four tiers; (c) a Land Management Commission; (d) a Land Valuer-General; (e) a Land Rights Management Board, with local management committees; (f) properly aligned common property institutions (CPIs); and, (g) the Land Tenure Security Bill. 2010, which is an integral part of the Land Reform Programme (LRP), but is treated separately from it." DRDLR *Green Paper* para 6.2.

land reform that seem productive in general, except insofar as it includes problematical issues addressed elsewhere in this submission, especially with regard to the land tenure system and the powers given to the Land-Valuer General.

Clause 6.3⁶⁶ describes the creation and implementation of a Recapitalisation and Development Programme that will support land reform farms with the goal of achieving 100% success with the aim to address issues retrospectively from 1994.

Clause 6.4⁶⁷ sets out the land-tenure framework and contains highly problematical terminology. The general connotations to tenure, leasehold and freehold point to the feudal system of land tenure and not ownership. It is suggested that government re-evaluate the use of these terms and concepts and rather make use of more modern property and ownership orientated concepts. In general, the proposal that state and public land be managed by means of a system of leasehold is sound.⁶⁸ This will ensure that state and public land can remain productive and be managed better. I would recommend that certain mechanisms be built into the leasehold structure to allow the termination of leasehold if the land is not used productively for the purposes for which it was leased and does not promote the general goals of the land reform programme. However, I would like to caution against the unnecessary hoarding of land by government when such land can be effectively transferred to South African citizens who are able to make productive use thereof. The reform of land that is not directly utilised by government for a public purpose should be seen as an integral part of the land reform programme and not only the target of moving

⁶⁶ "A Recapitalisation and Development Programme. The goal of this Programme is to ensure that all land reform farms are 100% productive. It focuses on all land reform farms acquired through state funds since 1994, as well as small-holder farms which had been privately acquired, but the new owners have had no means of keeping them productive. The strategy underlying the Programme is partnership with commercial farmers on a risk-sharing basis." DRDLR *Green Paper* para 6.3.

⁶⁷ "A single land tenure framework has been fashioned out, integrating the current multiple forms of land ownership - communal, state, public and private - into a **single 4-tier tenure system**: (a) State and public land: Leasehold; (b) Privately owned land: Freehold, with limited extent; (c) Land owned by Foreigners: Freehold, but Precarious Tenure, with obligations and conditions to comply with; and, (d) Communally owned land: Communal Tenure, with institutionalised use rights. The Communal Land Tenure (the 4th Tier), because of (a) its complexity (need for extensive consultations and constitutional compliance) and, (b) the recent nullification of the Communal Land Rights Act (CLaRA) by the Constitutional Court, will be treated in a separate policy articulation." DRDLR *Green Paper* para 6.4.

⁶⁸ See in general Matlala 2014 *PER* 851-854.

land out of white ownership. It is questionable whether it is necessary for government to attempt to administer the land, and if government has the capacity to effectively administer productive agricultural land by not transferring it to private ownership of citizens.

Concerning the proposal that privately owned land be held in freehold, the vagueness of the wording and especially the reference to it being of "limited extent" is troubling. The perception is created that the *Green Paper* plans to place extra limitations on ownership that could possibly be unconstitutional.

The vagueness of the limitation of ownership of land held by foreigners is problematic. I would like to highlight the possible investment and economic implications of limiting the ownership of property by foreigners. There is also uncertainty about the implementation of this measure. Will it entail limitation of foreign ownership in the future or would it apply to current owners? It is proposed that this be approached with circumspection and that more clarity should be given to this issue. While the practice of limiting the ownership or land interests of foreigners is successfully implemented in certain other countries, the constitutional obligation to compensate owners if they are expropriated should always be borne in mind. If government should choose to take away full ownership from foreigners who currently own land in South Africa, this could constitute expropriation rather than deprivation, for which compensation would have to be paid. Such compensation should be budgeted for.

Regarding the classification of communally owned land as communal tenure, I support the recognition of this as an exceedingly complex matter that would need extensive consultations, and support the idea that this issue will be dealt with in separate policy documents. However, I would like to highlight the large systemic problems with the current communal land holding system, especially the issues raised by stakeholders that individuals living on communal land would prefer individual ownership rights.

Clause 6.5 (Land Management Commission (LMC))⁶⁹

Clause 6.5 sets out the creation of the Land Management Commission, which does not seem to be problematic except for the issues as raised below. Clause 6.5.1⁷⁰ sets out the proposed functions of the LMC, and a number of serious questions are raised by Pienaar.⁷¹ Clause 6.5.2⁷² sets out the proposed powers of the LMC and does not seem problematic, except for the powers contained in Sub-Clauses 6.5.2 (c), (e) and (f). The powers to "verify and / or validate / invalidate individual or corporate title deeds"; grant amnesty and / or to initiate prosecution, whichever the case might be, at its own discretion; and the power to seize or confiscate land gotten through fraudulent or corrupt means are powers which should be dealt with by the judiciary in terms of (c) and by the prosecuting authority in the case of (e) and (f) with the possibility of judicial oversight. The setting aside of title by an extra-judicial body in the context of the constitutionally guaranteed right to have a dispute resolved by a court of law, together with the effects that these powers will have on the South-African land-ownership system are highly problematic as well as patently unconstitutional.⁷³

⁶⁹ "The LMC will be autonomous, but not independent, of the Ministry and Department. It will be accountable to the Ministry through the Department; and, will submit regular reports to the latter. A financial manager, accountable to the Department's Accounting Officer, will manage the finances of the Commission. The LMC will be composed of all stakeholders in land and persons appointed by the Minister because of their special attributes." DRDLR *Green Paper* para 6.5. Pienaar 2014 *PER* 655.

⁷⁰ "Functions of the LMC (a) Advisory - issues advisory opinions, research reports and guidelines on land management to all land related departments and state organs. (b) Coordination - ensures alignment, inter-linkages and coherence of disparate land management agencies, departments, spheres and other organs of state. (c) Regulatory - Manage the regulatory environment that ensures that lands are managed in a manner that will protect the quality and values. (d) Auditing - assures the integrity of the inventory of state and public lands including monitoring its uses. (e) Reference point." DRDLR *Green Paper* para 6.5.1. See Pienaar 2014 *PER* 655-656; Mostert 2014 *PER* 760.

⁷¹ Pienaar 2014 *PER* 655-656.

⁷² "Powers of the LMC - The LMC will have power to: (a) subpoena anyone and any entity, private or public, to appear before it, and answer any question relating to its landholding or land interest; (b) enquire about any land question, out of its own initiative or at the instance of interested parties; (c) verify and or validate I invalidate individual or corporate title deeds; (d) demand a declaration of any landholding, with all the necessary documentation relevant to such a declaration; (e) grant amnesty and or to initiate prosecution, whichever the case might be, at its own discretion; and, (f) seize or confiscate land gotten through fraudulent or corrupt means." DRDLR *Green Paper* para 6.5.2.

⁷³ See also Pienaar 2014 *PER* 655-656; Mostert 2014 *PER* 760, 779-780.

Clause 6.6 (The Land Valuer-General (LVG))⁷⁴

Clause 6.6 concerns the creation of the Land Valuer-General and the initial problem statement in Clause 6.6.1⁷⁵ clearly makes out a case for the creation of such a institution. Clause 6.6.2⁷⁶ sets out the proposed responsibilities of the Office of the Valuer-General (OVG), which seem unproblematic in general, except for the first two responsibilities contained in 6.6.2(a) and (b). I would like to express my unease with removing the full capacity of valuing land from the public and market sphere and artificially imposing compulsory valuations on the market. The final determination of financial compensation in cases of expropriation should also not be removed from the sphere of the market and ultimately ousting the courts from the determining of value for purposes of expropriation. Even though it is stated that the compensation will be determined in compliance with the Constitution, it will clearly be unconstitutional due to the fact that Section 25 of the Constitution states that in the absence of an agreement being reached by the parties, the question of compensation has to be decided or approved by a Court.⁷⁷

⁷⁴ Pienaar 2014 *PER* 656; Mostert 2014 *PER* 760; Du Plessis 2014 *PER* 806.

⁷⁵ "Problem Statement (a) South Africa lacks a nationwide comprehensive, reliable and collated hub of property values; (b) absence of legislative framework to determine when 'market value' is one of the variables in determining values as opposed to being the only criterion; (c) probity of some of the valuation is questionable; (d) conflict of interest and malpractices; (e) improper or hurried valuations in order to meet deadlines or compliance planning; and, (f) an ahistorical or mechanical approach to valuation." DRDLR *Green Paper* para 6.6.1.

⁷⁶ "Responsibilities of the Office of the Valuer-General (OVG) The Valuer-General will be a statutory office responsible for: (a) the provision of fair and consistent land values for rating and taxing purposes; (b) determining financial compensation in cases of land expropriation, under the Expropriation Act or any other policy and legislation, in compliance with the constitution; (c) the provision of specialist valuation and property-related advice to government; (d) setting norms and standards, and monitoring service delivery; (e) undertaking market and sales analysis; (f) setting guidelines, norms and standards required to validate the integrity of the valuation data; and, (g) creating and maintaining a data-base of valuation information." DRDLR *Green Paper* para 6.6.2. See Pienaar 2014 *PER* 656; Du Plessis 2014 *PER* 810-819.

⁷⁷ "Property may be expropriated only in terms of law of general application – (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court." *Constitution of the Republic of South Africa*, 1996 S25(2). See also Du Plessis 2014 *PER* 810-819.

Clause 6.7 (Land Rights Management Board (LRMB) and Land Rights Management Committees (LRMCs))⁷⁸

Clause 6.7.1⁷⁹ concerns the composition of the LRMB. The only issue here is that the content of the composition and identification of "representatives of sectors which hold rights to land" should be clarified so as to ensure a democratic representation. Clause 6.7.2⁸⁰ mentions the proposed functions of the LRMC and Clause 6.7.3⁸¹ sets out the proposed powers of the LRMB.

Clause 7 (The Strategic Thrust of Land Reform)⁸²

I agree in general with the contents of this clause. However, it is clear from the general inconsistencies and tension between the focus on Land Reform on the one hand and Rural Development on the other hand that these two areas are not really capable of being properly promoted within the same framework.

⁷⁸ Pienaar 2014 *PER* 657.

⁷⁹ "The LRMB will be composed of representatives of sectors which hold rights to land and persons appointed by the Minister because of their special knowledge and capacity to provide professional services to the Board. The Land Rights Management Committees, on the other hand, will be composed of representatives of residents in a specific rural environment or settlement: farm-workers and dwellers, commercial farmers, relevant municipal councils, government departments such as the drdlr, Human Settlements, as well as the South African Police Service." DRDLR *Green Paper* para 6.7.1.

⁸⁰ "Functions of the LRMB (a) communication of legal reforms to farm owners, farm-dwellers and potential land beneficiaries; (b) build institutional capacity (inside and outside state institutions) to advise and support rights-holders, and facilitate their active use of the law; (c) in collaboration with the Chief Deeds Registrar, develop accessible and efficient systems for recording and registering rights on land; (d) to encourage the primacy of social solutions to social problems and disputes; (e) to provide legal representation, where necessary, e. g. unlawful evictions; and, (f) to establish a co-ordinated and integrated support system for state, civil society and private sector participation in integrated development measures in rural settlements." DRDLR *Green Paper* para 6.7.2.

⁸¹ "Powers of the LRMB The LRMB will have power to: (a) establish and, or, dissolve Land Rights Management Committees (LRMCs); (b) set norms and standards for the LRMCs; (c) delegate certain powers to the LRMCs; (d) enforce compliance with norms and standards, as well as land rights management policies and laws; (d) hear appeals on matters handled by the LRMCs; (e) to over-turn decisions of the LRMCs; and, (f) enforce respect for, and observance of, rights of fellow dwellers." DRDLR *Green Paper* para 6.7.3.

⁸² "7.1 Land Reform is located within the CRDP, and is anchored by the following pillars: (a) a coordinated and integrated broad-based agrarian transformation; (b) an improved land reform programme; and, (c) strategic investment in economic, cultural, ICT and social infrastructure for the benefit of all rural communities. 7.2 While separate in the design, rural development and land reform are aligned at policy, programme and institutional levels to ensure coordinated service delivery. In pursuit of agrarian transformation, the link between the land question and agriculture is acknowledged as the basis of the search for an economic rationale and a vision of a post-reform agrarian structure. Yet, demand for land may be for other productive but non-agricultural uses." DRDLR *Green Paper* paras 7.1-7.2. See Pienaar 2014 *PER* 650.

Clause 8 (Land Experience Elsewhere)⁸³

The contents of this clause are extremely vague and do not add any substance to the *Green Paper*, since it does not evaluate, analyse or give any conclusions to the comparative case. It is proposed that it be removed in its entirety or completely rewritten and properly argued so that it clearly illustrates its relevance to the South African situation.

Clause 9 (Challenges and Constraints)⁸⁴

I agree with the contents of this clause. However its emphasis on a speedy resolution of the land question is unjustified. It is submitted that haste should not be a factor in the implementation of a new system, since the results could once again be deemed unsatisfactory even after a decade of first implementation.

⁸³ "8.1 Asia 8.1.1 China China replaced the Commune System with a two-layer management system - household contract responsibility system and granting farmers self-management rights; it replaced monopoly over purchase and marketing, allowing farmers the right to exchange farm produce freely; and, it transformed the single collective ownership into various private ownerships, where the farmer can dispose of assets. 8.1.2 India India introduced the following reforms: it regulated sharecropping; provided legal protection against eviction; instituted a land ceiling Act; and provided homestead plots. 8.2 Latin America 8.2.1 Brazil Brazil embarked upon selective expropriation with compensation; viable family smallholder farms receiving government support, serving domestic market, while large-scale commercial farms serve export markets; and, combined market-related strategies with traditional land management systems, in a complementary manner. 8.2.2 Mexico Mexico had mixed experiences: nationalisation in 1910; redistribution in 1935; denationalisation in 1946; and, a peasant revolt in 1970 resulted in the take-over of land owned by foreigners, turning it into collectives. 8.2.3 Chile Chile expropriated large farms in the 1960s, turning them into co-operatives for peasants and small farmers. There was a reversal in 1974, after the assassination of President Allende, with the re-instatement of elite family farms. Regulatory reforms were introduced on land rentals and subdivisions in the 1980s. 8.3 Africa On the African continent the Egyptian experience provides interesting lessons on land reform. Legislation was passed in the 1950s, limiting farm size to a maximum of 42ha per individual; limiting rental rates; and, setting minimum lease durations." DRDLR *Green Paper* para 8.

⁸⁴ "9.1 For the land reform programme to proceed rapidly and succeed, as it must, a number of challenges and constraints have to be confronted, and overcome. **The main challenges are:** (a) entrenched vested interests, in both the commercial and communal land spaces; and, (b) poor co-ordination and integration of effort and resources among public institutions, and between public and private sector institutions; and, (c) the main constraint is the poor capacity of organs of state to implement. 9.2 These three elements constitute a complex risk-factor to any effective, equitable and speedy resolution of the land question. It will require time and an enduring, collective, national political effort to overcome them. Co-ordination and integration across all relevant organs of state and civil society is the key to a successful execution of the sustainable land reform programme." DRDLR *Green Paper* para 9.

Clause 10 (Summary and Conclusion)⁸⁵

I would like to reiterate the problem of making broad sweeping statements. In Sub-clause 10.1 reference is made to "undoing the social, economic and cultural effects of CENTURIES of discrimination and exclusion" (emphasis added). Referring to the discussion of this issue at the beginning of this paper, it would seem as if the *Green Paper* reiterates the position that land reform aims to address all issues regarding

⁸⁵ "10.1 Undoing the social, economic and cultural effects of centuries of discrimination and exclusion, on the basis of race, class and gender will take time and an enduring national political effort. 10.2 Challenges and constraints experienced over the last seventeen years, and lessons drawn from other countries across the world, show clearly that there are no silver bullets to solving post-colonial land questions. 10.3 A systems approach seems necessary and appropriate in addressing complex and emotive challenges such land reform. The failure to protect the rights and security of tenure of farm workers and dwellers is a good illustration of this point. There is a strong view that the real problem in land reform in general; and, in the protection of the rights and security of tenure of farm-dwellers, in particular, may be that of a total-system failure (TSF) rather than that of a single piece of legislation, e.g., Extension of Security of Tenure Act (ESTA). 10.4 In the case of farm-workers and dwellers, this failure would reflect in a number of aspects: inadequate articulation of policy and legislative regime to protect farm workers and dwellers; poor implementation of existing policies and legislation by organs of the state; weak enforcement of legislation by law-enforcement agencies; the judicial system not being worker-friendly in handling eviction cases; labour unions not organizing effectively on farms; non-complementary (almost adversarial) relationship between non-governmental organizations and state organs in addressing problems of farm-dwellers; and, poor or non-existent monitoring, co-ordination and communication amongst state organs, within and across the three spheres of government, and other interested parties. on matters negatively affecting the rights of farm workers and dwellers. 10.5 The following passages, directly and indirectly quoting the first President of the African National Congress, Dr John Langalibalele Dube, have been taken from the recently published book by Heather Hughes, *First President* (2011). It addresses the hunger and need for land by African people. The situation has not changed much since the 1930s, when the sentiment was expressed by Dr Dube. **We must change it now! The points that Dube and his colleagues had made about the draft legislation (Natives' Representation in Parliament Bill, the Natives' Land Bill and the Natives' Council Bill) were incorporated and extended in his testimony to the Natives' Economic Commission. He had prepared a written submission on which he was closely questioned at great length in the hearing. Uppermost in his mind and, he said, in the minds of African people was the land issue. They needed far more of it, particularly those who could not afford to buy. The land ought to be purchased for them and handed over; all the African areas ought to be properly surveyed and divided into building plots, grazing grounds and gardens. People could pay a nominal rent for their plots.** 'There are only one million of you and there are about six millions of us; and one million of you have three fourths of the land, and six millions of us have one fourth of the land. That is not fair In asking (for more land) I do not think we are asking for charity; we have contributed to the development of South Africa with our labour... we have done our share in that respect, and in the matter of taxation, both direct and indirect'. **He vigorously fought off the commissioners' views that Africans did not know how to use their land properly, that any more would just be wasted, that Africans multiplied too fast, that they had too many cattle:** 'The black ox has nowhere to feed, and the white ox has all the pasture ... I am sorry if I cannot make that clear to you'. [Heather Hughes (2011). *First President. A Life of John L Dube*, founding President of the ANC]." DRDLR *Green Paper* para 10.

dislocation from land for the past few hundred years. Quite clearly this is untenable and should be clarified.

In Sub-clause 10.4 a section is inserted in the conclusion about the case of farm-workers and dwellers. This sub-clause is out of place and should not be part of the conclusion. It once again illustrates the problem of trying to address both land reform and rural development in the same document. Sub-clause 10.5 also does not add any substance to the *Green Paper* and does not help to bring any clarity to the real conclusion to be reached from this *Paper*.

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Green Paper on Land Reform: Overview and Challenges¹

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SUMMARY

Originating as a submission made to the Department of Rural Development and Land Reform by the Centre for Constitutional Rights in 2011, this paper provides an overview of some of the main aspects and key features that stem from the *Green Paper on Land Reform*, 2011. Following the framework of the Green Paper, this article provides a brief commentary on some of the most problematic aspects of the Green Paper, cross-referencing the key topics to the *Green Paper* itself as well as the other articles in the special edition of PER dealing with the *Green Paper on Land Reform*, 2011.

KEYWORDS: Green Paper on Land Reform; Land Reform; Section 25; Property Law; Ownership; Constitutional Law; Security of Tenure.

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