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## **PUBLIC SUBMISSION TO THE *AD HOC* COMMITTEE ON THE AMENDMENT OF SECTION 25 OF THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (CONSTITUTION EIGHTEENTH AMENDMENT BILL) [HEREINAFTER REFERRED TO AS THE “BILL”]**

The Banking Association South Africa (“The Banking Association”) would like to thank the *Ad Hoc* Committee for the opportunity to comment on the proposal for the review of Section 25 of the Bill of Rights within the Constitution of the Republic of South Africa (1996) [the Constitution].

### **WHO WE ARE**

The Banking Association is an industry body representing all banks registered in terms of the Banks Act, 94 of 1990, and operating in South Africa. The Banking Association has 35 member banks, which include both South African and international banks. All licenced banks are members of The Banking Association. It forges dynamic partnerships with relevant stakeholders to influence an environment in which banks can do profitable business in a way that promotes international best practice, transformation and sustainable socio-economic growth and development. Our vision and role, together with our areas of focus and a list of our members may be found on our website, [www.banking.org.za](http://www.banking.org.za).

### **FRAMEWORK OF SUBMISSION**

Given the complexity and importance of this matter, the submission from The Banking Association is lengthy. We have accordingly divided the submission into parts, namely:

- Our comments in respect of the proposed amendment to section 25 of the Constitution of the Republic of South Africa, 1996 (Constitution eighteenth Amendment Bill [hereinafter referred to as the “Bill”];
- Our detailed supporting comments on the economic, social, land-based classes and regulatory implications, as the following Annexures:
  - Annexure A Context
  - Annexure B Economic Implications of Expropriation at nil compensation
  - Annexure C Social Implications of Expropriation at nil compensation
  - Annexure D Legal Implications of Expropriation at nil compensation
  - Annexure E Food Security Implications of Expropriation at nil compensation/Expropriation at below market value

## CONTEXT

The Banking Association is fully supportive of the state's initiatives to rectify past racial injustices, to correct current land ownership patterns, to reduce inequality and alleviate poverty. We remain committed to playing a role in working with key stakeholders, including the State in finding all-inclusive solutions to this and other economic challenges to create a better life for all South Africans.

Prior to dealing specifically with the proposed amendments to Section 25 of the Constitution, The Banking Association re-emphasises its view that there is no need to amend this section within the Constitution. Our view is premised on the views expressed by a number of legal experts, including former Constitutional Court judges Moseneke and Sachs. The views expressed herein are consistent with the views previously expressed to the Constitutional Review Committee that was tasked with reviewing whether there was a need to amend Section 25 of the Constitution.

Although The Banking Association understands that it is the intention of Parliament to treat this process as a continuation of the process that was undertaken by the Constitutional Review Committee, we believe that it is appropriate for the Banking Association to highlight its views, which were shared with the Constitutional Review Committee, in order to enable Parliament to have context to the comments of The Banking Association in relation to the proposed Section 25 amendment.

The Banking Association recognises that "over the past two decades, government has implemented several models to give effect to land reform". However, these have not succeeded in resolving the challenges of "the stubbornly entrenched dualities and inequalities that continue to characterise South Africa" (High-Level Panel Report on "The Assessment of Key Legislation and The Acceleration of Fundamental Change in South Africa, 2017" refers (High-Level Panel Report)). The Banking Association accordingly believes that it is essential that continued land reform occurs, in a manner that is consistent with the commitment by the State (also articulated in the resolution passed by Parliament to review Section 25 of the Constitution), to be implemented in a manner that increases agricultural production and not for this to impact negatively on economic growth, improves food security and which ensures that the land is returned to those from whom it was taken under colonialism and apartheid. This should however be undertaken in an orderly manner that does not dilute property rights. On this basis, The Banking Association believes that any amendments to Section 25 of the Constitution should be tested by means of empirical research. Some years ago the Department of Planning, Monitoring and Evaluation introduced the need for a Socio-Economic Impact Assessment to be undertaken prior to the introduction of a Bill. Given the far reaching implications for the country should the state proceed with the expropriation of property at compensation levels which are below market value or even nil for land reform purposes, we submit that extensive research on the merits/demerits of implementing such a policy framework is undertaken by an independent credible research company and that this report be made available to the public.

A sound and secure banking and regulatory framework is essential to enable faster and inclusive economic growth. From a financial services sector, and in particular from the banks' perspective, property rights and prosperity are inextricably linked, where banks place reliance on property (including land and improvements thereto) as security for loans. Banks are also required in terms of the Banks Act (1990) and Regulations thereto (Regulation 225) to value assets at market value. In turn, the South African Banks Act and supporting Regulations are aligned to the global regulatory framework (Basel III), a global regulatory framework for bank capital adequacy requirements, ensuring adequate market liquidity risk and decreasing bank leverage in order to protect investors and depositors (seeks to ensure that banks remain solvent and are able to repay consumer deposits on demand, which deposits banks have on lent to borrowers). South Africa, as a member of the G20, is obliged to implement the Basel regulatory frameworks.

A marked decrease in the value of land-based property, caused by either an amendment to legislation and/or market uncertainty, and the resultant reduced appetite from property buyers could destabilise the banking sector, and have a negative impact on the credit rating of the sector and the

country. The current exposure banks have in relation to land-based property is approximately R1.613 trillion in the form of mortgages. This quantum excludes other types of non-mortgage loans afforded to borrowers premised on their net worth, where their land-based property constitutes much of their net equity base and provides support to lenders for such loans in the event of default (the market value of land-based property is estimated to be in excess of R7 trillion). Many banking crises around the world have as their starting point the decline in land-based property and the impact that this has on market confidence. An example of this is the 2007-2008 global financial crisis which started from the downturn of land-based properties in the United States of America.

It is therefore important that South African land reform initiatives, to the greatest extent possible, be implemented in a manner that limits any potential destabilisation of the financial markets whilst still balancing the need for the redress that is intended by land reform initiatives such as legislative changes.

Financial institutions place reliance on land-based property as an important asset class, in support of loans which they provide to their customers. In terms of the Banks Act (1990) and Regulations thereto, banks are required to annually value the security they hold in support of loans at market value, and so, legislation which has the potential to dilute the value of these assets to below market value (what a buyer would be prepared to pay in an open and competitive market) will, if not properly drafted with the needed certainty, have unintended, but foreseeable consequences for the safety and soundness of the banking system (discussed in-depth in **Annexure B** ).

The Banking Association recognises that countries have different property rights regimes. However, because of the historical nature of the South African property rights regime, as envisaged in the interim Constitution and Section 25 of the Constitution, any changes or clarifications of what is “implicit to be made explicit” needs to be undertaken with the greatest circumspect in relation to the effect of such changes on all stakeholders including the intended beneficiaries of the changes, the current holders of property rights, holders of registered and unregistered rights and, investors in the property market, including listed entities with property portfolios.

Where one moves from a regime of relatively secure property rights to one which may bring uncertainty, this is likely to hinder economic development and limit economic opportunities. Property rights are the basis of exchange and the extension of ownership to capital goods provides the basis for the development of financial markets, which is essential for economic growth and development. To promote economic development that benefits the poor though, formal property rights are important.

Meaningful land reform and the reversal of land ownership patterns is an imperative for the country. Although The Banking Association recognises and respects the decision of the Constitutional Review Committee, The Banking Association remains of the respectful opinion that amending the Constitution to give effect to land reform is unnecessary. The Banking Association also believes that a consistent message from all stakeholders is critical in order to allay some of the fears created by the media and political hype around the proposed amendment of Section 25.

The Banking Association has been privileged to have been able to make submissions to the Constitutional Review Committee and to the Department of Public Works and Infrastructure in respect of the possible amendment to Section 25 of the Constitution, as well as the draft Expropriation Bill. In addition, we have been a member of the Business Unity South Africa (BUSA) Task Group which engaged at Nedlac on the draft Expropriation Bill. Regrettably, both the proposed amendment to Section 25 and the Expropriation Bill (in particular) are vague/silent in a number of areas, and most importantly in the areas of:

- Definitions:
  - Defining what is meant by the arbitrary deprivation of property;
  - Defining the distinction between deprivation of property and expropriation and its impact on compensation levels;

- Definitions for ‘public interest’ and ‘public purpose’;
  - Definition for what is meant by ‘just and equitable’ as well as the need for ‘equivalence between public interest and the interests of those affected’;
  - Definitions for land and improvements;
  - A definition for land reform.
- Limited recognition of the real rights that registered property owners enjoy, including the need to expropriate such registered rights (includes amongst others, a mortgage, long leases and a special notarial bond);
  - Where there is disagreement between parties in respect of compensation payable for the State to be able to expropriate the property prior to a court ruling on the dispute is problematic, especially as the current amended Expropriation Bill makes provision for penalising unreasonable compensation demands from expropriatees;
  - Alignment to international expropriation best practice.

We suggest that, unless either the proposed amendments to Section 25 or preferably the Expropriation Bill clarifies these areas in particular, the resultant court cases which will seek to obtain clarity on these aspects will simply exacerbate public uncertainty, which in turn will impact negatively on land-based property values.

Other than local investment into land-based property, it is essential that international investors continue to invest in South Africa (a critical component for job creation and economic growth). Internationally the norm amongst both developed and developing countries is that full, adequate, fair or just compensation is paid to expropriated property owners. If the international community were to view the proposed changes to either Section 25 of the Constitution and/or aligned legislation (the Expropriation Act), as not being aligned to international norms, this would pose a potential threat to their investment within South Africa/future investments into South Africa, especially as the Protection of Investment Act, 2015 subjects their right of access to the courts to the prescripts of South African legislation. Under such circumstances we can expect international investors to sell off existing investments and/or to desist from further investment into South Africa, with commensurate negative impacts on economic growth and employment. In this regard we remind the Committee that Xavier Carim, as the former South African Ambassador to the World Trade Organisation, highlighted to the *Ad Hoc* Committee in his presentation that “from an international law perspective, Bilateral Investment Trade Treaties constitute an international treaty and that the Constitution of any country is seen as part of its ‘internal’ law and that it cannot invoke its ‘internal’ law, including its Constitution as justification for not meeting its treaty obligations. Further, that such treaties remain in place for periods ranging from 10 to 20 years under the ‘survival’ clause post the termination of a treaty and therefore that South Africa is still obliged to protect investments covered under such treaties (Article 28 of the Vienna Law on Treaties refers). Moreover, should an international investor not be satisfied with the quantum of compensation payable upon expropriation, they would have access to the International Settlement of Disputes for arbitration on the matter. Past cases indicate that the standard has tended to be the ‘market value’ of the investment immediately before the expropriation took place (this would apply to property in its widest form).”

Rather, we must ensure that going forward, ‘just and equitable’ compensation at below market value/nil compensation does not increase the plight of the poor, due to a myriad of factors including reduced local or international investment, slower economic growth, job losses, increased levels of food insecurity, caused by the collapse of food production or a credit rating downgrade of both the banking sector and the country. If this were to happen, we would all suffer, and mostly the poor, whom we are hoping will benefit from land reform.

Moreover, we draw to the attention of the Committee that in the *Du Toit vs the Minister of Transport* court case (Constitutional Court 2006), it was held that the expropriatee must be placed in the same position he would have been in, but for the expropriation. In the more recent 2012 Constitutional Court case, *Mhlanganisweni Community vs the Minister of Rural Development and Land Reform*, the court ruled that the purpose of compensation is to recompense, and further that ‘market value’

was considered as an important circumstance to take into account when determining compensation. Furthermore, the owner cannot be punished for not using the land in a certain way (Van der Walt. *Constitutional Property Law*, 512-513). The Supreme Court of Appeal ruled in the *City of Cape Town vs Helderberg Park Development (Pty) Ltd* (2007) that an owner may not be better or worse off because of the expropriation and that a monetary award must restore the *status*.

A critical consequence of this Bill would be the negative impact on the capital adequacy and the stability of commercial banks. Also, private sector lenders could:

- withdraw from providing loans where land-based property is being offered as security for the loan; and/or
- adopt a more conservative approach to the extent of the loans they would be prepared to provide as compared to land-based property values (so-called maximum loan to property value); and/or
- increase borrowing interest rates to compensate for the additional risk in the event of expropriation.

This could in turn sterilize the land-based property market. In stakeholder engagements with the Department of Rural Development and Land Reform (DRDLR) in 2011, the department recognized the need for the State to avoid such an occurrence. Cabinet approval was therefore obtained for their policy framework document styled “A policy framework for land acquisition and land valuation in a land reform context and for the establishment of the Office of the Valuer General dated 18 October 2012”. The following paragraphs are extracted from this document:

“Legislating the definition of market value: The international definition of market value should be domesticated in appropriate legislation and interpreted to specifically exclude prices paid by government as evidence for market value. This will have the immediate effect of aligning prices paid by government with those of the private sector in those cases where market value is the basis of transaction and thereby help to control price speculation. ‘Just and equitable’ compensation may lie below market value. The change to ‘just and equitable’ compensation will have implications for the collateral value of existing debt. This will in turn impact negatively on the capital adequacy of these institutions, and on their ability to provide credit to property related sectors or accept such property where security for a loan granted is required. In order to mitigate these potential effects, government should automatically guarantee the difference between ‘just and equitable’ compensation determined in terms of Section 25(3) and market value. Thus, where mortgaged land has been acquired at less than market value, government should pay directly the financial institution concerned the difference between the purchase price and the outstanding amount, up to a maximum of the market value of the property. This guarantee will allow financial institutions to continue lending to these sectors on the basis of market value.”

We accordingly look to the *Ad Hoc* Committee to consider such Cabinet approval. Further, we would argue that this should be broadened to include any property where a registered and unregistered real right exists, and which is to be expropriated.

***Recommendation (New insertion into the Bill):***

A clause which provides that parties with registered and unregistered rights are to be provided with a State guarantee (to be paid by the expropriating authority) that they would not experience a loss in the event that expropriation compensation levels are lower than the registered rights owner/s’ exposure to the expropriated owner, provided that this does not exceed the market value of the expropriated property.

**Comments**

- We believe that it is premature for the Department of Public Works and Infrastructure to attempt to finalise a draft Expropriation Bill which seeks to be aligned to the proposed

changes to Section 25, whilst these changes have not been finalised. Once the changes to Section 25 have been finalised, this would provide definitive guidance to the affected state departments in respect of their legislative frameworks and any changes they need to make (ensures alignment with the amended Constitution).

- In Section 25(3), the wording "...a court may determine" is used. This section retains discretion as the words may steer a court's decision towards "nil compensation". If a court attaches a lot of weight to this, the concern is that this can be changed through primary legislation. In effect, this provision would allow the scope of a fundamental right's application to be changed through primary legislation which only requires a 50% plus one majority in the National Assembly. The intention of Section 74 of the Constitution was that fundamental rights should only be changed through a 66% majority. One could make out an argument that this provision conflicts with Section 74 of the Constitution as amendments to the scope of a fundamental right surely equates to amending that fundamental right?

## **SPECIFIC COMMENTS ON THE BILL**

### **PREAMBLE**

#### **Concerns**

The Preamble of the Amendment Bill is inaccurate in that:-

- Whilst minimal progress has been made in respect of land reform, we are of the view that this is not due to mechanisms not being in place within Section 25, but rather due to failed land reform programmes (Section 25 (2) refers).
- The Preamble creates an impression that land reform has not previously existed in the country and that this amendment is necessary to introduce such reforms and its wording should therefore be altered.

#### **Clause 1(a)**

The Amended Section 25 provides that "*Provided that in accordance with subsection (3A) a court may, where land and any improvements thereon are expropriated for the purposes of land reform, determine that the amount of compensation is nil.*"

#### **Concerns**

- The Banking Association's submission is that the decision to expropriate land without compensation should not be left to the executive without oversight from the judiciary. The Banking Association therefore supports the inclusion of the judicial oversight provision in the Bill. Judicial oversight will address potential arbitrary deprivation of property, which is against the Constitution. The Banking Association's submission is that any attempt to take away judicial oversight must be avoided by all parties, as judicial oversight strikes a balance between the government's intention to accelerate land reform and the rights of impacted stakeholders to have an independent platform at which determinations can be made in relation to land that is earmarked for expropriation without compensation. Although it is tempting to argue that parties can always have recourse to Courts, the costs and burden of challenging the executive's decision in the Courts will be very burdensome for an expropriated owner or an expropriated holder of an interest in the land.
- In relation to improvements, we do not believe that it would be 'just and equitable' for a court to decide that nil compensation is payable for improvements. While improvements may accede to the land, their value can be determined separately. It is our understanding that the Parliamentary *Ad Hoc* committee's view is that improvements always accede to the land and

therefore they should be treated in the same manner as the land on which they accede. We respectfully submit that the Committee has failed to provide any legal or social justice explanation as to why nil compensation should also apply to improvements.

- It is also not clear within the proposed clause as to whether the intention is to include both movable and immovable improvements.
- This wording is problematic in that it can err on the arbitrary deprivation of property which is not permitted as per Section 25 (1), that reads as follows “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” If the intention is that the definition of “land” and “any improvements thereon” will be defined in national legislation or that this will be decided by the courts, this should be explicitly stated in section 25 of the Constitution

### **Recommendations and commentary on the ‘arbitrary deprivation of property’**

- We recommend that improvements be deleted from the proposed clause. Should improvements not be deleted as recommended, we believe that as per Section 25(3), the amount of the compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
  - a) the current use of the property;
  - b) the history of the acquisition and use of the property;
  - c) the market value of the property;
  - d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
  - e) the purpose of the expropriation.

### **Case law on arbitrary deprivation of property**

The meaning of the word "arbitrary" as used in Section 25(1) of the Constitution has been considered by the Constitutional Court in *First National Bank of SA v Commissioner, SARS* 2002(4) SA 768 (the "**FNB matter**") and *Bissett v Buffalo City Municipality* 2005(1) SA 530 (the "**Bissett matter**").

In the FNB matter, the Constitutional Court held that "it is concluded that a deprivation of property is arbitrary as meant by section 25 when the law referred to in Section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair". In the FNB matter, the court then expanded on the various matters that should be taken into account in determining whether "sufficient reason" exists for the deprivation.

In the Bissett matter, the Constitutional Court summarised the remarks made in the FNB matter in the following language “The meaning of arbitrary in Section 25 of the Constitution was determined in the FNB case. Deprivation of property is arbitrary within the meaning of Section 25 of the Constitution if the law either fails to provide sufficient reason for the deprivation or is procedurally unfair. To determine whether there is sufficient reason for a committed deprivation, it is necessary to evaluate the relationship between the purpose of the law and the deprivation effected by that law. A complexity of relationships must be considered in this assessment including that between the purpose of the provision on the one side, and the owner of the property as well as the property itself on the other. If the purpose of the law bears no relation to the property and its owner, the provision is arbitrary. The FNB judgment also sets out the approach to be adopted if there is a connection between the purpose of the deprivation and the property or its owner. In these circumstances, there must be sufficient reason for the deprivation, otherwise the deprivation is arbitrary. The nature of the relationship between the means and the ends that must exist to satisfy the Section 25(1) rationality requirement depends on the nature of the affected property and the extent of the deprivation.”

If the relationship between the means and the ends of an expropriation of property that is subject to a mortgage bond is considered in circumstances in which no compensation is determined for the mortgage bond:

- The "ends" that the expropriating authority seeks to achieve is the public purpose for which it expropriates the property;
- The "means" by which that purpose is achieved is to (i) deprive the bondholder of his rights under the mortgage bond without paying compensation, and (ii) leaving the mortgage holder in a position in which he must agree on the amount outstanding under the bond with the expropriated owner; and those means do not justify the end and in particular there is no reason whatsoever why the expropriating authority should not be left with the burden of determining the compensation that should be paid to the bondholder.

In addition, there is a need for greater certainty on two key issues:

While the cross-reference to subsection (3) in the new subsection (3A) seems to be intended to convey that nil compensation is only permissible where this quantum of compensation is just and equitable, this should be made clear. We note that such an approach is consistent with the fact that the preamble to the draft Bill indicates that it intends to make explicit what is already implicit in the Constitution. In terms of section 25, as it stands, an expropriation that takes place without compensation would only survive constitutional scrutiny if: (i) nil compensation constitutes just and equitable compensation as envisaged in section 25(3); or (ii) the non-payment of compensation amounts to a reasonable and justifiable limitation of the right to property in terms of section 36(1) of the Constitution.

Although the preamble to the draft Bill and the amendment to subsection (2)(b) indicate that nil compensation is only potentially permissible where property is expropriated for purposes of land reform, this qualification is not specifically included in subsection (3A).

It seems that the uncertainty flows from the fact that the issue of nil compensation is addressed in two provisions of the draft Bill that need to then be read together (subsections (2)(b) and (3A)). If section 25 is to be amended, it would, in our submission, be preferable to delete the proviso in subsection (2)(b) and for subsection (3A) to be worded along the following lines:

*"Subject to subsections (2) and (3), national legislation must set out circumstances in which a court may determine that it is just and equitable that the amount of compensation in respect of land that is expropriated for purposes of land reform is nil."*

## **Clause 1(c)**

### **Concern**

The proposed wording "(3A) National legislation must, subject to subsections (2) and (3), set out specific circumstances where a court may determine that the amount of compensation is nil." can lead to the temptation to have an infinite list of circumstances. We submit that there is a need to confine this list to specific circumstances as this will provide long term certainty to the public and further that any proposed changes to the closed list would constitute an amendment to a fundamental right.

### **Recommendation**

We recommend that the proposed wording of section 3A clause 1(c) be amended as follows –  
“(3A) National legislation must, subject to subsections (2) and (3), set out **a closed list of specific circumstances** where a court may determine that the amount of compensation is nil.”.

## CONCLUSION

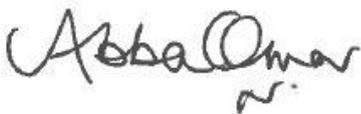
Meaningful land reform, together with the reversal of skewed land ownership patterns is an imperative for the country. We are however, still of the respectful opinion that amending the Constitution to give effect to this is unnecessary. We must ensure that going forward, expropriation at below market value or even at nil compensation does not negatively impact on local and international investor confidence or increase the plight of the poor, either because of job losses, poor economic growth or more importantly increased levels of food insecurity, caused by the collapse of food production. If this were to happen, we would all suffer, and mostly the poor, whom we are hoping will benefit from a considered land reform programme.

The South African economy can ill afford banking sector and country instability, brought on by the erosion of private property rights. Rather, the state needs to prioritise land reform/agricultural sector transformation and re-align its resources accordingly.

The Banking Association proposed a mixture of state and market led initiatives to effect meaningful land reform and transformation within the agricultural sector to the Constitutional Review Committee. We accordingly recommend that once the state has evaluated its options, and has decided on a way forward, that an all-inclusive key stakeholder land *indaba* be held. The outcome from such an engagement would be a joint commitment from all stakeholders to the achievement of meaningful land reform and agrarian transformation, which could include target setting and the monitoring/evaluation thereof.

Land expropriation, with or without compensation, looms large for landowners. Expropriation at nil compensation, if not done according to the confines of the Constitution and a law of general application could create systemic risk for the South African banking/financial sector and the country alike. Even if expropriation at nil compensation is confined to specific classes of property, we emphasise the need for the State to create market certainty through crisp and definitive policy/legislative frameworks which are well communicated and that measures are put in place to prevent expropriation at below market value or at nil compensation value property class 'creep'.

Yours sincerely



**Dr Yacoob Abba Omar**  
**Acting Managing Director**

## ANNEXURE A

### Context

We recognize the need to reverse skewed property ownership patterns which reflects:

- 67% ownership of commercial agricultural land by white farmers;
- 15% of land is in Black Communal Areas (much of which is State owned);
- 10% reflects other State-owned land (conservation areas, hospitals, schools etc); and
- 8% is urban land<sup>1</sup>.

Given past injustices, we are therefore mindful that the ownership of land or lack thereof is a highly emotional and sensitive matter as it is not only reflective of dispossession, but also a loss of dignity and identity in many instances.

### Motion by Parliament on 27 February 2018

Parliament passed a motion brought by the Economic Freedom Fighters (EFF), to carry out “land expropriation without compensation”. The motion included the need for a review of Section 25 of the Constitution.

The wording of the resolution that was passed is as follows:

- i. pursue with greater determination the programmes of land reform and rural development as part of radical economic transformation;*
- ii. land expropriation without compensation ought to be amongst the key mechanisms available to give effect to land reforms and land redistribution;*
- iii. in determining the mechanisms for implementation, we must make sure that we do not undermine future investments in the economy, or damage agricultural production or food security;*
- iv. furthermore, our interventions must not cause harm to other sectors of the economy, and interventions must be based on three elements (programmes): increased security of tenure, land restitution and land redistribution.*

The matter was referred to the Constitutional Review Committee to report back to Parliament by the 30th August 2018, on whether the State should amend Section 25 of the Constitution to make it possible for the State to expropriate land in the public interest, without the payment of compensation. The Constitutional Review Committee made recommendations to Parliament to do so, with the result that the *Ad Hoc* Committee has now gazetted the proposed amendments to Section 25 of the Constitution for public commentary. The matter is discussed below.

### Scope of Application

Whilst the resolution sought to restrict the amendment to Section 25 of the Constitution to land and improvements thereon only, Section 25 does not define “property” and so property in terms of section 25 needs to be seen in its widest context which will include, amongst others, all immovable, moveable and intellectual property. We note that the wording of the proposed amendment to Section 25 (1(b) seeks to restrict the amendment to only include “...land and improvements thereon are expropriated for the purposes of land reform...”, this will include all forms of land-based property such as commercial, industrial, agricultural and residential zoned land.

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<sup>1</sup> Source: Institute for Poverty, Land and Agrarian Studies, Research Article, 2014

Property is both an economic and social good, and as most Black South Africans were legally denied the right to acquire land and as many Black South Africans were dispossessed of their land during the colonial and apartheid eras, Section 25 of the Constitution makes it clear that the expropriation of property is permissible to either effect land reform or to achieve some other 'public purpose' or for the 'public interest' and that where this applies to land reform a court may determine that the amount of compensation that is to be paid could be nil. However, as many property owners use their land productively, paid market value for the property, owe money on mortgage bonds taken out to pay for such property or need access to property for housing purposes, Section 25(3) also prohibits the arbitrary deprivation of property as well as the expropriation of property without the payment of 'just and equitable' compensation, which has either been agreed upon or which has been decided by a court of law. However, notwithstanding the said prohibition, it must be noted that section 25(8) specifically states that no provisions of Section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform, to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of Section 36(1).

The Constitutional Court, in the case of *Haffejee NO and Others v eThekweni Municipality and Others*<sup>2</sup>, handed down judgment in a case in which it had to decide whether the provisions of the Expropriation Act allows for expropriation (even before a price has been agreed upon by the parties or the court has made a final determination on the price) is constitutionally valid. The constitutionality of other aspects of the Expropriation Act was not challenged, and so the judgment today only deals with a narrow legal issue. The court, in a unanimous judgment authored by Justice Johan Froneman, pointed out that the starting point for constitutional analysis, when considering any challenge under Section 25 for the infringement of property rights, must be Section 25(1). The interpretation of the Section must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. International law must be considered, and pre-constitutional expropriation law must be approached circumspectly. The historical context in which the property clause came into existence should also be kept in mind when determining the scope of Section 25. (**Annexure D** provides a detailed legal analysis of Section 25 in respect of expropriation at nil compensation).

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<sup>2</sup> (CCT 110/10) [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC) (25 August 2011)

## ANNEXURE B

### ECONOMIC IMPLICATIONS OF EXPROPRIATION AT NIL COMPENSATION

#### 1.1. Economic implications for South Africa

Whilst primary agriculture only contributes approximately 2.5% toward South Africa's Gross Domestic Product (GDP), given forward and backward linkages with the rest of the economy, it contributes about 7.5% to South Africa's GDP. A programme of mass expropriation of agricultural land will result in a protracted period in which there is no net new investment in agriculture, which means no growth in agricultural output as well as no growth in the agribusiness sector. This is because commercial farmers, regardless of race, who have not (yet) been expropriated, are unlikely to make new investments into their farm or employ new workers and because the new farmers (beneficiaries of land reform) would also not have the necessary means to immediately invest in these properties.

Also, it is worth noting that the indigent spend a larger share of their income on food than wealthier people do (Statistics SA General Household Survey, 2016 refers), and that a stagnant or shrinking agriculture sector would be accompanied by higher food prices, which will impoverish the poor rather than the middle-income and wealthier people of the country. Whilst it is possible to import many commodities and process them in South Africa, this imposes higher costs and limitations. South Africa would have to give up foreign exchange to import the raw materials that go into the production of the food we eat. Hence, the need for ongoing/increased food production to feed a growing population is critical if food security is to be maintained. According to 2016 Stats SA General Household Survey, already some 22.3% of South Africans are food insecure, with some 11.8% experiencing hunger (Statistics SA General Household Survey, 2016 refers).

The importance of maintaining current and increased food production is highlighted in the graph below, where adverse weather conditions resulted in a sharp increase in food inflation during 2016/2017:



On average, primary agriculture employs 4.5 additional workers for every R1 million in capital invested (compared to 2.94 for the economy as a whole), while the food-processing industry is the most labour-intensive component of South Africa's manufacturing sector. Overall, growth in employment can only happen because of a growth in investment. Therefore, it could be argued that expropriation at nil compensation/expropriation at below market value will lead to a decline in employment. One of the biggest risks in any form of expropriation at nil compensation/expropriation at below market value is the effect it has on general prices in the economy. All prices are the result of numerous interactions between economic agents that result in the ever-changing prices that are attached to everything. Land is simply one form of property and it is impractical to differentiate between land and other economic agents. Property rights are inherently required to establish capital

investment across the entire economy. If one set of property rights is to be affected, the expectation will be that others or all might be affected in the future. It is worth noting that the primary agricultural sector alone currently employs more than 668 000 workers (more than 5% of total employment in South Africa) [National Treasury Multiplier Model 2015 refers]. The sector makes an important contribution to employment and has the potential to create more jobs (the National Development Plan envisages that an additional 1 million jobs be created within this sector) in a country where the unemployment rate is particularly high. It must further be noted that the secondary agriculture sector is more labour intensive than most other industries in South Africa, and therefore contraction of the sector will also shed many more jobs that will not easily be regained.

A modern economy is mainly based on the credit structures of the various role players and their risk profiles, and this structure delivers the yield that is required to compensate for the risks involved. This yield requirement is directly linked to prices. The ripple effects of expropriation at nil compensation/expropriation at below market value will therefore be experienced across all sectors of the economy and will not be limited to agriculture. If one set of prices change due to government action, other prices will adjust to allow the market to reach a new equilibrium. Local investors may hoard their reserves, thereby denying the country the necessary impetus for growth. South Africa is also heavily reliant on net capital inflows and a negative investor climate may result in higher capital outflows that will weaken the rand and increase the cost of imported commodities and equipment as well as increasing inflation and interest rates.

Many assets related to land (houses, for example) will respond by also decreasing in value, while those that are not affected by the changes will, in turn, need to increase. Foreign assets will increase in value, leading to greater demand for them, which in turn will influence the value of the currency. Domestic asset classes exposed to the sector, such as banks, will have much of their underlying value destroyed, which in turn will lead to a reduction in credit, across all sectors. Given the scale of the intervention, it is likely that the impact will be severe as capital rushes to adjust. Below are the few scenarios we consider relevant in contributing to expropriation at nil compensation/expropriation at below market value in South Africa.

## **1.2. Potential impact for South African Banks**

Widespread expropriation at nil compensation/expropriation at below market value has the potential to create systemic risk for the banking sector, as loan agreements concluded with a bank do not typically consider a scenario in which land-based property seizure results in the forcible change of ownership at below market value. If a loan is defaulted upon due to expropriation at nil compensation or expropriation occurs at below market value, it is unclear how the lender will be able to recover the losses incurred on the loans granted. Initial legal opinions indicate that the borrower would still be fully liable for any debt incurred, irrespective of any expropriation of the underlying asset.

### **1.2.1. Impact on the banking sector's assets (loans & advances)**

A sound and secure banking and regulatory system is essential to enable faster and inclusive economic growth. The primary role of a bank is to undertake financial intermediation by transforming the country's savings (deposits) into investment and consumption (loans), thereby facilitating economic growth, employment creation and wealth creation. South African banks are well positioned to weather economic challenges and assist their clients, stakeholders and country alike, in this ever-changing landscape. The financial stability of the banking sector is a valuable national asset, as these lower the sector's borrowing costs and ensures funding availability for government, companies and individuals alike.

While acknowledging the need to fast-track land reform, it is important to understand and evaluate the costs of any policy against the potential benefit or gains of such policy. The current proposal to make greater use of expropriation at nil compensation/expropriation at below market value to accelerate land reform poses a significant risk to the banking industry and therefore the greater

economy, as there are both direct and indirect costs associated with expropriation at nil compensation/expropriation at below market value. These are:

**1.2.2. Direct costs:**

The banking industry is directly exposed to expropriation at nil compensation/expropriation at below market value through the financing provided to farmers, developers, companies and households. The direct costs to banks would be the higher levels of write-off of the debt, as follows:

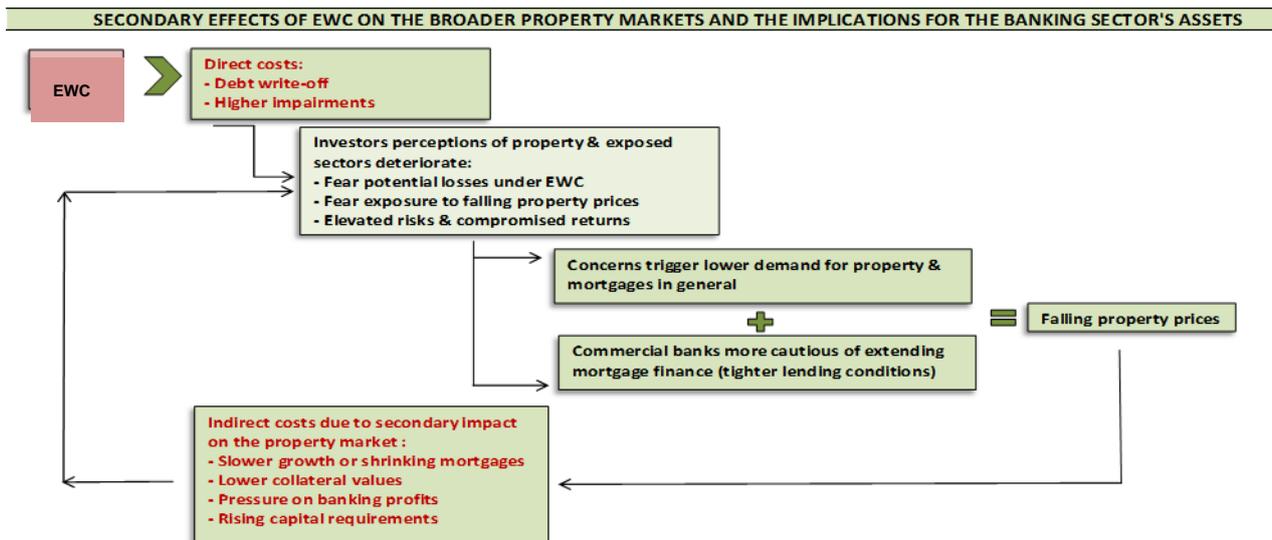
R' billion	Agriculture	Residential	Commercial & Industrial	Total
<b>Total exposure</b>	<b>156</b>	<b>988</b>	<b>469</b>	<b>1 613</b>

The extent of the direct costs to the banking sector would be determined by the types of property affected and the scope or extent of expropriation at nil compensation/expropriation at below market value as well as the banks legal ability to collect residual debts without security. It is also important to note that many products related to these asset classes reside in unit trusts and pension funds whose investors would be similarly impacted.

We highlight that the National Credit Act (2005) prevents a lender from repricing existing debt unless borrowers are in default on their loans. It follows that lenders would be unable to increase interest rates to compensate for the increased risk (high levels of write offs of debt). Lenders are therefore untowardly negatively impacted as their loan pricing is unable to match direct costs that they will expect to incur due to compensation being below market value/at nil compensation.

**1.2.3. Indirect costs:**

Expropriation at nil compensation/expropriation at below market value, even if limited and contained to specific portions of the industry’s mortgage book, would trigger a series of secondary ripple effects within the broader land-based property market, which would in turn damage the value and growth of the industry’s assets, thereby adversely affecting the soundness and stability of the banking sector, as highlighted in the following flow-diagram:



Expropriation at nil compensation/expropriation at below market value is also likely to negatively impact on the appeal of land-based property as a safe and profitable asset, as investment into property necessitates long-term investor confidence. Changing risk perceptions will therefore have

a wider impact on the entire land-based property market and impose further costs, including increased impairments and debt write offs on the banking industry.

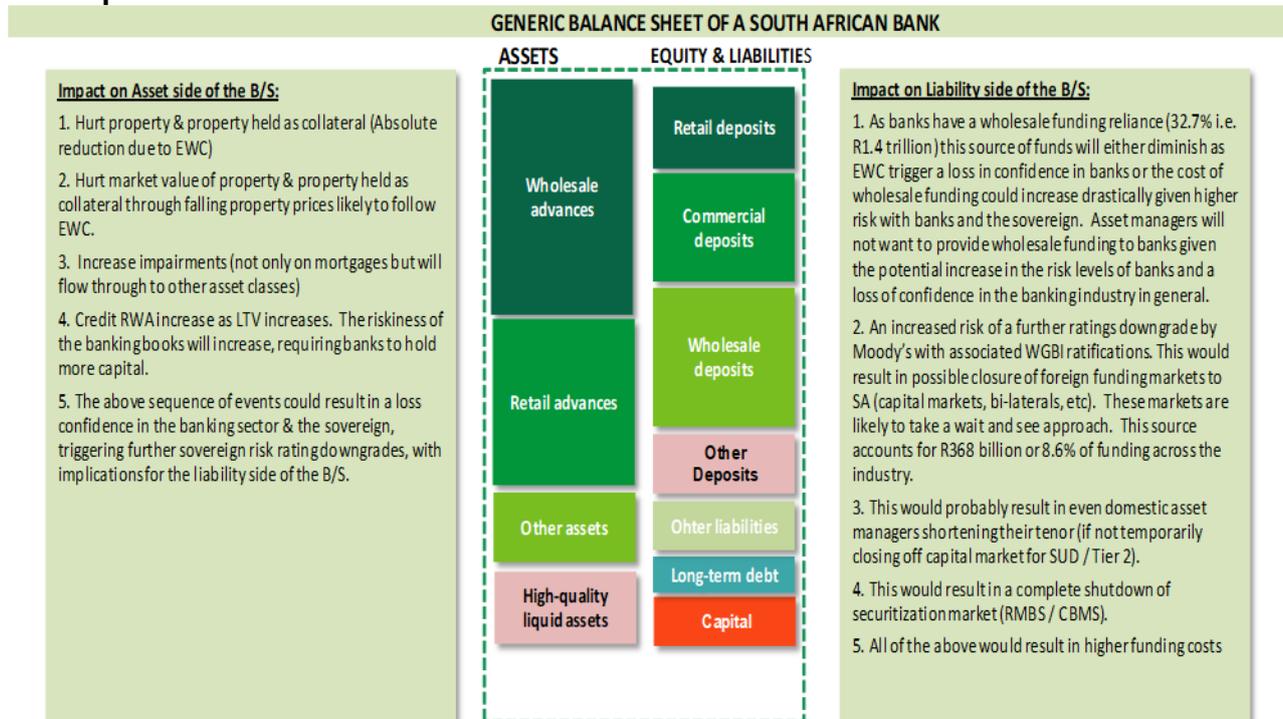
Even if expropriation at nil compensation were to be confined to vacant and unproductive land, it will still impose a severe cost on those individuals and companies whose land is seized. The risk of such losses would also weigh on the minds of all other investors, big or small. Investors are therefore likely to reduce their exposure to land-based property and all related and exposed industries to avoid potentially heavy losses from expropriation at nil compensation and reducing returns caused by falling land-based property prices.

This perception would result in lower demand for land-based property in general (agricultural, residential, commercial and industrial), resulting in a weaker demand for mortgages, thereby adversely affecting the growth in banking assets as well as bank earnings and profits in the process, thereby impacting banking capital and the ability of banks to support general economic growth.

There is also a high probability that banks credit ratings would be re-rated downwards, and going forward, pricing would be increased to reflect the impact of increased losses arising from lower recoveries. This would result in tighter lending standards and higher interest rates being charged to clients, negatively impacting on access to finance, making land-based property less affordable and reducing demand for land, housing and mortgages even further, thereby inflicting multiple and on-going negative impacts on the ability of many South Africans to own their homes.

The severity and duration of this downward spiral will depend on whether expropriation at nil compensation/expropriation at below market value proceeds under an altered or unaltered Constitution as well as the scope, messaging and the way in which this is ultimately implemented. The broader the scope and types of property targeted for expropriation, the greater the damage to the economy and the greater the negative impact on the banking industry.

### 1.3. Impact on a bank's balance sheet



Index: RWA= Risk Weighted Assets; LTV= Loan to property value; B/S= Balance Sheet; WGBI= Citibank's World Government Bond Index; SUD/Tier 2= Senior unsecured debt Tier 2 type; RMBS=Retail mortgage-backed securities, CBMS = Commercial mortgage-backed securities

The primary role of a bank in terms of financial intermediation is to transform short-term deposits (savings) into longer-term loans (to enable consumption and investment). By fulfilling this role, banks are inherently susceptible to liquidity mismatches and consequently funding and market liquidity risks. Moreover, banks fulfil the role of custodian for retail depositors and we therefore have a fiduciary responsibility to ensure that their deposits are protected and that when we on-lend their deposits we do so without placing their deposits at undue risk.

Through the robust Liquidity Risk Management Framework, banks manage the funding and market liquidity risk to ensure that banking operations continue uninterrupted under normal and stressed conditions. The key objectives that underpin Liquidity Risk Management is to always maintain financial market confidence, protect key stakeholder and depositor interests and to meet regulatory liquidity requirements. Expropriation at nil compensation/expropriation at below market value could destabilise this and could become a trigger for a broader financial crisis.

### **1.3.1. Assets**

Expropriation at nil compensation/expropriation at below market value would adversely impact on the asset side of the balance sheet of banks by reducing the amount and market value of land based property and land based property held as collateral. A depressed property market, characterised by high levels of uncertainty and falling property prices caused by expropriation at nil compensation/expropriation at below market value, would also result in increased impairments, probably not only for mortgages but other asset classes attached to land. If current regulatory guidelines are applied to the changed set of circumstances, the outcome will be an increase in the riskiness of the banking industry's books, which would require that banks hold more capital to comply with global (Basel III) and local (The Bank's Act) regulatory requirements. This will undermine credit extension to the entire economy. Falling market values of banking assets, compromised earnings growth and rising impairments could result in a global loss of confidence in the banking sector and the sovereign, triggering further sovereign risk ratings downgrades, which would then spill over into the liability side of the balance sheet of banks.

### **1.3.2. Liabilities**

South African banks rely heavily on wholesale funding, which accounts for about 33% or R1.4 trillion of total liabilities. If expropriation at nil compensation/expropriation at below market value results in a general loss of confidence in the banking industry and causes further sovereign risk ratings downgrades, this source of funding would be compromised. Under such circumstances, this source of funding would diminish, or the cost of funding would increase substantially to reflect the higher risk profile of local banks and the downgrades to the sovereign. Asset managers would also probably withdraw their deposits from the banking sector, as it would be deemed to be too risky to be exposed to unpredictable losses. This could lead to a 'run' on bank deposits that in turn would cause the South African Reserve Bank and National Treasury to have to play the role of lender of last resort, with devastating effects on sovereign balance sheets and growth - like what happened to many global banks in the global financial crisis.

Expropriation at nil compensation/expropriation at below market value may also trigger further sovereign risk ratings downgrades. Both South Africa's foreign and local currency sovereign debt are currently rated one notch below investment grade by two major rating agencies, Fitch and Standard & Poors Global. Only Moody's Investor Services still rate South Africa's sovereign debt at investment grade. All three major rating agencies have expressed concerns over the Parliamentary motion to alter the Constitution and indicated that the outcome will impact on future ratings decisions. If the outcome is perceived as being unfavourable, particularly if the Constitution is altered, then further ratings downgrades are likely to follow, with all three major agencies rating South Africa's sovereign debt at junk status.

Such an outcome would:

- Increase the cost of capital for the state, banks, businesses and households over time;
- Compromise access to funding. This could result in the possible closure of foreign funding markets to South Africa (capital markets, bi-laterals, etc), as these markets take a wait-and-see approach. Foreign funding accounts for about 9% or R368 billion of total funding for the banking sector;
- The impact on the State will be that South Africa's sovereign debt would be excluded from Citi's World Government Bond Index (approximately US\$ 10 billion [source, Standard Chartered Bank]), which would trigger significant forced bond sales and large-scale capital outflows (asset managers are prohibited from investing in the bond issues of countries that are rated as junk status and they would therefore be forced to withdraw from funding into South Africa). This would result in a depreciating rand, rising inflation and higher interest rates.

The pressure on bank earnings and profits (headline earnings, return on equity and dividend payments) brought about by expropriation at nil compensation/expropriation at below market value could convince investors to reduce their exposure to banking shares, potentially resulting in sharp declines in banking share prices and the erosion of the banking sector's capital as well as confidence in the sector. The combined effect of all these developments would be higher funding costs for the banking industry. The most severe outcome would be a large-scale run on deposits, which would result in a liquidity crisis for the banking sector, with similar financial and economic ramifications to those that followed the global financial crisis of 2007/08.

The wider economic effect of expropriation at nil compensation/expropriation at below market value comprising the stability of the banking sector and triggering ratings downgrades to universal junk status would be the erosion of confidence, a falling currency, higher inflation and rising interest rates, which would result in tighter lending conditions, reduced demand for credit, higher bad debts, reduced consumer spending and fixed investment, weaker economic growth and increased unemployment. Banking crises and sovereign risk rating downgrades to junk status are normally followed by long periods of economic stagnation, job losses and recession.

**ANNEXURE C**

**SOCIAL IMPLICATIONS OF EXPROPRIATION AT NIL COMPENSATION**

Sections 27,28 and 35 of the Constitution impose an obligation on the state in respect of the right to food. Expropriation at nil compensation/expropriation at below market value poses a threat to both food insecurity and employment levels within the agricultural and manufacturing sectors.

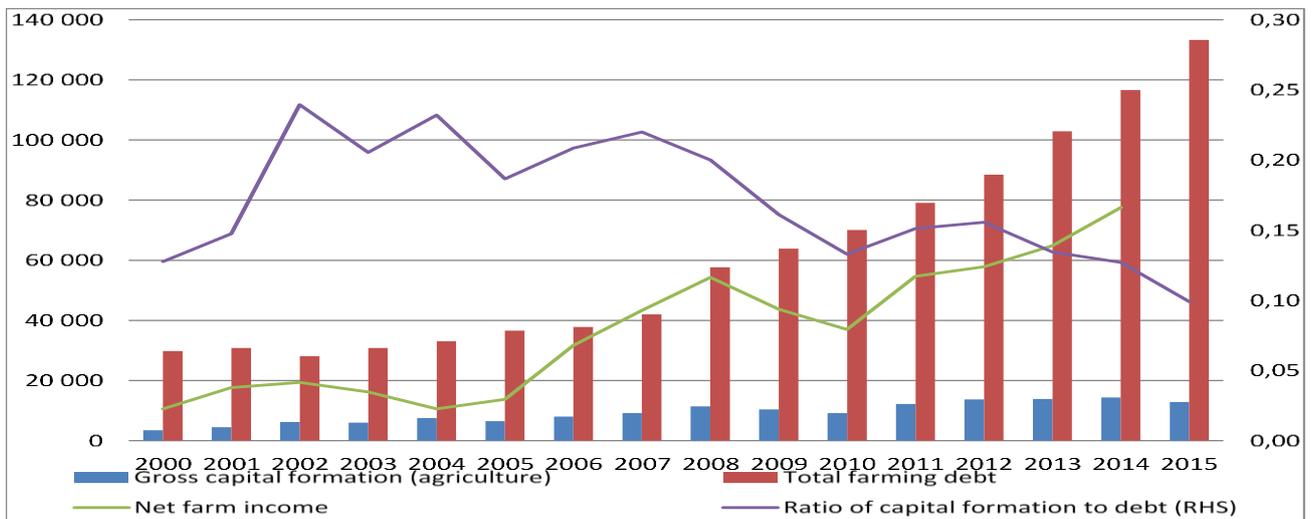
We also envisage that the unintended counter-productive impact that legislation which seeks to provide increased security of tenure to farm workers and their extended families will promote a market shift towards increased mechanisation and the need for the state to provide off- farm housing for farm workers. Further, such legislation negatively impacts on property values as potential buyers are burdened with not being able to obtain vacant possession and beneficial use of agricultural properties. A holistic solution which promotes both increased security of tenure for farm workers and owners is therefore required. At the Agricultural Sector Operation Phakisa, a number of recommendations were made in this regard.

**1. AGRICULTURAL SECTOR PERSPECTIVE**

**1.1. Extension of Credit and Disinvestment**

The major sources of credit for farmers are commercial banks (56%), agricultural cooperatives and agribusinesses (9%) and the Land and Agricultural Development Bank of South Africa (the Land Bank) (30%).

The impact of a large-scale expropriation at nil compensation/expropriation at below market value initiative on food security, the preservation of jobs in the agricultural sector and the fall in GDP would complicate matters further. Given the devastating drought of the last few years there has been little investment in the agricultural sector. We do not expect any further investment in the agricultural sector going forward, if expropriation becomes a reality and/or expropriation at nil compensation creates further policy uncertainty. We expect many farmers to pursue strategies to protect their investment into their farms against expropriation. This may result in farmers restructuring their balance sheets to protect themselves against the potential financial implications of expropriation at nil compensation/expropriation at below market value. Already, whilst short term agricultural profitability has increased, farmers are not investing in their properties due to policy uncertainty, as is highlighted by the graph below. This does not bode well for the competitiveness of the sector (and hence food security) over the medium to long term.



Source: Stats SA

Production within the agricultural sector is undergoing rapid change due to the following market and environment changes:

- Climate change is disproportionately increasing production risk;
- Water constraints are forcing farmers to do more with less;
- There is global adoption of precision agriculture, artificial intelligence and automation to maximise resource efficiency and productivity increases;
- Export market requirements drive an increasing demand for traceability to improve trust and confidence in food safety, sustainability and *fair trade* (alleviate exploitation and human rights abuses);
- Perceptions of convenience and health are changing consumption patterns and hence production;
- There is a global trend towards intensive capital concentration, where large market participants become more vertically integrated and supermarkets dominate within the retail environment;
- Policy uncertainty drives down growth prospects, compelling farmers to adopt innovative diversification strategies;
- Over the past 50 years, the world's population has doubled, and this trend is expected to continue, food and water consumption has tripled, and the usage of fossil fuels has quadrupled, posing a threat to our planet.<sup>3</sup>

These trends indicate that unless farmers make substantive investments into infrastructure, including mechanisation, science-based production and cutting-edge technology, productivity levels will lag their global competitors, leading to lower (and costlier) production, which in turn will result in increased food imports and reduced food exports, with commensurate negative impacts on food inflation and hence both food security and the economy, as discussed earlier in this submission.

## **1.2. Land Reform (security of tenure, land restitution and land redistribution)**

### **1.2.1 Security of Tenure**

Security of tenure is recognized in Section 25(6) of the Constitution, which states that “*a person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or comparable redress.*”

As the High-Level Panel eloquently puts it, “*There is a fundamental correlation between vulnerable forms of tenure and the geography of spatial inequality and poverty that remains entrenched in South Africa.*” Given that approximately 31% of South Africans (17 million people) face tenure insecurity, this poses one of the most pressing challenges that the state needs to urgently address. From a lender perspective, tenure insecurity also poses access to finance challenges which need to be overcome, if such property occupiers are to improve their living conditions and accumulate wealth through leveraging finance to increase both the means of production and asset accumulation. Currently, private sector lenders can provide production loans to commercial farmers only, and there is therefore a need to broaden and diversify such production loans, which we submit will require a public/private partnership to reduce lender risk to viable levels, e.g. crop insurance, risk enhancers etc.

In respect of loans for the provision of infrastructure and/or other term finance, insecurity of tenure is particularly problematic, as banks/lenders place reliance on property as security for such loans. It follows that security of tenure is therefore also central to such infrastructure and production

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<sup>3</sup> Source World Wildlife Foundation

improvements, including food security. Similarly, a public private partnership to overcome this obstacle suggests itself (in order for bank risk to be reduced to acceptable levels), in the absence of security of tenure.

The High-Level Panel and the Agricultural Sector Operation Phakisa identified challenges surrounding the implementation of land redistribution and restitution and many of these challenges can be ascribed to gaps in the legislative framework. An analysis of these reports, which are extracted from the High-level Panel Report highlights the following:

### **1.2.2. Land Restitution**

Based on the High-Level Panel report, only 75 000 land restitution claims have to date been settled and that there are still more than 7 000 unsettled and more than 19 000 un-finalised claims from before the initial 1998 land claims cut-off date. Based on their calculations, at current progress levels, it will take another 35 years to finalise these claims.

In respect of claims received for the second, post 1998 period, those claims that have already been lodged will take 143 years to settle, and if the expected 397 000 claims which are still expected to be received are considered, it will take 709 years to complete land restitution.

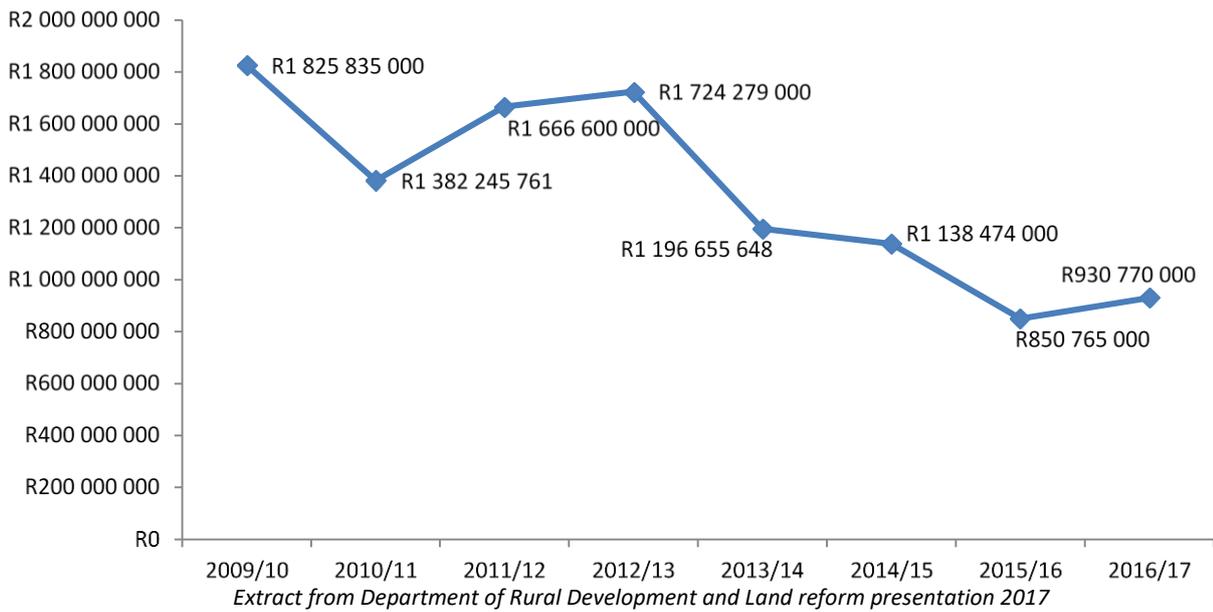
This is an untenable situation for both land claimants and property owners alike. On the one hand this represents an injustice for claimants, and on the other hand such property owners faced with 'tenure insecurity' will not invest in their properties, with commensurate negative impacts on productivity and food security, as discussed above. Moreover, with many of these land claims encroaching into urban areas, this poses a material and potentially systemic risk to commercial banks. We accordingly believe that a viable and alternative solution to restitution claims needs to be urgently found.

The Restitution of Land Rights Act allows for beneficiaries to choose between restoration of land, alternative land and financial compensation if a claim is not disputed. The nature of land restitution is such that several people or several communities may have equally valid claims to the same property. Representatives at the Agricultural Sector Operation Phakisa identified this as a stumbling block as the practice has been established that all claimants must be joined into a single, 'manufactured' grouping and jointly indicate which option they would prefer. Often the claimants have only this single connection to a historical dispossession in common but are then required to either opt for financial compensation or work together in a communal property institution (trust, CPA, traditional council etc.) if the land is restored. This process can later manifest itself through internal conflict which presents substantial governance challenges. To remedy this situation, we endorse the recommendation emanating from Operation Phakisa that individuals that are dissatisfied by the decision of the majority should be able to 'opt out' of the communal property institution. Aside from financial compensation, the Act should make provision for in-kind compensation such as a housing grant or a bursary for higher education.

### **1.2.3. Land Redistribution**

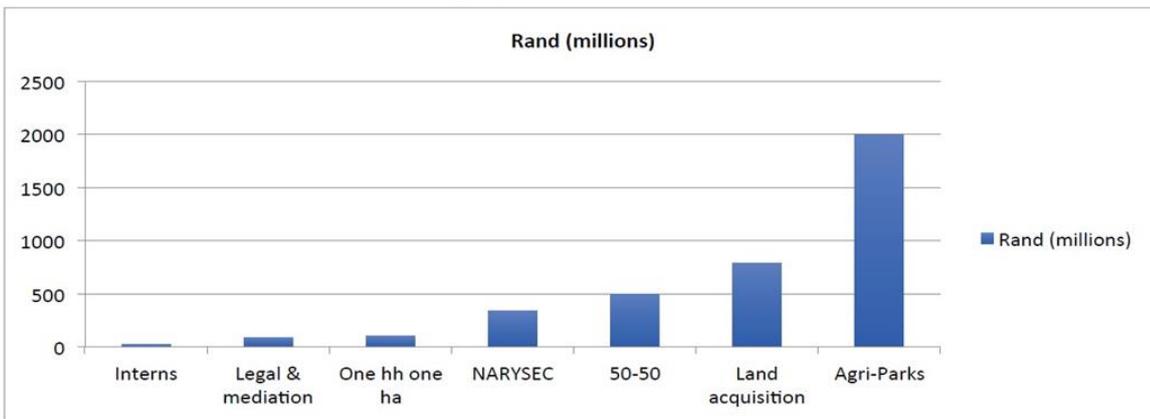
The High-Level Panel recommended that framework legislation be enacted to guide the interpretation of all land reform programmes and further regulate key aspects of the redistribution programme. The Banking Association endorses this recommendation. We made a number of proposals in this regard to the Constitutional review Committee which we would make available to the *Ad Hoc* upon request.

It is however disconcerting to note from the High-Level Panel report that there appears to be no alignment between budget allocations and land redistribution, and that the budgetary woes experienced at District Land Reform Committees (DRRC's) are due to the real and nominal allocation of funds for land acquisition, which has decreased year on year since 2009.



To make matters worse, aside from the overall budget for land acquisition being reduced year on year, a substantial portion of the budget intended for land acquisition is being redirected towards rural development targets such as Agri-parks. Figure 3.3 (extracted from the High-level Panel Report) reflects that more than half of the funds intended for land acquisition is spent on Agri-parks, the strengthening of real rights of workers (50/50) pilots and skills development for the youth and unemployed within rural areas (NARYSEC).

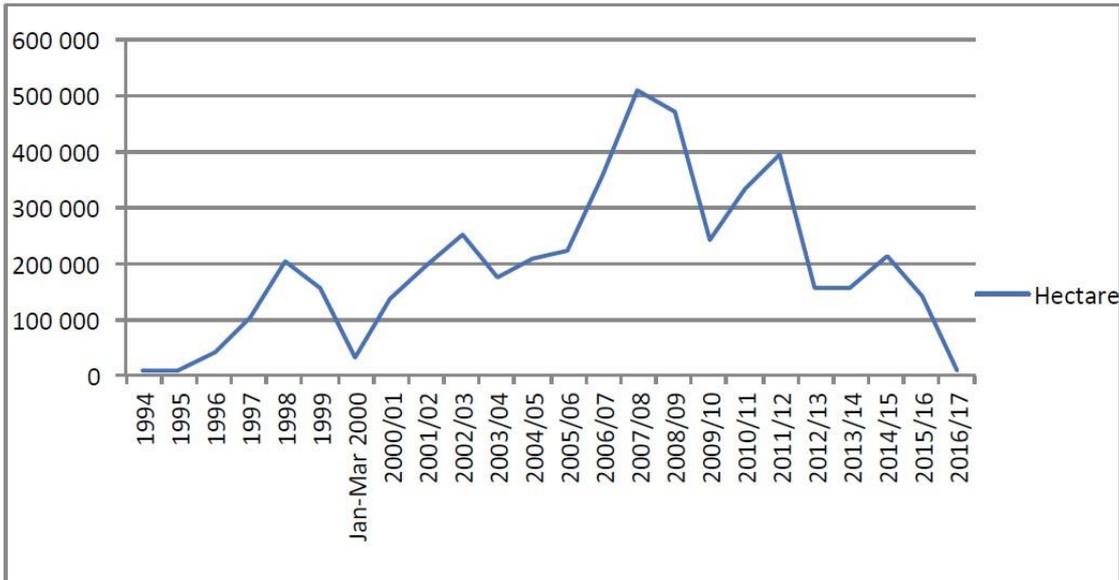
**Reallocation of land reform budget, 2016/17**



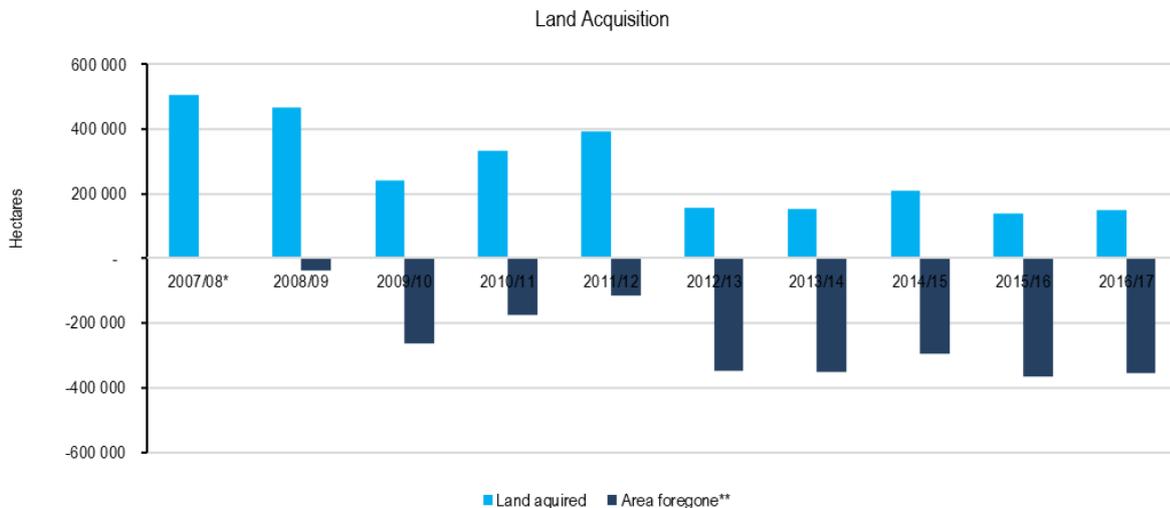
Source: Keep and Hall 2016, from MRDLR 2016

The nett result is that reduced budgetary allocations coupled with the addition of an unfunded mandate to pursue projects such as Agri-Parks, have resulted in the actual number of hectares acquired for transfer to rapidly decline from 2009 onwards. This is best illustrated by the graph (extracted from the High-level Panel Report) below.

**Amount of land transferred through land redistribution, in hectares per year**



In the Fiscal and Finance Commission’s report delivered to the Portfolio Committee on the 4<sup>th</sup> of October 2017, it was found that spending on the DRDLR’s Agricultural Land Holdings Account decreased by 17% in real terms in 2017 from 2013. The commission also found that substantial amounts of the budget have been diverted away from land acquisition in favour of administration.



In collaboration with the Agricultural Business Chamber based on figures provided by DRDLR, an estimate of the number of hectares that could have been acquired if these funds were not reprioritised are as follows:

Therefore, it could be argued that had the state not prioritised the funds to other uses and kept its budget at levels for the 2007/08 financial year, an additional 2.3 million hectares would have probably been acquired from the market.

Further, The Banking Association in collaboration with the Agricultural Business Chamber created a land redistribution financing model in 2015, premised on a funding partnership with DRDLR, which would, through leveraging private sector funding, have doubled this acquisition rate to approximately 5.3 million hectares (an additional 6.5% of commercial agricultural land). Unfortunately, the proposed ‘blended finance’ model was never incepted by DRDLR, presumably due to DRDLR funding

constraints, as the model was 'in principle' supported by DRDLR as it was aligned to meaningful land reform best practice. Further, the private sector is in the process of creating an Agricultural Development Agency in partnership with all key stakeholders (including government) which seeks to fast track private sector led agrarian and land reform. This is expected to be launched end February 2020.

The Fiscal and Finance Commission report identified the need for a review of land reform programmes as their report detailed the failures of current policy frameworks. This was confirmed by the High-Level Panel Report, which called for a review of existing land reform programmes. Regarding the issue of expropriation without compensation, the High-Level Review Panel stated as follows:

"The Panel is reporting at a time when some are proposing that the Constitution be amended to allow for expropriation without compensation to address the slow and ineffective pace of land reform. This at a time when budget for land reform is at an all-time low at less than 0.4% of the national budget, with less than 0.1% set aside for redistribution. Moreover, those who do receive redistributed land are made tenants of the state, rather than owners of the land. Experts advise that the need to pay compensation has not been the most serious constraint on land reform in South Africa to date - other constraints, including increasing evidence of corruption by officials, the diversion of the land reform budget to elites, lack of political will, and lack of training and capacity, have proved more serious stumbling blocks to land reform."

#### **1.2.4. Country Studies**

There are numerous country case studies where land reform initiatives have been undertaken post colonialism, and which can serve for referencing purposes. From a developing country perspective, we submit that Brazil represents a country whose legacy was not unlike that of South Africa. It has however achieved a high level of success regarding land reform and at the same time it has become one of the world leaders in agriculture. An overview of Brazil's land reform initiatives and agriculture transformation over the past three decades are as follows:

There are few countries which can compete with Brazils agricultural sector. It is one of the largest exporters of a diversity of agricultural products. It has built a resilient and highly lucrative agricultural industry.

However, Brazil did not always have a thriving agricultural sector and it has only been in the last 30 years since embarking on a plan to turn around its agricultural sector, that it has achieved this success.

For the initial part of the last 30 years, state-led agrarian reform was adopted with little success. However, this period laid the foundation for the successes achieved in the latter part of this era, were agrarian reforms were market-led with little intervention from the state.

Before examining the various measures, Brazil implemented, it is important to understand the state of the agricultural sector before agrarian reform was implemented. Brazil's agricultural sector was hampered by two major issues:

- Farming was characterised by rudimentary farming techniques, which resulted in low yields and environmental degradation;
- Land in Brazil was owned by a minority of the population.

Transformation of the sector was central to agrarian reform. Government, under pressure from society, created several mechanisms and initiatives to increase access to land and farming. Land reform in Brazil is achieved through both market-led and state-led approaches. The market-led approach follows the 'willing buyer, willing seller' model, where the buyer is supported by a government subsidised loan to acquire the land. The state-led approach is informed by the Constitution which allows for land to be expropriated with compensation. Expropriation is limited to

land which does not fulfil a social function (unproductive land). Individuals, and more often associations, identify large tracts of land which are not deemed to be fulfilling a social function. They then apply to the courts for the land to be expropriated. The Court decides if the land should be expropriated or not. In addition, government transferred state owned land to landless peasant farmers. It is important to note that land reform beneficiaries receive title deeds to their land. This is important for two reasons; firstly, it provides them with security and comfort that the land will not be taken away. Secondly, a title deed allows property to be used as collateral for loans.

Some 30 years ago, Brazil prioritised agriculture as its most important economic driver. It did not limit agrarian reform to merely land reform, but it had a holistic approach to agrarian reform, which is not exclusive to land reform beneficiaries. The importance of financial and technical support is also recognised for beneficiaries of land reform programs. Brazil begun its agrarian reform by initiating a program to modernise and advance farming practises in the country. Research departments were set up by the state to advance agriculture. The research department is divided into research units which examine varying aspects of the agricultural sector e.g. some research units focus on crop production, while others focus on the diverse climatic conditions and which crops are best suited to such climatic conditions. Such research has led to the development of crops and livestock which thrive in the Brazilian environment. Consequently, yields increased to world record breaking levels. At the same time, farms were modernised. They moved from labour extensive practises to technology driven production and mechanisation. At the same time government invested in the entire agricultural value chain. This resulted in multiple employment opportunities and benefits within secondary agriculture (agri-businesses etc.).

Finance is critical for modernisation and for land reform to be a success. Government created innovative credit mechanisms to finance the agricultural sector. A popular form of finance is the 'rural credit note' which allows a farmer access to credit in the short to medium term. Farmers issue a note which states the price which the farmer is willing to sell the crops at, and the date when the produce will be delivered. The produce needs to meet predetermined quality and quantity, failing which they incur penalties. The farmer receives payment at the time of issuing the note. Credit notes are also used by businesses who sell agricultural products to farmers. A farmer can issue a credit note to these companies and instead of receiving cash, the farmer will receive agricultural products which is needed at the time (such as fertiliser). Credit notes are also offered to individuals who live in the city to encourage rural investment. The note is registered with the authorities to prevent fraud and/or the farmer from selling the crop more than once. Moreover, the credit notes are tradable bonds. Government also provides finance to small-scale farmers and other marginalised groups, including indigenous people and beneficiaries of land reform programs. It is only accredited schemes post the 'state-led' period which receive loans with subsidised interest rates (land reform beneficiaries). Such beneficiaries are further supported with technical assistance and rural extension services.

One of the most important aspects of their agrarian reform process is the state's holistic approach. Agrarian reform is not restricted to one department of government, but rather there is policy alignment across multiple government departments and institutions, which significantly contribute to the success of the agricultural sector. This is evidenced in how land tax is derived from farmland. Tax is directly correlated to productivity and the size of the property. This taxation policy is used to encourage productivity and not to financially burden small producers or make productive larger farms unviable. Integration does not only occur amongst government departments and institutions, but also between government and the public. Public partnerships occur between government and farmers to address critical issues, such as the development of infrastructure needed for the agricultural sector. If one examines the success of the Brazilian agricultural sector, its economic contribution and the advances of its social agenda, one may argue that Brazil achieved success in balancing its resources, needs and outcomes. The system continues to promote the sustainable addition of more land reform beneficiaries each year, without putting the entire sector at risk.

One must also recognise the contribution of family farmers, as well as the large farms that are the most productive. Farming cooperatives also play an important role in ensuring the survival of smaller

family farms, as cooperatives negotiate on behalf of several small farmers which allows the smaller farms as a collective, to be active contributors to the market.

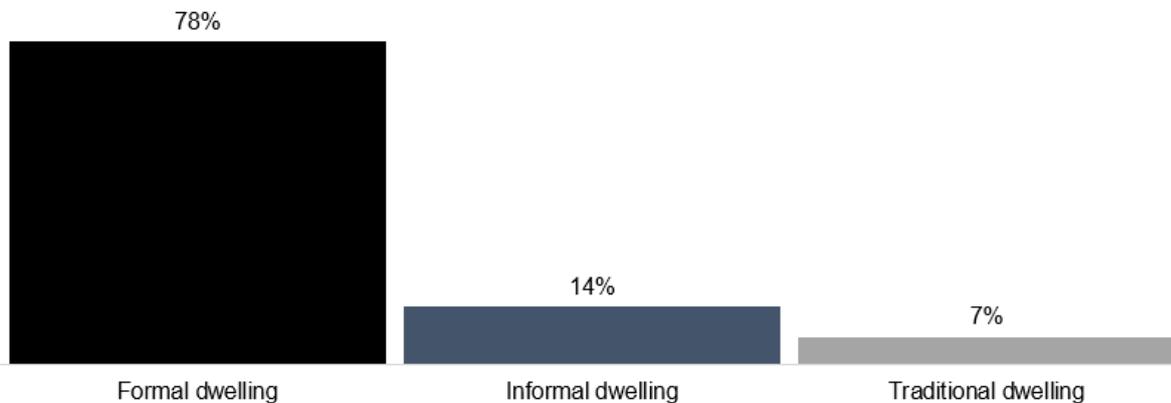
## 2. Residential and Commercial and Industrial Sector Perspective

### 2.1. Market Dynamics

In the context of changing Section 25, it is important to sketch the context and consider the impact that this will have on the residential/commercial and industrial property market as well as financial institutions. Both bonded and unbonded property values would be affected by a change in property rights which could pose dire consequences for household and business sector balance sheets alike and introduce systemic risk for banks if not carefully managed. In addition, financial products linked to such property values are held by many asset managers and pension funds. By way of example, the total value of residential properties in South Africa alone was estimated at R5.8 trillion in the formal sector Property Sector Charter Council 2015 report refers) [Now estimated at R7 trillion]. Residential property constitutes 59.5% of total household debt (South African Reserve Bank report 2017, refers). These numbers suggest that more than R4 trillion of equity of the household balance sheet is invested in residential property. A significant proportion of this value is at stake for the financial health of consumers if residential property values are negatively affected. A similar position would pertain for the commercial and industrial property sector.

Based on the Statistics SA General Household Survey, 2016, the number of households in South Africa is estimated at 16.7 million, with only 6.5 million properties in the formal sector. The housing backlog in South Africa therefore remains a mammoth challenge as does a well-functioning residential property market, which includes access to finance, which is key in addressing the housing needs in the country.

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Some 7, 7 million live in informal settlements (approximately 1.2 million households). Given the magnitude of inadequate housing conditions in urban areas, we are therefore of the view that land reform should not (and cannot) be contained to only rural land. The land crisis is more pressing in the urban context, which is evidenced by land invasions having all been on urban/peri-urban land over the past number of years. Whilst the Department of Human Settlements (DHS) has made noteworthy progress in housing the poor since democracy, the ability to eradicate housing backlogs has failed. In 1994, there were some 300 informal settlements, and these have since grown to approximately 2700, with housing backlogs having doubled over this period. Whilst the delivery of some 4 million subsidy houses is a noteworthy achievement, increased urbanisation levels (currently 60% and expected to grow to some 70% by 2030), coupled with smaller household sizes (now 3.5) has resulted in the housing crisis currently before us.

We believe that this necessitates that the state urgently reviews its urban human settlements policy and legislative frameworks should it seek to eradicate housing backlogs over the next decade or so. The Banking Association signed a Memorandum of Understanding with the Department of Human

Settlements in 2005 and 2015, wherein it committed itself to deepening its penetration within the lower income market and to accelerate housing delivery, amongst others. Such a commitment is however premised on an adequate supply of suitable stock, ownership rights, applicant credit worthiness and affordability levels (all of which are problematic). However, any threat to the value of urban property as security would make mortgage finance to the market less affordable and at the same time threaten the ability for banks to participate and support housing reform on current commercial terms.

## 2.2. Construction/Building Industry

An important component of a well-functioning property market is the generation of new residential and commercial and industrial property supply. This applies not only to new units being introduced to the market, but also to the construction industry. Negatively affecting the property rights of undeveloped agricultural, residential or commercial and industrial zoned property, where this is earmarked for development at a later stage, will discourage developers from participating in the South African property market and in doing so constrain the supply of new units (such properties are distinct from abandoned properties and/or unproductive agricultural properties). Currently the number of new units being constructed within the residential property market is estimated at approximately 40 000 non-subsidy new units and a further 60 000 subsidy (RDP) units per annum, with the World Bank estimating that there is an increase of 266 000 new households per annum.

The housing supply gap is therefore only partially being addressed by the development of new stock. The importance of the development industry and the protection of property rights on undeveloped property earmarked for future development must therefore be protected. We accordingly propose that all residential and commercial and industrial property, including agricultural property earmarked for future development be excluded from consideration for expropriation at nil compensation/expropriation at below market value due to the risk of a significant negative impact on the market/banks/pensions/savings as highlighted. Further, should land restitution claims encroach onto residential/commercial/industrial developed properties, we recommend that either a cash settlement or alternatively undeveloped land be allocated to such claimants.

We also mention that of the estimated 4 million government subsidised (RDP) houses that have been delivered since 1994, only 1.8 million of these properties are formally registered on the Deeds Registry and so security of tenure is problematic within the urban RDP market. Most of these properties are also subject to restrictive pre-emptive conditions, including an eight-year prohibition on selling or letting, and a condition that there may be only one dwelling per property. These conditions restrict the legal transfer of these properties for an extended period, thereby limiting access, choice, mobility, financing and hampering formal sales activity.<sup>4</sup>

We emphasise that expropriation at nil compensation/expropriation at below market value within the residential/commercial and industrial property sector would result in banks:

- re-determining their risk appetite relative to residential and commercial and write off industrial property, as loans that are unsecured carry a far greater risk in non-performance than loans that are fully secured;
- consuming more capital overall because of an increase in unsecured lending. The current regulatory environment requires banks to hold more capital should loans not be secured with appropriate collateral. Whilst it can be argued that banks are well capitalised, this consumption of more capital places pressure on banks to determine where its resources are best placed. This determination may lead to the banks not supporting residential and commercial/industrial property loans at current levels;
- incurring a higher cost of funding and hence adding this increased cost to interest rates which they charge; and

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<sup>4</sup> Source: CAHF (Centre for Affordable Housing Finance in Africa)

- changing their overall lending criteria.

This change in lending criteria may create a situation where potential new borrowers will be unable to enter the market, as lending criteria would be more stringent and costly and landlords will be forced to pass on increased borrowing costs to their tenants, many of who may not be able to afford these.

In conclusion, the economic loss that would be sustained on current residential and commercial finance loans will be significant given the overall exposure to banks. Whilst we appreciate that not all residential/ commercial and industrial property is destined to be expropriated or will be expropriated, we are concerned that this could introduce systemic risk when market perceptions concerning such ownership is altered. This is more fully addressed in Annexure B (Economic Implications of expropriation at nil compensation/expropriation at below market value).

### **2.3. Regulatory and Legislative constraints**

Sections 78 – 82 of the National Credit Act (NCA), together with Regulation 23A of the NCA stipulate that credit providers must ensure that all applications from individuals for credit must be assessed and comply with the specific provisions preventing over indebtedness and reckless lending. Whilst the aim of these provisions is laudable, they are problematic in that historically disadvantaged persons that fall within the lower income earnings bracket or informal employment sectors, are not ordinarily able to meet the criteria.

The Subdivision of Agricultural Land Act prohibits the subdivision of agricultural land unless consent from the Minister of Agriculture is obtained. In many instances, land that can be made available for low household income residential housing cannot be sold as rezoned residential land due to this restrictive legislation.

The Transitional Leadership and Governance Framework Act (TLGFA) of 2003, as well as the Communal Land Rights Act of 2004, have been interpreted by courts in a way that gives traditional leaders, especially in former homelands, considerable powers to unilaterally make decisions pertaining to land.

The Minerals and Petroleum Resources Development Act, 2001, further assigns any decision for development on the affected land to the sole discretion of these traditional leaders. This impedes the accelerated development of the transfer of land in the former homelands.

The Spatial Planning and Land Management Act does not allow for greater flexibility to enable regulation that can be more responsive to diverse realities of South Africa, where land is specifically earmarked for certain use.

The Deeds Registries Act of 1937 does not contain an effective mechanism to give previously disadvantaged poor persons who have uninterrupted and exclusive use on communal land, access to title.

Importantly, there is a lack of implementation of the Government Immovable Asset Management Act 19 of 2007, which allows for state owned property to be used for low income housing.

## ANNEXURE D

### LEGAL IMPLICATIONS OF EXPROPRIATION AT NIL COMPENSATION

#### Chapter 2, section 25 of the Constitution (The Property Clause) and the Motion passed in Parliament

Section 25 of the Constitution states that (our underlining for emphasis):

1. *"No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
2. *Property may be expropriated only in terms of law of general application:*
  - a. *for a public purpose or in the public interest; and*
  - 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.*
3. *The amount of the compensation and the time and manner of payment must be just and equitable, reflecting the equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-*
  - a. *The current use of the property;*
  - b. *The history of the acquisition and use of the property;*
  - c. *The market value of the property;*
  - d. *The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*
  - e. *The purpose of the expropriation.*
4. *For the purposes of this section-*
  1. *The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and*
  2. *Property is not limited to land.*
5. *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
6. *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
7. *A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of parliament, either to restitution of that property or to equitable redress.*
8. *No provisions of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).*
9. *Parliament must enact the legislation referred to in subsection (6)."*

The resolution that was passed in Parliament, aimed at enabling the process of expropriation at nil compensation, noted, at paragraphs 6 – 9 of the resolution, that (our underlining for emphasis):

*"(the House)*

- (6) *recognizes that the current policy instruments, including the willing buyer willing seller policy, and other provisions of section 25 of the Constitution may be hindering effective land reform;*
- (7) *notes that in his State of the Nation Address, President Cyril Ramaphosa, in recognizing the original sin of land dispossession, made a commitment that Government would continue the land reform programme that entails expropriation of land without compensation, making use of all mechanisms at the disposal of the State, implemented in a manner that increases agricultural production, improves food security and ensures that the land is returned to those from whom it was taken under colonialism and apartheid and undertake a process of consultation to determine the modalities of the governing party resolution;*

- (8) further notes that any amendment to the Constitution to allow for land expropriation without compensation must go through a parliamentary process as Parliament is the only institution that can amend the Constitution; and
- (9) with the concurrence of the National Council of Provinces instructs the Constitutional Review Committee to –
- (a) review section 25 of the Constitution and other clauses where necessary, to make it possible for the state to expropriate land in the public interest without compensation, and in the process conduct public hearings to get the views of ordinary South Africans, policy-makers, civil society organizations and academics, about the necessity of, and mechanisms for expropriating land without compensation;
  - (b) propose the necessary constitutional amendments where applicable with regards to the kind of future land tenure regime needed; and
  - (c) report to the Assembly by no later than 30 August 2018.;”

The mechanism envisaged by the resolution to achieve expropriation at nil compensation is to amend the Constitution, specifically Section 25 thereof, which requires “just and equitable” compensation to be paid whenever property is expropriated.

We are of the view that there is no legal reason why Section 25 of the Constitution needs to be amended to remove the requirement for compensation to be paid, to achieve the goal as set out in the resolution, especially if one considers the underlined provisions of Section 25(2), (3) and (4) above.

The expropriation of land required for the purposes of redressing the dispossession of land from Black property holders, and that this purpose would constitute ‘for a public purpose or in the public interest’, as set out in Section 25 (4)(a). Furthermore, Section 25(3) states that the amount of the compensation that must be paid should be “just and equitable”, for the reasons set out in that subsection. There is no requirement that the amount of compensation must be at market value (this is but one of the criteria to be considered in 25(3)), or to an amount negotiated on a “willing buyer/willing seller” basis. The latter concept has evolved through policy and application but is not a stipulated requirement of the Constitution. “Just and equitable” compensation could arguably range from market value, to zero value, depending on the specific circumstances of each case.

The provisions of Section 25(8), as set out above, read with section 36(1) are also applicable here. Section 36 (1) of the Constitution dealing with the limitation of rights provides as follows (our underlining for emphasis):

36 “*Limitation of Rights*

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) *the nature of the right;*
  - (b) *The importance of the purpose of the limitation;*
  - (c) *The nature and extent of the limitation;*
  - (d) *The relation between the limitation and its purpose; and*
  - (e) *Less restrictive means to achieving the purpose.”*

The implication of these provisions is that any rights enshrined in the Bill of Rights may be limited by the state by enacting a law of general application (such as one dealing with expropriation of land catering for compensation to be paid, or not paid, according to certain criteria as set out in Section 36(1)). It is suggested that this mechanism could also negate the requirement to carry out a wholesale, or even partial, amendment of Section 25 to achieve the expropriation at nil compensation goals set out in the Parliamentary resolution as passed.

It is acknowledged that any legislation that is passed by Parliament to give effect to expropriation at nil compensation would nevertheless still have to meet the requirements of Section 25 as they currently stand, or if inconsistent, would have to be justified in terms of Section 25(8) and/or Section 36 of the Constitution, if it is to pass constitutional muster.

The High-Level Panel Report examines existing land reform legislation. The Report is critical in these discussions as it examines land reform in South Africa and the existing legislation relating to this. The Report states that land reform has been slow; however, rather than an amendment to the provisions of Section 25 of the Constitution, it notes that the rights in Section 25 are not being promoted, enforced and protected and this should be addressed. It also highlights the current impediments to land reform and current deficiencies in the implementation of land reform.

The Banking Association supports the following submissions made in the Report that:

- The State has not adequately utilized the powers it already has in terms of existing legislation to expropriate land for land reform purposes; and
- The State has not used the provisions in the Constitution that allow for compensation to be below market value in particular circumstances.

Their findings have been publicly supported by amongst others, former Constitutional Court Judges Sachs and Moseneke, that there is no need to amend Section 25 to give effect to expropriation at nil compensation.

In addressing the submissions above, we support Recommendation 3.1. in the Report, which states, *inter alia* that:

- a new framework legislation be adopted to address and define the meaning of equitable access to land, sets targets and reporting requirements for redistribution; and
- addresses the deficiencies in law and policy, and provides requirements for transparency, and other measures that promote good governance of the land reform process.

We also concur with the recommendations that the proposed law of general application must provide effective mechanisms for transparency and accountability for the implementation of land reform policies, to allow the public and their representatives in Parliament to assess whether the executive arm of the state is delivering on its constitutional commitments. We refer the Parliamentary *Ad Hoc* Committee to the High-Level Panel Report which provides suggestions on how such transparency and accountability is to be achieved and emphasise the central importance of ensuring that the main beneficiaries of land reform are the poorest and most vulnerable sectors of society.

In addition, we propose that an independent body be established to ensure fairness, and that equity remains at the forefront of land reform in general and more specifically in respect of land expropriation.

### **The impact of Expropriation at nil compensation on Property Rights**

Expropriation at nil compensation in its current form does not on face value seem to take into consideration the security rights (real rights) mortgagees have over immovable property. A mortgage bond over immovable property is real security that is registered with a deeds office in the jurisdiction in which the immovable property is located and in accordance with the Deed Registries Act 47 of 1937 (as amended).

A mortgage bond registered in favour of a mortgagee affords the mortgagee certain rights which includes the following:

- The mortgagee has a right of preference where a sale of the immovable property has been levied (even where it has been levied by other creditors). Similarly, if a Borrower is declared

- insolvent, the mortgagee is to be regarded as a preferent creditor over all other creditors in relation to the immovable property;
- The mortgagee has a right of pursuit (*ius persecuendi*) to follow the property into whomsoever's hands it may pass. The mortgage runs with the property and cannot be defeated by alienation, leases, or servitudes. If the mortgagor wants to terminate the mortgage bond, he/she can only do so with the prior written consent of the mortgagee. In the Banks case, a mortgage can only be cancelled upon the principal debt being discharged; and
  - The mortgagee has the right to foreclose. Firstly, the mortgagee obtains judgment specifically declaring the immovable property executable. Then, the mortgagee, as judgment creditor, issues a writ of execution against the mortgaged property, instructing the Sheriff to levy the execution immediately.

At this stage it is not understood if any of these rights will be affected and if property law legislation in South Africa would need to be amended to cater for the changes. This will need to be fully investigated.

Security aside, we understand that in the event a property which that bank has taken security over is to be expropriated, such an event will be considered as default under the loan and will have the following consequences:

- the repayment of the loan at the election of the Bank could be accelerated and this would place the borrower in a situation whereby he/she would need to repay the loan far quicker than what was anticipated;
- the immovable property could, at the election of the bank be foreclosed upon as set out above; and/or
- cause default in other loans (not only residential or commercial property finance loans) which has the potential impact of financially crippling the borrower as those loans could be accelerated at the election of the bank and security executed against same.

## ANNEXURE E

### FOOD SECURITY IMPLICATIONS OF EXPROPRIATION AT NIL COMPENSATION/ EXPROPRIATION AT BELOW MARKET VALUE

Sections 27, 28 and 35 of Chapter 2 of the Bill of Rights, impose an obligation on the State in respect of the right to food to:

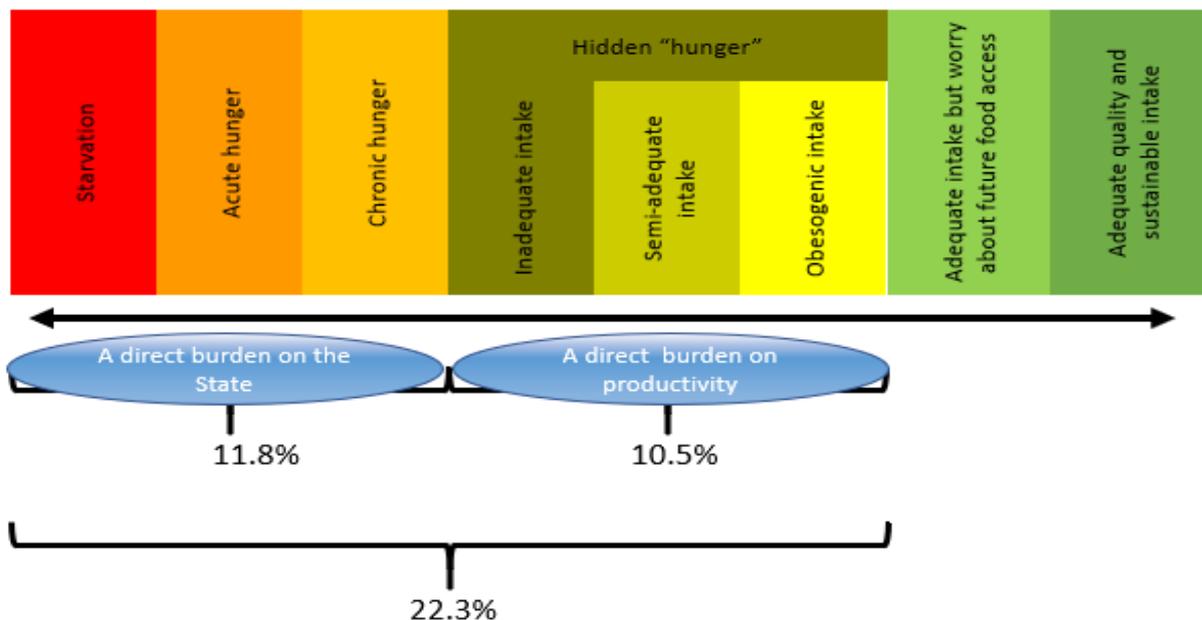
- Section 27: The right to sufficient food (progressive realization by the State within available resources (Section 27(1)(b));
- Section 28: In respect of children (18 years or younger), the right to basic nutrition (no limitation on the State's obligation) (Section 28(c));
- Section 35: Detained persons (including sentenced prisoners), the right to adequate nutrition (no limitation on the State's obligation) (Section 35(2)e)).

Food security exists when people always have physical and economic access to sufficient, safe and nutritious food to meet their daily needs and food preferences for an active and healthy life. There are four dimensions to food security, namely:

- Availability (production and distribution);
- Access (income, purchasing power, food on the shelves);
- Stability (resilient livelihoods and production, seasonable availability);
- Utilisation (nutrition, food safety, health care and sanitation).<sup>5</sup>

In South Africa, Stats SA General Household Survey, highlighted that in 2016, some 22.3% of South Africans were food insecure.

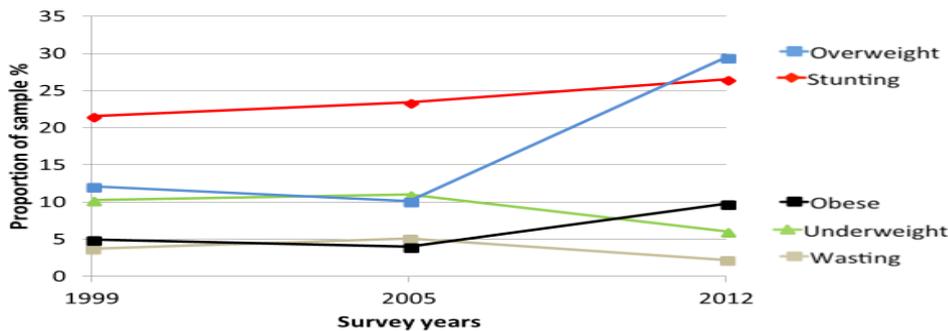
### The Food Security Continuum



<sup>5</sup> Source: UN Committee on World Food Security, 2012

**The impact that such food insecurity has on children is however far more marked:**

## Child nutrition outcomes



Sources: NFCS 1999, NFCS 2005, SANHANES 2012

© Prof Sheryl Hendriks (Institute for Food, Nutrition and Well-being, University of Pretoria) and  
© Prof Nic Olivier (Constitutional, Governance, Policy and Legal Consultant), 8 September 2015

South Africa is rated at number 44 out of 113 countries by the Global Food Security Index in terms of food security, despite the above inadequacies. On the other hand, Zimbabwe prior to its radical land reform programme, did not suffer from food insecurity, as it was a net exporter of food. It has since slipped to being rated number 112 out of 113 countries. The importance of well managed land reform that does not threaten food security cannot therefore be over-emphasised. Many of the land reform recommendations as contained within the High-level Panel Report, should therefore not only be seen within the land reform context, but in the absence of improved land reform legislation, security of tenure, post-settlement, mentorship and training support, the negative impact of such inadequacies being evident in food insecurity, where some 12.5 million people are food insecure.

## Employment

This topic has been partly covered within the “Economic Perspective” Annexure. Expropriation at nil compensation/Expropriation at below market value could however threaten the employment levels of more than 1 million domestic workers and gardeners (an additional 8% of employed people) [Statistics SA General Household Survey, 2016 refers], increasing the potential impact of expropriation at nil compensation/expropriation at below market value to approximately 13% of the current workforce (primary agricultural sector 5% and domestic workers/gardeners 8%)

The negative impact of legislation within the agricultural sector on employment levels, requires highlighting. Given past legacies, the state has increasingly sought to protect the rights of farm labour (and rightly so) through the Extension of Security of Tenure Act (1997) (ESTA) and amendments thereto. Based on the latest proposed amendments, the tenure rights of farm workers (past and present), including their extended families, enjoy extensive tenure rights, which will make it almost impossible for an owner/potential owner to obtain vacant possession and beneficial use of the property, thus negatively impacting on the value of agricultural properties (buyers will be burdened with an unwanted labour force and their extended families). This is negatively impacting on the desirability of an *in situ* labour force and/or the usage of labour for production purposes. Whilst the state in its National Development Plan hopes to create an additional 1 million agricultural jobs, the reality is that given ESTA, one can expect that even without expropriation at nil compensation/expropriation at below market value, farmers will increasingly shift into mechanised production, and further, if additional farm labour is to be employed, agricultural property owners will seek to do so off site. In turn, this will place an additional burden on the state to provide additional housing on the periphery of nearby towns (the residential housing backlog is discussed in more detail below) for farm labour. We accordingly submit that a holistic solution which does not undermine agricultural property values and/or dilute property ownership rights, but which also protects farm workers and their families, needs to be included within the scope of evaluating expropriation at nil compensation /expropriation at below market value and/or reviewing current land reform policy and legislative frameworks. The Agriculture Sector Operation Phakisa made a number of recommendations which the *Ad Hoc* Committee may find of value.