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7 February 2019

AGRI SA COMMENTS ON THE DRAFT EXPROPRIATION BILL, 2019

1. BACKGROUND

Agri SA is a federation of agricultural organisations, which was established in 1904 as the South African Agricultural Union and consists of 9 provincial-, 25 commodity organisations and 43 corporate members. Agri SA, through its affiliated membership represents a diverse grouping of individual farmers regardless of gender, colour or creed. Agri SA is committed to the development of agriculture in South Africa. Commercial agriculture ensures that our country is food secure and that the sector remains globally competitive. We are a non-profit, a-political organisation that is helping to develop a stable and profitable agricultural environment in South Africa.

Agri SA is supportive of an orderly process of land reform. Our interest in the draft Expropriation Bill of 2019 is twofold: Firstly, our members constitute the largest collective of rural land owners and in consequence we have an interest in ensuring that the legitimate rights of landowners are respected. Secondly, as we aim to ensure a sustainable and viable agricultural sector, we have an interest in promoting the success of land reform beneficiaries who obtain agricultural land through the land reform programme. Agri SA supports transformation in the agricultural sector with a concomitant commitment to increasing agricultural production and improving national food security. In this regard, Agri SA promotes the empowerment of land reform beneficiaries to use their land productively and to cultivate new and successful entrants to the sector.

Agri SA acknowledges that the dispossession of land caused deep emotional wounds, which have not healed, and that land dispossession caused great physical and psychological hardship of an enduring nature. We also recognize that we, as a society, are faced with the triple challenges of inequality, poverty and unemployment and that these challenges are particularly prevalent in rural areas. We appreciate that whilst our members, the farmers of this country, have managed to create close to half a million jobs currently (and over 1 million in the past) and have managed to keep our country food secure, there are still far too many households in rural and urban areas that are food insecure. Today's farmers cannot be held solely responsible for historical events and cannot be required to bear the burden of addressing apartheid

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dispossession disproportionately. Agri SA believes that past iniquities must be dealt with through positive, future and solution-driven conversation, and Agri SA wants to make a positive contribution to finding solutions.

Agri SA participated in the NEDLAC- and Parliamentary processes from 2013 through to 2016, which resulted in the 2016 Expropriation Bill that was adopted by Parliament and forms the basis for the current Bill. Agri SA also participated in the Constitutional Review Process on the possible amendment of section 25 and our views expressed during that process is also relevant to the Bill in so far as it provides for expropriation without compensation. In a nutshell, Agri SA is against expropriation without compensation. We support the principle of equality in the bearing of public burdens, generally accepted in constitutional democracies and we believe that current landowners should not be required to bear a disproportionate burden of the imperative for land reform in the public interest. This principle is aimed at achieving at a fair balance between the interests of the expropriator (usually funded by the fiscus) and the expropriatee (who has lost his or her land). Most European countries accept that the property owner's wealth status must not be affected by the expropriation, which means that their economic position must in principle be the same after the expropriation as before it.

Agri SA holds the following general policy views regarding expropriation:

- Expropriation should only be used as a measure of last resort where bona fide negotiations have failed.
- The procedures followed with expropriation should be fair towards the landowner, and the principles of administrative justice should apply.
- The purpose of the expropriation should be clear.
- A landowner whose land is expropriated should always have recourse to the courts. Agri SA stands firm on the principle of full access to the courts to adjudicate on the merits of expropriation as well as the amount of compensation should there be any dispute.
- Under no circumstances should the payment of compensation to a landowner be dependent on the state’s ability to pay.
- It is of utmost importance that a transparent process be followed in valuing land. Landowners should also have access to valuation reports.
- Payment should be immediate and in cash.

2. GENERAL COMMENTS

Expropriation or compulsory acquisition is a tool, which is widely used internationally, and this has been the case for many decades. As such, international best practice models have emerged over time.

Most countries constitutions require compensation, whether full compensation (Denmark, Norway, Russia, Kenya, the Seychelles and Lesotho), fair compensation where a balancing test applies (Egypt, France, Madagascar, Rwanda and Tanzania), equitable compensation (the Central African Republic, the Congo, Japan, Mozambique, Namibia, Poland, Senegal and the USA) or adequate compensation (Botswana, Malta, Uganda and Zambia).

The modern approach to compensation is based on the principle of equality in the bearing of public burdens. Equitability in respect of a public liability is a principle adopted by French-, German- and American law. According to this approach, "*where one or more individuals has to bear a sacrifice (being the loss of property) for the common good, their individual and excessive burden should be compensated by the community (thus the State).*" If South Africa should jettison the principle of equality, it will be out of step with most constitutional democracies.

In 2009, the Food and Agricultural Organization (FAO) of the United Nations published a guide on international best practice for expropriation. The point of departure of the document is that forced acquisition of property could be abused and that measures should be in place to prevent this. The guide requires, among other things, clear and transparent procedures for forced acquisition of property, and compensation that will ensure that the affected persons are not worse off after expropriation than they were before. Further it states that affected persons must not only be compensated for the loss of land but also for improvements made and for the disruption that accompanies expropriation.

The United Nations Conference on Trade and Development published a document on expropriation in 2012 as part of their series on international investment agreements[1]. In this document the UN sets out the basic international requirements for expropriation. These are that the taking must take for a public purpose, in a non-discriminatory manner, under a due process of law and against the payment of compensation. The document deals with indirect expropriation and regulatory measures not amounting to expropriation. Indirect expropriation is defined as total or near total deprivation of an investment but without a formal transfer of title or outright seizure. Most international treaties refer also to indirect expropriation. One

[1] https://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf

of the salient features among international investment treaties is that most of them incorporate the standard of prompt, adequate and effective compensation.

According to the document, compensation is considered to be prompt if paid without delay; adequate if it has a reasonable relationship with the market value of the investment and effective if paid in convertible or freely useable currency. The members of Agri SA are heavily invested in land and expropriation will always be an unpleasant and disruptive process, which nobody is keen on, so they are understandably concerned about the possibility of expropriation. No owner would willingly go through a process of expropriation. In the case of a farmer whose farm gets expropriated, he or she not only loses their home, but also their livelihood. Primary production is but a link in a value chain and a farmer who is forced to relocate may also lose their linkages to well-known input supplies and markets – business relationships, which may have been built up over many years. The power imbalance between an individual and the powerful state machinery that comes to play in the expropriation process, needs also to be recognized – in particular the daunting cost of litigation where an individual has to take a dispute to the courts.

3. SPECIFIC COMMENTS

3.1 Clause 1: Definitions

3.1.1 "Deliver"

All notices of expropriation should be delivered by hand. We suggest delivery by the sheriff of court in terms of Rule 4 of the Uniform Rules of Court. Service by registered post is no longer a reliable method to serve documents, especially important documents such as notices of expropriation, offers of compensation and compensation claims.

''Expropriation''

Agri SA has serious concerns regarding the definition of expropriation that was inserted into the previous Bill at Portfolio Committee stage. The proposed definition limits the concept to instances where the state acquires rights in property. This definition excludes statutory limitations that undermines the economic utilisation of property or dismantle its content from the concept of expropriation if they do not include the transfer of proprietary rights to the expropriator. Such statutory limitations are compensated in some form or another in almost all constitutional jurisdictions. This definition is also out of line with international jurisdictions. Internationally, the concept of expropriation has been developed by the courts on a case-by-case basis and is generally not defined. It is Agri SA's view that the courts should retain the discretion to determine when state encroachment on property

rights qualifies as an expropriation. The definition must be wide enough to include all forms of expropriation recognised internationally. The exclusion of severe statutory limitations on the use of property from the concept of expropriation could have a negative impact on investor confidence and the growth of our economy.

3.1.2 "Public interest"

Who decides what is in the public interest in any given case? Agri SA is concerned that too much discretion is given to government officials to decide what is in the public interest. The definition of public interest is too broad.

The legislature should not attempt to define the term *"public interest"* in section 25 of the Constitution, except by restating what is already contained in the Constitution. It is for the courts, and not the legislature, to interpret the term *"public interest"* as used in the Constitution. If the Bill should contain a provision giving the term a wider meaning than its meaning under the Constitution, the provision would in all likelihood be unconstitutional.

It is furthermore our understanding that an expropriating authority acting in the public interest will only be able to exercise the power of expropriation if that authority is granted by an existing law of general application (except for the Minister of Public Works, whose authority to expropriate arises from section 3 of this Bill). It therefore follows that there must be a rational connection between the expropriation and the purpose for which the authority is granted by the empowering provision. An expropriation will only be in the public interest if it is undertaken to further the purpose for which the empowering provision was enacted. Whilst this latter point seems to be self-evident, it would greatly improve investor confidence and public support for the Bill if the definition of *"public interest"* was tied to the empowering provision, thereby clarifying that the *"other related reforms"* referred to are not government actions taken in the abstract, but rather actions taken in terms of specific empowering provisions. This will in turn ensure that the constitutionally protected concept of *the "Rule of Law"* is concretised within the Bill. In this regard, we propose the definition be amended to read as follows:

"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 other related reforms in order to redress the results of past racial discriminatory laws or practices <u>as articulated in a law of general application aimed at such redress;</u>

There is no definition of land, only *"land parcel"* is defined. It is not clear at all whether buildings and fixed improvements on land is included in the concept of land.

Concepts such as *"speculative purposes"* and *"abandoned land"* should also be defined.

The definitions of *"service" and "deliver"* are ambiguous. Reference is made to delivering a notice personally to the relevant party. However, the definition of delivery includes postage, by hand or facsimile. Notices should be served on the person by hand.

3.2 Clause 2(2): Application of Act

The Department of Public Works should clarify what is intended with the insertion of the new clause 2(2) which reads: *"(2) Despite the provisions of any law to the contrary, an expropriating authority may not expropriate the property of a state-owned corporation or a state-owned entity without the concurrence of the executive authority responsible for that corporation or entity."* State land and land owned by state entities cannot be insulated from being made available for land reform. If there is a conflict, it can be addressed in accordance with the principles of co-operative government set forth in sec 40 and 41 of the Constitution.

The term *"executive authority"* be defined: is it the responsible Minister, or the Board of the corporation or entity, or the chief operating officer?

3.3 Clause 5: Investigation and gathering of information for the purposes of expropriation

Information on the factors to be taken into consideration in calculating just and equitable compensation will be crucial to the expropriation process and may well be the determining factor in any enquiry into whether the compensation offered in any given case is in fact *"just and equitable".* Agri SA is of the opinion that this exercise will require a high level of skill, expertise and experience.

3.3.1 Clause 5(4)(a): Investigation and gathering of information for purposes of expropriation

The documents, which the owner, tenant or occupier are required to make available, should be limited to official documents (such as title deeds), contracts relating to unregistered expropriated rights; building plans for improvements, dams and other infrastructure; any other documents which a court on application by the relevant expropriating authority may order the owner or occupier to make available. The

person conducting the investigation should not have access, for example, to the financial records of the owner or to reports and valuations obtained by the owner for purposes of assisting him in negotiating a sale of the property to the State or in anticipation of an expropriation. The owner may have obtained a valuation of the property with which he disagrees and do not intend to use. Why must he/she be compelled to make it available to the person undertaking the investigation, enabling the State to use it against him in future?

3.4 Clause 6: Consultation with municipality

This clause is welcomed as it is the municipality that must provide services to new developments such as communities settled under restitution or Agri-villages. For any such settlement to be viable, the persons residing there must have access to basic services. Too often in the past, communities have been settled without proper planning and without having regard to their need for basic municipal services. Having said that, it is our experience that municipalities are very reluctant to provide services in outlying areas. This holds implications for the proposal in clause 12(3) of the Bill that provides for the possibility of expropriation without compensation of land occupied by labour tenants. Only municipalities can by law, provide services and these labour tenants mostly reside in outlying rural areas, where the provision of services is very difficult.

3.5 Clause 7: Notice of intention to expropriate

Clause (7)(1)(h): The owner has only 30 days to provide certain information following an expropriation notice. This period is inadequate taking into consideration the information that must be submitted by the owner.

Clause 7(2)(g): Delivery of mail has become very erratic. Facsimile communication is becoming less and less prevalent. Delivery by e-mail address be added. Lastly, an affected person may have no postal address and no access to facsimile or email communication. Communications to such a person should, whenever feasible, be by hand delivery.

Clause 7(2)(g)(iv): It is suggested that the word *"choice"* be substituted by *"preference",* to bring the subclause in line with clause 24(6).

Clauses 7(4), 7(6) and 7(7): One of the biggest frustrations experienced by owners and holders of rights in the course of an expropriation process is that expropriating authorities, having initiated the process, sometimes disregard statutory time limits, fail to deliver prescribed documents in time, do not prepare their cases properly and do not co-operate towards achieving an expeditious hearing. The Bill provides

remedies for expropriating authorities where owners or holders of rights do not comply with their obligations in terms of the Bill, but few (if any) remedies for owners or holders of rights if expropriating authorities do not comply.

Agri SA would therefor like to propose the following amendments: The purpose of the amendments proposed hereunder is to tighten the time periods within which expropriating authorities must comply with their obligations and to provide suitable relief for owners and rights holders should the expropriating authorities fail to do so.

- Clause 7(1): An expropriating authority must, as a first step in the expropriation process, serve a notice of intention to expropriate on the owner and any known holder of a right;
- Clause 7(4): An owner or holder of a right must thereupon, and within 30 days, deliver a written statement, indicating (inter alia) the amount claimed and furnishing full particulars of how the amount is made up;
- Clause 7(6): the expropriating authority must then, within 20 days of receiving such statement, indicate whether the compensation claim is accepted and, if not, the amount of compensation offered, together with full details and supporting documents.
- Clause 7 (7): This clause should be amended as follows:

"7(7)(a) If no agreement on the amount of compensation payable has been reached between the expropriating authority and the owner or the holder of a right within 40 days after the expropriating authority has received the written statement of claim contemplated in subsection (4), the expropriating authority must decide within 10 days whether –

- to continue with negotiation on compensation in accordance with section 16; or
- to proceed with the expropriation of the property; or
- not to proceed with the expropriation and inform the owner or holder of a right in writing of the decision taken.

7(7)(b) If the expropriating authority has decided in terms of subsection 7(7)(a)(i) to continue with negotiation and no agreement on the amount of compensation payable has been reached between the expropriating authority and the owner or the holder of a right within 40 days after the owner or holder of a right has been informed of the expropriation authority's decision to continue with negotiation, the expropriation authority must decide within 10 days whether –

- to proceed with the expropriation of the property; or
- not to proceed with the expropriation and inform the owner or holder of a right in writing of the decision taken.

7(7)(c) If the expropriating authority has decided in terms of subsection 7(7)(a) or (b) to proceed with the expropriation of the property, it must within 20 days after the owner or holder of a right has been informed of the decision, serve a notice of expropriation in terms of section 8(1).

7(7)(d) If the expropriating authority has decided in terms of subsection (7)(a) or (b) not to proceed with the expropriation, it must within 20 days after the owner or holder of a right has been informed of the decision, publish a notice of its decision not to proceed in terms of section 24."

Clause 7(7)(b): What will be regarded as *"a reasonable time"?* Without fixing a timeframe to such decisions will only contribute to unnecessary uncertainty by the owner or holder of a right.

3.6 Clause 8: Notice of expropriation

Agri SA welcomes the detail in which this clause sets out the requirements for proper notice to the landowner and other affected parties and particularly the requirement that an offer must contain an explanation of what the amount of compensation comprises of and that the notice must be accompanied by copies of reports detailing how the amount of compensation was determined. It has been the experience of many of our members that they are denied copies of valuation reports in restitution settlements. A landowner can only make an informed decision on compensation offered if all the relevant information is available to him or her.

Several commentators have publicly stated that the Bill is unconstitutional, by virtue of the fact that it permits expropriation to take place by way of notice prior to the determination of compensation in the case of a dispute. These commentators are of the opinion that it is unconstitutional because the Bill permits a dispute regarding compensation to be determined by the courts only after the expropriation has taken place. The advice that Agri SA has obtained points to the fact that the Constitutional Court, in the case of *Haffejee NO and Others v eThekwini Municipality and Others (CCT 110/10) [2011] ZACC 28; 2011 (6) SA 134 (CC); 2011 (12) BCLR 1225 (CC)* (25 August 2011), per Froneman J held that section 25(2) can be interpreted in either of two ways namely:

- that compensation must be fixed before expropriation takes place; and

- that compensation may be fixed as soon as possible after the expropriation takes place.

Froneman J held that both interpretations are equally plausible. Froneman J has the following to say in paragraph 35 of the judgement:

"The text of section 25 does not exclude an interpretation that compensation must precede expropriation. The language of the clause is compatible with compensation being a condition precedent to a valid expropriation, but the opposite is equally plausible."

He states that in some cases it may be unjust to take someone's land away before compensation is fixed but in other cases it may unjust to the state if compensation is required to be fixed first. The notion that someone may lose their livelihood is an important consideration. Froneman J makes a choice between two compelling arguments, and in the facts of the Haffajee case Froneman J judges that the prejudice to the state weighs higher (In other words, it would unduly prejudice the state if the expropriation cannot take place before the compensation is fixed). However, Froneman J states that unless there is a compelling reason why the state cannot determine the compensation beforehand, it could be unconstitutional not to do so, because the Bill does not provide an option to have compensation determined by a court prior to expropriation, as the current section 8 (1) mandates the expropriating authority to deliver the notice of expropriation (thereby effecting the expropriation) in the event that the parties cannot reach agreement on the compensation, and the expropriating authority wishes to continue with the expropriation. It therefore shackles the expropriating authority. If the expropriating authority and an expropriated owner cannot agree on the quantum of compensation, the Bill must enable the expropriating authority to suspend the operation of the expropriation pending determination of the compensation by the court. As per the Haffejee case, failure to do so could render the act of expropriation unconstitutional if there were no compelling factors favouring an expedient process, as the prejudice to the individual could outweigh the prejudice to the state. The Bill is therefore not blatantly unconstitutional, but it does carry the risk of unconstitutionality.

We would like to propose a new clause 8(1) to address this problem:

"*An expropriating authority, an owner or the holder of a right may apply to court for an order that would permit the court to determine the amount of compensation that would be payable to the owner of or the holder of a right in property if that property should be expropriated, and the Court may grant such an order –*

- *If it is satisfied that there are good reasons for doing so;*
- *Subject to such terms and conditions as it deems appropriate; and*
- *Setting a time limit within which the property must be expropriated after the determination of compensation has been made, failing which the determination will lapse."*

Regarding clause 8(2)(c): In terms of sec 31(6)(a) and sec 32(5) of the Deeds Registries Act,14 a certified copy of the notice of expropriation must be lodged by the expropriating authority with the Registrar of Deeds. It is suggested that a reference to this obligation be included in the Bill.

Clause 8(4)(d): The meaning of *"comprises of"* is unclear. It is suggested that the wording of cl 15(2) be followed (particulars of compensation offers made to holders of unregistered rights).

3.7 Clause 9: Vesting and possession of expropriated property

Regarding clause 9(2)(a): It is suggested that the following be added to the clause, at the end thereof: "... or determined in terms of section 8(4).

3.8 Clause 10: Verification of unregistered rights in expropriated property

Clause 10(1): Consider inserting, after the words *"that person has not been compensated" in the first sentence, the phrase: "and in respect of which a notice of expropriation has not been served on that person in terms of section 8(1)"*

Clause 10(2): The words *"subsection 35(1)"* in the third line should read *"subsection (1)".*

Clause 10(5): if the expropriating authority does not accept the validity of a claim, the claimant must be entitled to refer the matter to a court for appropriate relief. A provision that the expropriating authority has the final say might well be constitutionally invalid. It is suggested that the expropriating authority must take a decision on the claim within 50 days after receipt of the evidence requested in terms of sub-clause (1) and notify the claimant in writing of the decision.

3.9 Clause 11: Consequences of expropriation of unregistered rights and duties of expropriating authority

Sub-clause 5 states as follows:

“(5) If the expropriated owner or expropriated holder knew of the existence of an unregistered right contemplated in subsection (2) and failed to inform the expropriating authority of the existence thereof, the expropriated owner or expropriated holder, as the case may be, is liable to the expropriating authority for any loss incurred in the event of the expropriating authority having to pay compensation for the expropriation of the unregistered right after the date of payment of compensation to the expropriated owner or expropriated holder, as the case may be.”

The definition of an unregistered right is very wide and quite vague. It may very well be that a landowner was aware of people utilizing the land for gathering firewood or access to graves but did not know that these are compensable rights. This provision seems to be placing an unacceptable burden on owners to know exactly who is exercising what rights on their farms (keeping in mind that some farms are very large) and knowing which of these rights qualify for compensation upon expropriation. It is important that land owners know what kind of rights are included in the definition of *"unregistered rights"* because, if they omit to inform an expropriating authority of a right which they thought is excluded but later appears to be included, the financial consequences for them could be harsh. According to the definition, *"unregistered right"* means a right in property, including a right to occupy and use land, which is recognized and protected by law, but is neither registered nor required to be registered. It is assumed, for example, that any rights which land invaders and *"unlawful occupiers"* as defined in the Prevention of Unlawful Occupation Act (PIE) may have to remain on the land until they are evicted by order of a court, are not included. This could, however, be debatable, and land owners need certainty. Consideration could be given to replacing the words *"including a right to occupy and use land"* in the definition of *"unregistered right"* by the words *"including a registrable real right and a non-registrable form of land tenure".*

3.10 Clause 11: Consequences of expropriation of unregistered rights and duties of expropriating authority

It needs to be considered whether, in the light of sec 25 of the Constitution, a provision to the effect that when ownership of a property is expropriated, all registered rights over that property are simultaneously expropriated, can be valid to the extent that it may include unregistered rights held by a holder who was not aware of the expropriation.

3.11 Clause 12: Compensation for expropriation

The issue of compensation is of paramount importance to the members of Agri SA. Whilst we acknowledge that no person should be allowed to unduly benefit from land reform, and that deductions from market value may be fair in certain cases, we feel quite strongly that no individual landowner should be unduly penalised for something, which is in the collective national interest. Agri SA and its members harbour a legitimate concern that landowners may be undercompensated for their property.

In our view, an approach whereby compensation paid for land is generally substantially below market value will have dire consequences for investment in and lending to the agricultural sector. If the market value of farms is driven downwards, this will eventually impact of food prices, as farmers will start to struggle to obtain the required production credit. It will also become more difficult for new black farmers to establish themselves, as they will also struggle to get access to sufficient production credit. Market value plays a very useful role in practice because of the determinacy and quantification difficulty in establishing appropriate compensation. This is best illustrated by the practice, which has been adopted by our courts, namely to first establish market value, as an initial indicator of value, and then determine whether it should be adjusted in view of the other less quantifiable factors in section 25(3) of the Constitution in order to arrive at a just and equitable amount [see the court decisions in Khumalo v Potgieter [2000] 2 All SA 456 (LCC); Du Toit v Minister of Transport 2003 (1) SA 586 (C) paras 23—52].

In Du Toit v Minister of Transport 2006 (1) SA 297 (CC) para 35 the majority of the Constitutional Court followed a comparable approach in deciding whether a compensation award was constitutionally justifiable: first establish what compensation would be according to the *'standard'* approach and then check whether it is in line with the other constitutional demands. Market value should of course not be favoured at the expense of the other considerations enumerated in section 25(3) of the Constitution, but we are of the opinion that it remains an acceptable starting point as remains the only factor listed in section 25(3) that can be quantified independently from the other considerations.

Agri SA accepts that section 25 of the Constitution is the basis for the calculation of compensation and that the norm is *"just and equitable compensation".* We do however also subscribe to the principle of *"equivalence"* as set out in the FAO report on compulsory acquisition and compensation. This principle entails: *"Compensation, whether in financial form or as replacement land or structures, is at the heart of compulsory acquisition. As a direct result of government action, people lose their homes, their land, and at times their means of livelihood. Compensation*

is to repay them for these losses and should be based on principles of equity and equivalence. The principle of equivalence is crucial to determining compensation: affected owners and occupants should be neither enriched nor impoverished as a result of the compulsory acquisition. Financial compensation based on equivalence of only the loss of land rarely achieves the aim of putting those affected in the same position as they were before the acquisition; the money paid cannot fully replace what is lost. In some countries, there is legal provision recognising this in the form of additional compensation to reflect the compulsory nature of the acquisition. In practice, given that the aim of the acquisition is to support development, there are strong arguments for compensation to improve the position of those affected wherever possible."

We believe that adherence to the principle of equivalence will result in the most just and equitable outcome for all parties involved.

Agri SA views land reform as a national priority, and as such should be funded with general taxpayer money. Individuals belonging to one industry cannot be expected to bear the costs of a national priority. Landowners, whose land is earmarked for land reform purposes, must be placed in a position to continue farming elsewhere in a similar manner, should they wish to do so.

It should be clear that compensation paid to holders of unregistered rights is over and above any compensation paid to the owner and is not to be subtracted from compensation due to the owner.

3.11.1 Clause 12(2)

This provision states that the fact that the property has been taken without the consent of the expropriated owner or expropriated holder, must not be taken into consideration by the expropriating authority. There is much to be said for providing, as part of the compensation amount, a solatium for the trauma caused by the expropriation.

Expropriation without consent is a traumatic experience often causing financial loss, emotional trauma and suffering and a property owner should be entitled to receive compensation for this trauma. The concept of a *"solatium"* as it appears in the Expropriation Act (1975) should therefore be retained and actual financial loss resulting from the expropriation should also be compensated for.

In addition, one should not lose sight of the fact that section 25 (3) of the Constitution states that the compensation *"must be just and equitable having regard to all of the relevant circumstances".* Although section 15 (3) provides some guidance as to

which factors should be taken into consideration by listing the factors in (a) to (e), it does not limit the court's interpretation by excluding any other factors. By attempting to exclude the trauma caused by a forced acquisition extra-constitutionally, the provision's constitutionality could come into question should a court decide that it is a relevant consideration in the circumstances as contemplated by section 25 (3) of the Constitution.

3.11.2 Clause 12(3)

The new clause 12(3) provides for expropriation at nil compensation, which may be regarded as just and equitable in certain cases. Agri SA is against expropriation at nil compensation. Expropriation is highly disruptive and often leads to consequential lost. It is difficult to envisage how expropriation at nil compensation can be regarded as just and equitable. Agri SA is concerned about the vagueness of terms such as *"speculative purposes" and abandoned land".* Where state subsidies are taken into consideration in calculating compensation, the original purpose of such subsidies need to be considered.

The dictionary meaning of "speculation" is as follows:

"The action or practice of investing in stocks, property, etc. in the hope of profit from a rise or fall in market value but with the possibility of a loss; engagement in a venture offering the chance of considerable gain but the possibility of loss." - The New Shorter Oxford English Dictionary.

"The buying or selling of something with the expectation of profiting from price fluctuation."- Black's Law Dictionary.

The word *"speculative"* has a very wide meaning, and can include legitimate and morally acceptable purposes, which cannot justify nil compensation. As presently worded, the scope of the sub-clause is unacceptably wide, and it could have a very negative impact on investor confidence and the economy.

Whilst a number of specific categories of land that can be expropriated at nil compensation, is listed, it is clear from the wording of clause 12(3) that any land expropriated in the public interest can potentially be targeted for nil compensation. This includes for example land which is the subject of a restitution claim. The scope for expropriation at nil compensation is potentially quite broad. Whilst we recognise that all relevant circumstances will be taken into consideration, this is quite concerning for our members, the majority of whom are landowners.

Agri SA is particularly concerned about clause 12(3)(a) that provides for the possibility of nil compensation where land is occupied or used by labour tenants. We question the inclusion of labour tenants in the categories of land identified for possible expropriation at nil compensation. The Land Reform (Labour Tenants Act) is a complex piece of legislation. The definition of a labour tenant has been the subject of many a court action. The main problem with this legislation has been the Department of Rural Development and Land Reform's (DRDLR) inability to implement the legislation, not the issue of payment of compensation. This was highlighted in the High-level Panel Report on Key Legislation, as well as the judgement in the Mwelase case. [2] The Director-General of DRDLR's testimony in the Mwelase case is very interesting and points to the complexity of the implementation of this legislation. These problems will not be solved by nil compensation! He testified that: *"The DG stated that the following problems were experienced in the implementation of the LTA. The number of claims exceeded the Department's capacity to deal with them expeditiously and involved far more logistics than had been foreseen. Labour tenant claims typically involved the rights of extended families who lived on land for many generations. Membership of those families had to be verified and to that end the Department's officials conducted thousands of farm visits until 2006. The DG denied that the government had done nothing regarding labour tenant claims for more than 10 years. Many restitution claims overlapped and even conflicted with labour tenant claims, which had not been foreseen in the early stages of land reform legislation. In addition, in every case labour tenants were required to present expert evidence by professional valuers and be legally represented; and often needed the services of land surveyors. It appeared from the cases referred to the LCC that labour tenants were encamped in small, unsustainable areas of land claims mechanically and then referring them to the LCC."*

The issue of provision of services to small communities of labour tenants in far-flung rural areas referred to earlier, further complicates the matter.

If, despite Agri SA's opposition to it, such a clause is inserted, it must be clear from the wording that only labour tenants, whose claims have been formally recognized by the landowner or the courts can qualify. The wording of clause 12(3) should be amended to read:

"Where land is expropriated in the public interest, the compensation determined in terms of section 12(1) may be nil, if it is just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including but not limited to: ...."

[2] http://www.justice.gov.za/sca/judgments/sca_2018/sca2018-105.pdf

*"(a) Where the land **[is occupied or used]** has successfully been claimed by a labour tenant, **[as defined]** in terms of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996);"*

Regarding subclause (e), it should be noted that many subsidies in the past were provided for reasons that had nothing to do with discrimination or politics. There is no clarity on what kind of subsidies are to be considered. Under section 25(3)(d) of the Constitution, the extent of *"direct state investment and subsidy"* in the property has to be considered, together with the other factors listed in sec 25(3), when determining the amount of compensation. If the extent of the *"direct state investment and subsidy"* exceeds the market value of the property, the outcome could be a small amount or nil compensation. Clause 13(3)(e) of the Bill is therefore unnecessary. It could even be in conflict with the Constitution, because even if the *"direct state investment and subsidy"* exceeds the market value of the property, the other factors to be considered in terms of the Constitution might well justify an award of some compensation. This would not necessarily be the case under Clause 13(3)(e).

3.12 Clause 13: Interest on compensation

Agri SA is of the view that the interest rate should be the greater of either the PFMA or the interest rate payable by the expropriated owner in satisfying a debt secured by an encumbrance on the property.

The meaning of *"the date on which the amount has been made available or by prepaid registered post dispatched"* is not clear. Does it mean that the notification that the amount is available may be dispatched by prepaid registered post, or that a cheque or warrant voucher may be so dispatched?

Registered mail is nowadays very unreliable, and experience have shown that it may take months for registered mail to arrive at its destination, if it arrives at all. The clause should provide for a different manner of payment.

3.13 Clause 14: Compensation claims

Regarding clause 14(1)(d)(i): It is suggested that the sub-clause be amended to require the holder of the unregistered right to provide particulars of improvements on the land only insofar as the improvements may be relevant to the claim.

Clause 14(2)(a): The purpose of this sub-clause is unclear. The holder of an unregistered right over land will hardly ever have the title deed to the land in his possession or know where it is. It is suggested that the sub-clause be deleted

3.14 Clause 17: Payment of amount offered as compensation

It is not acceptable that the expropriating authority be permitted to take possession of the expropriated land before the compensation, which it offered to the owner has been paid. If there is good reason for a delay in the payment of compensation, the expropriating authority should, before taking possession of the property, obtain a court order in terms of sub-section (4), authorizing a later payment date.

Clause 17(5): It is doubtful whether there is any lawful basis on which an expropriating authority can withhold payment of compensation, which is due to a claimant who is not tax compliant. The claimant may be late in the submission of a tax return or involved in a dispute with SARS. Withholding payment of compensation due to a claimant in order to put pressure on him or her to submit a late tax return or to settle a dispute with SARS, is unacceptable conduct. An expropriating authority is not a collection agent for SARS.

Clause 17(6): The sub-clause should also contain a provision that information and documents delivered by a claimant to facilitate electronic payments are confidential, and that the expropriating authority should take appropriate measures to protect their confidentiality.

3.15 Clause 18: Property subject to mortgage bond or deed of sale

In arriving at an amount which is *"just and equitable",* we believe regard should be had to any registered bonds over the property, but no landowner should be bankrupted as a result of expropriation. Agriculture is by its nature an industry that is heavily reliant on access to credit. Currently, the majority of commercial landholdings in the sector are bonded to a financial institution. As such, we recognise the legitimate interests that bond holders may have in the property and that they should be compensated if their right is expropriated. However, at the same time, the interests of the bondholders should not outweigh the legitimate interests of the land owner. In a scenario where the compensation is less than the debt secured by the mortgage bond, the apportionment of compensation between the land owner and the financial institution is critical. We believe that should expropriation lead to an otherwise solvent farmer being driven into insolvency, it cannot be regarded as a just and equitable outcome. Careful consideration should be given to the issues outlined below.

South African banks are legally obliged to use market value as the basis on which real security for loans are measured. As a result, financial institutions calculate loans on the assumption that the land can be sold to repay the entire debt if the lender

defaults, hence secured loans seldom exceed the market value of the land. Where compensation paid upon expropriation is less than the market value, there may be a shortfall between the total compensation provided and the amount lent to the land owner. In South African law, the owner as well as the mortgagor has real rights in the land, namely ownership and the mortgage. Whilst an expropriation dissolves all real rights in the land (subject to each party receiving just and equitable compensation for their right), it does not automatically dissolve the contractual right between the lender and the borrower. This means that the borrower will still be liable to pay the financial institution the full extent of the loan, albeit an unsecured loan following the expropriation.

Particularly in the agricultural sector, land is often the farmer's single greatest capital asset as well as his or her only source of income. If the compensation received for land falls significantly short of the amount owing on the loan (which was calculated according to the market value of the farm), it can result in the land owner finding him or herself factually insolvent, with more debt than assets and no form of income to repay the balance of the loan. The credit extended by the financial institution would not be regarded as reckless, nor was the farmer over-indebted before the expropriation. Yet, as a direct result of the expropriation, the farmer may face insolvency. In this scenario, we strongly believe that compensation below market value would not be *'just and equitable, reflecting an equitable balance between the public interest and the interests of those affected.'*

In foreign jurisdictions, this potential inequity has been identified and accordingly dealt with to avoid expropriation (often referred to as compulsory purchase or eminent domain in various jurisdictions) leading to insolvency by inserting specific anti-insolvency provisions whereby existing debts are *'deemed'* to be extinguished by the expropriation (which is not currently the case in this Bill). Furthermore, it must be borne in mind that all of these countries are legally obliged to calculate compensation based on market value plus actual financial loss. In theory then, the compensation awarded in these foreign jurisdictions will always be enough to satisfy the loan, because the loan is based on the market value of the security. The fact that the South African Constitution makes provision for just and equitable compensation, and that the expropriation Bill does not expressly extinguish all debts related to the property, merely highlights the precarious position that a land owner may face upon expropriation.

With the above in mind, Agri SA supports the wording of clauses 18(1) and (2) as it gives some protection to landowners, who have very little bargaining power vis-a-vis financial institutions holding bonds over property. Whilst Agri SA recognizes the critical importance of investment in the sector, we cannot support a scenario where the landowner alone carries all the risk of possible lower than market value

compensation and ends up walking away with nothing if the bond is more than the compensation received for the property. This is one of the reasons why market-related compensation is so important to our members and our sector, which is very dependent on production credit. If financial institutions were to consider the financing of farming too great a risk, because of concerns about the collateral value of farms, it could have very real implications for investment in the sector and the future productive capacity of the sector. At the same time, individual landowners cannot be expected to foot the Bill for land reform through reduced non-market related compensation. A balance needs to be struck somehow.

Clause 18(3): It should be noted that the absence of agreement on the apportionment of compensation between the owner and a mortgagee or buyer of the expropriated property is not always due to a dispute. Lack of consensus on the apportionment is not a dispute. The court should be authorized in the Bill to apportion the compensation between the owner or holder of a right on the one hand and the mortgagee or buyer on the other, as this may not ordinarily be within the jurisdiction of the court. Consider an amended wording along the following lines:

"In the absence of an agreement as envisaged in subsection (1), the expropriating authority may apply to court for an order:

(a) Apportioning the compensation money between the expropriated owner or expropriated holder and the mortgagee or buyer concerned, and
(b) If the compensation money has been deposited with the Master, directing the Master to pay the compensation money to such persons, in such manner and on such terms as the court may determine."

3.16 Clause 19: Payment of municipal property rates and other charges out of compensation money

For purposes of accuracy and clarity, it is suggested that the *"charges"* referred to in sub-clause (1), be described as amounts due to a municipality as described in section 118(1)(b) of the Local Government: Municipal Systems Act.

Clause 19(2): It is further suggested that the words *"inform the expropriating authority in writing of such charges, as at the date contemplated in section 9(2) or (4)"*, be replaced by words to the following effect:

".... issue a certificate to the expropriating authority, mutatis mutandis in accordance with section 118 of the Local Government: Municipal Systems Act, certifying the outstanding amounts of the charges as at the date contemplated in section 9(2) or (4)."

Clause 19(3): Informing the registered owner by registered mail of outstanding charges will not be feasible. Many owners, especially if they live on rural land in outlying areas, will not be reachable by registered mail. Experience show that, nowadays, registered letters often do not reach their destination within the 20 day period within, which registered owners can object to the outstanding amount. The information should be delivered in accordance with the provisions of clause 24(3) of the Bill.

Clause 19(4): It must be remembered that the expropriating authority becomes the owner of the expropriated land on date of expropriation. The expropriating authority must file a copy of the notice of expropriation (together with some other documents) with the registrar of deeds, who must note the expropriation in his records. Ownership of the expropriated land is not passed to the expropriating authority by virtue of the subsequent Deed of Transfer. The Deed of Transfer merely record that the expropriating authority is already the owner of the land. It is doubtful whether a municipality is entitled to levy property rates on a person for periods during which he or she was not the owner of the property. If the date of possession is later than the expropriation date, the municipality may not be able to hold the erstwhile owner liable for property rates in respect of periods subsequent to the expropriation date

3.17 Clause 21: Mediation and determination by court

The absence of an agreement on the amount of compensation can hardly be described as a *"dispute".* The words *"to settle the dispute"* should be replaced by *"to reach agreement on the amount".*

It is proposed that clause 21(2) be reworded as follows:

"(a) *The compensation to be paid for any property expropriated by an expropriating authority shall, in the absence of agreement, be decided or approved by a competent court in an action instituted by any party concerned;*

(b) An action for the determination of compensation for the expropriation of a property may not be instituted before the expiry of a period of 20 days from the date of expropriation.

(c) The proceedings shall be conducted in accordance with the rules and procedures applicable to civil proceedings in the court concerned, but subject to any orders or directions, which the court or the presiding judge may issue for the preparation and hearing of the proceedings.

(d) Any judgment or order of the court shall be deemed to be a judgment or order in civil proceedings."

3.18 Clause 22: Urgent expropriation

It is suggested that the owner or holder of a right should at least receive prior written notice that a right to use the property temporarily will be taken, stating when the right will be taken and for how long, giving a description of the right and setting forth why the taking is urgent.

3.19 Clause 25: Extension of time

Consider adding that a period of time may be extended for a further period or periods, even after it has expired.

3.20 Clause 26: Expropriation Register

Agri SA proposes that the expropriation register should be open for public inspection and same should be expressly stated in the Bill. It should be stated that the expropriation register is open to the public, on such reasonable terms as the Director-General may determine.

3.21 Clause 27: Civil fines and offences:

Experience has shown that expropriation authorities are often guilty of not complying, timely or at all, with their obligations under the Act. Clause 27 of the Bill should be amended so that it also applies to delinquent expropriation authorities and its officials. The list of breaches in clause 27(1) could be expanded to include breaches by the expropriating authorities.

4. CONCLUSION

Experience in other countries has shown that expropriation does not speed up land reform significantly, nor does it make land reform more affordable. In fact, the contrary seems to be true. Expropriation does have a limited role to play in land reform but only as a measure of last resort. When expropriation is utilized, it should be perceived by all to be a fair and transparent process. Safeguards should be put in place to prevent any misuse of the power to expropriate. Current landowners should receive prompt, adequate and effective compensation, which will enable them to start anew somewhere else; they should not be worse-off as a result of the expropriation.

The full cost of expropriation should be borne by the fiscus; individual landowners cannot be expected to foot the Bill for land reform through reduced non-market related compensation. In the interest of the future of this country government should nurture the agricultural sector.