

Agbiz Information day

Legal Intelligence desk

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For today

1. Climate Change Mitigation

- Proposed legislative framework

2. Natural Resource Legislation

- Competition for land and water resources

3. Labour and other matters

- National Minimum Wage

4. Land Reform

- Land ceilings, valuations, communal land and expropriation without compensation

Climate Change Mitigation

Proposed legislative framework

New legislative mechanisms

Green House Gas reporting Regulations

- Published in terms of the National Environmental Management: Air Quality Act;
- Entered into operation on the 3rd of April 2017;
- Entities that fall under 'category A' must have submitted their annual Green House Gas (GHG) emissions to DEA by the 3rd of May 2017, and thereafter on the 31st of March every year, these include:
 - Food processing, beverage and tobacco processors with boiler design capacity ≥ 10 MW (th) net heat input;
 - Agriculture, forestry or fish farms with boiler design capacity ≥ 10 MW (th) net heat input;
 - Owner of forestry land ≥ 100 ha; and
 - Specific thresholds for the producers of lime and other chemicals.
- The specific thresholds and reporting requirements can be obtained from the Technical Guidelines for Monitoring, Reporting and Verification of GHG emissions by Industry (DEA; 2017).
- The reporting will become relevant in the context of Carbon Budgets that will be explained below.

| IPCC Code | Activity Name | Category A | | |
|-------------|--|--|--------------------------|--|
| | | shall report when their total installed capacity for this activity is equal or above the threshold | Threshold | Transitional Arrangement Applicability (Regulation 15) |
| 1 | ENERGY | | | |
| 1A | Fuel Combustion Activities | | | |
| 1A1 | Energy Industries | | | |
| 1A1a | Main Activity Electricity and Heat Production | Tier 2 or 3 | 10 MW(th) | YES |
| 1A1b | Petroleum Refining | Tier 2 or 3 | 10 MW(th) | YES |
| 1A1c | Manufacture of Solid Fuels and Other Energy Industries | Tier 2 or 3 | 10 MW(th) | YES |
| 1A2 | Manufacturing Industries and Construction | | | |
| 1A2a | Iron and Steel | Tier 2 or 3 | 10 MW(th) | YES |
| 1A2b | Non-Ferrous Metals | Tier 2 or 3 | 10 MW(th) | YES |
| 1A2c | Chemicals | Tier 2 or 3 | 10 MW(th) | YES |
| 1A2d | Pulp, Paper and Print | Tier 2 or 3 | 10 MW(th) | YES |
| 1A2e | Food Processing, Beverages and Tobacco | Tier 2 or 3 | 10 MW(th) | NO |
| 1A2f | Non-Metallic Minerals | Tier 2 or 3 | 10 MW(th) | YES |
| 1A2g | Transport Equipment | Tier 2 or 3 | 10 MW(th) | NO |
| 1A2h | Machinery | Tier 2 or 3 | 10 MW(th) | NO |
| 1A2i | Mining and Quarrying | Tier 2 or 3 | 10 MW(th) | YES |
| 1A2j | Wood and Wood Products | Tier 2 or 3 | 10 MW(th) | NO |
| 1A2k | Construction | Tier 2 or 3 | 10 MW(th) | NO |
| 1A2l | Textile and Leather | Tier 2 or 3 | 10 MW(th) | NO |
| 1A2m | Brick manufacturing: | Tier 2 or 3 | 4 million bricks a month | NO |
| 1A3 | Transport | | | |
| 1A3a | Civil Aviation | Tier 2 or 3 | 100 000 litres/year | Yes |
| 1A3b | Road Transportation | NA | NA | NO |

New legislative mechanisms

Carbon Tax Bill

- Basis for draft legislation:
 - Tax levied per tonne of CO2 equivalent of the GHG emissions of a taxpayer per year (as reported in terms of the GHG reporting regulations).

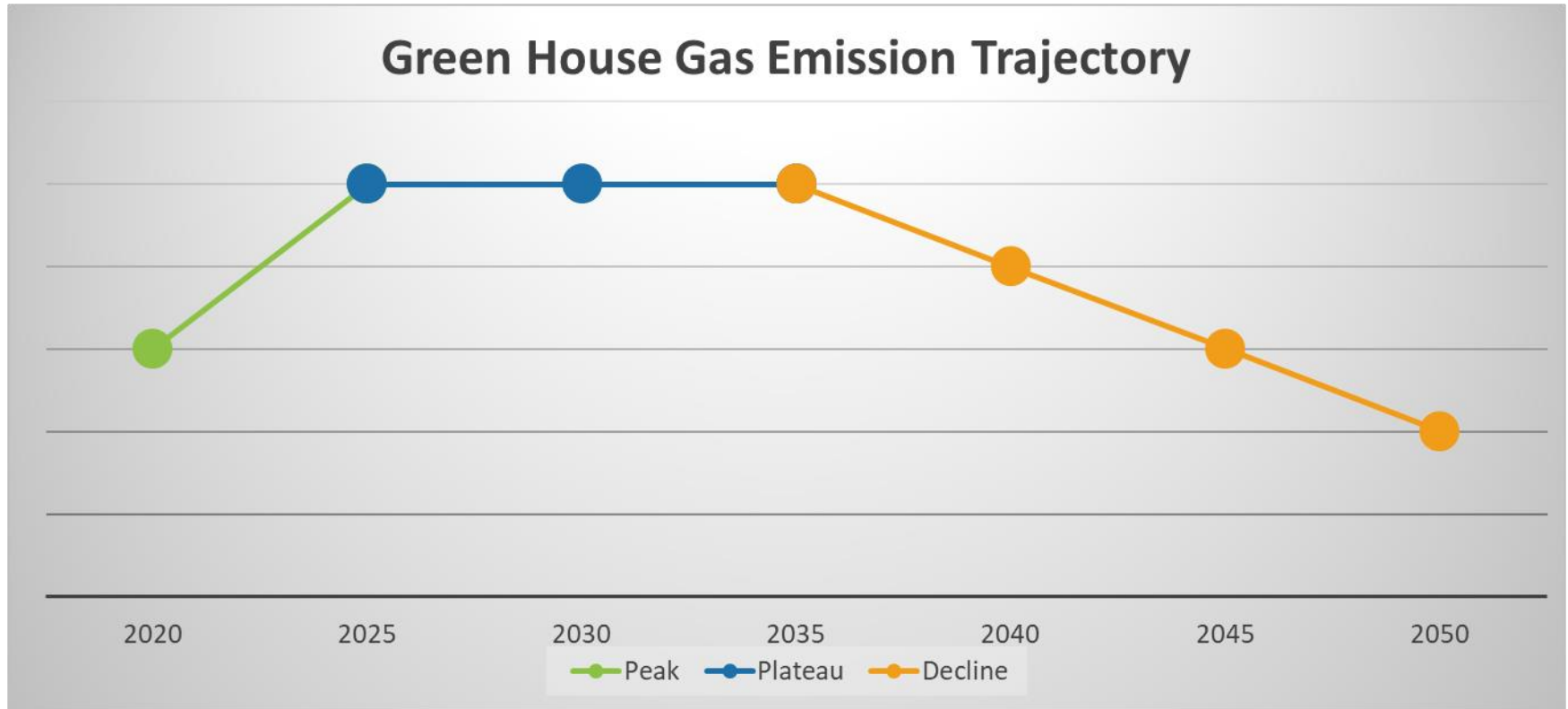
Effect:

- Direct effect – large emitters will have to pay additional taxes
- Indirect effect – consumption of electricity and fuel (logistics) will become more expensive

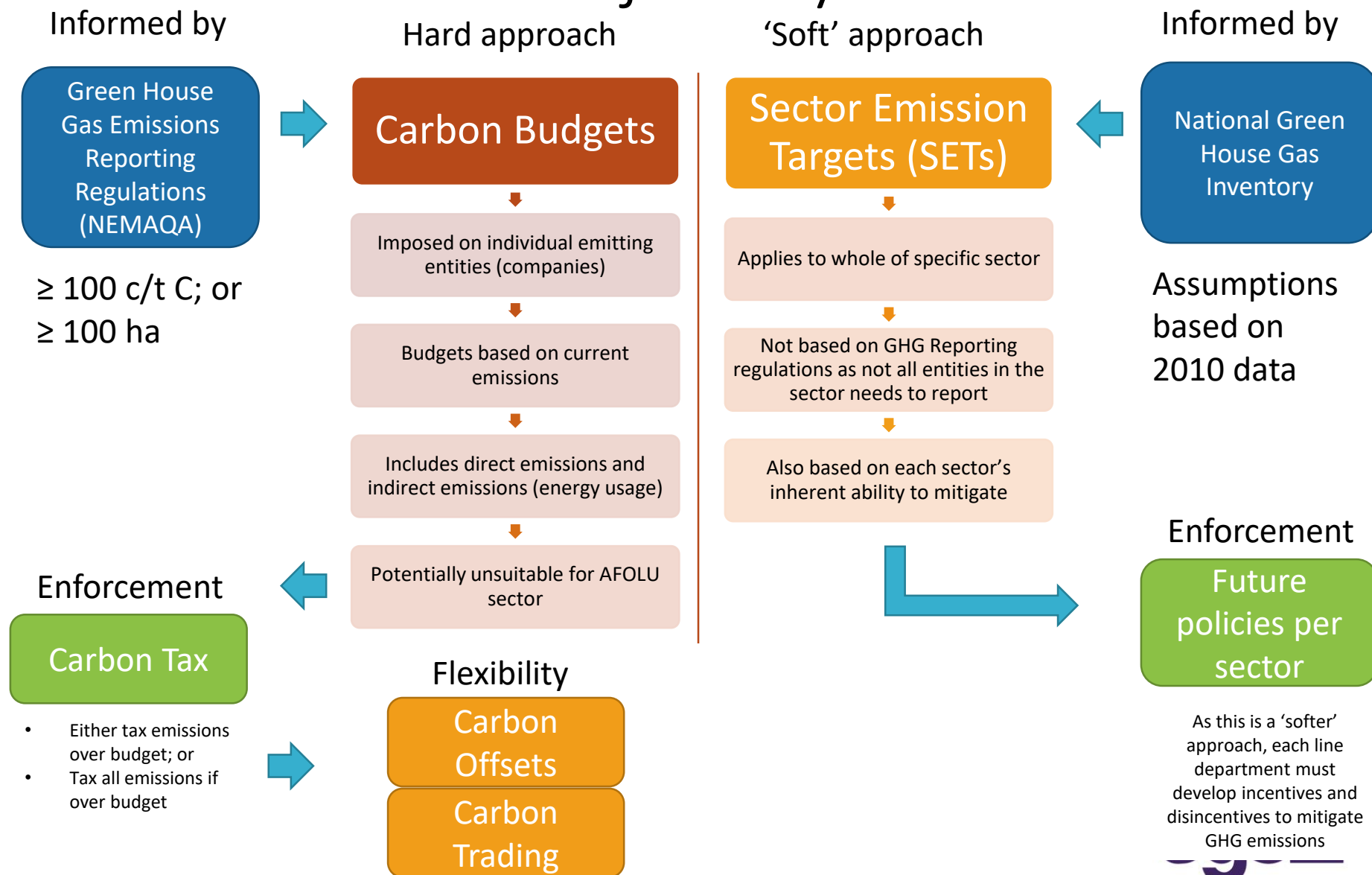
Process:

- Treasury has revised the Bill, waiting on new Minister to sign-off then it will go to cabinet & Parliament;
- Role of Carbon Tax in post-2020 mitigation system under discussion between Treasury and DEA – will be explained below.

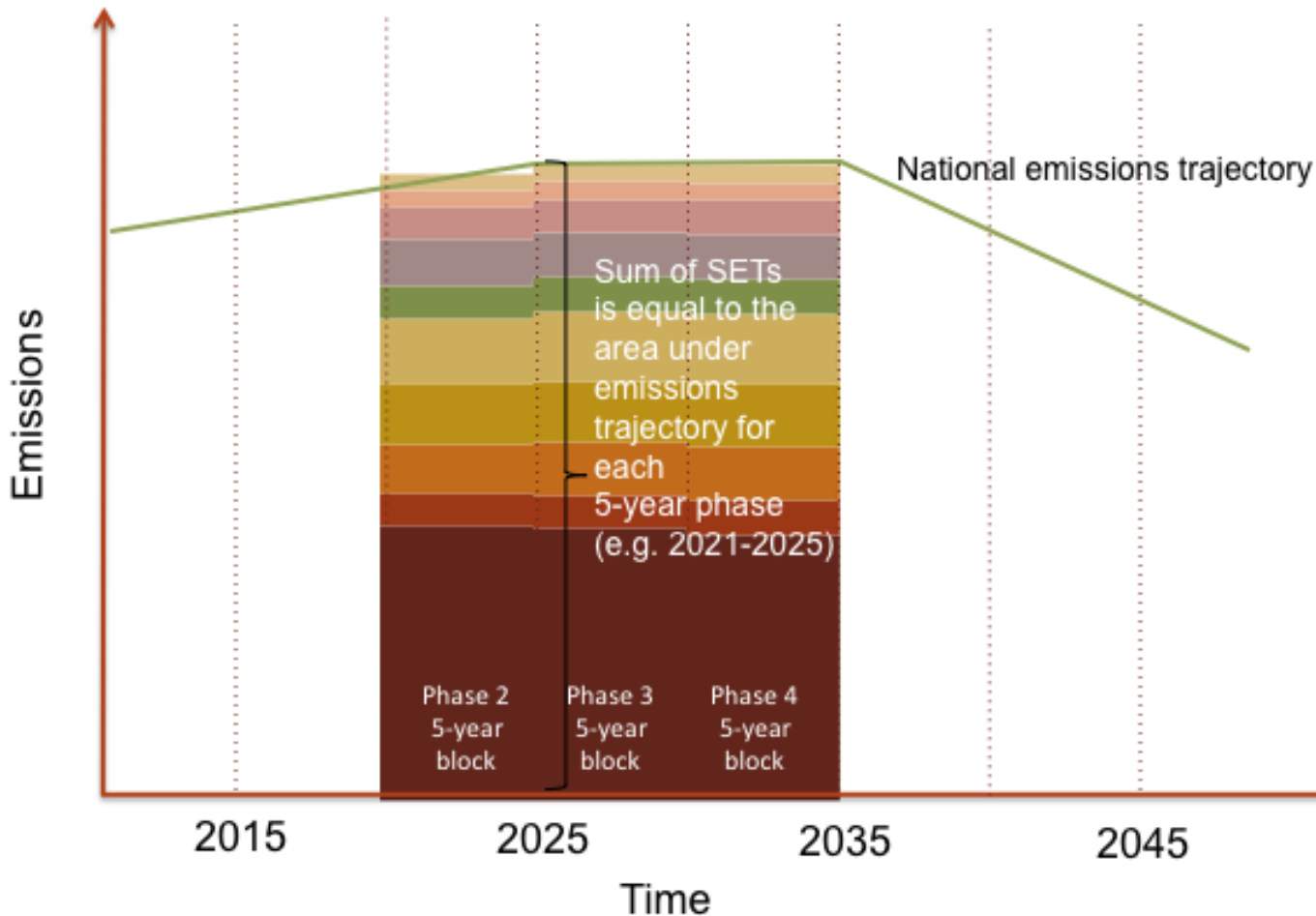
SA's Post 2020 Climate Change Mitigation *'peak, plateau, decline trajectory'*



Post 2020 mechanisms to achieve trajectory



Interface between SETs and emissions trajectory



BUSA environmental committee

Agbiz sits on the committee and provides inputs on the following environmental matters on behalf of the agro-food sector:

- Carbon Tax Bill;
- Climate Change Legislative Framework;
- Climate Change Mitigation System;
- Green House Gas Emissions Reporting Regulations;
- Air Quality Framework Review;
- Water Use Licence Applications and Appeals Regulations;
- Review of National Water Act and Water Services Act;
- South Africa's Third National Report on the UN Framework Convention for Climate Change.

Natural resource legislation

Preservation and Development of Agricultural Land Bill (PDALB)

The process at a glance:

- **Delicate balancing act within BUSA** between agricultural and mining interests;
- Bill had to be redrafted following legal opinion on constitutionality;
 - Certain functions moved to local and provincial government.
- Diverse business interests moving towards common ground:
 - DAFF's consent needed for certain non-agricultural activities on agricultural land;
 - Trying to reduce duplication in processes with NEMA EIA requirements.
- Agricultural interests gaining recognition but trying to avoid additional red tape as far as possible.

Water use rights – strategic considerations

- Secure water rights NB!
 - If finance is obtained to start an agricultural enterprise, the ROI, value of the land, business plan etc. all greatly depend on ability to lawfully use water for irrigation.
- Not all enterprises function based on water licences, many have ‘existing lawful use’ (ELU) rights;
- ELU based on historical use, but water reform clearly a constitutional priority that is lagging behind;
 - S25 (8) – ‘No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform...’
- *Goede Wellington case* based on NWA– need for transformation one of many considerations.
- New legislation will likely have a stronger focus on water reform by;
 - Prohibiting water rights trading;
 - Applying a ‘use-it or lose-it’ approach;
 - Possibly link water to BBBEE status or other transformation measure.
- New legislation not published yet, but Portfolio Committee deems it a priority;

Water use rights – strategic considerations

- Current Act makes provision for ‘old order’ (i.e. ELU) and ‘new’ rights (i.e. Water Licence);
 - Also makes provision for the ‘surrender’ of ELU to assist a water licence application;
 - Unclear whether ELU will still be recognised in new legislation;
 - ELU likely to hinder water reform (cannot reallocate limited supply of water if all existing users’ rights continue unabated).
- What if new legislation does not recognise ELU?;
- Would it constitute an expropriation for which compensation is required?
- Position still very unclear:
 - A water right is ‘property’ in terms of the Constitution, but there are very strong parallels between this situation and that of mineral rights under the MPRDA.

Minerals (MPRDA)



'Old order rights':
Land owner = mineral owner



Transitional period (2yrs) to convert
'old order rights' to new mineral rights



Mineral reform and reallocation NB



Agri SA CC case: old order rights
expropriated?



Majority judgement: no expropriation,
therefore no compensation.



Minority judgement: Expropriation,
but chance to convert old order into
new rights the 'compensation in kind'

NB!

Water (NWA)



'Old order rights':
Existing lawful use = recognised



'Surrender' of ELU in favour of water
license



Water reform and reallocation NB



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Water use rights – strategic considerations

- Minority judgement: if the new water Bill does not recognise ELU, chance that the ‘surrender’ provisions are deemed to have been the ‘compensation in kind’.
 - New water Bill not published yet – will only know once it is published.

Strategic question: best positioning to ensure continued security of supply for legitimate water users?

- Ensure good BBBEE rating;
 - Strategic consideration: Could be advantageous to convert ELU to water licence if new Bill does away with ELU to promote water reform.
-
- Criteria for obtaining a licence settled under s27 of NWA;
 - Process: **New Regulations Promulgated** 24 March 2017;

New Regulations: Water licence application procedure

New regulations

- Draft published in 2015 – final version promulgated March 2017;
 - No consultation on changes made btw draft and final;
 - Areas of concern:
 1. Onerous public consultation procedure; and
 2. Provision of financial security.
-
1. Consultation key, but onus fully on applicant;
 - Compile list of interested and affected parties;
 - host consultation sessions;
 - inform land claimants;
 - Inform all relevant Gov. departments;
 - publish in newspaper and gazette.

New Regulations: Water licence application procedure

2. Provision on financial security by applicant

- Similar to 'mine rehabilitation fund';
- Power to request security for rehabilitation in Act - discretionary;
- Asking for criteria to be included in Regs to indicate when this will be required.

Process

- No formal commentary period as Regulations are in force; but
- Met with DWS via BUSA;
- Highlight concerns through a detailed submission;
- DWS with legal team will look at our points and consider amending Regulations accordingly.

Labour and other matters

- National Minimum Wage and BCEA amendments;
 - 2 Bills Currently at Nedlac - later to be published;
 - Push to be ready by 1 May 2018;
 - R20 per hour; but
 - Agriculture given 'phase-in' period – 80% in 1st year, 90% in 2nd year and then same as rest of economy.
 - Other conditions of employment currently regulated by sectoral determination (accommodation, deductions etc.) to be retained.
- Credit reporting guidelines;
- Guidelines for info sharing between competitors;
- Davies tax commission:
 - Proposes wealth tax and additional land taxes.
- Intellectual property policy
- Electronic Deeds Registries Bill

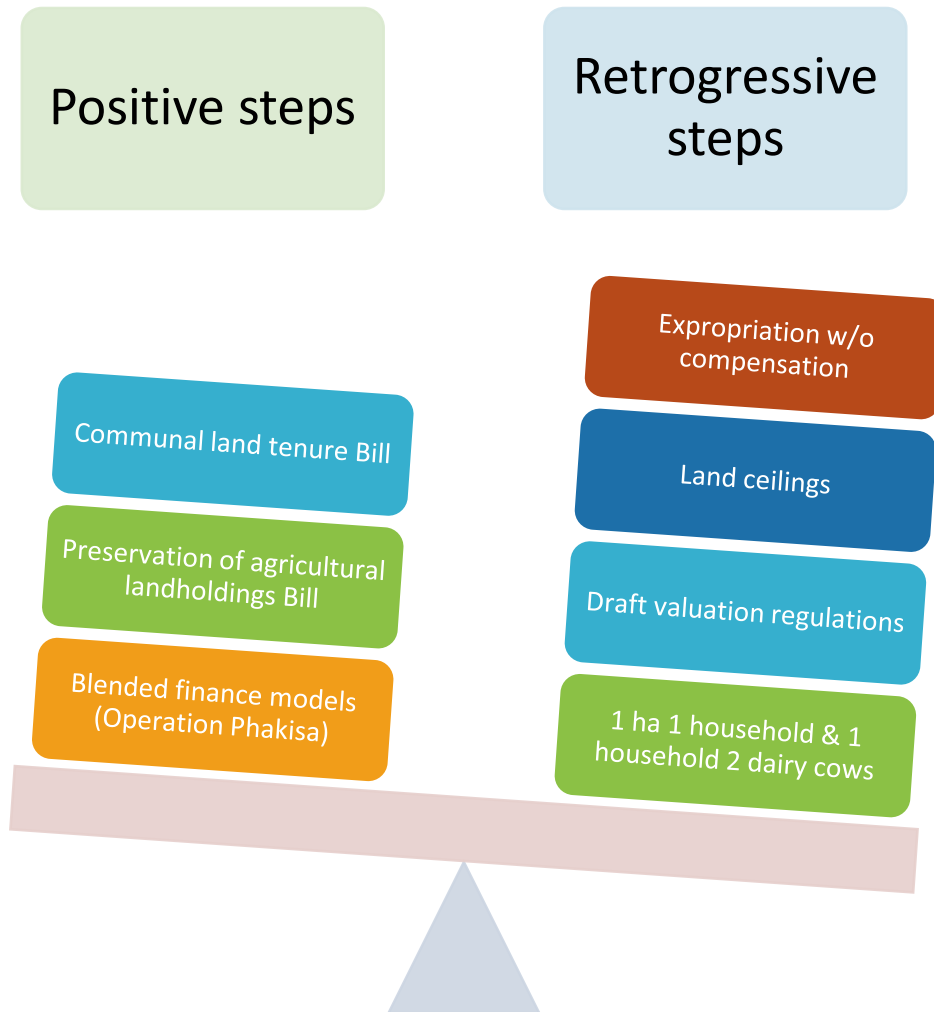
Land Reform

For today

1. Restitution of Land Rights Amendment Bill;
2. Regulation of Agricultural Landholdings Bill;
3. Draft Property Valuation Regulations;
4. Communal Land Tenure Bill;
5. Expropriation without compensation;

So where are we headed?

Mixed bag of new developments:



Persistent uncertainty
and internal
contradictions =

- Reduced investment &
- Growing frustration amongst the landless.

1. Restitution of Land Rights Amendment Bill

Reopening the lodgement period

- 2014 Amendment Bill declared unconstitutional due to a faulty public consultation process;

Effect:

- New Bill could reopen the lodgement period up to 2021;
- Despite talks of a pre-colonial land audit, no provision for pre1913 claims as this could require a constitutional amendment

Agbiz comments:

- Broadly supportive of restitution, but must take place quickly and efficiently to prevent prolonged uncertainty;
- As far as Agbiz's membership is concerned –
 - Compensation received for land more relevant than the purpose of land reform (restitution v redistribution);
 - NB that the owners are properly compensated to maintain integrity of land market, collateral value and property rights.

2. Regulation of Agricultural Land Holdings Bill

Land Commission

- Can be enabling as a source of information if commission is credible;
 - Autonomous, suitably qualified & integrated database.
- Currently no private sector land reform or private sales counted.
- Results of private land audit?

Prohibition of foreign ownership

- Not based on sound data – hence the need for a land commission;
- Limitations not unprecedented, but prefer a model similar to Australia where transactions over a threshold require consent
 - dealt with on the merits of each transaction.

Land ceilings

Cost v Benefit?

- Mortgage bonds will have to be deregistered and reconsidered (still a viable unit?);
- Huge costs associated with subdivision – why not buy existing land parcel?;
- Some producers may be denied economies of scale;
 - SA producers use scale to remain competitive in a climate of high input costs (weak Rand) and highly subsidized international competition.
- Can have a negative impact on investor confidence and bond financing;
- International examples not necessarily relevant;
 - China, Taiwan, S Korea, India have different resource base; and
 - Egypt, Colombia etc. done for different motivations.

Land ceilings

Will it benefit beneficiaries?

- Beneficiaries will receive 'off cuts';
 - economically viable?
 - Access to resources (water, good soil etc..)
 - Access to roads or municipal services?;
- Conflicts with NDP, DLRCs and government's own demanded redistribution policies (strategically located land);
- PDALB (DAFF) v land ceilings (DRDLR)?
- Beneficiaries will have to deal with whatever off-cut they get – why not look for land suited to beneficiary's needs and aspirations?

3. Property Valuation Regulations

What its all about:

- Office of the Valuer General (OVG) mandated to value land identified for land reform at 'just and equitable' rate;
- Regulations designed to give 'content' to the 'just and equitable' principle in section 25 (3) of the constitution;
- Came up with the following formula:

'value' = (current use value + market value) – subsidies

Property Valuation Regulations

Effects:

- 'current use value' is not the same as 'productive value'!
- 'current use value' is the net income generated by the property and expressly excludes its optimal or best use.
- Will result in an under-valuation as it does not take the potential of the land into consideration but rather the current income generated.
- Presumably aimed at 'punishing' underutilized or 'lifestyle farms'; but
- Will have negative side-effects on long term investments and sustainable use.

Property Valuation Regulations

Agbiz comments:

- Unique set of regulations as it represents a complex interface between economic principles, technical valuation practice and legal/constitutional principles;
- Outlined negative effects it will have on financing of agriculture and long term investments;
 - 'return on investment' (capitalisation rate) not factored into equation;
 - Therefore a disincentive to invest in capital improvement of property.
- Formulation not aligned with any recognised methods for valuing agricultural properties.
- Rigid formula not in line with section 25 of the Constitution;
 - s25 a flexible mechanism that must be applied to the circumstances of each case.
 - Impossible to apply all factors rigidly as a court would weigh factors in s25 and apply them according to their relevance;
 - To treat all land owners the same using a formula is not in line with s25 of the constitution.

Property Valuation Regulations

NB! – perspective required;

- valuation never binding;
- OVG cannot ‘set’ the price when the state purchases land for reform – seller only bound to what he agreed on.
- Nor can OVG ‘set’ compensation upon expropriation

– Compensation must be agreed upon or decided by a court. OVG can simply inform the state’s offer.

Ultimately what matters is that the compensation must be ‘just and equitable’, reflecting an equitable balance between the interests of the state and those affected, taking into consideration all the relevant circumstances.

- Agbiz has submitted comments and is trying to secure a meeting with the OVG through BUSA.

4. Communal Land Tenure Bill

Content:

- Provides for title deeds to be transferred to communities;
 - But at Minister's discretion.
- Communities can decide on nature of individual rights within communal land (use rights, lease or title);
- Communities can opt for CPAs, Trusts or Traditional Authorities as a governance structure.

Agbiz comments:

- Transfer of title deeds a positive step for agricultural development;
- Preference for ownership has nothing to do with common law v communal law notions of property;
- It is simply a practical consideration;
 - Ownership most legally secure form of tenure in SA + rates highly by international measures;
 - No need to reinvent the wheel.

| International measures of tenure security | SA status quo | Ownership |
|---|---------------|-----------|
| Duration of rights | ✓ | ✓ |
| Legal title and record of rights | X | ✓ |
| Method of acquisition | X | X |
| Range of use rights | X | ✓ |
| Duration of possession | ✓ | ✓ |
| Renewability of rights | X | ✓ |
| Probability of renewal | ✓ | ✓ |
| Ability to defend rights through litigation | X | ✓ |
| The rights to sell, transfer and encumber the right | X | ✓ |
| Obligation to share financial returns with government | ✓ | X |
| Probability of eviction | X | ✓ |
| Probability of expropriation/compulsory acquisition | ? | ? |
| Expected time until eviction | X | ✓ |
| Conflict with abutters or owners of adjacent land and measures to resolve those conflicts | X | ✓ |
| Perceptions of good governance | X | ✓ |

Comments

- Concern about Minister's discretion -can decide on:
 - Existence of right;
 - Nature and extent of informal right; and
 - Whether or not to upgrade to ownership.
- Informal rights no less valid, still constitutionally protected;
- Only a court can decide on validity and extent of right;
- Choice not to transfer ownership or reserve land for state = limitation of informal property right.

Recommendation:

- Minister & land rights inquiry can investigate validity of rights and facilitate transfer where there is agreement only;
- Where 'other' state interests are at play, Land Claims Court should decide if it is a reasonable and justifiable limitation;
 - Minister cannot be 'player and referee'.

Implications for agribusiness

- Transfer of ownership from the state to the 'community' facilitates land to be used as collateral;
- However, limitations-
 - Community resolution needed to encumber land (60%);
 - Collateral value of individual allotments may differ from community to community; but
 - Community consent needed irrespective of form.

Way forward

- Consult experts in the field;
- Comments to be submitted by 4 November;

The Bill isn't perfect, but the building blocks are sound.

5. Expropriation without compensation

- Not currently government policy nor provided for in the Constitution;
- However it is very much on the table;

This is the most important issue on the table as it can overshadow all of the land reform legislation discussed

Expropriation without compensation

- The state can currently expropriate for land reform purposes;
 - Powers contained in ESTA, Restitution Act and other.
- However, it will be subject to ‘just and equitable compensation’ as per s25 of the Constitution.
- The government has failed dismally to use its available budget for land reform in the past 25 years and never used their powers of expropriation;
- However, to cover their backs, they are using the protection of property rights as a scape goat.

Expropriation without compensation

- Frustration at the slow pace of land reform is bubbling over amongst the poor and disenfranchised;
- However instead of blaming government, the 'scape goat' strategy has been very effective to divert attention away from government's lack of implementation towards an attack on s25;
- As such, there is wide-spread support for amending the Constitution to allow for land expropriation without compensation;
- ANC branches must vote on this proposal in December.

Expropriation without compensation

Agbiz strategy:

- Designed a communication strategy aimed at highlighting the practical effects thereof in simple language;
- Not an intellectual debate – must use social media, community radio stations and publish articles in non-traditional media;
- Agbiz & Banking Association South Africa jointly running this initiative with the help of expert consultants.

Key messages

- *R160 billion invested in agriculture using money deposited in banks, i.e. expropriation without compensation could cost ordinary citizens R160 billion;*
- *No compensation means no finance for existing and new farming businesses*
- *No compensation will increase the price of food twofold;*
- *Expropriation without compensation will short-change communal occupiers who are set to receive ownership of their land;*
- *Show that government has done little with its budget, whilst the private sector has invested greatly in land reform;*
- *Win-win still possible; leverage funds from private sector through subsidies loans to make more funds available;*

Where we are now

- The ANC is split down the middle on this crucial issue;
- It is not the public that will decide, but the ANC. Hence it all comes down to how many members certain branches have recruited;
- Whilst there are many rational minded leaders within the party that can see the dangers, we need to strengthen their hand by providing concrete arguments and alternatives;
- The best tool we have is to try and educate the public & the ANC delegates on the consequences of this route.
- We have no more than 2 to 3 months to influence the ANC delegates that must vote on this proposal, therefore we must give it our all;

“John Purchase: I don’t want to look back in a few year’s time and wonder if there was more that we could have done...”

Questions and comments?

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