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# Agbiz Information Day Legal Intelligence Desk

By Theo Boshoff

01 March 2018

Pretoria, South Africa



# For today

1. Carbon tax
2. Labour legislation
3. Water rights
4. Land reform

# Carbon Tax

# Carbon tax Bill

- Tax levied per ton of carbon dioxide released;
- Only levied directly on large emitters (installed capacity of more than 10MW);
- But will affect clients indirectly through levy on fuel used and electricity consumed;
- Allowances for trade exposure, benchmarking and carbon sequestration.
- Public consultation and Parliamentary process to run parallel.
- Implementation date 1 January 2019

# Labour Legislation

# National Minimum Wage Bill

- NMW & BCEA amendment Bill submitted to Parliament;
- NMW Bill to introduce a cross-cutting minimum wage of R20 per hour as of 1 May 2018;
  - R18 per hour for Agriculture in 2018, must 'catch up' with NMW by 2020;
  - Minimum wage includes worker contribution to social security but excludes employer contributions & other benefits.
- Sectoral Determinations to continue regulating non-remuneration aspects & NMW to regulate all wages;
- Regulations to apply for exemption currently in Nedlac, to be released simultaneously with Bills.

# Labour Relations Amendment Bill

- Aimed at labour market stability;
  - Introduces secret ballots prior to strikes; and
  - Picketing rules to be agreed to before picketing.
- 
- NMW & LRA amendment Bill part of a compromise agreement reached at Nedlac – seen as a ‘package deal’;
  - As such, BUSA will supply limited comments in Parliamentary process so as to prevent agreements from unravelling.

# Water Rights

# Introduction

- Secure water rights NB!;
  - ROI, value of the land, business plan etc. all greatly depend on ability to lawfully use water for irrigation.
- Agriculture by far the biggest water user
  - 67% of water used for irrigation
- Water use likely to come under increasing pressure from industrial and domestic demand.
- Much stronger focus on water reform expected;
  - Minister clearly stated at the AFASA congress that water reform is a priority for government


# Setting the scene – a Department in crisis


Auditor-General reporting to Parliament on the 4<sup>th</sup> of October:

Programme	Budget amount (R'000)	Spent amount ('000)	Budget spent	Goals achieved
Administration	R1 547 743	R1 504 930	97,2%	85%
Water Planning and Information Management	R749 656	R695 604	92,8%	67%
Water infrastructure development	R12 130 318	R12 082 462	99,6%	28%
Water and sanitation services	R778 488	R1 070 757	137,5%	83%
Water sector regulation	R318 392	R281 685	88,5%	35%

## Executive summary on Key Projects audited as part of the statutory audit

#	Key Projects audited	Budget versus spending	Financial management (AFS)	Compliance (incl. to Contract requirements)	Pre-determined objectives	Implementation party
1	Eastern Cape – Greater Mbizana Regional Bulk Water Supply					Umgeni Water Board
2	KZN – Lower Thukela Bulk Water Supply Scheme					Umgeni Water Board
3	Limpopo – Giyani Bulk Water Services and Giyani Water Services					Lepelle Water Board
4	Mpumalanga – Northern Nsikazi Bulk Water Scheme					Rand Water
5	North West – Taung / Naledi					Dr Ruth Segomotsi Mompati District Municipality
6	Limpopo – Mopani Emergency Project					WTE construction unit
7	Limpopo – Nwamitwa Dam					Lepelle Water Board
8	Limpopo – Raising of the Tzaneen dam wall					Lepelle Water Board
9	Western Cape – Raising of Clan William Dam wall					Started by WTE, in the process to appoint external service provider
10	Eastern Cape – Mzimvumbu Water Projects					Started by WTE in process to move to TCTA

 Material findings / concerns noted

 No material findings / concerns noted



ACCOUNTABILITY = PLAN + DO + CHECK + ACT

# Department in crisis

## Financial concerns

- AG: in 2016/2017 financial year the Department incurred;
  - A net loss of R89 million;
  - overdraft of R194 million; and
  - unauthorized expenditure of R406 million.
  - The department's current liabilities exceeded its total assets by R454 million
- R2.675 billion overdraft obtained from Reserve Bank

# Department in crisis

## Capacity & human capital

- Several senior officials suspended;
- Probe underway by the Public Protector and a Special Investigative Unit (SUI) investigation underway;
- Only 2 out of 9 Catchment Management Agencies (CMAs) established;
  - Breede-Gouritz & Inkomati-Usuthu
  - Move to 1 national CMA?
- Minister Nkwinti (previously DRDLR) appointed new Minister Water and Sanitation.

- Financial crisis in Department can result in more onerous fee structure to dig the Dept. out of its financial hole;
- Very limited capacity for monitoring and evaluation;
  - Ability to 'police' unlawful water use very limited; and
  - Verification & validation process still not finalised;
- Pressure on Dept. to effect water reform will likely translate into legislative steps;
  - *DWS: 60% of water use allocations to PDIs by 2024;*
  - *Future of Existing Lawful Use very uncertain.*

# *Where are we headed?*

- How to position yourself for the future

# Policy imperatives

- Dept. has repeatedly stated that there is a need to consolidate the National Water Act with the Water Services Act.
- Stronger focus on water reform expected.
- National Water Policy Review (2013):
  - 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 the Portfolio Committee deems it a priority.

# Water use rights – strategic considerations

- Current Act makes provision for ‘old order’ (i.e. Existing lawful use) and ‘new’ rights (i.e. Water Licence);
- ELU based on historical use, but may be a barrier to water reform (cannot reallocate limited supply of water if all existing users’ rights continue unabated).
- Unlikely that ELU will still be recognised in new legislation;
  - 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.
- Water reform likely to play a central role in new Water Bill;
- New legislation not published yet, but DWS has expressly said that they want to do away with ELU to promote reform in the water space.

# Water use rights – strategic considerations

- 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



?



?



?

# 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.

Downside = licences have a limited duration, not perpetual rights.

- Criteria for obtaining a licence settled under s27 of NWA;
- Process: **New Regulations Promulgated** 24 March 2017;

# *Where are we now?*

- Procedure to obtain a water licence
- Metering and self-reporting
- Raw water tariffs

# New Regulations

## **Water licence application procedure**

- Regulations promulgated March 2017;
- Sets out the detailed procedure to apply for a water licence;
- Important provisions:
  1. Onerous public consultation procedure;
  2. Provision of financial security;
  3. Expert reports required.
- 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

2. Provision on financial security by applicant
  - Similar to 'mine rehabilitation fund';
  - Power to request security for rehabilitation in Act - discretionary;
  - Unlikely to be required of agricultural sector.
3. Expert reports
  - Series of expert may be required to accompany application
  - Significant costs involved.

## 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.

# Electronic applications

Department of Water and Sanitation

## e-WULAAS LAUNCH

## INVITATION



The Minister of Water and Sanitation Mrs Nomvula Mokonyane invites the public to the Launch of:  
**Electronic Water Use License Application Authorisation System.**

Date: 31 October 2017  
Time: 09:00 – 14:00  
Venue: Riverside Sun Hotel, Vanderbijl Park

Kindly RSVP by 25 October with Sarah Mothimonye @ mothimonyes@dws.gov.za or 083 800 2616 and Lettie Leballo Leballol@dws.gov.za or 083 790 9101.

WATER IS LIFE - SANITATION IS DIGNITY



**water & sanitation**

Department:  
Water and Sanitation  
REPUBLIC OF SOUTH AFRICA



**agbiz**

# Water Tariffs – short term outlook

## Proposed Raw Water Tariffs for 2018/19

- Notice was given in the GG that the water research tariff has been increased by 6.79%;
  - This is however a relatively small portion of the raw water tariffs as it will amount to an additional 0.063 cents increase per ha of irrigation.

## Proposed increased for 2018/2019 financial year:

- Water Resource Management:
  - Ranges from 0% - 14.6% increase;
    - capped by PPI (4.6%) for charges that exceed 1.5 c/m<sup>3</sup>
- Water Resource Infrastructure:
  - Ranges from 0% - 14.6% increase
    - Depreciations charge capped at 1.5 c/m<sup>3</sup> plus PPI
    - Operation & maintenance cost increased limited to 50% p.a.

# Proposed Raw Water Tariffs for 2018/19

Water Resource Infrastructure moving towards total recovery of costs

- Capital Unit Charge (CUC)
  - May 2017 CPI was 5.7% y-o-y
  - Proposed increase of 8.4% as a result of:
    - Future demand as a result of water restrictions; and
    - Government's limited ability to increase funding for WRI
- Bulk Operating & Royalties Charge (BO&RC)
  - Proposed increase of 29.6%

# Long-term developments

- Water 'master plan'
- Economic regulator for water

# Water 'master plan'

- Water master plan overarching policy for raw water and sanitation services;
- Includes water reform, infrastructure development, water regulation etc.
- Will inform the basis for the new water legislation;
- On-going consultations on draft version, to be approved by Cabinet and formally published for public comments in March.

# Water 'master plan'

Key points:

- 1 CMA approach;
- Economic 'regulator' for water;
- New legislation to combine raw water and water services:
  - Use-it or lose-it;
  - No trading of water rights;
  - Existing Lawful Use 'scrapped';
  - Link water use allocations to BBBEE;
- 60% of SA's water authorisations to PDIs by 2024.

# Economic regulator for water?

- Included in the Water Master Plan is an independent regulator for water;
- Similar to NERSA in relation to energy;
- Currently the DWS consults on Raw Water Pricing Strategy but ultimately still makes the decision

## *Rationale for an independent regulator:*

separate tariff-setting function from implementing developmental and regulatory functions of the Department –

- Avoid a conflict of interest between needing more money and setting the tariffs

# Economic regulator for water?

## Analysis

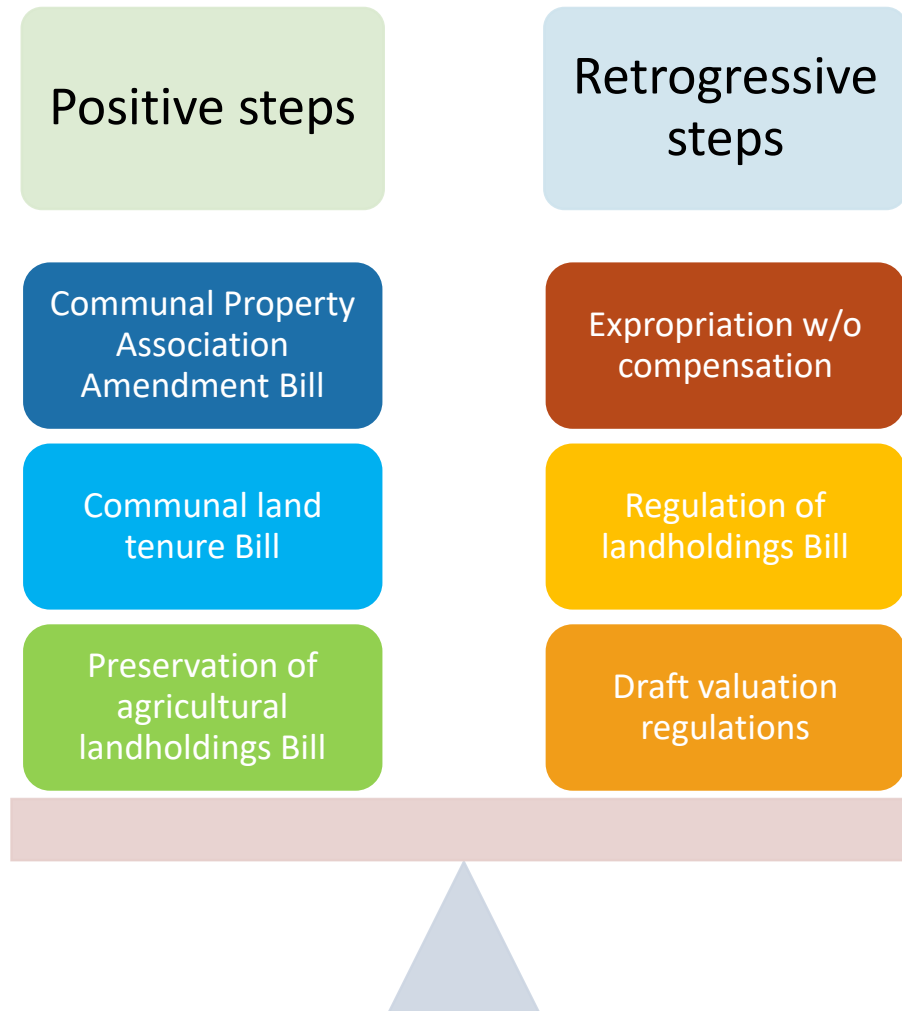
- The intention is good, but there are some hurdles to overcome:
  - Provision of water services a function of local government;
  - Unclear mandate:
    - Draft Master Plan indicates that the regulator will set tariffs but other policy documents seem to envision a wider role –
    - Granting of water use authorisations?
    - Collection and enforcement of levies?
    - Budgeting for infrastructure etc.?

*“Much work to be done, but the idea is good”*

# Land reform

# So where are we headed in 2018?

Mixed bag of new developments:



Persistent uncertainty  
and internal  
contradictions =

- Reduced investment &
- Growing frustration amongst the landless.

Possible restraints...

# Regulation of Agricultural landholdings Bill

Seeks to:

1. Create Land Commission to hear public disclosures of land ownership by race, nationality & gender;
2. Prohibit prospective agricultural land ownership by foreign nationals;
  - Only long term lease permitted;
3. Introduces 'cap' or 'ceiling' on land holdings.
  - No set ceilings – to be determined by Minister;
  - "excess land" to be sold to PDIs, or the state, or expropriated.

# Regulation of Agricultural landholdings Bill

## Implications:

- Land Commission can be enabling; but
  - Need for land commission clashes with results of 'private' land audit just released;
  - Both Agri SA & DRDLR just released land audits with conflicting information;
  - Both sets based in questionable, but same methodology;
  - What do we make of conflicting results?

# Regulation of Agricultural landholdings Bill

## Implications for financiers:

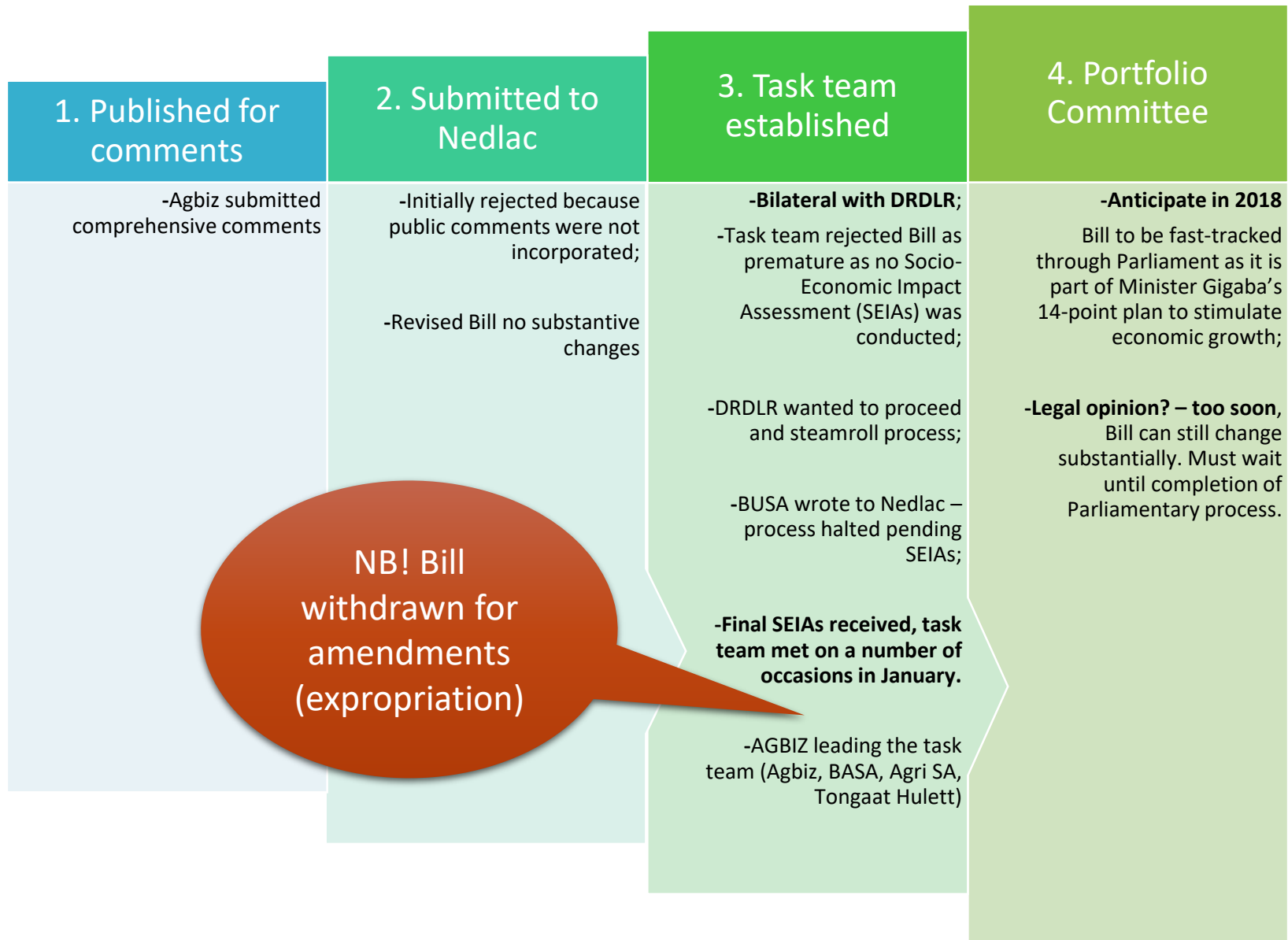
- Ban on foreign land ownership:
  - Current owners can continue to own land, but must make first offer to the state if they want to sell;
  - May retard transactions by 90 days or more;
  - New dispensation: long-term leases up to 50 years;
  - Tradable? – Bill does not address this so usual rules should apply and is should be tradable;
  - Collateral value?

# Regulation of Agricultural landholdings Bill

## Implications for financiers:

- Land ceilings:
  - Current owners over the ceiling will have to sell excess or face expropriation;
  - This could break up current landholdings with mortgage bonds registered over them;
  - Bonds will have to be de-registered and re-registered over a smaller land parcel;
  - Costs of registration?
  - Smaller land parcel still viable security vis-à-vis loan?

# Regulation of Agricultural Land Holdings Bill



# 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 as in s25 of the Constitution;
- Regulations codifies 'just and equitable' into set a formula to be applied by valuers:

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

# Property Valuation Regulations

Practical effects:

- 'current use value' is not the same as 'productive value'!
  - Only looks at net income for year, no return on investment or 'capitalisation rate'.
- = under-valuation - potential of the land not considered.
- Presumably aimed at 'punishing' underutilized or 'lifestyle farms'; but
  - Will have negative side-effects on long term investments; and
  - Ecology – disincentive to exploit resources;
- Can have severe effects 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.
- If the value of land acquired for land reform is pushed down, will lower the value of the land - not fully empowered or compensated.

# Property Valuation Regulations

Complex interface between economic principles, technical valuation practice and legal/constitutional principles;

- Rigid formula not in line with section 25 of the Constitution;
  - flexible mechanism - circumstances of each case.
  - 'fairness', not a simple formula.
  - can overcompensate some and undercut others
  - 'Weight' of factors in s25 determined according to relevance in the given circumstances;

To treat all land owners the same using a formula could be out of line with the court's approach to interpreting 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.

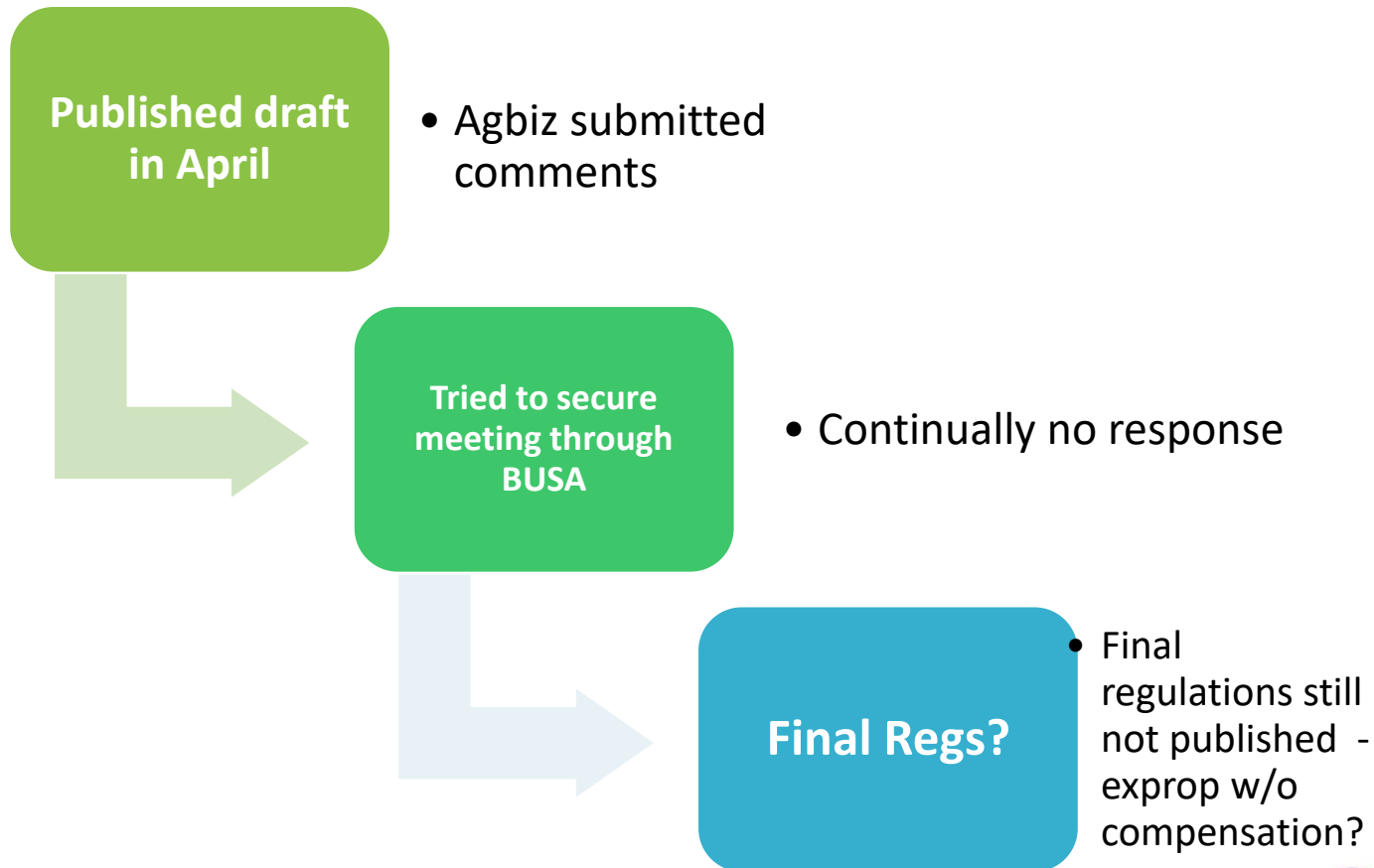
But – if no consensus reached, role of OVG can become redundant.

Status vis-à-vis expropriation issue?

# Property Valuation Regulations

= Value land according to 'just & equitable' formula

Process:



# Expropriation without compensation

What is expropriation?

- In the event where the state needs property for a public purpose or in the public interest, the state must have the power to acquire property even if the owner is not willing to sell;
- Most governments have this power under some name or another:
  - ‘expropriation’ – SA & continental Europe;
  - ‘compulsory acquisition’ – UK & anglophone countries;
  - ‘state’s right of eminent domain’ – USA
- **No consent required, but subject to compensation.**
- Section 25 of the South African Constitution does currently allow for expropriation but subject to ‘just and equitable’ compensation.

# Expropriation

## Section 25:

“(2) Property may be expropriated only in terms of a 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 Compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having due regard to all relevant circumstances, including-

- (a) the current use of the property;
- (b) the history of the acquisition and the 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.”

# Expropriation

What does this mean?

- Provision seldom in the past 22 years;
- Courts have had precious little opportunity to give content to s25;
- We still do not know exactly what a 'just & equitable' amount may be;
- But it is not the same as market value – deviation will depend on the circumstances of each case;
- Former Constitutional Court Justices Sachs and Moseneke have both come out strongly in favour of retaining the current wording:
  - section 25 is a flexible mechanism;
  - designed to strike a balance between the individual and the needs of the public;
  - It is already a carefully crafted compromise;
  - LAND REFORM CAN BE EFFECTED USING THE CURRENT SECTION 25.

# Findings of the High-Level Panel

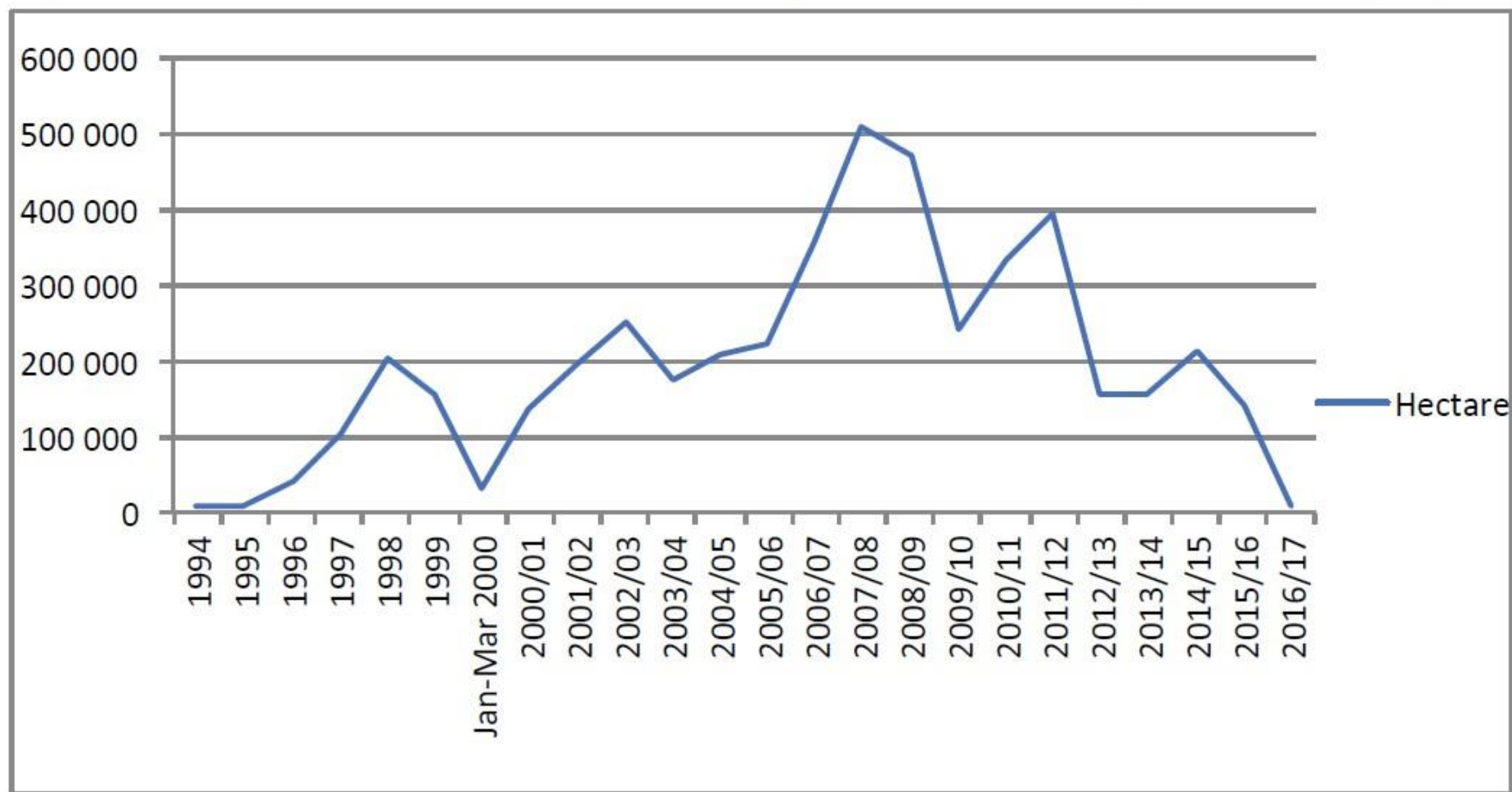
The High-Level Panel chaired by former President Motlante made the following findings:

- The requirement to pay compensation is not the biggest stumbling block to the land reform programme;
- Poor implementation, legislative gaps, corruption and a reluctance to transfer ownership as identified as the biggest stumbling blocks.

Recommendations:

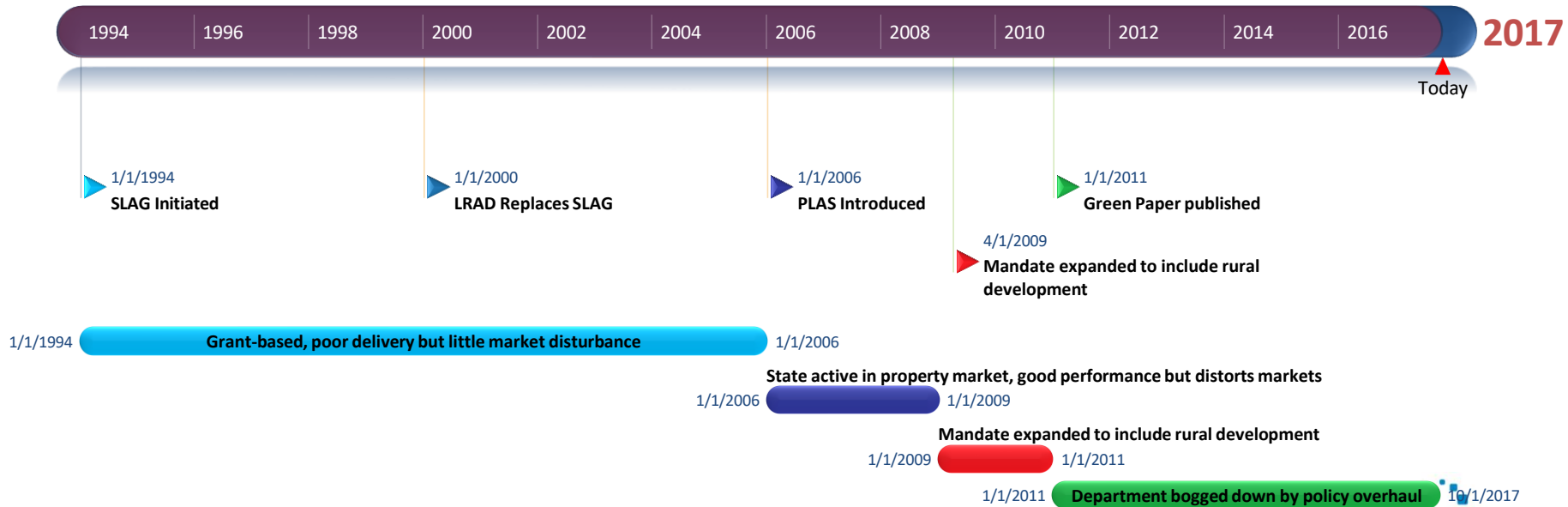
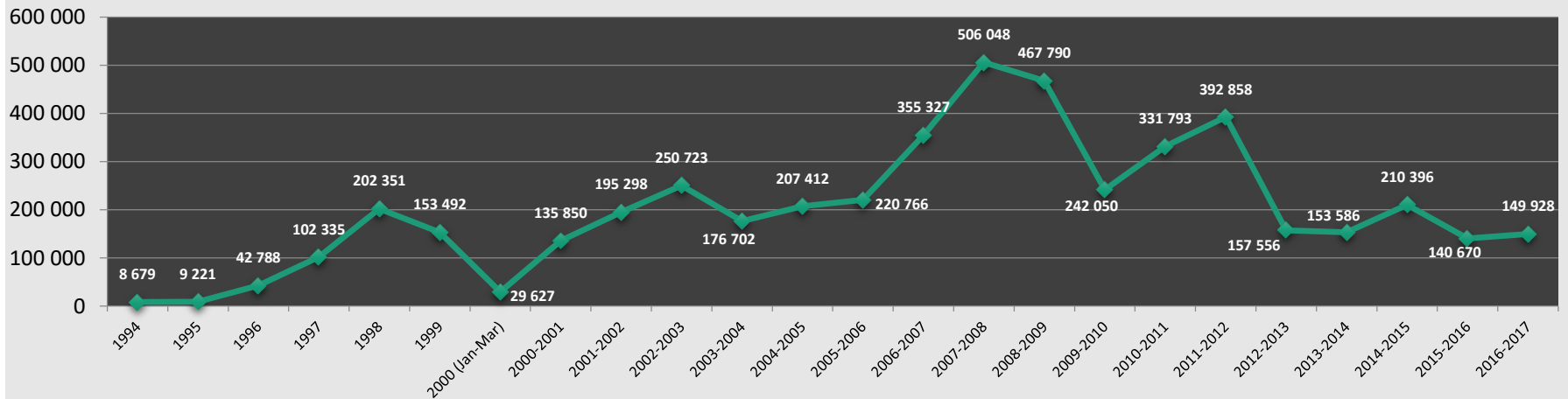
- Urgently finalise legislation to regulate communal land tenure which recognises a continuum of right; and
- Enact framework legislation for land redistribution which:
  - Regulates beneficiary selection;
  - Regulates land identification;
  - Provides for the transfer of ownership; and
  - Provides for various forms of landholdings (individual & collective).

**Figure 3.1: Amount of land transferred through land redistribution, in hectares per year**



\* Sourced from the High-Level Panel's report on page 301

# Major shifts in policy v performance



\*Table courtesy of presentation delivered by DRDLR, 5 October 2017 at the Land Reform Panel

Discussion at Werskmans Attorneys, Cape Town.

\* Timelines approximated

# Proposed amendment

**At the ANC's 54<sup>th</sup> elective conference in December 2017, it was announced that:**

- 1. The Constitution must be amended to allow for expropriation\* without compensation; provided**
- 2. It must pass a so-called 'sustainability test' in that it must not harm the economy, the financial sector or endanger food security.**

- \*It is unclear whether the proposal is to allow for all property to be expropriated without compensation (i.e. moveables, intellectual property etc.) or only agricultural land.

# Potential effects

Agbiz launched an extensive media campaign to highlight the consequences and focused on the following issues:

## 1. The effect on the financial sector

- Commercial banks, DFIs and agribusinesses have R160 billion invested into agriculture and many loans are securitised using the value of the land;
- If the value of the land is destroyed, it could endanger the R160 debt owed by farmers to financial institutions;
- This in turn would place huge strain on the banks and the depositors whose savings are used to extend credit.

## 2. Accessing credit;

- If land is no longer seen as credible security, commercial and emerging farmers may struggle to access credit to finance their business operations;

## 3. The price of food will increase

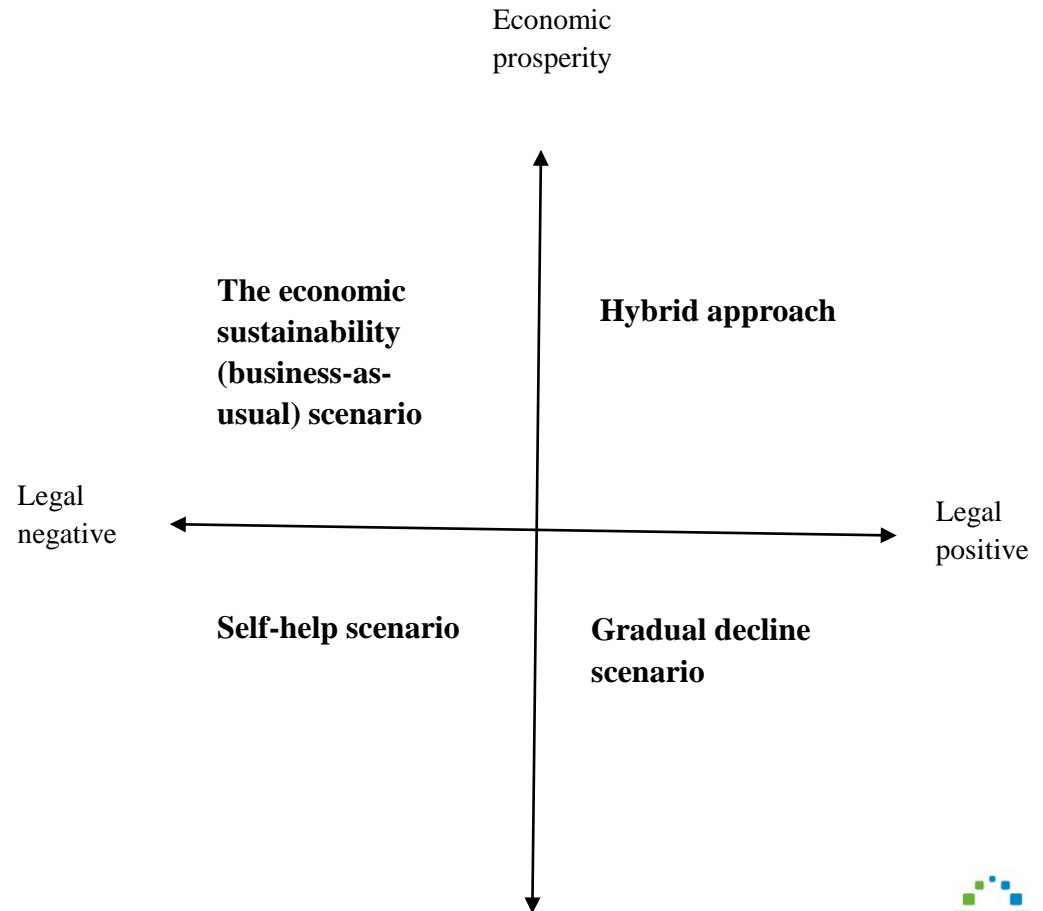
- If farmers cannot access credit, then they will not be able to farm optimally and we will need to import agricultural commodities at import parity price, thereby increasing the price of basic food items.

# Potential effects

4. Communal farmers will continue to be marginalised;
  - There is currently a Bill out for comments which seeks to transfer ownership to approximately 20 million communal land occupiers currently living on state land;
  - Whilst the state is finally willing to give them ownership, they will be 'short-changed' as expropriation without compensation will destroy the value of their land.
5. Win-win solution not out of reach yet:
  - We can still achieve a win-win outcome without changing the Constitution if the state focuses it's resources on acquiring ownership for those who do not need large tracts of land for commercial farming;
  - State focuses on buying small plots for farm workers, labour tenants etc. who merely need security of tenure and small plots for subsistence production;
  - To transform the commercial sector the state should focus its resources on blended financing models where private-sector capital can be unlocked on a Public-Private-Partnership basis.
  - Agbiz & the Banking Association South Africa has already developed a co-financing model whereby land reform beneficiaries can access 'soft-loans', but the state has been very slow to take up this offer.

# Unpacking the ANC's policy pronouncements

- Very unclear how to reconcile expropriation without compensation & economic prosperity;
- We constructed 4 possible scenarios dependent on the emphasis placed on maintaining economic growth v rapid redistribution of land without compensation;
- The scenarios were constructed by using the economic and legal consequences of various options as the X & Y axis:



# Unpacking the ANC's policy pronouncements

## 1. Self-help scenario

- ANC's drags its feet and does not detail what is meant by its pronouncements;
- This results in wide-spread frustration and results in self-help through mass farm invasions;
- This results in the collapse of the rule of law and the agricultural economy comes to a standstill.

## 2. Gradual decline scenario

- Land reform still takes pace within the rule of law but the Constitution is amended to allow for land to be expropriated without compensation, although compensation still paid for the farming enterprise as a going concern;
- The rule of law is upheld but financial institutions lose out from not being awarded compensation;
- This results in a gradual decline of investment into the sector and ultimately the agro-food sector shrinks.

# Unpacking the ANC's policy pronouncements

## 3. The economic sustainability (business as usual) scenario

- Macro economic growth in the sector is prioritised so a decision is taken not to amend the Constitution;
- Land reform continues to take place through the state-led process with all of its inefficiencies;
- The private sector continues to be marginalised and the process is characterised by litigation and exorbitant prices paid for land;
- Economic growth is maintained but the Constitutional vision of land reform remains unrealised.

## 4. Hybrid approach

- Multiple mechanisms are used to speed up land reform, including blended finance models and AgriBEE for high value commercial farms;
- The state targets unused, unoccupied and unbonded land for expropriation;
- Expropriation is initially undertaken according to the existing provisions to 'test' what amount is 'just & equitable' where the public interest argument is strong (weekend or 'lifestyle' farms targeted);
- An assessment made as to affordability of compensation v amending section 25.

# Process

- 1. National Assembly passed a motion to mandate the Constitutional Review Committee to consider an amendment**
  - 241 voted in favour, 83 against
  - Review committee = proportionate representation
- 2. Public hearings to be held;**
  - Constitution prescribes that the public must be afforded an opportunity to provide inputs;
  - Agbiz will certainly participate
- 3. Vote in National Assembly & NCOP;**
  - Two thirds majority required + 6 provinces;
- 4. Signed into law by President:**

# Where does that leave us?

- The specific nature of the amendment still unknown and can hopefully still be influenced but an amendment of some sort seems very likely;
- moving closer to the 'gradual decline scenario';
- Still unsure how to strike a balance with economic sustainability;
- Qualifiers may move from rhetoric and find expression in test of amendment;
  - Only rural land?
  - Only underutilised land?
  - Absentee landlords, farms in deceased estates (NDP)?

# Red-herrings

Avoid these red-herrings!

1. Opinion that 75% majority in the National Assembly is required to amend section 25;
  - The argument was made in the media that property rights is a fundamental part of the rule of law, and as such one requires 75% opposed to a 2/3 majority to amend section 25;
  - 75% is only required if the rule of law is removed as a fundamental principle of our legal system.
  - Should section 25 be amended it could affect our interpretation of the rule of law, but that does not mean that the rule of law must be removed from the Constitution;
  - The Constitution is clear on procedure: 2/3 required to amend section 25, not 75%.

# Red-herrings

Avoid these red-herrings!

2. The term 'land grabs';

- A 'land grab' takes place outside of the law;
- Even if no compensation is payable for expropriation, one still has the following fundamental rights:
  - Not to be evicted from one's home without a court order;
  - Right to just administrative action and a fair procedure;
  - Not to be arbitrarily deprived of property (must take place within the law);
  - To challenge unlawful state action in the courts.
- Although compensation is critically important, it does not mean that land reform can take place as a 'free-for-all' outside of the law.

# What does this mean for financiers?

- Still uncertain if it will take place, and if so when?
  - Recommendation due by 30 August, but will still need to be debated and voted on;
  - Expropriation Bill? – withdrawn from PC...
- Agbiz busy talking to major stakeholders behind the scenes and coordinating a process with other role players (Agri SA, BASA, AFASA & TAU) to come up with workable alternatives;

Way forward: will need to try and influence Constitutional Review Committee.

Positive signs...































# 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		
Method of acquisition		
Range of use rights		
Duration of possession		
Renewability of rights		
Probability of renewal		
Ability to defend rights through litigation		
The rights to sell, transfer and encumber the right		
Obligation to share financial returns with government		
Probability of eviction		
Probability of expropriation/compulsory acquisition		
Expected time until eviction		
Conflict with abutters or owners of adjacent land and measures to resolve those conflicts		
Perceptions of good governance		

# 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

- Comments submitted November 2017;
- Awaiting Bill at Nedlac;
- High-Level Panel finding – customary law misunderstood by state, customary law does not imply 'ownership' by traditional authorities;
- ANC resolution also affirmed communal ownership, not tribal ownership.

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

# Communal Property Association Amendment Bill

## Purpose:

- Regulate governance of CPA's (landholding entities where ownership of land is transferred);
- Seeks to introduce community thresholds (60%) for alienation or encumbrance of communal land;
- Currently before Parliament;
- Bill positive on the whole; but
- Unsure what the future of CPAs will be in light of the Communal Land Tenure Bill.

# Preservation and Development of Agricultural Land Bill (PDALB)

## Purpose:

- Seeks to regulate subdivision and competing interests for agricultural land;
- Provides guidelines to municipalities with regards to zonation functions – divert developments towards areas with the least impact on agricultural activities;
- Provides for national & provincial ‘protected agricultural areas’;
- Regulates non-agricultural activities through ‘norms & standards’.

# Preservation and Development of Agricultural Land Bill (PDALB)

## Process:

- Bill still at Nedlac after 13 months;
- State Law Advisor gave a damning opinion on the Bill due to drafting errors;
  - Nedlac process halted so that DAFF can redraft for the 3<sup>rd</sup> time.
- BUSA offered our services to assist DAFF with drafting the Bill;
  - Meeting on a continual basis to assist with drafting;
- Return to Nedlac in April 2018.
- **Concern: Still fundamental disagreements within BUSA;**
  - **May have to 'agree to disagree' soon.**

# Thank you!

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