

LAND REFORM

Status update
May / June 2020

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INTRODUCTION

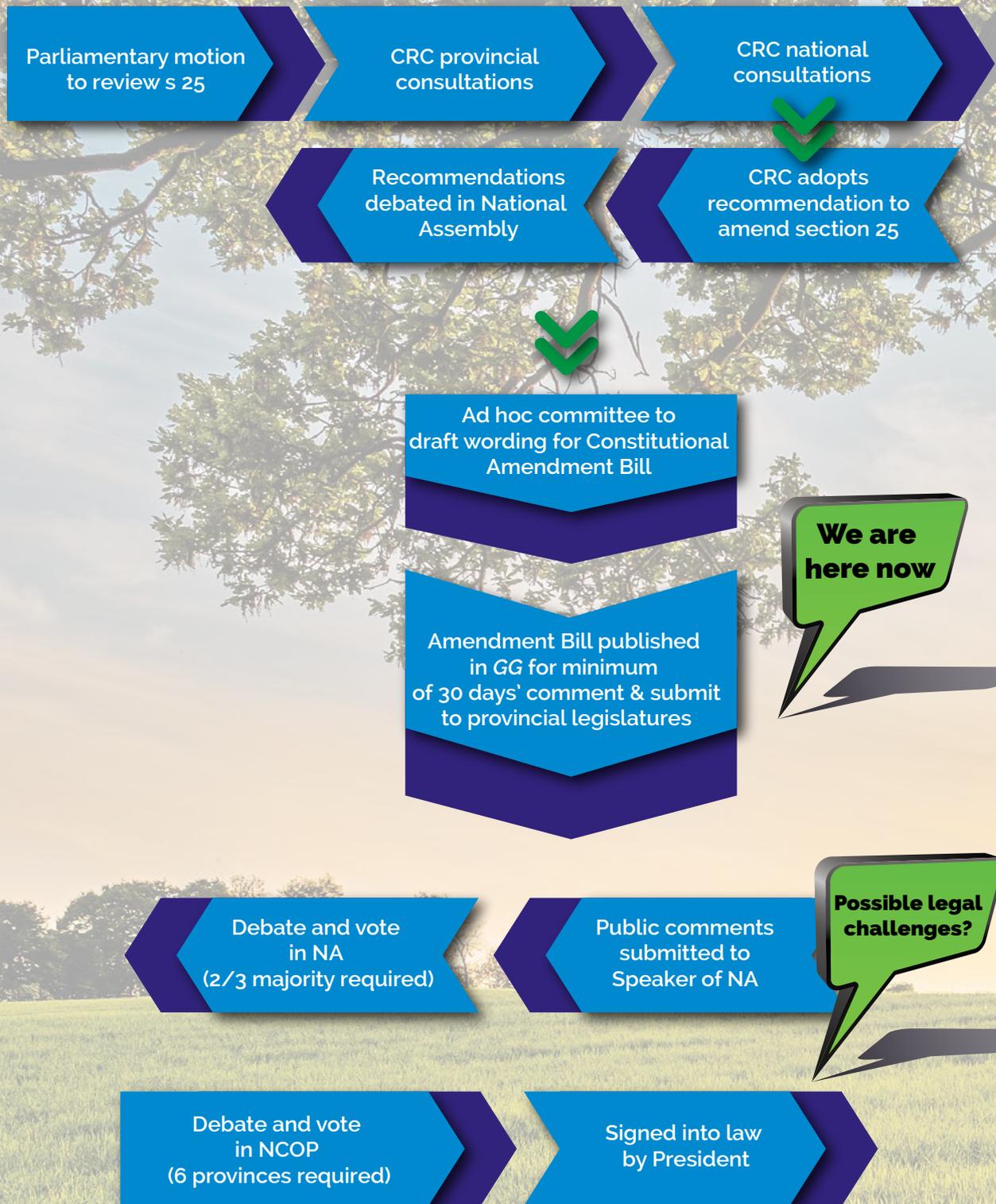
The ad hoc committee tasked with drafting an amendment to section 25 of the Constitution published the 18th Constitutional Amendment Bill for public comments. The period for written submissions ended on 29 February 2020. Provincial consultations were started and the national consultations were about to take place but had to be postponed indefinitely due to the Covid-19 crisis. The Bill seeks to retain just and equitable compensation but expropriation includes a proviso stating that a court may determine that it is just and equitable for nil compensation to be paid for land and improvements expropriated in the interests of land reform. This is followed by a memorandum which mandates national legislation to determine the specific circumstances in which nil compensation may be just and equitable. Agbiz has submitted comments that clearly convey our opposition to an amendment and provide thoroughly researched inputs on the wording while reserving our right to oppose an amendment in principle.

The revised Expropriation Bill is now of critical importance as it outlines the conditions under which a court may determine that it is just and equitable to expropriate land at nil compensation. Agbiz submitted comprehensive inputs on the Bill during the Nedlac process which was finalised in March 2020. The Bill must now be approved by Cabinet before submission to Parliament, where Agbiz will again make use of the opportunity to submit inputs to the Portfolio Committee.

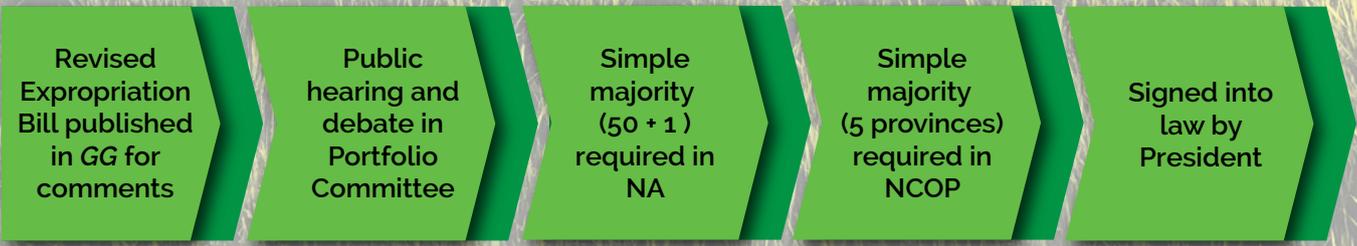
Expropriation is, however, merely one element of the broader land reform debate. There are several outstanding issues which predate the expropriation debate and which are vital to the success or failure of land reform in South Africa. Policy decisions on a number of these issues were largely held in abeyance while an inter-ministerial committee (IMC) considered the recommendations of the Presidential Advisory Panel on Land Reform and Agriculture. Two policy recommendations relating to land donations, beneficiary selection and land allocation have been published and Agbiz is again at the forefront of providing inputs.

This document is intended to place the latest developments on expropriation in context and to provide an overview of the broader direction in which land reform is moving.

Process flow for review of section 25



Parallel process could be followed to amend the Expropriation Bill, where the detail will be prescribed.



There are several outstanding issues which Agbiz is focusing on to improve the outlook on land reform.

Expropriation Bill

The Expropriation Bill provides for a uniform procedure to be followed whenever expropriation takes place under an empowering provision in legislation, as well as for the methodology to be used in calculating compensation. The Bill dates back to 2013 but an amended version was again discussed at Nedlac in 2019. The salient difference is the insertion of a provision for discretion to award nil compensation for specified categories of land, including land

- that has been abandoned;
- held for speculative purposes;
- owned by SOEs;
- that has successfully been claimed by labour tenants;
- acquired using subsidies that exceed the market value; and
- which constitutes a public health or safety hazard.

Discretion is retained and the Bill is not prescriptive in the sense of stipulating that the compensation paid must be nil. The decision still hinges on what is just and equitable in the circumstances.

Communal Land Rights

Tenure reform for the communal areas of South Africa is long overdue. A draft Bill which was published for public comment in 2017 made provision for title deeds to be given to communities, and for each community to decide on the nature of individual landholdings within the collective. Aside from comments regarding the scope of the minister's discretion, the content of the draft Bill was found to be largely positive. The Bill has, however, been held in abeyance and an alternative policy direction may be embarked on following the recommendations of the High-Level Panel. The inter-ministerial committee must consider the panel's recommendation to provide increased legal recognition to land rights that are not registered in the deeds registry. The Bill may well be redrafted as the panel is proposing wide-ranging recommendations on governance reform in communal areas as well as on the legal nature of communal land rights.

Restitution of Land Rights Amendment Bill

After the 2014 Bill was declared unconstitutional on procedural grounds, the Bill was referred back to Parliament for further consultation. As it currently reads, the Bill seeks to open the claims lodgement process for an additional three years. However, Agbiz and other stakeholders have called for the Bill to be reconsidered as key recommendations by the High-Level Panel and presidential panel will need to be incorporated before any amendment can be considered.

Land Reform (Labour Tenants) Act 3 of 1996

After a damning judgment was handed down against the Department of Rural Development and Land Reform (DRDLR) in 2016, a special master has been appointed to oversee the implementation of the Labour Tenants Act.

Beneficiary Selection and Land Allocation Policy

Following a similar recommendation by the presidential panel, the draft policy was published for public comments on 3 January 2020. The policy is a positive step in principle as it seeks to provide clarity on the selection of beneficiaries and allocation of land for redistribution. In its inputs, Agbiz commended the step but advised that the policy should be translated into law and the landholding status should be clarified. It was also advised that the institutional arrangements be reconsidered to give effect to the inclusive selection process recommended by chapter 6 of the National Development Plan (NDP).

Land Donations Policy

Although based loosely on a recommendation from the presidential panel, the draft Land Donations Policy published in February 2020 does not contain any incentives for landowners to donate unused land for reform but only deals with the manner in which such land is to be allocated. In Agbiz's submission, we make a substantiated proposal that the essence of the panel's recommendation should be taken on board in that landowners should be incentivised through access to blended finance, B-BBEE recognition and an exemption from donations tax.

ALSO UNDER SCRUTINY



Status update on Agbiz/ BASA land reform proposal: commercial financing for NDP model on land reform

Background

The focus placed on partnerships in the National Development Plan (NDP) in 2012 has prompted Agbiz and the Banking Association South Africa (BASA) to formulate a blended finance proposal for land redistribution.

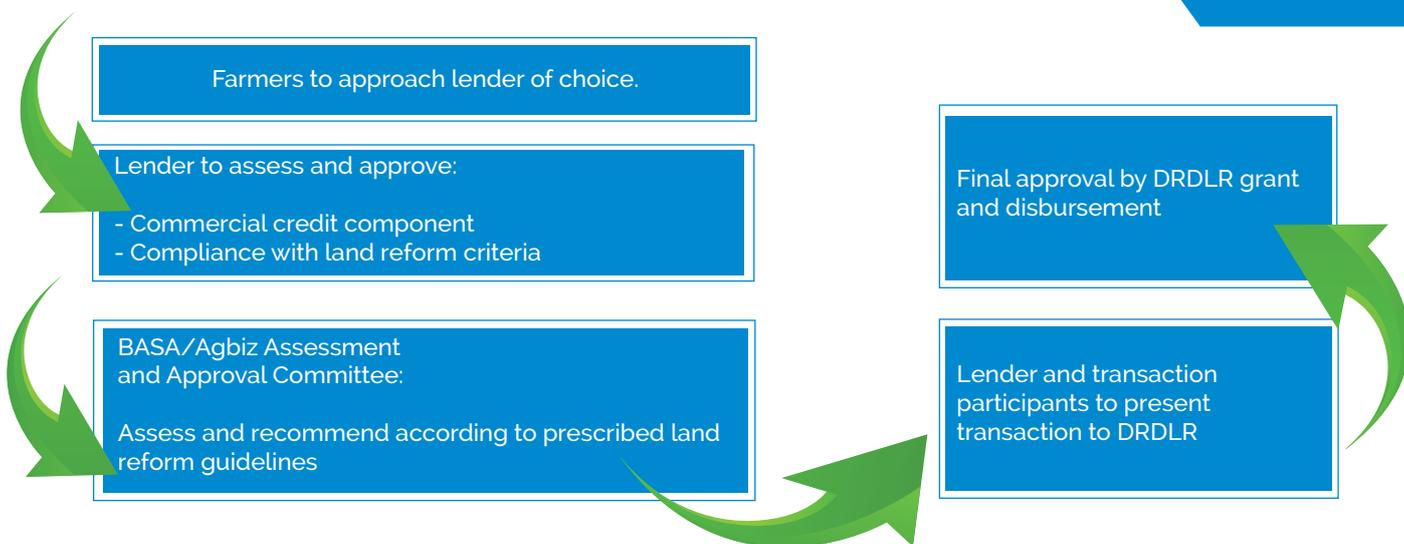
The BASA/Agbiz Task Team proposal

This proposal comprises a mechanism and process for the commercial financing of land redistribution. It is based on the principle of blended finance, whereby the state would be able to commit resources to unlock commercial funding for land redistribution. The principle would retain competition among lenders for the commercial portion and enable the state to achieve greater developmental results by doubling up on its developmental spend.

The active participation of commercial farmers in the financing of land reform and establishment of a viable black commercial farming sector is a critical success factor. Commercial farmers can offer commercial acumen and skills to enable the financing process. They would be responsible for initiating commercially viable land acquisition transactions, with possible concomitant operational funding solutions, and should receive recognition in the form of B-BBEE points as well as access to incentives such as access to grants, tax incentives or preferential finance.

Process flow:

Commercial financing of land reform



Status update

The Jobs Summit outcomes for the agribusiness sector emphasised the need for blended finance models to fast-track land reform and farmer development. Arrangements are being put in place between the Department of Agriculture, Forestry and Fisheries (DAFF), the DRDLR, the Land Bank and the Jobs Fund to create a blended finance model to support farmers. The Agbiz/BASA model for land redistribution was also captured in the Jobs Summit agreement and expressly referred to by the President in his opening address. Despite this commitment, it has been a challenge to secure engagements on the proposal, but a renewed effort is being made through the Jobs Summit platform at Nedlac.

Agricultural Development Agency

To fill the vacuum which currently exists in support provided for land reform beneficiaries and developing farmers, the Agricultural Development Agency (AGDA) has been established and will initially be led by the former director-general of the Department of Rural Development and Land Reform, Leona Archery. AGDA is intended to provide comprehensive support to deserving agricultural development projects, including the beneficiaries of land reform. A number of initial projects have been identified for support. Agbiz has encouraged members who are in a position to do so, to engage with the agency.





Report of the Presidential Advisory Panel on Land Reform and Agriculture

Background

In 2018, President Ramaphosa convened a panel of experts to formulate proposals to fast-track land reform and stimulate agricultural development. Panelists were not nominated and did not represent any constituencies. Instead, they were chosen on the basis of their expertise and served in their personal capacity. The report was finalised early in 2019 and the Presidency made it available to the public in July 2019.

Context

The panel has finalised its work and submitted its proposals to the Presidency. An inter-ministerial committee has been established to consider the proposals and identify those that are to be adopted as formal policy proposals of the state. To date, the Department of Agriculture, Land Reform and Rural Development has published the draft policies on land donations, beneficiary selection and land allocation which are based on the panel's recommendations. Other recommendations which do not require legal or policy amendments, such as blended finance, are under discussion.

Proposals

The following recommendations do not require legal amendments but merely political will and stakeholder commitment for their initiation:

- ▶ create innovative financing mechanisms;
- ▶ create a 'land register' to house donations;
- ▶ identify and release state land;
- ▶ conduct a land audit;
- ▶ subdivide land already acquired by the state;
- ▶ provide tenure grants for certain occupiers;
- ▶ root out corruption;
- ▶ reallocate water rights in conjunction with land allocation;
- ▶ finalise outstanding restitution and labour tenant claims; and
- ▶ split the budget between reforming the commercial farming sector vis-à-vis land reform for social considerations.

In theory, these proposals, if accepted by Government, could be implemented immediately. This would, however, require substantial political will as the existing business processes of the department would need to be adjusted.

Other recommendations require amendments to the legal framework, including:

- ▶ institutional arrangements such as the creation of a land reform ombudsman;
- ▶ the creation of legally enforceable rights for the holders of off-register tenure rights;
- ▶ amendments to the municipal property rates regime;
- ▶ altering the legal framework regulating land rights on farms (ESTA);
- ▶ clarifying the role of traditional councils and communities in natural resource governance in communal areas;
- ▶ expanding the capacity and mandate of the Land Claims Court;
- ▶ introducing a compensation policy for expropriation.

The latter issues require legal amendments which cannot be undertaken without substantive public consultation, usually characterised by the following processes:

- ▶ gazetting for public comments;
- ▶ Nedlac process; and
- ▶ public hearings in the Portfolio Committee and Select Committee of the NCOP where applicable.

Agbiz is well positioned to participate on each platform.

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