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**COMMENT**

**to the**

**DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM**

**about the**

**GREEN PAPER ON LAND REFORM, 2011**

## 1. Executive summary

- 1.1. The Free Market Foundation of Southern Africa (also referred to here as ‘the Foundation’ or ‘the FMF’) comments as follows on the Green Paper on Land Reform, 2011 (‘the Green Paper’).
- 1.2. The Foundation gladly takes part in the rigorous engagement promised by the Green Paper for fundamental review of the land-tenure question.<sup>1</sup>
- 1.3. There is no need for new costly bureaucratic institutions like the proposed Land Management Commission. The poor capacity of government agencies is not cured by creating another government agency.<sup>2</sup>
- 1.4. The proposed Office of the Valuer-General will likewise be superfluous. Its envisaged functions of analysing markets and maintaining a valuation database could be carried out by existing departments or external consultants. We point out that prices agreed by willing buyers and sellers do not distort markets.<sup>3</sup> The proposed Land Rights Management Board and committees are likewise unnecessary.<sup>4</sup>
- 1.5. The proposed imposing of limits on the extent or hectarage of private-owned land would prejudice the productive use of land.<sup>5</sup> The proposed imposing on foreigners of precarious tenure and compliance with obligations would prejudice foreign direct investment and impair South Africa’s economic-freedom rankings.<sup>6</sup>
- 1.6. The resale by land-reform beneficiaries of their land is not a sign of failure. Freely-tradable assets gravitate into optimal hands. The policy of granting leases of State and other public land and tying land beneficiaries to onerous lease obligations on pain of losing their farms and houses gives blacks the same racially-inferior tenure that they had under apartheid. This

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<sup>1</sup> See part 2 of this submission below.

<sup>2</sup> See part 3 of this submission below.

<sup>3</sup> See part 4 below.

<sup>4</sup> See part 5.

<sup>5</sup> See part 6.

<sup>6</sup> See part 7.

perpetuates poverty. Land-reform beneficiaries should receive full unrestricted ownership title with freedom to dispose of the property as and when they please.<sup>7</sup>

- 1.7. It is a myth that land reform should focus on redistribution of rural land. Reform should be concerned with access to the more-valuable urban land and housing.<sup>8</sup> The government should cease to pursue the ineffective, slow, costly and insignificant measures that it has attempted to implement to date. There is no time to waste.<sup>9</sup>
- 1.8. The government should immediately redistribute its own land. A small proportion of superfluous government land will suffice to provide, free, to all landless and homeless South Africans the full unambiguous freely-tradable ownership of a plot of urban residential land or viable agricultural land. All land parcels permanently held by black South Africans on government- or municipal-owned land should be summarily converted to full unambiguous freely-tradable ownership at zero cost to beneficiaries.<sup>10</sup>

## **2. Fundamental review by rigorous engagement**

- 2.1. The Green Paper states<sup>11</sup> that the Department will fundamentally review the current land tenure system, through rigorous engagement with all South Africans, so that we could emerge with a tenure system which should satisfy the aspirations of most if not all South Africans, irrespective of race and class.
- 2.2. We trust that the Department in that spirit will engage rigorously with these written comments by the Free Market Foundation, with a view to South Africa's emerging with land reforms that satisfy the aspirations of all.

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<sup>7</sup> See part 8.

<sup>8</sup> See part 9.

<sup>9</sup> See part 10.

<sup>10</sup> See part 11.

<sup>11</sup> Green Paper, para. 1, *Introduction*.

### 3. **Land Management Commission**

- 3.1. If the Green Paper's suggestions are adopted, there would be a Land Management Commission,<sup>12</sup> subservient to government.
- 3.2. The Green Paper states that this Commission would be autonomous, but not independent, of the Ministry and Department. It would be accountable to the Ministry through the Department and would submit regular reports to the latter. The Commission would be composed of stakeholders in land and persons appointed by the Minister because of special attributes.<sup>13</sup>
- 3.3. The proposed Commission's functions would be: Advisory through the issuing of advisory opinions, research reports and guidelines on land management to all land-related departments and state organs; coordination to ensure alignment and inter-linkages of land-management agencies, departments, spheres and organs of state; regulatory to ensure that lands will be managed to protect quality and values; auditing and monitoring of uses to assure integrity of the state and public lands inventory; and acting as reference point.<sup>14</sup>
- 3.4. We submit that the creation of a new statutory body such as this Land Management Commission would be financially costly and probably futile, and is administratively unnecessary.
- 3.5. The Commission's proposed functions could be carried out by liaison between existing state departments and organs. There is no need to create another one.
- 3.6. The Green Paper states that the main constraint to be overcome to enable the land-reform programme to succeed is the poor capacity of organs of state to implement measures. The document says that there is poor co-ordination and integration of effort and resources among public institutions.<sup>15</sup>

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<sup>12</sup> Green Paper para. 6(2)(c).

<sup>13</sup> Green Paper para. 6.5.

<sup>14</sup> Green Paper para. 6.5.1.

<sup>15</sup> Green Paper paras. 9.1(b) and (c).

- 3.7. We submit that the problems of dysfunctional government agencies are not cured by creating another government agency. As the Green Paper says, co-ordination by relevant organs of State is a key to successful execution of a sustainable land-reform programme.<sup>16</sup>

#### **4. Land Valuer-General**

- 4.1. The Green Paper also suggests the appointment of a Land Valuer-General and the creation of an Office of the Valuer-General.<sup>17</sup>
- 4.2. The Green Paper states that the Valuer-General's Office would among other things undertake market and sales analyses, set guidelines and standards to validate the integrity of valuation data, and maintain a valuation-information database.<sup>18</sup>
- 4.3. We submit that it is superfluous to create an Office of a Valuer-General to carry out these functions.
- 4.4. If the government wishes to carry out market analyses or maintain a valuation-information database, it can do so within existing departments or by procuring private consultants. It is unnecessary to establish a new and separate government office for this.
- 4.5. The Green Paper mentions that a current challenge and weakness, and rationale for change, is the land-acquisition strategy's willing-buyer willing-seller model which it describes as a distorted land market.<sup>19</sup> We submit that prices arrived at between willing buyers and willing sellers do not distort the market. They are market prices. A market consists of willing buyers and willing sellers.

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<sup>16</sup> Green Paper para. 9.2.

<sup>17</sup> Green Paper para. 6.2(d).

<sup>18</sup> Green Paper paras. 6.6.2(d)–(g).

<sup>19</sup> Green Paper para. 5(a).

## **5. Land Rights Management Board**

- 5.1. The Green Paper proposes that there should also be a Land Rights Management Board, with local management committees.<sup>20</sup>
- 5.2. We submit that the creation of these new bodies would be unnecessary and costly.

## **6. Privately-owned or freehold land with limited extent**

- 6.1. The Green Paper states that the proposed land-tenure framework would include private ownership or freehold ‘with limited extent’.<sup>21</sup> This implies that private landowners would be restricted to a maximum hectareage.
- 6.2. To impose any such limitation on the maximum area of land which any person (whether an individual or a company) can own would be counterproductive.
- 6.3. Land is an economic resource. The national interest is served by allowing it to be consolidated or subdivided freely. The absence of restrictions on the size of land portions which may be acquired enables land to be utilised at the optimal size and enhances the productive use of land. This benefits all South Africans.
- 6.4. Any policy of imposing maximum property extents on the private owners of land would lead to less-productive uses of properties. Applied to agricultural land, it would effectively reduce all such properties to inefficient peasant smallholdings. It would also discourage the economic development of land for large-scale industrial, commercial and other productive uses.

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<sup>20</sup> Green Paper para. 6.2(e).

<sup>21</sup> Green Paper para. 6.4(b).

## **7. Foreign-owned land subject to precarious tenure and compliance with obligations**

- 7.1. The Green Paper proposes that foreigners would own land under ‘precarious tenure’ and be subject to obligations and conditions.<sup>22</sup> There would be ‘secure forms of long-term land tenure’ for resident non-citizens engaged in appropriate investments which enhance food sovereignty and livelihood security, and improved agro-industrial development.<sup>23</sup>
- 7.2. This would seemingly not apply to, for example, a retired couple in Britain who buy a flat in Cape Town’s Camps Bay to stay in during the European winter. The document is concerned with rural and in particular agricultural land and ignores residential, commercial and other non-agricultural land.
- 7.3. We submit that xenophobia in the form of these proposed discriminatory measures against foreigners would be counter-productive. Land is an economic resource like any other. The national interest is served by allowing land to be used and traded freely, so that it gets spontaneously into the hands of optimal users. It would make no difference whether people who own land are local or foreign. The fact that foreigners are willing to invest in our country and land should be welcomed.
- 7.4. This proposed precarious tenure for foreigners and need to compliance with obligations would undermine secure property rights and introduce regulatory uncertainty in foreign direct investment. This would adversely affect foreign direct investment into South African agriculture. It would also adversely affect South Africa’s comparative global rankings for economic freedom.<sup>24</sup>

## **8. Leasehold of State and other public land**

- 8.1. The Green Paper proposes that there should be leasehold tenure for State and other public land.<sup>25</sup>

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<sup>22</sup> Green Paper para. 6.4(c).

<sup>23</sup> Green Paper para. 3.3.

<sup>24</sup> See for example *Economic Freedom of the World: 2011 Annual Report*, J. Gwartney et al, Fraser Institute 2011, [www.freetheworld.com](http://www.freetheworld.com).

<sup>25</sup> Green Paper para. 6.4(a).

- 8.2. The Minister has reportedly disclosed, as if it were an admission of failure, that some 30 per cent of land bought by government since the end of apartheid for redistribution to black farmers has been resold by the beneficiaries, often back to the original owners.<sup>26</sup> But this is no failure:
- 8.3. We submit that the resale by land-reform beneficiaries of their land is not a cause for concern or complaint. Freely-tradable assets gravitate into optimal hands. Bargaining will lead to an efficient outcome regardless of the initial allocation of property rights.<sup>27</sup> Ownership and private property exists only where the individual can deal with and dispose of his property in the way he or she considers most advantageous, and society as a whole benefits. The government's leasing policy prevents this, by tying land beneficiaries to onerous lease obligations to farm the land or lose their rights. It makes beneficiaries into serfs beholden to the State.
- 8.4. The government applies the same restrictive conditions and controls to residential housing allocated under the Reconstruction and Development Programme (RDP). These properties are commonly subject to an eight-year prohibition against selling or letting, and a condition that there be only one dwelling per property. Occupants are in the invidious position of not being able to realise their equity. Many sell or let 'informally' at heavily discounted prices, since they have no freely tradable title. New occupiers live in fear that they might be caught and summarily evicted. Many of these houses have illicit second-dwelling shacks in the yard.
- 8.5. A leasing policy keeps the government in control of redistributed land and recipients. Officials repossess properties from land-reform recipients who are not using them to their satisfaction, or who are not in personal occupation.
- 8.6. Blacks continue to get racially-inferior land tenure on farms and houses, not wealth-creating full ownership title. This prolongs the apartheid legacy. It perpetuates and exacerbates the problem of poverty in the new South Africa.

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<sup>26</sup> 'Apartheid land reforms in chaos as blacks sell farms back to whites', *The Independent*, 3 September 2011.

<sup>27</sup> R. Coase, 'The Problem of Social Cost', *Journal of Law and Economics* 3(1) [1960] pp. 1-44.

- 8.7. It is assumed within the government that blacks act irresponsibly if they dispose of their property. But people sell or let their most valuable asset only after careful consideration. They usually need the money more than the property. They usually need the funds for legitimate reasons. Good reasons include moving elsewhere with better job prospects, starting a small business, educating children, or health care.
- 8.8. The Green Paper proposes the avoiding or minimising of land redistribution and restitution which do not generate ‘sustainable’ livelihoods, employment and incomes.<sup>28</sup> We submit that the government should not tie beneficiaries to the land by restricting their free right to dispose of the property. This imposes the government’s view and ignores beneficiaries’ own views of what will best sustain their livelihoods, employment and incomes.

## **9. Myths about land reform**

- 9.1. The Green Paper largely reflects the national obsession with land owned by the few white farmers with their handful of black residents. It ignores residential land, which is of far greater importance and value and where almost all South Africans live. (Yet the Green Paper does observe, in our respectful view correctly, that demand for land may be for non-agricultural uses.<sup>29</sup>)
- 9.2. Land reform has been led astray by myths. One myth is that land reform should involve restitution or redistribution of ‘rural’ land; however, land reform should be concerned with access to land and housing in urban areas, and the obsession with rural land abandoned.
- 9.3. Another misapprehension is that access to land is important for black liberation; yet most people in advanced countries, including many of the wealthiest, do not own land, but live as tenants on someone else’s apartment blocks or other property.
- 9.4. People generally believe that under apartheid blacks owned 13 per cent of the land. This is incorrect. But the government’s land trust and then homeland governments, and now their successor the South African government owns most of that land.

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<sup>28</sup> Green Paper para. 6.1(b).

<sup>29</sup> Green Paper para. 7.2.

- 9.5. It is a myth that land ownership should be measured by how much land blacks own as a proportion of total land area. What matters is what land blacks own as a proportion of total land value. Urban land is more valuable than rural land.
- 9.6. Most people believe that the government delivers when it gives benefits to blacks at the expense of whites. But the government genuinely delivers when it creates an environment in which black South Africans become land- and home-owners and enjoy other benefits by their own efforts through an unrestricted market.
- 9.7. Restitution is not always clearly understood, especially by whites, who assume that it amounts to a Zimbabwe-like threat to their property rights. On the contrary, restitution is about respecting and upholding property rights. Blacks have a heavy burden of proof that they owned land and that it was misappropriated under apartheid. They are subject to an arbitrary and unjust cut-off date of 1913. In addition, once they discharge the burden of proof, they seldom get restitution. More commonly, they get offered alternative land or compensation. Redistribution has acquired the erroneous meaning of rural land being purchased from whites and redistributed to blacks when their restitution claim is rejected. This concept of restitution and redistribution is prohibitively costly, conflict-provoking and time-consuming.
- 9.8. A common misapprehension is that land reform has failed.

## **10. No time to waste**

- 10.1. The Green Paper states that the main constraint of state organs' poor capacity to implement and public institutions' poor integration of effort must be overcome to enable the land-reform programme to proceed 'rapidly' as it must,<sup>30</sup> and that they are constraints to effective 'speedy' resolution of the land question.<sup>31</sup> Yet the Green Paper also says that overcoming these constraints will require 'time' and 'enduring' political effort.<sup>32</sup>

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<sup>30</sup> Green Paper para. 9.1.

<sup>31</sup> Green Paper para. 9.2.

<sup>32</sup> Green Paper para. 9.2.

- 10.2. We submit that it is inconsistent to say on the one hand that land reform must proceed ‘rapidly’ to a ‘speedy’ resolution, and on the other hand that fixing government poor capacity to implement reform will take ‘time’ and ‘enduring’ effort.
- 10.3. The Free Market Foundation submits that there is no time to waste. We respectfully recommend that the government should cease to pursue the ineffective, slow, costly and insignificant measures that it has attempted to implement to date.

## **11. Recommendations for land redistribution**

- 11.1. We submit that by far the bigger, better and quicker prospect for land redistribution is for the government to distribute its land.
- 11.2. The government owns in historically-black rural and urban areas some five to fifteen million parcels of land (estimates vary). The government could immediately redistribute them all to existing occupiers at little cost. This would result in millions of new landowners.
- 11.3. We recommend that all land parcels lawfully or permanently held by black South Africans on government- or municipal-owned land should be summarily converted to full unambiguous freely-tradable ownership at zero cost to beneficiaries. All other government land not needed for public purposes should also be privatised. A small proportion of superfluous government land will suffice to provide, free, to all landless and homeless South Africans the full unambiguous freely-tradable ownership of a plot of urban residential land or viable agricultural land.
- 11.4. And the government should allow private owners with informal settlements on their land to convert that land, through private contracts with occupiers, to full unambiguous freely-tradable ownership, with nominal red tape and cost.

11.5. The Green Paper refers to communally-owned land, and contemplates communal tenure with institutionalised use rights.<sup>33</sup> The document says that this will be treated in a separate policy articulation because there needs to be extensive consultations and constitutional compliance.<sup>34</sup> We recommend that all community, traditional and tribal land should be unambiguously and democratically owned and controlled by the people concerned, who should be allowed to give to each lawful occupant if they wish the plot they hold, in full unambiguous freely-tradable ownership.

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<sup>33</sup> Green Paper para. 6.4(d).

<sup>34</sup> Green Paper para. 6.4.

## **About the Free Market Foundation**

The Free Market Foundation of Southern Africa ('the Foundation' or 'the FMF') is an independent policy research and education organisation founded in 1975 to promote the principles of limited government, economic freedom and individual liberty.

The FMF argues for respect for the Constitution, proper application of the rule of law (which is enshrined in the Constitution), high economic growth as the best means of alleviating and reducing poverty, and economic freedom as the best means of achieving an improvement in all aspects of human development.

The Foundation is a voluntary association. It receives funding from members (corporate, organisational and individual), sponsorships and the sale of publications.