LAW REVIEW PROJECT

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COMMENT

to the

DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM

about the

GREEN PAPER ON LAND REFORM, 2011

1. The Law Review Project

1.1. The Law Review Project (also referred to here as 'the Project' or 'the LRP') is an independent legal research organisation founded to promote the removal of unnecessary, burdensome and unduly-restrictive laws with the aim of promoting economic development.

1.2. The Project makes submissions to government for the review of legislation and proposes and formulates legislative change to achieve this aim. It is a private-sector resource to assist governments.

1.3. The Foundation is a non-profit company. It receives funding from companies, organisations and individuals who support these goals.

2. Executive summary

2.1. The Law Review Project makes the following comments about aspects of the Green Paper with Constitutional or other legal significance. The deadline for lodging comments is 29 November 2011.[1]

2.2. We submit that it is unrealistic and over-ambitious of the Green Paper to propose that the new Land Management Commission could develop the expertise necessary to provide useful land advice and auditing services for all the various government departments, public entities, organs of state, municipalities and agencies at all three levels of government who are responsible for or interested in land. We also submit that it would be unconstitutional for this Commission to be given the power to invalidate title deeds and confiscate land as proposed.[2]

2.3. It would also be unconstitutional if the proposed new Office of the Valuer-General purports to make final determinations of the financial compensation payable in cases of land expropriation. We observe too that, if this new Valuer-General's Office will as proposed provide land values for municipal-rating purposes, this would duplicate the valuation

[1] See part 3 below.
[2] See part 4 below.

functions which existing municipal-rating legislation assigns to metropolitan and local municipalities under oversight of the national local-government minister. That legislation requires property valuations to reflect market values or prices if sold in the open market by a willing seller to a willing buyer. This requirement might conflict with the Department of Rural Development and Land Reform's new preferred approach with expropriations for redistribution.[3]

2.4. We submit that it is unnecessary to establish a Land Rights Management Board to communicate legal reforms, advise rights-holders, develop land-registration systems, provide legal representation, or enforce compliance with laws. Existing government organs could do so. It is unnecessary to create a statutory framework for convening local committees to carry out these tasks; if the government wishes to communicate a legal reform or advise local rights-holders it could convene a meeting for interested parties.[4]

2.5. **We point out that it is already state policy to give land-reform beneficiaries merely lessee's rights. The government's leasing policy ties land beneficiaries to onerous lease obligations to farm the land or lose their rights. The government apparently applies similar restrictive conditions when providing urban housing. There is no security of tenure, properties are liable to forfeiture for prescribed reasons, and disposal requires official consent. We submit that the government thus in substance imposes on blacks the same land-tenure restrictions as were imposed under apartheid.[5] Under apartheid there was no security of tenure, rights of occupation were subject to forfeiture for prescribed reasons, and disposals required official consent. The government or statutory bodies owned the land. These racially-based land measures have been formally abolished.[6] Yet the government administratively imposes what are in our respectful view substantially the same restrictions.**

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3 See part 5 below.
4 See part 6 below.
5 See part 7 below.
6 See part 8 below.

3. Deadline to comment on Green Paper

3.1. The Green Paper on Land Reform, 2011 ('the Green Paper') was published in the *Government Gazette* on 30 September 2011 under General Notice 686 of 2011.

3.2. That General Notice invites any interested person or body to provide comments on the Green Paper as published under the Notice, and that written comments must be submitted to the Director General, Rural Development and Land Reform, at the contact details provided.

3.3. The Notice states that the closing date for comments is 60 calendar days from the date of publication of the Notice in the *Gazette*, which is to say by Tuesday 29 November 2011.

4. Land Management Commission

4.1. If the Green Paper's suggestions are adopted, there would be a Land Management Commission,[7] subservient to government.

4.2. 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.[8]

4.3. 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.[9]

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7 Green Paper para. 6(2)(c).
8 Green Paper para. 6.5.
9 Green Paper para. 6.5.1.

4.4. We respectfully submit that it is unrealistic and over-ambitious of the Green Paper to propose that the Land Management Commission could render services to all the various government departments, public entities, organs of state, municipalities and agencies at all three levels of government who are responsible for or interested in land.[10] Each of these organisations has its own experience and requirements. In our respectful view it is unlikely that the proposed new entity could develop and maintain the skills and expertise necessary to provide useful research, advice and auditing services for all these different bodies.

4.5. The Green Paper also says that this Commission would have power to invalidate title deeds and confiscate land obtained through fraud or corruption.[11]

4.6. This may be well-meaning. Instances have been reported of fraudulent transfers of land being executed and possible corruption in deeds registries. But stripping registered owners of land titles administratively is drastic and unnecessary. Fraud is not lightly to be inferred.[12] Frauds and land disputes should be left to be decided under common law as at present.

4.7. Disputes should be decided by courts or independent tribunals, not by a Commission answerable to government such as this. The Constitution stipulates that everyone has the right to have any dispute which can be resolved by the application of law decided in a fair

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[10] In addition to the Department of Rural Development and Land Reform (from which the Green Paper emanates), other national government departments concerned with land include the following Departments: Agriculture, Forestry and Fisheries; Environmental Affairs; Human Settlements; Mineral Resources; Public Works; Tourism; Traditional Affairs; Transport; and Water Affairs.

National public entities that own or are concerned with land include the Airports Company of South Africa Ltd, CEF (Pty) Ltd, the Development Bank of Southern Africa, Eskom Holdings Ltd, the Independent Development Trust, the Industrial Development Corporation of South Africa Ltd, the Land and Agricultural Bank of South Africa, SA Forestry Company Ltd and Transnet Ltd.

The Ingonyama Trust Board administers some 2,700,000 hectares of Ingonyama Trust land spread throughout KwaZulu-Natal.

There are also the Agricultural Research Council, wetland park bodies, river-water catchment management agencies, South African National Parks board, the SA National Roads Agency, water boards and national-government farm companies, among others.

In provinces there are the government departments responsible for agriculture, development planning, environment, housing or human settlements, local government, public works, roads, transport. Provincial public entities that own or are concerned with land include the Gautrain Management Agency, the Western Cape Nature Conservation Board, Ezemvelob KwaZulu-Natal Wildlife, Kwazulu-Natal Agri-Business Development Agency, Mpumalanga Tourism and Parks Board, Limpopo Tourism and Parks Board, North West Housing Corporation, North West Parks and Tourism Board, North West Provincial Heritage Resources Authority, East London Industrial Development Zone Corporation, Mpumalanga Agricultural Development Corporation and provincial-government farm companies, among others.

Municipalities also own or are concerned with land in their areas. In addition, the City of Johannesburg's agencies include the Johannesburg Development Agency and Johannesburg Property Company.

[11] Green Paper paras. 6.5.2(c) and (f).

[12] *Loomcraft Fabrics CC v Nedbank Ltd and another* [1996] 1 All SA 51 (A) 56.

public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.[13]

4.8. The Constitutional Court has observed that impartiality connotes absence of bias actual or perceived, and independence embodies the traditional constitutional value of judicial independence and connotes not merely a state of mind or attitude in the actual exercise of judicial functions but a status or relationship to others particularly the Executive Branch of government that rests on objective conditions or guarantees.[14] A statutory office such as the proposed Land Management Commission, accountable to the Ministry, reporting to the Department and with ministerial appointees, would meet these criteria for impartiality and independence.

5. Land Valuer-General

5.1. The Green Paper also suggests the appointment of a Land Valuer-General and the creation of an Office of the Valuer-General.[15]

5.2. The Green Paper states that the Office of the Valuer-General will be a statutory office responsible for 'determining' financial compensation in cases of land expropriation, under the Expropriation Act or any other policy and legislation, 'in compliance with the constitution'.[16]

5.3. If the aim is that this functionary would make final determinations of compensation payable, this would be unconstitutional. The Constitution lays down that the amount of compensation for expropriated property, and the time and manner of payment thereof, must either been agreed to by those affected or decided or approved by a court.[17]

5.4. But perhaps the benefit of the doubt should be given to the Green Paper. It says that the Office of the Valuer-General would be responsible for the provision of 'specialist valuation and property-related advice to government'.[18] So perhaps the intention is that this official

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13 Constitution s. 34.
14 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC) para. [71], citing with approval *R v Valente* (1985) 24 DLR (4th) 161 (SCC) 169-70.
15 Green Paper para. 6.2(d).
16 Green Paper para. 6.6.2(b).
17 Constitution s. 25(2)(b).
18 Green Paper para. 6.6.2(c).

would be a mere resource to government to assist it by determining amounts for the government to offer as compensation for expropriation of property. If an expropriated party does not agree to accept the amount offered, then the amount of compensation would be decided or approved by a court as the Constitution requires.

5.5. The Green Paper proposes that this new Valuer-General's Office would provide 'fair and consistent land values for rating and taxing purposes'. [19]

5.6. This would involve the taking over by this new Valuer-General's Office of the valuation functions assigned by existing municipal rating legislation to the 236 metropolitan or local municipalities. That municipal-rating legislation lays down that metropolitan or local municipalities may levy rates.[20] There are eight metropolitan municipalities and 228 local municipalities.[21]

5.7. The municipal-rating legislation states that a municipality intending to levy a rate on property must cause a general valuation to be made of all rateable properties in the municipality and a valuation roll to be prepared of all those properties.[22] A general valuation must reflect the market value of properties determined in accordance with market conditions which applied at date of valuation.[23] Market value is the amount the property would have realised if sold on the date of valuation in the open market by a willing seller to a willing buyer.[24] A rate levied by a municipality on property must be an amount in the rand on the market value of the property.[25]

5.8. The municipal-rating legislation says that the national Minister responsible for local government[26] may monitor, and from time to time investigate and issue a public report on, the effectiveness, consistency, uniformity and application of municipal valuations for rates purposes. The investigation may include studies of the ratio of valuations to sale prices and other statistical measures to establish accuracy of valuations.[27]

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19 Green Paper para. 6.6.2(a).
20 Local Government: Municipal Property Rates Act No. 6 of 2004 s. 2(1).
21 South African Local Government Association website.
22 Local Government: Municipal Property Rates Act No. 6 of 2004 s. 30(1).
23 Act No. 6 of 2004 s. 31(2).
24 Act No. 6 of 2004 s. 46(1).
25 Local Government: Municipal Property Rates Act No. 6 of 2004 s. 11(1)(a).
26 The *Minister of Cooperative Governance* and Traditional Affairs.
27 Local Government: Municipal Property Rates Act No. 6 of 2004 s. 82(1) and (2).

5.9. We submit that there could be an inconsistency between the Green Paper's attitude to land values for government purchases of land for redistribution (when it appears to favour offering purchase prices lower than market prices) and the government's approach to valuations for the levying of municipal rates and taxes (where doubtless the government would favour market values).

6. Land Rights Management Board

6.1. The Green Paper proposes that there should also be a Land Rights Management Board, with local management committees.[28]

6.2. The Green Paper states[29] that this proposed Board would: Communicate legal reforms to farm- owners and -dwellers and potential land beneficiaries; build institutional capacity inside and outside state institutions to advise rights-holders; develop accessible and efficient systems for recording and registering rights on land in collaboration with the Chief Registrar of Deeds; encourage social solutions to social problems and disputes; provide legal representation where necessary such as for unlawful evictions; establish a co-ordinated and integrated support system for state and public participation in integrated development measures in rural settlements.

6.3. The Board would also enforce compliance with norms, standards and land-rights management policies and laws.[30]

6.4. The Green Paper says that the Board would also have power to establish and dissolve local Land Rights Management Committees, and delegate certain powers to them.[31] A local committee would comprise representatives of residents in a specific rural environment or settlement: farm-workers and -dwellers and commercial farmers, and municipal councils, government departments and police.[32]

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[28] Green Paper para. 6.2(e).
[29] Green Paper paras. 6.7.2(a)–(f).
[30] Green Paper para. 6.7.3(d).
[31] Green Paper paras. 6.7.3(a) and (c).
[32] Green Paper para. 6.7.1.

6.5. We respectfully submit that it is unnecessary to establish a Land Rights Management Board. If the government wishes to communicate legal reforms, build institutional capacity to advise rights-holders, develop systems for registering land rights, encourage solutions to social problems, provide legal representation, support participation in rural-development measures, or enforce compliance with laws, it could do so though existing government organs. It is not necessary to create a new board.

6.6. Nor it is necessary to create a statutory framework for convening local committees to carry out certain of these tasks. If the government wishes to convene a local committee to communicate a legal reform, advise local rights-holders, provide a solution to a local problem, or participate in rural-development measures, it could convene a meeting and invite interested parties to attend.

7. Leasehold of State and other public land

7.1. The Green Paper proposes that there should be leasehold tenure for State and other public land.[33]

7.2. We point out that it is already state policy to give to land-reform beneficiaries merely lessee's rights. The Department of Rural Development and Land Reform's 2010-11 annual report states that the Department has transferred some 322,845 hectares in 288 land-reform projects and provided access to land to 3,089 beneficiaries through 'leases or caretakership agreements'.[34]

7.3. **The Ingonyama Trust's grant policy is to similar effect. The KwaZulu-Natal Ingonyama Trust Board's preference in most cases is to enter into leases of Trust land. Ownership thus remains with the Trust for ultimate transfer 'in due course' to its beneficiaries. The Board does not usually agree to the sale of land. The Board sees real-estate management as its major core function.[35]**

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[33] Green Paper para. 6.4(a).

[34] Department of Rural Development and Land Reform, *Annual Report 1 April 2010 to 31 March 2011*, p. 35, 'Programme 5: Land Reform'.

[35] Ingonyama Trust Board website, 'Tenure rights'.

7.4. The government's leasing policy ties land beneficiaries to onerous lease obligations to farm the land or lose their rights. A leasing policy keeps the government in control of redistribution land and beneficiaries. Officials repossess properties from land-reform recipients who are not using them to their satisfaction, or who are not in personal occupation.

7.5. The government apparently applies similar restrictive conditions and controls to residential housing allocated under the Reconstruction and Development Programme (RDP). These properties are reportedly subject an eight-year prohibition against selling or letting, and a condition that there be only one dwelling per property.

7.6. **It thus appears that Blacks continue to get racially inferior land tenure on farms and houses. There is no security of tenure. Beneficiaries' rights are subject to forfeiture for prescribed reasons. Disposal requires official consent.**

7.7. **We submit that the government is thus in substance imposing on blacks the same land-tenure restrictions as the apartheid government imposed on blacks under the apartheid land laws.**

8. Blacks' land-tenure rights under apartheid

8.1. Apartheid tenure in black areas

8.1.1. Proclamations under the black administration act of 1927[36] provided for the administrative grant to blacks of permission to occupy residential sites and arable allotments in reserve towns[37] and settlements[38]. There was no security of tenure. Rights of occupation were subject to forfeiture for prescribed reasons. Disposal required official consent.

8.1.2. For example, rural residential or arable allotments could not, without permission in writing of the commissioner, be used for any purpose other than that for which occupation was

[36] Act No. 38 of 1927.
[37] Proc. R.293 of 1962.
[38] Proc. Notice R.188 of 1969.

authorized. The rights of the holder in or to the allotment or any improvements thereon could not be transferred, mortgaged, leased or otherwise disposed of except in accordance with the commissioner's prior written approval. This permission in no case entitled the holder to compensation from the government's land Trust for any improvements on such land; and such improvements would as a rule upon termination of the holder's rights to the allotment, or cancellation of the permission to occupy, become property of the Trust without payment of compensation. A permission to occupy could be cancelled if the holder failed to comply with any of the conditions of such permission or longer used the allotment for the purpose for which it was granted.[39]

8.2. ***Black land acts***

8.2.1. The black land act of 1913[40] prohibited the sale or lease of demarcated land in scheduled areas reserved for blacks to whites. It prohibited blacks from acquiring land outside these scheduled areas. Scheduled areas comprised only reserves and locations which blacks already inhabited. These scheduled areas were only about half the land that blacks inhabited. Though intended as a preliminary delimitation to be increased, that was not done until 1936.[41] In that year a government land trust[42] was created to purchase additional areas released for black occupation.

8.2.2. Scheduled areas under the 1913 land act included much government land. The government's land Trust created in 1936 purchased and owned additional areas released for black occupation.[43]

8.2.3. In urban areas, a 1937 blacks (urban areas) amendment statute[44] applied similar restrictions in those areas. The amendment prohibited the acquisition of land by blacks from non-blacks in urban areas. Only blacks could acquire premises in black townships (residential areas set apart for black residence near urban areas occupied by whites, coloureds or Indians). These laws were augmented by the group areas statute in 1950,[45] providing for the proclaiming of areas for a particular racial group, and the prohibiting of other groups from living, trading or

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39 Proc. Notice R.188 of 1969.
40 Act No. 27 of 1913.
41 Act No. 18 of 1936.
42 South African Development Trust.
43 See text accompanying fnn 41 and 42.
44 Act No. 46 of 1937, amending Act No. 21 of 1923.
45 Act No. 41 of 1950.

owning land there. Members of other groups living there were moved out. A 1954 statute for black resettlement[46] provided for elimination of 'black spots' or townships in white areas and the forcible relocation of occupiers.

8.2.4. Black townships near urban areas were largely municipal land, but vested in statutory black-affairs administration boards after 1971 for a period.[47] Blacks had been unable to acquire freely-transferable and mortgageable property in these urban townships, until a 1984 statute[48] enabled blacks to acquire 99-year leasehold rights to urban lots. Similar 99-year leasehold and so-called deed-of-grant rights also became available in the 1980s[49] in towns in the 1913 and 1936 scheduled and released areas.

8.3. ***Repeal of apartheid land laws***

8.3.1. In 1991 all apartheid land laws were repealed by a statute for abolition of racially-based land measures.[50] That statute provided for repeal or substitution of land-tenure proclamations and regulations made under the repealed laws in order to readjust matters in a non-racial manner.

8.3.2. Another 1991 statute provided for the upgrading and conversion into ownership[51] of the various statutory rights to land referred to above (quitrent, 99-year leasehold, deed-of-grant rights, permissions to occupy, etc), in accordance with prescribed procedures.

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[46] Act No. 19 of 1954.
[47] Act 45 of 1971.
[48] Act 4 of 1984.
[49] Amendment to Proc. R.293 of 1962; Proc. R.29 of 1988.
[50] Act No. 108 of 1991.
[51] Act No. 112 of 1991.