

Diagnostic Report on Land Reform in South Africa

Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa

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September 2016

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1. Introduction

The High Level Panel is an initiative of the Speakers' Forum of Parliament aimed at taking stock of the impact of legislation insofar as it advances or impedes progress in addressing the triple challenges of poverty, unemployment and inequality. The mandate of the panel is to investigate the impact of legislation in respect of:

- the triple challenges of poverty, unemployment and inequality.
- the creation and equitable distribution of wealth.
- land reform, restitution, redistribution and security of tenure.
- nation building and social cohesion.

The panel will assess the possible unintended consequences, gaps and unanticipated problems in post-apartheid legislation, as well as how effectively laws have been implemented. The panel will propose appropriate remedial measures to Parliament including the amendment, or repeal of existing legislation or additional legislation where necessary.

This diagnostic report on land reform is the first of several commissioned reports. It aims to set the scene for the detailed reports on different aspects of land reform that will follow. The purpose of the report is to orientate the sub-committee in relation to how various laws, programmes and different aspects of land reform relate to one another, and to provide the sub-committee with an overview of current debates and controversies.

The report summarises key findings of reports and research findings that are in the public domain, including research commissioned by the Department of Rural Development and Land Reform (DRDLR), and by the Directorate of Performance Monitoring and Evaluation in the Presidency, as well as the voluminous academic literature.

2. The wider context of land reform: the transition to democracy and the Constitution

In the early 1990s South Africa was a profoundly divided society characterised by the deep poverty of the majority of its people, high levels of inequality (in relation to race, but also gender and class), social disorder, endemic violence and severe political tensions. The legacies of past state policies loomed large, reaching back to the very beginnings of European settlement by colonial powers in the 17th century and stretching forward to 20th century policies of segregation and apartheid. These were designed to entrench a system of racial privilege, but also underpin regimes of capital accumulation.

On the cusp of the transition to democracy, it was widely agreed that one key legacy of the past was the massively unequal distribution of land that had resulted from a three and a half centuries of dispossession. Building on analyses offered at different times by various strands of the liberation movement, dispossession was seen as contributing directly to the wider

structural problems of unequal power and wealth in South African society, as well as laying the foundations of contemporary rural poverty.¹

Land reform was thus identified as a key programme to be adopted by the incoming democratic government. It was seen by the African National Congress, for example, as the 'central and driving force of a programme of rural development which will build the economy by generating large-scale employment, increasing rural incomes and eliminating overcrowding it must raise incomes and productivity'.² The potentially positive wider impacts of land reform were thus strongly emphasized from the outset.

Soon after the first election of 1994, an ambitious policy of land reform began to be implemented. This included a *land redistribution* programme, aimed at broadening access to land among the country's black majority; a *land restitution* programme to restore land or provide alternative compensation to those dispossessed as a result of racially discriminatory laws and practices since 1913; and a *tenure reform* programme to secure the rights of people living under insecure arrangements on land owned by others, including the state (in communal areas and the former 'Coloured' rural reserves) and private landowners (farmworkers, farm dwellers and labour tenants). A less high profile programme to improve systems of *land administration* was also proposed.³

As described in key documents such as the White Paper on South African Land Policy (DLA 1997), these programmes seek to be directly complementary to one another. For example, a cut-off date was required to allow restitution of land to individuals and groups dispossessed in the recent past, in order to avoid triggering intractable disputes between competing groups of claimants. The date on which the Natives Land Act of 1913 was adopted (19 June 2013) was selected as the cut-off. Restitution is a rights-based sub-programme, and this means that the existence of prior rights in land must be proven before a restitution award can be made. However, much dispossession took place prior to that date and hence a redistribution sub-programme is also required to address the massive inequalities in land holdings. Land redistribution is not rights-based, however, but application-based, and the key criterion is need, not rights.

Similarly, tenure reform is a necessary complement to the other programmes. Tenure reform is required to secure the previously insecure rights to land of black South Africans, in law and practice, and thus is also rights-based, but also seeks to offer viable tenure options to those occupying restored and redistributed land. Because many of the beneficiaries of restitution and redistribution desire to hold land as a group, legal innovation was required, and legislation has provided for a new form of land-holding entity, the Communal Property Association (CPAs), in addition to the existing option of forming a trust. However, there has been long delay in offering tenure reform options to secure the land rights of people in communal areas, and this means that to date CPAs or trusts have been the only option available for collective land holding. CPAs have suffered from the lack of any substantive programme of support from government, which is one reason that many have become dysfunctional institutions.

The constitutional framework for land reform was agreed after a protracted and contentious negotiations process involving all the main political parties. The 'property clause' (section 25) in the final constitution provides protection for the holders of property rights, but allows compulsory acquisition to take place for both public purposes and in the public interest. Land reform is explicitly defined as a measure in the 'public interest'. Expropriation should take place at levels of compensation that are 'just and equitable', and thus not necessarily at market value. Section 25 provides a right to restitution of land dispossessed after 19th June 1913, and a right to security of tenure, in both cases with the option of comparable redress (cash compensation or alternative land) when needed.

Access to land through redistribution is not a right, but the state must take 'reasonable measures', 'within its available resources', to foster conditions enabling equitable access to land. The new government adopted a willing buyer, willing seller approach to land acquisition for purposes of redistribution, and prices paid since 1994 have generally been close to market value. Compensation for land acquired for restitution has also been close to market value, and very few expropriations for land reform purposes have occurred since 1994. The property clause is shown in Box 1 below.

Box 1. The property clause in the Constitution (section 25)

- (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) Property may be expropriated only in terms of 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 the 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 regard to all relevant circumstances, including— (a) the current use of the property; (b) the history of the acquisition and 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.*
- (4) For the purposes of this section— (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land.*
- (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
- (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
- (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*
- (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results Chapter 2: Bill of Rights 11 of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).*
- (9) Parliament must enact the legislation referred to in subsection (6).*

Government's early vision of land reform, set out in both the 1996 Green Paper and the 1997 White Paper, emphasized its multiple objectives: addressing dispossession and injustice; creating a more equitable distribution of land; reducing poverty and assisting economic growth; providing security of tenure; establishing sound land administration; and contributing to national reconciliation. Settlement and tenure security in informal settlements and urban areas were also to be supported. The primary beneficiaries of land reform were defined as the 'rural poor', but included a number of diverse interest groupings within that broad category: the victims of land dispossession, farm workers, labour tenants, communal area residents, people living in informal settlements, small-scale farmers, women and youth.⁴

3. Key debates on land reform

Key debates on land reform that emerged in the early 1990s continue to resonate today. A few debates are briefly summarized here, and some are discussed further in other sections of this report.

(1) Should the property rights of the white land-owning elite be protected, and does this not severely constrain redistributive land reform? Arguments that stolen land should not be paid for by the victims of dispossession contend with the view that the property rights of all citizens, including those of the rural and urban poor, need to be afforded constitutional protection, and that the property clause as a whole enables rather than constrains land reform, including the provision that land reform is in the public interest.⁵

(2) Should land acquisition and transfer take place primarily through market transactions, or through state interventions such as expropriation? The World Bank's model of 'market-assisted' land reform, in which grants are provided by the state to applicants wishing to purchase land on the open market, with 'willing buyers' negotiating land prices with 'willing sellers', was adopted by government.⁶ However, this approach has generated much controversy, and critics have often recommended either a greater role for expropriation or for more effective targeting of both land and beneficiaries within a 'pro-active' approach.⁷

(3) Why is the cut-off date for the lodging of land restitution claims set as June 1913, when land dispossession in South Africa dates back many centuries? The 1913 cut-off date was chosen as a pragmatic compromise between two other alternatives (1652 and 1948), and as a way of minimising the potential for competing claims amongst different groups of black South Africans. However, groups representing indigenous peoples such as the KhoiSan have contested the legitimacy of this compromise, and government has occasionally flirted with the idea of re-opening restitution claims to allow those based on dispossession prior to 1913.⁸

(4) Is land reform on its own, without major intervention in the agricultural and rural economy, including the provision of substantial support for beneficiaries, not likely to fail? Some analysts and activists have argued that land rights and mechanisms for acquiring and transferring land have been over-emphasized, and that measures to provide post-settlement support for agricultural production and other forms of rural livelihood have been neglected. Some of these critiques are articulated in terms of the need for a broader programme of *agrarian* reform.⁹ Others argue that a focus on agricultural livelihoods alone is too narrow, and that land should be acquired for settlement purposes as well, or that rural livelihoods based on natural resources or tourism should also be supported in addition to agriculture.¹⁰

(5) How important is land reform in efforts to reduce rural poverty and spatial inequality? For some commentators land reform is a key thrust of post-apartheid policy since it addresses a root cause of poverty and inequality – land dispossession and the spatially skewed character of inequality in both rural and urban areas. Others assert that its role in poverty reduction is necessarily limited in an economy in which agriculture makes a limited contribution to GDP and employment, and in a society that is increasingly urban in character.¹¹

(6) *Which scales of agricultural production and land use should be supported by land reform, and to what degree should projects be assessed in terms of market viability?* Arguments have been mounted in favour of both large-scale commercial farming and small-scale farming, and sometimes of a combination of the two. One view is that agricultural development must aim to create commercially viable enterprises, and in the contemporary world this requires large-scale and mechanized farming systems. This argument has in turn been challenged by critics who provide evidence of the key role of smallholder-oriented redistributive land reform and small-scale agriculture in poverty reduction programmes around the world.¹²

(7) *How will tenure reform in communal areas (located on 13% of the country's land area) contribute to the wider transformation of patterns of land ownership and use (on the remaining 87%)?* An argument mounted by activists in the mid-90s was that a focus on securing land rights within the previous Bantustans is a distraction from the more important task of redistributing land. This has been countered by the view that a key legacy of the oppressive past is insecure land rights, and that where rights are overlapping due to forced removals and other forms of dispossession, land redistribution needs to offer alternative land within the redistribution programme as part of the solution.¹³ The links between rural development in communal areas and a wider agrarian reform has become controversial in recent years given the narrow focus of government's Comprehensive Rural Development Programme (CRDP).¹⁴

(8) *Should land in the former Bantustans continue to be held in systems of 'communal tenure' or not, and what roles and powers should traditional leaders have in relation to land?* Some argue that systems of land rights derived from customary norms and values are outdated and should be replaced by individual titles to private property, which make the poor 'bankable' and can thus promote investment and development. Others see living customary law as a feasible and appropriate alternative to titling, but reject the current boundaries of 'traditional communities' since these were imposed by the state in the past, and often placed groups under the authority of a traditional leader against their will.¹⁵ For some, traditional leaders should only enjoy those roles and powers in relation to land that are agreed to by communities of rights holders, whose security of tenure is independently guaranteed by law. Traditional leader lobbies, however, assert that chiefs and traditional councils should take ownership of communal land on behalf of community members, and enjoy wide-ranging powers of control and investment.¹⁶

(9) *Are Communal Property Associations and trusts appropriate institutional arrangements for collective holding of land, and can their performance be improved?* Many CPAs and trusts are dysfunctional, but there is disagreement on why: are they inherently problematic, or is it primarily because of inadequate institutional support from government and other agencies? Also controversial is the issue of the relationship between CPAs and trusts, on the one hand, and traditional leaders and traditional councils, on the other?¹⁷

(10) *Do efforts to strengthen the tenure security of farm workers and dwellers have negative unintended consequences?* Critics argue that the Extension of Tenure Security Act (ESTA) has led many farm owners to either downscale their labour forces through mechanising production, or to recruit temporary labourers from off-farm locations such as informal settlements, sometimes through contractors, both having negative impacts on farm

employment. Others have argued that government's commitment to implementing the Act has been weak, and that economic forces are primarily responsible for increased mechanization and declining levels of employment.¹⁸

A number of other important debates on aspects of land reform will not be discussed much here because of limitations of space, but will be considered in the more detailed reports to be submitted by other authors. These include:

- agricultural policies, including deregulation and liberalization, and their impacts on land reform¹⁹
- the need for a national programme of small farm support²⁰
- water allocation reform and irrigation²¹
- whether or not legislation to protect the land rights of labour tenants is likely to be effective²²
- the advantages and disadvantages of strategic partnerships between communities and private sector companies within restitution and redistribution projects²³
- land reform's contribution to reducing gendered inequalities²⁴
- the potential of rental markets in communal areas²⁵
- urban land reform, including anti-eviction legislation, and its contribution to reducing spatial inequality in towns and cities²⁶
- the most effective institutional arrangements for governing land tenure in the former 'Coloured' rural reserves²⁷
- the potential of municipal commonage land²⁸

4. Changing approaches over time

The key focus and priorities of land reform policies have shifted over time, in response to wider political dynamics. This section briefly sketches some of the main changes in emphasis between 1994 and the present.

The Mandela presidency: 1994 – 1999

The early years of democracy were strongly focused on inclusive policy making processes. Often these were highly participatory, involving a wide range of participants from across the social and political spectrum, including anti-apartheid activists from civil society organisations and members of communities. The first Minister of Land Affairs was Derek Hanekom, whose responsibilities were expanded to include agriculture in 1996. A Green Paper of 1996 and a White Paper of 1997, which set out the emerging consensus on land policy, bear the imprint of wide consultation. However, land reforms that favour the poor majority were new to South Africa, and a great deal of experimentation and learning-by-doing took place over the next few years, leading in some cases to fundamental revisions of policy.

Progress was slow in the first five years of land reform, and many of the initial targets were not met. The amount of land redistributed by March 1999, for example, amounted to only 650 000 ha or less than 1% of private farm land, as compared to the target of transferring 30% within 5

years.²⁹ Pilot schemes involving the Settlement and Land Acquisition Grant (aligned to the R16 00 housing grant) for the funding of land redistribution were tested in sites across the country. Although land reform projects were exempt from restrictions of subdivision, in practice large groups of people were expected to operate farms as unitary commercial enterprises, a practice that has continued to date.

By the cut-off date of December 1998, a total of 63 455 land restitution claims had been lodged. Further investigations revealed that some claims needed to be split, and the official total was then revised upwards, rising to 79 696 by 2007. Around 88% of claims were from individuals or families in urban areas; in contrast, most rural claims were group-based and thus involved a great many more people than urban claims. In 1999 the Restitution Act was amended to allow the programme to move from a cumbersome, courts-driven process into one with considerable administrative leeway. Only 41 land claims had been settled by March 1999; after the new approach was adopted, the pace quickened and 12 314 claims had been resolved by June 2001. However, the Land Claims Commission found it very challenging to provide effective post-settlement support for beneficiaries, and criticism of this aspect of restitution has continued ever since.

A host of new land laws were passed, aimed mainly at securing land tenure rights, and began to be implemented. Farmworkers and dwellers were protected from arbitrary evictions, through the Extension of Security of Tenure Act of 1997. The occupation and use rights of labour tenants were protected, but tenants or former tenants could also apply for ownership of the land they occupied, as provided for by the Land Reform (Labour Tenants) Act of 1996. Communal Property Associations (CPAs) allowed groups to hold restored and redistributed land, and many were formed with the help of consultants. However, most did not receive much support thereafter, little oversight was exercised by government, and many have become somewhat dysfunctional.³⁰ Communal tenure reform was highly politicized as a result of the lobbying power of chiefs, and progress in developing a policy framework was slow and incomplete, with no new legislation adopted by mid-1999.³¹

Agricultural policies remained uncoupled from land policies, and initially focused on deregulation and liberalization of the sector. State subsidies for credit, inputs and exports were abolished and the single channel marketing system, involving fixed prices, was dismantled. These measures were portrayed as progressive because they removed state support for privileged white farmers, but large-scale programmes of support for small-scale black farmers and land reform beneficiaries, despite being identified as a key need, were notable by their absence.³²

The Mbeki and Motlanthe presidencies: 1999-2009

In 1999 Thoko Didiza was appointed as the new minister, later being replaced by Lulu Xingwana for the period 2006 - 2009. In this period, priorities shifted from a strong focus on meeting the land needs of the poor to servicing a group of aspirant black commercial farmers, and market efficiency and the deracialization of commercial farming received renewed emphasis.

A 'land redistribution and agricultural development' (LRAD) programme replaced earlier policy frameworks for redistribution, and was to be complemented by a 'comprehensive agricultural support programme' (CASP). LRAD, developed with the assistance of the World Bank, offered a sliding scale of grants for land acquisition and development ranging from R20 000 to R100 000, and required a contribution in cash or kind, the size of the contribution determining the value of the grant. The minimum 'own contribution' was R5 000 (and could comprise 'sweat equity', or labour) and could obtain a grant of R20 000, while a maximum grant of R100 000 was available to those who able to contribute R400 00 or more.

The means test for those applying for land redistribution grants was removed, but in practice relatively few applicants were at the upper end of a sliding scale of grants. Individuals rather than households received LRAD grants, and decisions on grant applications were decentralised to provincial and district levels.

The target date for redistribution of 30% of agricultural land was set at 2014, implying an average annual transfer of 1.64 million hectares.³³ By September 2009 government reported that in fifteen years a total of 3.04 million hectares had been transferred to 185 858 beneficiaries through redistribution.³⁴

Land restitution speeded up dramatically in this period. Government reported that by 2009 the land restitution programme had resolved 75 787 claims, the great majority being urban claims resolved through cash payouts, using 'standard settlement offers' of around R40 000. Around 1.5 million people were reported as benefitting from restitution, and 2.64 million hectares were reported as restored.³⁵ However, the sustainability of restitution projects was often called into question. On farms where a great deal of capital investment had taken place (e.g. in subtropical fruit and nuts), government preferred that claimants enter into so-called 'strategic partnerships', or joint ventures, with private companies, in order to preserve continuity of production and employment. Few of these have proved successful, however, with some private sector partners overstretched; lack of promised government funding for capital investment has been another major problem.³⁶

Many of the problems experienced in the first five years of land reform resurfaced: official processes remained cumbersome and slow, characterised by poor co-ordination between different departments and spheres of government. Group projects saw beneficiaries continuing to pool their grants to purchase large farms, but subdivision was not allowed. The large-scale commercial farming model continued to influence planning and thinking about post-settlement support. Consultants based in the large-farm sector remained the main source of expertise for processes of farm business planning, but this meant that there was often a large gap between expert-driven business plans and the needs, desires and capacities of beneficiaries.³⁷

Reported cases of project failure contributed to a public perception that land reform was in trouble. A National Land Summit held in 2005 agreed on a review of 'willing seller, willing buyer', the expanded use of expropriation, and a proactive role for the state. The following year saw several new policy thrusts: area-based planning, a proactive land acquisition strategy, a draft Expropriation Bill, and reports on foreign land ownership, land ceilings and land taxes.

The ANC's National Conference in Polokwane in 2007 emphasized the need for an 'integrated programme of rural development, land reform and agrarian change'.³⁸

These 'new directions' did not lead to much change on the ground. Area-based planning became a consultant-driven process with low levels of commitment to them by local government or the department itself, and the idea of pro-active land acquisition was reduced to that of the state purchasing farms and leasing them to redistribution applicants for 3-5 years. Funds for the comprehensive agricultural support programme (CASP) were directed mostly to a minority of larger-scale producers.³⁹

The department devoted relatively few of its resources to implementing the Land Reform (Labour Tenants) Act of 1996 or the Extension of Security of Tenure Act of 1997 (ESTA), and CPAs and land-holding trusts were neglected.⁴⁰ Evictions of workers from commercial farms continued, pre-emptively and in response to competitive pressures, indicating the weakness of the legal system on its own when political will is lacking.⁴¹

In relation to the thorny issue of communal tenure reform, Minister Didiza oversaw the passage of the Communal Land Rights Act (CLARA) through parliament in 2004. This was premised on transferring ownership of land from the state to traditional councils under chiefs, within the boundaries of existing tribal authorities as determined by the apartheid state. According to some observers, CLARA arose out of deal struck by the ANC with the traditional leader lobby, which could not be offered formal powers of local government and hence was offered control over land instead.⁴² Communities and civil society groupings objected vociferously to the law in parliamentary hearings, and launched a litigation challenge to CLARA in 2005, asserting that it undermined rather than secured land tenure rights, and that the procedure followed did not involve sufficient consultation.⁴³ The Act was never implemented, and in 2010 it was struck down by the Constitutional Court on procedural grounds.

The Zuma presidency: 2009 – 2016

After 2009 rural development, food security and land reform were identified as priorities of the incoming President Zuma, and the Department of Rural Development and Land Reform (DRDLR) was created under Minister Gugile Nkwinti. A raft of new policy directions for land reform has emerged over the past seven years, some controversial, but not all have moved to the stage of implementation.⁴⁴ There is increased pressure on government to resolve the problems in its land reform programme, some from a new opposition party that came into being in the 2014 elections, the Economic Freedom Fighters, which demands expropriation of land without compensation.

A new programme launched by government in 2009 was the Comprehensive Rural Development Programme (CRDP), aimed at creating 'vibrant and sustainable rural communities'. This is targeted at nodes located in wards where poverty is particularly deep, and involves para-development specialists training community members to be gainfully

employed in a range of micro-projects. DRDLR sees itself as playing a coordinating role, in partnership with other government departments and local government bodies.

The strategy of the CRDP is based on a notion of '*agrarian transformation*', defined as '*rapid and fundamental change in the relations (meaning systems and patterns of ownership and control) of land, livestock, cropping and community*', with the objective of promoting 'social cohesion and inclusive development of rural economies.' This ambitious vision is proving difficult to realize, as a 2014 evaluation of the CRDP commissioned by DPME makes clear. Key problems include tensions with other line departments, and job creation that is short-lived, mainly in infrastructural development.⁴⁵

A Green Paper on Land Reform was published in August 2011, but was very short on detail, being only eleven pages long, and contained only general statements of principle. No other overarching framework for land reform policy has appeared since then. The main focus of the Green Paper is on developing a 'four tier' tenure system, comprising leasehold on state land; freehold 'with limited extent', implying restrictions on land size; 'precarious' freehold for foreign owners (i.e. with obligations and restrictions); and communal tenure.

The Restitution of Land Rights Amendment Act of 2014 opens up land claims for another five years, until 2019. This affects thousands of existing claims that have not been settled, as well as another 20,000 that are settled but not yet implemented. This has led to fears that existing claims could be swamped by the new claims lodged since 2014. In addition, government appears to want to open up the claims process to traditional leaders.⁴⁶ It is unclear whether or not the funds required to settle an estimated 397,000 new claims will be made available by Treasury. The Amendment Act has recently been struck down by the Constitutional Court, on procedural grounds, which calls into question the future of the re-opening of land restitution claims.

The State Land Lease and Disposal Policy (SLLDP) of 2013 applies to farms acquired through a proactive land acquisition strategy (PLAS), which has replaced the LRAD programme. It identifies four categories of beneficiaries: (1) households with no or very limited access to land; (2) small-scale farmers farming mainly for subsistence and selling some produce locally; (3) medium-scale farmers already farming commercially but constrained by insufficient land; and (4) large-scale commercial farmers with potential to grow but disadvantaged by location and farm size. This policy appears to be aimed mainly at medium-scale and large black commercial farmers. It assumes that there will be only one lessee per farm, and no mention is made of subdividing large farms.

The Recapitalisation and Development Policy Programme ('Recap') of 2014 replaces all previous forms of funding for land reform, including settlement support grants for restitution beneficiaries. Business plans written by private sector partners or officials are used to guide decision-making. Funding is for a maximum of five years. Beneficiaries must have business partners recruited from the private sector, as mentors or 'co-managers', or within share-equity schemes, or through contract farming.

The Agricultural Landholding Policy Framework of 2013, which is not yet law, proposes that the government designate maximum and minimum landholding sizes in every district. District land reform committees will determine floors and ceilings by assessing a wide range of variables. Holdings in excess of the ceiling will be trimmed down through 'necessary legislative and other measures', possibly through giving the state the right of first refusal on land offered for sale or expropriation.

A 2014 policy document on 'Strengthening the Relative Rights of People Working the Land', also known as the '50/50' policy, has not yet been approved. Each farm owner is to retain 50% ownership of the farm, ceding the other 50% to workers, whose shares in the farm will depend upon their length of 'disciplined service'. It is unclear if the scheme is to be compulsory or voluntary.

A new Expropriation Bill was introduced in 2015 and approved by parliament in 2016. It aims to bring the law in line with the constitution, specifically in relation to allowing compensation that is below market value, but is 'just and equitable'. The Act allows for oversight of expropriation processes by the courts, important when the levels of compensation on offer by the state are disputed. Government is establishing a new office of the Valuer-General, which can provide professional property valuation services to all levels of government, and this will help define the procedures for assessing what is meant by 'just and equitable' compensation. Although the commercial farmer lobby, as represented by Agri-SA, is assured that the new Expropriation Act passes constitutional muster, other groupings, notably the Institute for Race Relations, is not.

Tenure reform remains a problematic programme, with farm workers and farm dwellers continuing to be vulnerable to eviction, either within the framework of ESTA through seeking the approval of a court, or outside of it (i.e. illegally).⁴⁷ Recently some amendments to ESTA have been proposed. In relation to labour tenants, an NGO in KwaZulu-Natal, the Association for Rural Advancement (AFRA) has recently launched court action to force the department to commit itself to resolving the claims of some 19 000 labour tenant claims not yet attended to.⁴⁸

The department's current policy stance on communal tenure reform envisages the transfer of land ownership to traditional leadership structures such as traditional councils, possibly with an alternative choice of CPAs. This is similar to the approach adopted by CLARA. The option of securing community members' rights to residential and arable land and the commons through statutory recognition of customary land rights, in relation to both their form and their content, as the fundamental basis of reform, is not considered.⁴⁹

In government's current draft Communal Land Tenure Bill, a governance structure (either a traditional council or a CPA) will become a title-holder 'only in respect of the communally owned portions of land... reserved for collective and individual enterprise and industrial sector activities, including, but not limited to grazing, cropping, forestry, mining, tourism, infrastructure and manufacturing'. However, it is clear that the governance structure will be the 'title-holder to the entire cadastral unit'. These owners will be empowered to enter into business arrangements with external investors through 'investment and development entities'

and joint ventures.⁵⁰ Critics have argued that this approach to communal tenure reform runs the risk of encouraging unaccountable traditional leaders and councils to agree to business deals that privilege local and external elites and provide few benefits to ordinary community members, as is often the case at present in relation to mining.⁵¹

Assessing these shifts over time

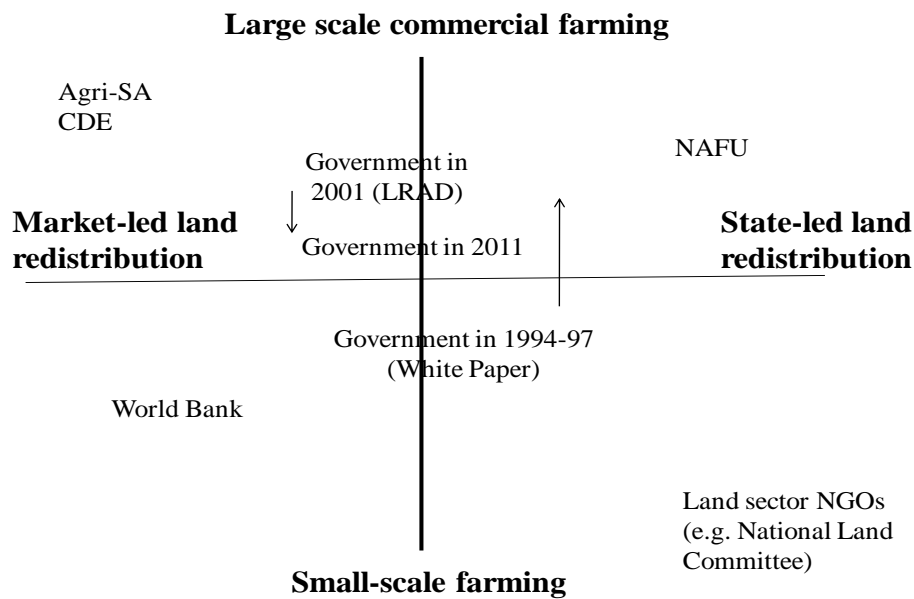
It is clear from this thumbnail sketch that shifts in land policy over time can be explained in part by responses to widespread public criticism and perceptions of failure (e.g. of its slow pace, ineffectiveness in enhancing the livelihoods of beneficiaries and improving their tenure security, difficulties in raising levels of production, and so on), and in part by changing ideas about who should benefit, with a new emphasis being placed on supporting relatively well-off black emerging farmers after 1999. Although the notion of land reform being embedded within a wider *agrarian* reform has gained currency over time, no programme to give effect to this vision has been developed and debated as yet.

Many of the policy directions adopted since 2009 are highly controversial, amongst civil society and community-based groupings (especially in relation to communal tenure, but also tenure reform more generally, as well as the extension of the time period for lodging land restitution claims), and amongst the commercial farming lobby, both white and black (especially in relation to proposals for '50/50' equity share schemes, limits to farm size, and the current practice of offering state leaseholds on redistributed land, rather than titles). There are deep social and political divides within the country on the issue of whether or not property rights should continue to be protected in the constitution, and over measures for expropriation and reducing levels of compensation for expropriated land.

As expressed by one analyst, South Africa continues to lack clarity on several dimensions of land reform: *what* it should be focusing on, *why* it should do (as informed by political objectives), *who* should be targeted for which land (a key question being the mix of large-scale vs small-scale production systems), *and* how land can be acquired and transferred and rights secured (with a key issue being the relative mix of state interventions and market mechanisms).⁵² There is also the question of *where* land reform should take place – the issue of spatial targeting.⁵³

Stances within South African debates in relation to two central policy issues (to emphasise state or market mechanisms, and to promote large-scale or small-scale farming) are depicted in Figure 1.⁵⁴ Note that the apparent shift by government from 2011, to promoting a balanced mix of large-scale and small-scale farming through a combination of state-driven and market-assisted processes, may be somewhat misleading: analysts have suggested that this may be rhetorical rather than real, with little attention to market realities in the design of the programme and no support in practice to small-scale producers.⁵⁵ Thus the figure below may reflect ideological framings rather than actual changes.

Figure 1. Contrasting land reform policy stances



Source: Cousins 2013

The sections that follow offer more detailed descriptions of the various programmes of land reform.

5. Land redistribution

The model adopted for funding land redistribution in the 1997 White Paper was the *Settlement/Land Acquisition Grant (SLAG)*. It remained agnostic on key questions of what kinds of farming and social relations would be supported; land redistribution aimed to contribute to a more diversified size structure in agriculture, where all producers would compete in a deregulated environment. SLAG had several distinguishing features. First, it promoted access to land for poor people only, being means-tested. Second, it provided a R16 000 household grant, initially equivalent to the urban housing subsidy, with which people could buy land. Third, while the policy focused on 'communities', many different interests were to be accommodated in the policy, including people wanting land for their own use as well as those wishing to live and use their land together as community.

The SLAG-based redistribution programme alienated almost all interest groups. These included the NGOs, which opposed its market-based framework; many of the rural communities with whom they worked, who were frustrated with slow delivery and the absence of support for them after they took ownership of their land; the white farmers, who objected to large-scale black settlement in the white commercial farming heartland; and black 'emerging' capitalist farmers, who were excluded from the programme by its pro-poor means test and whose aspirations to individual ownership of whole commercial farms were thwarted by its criteria and the small grants it offered.

The Subdivision Act of 1970 requires permission to be sought for subdivision of farmland. Debate on its potential to constrain land reform made it clear that the consensus amongst agricultural economists is now that this is unnecessary, and that zoning regulations are sufficient to prevent the loss of agricultural land to other land uses such as housing. In 1998 a Repeal Act was approved by parliament, but was never signed into law by the President, for no known reason. Farmland acquired for land reform purposes is exempt from the Subdivision Act, but in fact no actual subdivisions have been carried out in land reform contexts thus far. For critics, this is further evidence of the negative influence of the 'large commercial farm' model on planners.⁵⁶

In 2000, the World Bank helped to design a revised grant to replace SLAG, and aimed to create a new class of black commercial farmers. The Bank criticised the government for setting up large, 'rent-a-crowd' collectives unable to manage and use their land, and for failing to address the class interests of those with the resources and capacity to become commercial farmers. From 2001, the new *Land Redistribution for Agricultural Development (LRAD)* programme offered a sliding scale of grants from R20 000 to R100 000 per individual. The level of grant would now be determined by the level of contributions that applicants themselves could make, meaning that those who were better off would get more state support. The funds were only available to those wishing to farm, and gave priority to those aiming to farm commercially who could show that they had the means to do so.

Requiring applicants to contribute their own capital and assets was a response to production failures on redistributed farms. Applicants' ability to contribute financially was viewed as a proxy indicator of their commitment to farming: if they put in their own money, they would be more 'committed'. With LRAD, redistribution policy prioritised productivity and economic efficiency instead of poverty alleviation and rural livelihoods. This justified channelling available budget resources to fewer people than in the past. A 'picking winners' policy focused on black emerging farmers at a variety of scales, and assumed that all black farmers were 'emerging' from non-commercial and into commercial farming. It did not address the land needs of people wanting a secure place to live, instead of farming.

By 2001, when LRAD was launched, Minister Didiza warned of the dangers of 'squatter farming' on redistributed land. She was responding in part to the commercial farming lobby's attempts to pressure government to ensure that redistributed land would be commercially farmed, and that settlement on farmland in the commercial heartland would be strictly controlled. The government's response was to limit group sizes in LRAD to 10 people per project; this would, Ms Didiza explained, address the problems of overcrowding and group-based conflict that had emerged under SLAG. The primary effect of limiting projects to 10 people, however, was to limit the number of properties that could be bought for redistribution, especially as government did little or nothing to enable farms to be subdivided. For those without money of their own, it meant that they had to find farms that they could buy, invest in and operate for under R200 000; unsurprisingly, very few such opportunities existed.

This focus on enterprising individuals, meant to be farming full-time, together with the imposition of income targets, shaped the implementation of LRAD. It favoured businessmen with income from other sources and marginalised the majority of rural farmers, many of whom are women. This was in contrast with the original, poverty reduction oriented objectives of land reform adopted in the 1990s. The continuing need for land for an improved livelihood, rather than to farm as a business, was confirmed in a major land demand survey undertaken by the HSRC, which found that the vast majority of people wanted land of less than one hectare.⁵⁷

However, finding aspirant black farmers with sufficient capital of their own to invest proved challenging. In its first two years, the LRAD programme provided 41% of its grants at the lowest end (R20 000), and 40% at the R30 000 level. Most applicants continued to pool their grants, unsurprisingly, given the small size of the grant relative to the cost of large farms and the absence of any thrust to subdivide. Group size declined in some provinces, but remained large in others. Grant size was not adjusted for inflation, yet land prices across the country increased in the early 2000s, and grants decreased in value in real terms as a result. Available evidence suggested the persistence of 'the dichotomy of large group projects for the poor and small (household or individual) projects, albeit with relatively large per capita land areas, for the better-off'.⁵⁸

Comprehensive Agricultural Support Programme (CASP) funds were also provided to land reform beneficiaries. It is estimated that between 2005 and 2008 there was an annual average of 61 000 CASP beneficiaries and about 2 500 farmers per annum received loans from MAFISA. These figures mask a highly skewed distribution: in 2009, for 322 national CASP projects, 50.7 % of funds went to 2.6 % of beneficiaries; taking all small-scale farmers into account, 'the lion's share of state funding ... goes to less than 0.02 % of them'. The bulk of funds went to land reform projects, and communal areas were largely excluded. The implicit criterion for CASP funding was 'commercial viability', and the imperative to spend large budgets resulted in officials scaling down the number of projects and scaling up the size of each project.⁵⁹

The Proactive Land Acquisition Strategy (PLAS) was launched in 2006, with the state buying farms and leasing them to beneficiaries. From 2011 PLAS replaced LRAD and all other grant-based programmes supporting land redistribution. Government explained this approach as its response to criticism of the 'willing buyer, willing seller' approach, and its promise at the National Land Summit that it would now proactively acquire land for redistribution. A proactive approach had been advocated by civil society and academic groups as an alternative to 'willing buyer, willing seller' in the period leading up to the National Land Summit, but the policy did not adopt key elements of that proposal, specifically that the state first be proactive in engaging with landless people and small farmers, and only then seek to buy land to meet their needs. Delivery statistics for PLAS are not clearly reported by the department, but some findings can be extrapolated from available data (see below).

A consultative and participatory element in land acquisition and transfer has been largely absent to date. This means that the 'proactive' state is not just a willing but also a somewhat blind buyer, lacking any clear basis to determine which land to buy. What land is acquired is

determined by the farms on offer rather than identified demand in a particular locality. Because government is now the 'willing buyer', it is free to spend as much as needed (and available) from the national budget to buy farms, in this way avoiding the constraints of the subsidies provided under SLAG and LRAD and the mismatch between these subsidies and the actual market prices of farm properties.

PLAS gives far-reaching powers to officials to purchase land directly, rather than by disbursing grants to enable beneficiaries to buy land. The leases were initially to be on a trial basis, with an option to purchase after three years, but following widespread non-payment of rents, in 2011, Minister Nkwinti, ruled out the possibility of any 'second transfer' for the foreseeable future. He also spoke about 'use it or lose it' (not a formal policy, but a ministerial injunction), promising that those not using land according to agreed business plans and complying with a new criterion of production discipline would be removed and the land given 'to another deserving entrepreneur'.

The current redistribution programme is thus focused on the state buying and then leasing out whole commercial farms, at discounted rates, and in practice sometimes for free. This new model addresses the problems of buying land with small land purchase subsidies, as under SLAG and LRAD, but does not resolve other problems. The DRDLR reported that it had spent R8.5 billion between 2009 and 2014 buying farms for beneficiaries. In the first three years, this worked out to an average of R5.3 million per project and R1.8 million per household.⁶⁰

Within these parameters there is much variation, with some people acquiring a modest amount of land and starting farming from scratch, while others receive large and valuable properties with good infrastructure, equipment, livestock and standing crops and farms still in operation. Now that land redistribution is freed from the grant system, there appears to be no way to ration the distribution of public money to beneficiaries. In addition, as the state has become more closely involved in the land market, as both buyer and landlord, it has become more conservative in its plans for land use, insisting that beneficiaries provide commercial business plans before they can get leases – yet few are able to start production in the absence of such leases. The result is long delays as people wait for approval of business plans and recapitalisation grant applications, which now precede the offer of secure land rights.

The *State Land Leasehold and Disposal Policy (SLDP)*, was adopted in 2013, and applies to farms acquired through PLAS. It is targeted at black South Africans, and defines four categories of beneficiaries: (1) households with no or very limited access to land, even for subsistence production; (2) small-scale farmers farming for subsistence and selling part of their produce on local market; (3) medium-scale commercial farmers already farming commercially at a small scale and with aptitude to expand, but constrained by land and other resources; and (4) large-scale or well established commercial farmers farming at a reasonable commercial scale but disadvantaged by location, size of land and other resources or circumstances and with potential to grow

Categories 1 and 2 will be leased state land at a nominal rental of R1.00 per annum, without an option to purchase. Labour tenants and farm workers who acquire land in terms of the provisions of existing legislation on security of tenure will also lease from the state, but pay only a nominal rental. Categories 3 and 4 will be leased state land for 30 years, with leases renewable for another 20 years, and have an option to purchase. The first five years of the initial lease will be treated as a probation period in which the performance of the lessee will be assessed, and new lessees will pay no rental in this period. For categories 3 and 4, the rental thereafter will be calculated as 5% of 'projected net income', as set out in an approved business plan. Leases will require beneficiaries to establish a legal entity with its own bank account in order to engage in business activities, have notarial bonds entered on their leases, provide tax clearance certificates, maintain an asset register, and seek permission to make improvements.

The *Recapitalization and Development Policy Programme (RDPP)* replaced all previous forms of funding for land reform in 2013, including settlement support grants for those having land restored through restitution. Its rationale is that many land reform projects have been unsuccessful because of inadequate and inappropriate post-settlement support and are in 'distress', and thus in need of further injections of funds. It also provides financial support to black farm owners who are not land reform beneficiaries, and to producers in communal areas. Beneficiaries are 'prioritized' in accordance with the four categories listed in the SLDP, but just what that means is unclear. Again, business or development plans written by either private sector partners or departmental officials are used to guide decision-making. Funding is for a maximum of five years.

Beneficiaries of the policy must have business partners recruited from the private sector to work closely with them, as mentors or 'co-managers', or within share-equity arrangements, or as part of contract-farming schemes. The definition of 'co-management' is confusing, but seems to imply some kind of joint venture for a specified period of time.

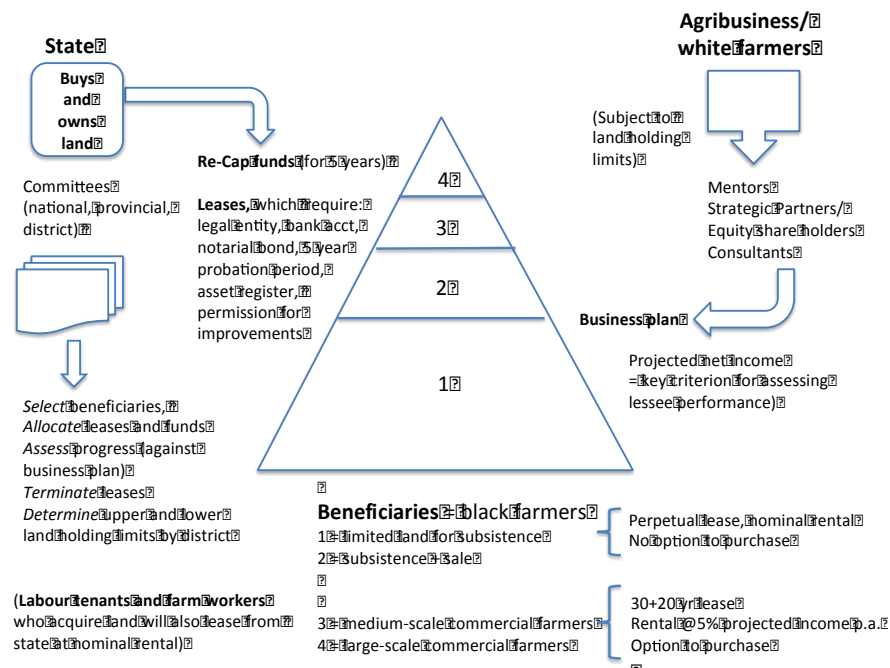
The Presidency commissioned a mid-term evaluation of the Recap programme in 2013, showing that large sums are being spent on relatively few beneficiaries, few new jobs have been created, and access to markets for produce remains limited. In the six provinces covered in the assessment, an average of around R3.5 million was spent per project, around R520 000 per beneficiary, and job creation cost R645 000 per job. Some mentors and partners pay little attention to skills transfer.⁶¹

The *Agricultural Landholding Policy (ALPF)* of 2013 gives effect to the notion in the 2011 Green Paper that one 'tier' of land tenure in South Africa will be 'freehold with limited extent'. By 2016 it appeared that this policy might soon be given legislative expression. The policy proposes that government designate maximum and minimum land holding sizes in every district, and take steps to bring all farms either up to the specified minimum size (a 'floor level') or below the maximum size (a 'ceiling'). The rationale is to attain higher levels of efficiency of land use and optimize 'total factor productivity'.

District land reform committees will determine landholding floors and ceilings by assessing a wide range of variables (including climate, soil, water availability, water quality, current production output, commodity-specific constraints, economies of scale, capital requirements, numbers of farm workers, distance to markets, infrastructure, technology, price margins, and relationships between different on-farm resources). Holdings in excess of the ceiling will be trimmed down through 'necessary legislative and other measures'. What this means is unclear, but the document indicates it may include purchase (possibly through giving the state the right of first refusal on land offered for sale), expropriation, or equity sharing.

The ALPF policy document reviews international experience of land ceilings as a land reform measure, and in particular the cases of India, Egypt, Mexico, the Philippines and Taiwan. The document points out that in almost all cases the impact of land ceilings has 'not lived up to expectations', and in some cases they have had almost no effect on disparities in land-holdings. The document also states that 'optimum levels of productivity (i.e. both floor and ceiling) are 'dynamic and continuously changing upwards and downwards'.

Figure 2. New land redistribution policies



Source: Cousins 2013b

A broadly similar institutional framework for implementation is proposed in each of the above three post-2013 land redistribution policy documents. District committees undertake detailed assessments of applications, select individual beneficiaries, recommend the allocation of leases and recap funds, assess beneficiaries' progress against approved business or development plans, will determine minimum and maximum landholding sizes, and recommend termination of leases when performance is deemed to be poor. These committees are composed mainly of officials from different departments and levels of government, but at district level will include a few representatives of the private sector. For leases, a national committee makes recommendations based on the advice of district committees, and the Director-General of the department gives final approval. In relation to recapitalisation grants, a national committee chaired by the Minister makes final decisions. In relation to landholding size, it appears that a proposed National Land Management Commission will have final authority. The way in which these different policies articulate with one another is shown in Figure 2 above.

Analysts have commented that the new policy framework makes little provision for small-scale black farmers.⁶² Farmers in categories 1 and 2, who greatly outnumber commercially-oriented black farmers in categories 3 and 4, will never have the option to purchase the land they occupy. People who want secure rights to well-located land for settlement and as a base for multiple livelihood strategies, a possible route out of rural poverty, are not catered for. The policies require lessees set up companies with bank accounts and enter into strategic partnerships with commercial farmers or private sector companies. The leasehold policy assumes that there will be only one lessee per farm, and no mention is made of subdividing large farms to provide for smallholders. Applicants for land who are deemed to fall within categories 3 and 4 are the main beneficiaries.

In addition, critics have suggested that the agricultural land holdings policy lacks a sound basis in both theory and in relevant experience in other contexts. South African agriculture is highly diverse in its products, systems and scales of production, partly in response to high levels of environmental variability and market realities. Environmental and market conditions are dynamic and fluctuating, and 'optimum productivity' is a constantly moving target. Successful farmers, both large and small, are those who are able to improvise flexible and effective responses to dynamic variability.

The mixed experience to date of strategic partnerships and joint ventures in land reform in South Africa appears not to have informed these policies. There are a few success stories, but a great many failures. Some partnerships established on fruit and nut farms in Limpopo have gone bankrupt, and others continue to struggle to pay any kind of dividend to community members. Small-scale farmers on irrigation schemes have experienced losses in poorly-managed joint ventures with tobacco and fresh produce companies. Many of the business plans drawn up by these partners have been far from appropriate, and have not provided useful instruments with which to measure the performance of beneficiaries of land reform.⁶³

In relation to the proposed '50/50' policy, or '*Strengthening the Relative Rights of People Working the Land*', it was announced in early 2016 that a number of pilots are being implemented, but no details are available as yet. It may be that the nature of the pilots is very different to the scheme as originally proposed. This involved farm owners retaining 50% ownership of the farm, and ceding 50% ownership to workers, who would acquire shares in the farm depending on their length of service. It should be noted that in 2009 a moratorium was placed on farm equity schemes, the Minister indicating that 'of the 88 farm equity share projects implemented between 1996 and 2008, only nine have declared dividends'. It is unclear how the new scheme relates to the earlier model.

Delivery since 1994

The number of hectares transferred under the land redistribution and tenure reform programmes (which are always lumped together in the department's statistics), together with the number of beneficiaries, are shown in Figure x below. The fact that tenure reform is not reported separately does not allow for any assessment of the numbers of beneficiaries who have had their tenure rights secured since 1994, including those labour tenants to whom land has been transferred. (N.B. The same is true in budgeting and planning, where redistribution and tenure reform are again not separated out). The graph shows clearly that the department has not reported delivery on a consistent basis over the years, and it is not possible to reconstruct the cumulative totals in a clear and consistent manner.

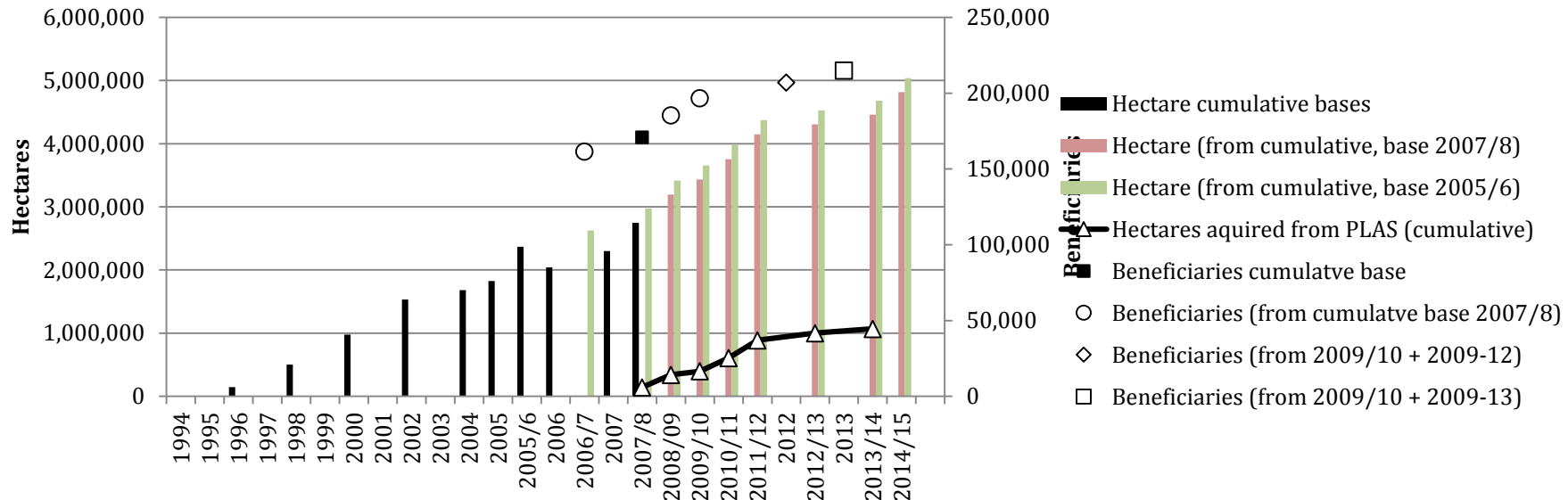
The graph below shows that delivery was slow in the first five years of the programme, and that by the end of 1999 around 1 million hectares had been redistributed. This is not surprising, given that land reform was a new programme, there was an extensive process of public consultation, appropriate policies had to be designed, procedures had to be put in place, and capacity for implementation had to be built more or less from scratch. NGO staff moving into government had to adjust to a new *modus vivendi*.

The SLAG programme was replaced by LRAD in 2000 and delivery improved by 50% in two years. This was at a time when government was being criticized for the slowness of land reform. By 2006 around 2.5 million hectares had been transferred to around 170 000 beneficiaries. Delivery of land speeded up from 2008, levelled off after 2012, but was not matched by commensurate increases in the number of beneficiaries. The acquisition of land under the PLAS programme also levels off after 2012, but whether or not all the land acquired under PLAS has actually been transferred or not is unclear from reports. The performance of PLAS is discussed further below.

A key issue is that the department does not collect statistics on the number of beneficiaries who move onto or remain on land after the initial transfer. Case study research reveals that a great many people never settle on redistributed land, and many of those who do move on after a period of time. This means that we have no idea how many beneficiaries of land reform continue to benefit from land transfers over time.

The total number of hectares delivered by the land redistribution programme between 1994 and 2014/15 is around 5 million hectares, averaging 238 000 hectares per year.

Figure 3. Approximate cumulative number of hectares transferred and numbers of beneficiaries of the land redistribution and tenure reform programme, 1994 – 2014/15



*Cumulative base 1994, 1996, 1998, 2000, 2004, 2005, 2006, 2007/8 (Gwanya 2008) includes land transferred under redistribution and tenure reform. Whether this includes transferred state land unclear. It is also unclear whether the aggregate figures for 2009 – 2012 and 2009 -2013 in the mid and end-term reviews (DRDLR 2012b; DRDLR 2014b) are inclusive of lands acquired by labour tenants.

**Cumulative base 2005/6 (Thomas, 2007) includes land transferred under redistribution and tenure reform and transferred state land.

*** 258,890 hectares transferred in year 2006/07 (DLA 2007) refers to “Productive white-owned agricultural land provided to black South Africans for sustainable agricultural development.” It is unclear whether this includes land transferred to labour tenants and/or transfer of state land

**** 347038.5 hectares transferred in year 2007/8 (Gwanya 2008) includes redistributed and land tenure reform land. The number is arrived by the sum of provincial total, though this differs from another presented total figure by 1,027 hectares.

***** The bars showing cumulative redistributed land for the years 2008/9 (DLA 2009) and 2009/10 (DRDLR 2010) includes 226,986.2 hectares and 99,433.0566 hectares respectively acquired under the Proactive Land Acquisition Strategy (PLAS). These figures differ from those listed in the PLAS Implementation Evaluation (DRDLR, 2015b) listed as 197,617.81 hectares and 57,060.99 hectares, respectively. The latter figures are used for the line showing the cumulative increase in PLAS hectares. PLAS land is listed separately from land redistributed under LRAD/COM/SLAG/SPLAG, and it is unclear what proportion of land acquired has been redistributed.

Sources: DRDLR 2009, 2010, 2011, 2012a, 2012b, 2013, 2014a, 2014b, 2015a, 2015b; DLA 2005, 2007; Gwanya 2007, 2008; Thomas 2007

Delivery of the Proactive Land Acquisition Strategy (PLAS)

In 2013 the department reported that it had spent R4.5 billion buying farms between 2009 and 2012 (National Treasury 2013). Although not all farms were allocated to beneficiaries in the same years, this worked out to an average cost of R5.3 million per project and R1.8 million per household (DRDLR 2012: 22, National Treasury 2013). But little could be discerned from the total delivery data made available by the department, as shown in Table 18.1 below.

Table 1. PLAS projects, hectares and beneficiaries, 2009 to 2012, and averages (by province)

Province	Projects	Hectares	Beneficiaries	Ha / project	Ha / beneficiary	Beneficiaries / project
Eastern Cape	123	132 849	1 167	1 080	114	9
Free State	102	71 428	427	700	167	4
Gauteng	56	7 683	231	137	33	4
KwaZulu-Natal	154	72 936	4 817	474	15	31
Limpopo	92	40 512	481	440	84	5
Mpumalanga	122	100 933	1 209	827	83	10
Northern Cape	57	350 869	176	6 156	1 994	3
North West	99	73 977	246	747	301	2
Western Cape	41	31 051	1 693	757	18	41
Total	846	882 238	10 447	1 043	85	13

Source: DRDLR 2012: 22 (last three columns are derived by the author from data in the other columns)

However, comparing delivery data under the PLAS with that from prior policy cycles, it is clear that in this period available budgetary resources were being crowded into fewer projects. As Table x shows, the number of beneficiaries per project was low, while the number of hectares per beneficiary was high compared to SLAG and LRAD, which averaged 4ha and 18ha per beneficiary on average. Yet it must be recognised that these averages (the only analysis possible on the basis of the limited official published data) provide little insight into the varied circumstances within provinces.

Table 2. Comparing the outcomes of SLAG, LRAD and PLAS

Policy	Projects	Hectares	Beneficiaries	Ha / Project	Ha / Beneficiary	Beneficiaries / Project
SLAG	472	636 599	144 528	1 349	4	306
LRAD	4 213	1 133 928	63 300		18	15
PLAS	846	882 238	10 447	1 043	85	13

Sources: DLA 2001, DRDLR 2010a and DRDLR 2012: 22.

Notes: SLAG here refers to the period 1994–1999 and excludes those SLAG projects implemented after this period; because the SLAG grants were per household, these have been converted into ‘beneficiaries’ at a rate of 3 beneficiaries per household. LRAD here refers to all LRAD projects up to 30 June 2010. PLAS here refers only to PLAS projects implemented in 2009/10 to 2011/2012 financial years and excludes those implemented before this, as no data is available for the prior period.

Assessing the impacts of redistribution

Many case studies have been undertaken of the impacts of land redistribution projects on land use, production and livelihoods, as well as of the institutional arrangements within these projects.⁶⁴ Here only a few of these can be briefly summarised.

Kirsten and Machete (2005) carried out a comprehensive audit of 124 of 177 registered land reform projects in Northwest Province, most of them LRAD-based redistribution projects, and determined that 27% were not operational. Only 42% of projects were producing effectively and marketing their produce. No production had occurred on 24% of the projects. In a detailed review of 43 selected projects, four categories were: 10 projects showed increased production; 14 showed stable production; 10 showed decreased production; and 9 showed no production. They identified a number of reasons for poor or absent production in the latter two categories: there has been no investment in farm infrastructure and there was limited access to funds for production costs. Farms were also characterised by poor decision-making and management, with beneficiaries having limited prior experience of agriculture and poor financial management skills. As a result of limited beneficiary involvement many beneficiaries had lost interest. There was a severe lack of support services for beneficiaries, with limited advice and support from the provincial Department of Agriculture, input suppliers and agribusiness.⁶⁵

Aliber et al (2013) investigated the impact of land reform on livelihoods in Limpopo Province, through 13 detailed case studies drawn from two district municipalities, Vhembe and Capricorn. At the time the study began in 2007, there were 119 land reform projects in Capricorn and Vhembe Districts, of which 81 were redistribution projects and 36 restitution projects. As of late 2007, for 46 % of projects, project land was completely idle; for 40 %, at least some beneficiary activity on the land was discernible; 3 % had no beneficiary involvement, with some or all project land leased out; and for 10 % of projects, no information was obtainable, most likely suggesting that their land was also idle. The project census also established that among the projects with at least some activity on the land, the numbers of beneficiaries still present were dramatically less than the official number.⁶⁶

This study confirms the wide-scale failure and collapse of land reform projects in central-north Limpopo, but also highlights that even where projects have not failed the benefits can be quite limited. Two types of beneficiaries have been systematically neglected by land reform in Limpopo: farm workers and farm-dwellers, and communal area dwellers and farmers, including the large proportion of black farmers who are women. The dominant model informing the planning of land reform projects, that of large-scale commercial farming, is highly problematic. The study also identifies specific circumstances in which land reform has provided access to land which has enhanced the livelihoods of poor people. In the Munzhedzi case, a restitution

claim 'went wrong' and hundreds of non-claimants were allocated plots that they successfully use for both small-scale farming and as a base for other livelihoods. This suggests the need to consider a land redistribution process based on the sub-division of large farms and support for small-scale, part-time farming as one of many livelihood sources.

Hornby (2014) describes an apparently successful redistribution project at Besters in KwaZulu-Natal, where 21% of the district's commercial farmland, along with tractors and beef cattle herds, have been redistributed to 13 Communal Property Associations made up of 170 former labour tenant and farm worker households. A number of the CPAs started selling weaned beasts within three years. Hornby shows that cattle production on these farms is only partially 'commercial', and that livestock continue to play multiple roles in livelihoods, hence it is best seen as a hybrid model. 'Success' is mixed because beneficiaries are socially differentiated, and tensions have emerged within the CPAs, but adequate levels of capitalisation (R21 million in this case) are key to supporting high levels of production.⁶⁷

Chitonge and Ntsebeza (2012) report the findings of a study conducted in land redistribution projects in the Chris Hani District in the Eastern Cape, focusing on the question of whether land transferred through the land reform programme in South Africa is making a contribution to improving the livelihoods of beneficiaries. The study found that the acquisition of land has improved, in some cases vastly, the socio-economic conditions of beneficiaries. Land reform beneficiary households and those who acquired land on their own in commercial farm areas are much better off than their counterparts in the communal areas, who have limited access to land. Most land reform beneficiaries are able to improve their livelihoods with very limited or no support from the state.⁶⁸

De Villiers and van den Berg (2006) focus on seven 'success stories' in land reform: three cases of restitution and four of redistribution using LRAD grants to acquire farms. These cases encompass a very large citrus estate (Zebediela), the Makuleke land claim to the northern section of Kruger National Park, a banana plantation, and cases involving sugar cane, dairying, wine grapes and flowers. All involve a large-scale commercial farming model, complex institutional arrangement such as CPAs and trusts, and relationships with strategic partners or mentors. In two cases, the strategic partner has been liquidated and these projects have since run into severe difficulties.⁶⁹

Some studies review the evidence from surveys, such as Quality of Life Surveys commissioned by the department at irregular intervals. Keswell and Carter (2014), for example, estimate that LRAD beneficiaries enjoy improvements in per-capita consumption of the order of 25% as compared to non-beneficiaries. Living standards drop for 3-4 years and then rise to around 150% of standards prior to land transfer.⁷⁰

In an extensive review of the evidence of both surveys and case studies, Hall (2009) has suggested a useful typology of rural land reform projects in South Africa:

- Large groups obtaining farms and farming collectively as a single commercial entity. This pattern was officially discouraged after 2000, but nevertheless has remained

dominant in both restitution (due to the community-based nature of many claims) and in redistribution (due to the grant structure of LRAD).

- Large groups obtaining farms and farming individually or in smaller groups. This pattern has emerged by design but also by default, when attempts at group-based production have collapsed.
- Individuals, families or small groups obtaining farms and farming them as a single commercial entity. This is usually possible only with substantial capital contributions and/or high levels of initial debt, and so is accessible in practice to only a small proportion of applicants who are better-off. This pattern is now encouraged (including in the recent PLAS model and state leasehold).
- Joint ventures between land reform beneficiaries and private sector or state institutions. This pattern, involving strategic partnerships, equity schemes and contract farming, is now encouraged. These quite limited options result from a combination of the market-based framework, the reliance on grants that are small compared to the price of farmland, the failure to confront the size and structure of farm holdings in the commercial farming areas through subdivision, and the emphasis in planning on the need to maintain existing production regimes on commercial farms.

Which type of project has yielded best results? Hall comments:

‘Land reform projects, then, typically have emphasised whole-farm commercial enterprises, many of which are costly and complex, take time to deliver benefits, and are often high-risk and seldom allow for multiple uses of farmland other than those undertaken by the commercial enterprise. On the other hand, smaller household-level projects have been possible only where applicants are relatively well-off and can contribute their own resources, avoiding the need to inflate the group size to access further grant funding and, instead, registering each member of a household as a beneficiary to reduce the ratio of own-contribution to grant. Between these two models is a third possibility: small-scale production by poor households on their own land, whether held in common or not. This is a crucial gap, a model not being promoted at present, and is probably the most important area for the future of land reform, if it is to directly address the situation of poor people living in rural areas.’⁷¹

These samples from the literature show that land redistribution has resulted in many project failures, impacts on production and livelihoods that are often somewhat indifferent, and a few success stories. The reasons for this pattern, evident also in land restitution, are complex, and contested in the literature. They are discussed further in the concluding sections of this report

6. Land restitution

The *Restitution of Land Rights Act, Act 22 of 1994*, was one of the first laws passed by the new democratic government, to begin to address the legacies of apartheid rule. It affirmed the right to restitution and defined the process for lodging their claims. The Act

established two institutions to drive the process: a Commission on the Restitution of Land Rights (CRLR) and a Land Claims Court (LCC). The timeframe for restitution set out in the 1997 White Paper was eighteen years in total. Initially three years were allowed for claims to be lodged, later extended to a final deadline of 31 December 1998 (DLA 1997: 49). Five years were envisaged for the settlement of claims and a further ten years for the implementation of all court orders and settlement agreements.⁷²

The Restitution Act set out the criteria for eligibility as a person or community who was dispossessed of property after 1913, as a result of racially discriminatory laws or practices, and was not adequately compensated; or the direct descendants or deceased estates of such people (RSA 1994, Section 2(1)). Eligibility hinges on providing sufficient proof that property rights existed and were lost through racially discriminatory laws and practices. Jurisprudence confirmed that restitution is not limited to those who had been private freehold owners of land, but extends to (former) non-owners, since most land held by blacks had been under forms of customary or informal tenure.

The major limitations on eligibility are the 1913 cut-off date, and (until the 2014 Amendment Act) the 1998 deadline for claims to be lodged. The reason given by Minister Didiza for not accepting claims predating 1913 was that this would open the way to claims on land already occupied by blacks, rather than focusing on white-owned land. There are very few rural claims in the Western Cape and why, in contrast, large portions of Limpopo and Mpumalanga – estimated by some at between 50 and 70 % of the farmland in those provinces – are subject to claims. It appears that the vast majority of those affected (along with their descendants) have never submitted claims for restitution. The Commission estimates that claims received reflect 10% of those potentially eligible although Walker suggests that the proportion is higher.⁷³

A second key dimension of restitution concerns what is to be restored. Claimants are able to indicate their preference among having their land restored to them, obtaining alternative land or receiving financial compensation – or a combination of these. Restitution can also take a ‘developmental’ form where compensatory funds are earmarked for investment in infrastructure or income-generating schemes for claimant communities. These are now the dominant form with respect to ‘betterment’ claims. While the Constitution affirms the property rights of both owners and the dispossessed, in practice where these come into conflict, current ownership has trumped historical claims. As of 2014, the government has only used its constitutionally mandated powers of expropriation in two cases, and in two of these cases the state revoked its expropriation notices to return to the negotiating table.

A third dimension of restitution concerns the identity of those who should carry the cost of restitution – persons who benefited directly, persons who own the land currently, or society as a whole? The long duration of dispossession in South Africa presents a problem of intergenerational claims, compounded by multiple transactions of property since the moment of dispossession. By the 1990s the owners of claimed land were more often the *indirect* rather than the direct beneficiaries of dispossession. By confirming existing property rights and providing for expropriation with ‘just and equitable compensation’, the constitutional

agreement ensured that society as a whole, through the state and the fiscus, would carry the cost, rather than current property owners.

The first five years of restitution

As well as setting up its central and regional offices, the Commission had to solicit claims and set up systems to register and investigate them. By 1997, concerned that many people remained unaware of the process, the Commission extended the deadline for lodging claims and launched a 'Stake your Claim' campaign to ensure that the public was aware of the opportunity to submit claims.

The work of settling claims started slowly. The challenges of establishing a new institution and the legalistic framework for settling claims were among the reasons for just 41 claims being settled in the first five years. In 1998 Minister Hanekom ordered a review of the process, which led to marked changes in the division of labour between the Commission and the Court. The process for settling claims was streamlined and the role of the Commission was expanded. The Restitution Act was amended to give the Commission delegated powers not only to investigate claims but also to negotiate and conclude settlement agreements with claimants (CRLR 1999:31 and RSA 1999: Section 42D). Under this approach 'restitution claims will be resolved via agreements between the parties, with the court only intervening to decide on legal disputes or where there is a need for interpretation of the law'.⁷⁴

Also arising from the review, the Commission's approach to cash compensation was standardized, especially in the urban context, leading to mass offers of cash compensation that did not require the valuation of each claim. Standard Settlement Offers (SSOs) were set initially at R40 000 for a residential property, with variations for major metropolitan centres (up to R50 000) and smaller amounts (R17 500) offered to claimants who had been long-term tenants at the time of dispossession.⁷⁵

Progress since 1995 in resolving restitution claims

Government has measured the achievements of restitution quantitatively in terms of the number of claims settled, how many people have benefited, and the extent of land restored to claimants. The quality of outcomes is evident in a small number of detailed case studies by independent researchers. However, even the quantitative data provided by government are often somewhat questionable. Also unclear is the current status of so-called 'settled' land claims, particularly rural claims. Many case studies show that few beneficiaries have actually relocated to restored land, and many have left such and following inadequate post-settlement support.⁷⁶

Claims lodged

A total of 63 455 claim forms were reported as lodged with the Commission by the extended deadline of 31 December 1998 but it soon became apparent that the total number of claims was a shifting target. Where different claim forms were submitted by members of one

community, these were consolidated into a single claim. More commonly, group claims were split up and counted separately, for instance where the land rights had vested in individuals or households, or where claimants were divided on the outcome (eg. if some wanted to return to their land while others opted for cash). The official total has been revised upwards on several occasions, rising to 79 696 by 2007.

There is some confusion as to the precise proportions of rural and urban claims within the overall total.⁷⁷ There is agreement that something between 83% and 88% of claims are in urban areas, but most of these are individual or family claims. Most rural claims, in contrast, are group-based and can involve very large numbers of households and individuals. In 2007 the Minister stated that about one-third of unsettled claims are 'complex', involving disputes among competing claimants, disputes over the jurisdiction of traditional authorities, refusal to sell or disputes over the validity of claims from landowners, or untraceable claimants.⁷⁸

Progress achieved before the adoption of the Restitution Amendment Bill of 2014

The pace of delivery accelerated dramatically from 1999, following the introduction of standard settlement offers for urban claims and the administrative rather than judicial approach. Shifts in the Commission's reporting format, from claims-as-lodged to claims-as-settled have served – perhaps unintentionally – to exaggerate progress and disguise the scale of the task still remaining, about which relatively little is known. It seems that by 2013 the majority of large rural claims were unaddressed as yet. On the basis of a presentation of the Chief Land Claims Commissioner to parliament in 2013, it appeared that a total of 79, 582 claims had been settled by August of that year (see tables 3 and 4).

Table 3. Status of land claims, August 2013

Status of claims	Number of claims
Ungazetted	7226
Gazetted but not yet settled	1507
Settled (claims as lodged) – claim forms	59415
Settled (claims as settled) – combination of claims forms and rights	79582
In process of being implemented	209592
Implementation finalised	58990

Source: Land Claims Commissioner's presentation to parliament, 2013

Table 4. Status of land claims by provinces, August 2013

Province	Number of ungazetted claims	Number of gazetted but not yet settled claims	Number of claims partially settled (in phases)	Number of fully settled claims (but not finalised)	Number of finalised claims
Eastern Cape	844	164	213	1885	14528
Free State	0	14	8	148	2743
Gauteng	227	43	1929	1747	9907
KwaZulu-Natal	1463	665	1244	3053	11540
Limpopo	580	176	849	447	2324
Mpumalanga	2396	289	578	374	1894
North West	5	82	303	914	2730
Northern Cape	99	37	82	562	2685
Western Cape	1612	37	2802	3454	10639
TOTAL	7226	1507	8008	12584	58990

Source: Land Claims Commissioner's presentation to parliament, 2013

Amount and cost of land

By 2013, the Commission reported that around 3 million hectares of land had been restored through restitution. However, much of this land was merely earmarked, *not* yet transferred, and in some cases did not involve physical restoration to claimants, as in protected areas. So the reported scale and cost of restored land refer to a mix of achievements to date and future commitments. They also differ widely across the provinces. Until recently, most restored land has been in the more arid parts of the country, particularly the Northern Cape where several large restitution claims have predominated, including that of the Khomani San. However, since 2005 a focus on rural claims in the north has led to the settlement of claims on large tracts of valuable commercial farmland in KwaZulu-Natal, Limpopo, Mpumalanga and North West.

By 2013/14 around R23 billion had been spent on or earmarked for buying land, and much less, around R5.6 billion, on compensating claimants in cash but the proportion of restitution budgets spent on land differs widely across the provinces.

Rural and urban claims lodged and settled

Rural claims account for around 13 % of all claims, but most entail groups of hundreds if not thousands of people. For this reason, rural areas – where an estimated 90 % of claimants live and where the bulk of the land is to be restored – are widely considered to be the “backbone” of restitution. Provinces with predominantly rural claims are Mpumalanga, Limpopo and the Northern Cape; the others are predominantly urban, with over 90 % of the claims in the Free State and Western Cape being urban (see Table 5).

Table 5. Rural and urban land claims, households represented in claims, and hectares claimed, by province, August 2013

Province	Rural claims	Urban claims	Dismissed	Households	Hectares
Eastern Cape	419	16207	291	65139	136753
Free State	41	2858	209	7614	55747
Gauteng	1717	11866	702	14320	16964
KwaZulu-Natal	2196	13641	141	85421	764358
Limpopo	2294	1326	438	48492	603641
Mpumalanga	1611	1235	202	53525	460964
Northern Cape	133	3593	255	21900	569341
North West	626	2924	319	44268	399407
Western Cape	1426	15469	633	27411	4140
Total	10483	69119	3190	368090	3011315

Source: presentation of the Chief Land Claims Commissioner to parliament, Aug 2013

Overall delivery statistics, 1996 - 2015

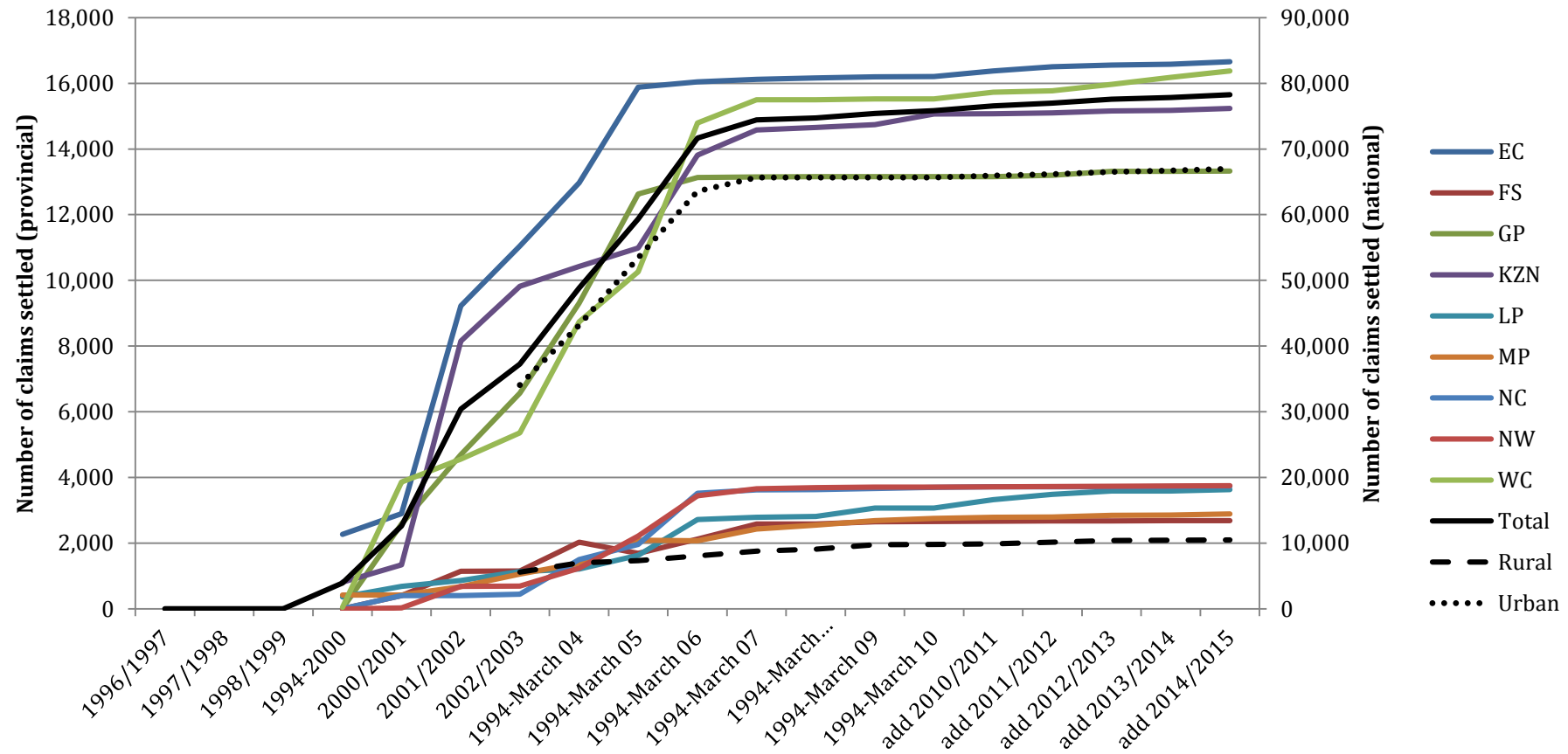
The cumulative progress of land restitution from its inception in 1994 to the present is shown below, in a series of graphs representing numbers of claims, hectares and beneficiaries. These show that the rate of settling land claims increased dramatically from 2000 to 2007, and that these comprised mainly urban claims (settled largely with cash compensation). The rate of settlement of rural claims has been consistently slow, and has moved particularly slowly after 2009 to the present.

The amount of hectares restored first moved above the 1 million ha mark around 2006, and then rose quickly to around the 2.5 million ha mark in 2009. Since then the number of hectares has risen only slowly, to 3.2 million ha in 2014/15. Similar patterns are evident in relation to the number of beneficiary households.

Many land claimants have benefitted from cash compensation. In relation to those having their land restored, or being awarded alternative land, the same caveat with respect to numbers of beneficiaries actually resident on the land, and using it productively, as noted above for redistribution, applies also to restitution. The Commission does not report such data, leaving a gap in our understanding of long-term impacts.

The key omission in official reporting of land reform delivery is the number of sustainable livelihoods created. Occasional Quality of Life reports commissioned by the department and outsourced to different researchers do attempt to provide some indication of impacts, but the usefulness of these has been highly questioned.⁷⁹

Figure 4. Approximate cumulative settled claims by province and settlement area. 1996/7 – 2014/15



*Data from the years 1996/7-1998/9 were retrieved from (CRLR 2003).

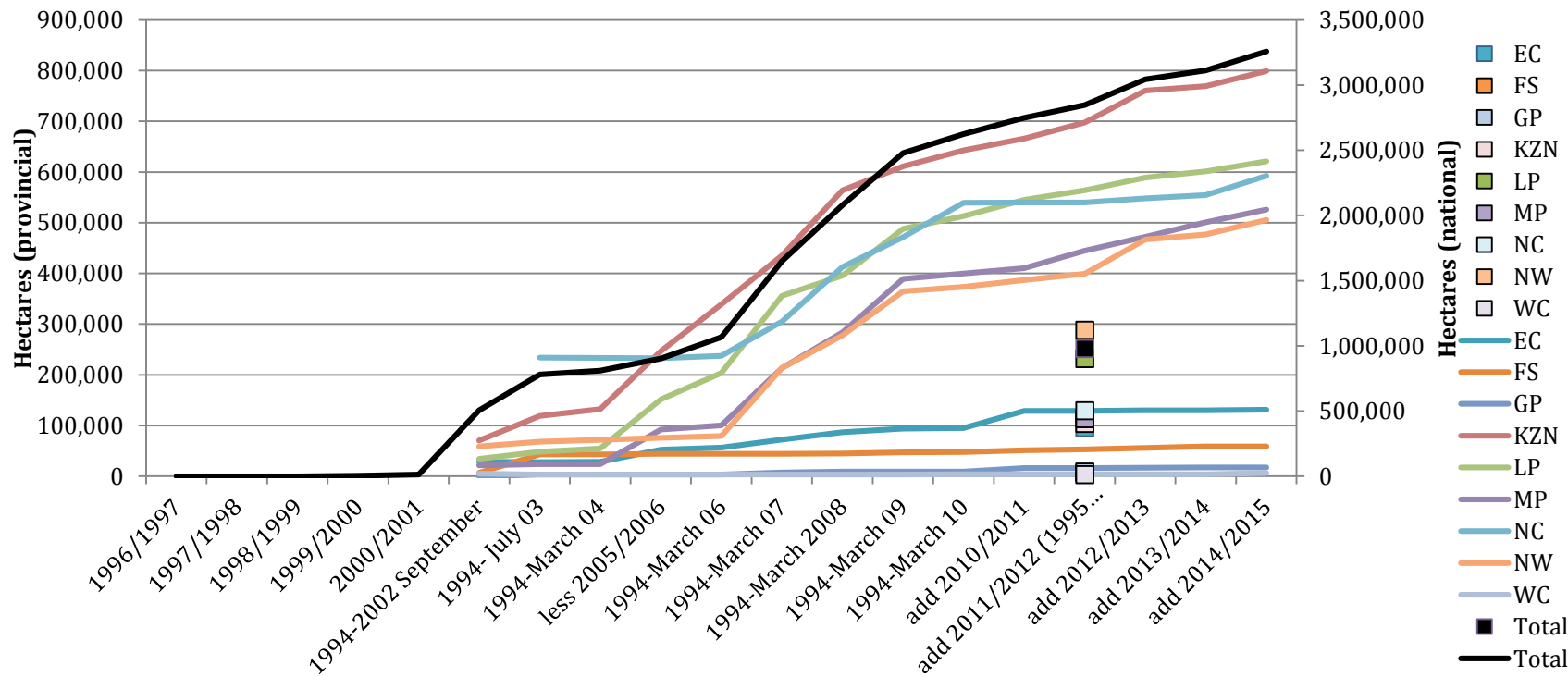
** Data from the years 1999/00 – 2002/3 were retrieved from (CRLR 2005).

*** Cumulative statistics for the years up to March 2004- March 2010 were provided from (CRLR 2004; CRLR 2005; CRLR 2006b; CRLR 2007a; CRLR2007b; CRLR 2008; CRLR 2009; CRLR 2010).

**** Data for years 2010/11-2014/15 were arrived by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016)

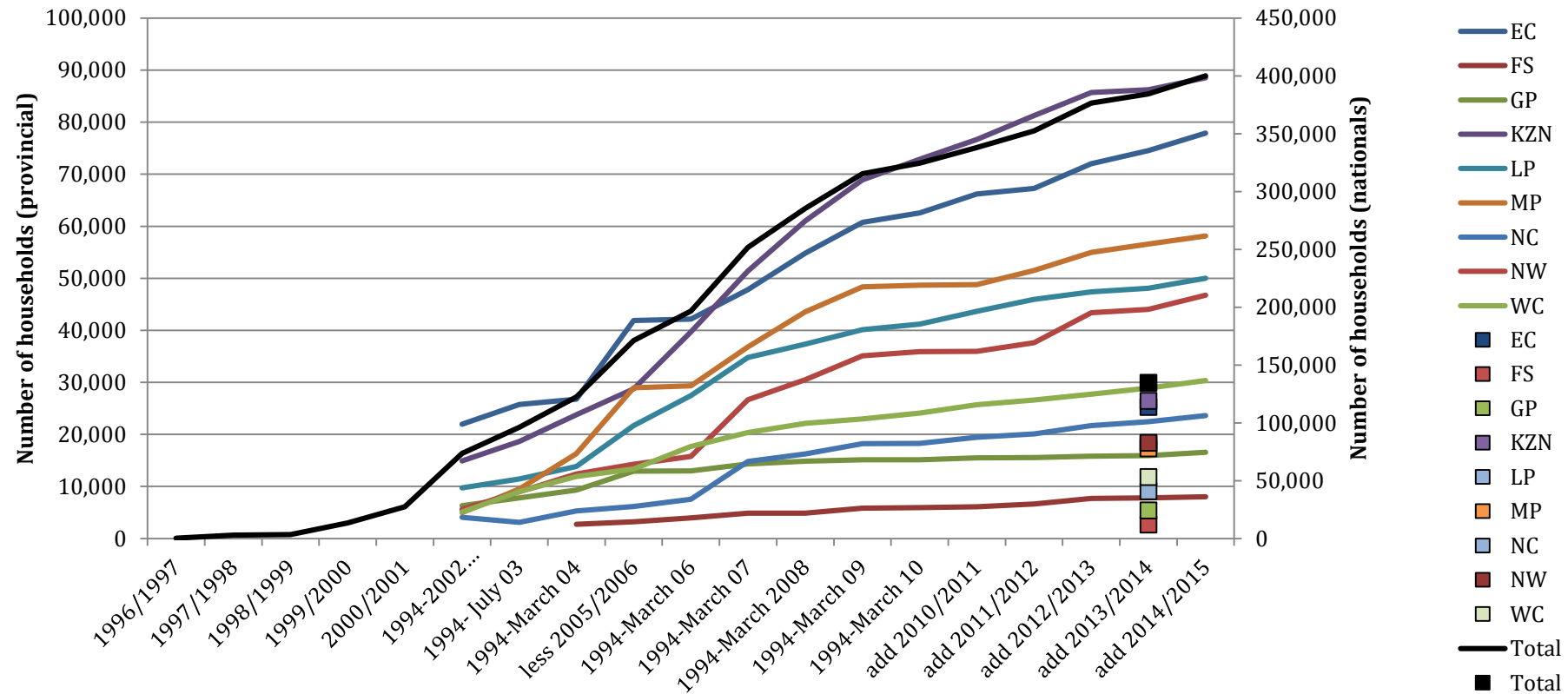
***** Data from 2002/3 – 2005/6 for urban and rural claims were derived by subtracting data from (CLR 2007b; CLR 2006a; CRLR 2005; CRLR 2003)

Figure 5. Approximate cumulative hectares approved for restoration by province, 1996/7 – 2014/15 and land actually transferred up to 2011/12



* Data from the years 1996/7-2000/01 were retrieved from (CRLR 2003). ** Cumulative statistics for the years up to March 2004 and March 2006- March 2010 were provided from (CRLR 2004; CRLR2006b; CRLR 2007a; CRLR 2007b; CRLR 2008; CRLR 2009; CRLR 2010). Cumulative statistics provided by (CRLR 2002) are to September 2002, and those provided by (CLR 2003) are to July 2003. *** Data from 2010/11-2014/15 arrived at by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016). Data for 2005 arrived at by deducting data from (CRLR 2006a) ****Data on actual land transferred taken from July 03 <http://www.pmg.org.za/docs/2003/appendices/030812land.ppt> sept 02 <http://www.pmg.org.za/docs/2002/appendices/021113restitution.ppt> Jan 2012 <http://pmg.org.za/files/docs/120207progress.ppt> *****Three data points were altered from what was published for what appeared to be obvious typos, the outcome of which was to present cumulative land approved as having decreased, an impossibility. These include: MP hectares transferred up to March 2004 was changed from 240,014 hectares to 24,014 hectares; MP hectares transferred up to July 2003 was changed from 233,979 to 23,979; and, Northern Cape hectares up to September 2002 was deleted altogether.

Figure 6. Approximate cumulative beneficiary households by province 1996/7 – 2014/15 and female-headed beneficiary households up to 2013/14



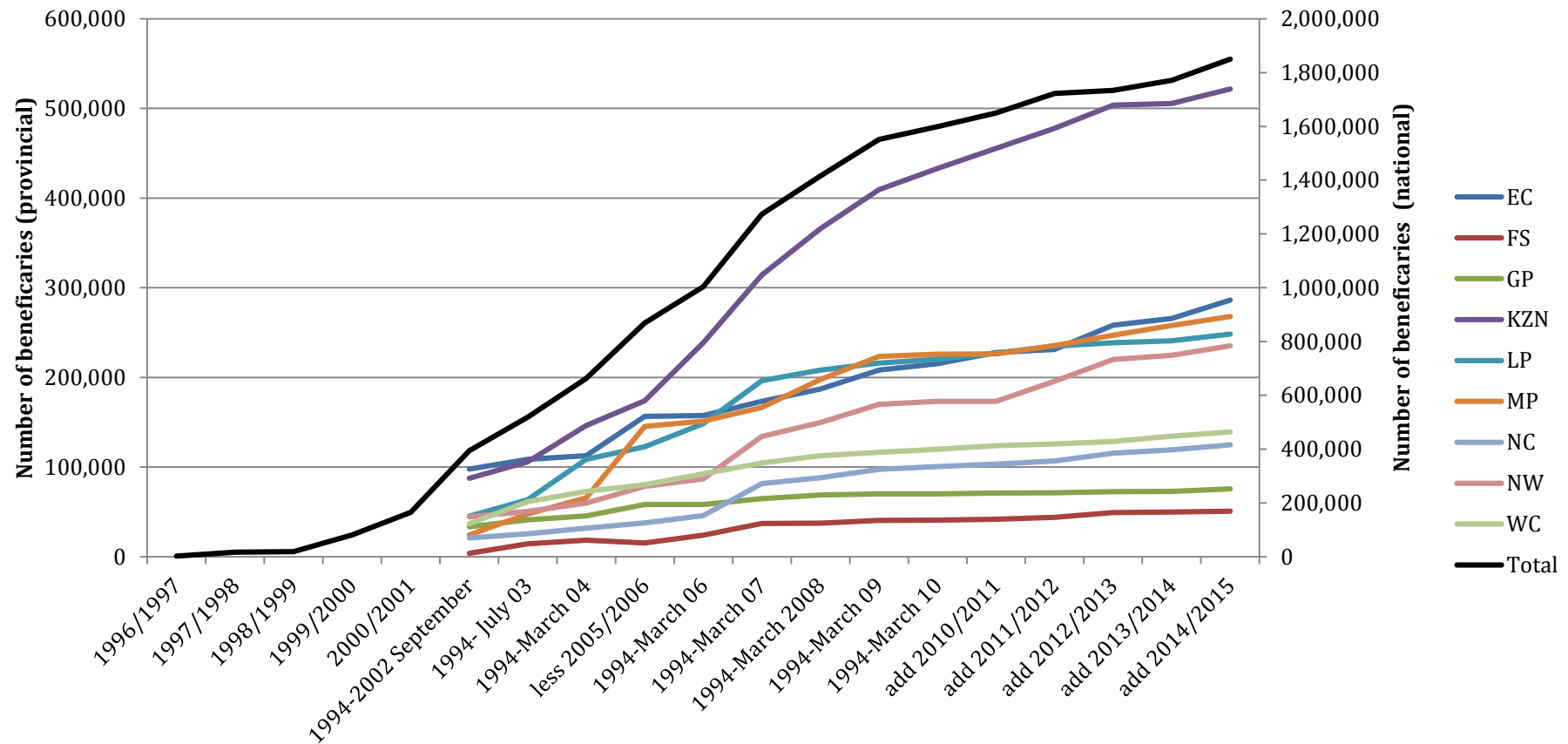
* Data from the years 1996/7-2000/01 were retrieved from (CRLR 2003).

** Cumulative statistics for the years up to March 2004 and March 2006- March 2010 were provided from (CRLR 2004; CRLR2006b; CRLR 2007a; CRLR 2007b; CRLR 2008; CRLR 2009; CRLR 2010). Cumulative statistics provided by (CRLR 2002) are up to September 2002, and those provided by (CLR 2003) are up to July 2003.

*** Data from 2010/11-2014/15 arrived at by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016). Data for 2005 arrived at by deducting data from (CRLR 2006a)

**** Data on cumulative number of female-headed households acquired from (DRDLR 2013)

Figure 7. Approximate cumulative beneficiaries by province 1996/7 – 2014/15



* Data for the years 1996/7-2000/01 were retrieved from (CRLR 2003). ** Cumulative statistics for the years up to March 2004 and March 2006- March 2010 were provided by (CRLR 2004; CRLR2006b; CRLR 2007a; CRLR 2007b; CRLR 2008; CRLR 2009; CRLR 2010). Cumulative statistics provided by (CRLR 2002) are up to September 2002, and those provided by (CLR 2003) are up to July 2003 *** Data from 2010/11-2014/15 arrived at by adding data from (CRLR 2011; CRLR 2012; CRLR 2013; CRLR 2014; CLR 2016). Data for 2005 arrived at by deducting data from (CRLR 2006a).

The impact of land restitution

Restitution in South Africa has been both hailed as a great success and critiqued as overly conservative, highly bureaucratic and painfully slow. Among its significant achievements thus far is the settlement of most urban claims with cash payouts, alongside a handful of significant attempts to rebuild urban spaces (mainly in Port Elizabeth, but much less so elsewhere). Progress towards addressing the complex geography of dispossession in rural areas has been much more modest. Rural claims have been settled very slowly. Although the pace has appeared to pick up in recent years, the sustainability of these settlements has not yet been fully tested.

The success story of restitution thus far has undoubtedly been the relatively rapid settlement of urban claims with cash compensation. There has been overwhelming pressure on urban claimants to accept standard cash payouts that bear no relation to the value of what was lost, or its current market value. The result is that restitution has made few inroads into the geography of apartheid that continues to shape our cities. Cash compensation has been derided as “cheque book” restitution, a quick fix solution to deep and intractable grievances, yet although the vast bulk of claims have been settled this way, little attention has been given to what this money has meant to people’s lives, how it has been spent, and the degree to which cash compensation is experienced as restitution. This once-off windfall is often divided among large extended families and is generally too small to bring about lasting change in their lives; it is most often used to pay off debt and meet immediate expenses like school fees and consumer items. As a result, available research suggests that those whose claims are settled in this way may *not* consider that justice has been done.⁸⁰

Restitution in the rural areas has opened up many overlapping land claims and raised fundamental questions about whose claims assume primacy. Many rural communities were forcibly removed more than once, often from land designated as ‘white’ to the reserves and then again into ethnically defined homelands. In these areas dispossession also took the form of reduced access to land and forced changes in land use, while people remained *in situ*. Those living in communal areas were compromised and their livelihoods disrupted both by ‘betterment’ planning – a form of enforced villagization – and by the dumping of ‘surplus’ people into the homelands, which led to overcrowding and overlapping rights, and widespread conversion of grazing and arable land into residential plots.

Competing claims pose the challenge of unraveling these pasts. Traditional leaders have also used the restitution process to reassert or extend their jurisdiction, in some instances reigniting long-standing disputes over the status of various chiefs and headmen as a result of apartheid-era manipulation of the institution of traditional leadership.⁸¹

In practice, restitution is also complicated by the distinction between those who have claimed land and those who have not. Most fundamentally, perhaps, it has privileged the claims of those who were dispossessed over the rights of those who managed to remain on land designated as ‘white’. This is most evident in the case of commercial farms, from which an

estimated 1.5 million blacks were evicted between 1963 and 1980 alone.⁸² These evictees can now claim restitution (and upgrading to ownership) of their former tenure rights. Paradoxically, however, those who remained on these farms cannot claim, and the claims by former farm workers and labour tenants who were evicted during the twentieth century are being addressed at a time when present-day evictions from farms are gathering pace.

The outcomes of rural restitution have been shaped by the difficulties of reconstituting 'communities', as properties are restored in private ownership to communal property associations (CPAs), established under the *Communal Property Associations Act of 1996*, or trusts. These entities often consist of large groups of people living in different places, with varied resources, assets, skills, and interests in the land they once owned. This has inevitably produced complex and often conflictual group dynamics centering on how the land is to be used, who can settle there and on what terms, how labour and capital will be mobilized for production, and how income will be either reinvested or distributed. The community ownership model has to date prevented individual community members from liquidating their assets or directly deriving rents from the restored property that they do not use.⁸³ This has often led to suggestions that more attention should be paid to the rights of individual members when CPAs or trusts are established.⁸⁴

CPAs and trusts face many difficulties, as described in a 2005 study undertaken by the Council for Scientific and Industrial Research and commissioned by the then Department of Land Affairs. The report reveals that CPAs can and do work in many instances, providing benefits especially for poorer members, and operate in a wide variety of social contexts. Although the CPA Act has been poorly implemented, CPAs remain a critically important option for restitution beneficiaries. The main problems arise because CPAs are under-resourced legal entities compared to property-holding options of sectional title estates and companies, but there has been very limited and thus ineffective support and oversight of CPAs from the government, and a lack of communication between officials and CPAs.⁸⁵

Problems of authority and accountability within CPAs and trusts are central. In some areas where traditional authorities are present, traditional leaders have tried to undermine the functioning of CPAs as they see them as challenging their authority. Long delays in transfer of title to a CPA undermine the authority of elected committees, and the uncertainty that ensues can sometimes allow opportunists to challenge or take control of the CPA. In some CPAs there is abuse of power by the committee and powerful CPA members and neglect or abuse of ordinary members. Committees are sometimes unaccountable. It is not clear to whom CPA members can appeal when conflict or abuse occurs.

There are also problems with the specification of rights in CPA constitutions, and often the substantive rights of CPA members are not clearly specified. Women's land rights can remain vulnerable and insecure. These problems are in part the result of the poorly designed and facilitated processes by which CPAs are set up, with little attention to the processual dimensions, such as translation into local languages. Many CPAs have constitutions that have been 'cut-and-pasted' from other CPAs, and do not reflect the understandings of their members or are poorly aligned to local land tenure practices, establishing rules that are

impossible for members to comply with.⁸⁶ It is clear that what is needed is a major investment in supporting existing CPAs and trusts and in establishing more robust institutions in new claims, as recommended by the CSIR study.

Perhaps the most significant shortcoming has been the degree to which restitution has enabled those acquiring land to improve their livelihoods. Rights to land do not necessarily lead to development. The only major review of the program's developmental impact to date has found that the vast majority of projects (179) were dysfunctional in that little if any production was being pursued, income from production was minimal, and only one project had achieved its developmental goals.⁸⁷

Restitution has shown up the wider contradictions of land and agricultural policy. Poor communities are expected to emulate existing production systems in a capital-intensive farming sector, as a collective, and to compete with the established commercial farming class and increasingly powerful and oligopolistic agribusiness sector. While the thrust of agricultural policy has been to withdraw state interventions, restitution has seen the state re-entering land markets.

Nowhere is this tension between the rights-based restitution programme and its economic policy context more evident than in community claims in rural areas, where high-value agricultural land is claimed by large, sometimes amorphous and heterogeneous groups of people.⁸⁸ Unlike the self-selecting would-be farmers who apply for land through redistribution, restitution offers little scope for the state to decide which people are to benefit – and which land to target. While the discretionary market-based redistribution programme allows the state to by-pass these disconcerting questions, restitution shows up starkly some foundational contradictions of land reform more generally.

The poor track record of production on restored farms has prompted concerns that extending existing approaches to the large rural claims that have not yet been settled will result in massive declines in production, sever the linkages to up- and downstream industries serving agriculture, and lead to job losses in both primary and secondary agriculture. These concerns have combined with the complaints of landowners and investors about the uncertainty created by outstanding restitution claims where high-value farming and mining land is at stake. In response, the Commission has put mounting pressure on claimants to agree, as one of their settlement conditions, to lease out their newly restored land via joint venture agreements with strategic partners – and, thereby, not to live on or use their land directly.

Research has drawn attention to the uncritical way in which strategic partnerships have been embraced as the dominant model for the settlement of large community claims in the context of high-value commercial farming enterprises, and the degree to which these involve established companies sharing risk with poor rural communities who have little control over the farming and business decisions. The concentration of claims on commercial farmland in the north-east regions of the country seems likely to be resolved through the extension of the strategic partner model, or other joint ventures. This is most marked where primary production is strongly linked through vertical integration into agro-processing, for instance in sub-tropical

fruit production, or in the forestry and sugar sectors where major milling companies have extended up and down the value-chain into input supply, milling, packaging and transport. The priority placed on continuity in production raises the question of whether or not restitution is being pursued in a way that maximizes its role in transforming unequal social relations and production systems in the countryside, or involves as little change as possible beyond transferring private title.⁸⁹

So-called 'betterment' planning in the former Bantustans refers to a form of land use planning imposed on rural communities from the 1940s onwards. Betterment designated consolidated areas for crop production, livestock grazing and residential settlement, in the name of both environmental conservation and efforts to 'modernize' African agricultural systems and forms of settlement. They also included draconian measures to reduce livestock numbers, such as forced culling, and fencing of grazing zones.⁹⁰ Settlement in consolidated lines or clusters of homesteads rather than in a dispersed pattern was supposed to facilitate the provision of services to people. In practice the mooted improvements in production and the quality of livelihoods failed to materialize, and indigenous systems and social relations were severely disrupted (de Wet 1995). In addition, residents often suffered the loss of land, with relocation of fields and homes often leading to reductions in the area available to each family, as well as longer distances from homes to fields and common property resources such as grazing, wood and water. The Surplus People's Project report of 1983 stated that 'betterment has forcibly moved more people in more places with greater social consequences and provoking more resistance than any other category of forced removal in South Africa'.⁹¹

Initially restitution policy did not recognize betterment as a form of dispossession relevant for land claims. The 1997 White Paper on South African Land Policy stated that the "claims of those dispossessed under 'Betterment' policies, which involved the forced removal and loss of land rights for millions of inhabitants of the former Bantustans, should be addressed through tenure security programmes, land administration reform and land redistribution."⁹² However, a small number of betterment claims have been recognized in the Eastern Cape since 2000, including in Chatha village in the Keiskammahoek area, following support for claimants from an NGO, Border Rural Committee, and the launching of a provincial campaign. In Chatha an agreement was signed that saw an amount of R39 697 per claimant family being awarded, but only half of this amount was paid out to families, the other 50% being set aside for community development purposes, implemented through a Communal Property Association and its elected committee. Various projects have been initiated with these funds, but many of these have stalled, and severe political tensions have led to paralysis.

The Restitution of Land Rights Amendment Act of 2014

Minister Nkwinti initiated meetings with large groups of land claimants in May 2011 and promised that the cut-off dates would be reviewed. In May 2013 a draft Amendment Bill was released for public comment. Many submissions were received, some welcoming the re-opening while others were highly critical. The next step was the commissioning of a Regulatory Impact Assessment (RIA), required for all new legislation.

The RIA evaluated the administrative, fiscal, legal and socio-economic feasibility of the re-opening of the 1998 deadline for the lodgement of land claims. It noted various problems in the restitution programme to date, including its slow pace; the subordination of land restitution to property rights; pecuniary compensation rather than restoration of land or prioritisation in state development initiatives; inadequate provision of post settlement support and a failure to link with broader development initiatives, etc.

The regional offices of the department were asked to estimate how many people had been unable to submit claims by the 1998 deadline (26 418), and to estimate how many claims could be expected during the proposed new lodgement period of five years (137 420). The RIA estimated the total number of people “excluded” from restitution as a ‘minimum of 4.886 million people’, comprising 86 000 unable to lodge claims by 1998; 1.3 – 2.5 million who were victims of betterment planning; the ‘majority of 4.5 million Africans living in South Africa in 1910’ as victims of pre-1913 dispossession; and between 1 and 7 million farm dwellers and labour tenants.⁹³ No sources for these estimates are provided. The RIA estimates the potential number of new claims as around 400 000, or 5 times the number submitted by December 1998, but it is not clear how this figure was arrived at.

The RIA made three recommendations: (a) re-open the lodgement of restitution claims to enable eligible persons and groups who did not submit claims by the cut-off date of 31 December 1998 to lodge claims for a further period of five years; (b) improve the planning and administrative processes of the restitution programme to ensure more effective implementation and avoid costly and cumbersome delays; (c) improve support provided to restitution beneficiaries.

The RIA was problematic in a number of respects:

- the bases of the estimates of the number of new claims remain unclear
- the original reasons for the exclusion of betterment and pre-1913 land claims are not adequately explored
- the experience of betterment claims in Chatha and other sites in Keiskammahoek to date is not reviewed
- the potential for divisions and tensions between claimants and non-claimants in rural communities where betterment took place is not explored
- the option of using alternative methods to resolve the land claims of those who could not or did not lodge claims by December 1998 (such as Ministerial interventions, or the prioritization of pre-1913 claims in the land redistribution programme, or using tenure reform legislation to address the land needs of farm dwellers and labour tenants), is not explored
- the notion that labour tenants have been wrongly ‘excluded’ from restitution did not take into account that the department has ignored most applications made in terms of the Labour Tenants Act for the past 15 years
- there is inconsistency in the basic argument: if inadequate implementation is the underlying cause of many current problems in land reform in general, and strengthening implementation capacity is needed to ensure that restitution succeeds,

then why does the same argument not apply to the alternative remedies available under existing legislation and policies?

- the risk that most new claims will be for cash compensation is acknowledged, but the assurance that these will be dealt with by insisting on restoration of alternative land is not credible, since claimants can freely choose their preferred remedy.

The Amendment Bill was tabled in parliament in October 2013, public hearings took place in November 2013 and January 2014, and the President signed the Act into law on 30th June 2014. Many submissions to parliament called for a ring fencing of existing claims, to protect them from competition from new claims and ensure that they could be dealt with first, before any new claims are addressed. This recommendation was not adopted, and instead existing unresolved claims will be able to be 'prioritised', as provided for in section 6(1)(g) of the Amendment Act.

Government stated that re-opening restitution would help to reverse 'the legacy of poverty, unemployment and inequality'.⁹⁴ However, this seems unlikely, since: (a) most of the land claims lodged since the passing of the Amendment Act in 2014 have requested cash compensation rather than restoration of land ownership, and cash payments do not contribute meaningfully to rural or urban transformation; (b) current policies constrain both land restoration and the award of alternative land to claimants, e.g. a court ruling in the *Baphiring* case indicated that government will determine the 'feasibility' of land restoration as dependent on its cost, whether or not current agricultural activities will be disrupted, and whether or not the state can provide sufficient support for resettlement and/or production; (c) settling betterment claims through cash payments makes no impact on the distribution of land ownership, but betterment claims are anticipated to comprise a third of all new claims

The Amendment Act could have other problematic impacts: (d) where land restoration is chosen by claimants, the Act threatens to initiate a conflictual process of people claiming and counter-claiming the same portions of land, but government has rejected proposals that, when re-opening claims, the older claims should be protected against new counter-claims and should be resolved first; (e) the Act has prompted competing claims to ownership of large territories of land by traditional leaders and Khoisan groups, based on assertions of 19th century tribal boundaries; (f) at the average rate of *finalizing* claims to date (2,949 claims per annum), it will take government 144 years to complete the programme; (g) the impact of the Act on other programmes of land reform such as redistribution and tenure reform, as well as rural development, remains a cause of concern, given the major demands that an extended and enlarged restitution programme will make on the Department in relation to staffing, funding, strategic planning and other aspects of institutional capacity.

In July 2016 the Constitutional Court found that the Amendment Act was invalid due to the failure of parliament to facilitate adequate public consultation on the Act. Until such time as it is re-enacted, the Commission is interdicted from processing any new claims, but must proceed with processing and finalizing older claims lodged by 1998.

7. Communal tenure reform

According to the 1997 *White Paper* the underlying problem that tenure reform in communal areas must confront is the second-class status of black land rights in law (DLA 1997: 57-67). Rights of occupation and use in black rural areas were not adequately recognised in South African law prior to 1994, with limited rights being granted in the form of a conditional permit – usually a ‘Permission to Occupy’ (PTO) certificate. Weak legal status is exacerbated by the overcrowding and forced overlapping of rights that resulted from South Africa’s history of forced removals and evictions in pursuit of policies of segregation and apartheid.

Particular problems are experienced by groups of black South Africans who purchased farms in the late 19th and early 20th centuries, but were not allowed to hold title deeds because of legal restrictions on black ownership. Some owners were dispossessed and have lodged restitution claims; others still occupy their land, but title deeds continue to show the Minister as trustee-owner. Whether dispossessed or not, these groups were often placed under the jurisdictional authority of neighbouring chiefs, some of whom have abused their authority by allocating land to outsiders in return for cash payments.

Another key problem identified in the White Paper is the partial breakdown of communal tenure systems due to the lack of legal recognition and declining administrative support. This has been accompanied by corruption and abuse by some traditional leaders.⁹⁵ Lack of clarity on land rights constrains infrastructure and service provision in rural areas, and there are tensions between local government bodies and traditional leaders over the allocation of land for development projects. Discrimination against women in land allocation is a particular problem; in the past, PTOs were issued only to men, and widows and divorcees often get evicted from family land. These problems are exacerbated by the exclusion of women from decision-making structures.

Analysts tend to agree that insecurity of tenure in communal areas is widespread but suggest that it is ‘also true that in many areas people do enjoy day-to-day *de facto* tenure security many existing systems, often informal in the sense that they are not recognized by law, work reasonably well.’ They also cite evidence from an analysis of the large number of tenure-related cases brought before the Department of Land Affairs in the late 1990s that ‘the underlying problems emerge strongly when development planning begins or investment projects are proposed’. They therefore characterise tenure insecurity as comprising a relatively small number of *high profile* cases where tensions or conflict have emerged or development is clearly stalled. These are now increasing in number as local level development planning begins; and a chronic *low profile* condition in which lack of certainty and weak legal status constrains the land-based livelihoods of the majority.⁹⁶

As outlined above, communal tenure reform in South Africa is a constitutional imperative. The *White Paper* sets out an approach that seeks to address the problems inherited from the past and to give effect to the constitutional right to security of tenure.⁹⁷ It lists some underlying principles that should guide the drafting of legislation and the implementation of a national programme of tenure reform:

- tenure systems must rest on well-defined rights rather than conditional permits;
- a unitary and non-discriminatory system of land rights for all must be constructed, supported by effective administrative mechanisms, including registration of rights where appropriate;
- tenure systems must allow people to choose their preferred tenure system from a variety of options (including different combinations of group and individual rights);
- tenure systems should be consistent with constitutional principles of democracy, equality and due process;
- rights-based approaches must assist in 'unpacking' overcrowded situations of overlapping rights, through the provision of more land or other resources; and
- tenure policy should bring the law in line with realities on the ground (that is, recognise *de facto* rights in law).

Once the principles of tenure reform had been agreed on, a law was required to give effect to ss 25 (6) and (9) of the Constitution. In 1996 an Interim Protection of Informal Land Rights Act (IPILRA) was passed as a 'holding measure', but this has had to be extended annually since then because of the absence of any other law. IPILRA requires only that occupiers and users of land who have only informal rights to it have to be consulted before any disposal of such land can take place. It does not provide legal certainty on the nature of these rights, and appears to have been used to secure rights in only a limited number of cases.

A draft Land Rights Bill was prepared in 1998/99, creating a category of protected rights covering the majority of those occupying land in the former 'homelands'. The Minister of Land Affairs would continue to be the nominal owner of the land, but with legally reduced powers relative to the holders of protected rights.⁹⁸ Protected rights would vest in the individuals who use, occupy or have access to land, but would be relative to those shared with other members, as defined in agreed 'group rules'. Protected rights would secure occupation and use without having to first resolve disputes over the precise nature and extent of these rights. Procedures were set out for people to choose which local institution would manage and administer land rights on their behalf. Rights-holders and local institutions would be supported by land rights officers, backed by a land rights board. The draft Bill specified procedures enabling rights-holders and groups of rights-holders to augment the content of their rights, or to take transfer of title but only on the basis of the informed agreement of the majority of those whose rights were affected. The draft Bill never saw the light of day. In June 1999, the new Minister, Thoko Didiza, decided that it was too complex and involved too much state support for rights-holders and local institutions, and decided to begin anew.

The Communal Land Rights Act of 2004

In 2004 the *Communal Land Rights Act* (CLARA) was approved by parliament, but its implementation was never initiated, in part because of a legal challenge mounted from 2005. The Act provided for the 'transfer of title' from the state to a community, which would have to register its rules before it could be recognized as a juristic personality legally capable of owning

land (Smith 2008). Individual community members would be issued with a deed of communal land right, which could be upgraded to freehold title if the whole community agreed. Before transfer of ownership could occur, the boundaries of 'community' land had to be surveyed and registered, and a rights enquiry held to investigate the nature and extent of existing rights and interests in the land. Community rules also had to be drawn up.

These rules would be enforced by a land administration committee, which would exert ownership powers on behalf of the 'community'. Sec 21 (2) of the Act specified that a Traditional Council established under the *Traditional Leadership and Governance Framework Act (TLGFA) 41 of 2003* 'may' act as such a committee. According to the Department of Land Affairs, people could choose which body, a traditional council or some other institution, would act as the land administration committee, but in another interpretation of the relevant sections, traditional councils, wherever they exist, would automatically become the land administration committee, and rights holders would not be able to exert choice. CLARA did not set out any procedures for exercising choice about which structure should act as a land administration committee. This suggests that the term 'may' was permissive only, allowing traditional councils to exercise land administration powers. The TLGFA specifies that the roles and functions of traditional councils may include land administration.

Passage of the Communal Land Rights Bill (CLRB) through parliament was stormy. A variety of civil society groups, including representatives of twelve rural communities, contested its appropriateness and constitutionality during portfolio committee hearings in 2003. Particularly contentious were the Bill's provisions for the land administration powers of traditional leaders and for gender equality. Critics argued that the CLRB failed to provide for a democratic version of communal tenure: it did not allow for *choice* by rural people (both of the overall nature of the tenure system to be adopted and of which local institution would have responsibility for land administration), failed to provide for *downward accountability* of land administrators to rights holders, and failed to adequately *address gendered inequalities* inherent in the 'old order rights' (such as PTOs), which would be upgraded to 'new order rights' in the new law. It was argued that traditional leaders would in effect have more powers over land than ever before. The traditional leader lobby, led by the Congress of Traditional Leaders of South Africa (Contralesa), was fully in support of the draft law, which they saw as providing recognition of their customary role as 'trustees' of community land.

Also contested was whether or not government had adequately consulted rural people before drafting the new law. Several authors have argued that the rapid passage of CLARA through parliament was the result of a political deal between the ruling party, the ANC, and the traditional leader lobby.⁹⁹

In 2005 a constitutional challenge to CLARA was launched by four rural communities. A history of interference with the land rights of groups and individuals by traditional leaders informed the applicants' arguments on the constitutionality of CLARA. In their view, transfers of title from the state to "communities" following the implementation of CLARA would result in control of land being vested in traditional councils, rendering insecure the rights of current

occupiers and users. In two of the four communities, the jurisdiction of large tribal authorities over smaller groups or communities, an apartheid legacy, was deeply contested.

Legal papers also argued that CLARA was unconstitutional because the nature and content of the 'new order rights' to be created were not clearly defined. The Minister was given wide and discretionary powers to determine these rights, without clear criteria to guide the Minister's decisions. CLARA also failed to create opportunities for community members to participate in making crucial decisions in relation to their land rights, or to challenge such decisions. A crucial omission was the lack of consultation with rights holders on whether or not they desired transfer of title from the state. It was also argued that CLARA undermined the tenure rights of female household members who occupy and use land other than as wives, such as mothers and divorced or unmarried adult sisters or daughters. Another core argument was that the incorrect procedure was followed in passing the law, in that the draft Bill was wrongly tagged as a section 75 bill, rather than a section 76 bill, which would have required wider processes of public consultation and participation at provincial level.¹⁰⁰

In October 2008 the North Gauteng High Court declared fifteen key provisions of CLARA to be invalid and unconstitutional, including those providing for the transfer and registration of communal land, the determination of rights by the Minister, and the establishment and composition of land administration committees. The judgment did not find the parliamentary process to have been procedurally flawed, and did not strike down CLARA as a whole. In May 2010, however, the Constitutional Court struck down the act in its entirety.¹⁰¹ The court accepted the applicants' arguments on the procedural issues, and therefore did not consider the substantive arguments made by the applicants or contained in the findings of the High Court. Prior to the hearing, Minister Nkwinti, declared that government would not defend CLARA in court since it was no longer considered to be consistent with government policy.

Government made no attempt to implement CLARA at any time between its passage into law in 2004 and the constitutional court ruling in 2010, in part because of the pending legal challenge. There is little information available on the extent to which IPILRA has been used to defend land rights in communal areas, but it appears to be limited.

Controversies generated by CLARA

One of the most controversial issues raised by CLARA was the role of traditional leaders in relation to land, together with the issue of the land rights of women. The Traditional Leadership and Governance Framework Act was also before Parliament at this time and the two laws are closely linked. At the centre of these debates is the question of democratic governance, and South African debates resonate strongly with those taking place across Africa, in relation to which local institutions should have authority over land matters. Given ongoing policy debates and struggles over the democratisation of the post-colonial state, the powers and functions of traditional authorities in relation to land are often contentious. Authority is always a key dimension in land tenure because 'struggles over property are as much about the scope and constitution of authority as about access to resources'.¹⁰²

The literature describes how the chieftaincy has been able to adapt to and capture the benefits of processes such as agricultural intensification. Some maintain or even extend their powers through strategic alliances with central government, capturing local government or securing control over land revenues. In other cases, the strength of customary authorities is eroded, for example, by the influx of large numbers of newcomers. A third outcome is the breakdown of accountability mechanisms and the privatisation of communal resources through land sales or rentals. Less powerful interest groups (such as commoners, women, youth and migrants) are seeing their security of tenure undermined as more powerful actors, including chiefs, direct processes of change in their own interests. Power relations, accountability and transparency within land regulation frameworks are thus key issues for effective tenure reform in Africa.

In South Africa, some analysts argue that CLARA, together with the Traditional Leadership and Governance Framework Act, centralises power at the level of traditional councils and makes no provision for localised decision-making and control over land—at the level of the family, the user group, the village and the clan. The laws thus entrench apartheid-era distortions and undermine indigenous accountability mechanisms that require leaders to actively win the support of community members in order to protect and extend their sphere of authority. In particular, the laws undercut the mediation of power between multi-layered levels of authority and through contestation over boundaries. This problem is compounded by disputed tribal authority boundaries becoming ‘default’ community boundaries, and by the false assumption that these boundaries enclose discrete and homogenous ‘tribes’.¹⁰³

Linked to this is whether or not traditional councils can justify the exercise of their powers by reference to the Constitution’s recognition of the role of traditional leaders in customary law. According to some authors, a ‘living law’ interpretation of custom would open up the determination of its content to the whole range of people who apply it in practice in local settings, thereby challenging the veracity of official and rule-based versions. This could open up the process of rule formation to include the multiple actors engaged in negotiating, challenging and changing property and power relations in everyday struggles in rural areas. Unless the living law interpretation can be given practical effect, there is a danger that distorted, rule-bound versions of customary law will close down processes of transformative social change that attempt to integrate traditional and democratic values.

This danger is heightened by laws such as CLARA, the Traditional Leadership and Governance Framework Act, the Traditional Courts Bill and the Traditional Affairs Bill, which entrench apartheid versions of chiefly power. The Traditional Courts Bill was introduced in 2008 but ran into substantial opposition from civil society in Parliament. It was reintroduced in 2011 but ultimately withdrawn from Parliament during the build-up to the 2014 elections. Introduced in 2016 was the Traditional Affairs Bill that aims to replace the Framework Act and ostensibly elevate certain Khoi-San claimants to the paid hierarchy of government-appointed traditional leaders. The pivotal law in the package is the Framework Act. Its ‘transitional arrangements’ in section 28 deem pre-existing tribal authorities to be traditional councils, provided they comply with new composition requirements, namely that 40% of members must be elected and at least one-third of the members must be women. Section 28 thus entrenches the controversial

tribal authority boundaries established by the apartheid government in terms of the Bantu Authorities Act of 1951.

Critics speculate that a key purpose of the new laws may be to protect chiefly power from countervailing authority over land and create a realm of semi-sovereign authority for traditional councils.¹⁰⁴ These kinds of laws make it more difficult to challenge corrupt decisions by traditional leaders in relation to land sales, and abuse of their power in relation to mining deals, development projects, restitution claims and tourism ventures. The laws embody a compromise arrangement between the state and traditional leaders. Because traditional leaders' demands in relation to local government status cannot be met within the framework of the Constitution, it seems that government has offered them control over rural land, augmented by legal powers that bolster their ability to define and enforce authoritarian versions of customary law that suit their interests.

Recent legislative proposals

The *Communal Land Tenure Bill of 2015* provides for the transfer of communal land, including Ingonyama Trust land, from the state to 'communities and members of communities'. It requires the registration of titles of ownership, with either traditional councils or CPAs then owning the bulk of the land and individuals or households owning smaller 'sub-divided' portions. New allocations to individuals or households must be registered in the Deeds Registry. The Minister requires a land rights enquiry to be held before making a determination on the location and extent of land to be transferred, and has a general plan be drawn up for the communal land in question. The Bill provides for communal land boards to be established to advise the minister, support land administration and help with dispute resolution. The new owners will be empowered to enter into business arrangements with external investors through 'investment and development entities' and joint ventures.¹⁰⁵

'Community rules' must be adopted that set out the general management and administration of communal land; the allocation of subdivided portions of communal land by a traditional council; the keeping of communal land register; the use of communal land by the entire community and households; and the alienation of rights to communal land. These rules must be adopted by a minimum of 60% of households, and must be registered by the department. The Bill requires that 'households forums' be established, comprising 20-30 community members, at least one third of whom must be women, to oversee the administration of land rights by traditional councils.

The bill is silent on a number of contentious issues. Although some sections appear to offer a choice between traditional councils and CPAs as land owning body, mechanisms for exercising such choice are not specified. One section deals with the roles of traditional councils, but no mention is made of the roles of CPAs. The Bill does not specify the nature and content of communal land rights, and appears to assume that 'titling' is unproblematic in systems of communal land tenure. It does not explicitly address the issue of disputed boundaries and jurisdictions. It does not specify the sequencing of the various processes proposed: making a

ministerial determination, forming household forums, holding a land rights enquiry, drawing up a general plan, and drawing up community rules.

8. Tenure reform in former 'Coloured' rural areas

The *Transformation of Certain Rural Areas Act (TRANCRAA) 94 of 1998* aims to reform land tenure in 23 rural areas originally set aside for so-called 'coloured' people. These areas cover 18 000 km² in four provinces – the Western Cape, Northern Cape, Eastern Cape and Free State. In some districts these areas constitute very small proportions of the total land area. In a few they amount to a significant proportion of the total, as in the municipalities of Kamiesberg, Nama-Khoi, Richtersveld and Khâi-Ma in the Namakwa District of Northern Cape. This district comprises about 45,000 km² and is home to about 80 000 people. Less than 700 private farms owned by whites comprise 5 % of Namaqualand. Around thirty thousand people live in the six 'coloured' rural areas of Richtersveld, Steinkopf, Concordia, Komaggas, Pella and Leliefontein, that together comprise 1.3 million hectares, or 27% of Namaqualand.¹⁰⁶

These rural areas were mostly created as mission stations, by and for people of mixed Khoi, San and European descent, who were trying to protect themselves from colonial penetration and dispossession. The state later nationalised this land and maintained the former mission stations as labour reserves. Apartheid governments governed them through the Coloured Rural Areas Act of 1963 and the Rural Areas Act 9 of 1987. People in these areas feel very strongly about the loss of their ancestral lands to the state, white farmers and mining companies. Since most land dispossession took place before 1913, residents cannot lodge restitution claims, and the major emphasis of land reform in these districts has thus been on redistribution.

TRANCRAA grew out of popular pressure and civil society advocacy during struggles against apartheid. The act was drafted through a consultative process in the mid-1990s and signed into law in 1998. The underlying premises of the Act are that the historical and current use rights of people living in these areas must be respected, and that land governance should be democratic and non-discriminatory.

The main aim of TRANCRAA is to provide for the transfer of land to (a) a municipality; (b) a communal property association; or (c) 'another body or person approved by the Minister'. Communities are offered a choice as to which of these options they prefer. The Act applies to the land used in common by these communities and held in trust by the State, but not township areas, which will continue to vest in the municipality; on residential plots in townships, people may register private titles. TRANCRAA provides resources to record and map family and individual use rights, and to help resolve land-related conflicts. Should a municipality become the owner of the land, it is required to be accountable to the right-holders. Depending on the choice of the majority, the Minister would then transfer ownership from the state to the legal entity selected.

The process was initiated in Namaqualand. From November 2002 to January 2003 referenda over land ownership were held in five of the six rural areas (due to local conflicts, Komaggas did not vote). People voted on three ownership alternatives: (1) a Communal Property Association (CPA); (2) a municipality; or (3) an option of their own choice (including Trust ownership and individual title). The results showed a majority voted for CPAs in four of the five areas (see Table x below). Very few people voted for the 'own choice' option (1%).

Table 6. Community referenda on land ownership in Namaqualand

	Municipal	%	CPA	%	Own	%	Spoiled	%	Total
Leliefontein	526	59 %	327	37 %	5	1 %	31	3 %	889
Richtersveld	42	4 %	939	94 %	2	0 %	17	2 %	1000
Pella	271	42 %	375	53 %	1	0 %	6	1 %	653
Concordia	183	44 %	221	53 %	1	0 %	14	3 %	419
Steinkopf	922	45 %	1074	52 %	22	1 %	46	2 %	2064
Total	1944	39 %	2936	58 %	31	1 %	114	2 %	5025

Source: Wisborg and Rohde 2003

A few referenda took place elsewhere than Namaqualand. Since 2003, however, there has been little further progress in the implementation of TRANCRAA. Very few transfers have taken place as yet in any of the four provinces affected. Community members have often expressed their dissatisfaction at the delays, but for some reason the department has been reluctant to implement the Act. In the past few years several meetings have taken place between the Minister, the department, land-sector NGOs and representatives from the 23 affected areas, but to no avail.¹⁰⁷ It may be that the Minister and the department have decided to wait until tenure reform policy in relation to communal areas in the former Bantustans is agreed and adopted, and a new national law is approved, before proceeding any further with TRANCRAA.

9. Tenure reform for farm workers and dwellers

The forced eviction of black people from farms in successive waves through the twentieth century was a response to the prohibitions imposed on sharecropping and labour tenancy, as well as long-term trends towards mechanisation and farm consolidation. It was part of a wider process of racialised dispossession.¹⁰⁸ Traditionally, most farm workers lived on the farms where they were employed, while some people living on commercial farms are not employed but involved in independent cultivation and grazing through a range of tenure arrangements. The category of 'farm dwellers', as opposed to 'farm workers', refers more generically to all who live on farms owned by others.

The 1997 *White Paper* on land policy framed the problem of tenure insecurity as not only a human rights issue, but also as an obstacle to political stability. The objectives of policy were that arbitrary and unfair evictions should be prevented; existing rights of ownership should be recognised and protected; tenants should be guaranteed basic human rights; and reform should promote long-term security through government-brokered locally based solutions to

which all parties contribute. Farm tenure reform would aim to balance the rights and interests of owners and occupiers.¹⁰⁹

The most significant new law passed was the *Extension of Security of Tenure Act 62 of 1997*, or ESTA, applicable to all people living on land zoned for agriculture, and with the consent of the owner. ESTA creates a category of 'occupier', namely a person who resides on a farm with the consent of the owner. Should this consent be revoked, this terminates the right of residence of the occupier, but does not entitle the owner to evict the occupier. Instead, the owner must apply for a court order to effect an eviction. ESTA prohibits the eviction of any occupier unless this is in terms of a court order.

In essence, ESTA does four things: firstly, ESTA defines the tenure rights of occupiers. Provided that they occupy land with the consent of the owner, farm dwellers are 'ESTA occupiers' and have the legal right to continue to live on and use the land. This right extends to services such as electricity, water and sanitation. Occupiers are entitled to live with their families and enjoy a family life that is in keeping with their culture. Occupiers over the age of 60 years who have resided on the farm for at least ten years or who are disabled or unable to work as a result of sickness are termed 'long-term occupiers' and may only be evicted if alternative accommodation is provided or if they have violated the terms of their occupation. A 2001 amendment to ESTA created an explicit right of occupiers, in accordance with their religion or cultural beliefs, to be buried on the farms where they lived and to bury their relatives there, if this was established practice on the farm (RSA 2001: Sections 6 and 7). Relatives may also visit and maintain family graves on a farm even if they no longer live there.

Secondly, ESTA places duties on occupiers. Occupiers must abide by the terms of their tenancy. This means that, should an occupier violate a condition of tenure, his/her tenure may be ended through eviction. Such violations include damage to property or causing harm to other occupiers or assisting people to build dwellings on the farm without the owner's consent.

Thirdly, ESTA stipulates when and how an occupier may be evicted. Eviction may only happen in terms of an eviction order issued by a court. Any other eviction is illegal. An owner seeking an eviction order must demonstrate that consent for occupation has been withdrawn. Consent may be revoked if an occupier has violated a condition of tenure or if the owner can demonstrate that the eviction is necessary for the operational requirements of the farm. If the occupier's rights of residence arose solely as the result of an employment relationship, these rights may be terminated on resignation or dismissal. In addition, right of residence may be terminated for any other reason provided that the termination is 'just and equitable'. In considering an eviction matter, the court must take into account all relevant factors including the potential hardship to be caused to the occupiers, if evicted, or to the owner, if the occupier remains.

Fourthly, ESTA creates opportunities for occupiers to acquire long-term rights to land. Occupiers are entitled to apply for, but are not guaranteed, grants with which to purchase land. Farm dwellers may use the grants to upgrade their rights on the land they occupy through subdivision and purchase of a portion of a farm, as long as the owner agrees to sell, or to seek

long-term tenure security through the purchase of alternative land off the farm. In practice, the grant initially provided for this purpose was the Settlement/Land Acquisition Grant (SLAG), originally set at R15 000 and later increased to R16 000 per household, though in later years funds were provided via the Land Redistribution for Agricultural Development (LRAD) and Settlement Planning Land Acquisition Grant (SPLAG) at much higher levels. Courts may also order alternative accommodation to be made available for evicted occupiers, which requires the agreement of local municipalities.

Labour tenants

Another law, the *Land Reform (Labour Tenants) Act 3 of 1996* (LTA), regulates the terms of tenancy for those who have historically worked on farms in return for access to their own land to cultivate and to graze livestock. It affirms their rights to continued use of the land (section 3-4), stipulating how and through what processes these rights may be legally terminated (sections 5-15) and allows labour tenants to obtain ownership of the land they currently use (sections 16-28), or alternative land, through an application or claim-based process – more akin to the land restitution process than to the more discretionary and somewhat vague prescriptions of ESTA.

By the deadline in March 2001, 19,416 labour tenant applications had been lodged. It is not known exactly how many have been resolved; 41,791 hectares were transferred to 7,834 labour tenants by 2004 and no more recent data are available.¹¹⁰ Indeed it appears that formal and procedural implementation of the Act ceased in the early 2000s, with government arguing that notifying landowners of claims initiated legal challenges – potentially towards 20,000 court cases – for which the state was unprepared. Arguing that the drafters of the LTA had not anticipated this, and with the apparent agreement by the Land Claims Court, in 1999 the Department ceased issuing notices informing landowners of claims on their land, which Section 17 of the Act required be served ‘forthwith’. Nearly a decade after this tacit agreement, landowners in Mpumalanga managed to get claims to their land nullified by the courts on the basis that the state had not adhered to steps prescribed in the LTA – a ruling which could have unravelled the entire labour tenant programme.

In 2014 a land activist NGO, the Association for Rural Advancement (AFRA), assisted a group of labour tenants to approach the Land Claims Court to compel the department to explain how it intended to deal with the outstanding claims. In 2014, the court ordered the department to file a report to it and the tenants before 31 March 2015. The department missed this deadline and every subsequent deadline. This prompted the tenants to apply to appoint a special master to assist the department and the court to implement the Act. In May 2016 Judge Yacoob in the Land Claims Court declared that ‘the parties shall negotiate in good faith to conclude a memorandum of understanding. The Department of Rural Development and Land Reform will appoint a senior manager responsible for managing the national implementation of the Land Reform (Labour Tenant) Act.’ Among other key features of the court order is the establishment of a National Forum of Non-Governmental Organisations who support labour tenants and farm dwellers, which would work together with the Department regarding the development of a national programme for labour tenants and farm dwellers, as well as the monitoring and

evaluation of its progress. However, negotiations broke down after Minister Nkwinti made a unilateral decision to announce his intention to convene a 'National Forum of NGOs' to determine terms of reference in respect of a programme for farm dwellers (labour tenants and occupiers) in June 2016, despite the premise of the court order being that all items contained within the scope of the Memorandum of Understanding were up for negotiation, including the possible establishment of such a forum. AFRA has now enrolled the matter with the Land Claims Court, for a hearing in October 2016.

Impacts of ESTA and the LTA

The impetus behind both ESTA and the LTA came from land rights NGOs, in convergence with their ex-colleagues who had now become senior departmental officials. They collaborated to frame these rights in law and, after their promulgation, to implement them, conducting rights education campaigns, monitoring evictions, intervening in threatened evictions, and brokering long-term solutions.

With attention focused on evictions, the 'developmental' dimension of ESTA was poorly implemented. Provision of long-term secure tenure rights involves upgrading rights to ownership *in situ*, or providing for off-site settlement, and was envisaged as a mechanism available to all farm dwellers. In practice, however, it has been provided almost exclusively in response to evictions – in the form of 'alternative accommodation', usually funded by the state – and even then, only to a very small %age of all those evicted (probably less than 0.5 %). Several extensive grazing projects were established on 53,390 in the Northern Cape, while in five other provinces a total of about 5,000 hectares had been transferred to farm dwellers, largely in the form of low-cost housing in settlement schemes.¹¹¹ 'Equity sharing' schemes, where farm workers became shareholders in the enterprises where they worked, have been favoured by agribusinesses in the capital-intensive wine and horticultural sectors of the Western Cape.¹¹²

However, evictions have gathered pace since 1994, in part prompted by the promulgation of the Acts themselves, but also by wider economic conditions and the strategic concerns of farmers. The only major national survey on evictions, by Nkuzi Development Association and Social Surveys, found that approximately 940 000 people were evicted in the ten years from 1994 to 2003, out of 2.5 million who moved off farms for a variety of reasons. Only around one % of them were evicted legally through a court order, as prescribed by section 26(3) of the Bill of Rights. Those evicted lost access to homes, land and to assets like livestock. Evictions spiked in years coinciding with droughts and with the promulgation of tenure and labour laws. The sale of farms, liquidations and changes in land use have also led to evictions, as did cost price squeezes experienced in particular industries, for instance in the apple industry in the late 1990s.¹¹³

Recent research by the International Labour Organisation (ILO) reveals key shifts in the overall profile of farm workers and farm dwellers. In 1970 agriculture employed 30 % of the economically active population of the country. By 1991 the agriculture, forestry and fisheries sectors employed around 1.1 million workers, constituting 11 % of total formal employment.

The 2011 census showed that 2.7 million people (5.2 % of the population) lived in farm areas, and 592 298 households with 2.07 million people lived on privately owned farms. Two thirds of workers earned less than R1 600 per month.¹¹⁴

In 2014 the Quarterly Labour Force Survey reported that 696 288 people worked in agriculture, forestry and fisheries. Just over a half of these workers had permanent jobs, a quarter had jobs of limited duration, and just under a quarter had jobs of unspecified duration. The contribution to total employment was around 5 %. The ILO report argues that these shifts can be explained by the impacts of deregulation and trade liberalisation, integration into global value chains and legislative interventions such as minimum wages and ESTA. Farmers responded to these by employing fewer workers, and by externalising and casualising employment.¹¹⁵ Many authors argue that reductions in employment cannot be attributed to ESTA alone.

If one sets the number of people who have been evicted against the number who have benefitted from land reform, it is apparent that between 1994 and 2005 many *more* black South Africans had lost their tenuous hold on land in the white farming areas, through evictions, than had gained land through land reform.

Less well documented, but very significant, have been unilateral changes in the tenure conditions of farm dwellers. Until the 1990s, farm dwellers had had very limited rights and those employed were excluded from labour legislation applying to all other categories of workers. Commercial farms were effectively excised from many areas of government regulation. Policy attention with respect to farm dwellers' rights has focused on tenure (and labour) rights, but their access to other socio-economic rights, and the services and amenities widely accessed in urban areas (housing, health, education, legal representation, water and sanitation, electricity, transport), continues to be constrained and in some respects has deteriorated since the advent of democracy. Those who remain on farms live in insecure arrangements, insulated from government services. How to provide public services to indigent people living on privately owned farmland has been left unclear in policy, and a stand-off is evident between line departments and municipalities on the issue of how to provide support and services to farm dwellers. In practice, government has had no coherent and coordinated response to the situation of farm dwellers.

Proposed changes to ESTA and the LTA

For the past decade and a half, the legal frameworks on farm tenure have remained in a perpetual state of review, with the result that implementers themselves appear unsure to what degree they are expected to implement it – and if so, how. A 1998 review recommended revision of the LTA, noting that it was prompting loss of tenure rights (such as the withdrawal of grazing land) and evictions. In 1999, a national review of ESTA concluded that the problems being experienced were not merely problems of implementation, but were inherent to the law itself. In 2001, at the National Land Tenure Conference, the Minister undertook to review ESTA and the LTA and to 'consolidate' them into a single law, hinting that this would strengthen substantive rights and resolve legal loopholes. Between 2003 and 2005, successive drafts of a Tenure Security Bill proposed a category of 'non-evictable occupier', yet the Minister herself

rejected this, arguing it would amount to *de facto* expropriation of farm owners' property rights.

In December 2010 a new Land Tenure Security Bill was published for public comment. It reiterated the key provisions of ESTA, adding to these several vague provisions entitling farm dwellers to own and graze livestock, and to cultivate, on the farms where they live. The key change introduced was the promotion of off-farm 'agri-villages' where those evicted from farms will acquire 'temporary permits' to land and housing, but could later be removed to make way for others who can show better ability to use the land. This Bill was never approved.

In 2015 a draft *Extension of Security of Tenure Amendment Bill* was published for comment. The memorandum to the Bill explains the purpose of the Bill as follows: to address aspects of the Act 'that make it easier for farm dwellers to be evicted'; to address the concept of residence; to address the fact that the Act gives 'no clear and adequate obligation on providing alternative accommodation for those that have been evicted'; to address shortcomings in institutional arrangements and capacities for enforcement of the Act through the creation of a Land Rights Management Board and Land Rights Management Committees. Submissions on the Bill to parliament in 2016 noted the following: (a) the memorandum does not explain why the concept of 'residence' needs to be addressed or what the Bill aims to achieve by defining this concept; (b) the Bill does not provide a clear and adequate obligation to provide alternative accommodation; and (c) the Bill does not explain how the new structures will address the limited capacity for enforcement in the existing duty-holder, the department.¹¹⁶ It is unclear how the department intends to proceed with this amendment.

Despite the growing importance of farm dwellers in political discourse, within the ruling party there appears to be a fundamental ambivalence within government about how (and even whether) to address their situation. A core finding of the investigation into land tenure and labour rights on farms by the South African Human Rights Commission in 2008 (following a 2003 inquiry) was that, 'The objectives of government policy with respect to farm workers and dwellers in the current context appear unclear. This is a fundamental problem currently preventing the emergence of practical solutions with the majority support of all role-players'.¹¹⁷ This may still be the case.

Evaluating the impact of farm worker tenure legislation

Why has the right to secure tenure on farms been so widely violated, and why has so little progress been made towards upgrading and securing long-term rights? Several factors appear to have contributed.

Firstly, ESTA's enforcement and implementation mechanisms have remained undeveloped. Although designated 'ESTA officers' were appointed in each provincial land reform office by the late 1990s, by the mid-2000s these posts had been disestablished, and project officers dealing with land redistribution projects were expected to address evictions issues. Their performance appraisals, though, were based on hectares transferred and budgets spent, rather than the

slow and complex work of resolving tenure disputes or preventing evictions, which produced less tangible outcomes.

Secondly, this weakness was compounded by a failure to create a dedicated budget line for tenure reform. Its funding is fungible within a wider 'land reform' budget, which has *de facto* proved to be a redistribution budget. Where actual transfers of land to farm dwellers have taken place, this has seldom been through the legally prescribed processes of ESTA and the LTA. The requirement that Minister 'shall' make available funds to secure and upgrade tenure rights (Section 4 of ESTA) has been equated in practice with redistribution grants. The department initially established provincial ESTA forums to promote cooperation among line departments (Land Affairs, Labour, Justice, Housing, Agriculture, Social Development) as well as land rights NGOs, the Human Rights Commission, rural advice offices, farm worker trade unions and farmer associations. These forums monitored evictions, enabled referrals, coordinated responses to threatened evictions, liaised with relevant local authorities, and initiated training of SAPS officials and prosecutors. By the mid-2000s, however, the forums had ceased to exist in any of the nine provinces.

Thirdly, the structural context has altered. A major transformation in the agricultural sector has been underway for two decades, as farmers adjust to deregulated markets. With the removal of centralised marketing boards, subsidies, and trade protection, they have adopted risk mitigation strategies in the face of volatile demand and variable pricing in both input and output markets – prime amongst which has been the reduction, externalisation and casualisation of employment. This has aggravated long-term trends towards job-shedding and led to an inversion in the ratio of permanent to seasonal labour.

Fourthly, shifts have occurred in demographic features and patterns of household formation. In some parts of the country, the closure of farm schools and demand for access to schools and other services have led to households being 'split' between commercial farms and communal areas. Wisborg et al document the practice in Limpopo of farm owners and managers evicting children (usually teenagers, but often pre-teens as well), ostensibly for their own benefit, so that they can attend school in nearby communal areas. Evictions of teenagers have also served to prevent claims to independent tenure rights by non-workers and the transfer of tenure rights to a new generation. It has ensured that those living on farms are more directly under the control of farm owners. A more general and enduring constraint is thus that the social relations into which 'tenure rights' have been inserted remain fundamentally untransformed.¹¹⁸

10. Agrarian reform and rural development

The 1997 *White Paper* set out a vision of 'a land reform which results in a rural landscape consisting of small, medium and large farms; one which promotes both equity and efficiency through a combined agrarian and industrial strategy in which land reform is a spark to the engine of growth'.¹¹⁹ Various types of small-scale farming that the SLAG grant might help

establish were listed, including irrigated cropping, small stock and feedlot enterprises, timber and fruit production, rain-fed cropping, extensive grazing, and contract farming. Opportunities for beneficiaries to engage in small-scale agricultural production, characterised as land and labour intensive, was one of six 'economic arguments for land reform', along with reducing unemployment.¹²⁰

A section of the White Paper discussed financial services for land reform beneficiaries, for establishing small-scale agricultural production or related rural enterprises. The recommendations of the Presidential Commission of Inquiry into Rural Financial Services (the Strauss Commission) were accepted and summarised, including the rejection of subsidised interest rates, the provision of 'sunrise' subsidies such as graded and flexible repayments of loans and discounted subsidies, state-supported financial packages for land reform beneficiaries, and the use of parastatals such as the Land Bank and the Post Office as rural financial service providers.

The White Paper referred to investigation of 'measures to expedite subdivision of land to encourage individual or smallholder ownership' and stated that 'there is general agreement that the Subdivision of Agricultural Land Act be phased out to free up the land market', accompanied by regulations to protect high potential agricultural or environmentally sensitive land.¹²¹ The Act would 'not be allowed to frustrate land reform', with draft regulations allowing for exemptions. The Provision of Certain Land for Settlement Act No. 126 of 1993 would be used as the legal framework for land transfers, and this exempted such transfers from the requirement of ministerial permission for subdivision. As discussed above, the Subdivision Act was repealed in 1998, but this has not as yet been signed into law by the President, and in practice very little subdivision of farms for land reform purposes has taken place.¹²²

The 1997 White Paper made little mention of how land reform objectives would be supported by agricultural policies, and the issue of agrarian structure and its reform was addressed in only one sentence. This disconnect was mirrored in a corresponding failure to integrate land reform into agricultural policy. The Department of Agriculture prioritised policies of deregulation and liberalisation, focused on the abolition of subsidies on credit, inputs and exports, and the dismantling of the system of marketing through single channel schemes and fixed prices. A new Marketing of Agricultural Products Act (No. 47) of 1996 aimed to increase market access for all 'market participants' (a euphemism for new black commercial farmers), promote efficiency, optimise export earnings and enhance the viability of agriculture.¹²³ The White Paper on Agriculture of 1995 (RSA 1995: 12) declared that state interventions in marketing should be 'limited to the correction of market imperfections and socially unacceptable effects'.

These conservative policy frameworks enabled the continued consolidation of large-scale agrarian capital, in both farm production and agribusiness. Farmer-owned cooperatives, many centred in the grain industry, were privatised and became major companies supplying goods and services along agro-produced value chains. There were already high levels of concentration in seeds, fertilizers, agro-chemicals, machinery, farm finance, milling, food processing and food retailing, and these saw further processes of vertical integration and the extension of 'private regulation' in parallel to the reduction of public regulation.¹²⁴

The *Comprehensive Rural Development Programme* (CRDP) was launched in 2009. (DRDLR 2009). At its core is a job creation model through which para-development specialists train community members to be gainfully employed in rural development projects. The overall goal is to create 'vibrant and sustainable rural communities'. The new Department of Rural Development and Land Reform (DRDLR) sees itself as playing a central coordinating role in partnerships with other government departments and local government bodies. A series of CRDP pilots was soon launched in selected sites, one in every province.

An early assessment of the CRDP pilots found the following weaknesses: lack of an agreed overall vision and strategic plan; insufficient conceptual understanding of the CRDP; lack of clarity on the constitutional mandate and legislative framework; lack of alignment and integration of budgets; failure to integrate relevant government policies and programmes; lack of clarity on authority and accountability; uncertainty and confusion as to who is leading the pilots; insufficient community participation; and lack of clear time frames or a functioning system of monitoring and evaluation.¹²⁵ The programme involves funding of a plethora of micro-projects within selected districts within the former 'homelands', and it is not clear how multiplying such projects is envisaged to lead to 'the emergence of rural industrial and financial sectors marked by small, micro and medium enterprises and village markets'.

A more recent evaluation of the CRDP was commissioned by DPME and completed in 2013. It finds that the CRDP is poorly understood, is perceived as a top-down initiative, and local buy-in and implementation capacity is weak. Only limited progress has been made in mobilising and 'empowering' local communities. Most employment creation has taken place through infrastructure development, is low wage and temporary. Co-operatives have not been sustained, and smallholder farmers have not benefitted much; only food gardens have been relatively successful. Poor levels co-operation with departments of agriculture are evident. Links with land reform have barely been evident, in part because the most relevant programme has been tenure reform, which has not been effective anywhere. Addressing basic needs such as water access has been the most successful aspect, and the right target groups have generally been targeted women, youth and the aged, but not the disabled, child-headed households and people living with HIV/AIDS). 'Value for money' is not being achieved in most sites.¹²⁶

It is unclear how CRDP projects are conceived of as linking up with or contributing to the 'agrarian transformation' component of the CRDP, which focuses on improved levels of agricultural production in communal areas, or to the land reform component – which appears to be prioritising 'emerging commercial farmers' on medium- to large-scale farm units (in practice, if not in theory). A coherent overall strategy to reconfigure the inherited (and largely intact) unequal agrarian structure, and the associated spatial divide between sparsely settled commercial farming areas and very densely settled 'communal areas', appears to be absent.

Within the agricultural sector, 'reform' has been taken to mean the opening up of opportunities for black business interests and emerging farmers. A policy framework for black economic empowerment was published in 2004, followed by an Agri-BEE Charter in 2008, the key objectives being to encourage black ownership and control of agri-businesses. A scorecard

establishes targets for variables such as equity ownership, employment of senior managers, and employment equity, the main incentive for companies being to secure procurement contracts from government. A survey of 30 large companies by the Agricultural Business Chamber in 2010 revealed that thirty % had completed a scorecard, with a further fifty % 'in progress'. Half of the businesses had black ownership of between fourteen and thirty-five %, and there were high scores for enterprise development, average scores for preferential procurement and low scores for management control, employment equity, and skills development. Some companies were attempting to support emerging farmers, but in most cases this was limited to a few individuals and small groups in the former 'homelands' and it appeared that many of these initiatives would not be sustained.¹²⁷

A range of private sector actors, from large sugar and forestry companies to individual commercial farmers, have embarked on farmer support programmes, some involving land reform beneficiaries.¹²⁸ It is unclear just how many farmers or land reform beneficiaries are benefiting from these private sector projects, but indications are that only limited numbers are involved. There appear to be few examples of successful contract farming schemes, with the much vaunted sugar industry subject to precipitous declines in smallholder cane production in recent years¹²⁹, and negative experiences abound in Limpopo Province irrigation schemes.¹³⁰ This seems to be the case for fresh produce contracts with supermarkets too: apart from a few localised examples,¹³¹ the character of these value chains means that 'in the absence of a wider set of procurement regulations and incentives, the practices and requirements of dominant market actors exclude small-scale farmers'.¹³²

In summary, attempts to 'transform' agriculture by supporting the entry of significant numbers of emerging black commercial farmers appear to have met with limited success to date. This outcome probably has much to do with the highly competitive nature of the sector, as well as sector-wide policies, such as deregulation, which have been distributionally regressive. The sector has become increasingly integrated into global markets for both inputs and outputs, and profits are strongly influenced by global conditions and exchange rates. Trends such as the growing concentration of farm ownership and declining levels of employment have been noted above.

The National Development Plan

The NDP proposes a vision for an integrated and inclusive rural economy and discusses agriculture, land reform, non-agricultural activities and human capital development. It suggests that a million new jobs can be created in agriculture, two-thirds of them in primary production and one-third in secondary jobs (in linked industries upstream of production, such as the manufacture of inputs, and downstream of farming, such as agro-processing). A model of land reform is suggested that sees a leading role for white commercial farmers and agribusiness, in exchange for protecting them from the acquisition of their land in future.¹³³

Key to the expansion of agricultural jobs, according to the NDP, is adding 500,000 hectares to the area presently under irrigation, now around 1.5 million hectares, through better use of existing water and the development of new schemes. Other strategies include converting

underused arable land in communal areas and land reform projects to commercial production, giving black farmers access to value chains, and encouraging higher levels of support for black farmers from white farmers and agribusiness companies.

According to the NDP around 250,000 primary jobs and 130,000 secondary jobs could be created by expanding commercial agriculture. Here the NDP advises government to 'pick winners' in large labour-intensive crops such as citrus, table grapes, subtropical fruit and vegetables; in smaller labour-intensive crops such as nuts, berries, olives, figs and rooibos tea; and in labour-extensive sub-sectors such as poultry and the grains and oilseeds required to feed them.

The NDP states that improved land use in communal areas has the potential to improve the livelihoods of around 300,000 people. Here 'jobs' are equated with 'improved livelihoods', but the latter are not defined. Another 150,000 secondary 'jobs' will result, assuming a multiplier of 0.5 jobs for each job in production. There is no discussion of what crops might be grown by these producers, how the increase in agricultural production will be achieved, and no mention of livestock. Similar assumptions underlie the estimate that a further 70,000 livelihood opportunities will derive from better use of land in existing land reform projects, through effective support and financing programmes. No estimates for jobs are provided for an *expanded* area under land reform farms.

The NDP stresses the need to increase the tenure security of what it calls 'communal farmers', but does not specify how this is to be achieved. On irrigated land the cooperation of traditional leaders will secure such land through 'fully defined property rights, which allows for development and gives prospective financiers the security they require'. It is unclear whether or not this refers to privately owned and titled land.

The NDP also proposes a model for what it calls 'workable and pragmatic' land reform. The principles involve not distorting land markets or business confidence; and building the capabilities of beneficiaries through mentorship and training, partly by white farmers and agro-industry, who can also contribute to success through value-chain integration and procurement from beneficiaries. The key institutional arrangement in the proposed model is a land committee organised at the level of a district municipality, comprising landowners, private sector stakeholders, and government departments and agencies. The committee will identify 20 % of commercial land in the district that can be transferred to black farmers, from land already in the market, land where farmers are under severe financial pressure, land held by absentee landlords who are willing to sell, and land in deceased estates. The state then acquires this land at 50 % of market value (which is 'closer to its fair productive value') and the shortfall is made up of cash or in-kind contributions from commercial farmers. In exchange, commercial farmers are protected from land reform and gain BEE status.

Critics have suggested that the bases for the chapter's estimates on job creation are unclear.¹³⁴ They appear somewhat over-optimistic; in relation to poultry, for example, 65,000 new jobs are projected, but the industry is currently in distress as a result of increased imports of

dumped products from Brazil, the USA and the European Union, and protective tariffs are now required to keep it alive.

Key questions not addressed in the NDP include: why is the private sector not already taking up these apparently profitable opportunities, and why are agricultural jobs decreasing rather than increasing at present? The question of the low wages of farmworkers is not discussed, and neither are increased mechanisation and job losses as the likely impacts of higher minimum wages. Wider issues in agricultural policy, such as whether or not to offer trade protection to some products, are not discussed. The proposal that another half a million hectares can be irrigated is controversial, and is not accepted by national water planners. Also unclear is how much of the half a million hectares of irrigated land should be for smallholders and land reform beneficiaries, and how much for large-scale commercial farmers. In relation to land reform, it is strange that the NDP projects no extra jobs from the additional land acquired. The proposal that participating commercial farmers be protected appears to assume that redistribution will never move beyond its initial target of 30 % of commercial farmland. Not discussed at all are the farming models to be promoted on redistributed land. However, the chapter's proposals for leases for 40 years and Land Bank mortgages suggest that it has a form of large-scale commercial farming in mind.

11. Expenditure on land reform

Funds provided by the National Treasury and expended for various aspects of land reform are shown in tables and a series of graphs below, which report the same data in a variety of formats. Data are reported both in actual rand amounts allocated by Treasury and at constant rand values. These data represent audited expenditure.

These graphs show that a total of R76 473 million (or 76.5 billion) was spent by government on land reform programmes between 1994 and 2015, at an average of 0.77% of the national budget. Land reform comprised slightly more than 1% of the total in only two years, 2007/08 and 2008/09. Either it has not been a political priority, or Treasury has been reluctant to expand the budget in the light of weak evidence of impact, or perhaps both factors are relevant. Holding the rand value constant at the 2015/16 value, the highest amounts expended on land reform were in 2011/12 and 2012/13, and expenditure has been in decline since then. Restitution spent most in 2006/7, and land reform (combining redistribution and tenure reform) most in 2007/08, but expenditure on both programmes has been in decline since then. Rural development dramatically increased its share of expenditure from 2009/10, at the expense of restitution and land reform.

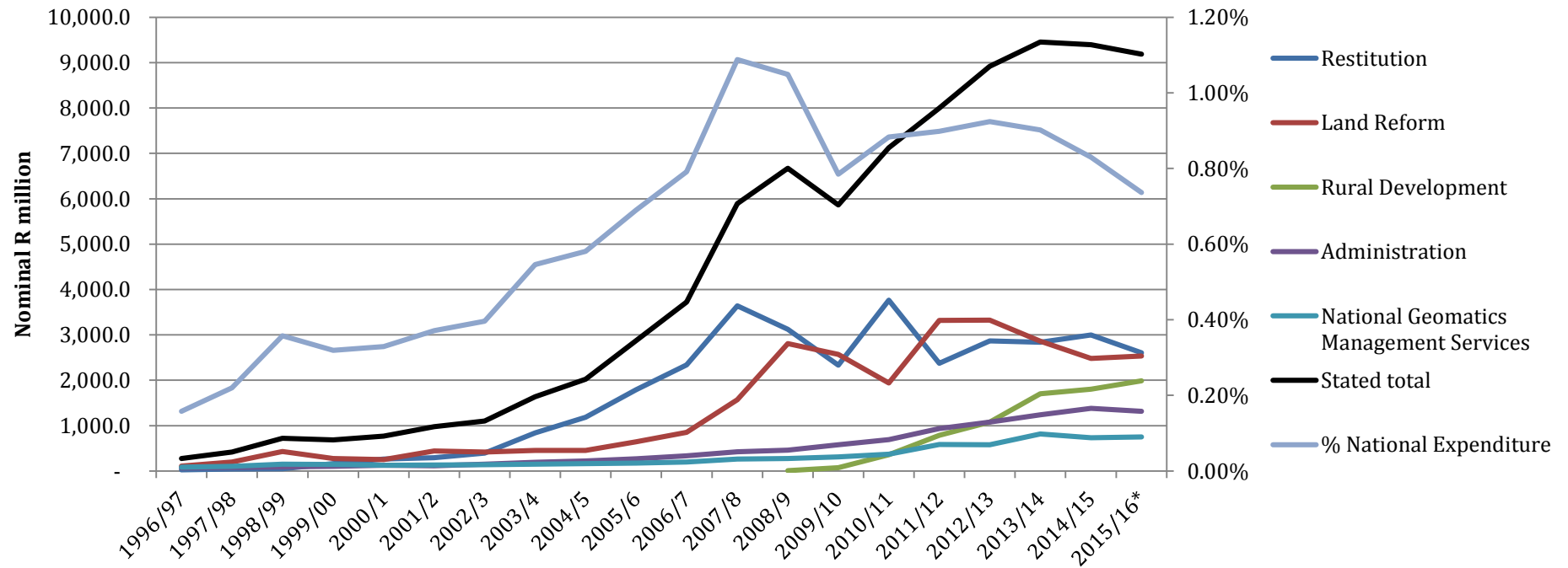
Table 7. Audited expenditure of the Rural Development and Land Reform Programme, 1996/97-2015/16

	1996/97	1997/98	1998/99	1999/00	2000/1	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16*
Restitution	22.4	43.7	46.9	164.1	265.1	291.0	394.3	839.1	1,182.8	1,789.4	2,338.4	3,638.5	3,122.1	2,331.6	3,766.8	2,376.3	2,865.7	2,836.7	2,997.9	2,602.7
Land Reform	106.3	195.7	431.0	275.7	252.6	443.5	416.0	453.7	453.7	644.9	854.1	1,571.1	2,805.6	2,569.6	1,937.2	3,317.8	3,326.5	2,863.2	2,482.1	2,537.1
Rural Development													9.1	72.1	357.5	786.3	1,075.6	1,700.8	1,801.0	1,984.6
Administration	65.0	76.6	93.0	103.8	127.2	112.3	151.8	191.2	223.1	266.6	331.3	420.6	456.6	579.5	689.7	934.4	1,076.7	1,238.8	1,382.2	1,314.9
National Geomatics Management																				
Services	83.0	101.2	149.5	141.3	125.2	129.3	140.2	151.8	162.4	173.8	196.8	263.0	276.3	311.0	371.7	583.0	575.1	814.6	732.5	748.1
Surveys & mapping	28.5	34.2	47.5	42.2	42.8	47.6	56.3	61.4	65.6	73.1	71.9	97.3								
Cadastral surveys	42.3	48.1	55.5	56.8	64.5	68.8	72.5	68.2	79.0	77.7	90.2	137.6								
Spatial Planning & Information	9.3	15.7	35.0	20.2	12.3	6.0	6.9	11.9	15.2	17.0	21.0	21.8								
Auxiliary & Associated Services	2.9	3.2	8.8	22.2	5.5	6.8	4.5	10.4	2.6	6.0	13.7	6.3								
Approp. Public Works			2.7																	
Stated total	276.7	417.2	720.7	684.9	770.1	976.2	1,102.3	1,635.9	2,022.0	2,874.7	3,720.5	5,893.1	6,669.8	5,863.8	7,122.9	7,997.7	8,919.6	9,454.1	9,395.8	9,187.4
National Expenditure (R billion)	175.5	189.9	201.5	214.8	233.9	262.9	278.5	299.4	347.9	416.7	470.2	541.5	636.0	747.2	806.0	889.9	965.5	1,047.8	1,132.0	1,247,317
% National Expenditure	0.16%	0.22%	0.36%	0.32%	0.33%	0.37%	0.40%	0.55%	0.58%	0.69%	0.79%	1.09%	1.05%	0.78%	0.88%	0.90%	0.92%	0.90%	0.83%	0.74%

*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016)

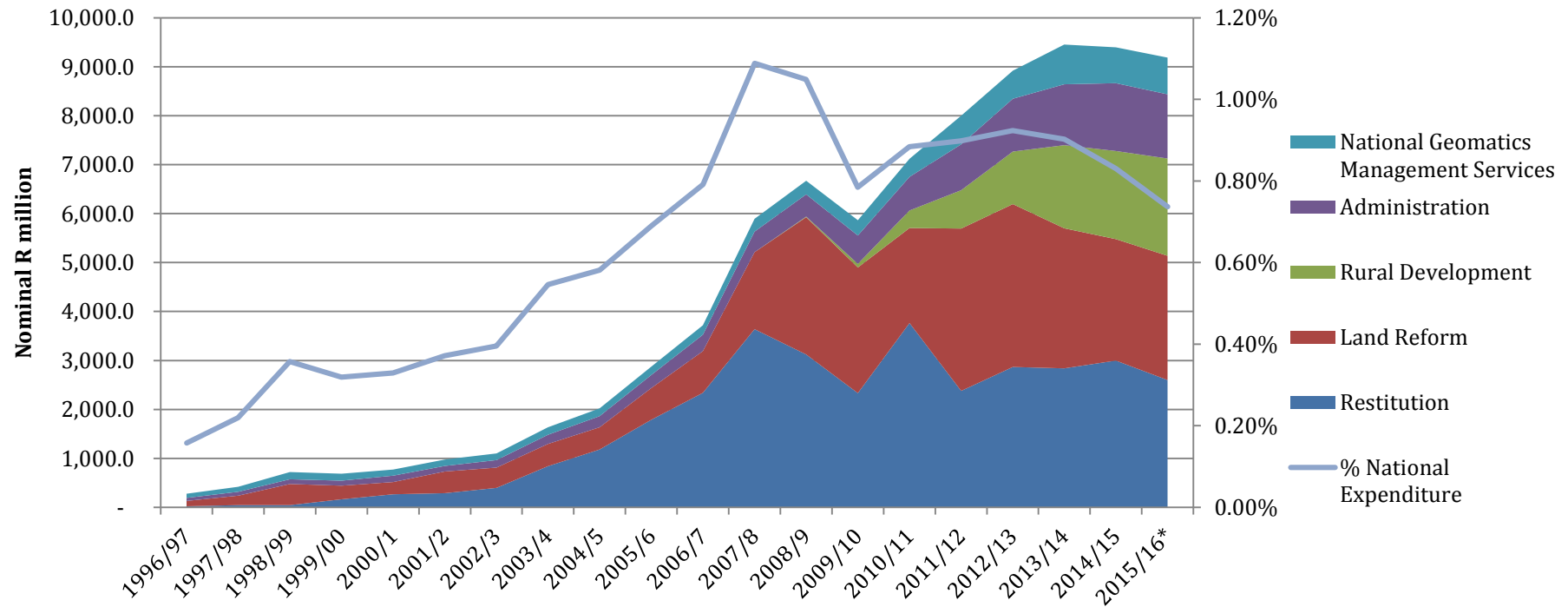
Figure 8. Audited expenditure of the Rural Development and Land Reform Programme, 1996/97-2015/16



*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016)

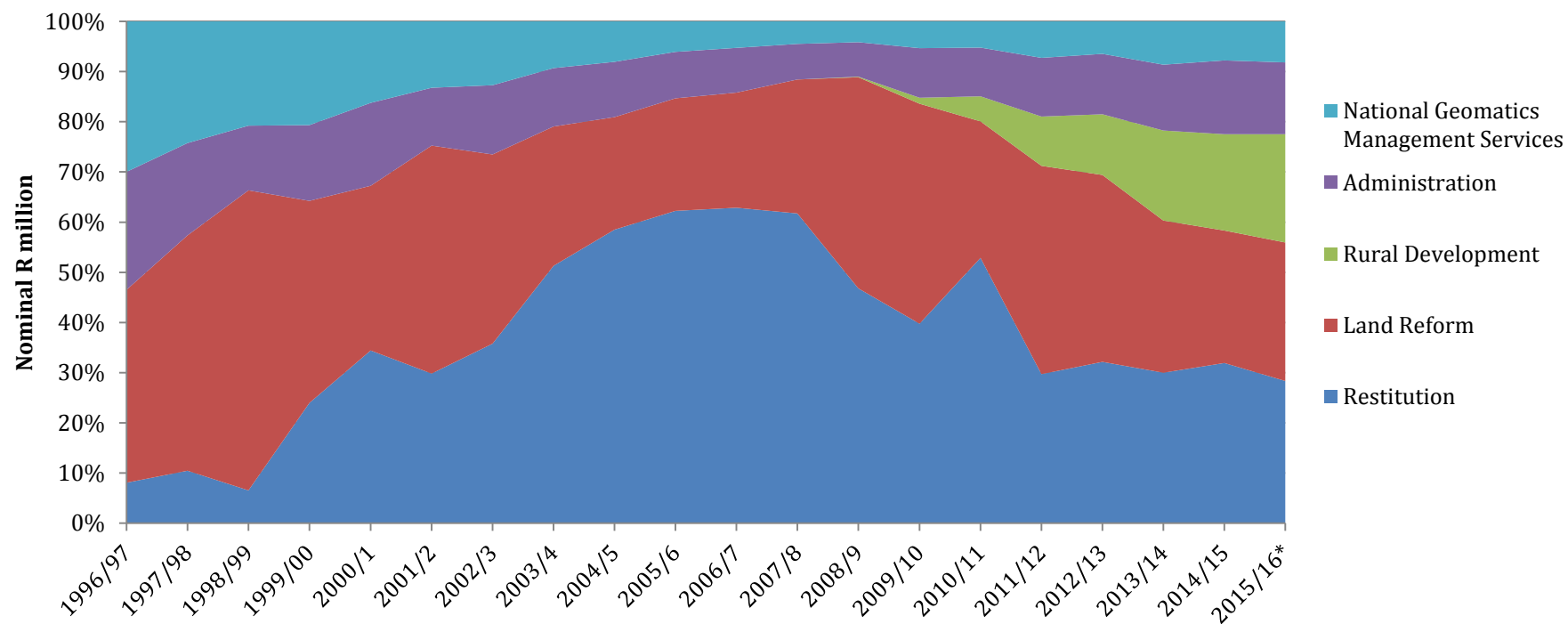
Figure 9. Audited expenditure of the Rural Development and Land Reform Programme, 1996/97-2015/16



*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016)

Figure 10. Audited expenditure of the Rural Development and Land Reform Programme, 1996/97-2015/16



*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016)

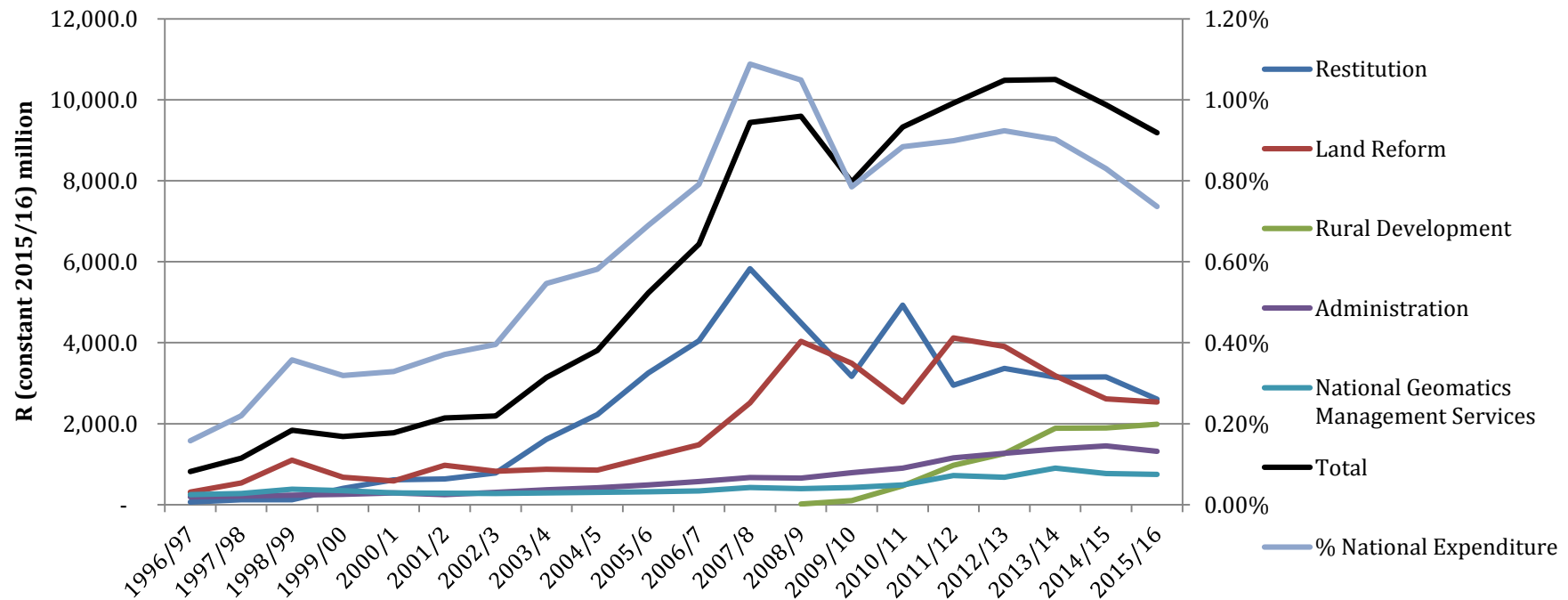
Table 8. Audited expenditure of the Rural Development and Land Reform Programme in constant R (2015/16), 1996/97-2015/16

	1996/97	1997/98	1998/99	1999/00	2000/1	2001/2	2002/3	2003/4	2004/5	2005/6	2006/7	2007/8	2008/9	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15	2015/16
Restitution	66.3	120.0	119.7	403.3	612.4	638.4	784.3	1,612.2	2,228.3	3,256.4	4,045.5	5,827.6	4,491.0	3,169.5	4,931.0	2,947.8	3,367.7	3,150.9	3,152.0	2,602.7
Land Reform																				
Rural Development	314.5	537.5	1,100.1	677.5	583.5	973.1	827.5	871.8	854.7	6	6	4	7	3,493.1	2,535.9	4,115.7	3,909.2	3,180.3	2,609.7	2,537.1
Administration	192.3	210.4	237.4	255.1	293.8	246.4	302.0	367.4	420.3	485.2	573.1	673.7	656.8	787.8	902.9	1,159.1	1,265.3	1,376.0	1,453.3	1,314.9
National Geomatics Management Services	245.5	278.0	381.6	347.4	289.1	283.8	279.0	291.7	306.0	316.3	340.5	421.2	397.4	422.8	486.6	723.2	675.8	904.8	770.2	748.1
Surveys & mapping	84.3	93.9	121.2	103.7	98.9	104.5	112.0	118.0	123.6	133.0	124.4	155.8	-	-	-	-	-	-	-	-
Cadastral surveys	125.1	132.1	141.7	139.6	149.1	151.0	144.2	131.0	148.9	141.4	156.0	220.4	-	-	-	-	-	-	-	-
Spatial Planning & Information	27.5	43.1	89.3	49.7	28.5	13.2	13.7	22.8	28.6	30.9	36.3	34.9	-	-	-	-	-	-	-	-
Auxiliary & Associated Services	8.6	8.8	22.5	54.5	12.7	15.0	9.0	20.0	4.9	10.9	23.7	10.1	-	-	-	-	-	-	-	-
Approp. Public Works	-	-	6.9	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Total	818.5	1,145.9	1,839.6	1,683.2	1,778.7	2,141.7	2,192.8	3,143.0	3,809.4	5,231.6	6,436.4	9,438.7	9,594.2	7,971.1	9,324.3	9,921.1	10,482.2	10,501.2	9,878.8	9,187.4
National Expenditure	519.1	521.7	514.4	527.8	540.3	576.8	554.0	575.3	655.3	758.3	813.4	867.3	914.8	1,015.7	1,055.1	1,103.9	1,134.6	1,163.8	1,190.2	1,247.3
% National Expenditure	0.16%	0.22%	0.36%	0.32%	0.33%	0.37%	0.40%	0.55%	0.58%	0.69%	0.79%	1.09%	1.05%	0.78%	0.88%	0.90%	0.92%	0.90%	0.83%	0.74%

*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016); StatsSA (2016)

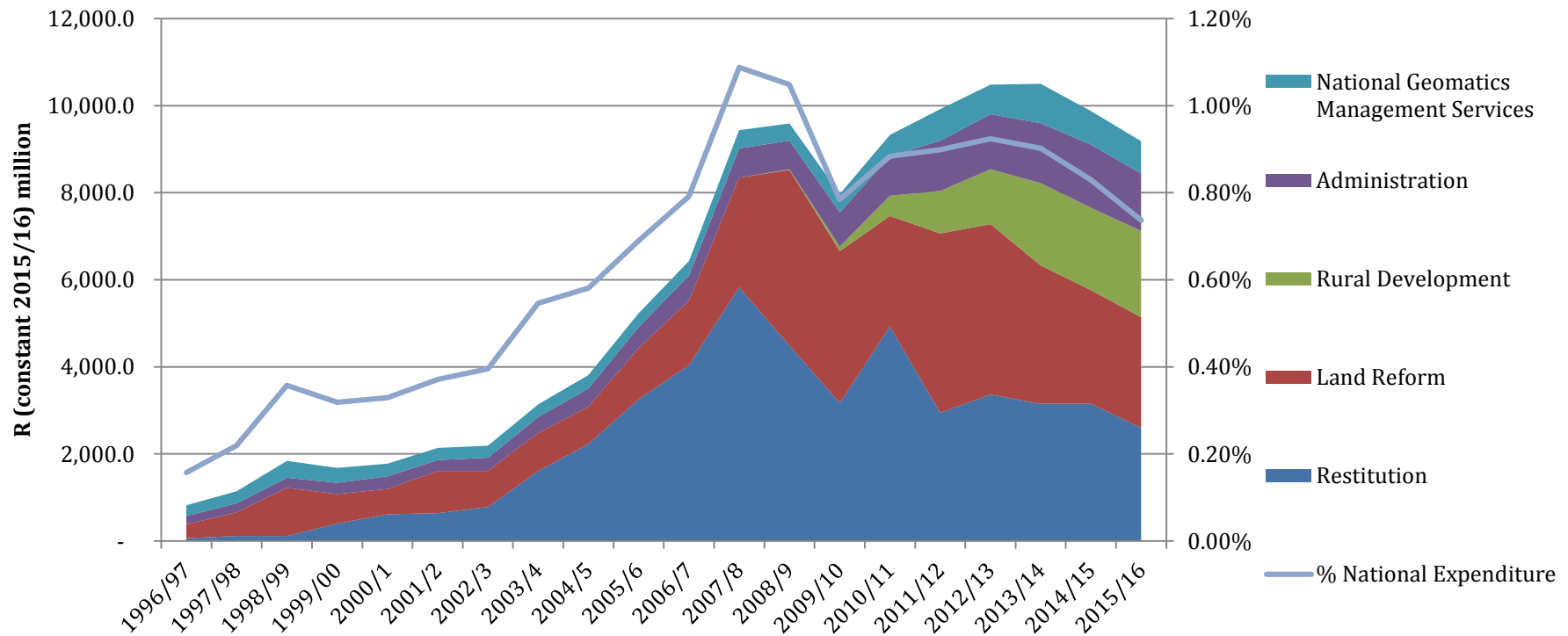
Figure 11. Audited expenditure of the Rural Development and Land Reform Programme in constant R (2015/16), 1996/97-2015/16



*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016); Stats SA 2016

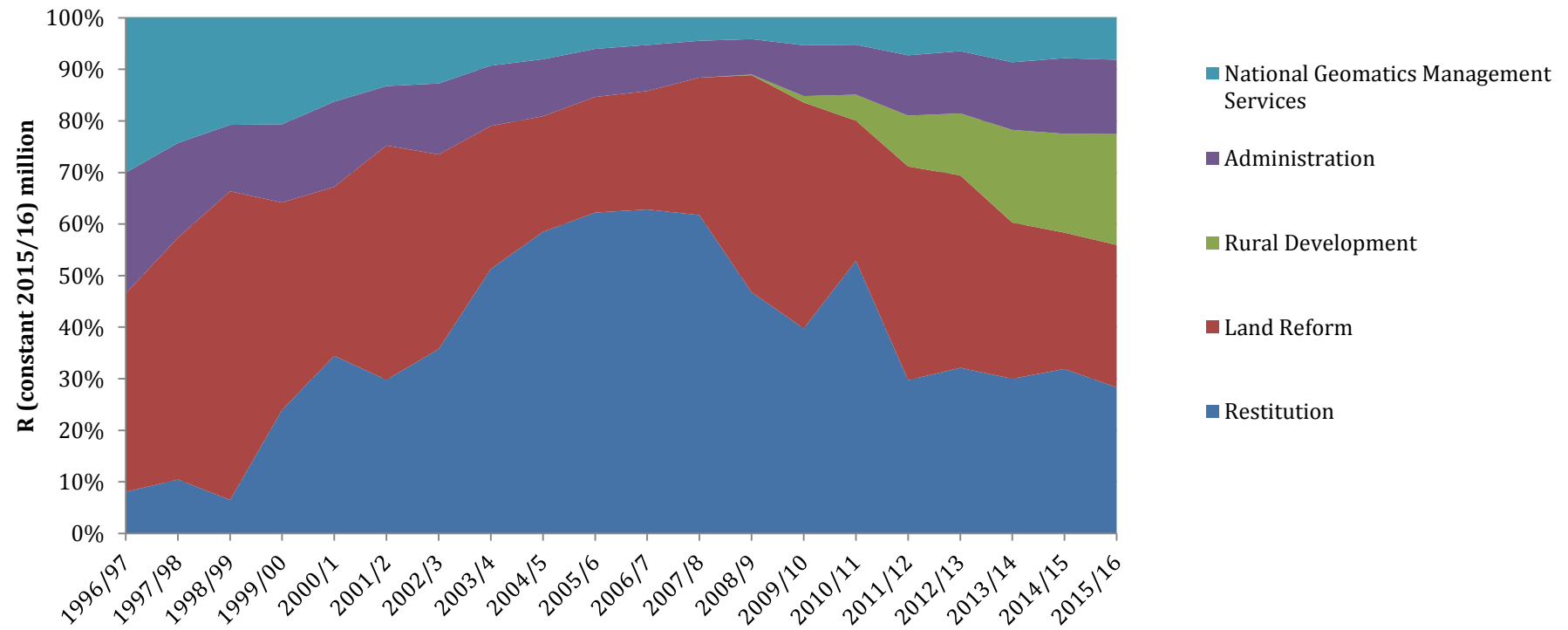
Figure 12. Audited expenditure of the Rural Development and Land Reform Programme in constant R (2015/16), 1996/97-2015/16



*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016); Stats SA 2016

Figure 13. Audited expenditure of the Rural Development and Land Reform Programme in constant R (2015/16), 1996/97-2015/16



*2015/16 figures represent revised estimate

Source: National Treasury (2000, 2003, 2006, 2009, 2012, 2015, 2016); Stats SA 2016.

12. Assessing the overall impact of land reform

Land reform is a politically controversial issue that is increasingly the focus of emergent opposition parties such as the Economic Freedom Front and social movements of young people and university students. Yet expenditure on land reform continues to comprise less than one % of the national total. Is this simply the result of a lack of political will, or is because Treasury is reluctant to increase its budget because it is sceptical of the impacts and benefits of land reform achieved to date? This remains unclear.

It is critically important to try to discern the patterns of impact achieved by land reform to date, and to provide an overall assessment of its efficacy. The criteria for such an assessment must surely be drawn from programme objectives. However, it appears that these objectives have shifted over time, and how these objectives should be interpreted is not straightforward. The precise meanings of terms such as 'addressing dispossession and injustice', or 'creating a more equitable distribution of land', and 'contributing to national reconciliation' are far from clear. If the livelihoods of the poor are understood to involve more than simply the amounts of cash income received, then even objectives such as 'reducing poverty' can be difficult to assess.¹³⁵ Another difficulty is the lack of comprehensive and reliable data on a large scale, given the weaknesses of the department's monitoring and evaluation efforts and the paucity of Statistics South Africa data on land reform.

Here we make a preliminary attempt to assess the impacts of land reform, largely in qualitative terms, drawing on intensive case studies across the country. We also draw on the limited survey data available, mostly from area-based assessments in particular regions or provinces. We also discuss what might explain these impacts.

Positive impacts

Although the literature is mostly critical of the performance of land reform since 1994, the possibility of some positive impacts should also be allowed for. Five are identified here.

(1) Land reform has contributed to a degree of political stability

Did the speed with which the land reform programme was launched after 1994 contribute to political stability, and to processes of 'reconciliation' thereafter? It is difficult to be certain, but it is possible that the early years of democracy would have been much more unstable if land reform had *not* been embarked upon. It was hailed as both necessary and important in the early years of democracy.

However, Gibson reports that by the mid-2000s many South Africans continued to be deeply divided on land issues and highly polarised on historical land injustices, mainly along lines of race. The reconciliatory impact of land reform to date has thus been somewhat ambiguous.¹³⁶

The continuing salience of the 'Land Question' in current political contestation indicates that Gibson's analysis was prescient.

(2) Most urban land claims have been resolved

Many commentators hail the resolution of the vast majority of the land restitution claims lodged by 1998 as a major achievement. Of course, the fact that around 88% of these were urban claims and most were settled with cash payouts has to be taken into account, but nevertheless this is a signal achievement.

A dissenting voice is Atahuene, who interviewed 150 urban land claimants in the mid-2000s, and describes how relatively small cash payments of the order of R40 000 have often failed to provide sufficient restoration of the human dignity that was impaired through land dispossession. This is despite the creative and productive uses of cash compensation reported by many claimants. The fact that white landowners are often paid vastly larger sums as compensation for farms acquired for restitution adds salt to these wounds. In relation to 'dignity restoration', then, cash settlements do not confront the underlying dehumanization, infantilisation and political exclusion that enabled the dispossession. This analysis resonates strongly with the views of emerging student movements about the centrality of 'the land question', seen primarily as a symbol of the lack of wider transformation in post-apartheid South Africa.¹³⁷

(3) Some rural land restitution claims have resulted in significant benefits to beneficiaries

There are a relatively small number of successful land restitution projects. These projects are of three types:

- Large-scale and capital-intensive commercial farming enterprises that supply lucrative and sometimes export markets with a range of cash crops, or in some cases, manage upmarket rural tourism operations. These depend critically on effective management and the employment of skilled professionals, as well access to private sector finance.
- Projects which have not been planned well, or not received financial or other support services, or have 'gone wrong' in some way or other, but which have nevertheless led to livelihood enhancements. They generally occur through a combination of smallholder agriculture and other livelihood opportunities, together with well-located settlement, developed by people themselves rather than through official support for these kinds of strategies;
- Other cases, where in purely economic terms the livelihood benefits are limited, but the restoration of ownership is enough for the beneficiaries to judge it a 'success'.

The first type is most visible, and these projects are often lauded in the media. They include the Makuleke community that runs a successful tourism venture in the northern part of the Kruger National Park, the Moletele claim in Hoedspruit, where the community is in strategic

partnerships with private sector companies producing citrus and other plantation crops, the Ravele CPA in the Levubu valley in Limpopo, which operates export-oriented macadamia nut farms, and the Amangcolosi community in Kranskop in KwaZulu-Natal, which owns a successful company, Ithuba Agriculture, that grows sugar cane, maize, timber and other crops. Some apparent 'success stories', such as the joint ventures between TSB Sugar and communities in the Nkomati area in Mpumalanga, are problematic, especially in terms of how widely the benefits are spread.¹³⁸

The second type is less visible, but some are documented in case studies such as that of Munzhedzhi and Morebene in Limpopo. Aliber et al comment that assessing 'success' in restitution is made more difficult because it seeks to achieve objectives other than economic upliftment or poverty reduction; 'implementers of rural restitution have to create some kind of economic meaning for a project whose main design parameters are outside of their control, such as the claimant group (its size, location, interest and experience in agriculture and so on). The room for manoeuvre is quite limited...' ¹³⁹

Examples of the third type are discussed by Walker and in various case studies, and are not be dismissed simply because the economic dimension appears unimpressive.¹⁴⁰

(4) Some land redistribution projects have delivered improvements in livelihoods

A similar pattern appears to be case for redistribution projects as for restitution: some high-profile success stories, such as those documented by de Villiers and van den Berg, often with private sector partners, and others that are less well-known but have offered significant benefits, often in the face of inappropriate business plans and inadequate support services. The view offered by Minister Nkwinti when he first took office, and was widely quoted in the media, that '90% of land reform projects have failed', does not appear to be based on any empirical evidence. Although no agreement has been reached as yet on criteria for assessment, modest improvements in livelihoods are apparent in around 40% of projects in most analyses.¹⁴¹

Lahiff et al document four cases of the latter type of project in Limpopo, where land use has been more intensive than it was before land reform, mainly though individual cropping by smallholders. The economic benefits have been real but modest, focused largely on improved food supply rather than cash income, and in the face of a range of problems: constrained supplies of labour, insufficient access to cash for purchase of inputs, weak communal property institutions, and inadequate project design and support from government.¹⁴² Chitonge and Ntsebeza also point to modest but real benefits in livelihoods after land reform in the Eastern Cape.¹⁴³

In relation to the new generation of redistribution projects implemented under PLAS and state leasehold, there has been little in the way of empirical research on these thus far. However, preliminary findings from a small sample researched by Kepe and Hall suggest that production levels are low, except where private sector partners operate and manage crops such as citrus and chicory. Here beneficiaries felt they were being treated like farm workers rather than as

partners. Other farms were derelict and degraded. The most vulnerable beneficiaries were former farm workers, often stranded on unproductive farms and barely scraping a living.¹⁴⁴

(5) Some tenure reform legislation has increased tenure security for a few people

Two post-apartheid laws that have had positive effects on tenure security are the Interim Protection of Informal Land Rights Act of 1996 (IPILRA), and the Prevention of Illegal Evictions Act of 1998 (PIE, which is aimed mainly at addressing tenure security in urban areas, and thus not discussed here).

IPILRA has not featured much in litigation to protect land rights in specific cases, but it has been renewed each year partly as a result of civil society vigilance. This has served notice on government, traditional leaders and others that people with rights to land derived from custom or sources other than formal law cannot be summarily evicted without their consent. It has thus acted as a deterrent on forced evictions to some degree.

Weaknesses

The general view in the literature is that land reform has been largely ineffective to date. This is so particularly in relation to its more ambitious goals of reducing inequality and rural poverty, contributing to economic growth and restructuring, and underpinning social transformation more generally. In addition, the basic constitutional right to tenure security, which is of great significance to the poor, has not been achieved in practice, despite the adoption of several laws.

(1) Constitutionally guaranteed rights to tenure security have not been secured in practice

Parliament has adopted several ambitious laws that seek to secure the tenure rights of farm workers and dwellers, including the distinctive category of labour tenants (or former labour tenants), and residents of former 'Coloured' rural areas. The Communal Property Associations Act is meant to secure the rights of the beneficiaries of land restitution and redistribution where they become owners as groups rather than individuals.

The Land Reform (Labour Tenants) Act of 1996 was effectively abandoned in the late 1990s, and only court action by civil society has brought it back into the realm of implementation. The content of the Extension of Security of Tenure Act (ESTA) of 1997 was never very strong, but the law has never been a high priority for the department; implementation has been weak and ineffective for two decades. Farm owners have long worked out how to circumvent the law or use it to their own advantage. Perhaps more fundamentally, the rights-based approach has been criticised for not connecting sufficiently strongly enough to the economic dimensions of farm employment, within a wider approach that could offer real alternatives in land rights and livelihoods outside of farm employment.¹⁴⁵ Few programmes of government focus specifically on supporting non-commercial land-based livelihoods.

The informal land rights of people located in communal areas, and in similar situations elsewhere, were secured on a temporary basis by the Interim Protection of Informal Land Rights Act of 1996 (IPLRA). This was seen as a holding operation only, until more permanent legislation was passed, but the Communal Land Rights Act of 2004 was struck down and never implemented, and hence IPLRA remains on the books. Government's failure to come up with a policy and legal framework for securing land rights derived from customary norms and values, that is widely legitimate and commands sufficient consensus within society, after over 22 years of debate, is clearly a major failure.

The law designed to facilitate tenure reform in former 'Coloured' rural areas, the Transformation of Certain Rural Areas Act of 1998 has also simply been put on ice. In relation to Communal Property Associations (and trusts), the department has never allocated sufficient funds or personnel to supporting the development of robust institutions with a challenging set of responsibilities. As a result many have become dysfunctional, and exceptionally strong and able leadership is required to make them work in the absence of oversight and support.

Linked to these failures is the highly gendered character of tenure insecurity, in land reform contexts, on commercial farms and in communal areas. Women's land rights are generally still more insecure than those of men, in part because of wider social prejudice but also because the implementing agencies charged with securing rights have not confronted these inequalities sufficiently strongly.

(2) The roles and powers of traditional leaders in relation to land remain highly contested

One of the key controversies in land reform, the role of traditional leaders in land holding and land administration, and inadequate provision for their downward accountability, is unresolved as yet. Recent revelations of the manipulation of customary institutions for private gain in areas where large-scale mining takes place have thrown the spotlight on governmental support for elite enrichment strategies of this kind. The fact that emerging business arrangements between traditional councils, chiefs and mining companies are so contested by local people and are generating high levels of violence and repression, indicates that they have little legitimacy, both locally and in society at large. Control over land is at the core of these arrangements. This is a nettle which land reform policy has to grasp. It is linked to a larger issue, that of elite capture of the land reform agenda, including restitution. There are fears that traditional leaders will use land claims to extend their jurisdictional territories following the Restitution Amendment Act that opens up the lodging of claims for another five years.

(3) The livelihood and poverty reduction impacts of land reform have been much weaker than anticipated

Although some success stories do exist, and complete 'failure' is not as widespread as some suppose, the livelihood impacts of land reform have not lived up to expectations. In some cases success has been contingent on additional support offered by business partners, who bring in capital, skills and market access, but often on terms that ensure profitability for themselves and bring few substantial benefits to beneficiaries (who often comprise large groups). There

are a handful of such cases around the country, but also many cases where the benefits of having a 'strategic partner' are dubious.¹⁴⁶

Overall, there are too few cases of real benefits to suggest that private sector partnerships by themselves are an answer to the problems of land reform, important though they might be in capital-intensive systems of production, such as large-scale fruit orchards. A scenario not beyond the bounds of possibility is one in which land reform beneficiaries hold reasonably secure land rights, but engage in no production at all on their own land, renting it out instead to companies for an annual fee – a 'rentier' model of land reform that would see most profits earned by economically powerful outsiders and a small, often insignificant, flow of rental income shared amongst large groups of poor people.

The alternative model to these kinds of private sector 'partnerships' is a smallholder-based model, where very different criteria of viability would be used to inform planning and support, one more aligned with the models found elsewhere in the world where large-scale land reform have been implemented. These have been absent in South Africa, where not a single case of the formal subdivision of a farm has been reported. In practice, as discussed above, small-scale and household-based farming is engaged in by many land reform beneficiaries, but has generally failed to attract significant support from government or other agencies. This is one key reason why levels of production and productivity on this land are lower than might be expected, along with neglect of or active discrimination against informal agricultural markets by local government bodies.

- (4) The structure and functioning of South Africa's rural economy has barely been altered by land reform

With only 8% or 9% of commercial farm land transferred to black South Africans over 22 years, and the full productive potential of this land not fully realised in many cases due to poor planning, lack of capital, lack of access to markets, lack of extension support, etc, it is hardly surprising that the agrarian structure has barely been affected, or that the rural economy continues to reproduce longstanding patterns of spatial inequality. The great majority of land reform farms remain at the periphery of the rural economy. Urbanisation continues despite high levels of unemployment in towns and cities.

In the deregulated commercial farming sector, continued processes of concentration mean that fewer and fewer enterprises dominate production in most sub-sectors. Global competition, combined with increased wages for farmworkers, means that these enterprises are mechanising as much as possible, and farm employment continues to drop. A small number of black commercial farmers are attempting to gain access to formal markets, often with the support of commodity associations and commercial farmer unions, but continue to face major challenges. The Land Bank supplies them with cheap credit, and some get substantial support from genuine and effective mentors and strategic partners from white farmers. Numbers remain small, perhaps 5 000 to 10 000 in all.¹⁴⁷

Apart from occasional rhetorical statements of intent, there is no coherent national strategy for agrarian reform in South Africa (to which land reform can contribute). The lack of any meaningful working relationship between the two relevant departments at present is a major obstacle to the development of such a strategy and programme.

- (5) The Comprehensive Rural Development Programme (CRDP) has failed to have any impact on both the structure of the rural economy or on local livelihood systems

As the budget analysis presented above shows, the CRDP has put a great deal of downward pressure on the funds available for other land reform programmes, given that the overall budget did not increase after it was decided that DRDLR should take on responsibility for 'rural development'. Yet few meaningful results have been achieved in over seven years. A major problem is clearly the fact that in this respect the DRDLR has overlapping functions with a range of other line departments, including health and education, and proper co-ordination and alignment has proved very difficult to achieve. A more fundamental problem is that there is little or no connection between the micro-level income generating projects that the CRDP has attempted to establish and land reform, which has the potential to address underlying structural problems. It is this not clear that the CRDP should be continued.

Underlying reasons for weak impacts or failure

This section briefly summarises a range of reasons that analysts have suggested help to explain the uneven performance of land reform to date, all of which have been discussed or mentioned in previous sections.

- (1) Problematic assumptions underlie the design of many land reform programmes, and inform planning paradigms; these include notions of what constitutes the 'viability' of agricultural production drawn largely from a dominant model of large-scale commercial farming. This helps to explain the inappropriateness and thus lack of traction of so many business plans, as well as the lack of subdivision of large farms.
- (2) The targeting of land reform beneficiaries has tended to assume that they live in 'communities' of relatively homogeneous social composition, but this has not been the case in either restitution or redistribution, sometimes leading to conflict, or to elite capture of projects and CPAs. Targeting has thus not sufficiently disaggregated, and led to 'one size fits all' plans and programmes. Differences amongst small-scale farmers are only belatedly beginning to be recognised.
- (3) Elite capture of land reform is identified by many analysts as a major issue at present. Poor people are largely sidelined in the redistribution programme, poorly supported within restitution (or asked to accept low levels of benefits from joint ventures), suffer from continuing evictions from commercial farms, or ignored if they are labour tenants or former tenants. Women's interests in land are neglected in government programmes. Traditional leaders are actively supported at present by government, often at the expense of ordinary residents. The class agenda of land reform reflects the

priorities of the emerging black middle class and bourgeoisie rather than of classes of labour and the rural poor.

- (4) Lack of effective post-settlement support is widely seen as a key problem. This includes access to finance, infrastructure, inputs, markets, extension and training, and water for irrigation.
- (5) Key realities ignored by land reform planning to date include the large population of market-oriented smallholders supplying loose value chains and informal markets, and the existence of a vibrant, informal livestock economy in communal areas.
- (6) Lack of capacity in government departments such as land reform and agriculture (the latter at provincial level in addition to national) has hampered the implementation of land reform. Many officials have little first hand experience of the realities they are attempting to change or support, and often have prior professional training that is not relevant to the work they do. Extension services in rural South Africa have long been in disarray.
- (7) Land reform has suffered from its poor co-ordination or alignment with agricultural and water reform policies, and the fact that land is a national competency and agriculture a provincial one has not helped matters.
- (8) Land reform has been characterised by top-down rather than participatory approaches to local-level planning, leading to inappropriate project designs, weak or dysfunctional institutions to manage land held in common (through CPAs and trusts), and a neglect of the priorities and perspectives of beneficiaries.
- (9) Land reform has lacked an effective monitoring and evaluation (M&E) system to help build government's capacity to learn from experiences of implementation and feed these back into policy-making. This absence is signified in the almost complete reference to M&E data in analyses of land reform.
- (10) Poor political leadership has often characterised land reform, with consequent lack of consistent support from key constituencies such as small-scale farmers, farm workers, rural women, NGOs and activists, as well as the large-scale farm lobby and agribusiness. Recently alliances with chiefs have been a key feature of government's land reform agenda, resulting in the alienation of many members of rural communities (especially in regions where mining is taking place). More generally, politicians in South Africa, as elsewhere in the region, have used land questions to try to bolster support for their party political agendas, but have underestimated their complexity and the demands they make on stretched government departments.

Two core debates

This section concludes by summarising the terms of two core debates in relation to land: the issue of expropriation, with or without compensation, versus a 'willing buyer, willing seller' approach to the acquisition of land; and the issue of social tenures (such as communal tenure) versus individual title. No conclusions are drawn here on the relative strengths of competing arguments.

(1) Expropriation vs 'willing buyer, willing seller'

A combination of ideological and pragmatic considerations informed the acceptance of the protection of property rights in the new constitution of 1996, and the adoption of a 'willing seller, willing buyer' (i.e. market-friendly) approach to the acquisition of land for redistribution. Until 2006/07 the primary mechanisms for redistribution involved several onerous bureaucratic procedures: applications for grants for land purchase and land development, award of such grants, establishment of legal entities to own land, and business planning. Business plans have often been poorly aligned to the resources, needs and desires of beneficiaries. Although subdivision of large farms acquired for land reform is allowed in law, very little has taken place in practice. In some ways South Africa's land reform has combined the least effective aspects of both state and market-driven approaches.

These problems, together with the slow pace of redistribution, have led to widespread dissatisfaction with the 'willing seller, willing buyer' approach. Partly in response, government has recently passed a new expropriation law consistent with constitutional provisions that compensation must be 'just and equitable' (but note that the law has been returned to parliament to check whether or not the correct procedures were followed, and thus is not operational as yet). The Expropriation Act will enable farm valuations to take account of a range of factors other than market value, such as the current use of the property, the history of its acquisition and use, the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and the purpose of the expropriation. Expropriation without compensation is not possible without a change to the constitution.

Some political formations, such as the EFF, have called for the property clause to be scrapped, so that land can be expropriated more cheaply and easily. However, it is not clear that the property clause is in fact a fundamental constraint on land acquisition and transfer on a large scale. The failure of the state to target appropriate land for purchase and to negotiate good prices, together with the ruling party's lack of political commitment to land reform, are also possible candidates.

Acquiring farms at prices below market value is possible, given that compensation must be 'just and equitable'. At prices much lower than say, 15-20% below market value, land reform might be slowed to a crawl by court action. If the budget for land reform increased from its present level to, say, 2-3% of the total, then land purchase would be more affordable.

In other respects the constitution is enabling of land reform, rather than disabling. In particular, Section 25(6), which requires that the state secure the land rights of black South Africans, is of key strategic significance. All forms of property are protected, not only private property. Given evidence of attempts at state capture by elements of capital, and the woeful human rights record of mining operations in communal areas, measures to protect the poor from dispossession are required, and the property clause is one such measure with considerable legal clout.

(2) Social tenures vs individual title

It is estimated that in 2011 some 60% of South Africans occupied land or housing without their rights being recorded in the Deeds Registry. This includes 17 million people in communal areas, 2 million on commercial farms, 3.3 million in informal settlements, 1.9 million in backyard shacks, 5 million in RDP houses without title deeds, and 1.5 million in RDP houses with inaccurate title deeds.¹⁴⁸ Their claims to property cannot meet the stringent requirements of the cadastre and remain 'off-register'. On land reform farms, beneficiaries often lack clearly specified rights to the land they hold though CPAs and trusts.

Many informal land tenure systems can be characterized as 'social tenures'. These are characterized by local oversight of processes of claiming rights and resolving disputes, and social relations and identities directly inform the recognition of rights, as well as of institutional arrangements. A key criterion is need, rather than ability to pay. These tenure systems are oriented to processes rather than well-defined rules, display a great deal of flexibility, and confer *de facto* tenure security to large numbers of people.

People inside such systems also experience many problems. The 'second-class' legal status of these tenures means that the state does not provide oversight of their functioning, and they cannot always prevent abuse, including gendered forms of discrimination. Local institutional arrangements are often ineffective in contexts such as new informal settlements, or where informal land markets develop, and social tenures are not well served by planning and service delivery. Land reform has done little to date to secure these rights.

One response is to assert that private property rights, recorded and registered in a formal system such as the Deeds Registry, are the answer. Advocates draw on de Soto's arguments that secure titles allow the poor to offer their land or housing as collateral for bank loans, which could be used to establish their own enterprises and thus move out of poverty.¹⁴⁹ Free market enthusiasts such as Sono suggest that 'this would change the fortunes of millions of South Africans overnight'.¹⁵⁰ In 2011 the main opposition party in South Africa, the Democratic Alliance, attempted to secure support in parliament for a private member's bill on state-sponsored titling of all land, arguing that giving people unencumbered ownership of their land is essential to secure their tenure and to ensure increased productivity, rural job creation and food security.

Another view is that private ownership through individual titling is at present an option only for people who are upwardly mobile and able to pay the high costs involved. At present it is not a

realistic option for the large numbers of people not in this bracket, for whom social tenures are much more likely to offer secure property rights, especially if they were officially recognized.

Adopting an alternative paradigm for tenure reform would have major implications for development planning and service delivery. If social tenures are to be properly recognized and supported, then high levels of precision in surveying of plots of land would need to be modified; social and territorial boundaries that are flexible would have to be accepted; co-ownership would need to be registered; township development procedures would need to be adjusted; new systems for the collection of rates would have to be developed; and professionals such as lawyers, surveyors and planners would have to be re-trained. Most importantly, new sets of skills would have to be developed to support the processual dimensions of land holding: facilitation, mediation, dispute resolution, and oversight of governance.

13. Conclusion

This Diagnostic Report has attempted to provide a brief descriptive overview of land reform in South Africa since 1994, and to present an analytical mapping of the key issues that the High Level Panel will have to confront in fulfilling its brief. It is not possible in a report of this nature to discuss each and every aspect of a complex and ambitious programme, and thus this report contains some gaps. However, the detailed reports to follow will be much more comprehensive.

Land reform in post-apartheid South Africa has proved troublesome, and continues to generate controversy. It is beginning to be a 'hot potato' issue, which presents both an opportunity and a danger. The opportunity is to move land issues higher up the political agenda, to mount arguments for higher levels of funding, and to begin to grapple more seriously with the complexity of the Land Question. The danger is that land might become even more of a political football than at present, subject to populist posturing rather than sober assessment and careful planning.

Four long-term scenarios for land reform policy in South Africa, recently developed in a think tank convened by Vumelana Advisory Fund and Reos Partners, may be worth considering, as plausible trajectories of change.¹⁵¹ Here a range of social, political and economic processes and events are postulated as driving land policy, and four alternative futures by the date 2030 are projected in some detail. These are:

(1) *Connection and capture* is about politically connected elites who drive land reform for their own benefit. As traditional leaders gain more formal recognition from the state and greater control of land in communal areas, some use this power to promote social, cultural and ecological connectedness. Many enter into shady business deals or sell land to outsiders. Other elites who benefit from land reform include unaccountable leaders in communal property institutions and business people who receive land through redistribution.

(2) *Market power and concentration* is about the increasing role of the private sector in changing the racial complexion of ownership, but without addressing questions of agrarian reform and rural development, resulting in a concentration trend of fewer, larger land owners and producers evident most clearly in the agricultural sector. Land reform is driven by partnerships between private sector organisations and beneficiaries.

(3) *Occupation and confiscation* is the story about the deepening of hardship and hunger, which creates impetus for the emergence of landless people's movements. Land reform is driven from below by the landless through illegal invasion and occupation. The unstoppable of their actions is later recognised through legal confiscation.

(4) *Hard bargaining and compromise* is a story about pragmatic and inclusive policies, that allow for the accommodation of multiple needs and interests, with a pro-poor orientation. Land reform is driven by considered regulation via a combination of both carrot and stick policies, primarily oriented to benefit the poor.

How realistic are these scenarios? Only time will tell.

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