South African Institute of Race Relations NPC
Submission to the
Department of Rural Development and Land Reform
regarding the
Property Valuation Bill of 2013
Johannesburg, 21st June 2013

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Introduction

The South African Institute of Race Relations (the Institute) has always condemned the race discrimination which unjustly restricted African land ownership prior to 1991, and which underpinned the forced removal of some 2m black people by the National Party government. It also supports constructive initiatives to redress the historical injustice regarding land and to bring about a process of land reform which is suited to the country's needs and plays a significant role in building the success of African farmers. This makes the Institute all the more concerned at the negative impact the Property Valuation Bill of 2013 (the Valuation Bill) – in combination with the Expropriation Bill of 2013 (the Expropriation Bill) and the Restitution of Land Rights Amendment Bill of 2013 (the Restitution Bill) – is likely to have on effective progress in land reform.

A key purpose of the Valuation Bill is to speed up land reform. However, the main obstacle to success in this regard is not the willing seller/willing buyer principle the Bill seeks to circumvent but rather a lack of capacity within the Department of Rural Development and Land Reform. In addition, between 50% and 90% of land reform projects implemented to date have failed, largely because the Government has omitted to provide adequate support to emergent farmers. If land reform is now to be speeded up by using the new 'valuer general' to decide on the compensation payable – rather than by addressing the key obstacles to its success – the result (as Tozi Gwanya, then director general of land affairs, warned in 2007) will be more 'assets dying in the hands of the poor'.

In providing a supposed 'quick fix' that bypasses the real challenges, the Valuation Bill is likely to be more of a hindrance than a help to successful land reform. In addition, the Bill governs not only land and other immovable property but also 'rights in or to property', along with all types of movable property. In combination with the Expropriation Bill, it thus paves the way for hundreds of government departments, municipalities, and other organs of state to expropriate both land and other property for less than adequate compensation.

In addition, the Valuation Bill empowers the State to proceed with expropriation irrespective of any dispute over the compensation payable. Thereafter, expropriated owners who object to the compensation offered by the State will have to follow complex and time-consuming objection and review procedures before they can apply to the courts to decide on a different measure of compensation. In practice, this means that the option of applying to court for this relief will be confined to those with deep pockets – the relatively few who, despite the loss of their property to the State and a lengthy review process – can still afford the high costs of lengthy litigation. In addition, *ex post facto* (after the fact) relief of this kind is contrary to Section 25 of the Constitution (the property clause) and unlikely to pass constitutional muster.

In combination with the Expropriation Bill, the Valuation Bill will encourage the use of expropriation as a first, rather than a last, resort. No matter how sparingly the Government may now intend to use its new powers under these Bills, once they have been put on to the Statute Book there will be little to prevent state agencies from resorting to them ever more often.

The mere risk of this will be enough to unsettle the property rights of all South Africans. This in turn will deter investment, undermine already faltering growth, and make it harder still to generate jobs and overcome poverty and inequality.

The content of the Valuation Bill

Definition of property

Property is defined in the Valuation Bill as including 'immovable property', 'rights in…such property', and 'any movable property which is contemplated to be acquired with the relevant immovable property'. Where property is intended for expropriation, 'property' has the same meaning as in the Expropriation Bill and thus extends from land to movable and other property. In addition, 'organ of state' is defined in the Valuation Bill as 'an organ of state that has been authorised to expropriate property in terms of legislation'. [Section 1, Valuation Bill] 'Legislation' will clearly include the Expropriation Bill once this is enacted into law.

These provisions will allow the expropriation not only of farmland, but also of farm equipment, vehicles, irrigation systems, and livestock at a value to be determined by a state official, the valuer general. In addition, though the Valuation Bill is being introduced by Gugile Nkwinti, minister of rural development and land reform (the minister), its provisions clearly extend beyond farms to land on which mines, factories, or other businesses may stand. These enterprises could also be expropriated as going concerns – especially as the Expropriation Bill expressly gives the power to expropriate to all national and provincial departments, South Africa's 283 municipalities, and hundreds of other organs of state. [Section 1, Expropriation Bill of 2013]

In combination, the Expropriation Bill and the Valuation Bill will greatly increase the scope for expropriation, along with the likelihood of the State's resorting to this drastic measure as a first, rather than a last, resort.

Office of the valuer general

The Valuation Bill establishes the 'office of the valuer general' and gives its head, the valuer general, an exclusive power to value property in cases of expropriation, land reform, or other acquisition (such as leasing) by the State. [Sections 2, 4, 5, 12, Valuation Bill] In this third instance – but only here – the valuer general must base his decisions on market value, determined on the willing buyer/willing seller principle. Elsewhere, other criteria will apply. [Section 12 (b), Valuation Bill]

The office of the valuer general is to be an 'autonomous' juristic person, which 'must be impartial' and 'exercise its powers without fear, favour, or prejudice'. However, it will also be 'accountable to the minister', while the valuer-general 'must be appointed by the minister'. [Sections 4, Valuation Bill] These provisions are a contradiction in terms.

New valuer general

The valuer general need not be registered as a professional valuer, for the Valuation Bill merely requires that he should have 'knowledge appropriate to the valuation of properties generally', a vague criterion. Though he must also have experience in public finance, public administration, or 'legal and constitutional matters affecting public administration', these qualifications are largely irrelevant to the professional valuation of property. [Sections 7, 10, Valuation Bill]

Though the deputy valuer general must be a registered professional valuer, it is unclear whether the valuer general's staff must generally also be so qualified. [Section 10(a), Valuation Bill] In addition, the valuer general will be able to authorise people with no professional qualifications or experience to assist in the valuation of property targeted for expropriation or land reform. [Section 10(1), Valuation Bill]

The Valuation Bill thus allows people with 'non-valuation qualifications, experience and competence' to assist in valuations to the extent that the valuer general considers necessary. [Section 10(2)(b), Valuation Bill] Whether these lay people will be able to override the views of a registered professional valuer is unclear, but the Bill suggests this might indeed be possible. Should land activists be authorised to assist in valuations, this could in practice lead to valuations inconsistent with the constitutional requirement of 'just and equitable' compensation.

Investigative powers

Authorised valuers – including land activists or other non-experts appointed to assist in any valuation – will have comprehensive investigatory powers. According to the Bill, they will be entitled, without the sanction of a court order, to: [Section 13, Valuation Bill]

- have 'full and unrestricted access to any document' relevant to the valuation;
- enter and 'inspect' any property during office hours;
- question the owners or occupiers of property; and
- demand the disclosure of information relevant to the evaluation, including that which is 'confidential, secret, or classified'.

These wide powers – which are also to be given to a new 'valuation review committee' (see below) [Section 33, Valuation Bill] – seem at odds with the guarantee of privacy in the Bill of Rights. They will also give property owners fewer rights to remain silent in the face of intrusive investigators than those enjoyed by people suspected of serious criminal conduct.

Criteria to be used in valuations

According to the Valuation Bill, the market value of property – as assessed on the willing seller/willing buyer principle (but without reference in general to prices paid by the State) – may be used as the basis for valuations solely where the property is *not* targeted for expropriation or land reform, but is being acquired by the State in other circumstances (by way of lease, for instance). [Sections 12, 1, Valuation Bill]

Where property has been 'identified for purposes of expropriation or land reform', different criteria will apply. According to the Valuation Bill, the value of such property must 'reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all the relevant circumstances'. Relevant factors identified in the

Valuation Bill include market value, along with the four 'discount' factors listed in the Constitution, these being: [Sections 12, 1, Valuation Bill]

- the current use of the property;
- the history of its acquisition and use;
- the extent of direct state subsidy in its acquisition or capital improvement; and
- the purpose of the expropriation.

However, the valuer general may develop further 'criteria' and 'policies' to be applied. In addition, the minister is empowered to make regulations laying down 'the criteria for the determination of the value of property' expropriated by the State. [Sections 5(2), 42(1), Valuation Bill] It remains uncertain what these criteria might be. Those laid down by the minister may simply be gazetted without reference to Parliament (though they will first have to be published for public comment). [Section 42(1) and (3), Valuation Bill]

According to the Valuation Bill, valuations carried out under the Local Government: Municipal Property Rates Act of 2004 are irrelevant in determining the value of property targeted for expropriation or land reform. [Section 4(2), Valuation Bill] This means that property owners cannot use higher municipal valuations to substantiate their claims for higher expropriation values. ['Property Valuation Bill', *The Contemporary Gazette*, in Institute of Directors, *IoD Direct Law* Volume 8 Issue 9, 28 May 2013, p10]

Valuation reports

The authorised valuer (within the office of the valuer general) who carries out any particular property valuation must prepare a 'valuation report'. This must reflect 'an opinion or conclusion on the valuation…of the property…and include all relevant information, including, where applicable, the current use of the property, the history of the acquisition and use of the property, the market value of the property, and an explanation on how a purchase price…was determined'. [Section 15, Valuation Bill]

Objections to valuations

Any person who 'has a direct interest in a particular valuation conducted by an authorised valuer' may lodge an objection with the office of the valuer general. This objection must be in writing, and must be lodged 'within 30 days after having received the outcome of the valuation'. [Section 18, Valuation Bill]

According to the Valuation Bill, an owner facing expropriation may thus 'dispute the valuation' arrived at by the valuer general. However, 'that dispute may not be used to delay, postpone or in any other way frustrate either…the expropriation…of the property in question…or [where appropriate, its] restitution' to a land claimant. [Section 5(4), Valuation Bill]

These provisions must be read together with the Expropriation Bill, which allows the State to take both ownership and possession of property by notice to the owner and before it pays any compensation. [Sections 9, 10 and 18, Expropriation Bill] In combination with the powers thus given to the State, Section 5(4) of the Valuation Bill will in practice make it difficult for expropriated owners who have lost their property to the State – and with it, often, their main means of livelihood – to object to the compensation proposed by the valuer general.

The valuer responsible for the particular valuation must 'promptly' (no time limit is laid down) decide on the objection, adjust the valuation if he thinks it necessary, and provide written reasons for his decision. [Section 18(3) (4), Valuation Bill]

Review of valuation decisions

If the objector remains dissatisfied, he cannot immediately approach the courts for relief. Instead, he may apply within 30 days for a review of this decision by a 'valuation review committee' (the review committee), giving his 'motivation and reasons for the review application'. [Section 19(1), Valuation Bill]

Short period for application

The 30-day period in which an objector must apply to the review committee is short and may not pass constitutional muster.

In 2009, in *Stefaans Conrad Brummer* v *Minister of Social Development and others*, the Constitutional Court ruled that certain 30-day time periods in the Promotion of Access to Information Act of 2000 were unconstitutional. Said the court: 'Before an application can be made to court, a person must take steps that require adequate and fair opportunity to consider the reasons given for a [decision], legal advice on whether an application is likely to be successful, and the raising of money for litigation.' [*Media Summary*, CCT 25/09, 13 August 2009; *IoD Direct Law*, p15]

Judge Sandile Ngcobo thus struck down the relevant provisions and ordered Parliament to enact legislation prescribing time limits that were consistent with guaranteed rights. In the interim, pending the enactment of appropriate legislation, the Constitutional Court ruled that a person wanting to challenge the refusal of access to information should be allowed 180 days in which to do so. [*Business Day* 14 August 2009]

The *Brummer* case is relevant here too, for in deciding whether to apply to the review committee an expropriated owner needs time to weigh the valuer's decision and the reasons for it, take legal advice on whether an application to the review committee is likely to succeed, formulate the 'motivation and reasons' for his review application, and raise funds for counsel to represent him, if he so wishes. [Section 35(2), Valuation Bill] Hence, the *ratio decidendi* of the Constitutional

Court judgment in *Brummer* indicates that the 30-day period in the Valuation Bill is too short to pass constitutional muster.

Insufficient autonomy for the review committee

The review committee is to be appointed by the minister. [Section 21(2), Valuation Bill] Members will hold office for a five-year term, but will be eligible for re-appointment by the minister. [Section 23, Valuation Bill] The minister will determine 'the conditions of appointment' of the members of the review committee, including their remuneration. [Section 24(1), (3), Valuation Bill]

Members of the review committee will effectively also be subject to removal from office at the instance of the minister. Under the Valuation Bill, the minister may remove a member only for 'misconduct, incapacity, or incompetence', and after 'an investigating tribunal' has made a finding to that effect. However, since the investigating tribunal is also to be 'appointed by the minister', it is unlikely to have sufficient independence from him. In practice, this will leave the power to remove committee members largely in the hands of the minister – and further undermine the autonomy of the review committee.

Also likely to erode the committee's autonomy is a further provision in the Valuation Bill empowering the minister to second as many of his departmental staff as he considers necessary to 'discharge the work of the review committee'. Though these staff members will be appointed 'after consultation' with the review committee, this form of words allows the minister to ignore the committee's views. [Section 29(1), Valuation Bill] In addition, such staff will remain employees of the minister's department and will be obliged to take instruction from both the minister and his director general.

The minister will also be responsible for appointing 'a suitable staff member' from his department to serve as the registrar of the review committee. The registrar is to carry out his functions 'subject to the directions of the review committee', [Section 29 (1) and (2), Valuation Bill] but will nevertheless remain a departmental official answerable to the minister.

Though the Valuation Bill provides that members of the review committee must carry out their duties 'in good faith and without fear, favour or prejudice', [Section 25(1)(a), Valuation Bill] the review committee will lack an essential institutional objectivity. As the Constitutional Court has made clear (in striking down aspects of the legislation establishing the Directorate for Priority Crime Investigation, commonly known as the 'Hawks'), an institution is unlikely to act independently if it is 'insufficiently insulated from political influence in its structure and functioning'. Institutions which are called upon to act 'without fear, favour, or prejudice' must thus have security as regards remuneration and against the dismissal for their members. They must also be shielded from ministerial control, 'hands-on supervision', and potential

interference. [*Glenister* v *President of the Republic of South Africa and others*, Case CCT48/10, paras 208, 220-229, 230-231, 234-235] In addition, members of a committee hand-picked by the minister are unlikely to meet the further need for individual objectivity.

Inadequate procedural safeguards

The review committee will in practice function under significant ministerial control. It will also be able to 'determine its internal procedures' for dealing with review applications. [Section 30, Valuation Bill] This could raise further procedural hurdles to fair assessment and adjudication – especially as the committee will be empowered to close its meetings to the public 'when deliberating on issues before it'. [Section 28(3), Valuation Bill]

The way in which the review committee is to function thus places it in breach of the right to 'just administrative action' in Section 33 of the Constitution. Under the Constitution, administrative action (which includes the decisions of the review committee) must be lawful, reasonable, and procedurally fair. The Valuation Bill contains no safeguards to ensure that these requirements are fulfilled, while the provisions it includes suggest that they will not in fact be met. The constitutional requirement of procedural fairness, for one, means that decisions should be made in public (not behind closed doors) and that no one should be a judge in his own cause (*nemo judex in sua causa*), whereas the review committee will be appointed by the minister and is likely to function at his bidding.

Possibility of a 'non-professional' majority

The review committee must comprise: [Section 21, Valuation Bill]

- a chairman, who must have 'a South African legal qualification and sufficient South African experience in the administration of justice';
- not fewer than four other members, of whom three must be professional valuers; and
- a person with 'non-valuation qualifications, experience and competence', if 'the circumstances so require'.

A majority of the review committee's members constitute a quorum. Decisions are made by a simple majority of the members of the committee, while the chairman (in the event of an equality of votes) also has a casting vote. [Section 31, Valuation Bill]

Assuming the review committee has six members (a chairman, four others, and a person with 'non-valuation qualifications', only three out of the six need be professional valuers. Should the committee be evenly divided, the chairman (who himself need not be a professional valuer), will have a casting vote.

Decisions of the review committee

According to the Valuation Bill, the review committee may 'confirm or adjust' the earlier decision of a valuer. It must then 'inform the objector… of its decision', along with the original valuer, any other interested party, and the director general of rural development and land reform. [Section 32, Valuation Bill]

The review committee is *not* obliged to give reasons for its decision, which also contradicts the constitutional right to just administrative action. Nor is any time limit laid down within which the review committee must decide on an objection. In addition, according to the Valuation Bill, the review committee's decision is 'final and binding on the parties and subject only to review by a court of law'. [Section 32(2), Valuation Bill]

Court review of the review committee's decision

In stating that the decisions of the review committee are subject to court review (but are otherwise 'final and binding'), the Valuation Bill is genuflecting in the direction of Section 25 of the Bill of Rights. Since this clearly requires that the amount of compensation payable on expropriation must either be agreed by those affected or 'decided or approved by a court', the Valuation Bill would undoubtedly be unconstitutional if it did not allow for court review.

In practice, however, the option of applying to court for a review will be available only to expropriated owners with deep pockets – the few who, despite the loss of property which may be their sole source of income – can afford not only a lengthy process of initial objection and further review but also the high costs involved in going to court thereafter.

The Valuation Bill unreasonably and unjustifiably limits the guaranteed right of access to court contained in Section 34 of the Bill of Rights. The *ex post facto* (after the fact) remedy it accords the expropriated owner is also too limited to pass constitutional muster.

Unconstitutionality of the Valuation Bill

Several provisions of the Valuation Bill seem inconsistent with the Constitution, including:

- the 30-day time limit for review applications,
- the conflict between the right to administrative justice and the way in which the review committee is to be established, hear objections, and hand down its decisions without giving reasons for them; and
- the way in which the right of access to court is restricted by requiring expropriated owners first to go through flawed and time-consuming objection procedures and review applications, which themselves infringe the right to administrative fairness.

More seriously still, the whole thrust of the Valuation Bill is in conflict with the property clause in the Bill of Rights. This allows the State to expropriate property, but only if the particular taking is authorised by a law of general application and (objectively assessed):

- is not arbitrary,
- serves public purposes or the public interest, and
- is accompanied by the payment of compensation which is not only 'just and equitable' in all the circumstances but has also been 'decided or approved by a court'.

The purpose of the Valuation Bill, in conjunction with the Expropriation Bill, is to allow the State to circumvent these constitutional requirements. As Mr Nkwinti, has indicated, his department's aim in introducing the valuer general is to speed up expropriation by side-stepping the courts. According to Mr Nkwinti, when the State tried to expropriate in the past, 'things would go to court and get contested and take a long time'. By contrast, the advantage of an institution like the valuer general is that it will 'make decisions quickly'. [*The New Age* 12 October 2012]

In combination with the Expropriation Bill, the Valuation Bill seeks to empower the State to expropriate property of all kinds by notice of expropriation to the owner –and without first obtaining a court order confirming (where the matter is disputed) that the core requirements for a valid taking of property by the State (as set out above and in Section 25 of the Bill of Rights) have been met.

The Valuation Bill, in particular, seeks to limit the jurisdiction of the courts in deciding the compensation due on expropriation by providing that the office of the valuer general – a state official appointed by the minister – is 'the only institution responsible for the valuation of property where…an organ of state is a party or has an interest, including cases of expropriation or acquisition…for purposes of land reform'. [Section 5(1), Valuation Bill]

In addition, the Valuation Bill seeks to limit access to the courts by barring the expropriated owner from seeking court review of the valuer general's decision until a flawed process of initial objection and subsequent review has been completed.

In combination, the Valuation Bill and the Expropriation Bill seek to give the Government the power to take ownership and possession of property by notice of expropriation to the owner and in return for compensation decided by a state official, rather than the courts. The Bills seek to allow the State to seize property of all kinds whenever it so chooses, while putting the onus on the expropriated owner – who has already lost ownership and possession of what might be his home or sole source of livelihood – to try thereafter to recover his property, or obtain a more adequate measure of compensation for it, on the basis that the State has acted unlawfully.

However, even our common law has long resisted the notion that property – including property that points to the commission of a crime – can simply be seized by the State without a court order.

Property is important in itself and as a facet of liberty. Our law has long protected the integrity of both person and property, providing that these can be invaded only by consent or by court order. Hence, the requirement for arrest and search warrants, and the need to obtain a court order before evicting a tenant.

The law is particularly opposed to invasions amounting to self-help. This protection is especially important when the State seeks to act in this way, since it is a bearer of power wholly disproportionate to the puny strength of the subject.

The integrity of the person is manifestly protected in this way under the Constitution, and the integrity of property should benefit from comparable protection.

Ex post facto remedies of the kind that both the Expropriation Bill and the Valuation Bill provide are inadequate because harm is done in the interim and people generally lack the means to reclaim lost assets or their full value.

The Valuation Bill's tacking on of an *ex post facto* right for expropriated owners to approach the courts to decide on a different measure of compensation well after both ownership and possession have passed to the State is not enough to bring the measure into line with the Constitution.

The Valuation Bill also ignores Section 26 of the Constitution, which prevents individuals from being evicted from their homes without a court order confirming that this is just and equitable in all the circumstances. In instances where the property to be expropriated includes a person's home, this constitutional requirement must be met – not treated as if it did not exist.

Overall, the Valuation Bill is unconstitutional in several of its key provisions as well in its overall thrust. It should thus be withdrawn in its entirety.

No need for the Valuation Bill

According to the explanatory memorandum on the Valuation Bill, the measure is necessary because 'escalating land prices have contributed significantly to the slow pace of land redistribution' and raised questions about 'the need for greater government intervention, including more willingness to use expropriation'.

However, this justification is misleading, for other factors – including the State's failure to support emerging farmers, along with incompetence and corruption within Mr Nkwinti's department – are primarily responsible for the failures of land reform.

The Government has also failed to acknowledge how much land is already in the hands of black South Africans. According to the State's own provisional audit of the land it owns, 17m hectares (14%) of land within the country is owned by national departments, provincial departments, and municipalities, while some 1.1m hectares under state control has yet to be categorised. But this leaves out of account the further 17m hectares of land held in communal ownership by traditional leaders, mainly in former homeland areas. This was always regarded as part of the State's land in the apartheid era and must be similarly regarded now. If this is taken into account, the amount of land in state ownership rises to 34m hectares or 27% of the total. In addition, some 7m hectares of privately-owned land has already been transferred via restitution or redistribution, while at least the same amount again of privately owned land has been bought by black South Africans on the open market since 1991, when the Land Acts were repealed. [2012 *Survey*, pp602, 604, 598] On this basis, the amount of land in black ownership has already risen to 48m hectares (out of 125m hectares) or 38% of the total.

Had the ruling African National Congress (ANC) carried out the comprehensive audit of both state and private land which it resolved in December 2007 at its national conference in Polokwane (Limpopo) to complete within 18 months, the extent to which land is already in the hands of black South Africans would have become apparent. Instead, the ANC often continues to aver that 80% of land remains white-owned, when this is clearly not the case. Moreover, based on this flawed assessment, the ANC resolved at its most recent national conference at Mangaung (Bloemfontein) in December 2012 to speed up land reform by 'replacing the willing buyer/willing seller with the "just and equitable" principle in the Constitution'. The ruling party also decided to 'expedite the promulgation of the Expropriation Act'. In combination, these resolutions suggest that the Government will no longer negotiate for the purchase of land but will instead expropriate it in return for as much (or little) compensation as it considers fair. [ANC, 53rd National Conference Resolutions, http://www.anc.org.za/docs/res/2013/resolutions53r.pdf]

However, according to organised agriculture:

- the willing buyer/willing seller principle has long been ignored in practice, the State generally paying only around 60% of market value and then pushing farmers into accepting this; [*Farmer's Weekly* 28 October 2011] while
- delays in land reform are large due to poor administration and a lack of capacity in the land department.

In addition, between 50% and 90% of all land reform projects have failed, the recipients of formerly successful farms failing to produce any marketable surplus. [*Business Report* 29 June 2011] Such failure stems from a lack of farming experience, a shortage of capital, inadequate mentoring and support by the land department, and the difficulty of joint decision-making in the many instances where land has been transferred to communities rather than individuals. It also means (writes journalist Stephan Höfstatter) that the Government, 'by its own admission, has

spent billions in taxpayers' money to take hundreds of farms out of production, costing thousands of jobs and billions more in lost revenue'. [*Business Day* 12 November 2009]

As long ago as November 2007, the then director general of land affairs and former chief land claims commissioner, Tozi Gwanya, expressed deep concern about what was happening to land after it had been transferred. He also warned that the current targets for land delivery were too steep, saying: 'If we are to give another 25% of our agricultural land to the previously disadvantaged, we must ensure they can participate in the commercial agricultural economy.' He urged that new targets be set – and that these should reflect not simply the quantity of land transferred but also the number of jobs created, the amount of income earned by beneficiaries, and the productivity of land following transfer. There was little point in speeding up land reform, he said, if the country then 'ended up with assets dying in the hands of the poor'. [Anthea Jeffery, *Chasing the Rainbow: South Africa's Move from Mandela to Zuma*, South African Institute of Race Relations, Johannesburg, 2010, p291]

Mr Gwanya's deputy, Mdu Shabane, added that some beneficiaries of land reform were now 'worse off than before because they lacked the skills and resources to unlock the potential of the soil in a profitable and sustainable manner'. He added: 'We will be wasting a precious resource by indiscriminately settling people on arable land simply for the sake of transformation.' [John Kane-Berman, 'Bad-faith Expropriation Bill not grounded in South Africa's land realities', *Fast Facts*, No 5, May 2008, p7]

Similar concerns have since been voiced by Stone Sizani, chairman of the portfolio committee on rural development and land reform. In February 2010 Mr Sizani said it was 'encouraging' that the Government was now budgeting to provide increased financial support to land reform beneficiaries after farms were handed over. This was 'a far cry' from what had happened in the past, when targets for the transfer of land were 'based on the heart – not on facts'. The Government now sought 'a more pragmatic approach', he went on, for it wanted to focus on job creation, improved livelihoods, and ensuring that transferred farms continued to produce food. It also wanted to avoid 'throwing money down the drain by buying more farms that aren't used productively'. [*Business Day* 18 February 2010]

Also relevant is the extent of the demand for farming land. Commentators have previously warned that the 30% target set by the Government might overstate demand, for South Africa is urbanising and many people are more interested in obtaining jobs in towns and cities than in acquiring land to farm. Mr Nkwinti seems also to have recognised the salience of this concern, for in April 2013 he finally acknowledged that few claimants wanted land. Said Mr Nkwinti: 'We thought everybody when they got a chance to get land, they would jump for it. Now only 5 856 have opted for land restoration.' People had chosen money instead because of poverty and unemployment, but also because they had become 'urbanised' and 'de-culturised' in terms of

tilling land. 'We no longer have a peasantry; we have wage earners now,' he said. [*Mail & Guardian* 5 April 2013] These figures, combined with those provided by the Presidency in December 2011, show that 92% of successful land claimants – some 70 370 out of the 76 230 whose claims have been settled [2012 *Survey*, p600] – have opted for financial compensation rather than for land to farm.

The Valuation Bill ignores the important reservations thus expressed by senior figures in the ANC and the DRDLR. Instead, it suggests a determination to turn expropriation into the State's principal instrument for land reform, irrespective of the need for this drastic remedy or its likely negative consequences. Yet the Valuation Bill, in summary, is unnecessary as:

- the 30% target for black land ownership has already been reached;
- 92% out of 76 230 successful land claimants (far more than an adequate representative sample of the total population) have opted for cash instead of land to farm;
- the prices paid by the State for land have long been well below the market values the willing seller/willing buyer principle would require;
- the slow pace of land reform is mainly the result of government ineptitude; while
- between 50% and 90% of land reform projects have failed, prompting key figures within the ANC to question the benefits of speeding up land transfers until the reasons for this high failure rate have been overcome.

Ramifications of the Valuation Bill

The negative effects of the Valuation Bill are compounded by the fact that the measure does not apply solely to farmland (as the explanatory memorandum misleadingly suggests) but in fact applies to land in general – as well as to all other types of property, whether movable, intellectual, or intangible.

The ambit of the Valuation Bill is so broad as to make its overall consequences impossible to foresee. All that is certain is that the Valuation Bill, in combination with the Expropriation Bill, will unsettle the property rights of all South Africans. This will make it much harder for the country to attract the direct investment, both domestic and foreign, it so urgently requires to raise the average annual rate of economic growth to 5.4%, as the National Development Plan (NDP) envisages. This, in turn, will make it much harder to generate the 11m new jobs for which the NDP has called. This is likely to leave millions of South Africans mired in destitution and make it much harder for the ANC to attain its objective of overcoming the 'triple evils' of poverty, inequality, and unemployment.

The Valuation Bill is thus also in conflict with the NDP. Not only does it undermine its key targets on growth, poverty, inequality, and unemployment but it further contradicts the NDP's emphasis on tenure security as vital to the success of both existing farmers and new entrants. Yet the NDP is supposed to be the ANC's 'overriding policy blueprint' for the next 20 years, as

President Jacob Zuma has recently reiterated – and needs to be upheld, rather than undermined. This too provides good reason not to proceed with the Valuation Bill.

Most saliently of all, lawmakers cannot ignore the Constitution, which states in Section 2 that 'law or conduct inconsistent with it is invalid' and that 'the obligations imposed by it must be fulfilled'. As already noted, the Valuation Bill undermines privacy rights and contradicts the rights of access to court and just administrative action. In addition, its whole thrust is in conflict with the property clause in the Bill of Rights, which it attempts to bypass rather than uphold. For this reason, above all others, the Valuation Bill needs to be withdrawn in its entirety.

South African Institute of Race Relations NPC **21st June 2013**