



GTAC/CBPEP/ EU project on employment-intensive rural land reform in South Africa:
policies, programmes and capacities

Thematic study

The strengths and weaknesses of systems of land tenure and land administration in South Africa and the implications for employment intensive land reform

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Abbreviations and acronyms

ACLA	Advisory Commission on Land Allocation
AFRA	Association for Rural Advancement
CBPEP	Capacity building programme for employment promotion
CC	Close Corporation
CLRA	Communal Land Rights Act
CLTB	Communal Land Tenure Bill
CPA	Communal Property Association
CPI	Communal Property Institution
CRLR	Commission on Restitution of Land Rights
DLA	Department of Land Affairs
DRDLR	Department of Rural Development and Land Reform
ESTA	Extension of Security of Tenure Act
GATT	General Agreement on Tariffs and Trade
GM	Genetically Modified
GTAC	Government Technical Advisory Committee
HLP	High Level Panel
ILO	International Labour Organisation
IPILRA	Interim Protection of Informal Land Rights Act
ITA	Ingonyama Trust Act
KZN	KwaZulu-Natal
LCC	Land Claims Court
LRAD	Land Reform for Agricultural Development
LRMF	Land Rights Management Facility
LTA	(Land Reform) Labour Tenants Act
LRB	Land Rights Bill
MPRDA	Minerals and Petroleum Resources Development Act
NDP	National Development Plan
PAP	Presidential Advisory Panel
PLAAS	Institute for Poverty, Land and Agrarian Studies
PLAS	Proactive Land Acquisition Strategy
PTO	Permission to Occupy
RDP	Reconstruction and Development Plan
SADT	South African Development Trust
SAHRC	South African Human Rights Commission
SCA	Supreme Court of Appeal
SLAG	Settlement and Land Acquisition Grant
TKLB	Traditional and Khoisan Leadership Bill
TLGFA	Traditional Leadership and Governance Framework Act
TRANCRAA	Transformation of Certain Rural Areas Act
WWF	World Wildlife Fund

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Executive summary

The overall aims of this thematic study are to identify the strengths and weaknesses of existing systems of land tenure and land administration in South Africa, and to explore the implications of these strengths and weaknesses for the promotion of employment-intensive land reform.

The study sets out to:

- to describe and characterize the range of land tenure systems found in South Africa at present, with a particular focus on the security of tenure of those who have obtained access to land through land reform and those living in communal areas, where most smallholder farmers are located;
- to describe the character of systems of land administration in South Africa at present and to assess their strengths and weaknesses, with a particular focus on rural areas;
- to assess the degree to which the tenure reform programme undertaken since 1994 has been effective in securing the land rights of black South Africans;
- to summarize and assess recent policy proposals for tenure reform and land administration emanating from the High Level Panel of Parliament and the Presidential Advisory Panel on Land Reform;
- to examine the implications of this assessment for a programme of land redistribution aimed at supporting smallholders and small-scale black commercial farmers and promoting employment-intensiveness, with a focus on the institutional and capacity requirements.

The study seeks to address seven interlinked research questions:

- 1. Through what systems of land tenure do farmers in South Africa hold land rights, and what are the key features of these systems (with a particular focus on smallholder and small-scale black commercial farmers, including land reform beneficiaries)?**

The study reviews a wide range of tenure settings and sets out the diverse ways in which land tenure rights are determined and secured across the landscape.

Farmers	Numbers	Key features	Tenure regime
Top 20% of large-scale commercial farmers on private land; almost all white	7000	Sophisticated, specialised, capital intensive farmers, reducing the export of Agro processing and large retailers; produce bulk of produce perhaps as much as 80%	Private land owned by individuals, companies and family trusts
Medium to large-scale commercial farmers on private land; almost all white	9000	some farmers succeed, some struggle, some are unable to turn a living from farming alone	
Small to medium scale commercial farmers on	19,000	many cannot survive from farming alone; includes hobby farmers	

Farmers	Numbers	Key features	Tenure regime
private land; mostly white, some black			
Small-scale black capitalist farmers in communal areas and in land reform context	5000 to 10,000	Many farmers earn income from off farm incomes and businesses in addition to farming	In communal areas and Act 9 reserves land rights held through a mix of historical quitrent and PTO certificates or leases issued by Ingonyama Trust
Market-oriented black smallholder farmers in communal areas and landform contexts supplying tight value chains (e.g. under contract)	5000 to 10,000	Many grow fresh produce and irrigation, others are livestock producers, and a few engage in dryland cropping	Increasingly land occupation in former communal areas is undocumented
Market-oriented black smallholder farmers in communal areas and landform contexts and urban areas supplying loose value chains	200,000 to 250,000	Many grow fresh produce and irrigation, and others are livestock producers. Few depend wholly on farming	In land reform contexts land access and use rights derive from membership of a CC, a CPA or as a beneficiary of a Trust. In urban areas livestock producers often graze informally and lack access to land
Subsistence oriented smallholder farmers growing food for themselves, and selling occasionally	2 to 2.5 million	Most crop production takes place in Homestead Gardens, some of which are quite large. Occasional livestock sales by some	Commonage users and people who have acquired land through PLAS notionally acquire rights through leasehold, although in many instances no leases are issued

The study notes that the land rights of at least 60% of the South African population remain off register, unrecorded and potentially insecure. These include the rights of between 17 and 18 million people living in former bantustan areas, together with workers and dwellers on farms and a wide range of urban residents in townships and informal settlements.

The study also acknowledges that the rights of many people who have obtained access to land through the land reform programme also remain insecure for different reasons. In the former communal areas land rights have been protected by the Interim Protection of Informal Land Rights Act (IPIIRA) which specifies that the land rights holders cannot be deprived of their rights to land without their consent. However, the recent promulgation of the Traditional and Khoisan Leadership Act is widely regarded as fundamentally eroding the limited protections provided by IPIIRA and renders the rights of people living in communal areas vulnerable to land grabs and dispossession.

The study also highlights the failure of the state to adequately support landholding entities established to hold land on behalf of beneficiaries where groups of people have obtained land through different land reform sub programmes. With regard to current land redistribution policy, the state acquires and retains ownership of land and leases it to selected beneficiaries. However, evidence suggests that many people on this land either do not have leases, or their leases have expired. There are also indications that the determination of rental calculations are inconsistent, creating a number of anomalies and challenges for the lessees.

2. How secure are these land rights, in both law and in practice, and in what ways do different tenure systems either support or constrain farmers in their agricultural production?

The relative insecurity of land rights varies from substantially from setting to setting. Even though legal protection may be thin in many former communal areas, living customary law and associated social norms generally make it difficult for people to be dispossessed. That said, there are also numerous circumstances where powerful figures have run roughshod over custom and practice and entered into land deals which dispossess or marginalise rural people and exclude them from resource benefits. In large areas under the control of the Ingonyama Trust, rural citizens are being reduced to tenancy on land which they have occupied for generations. Rural land rights are shown to be particularly vulnerable where mining deals are planned. The breakdown in land administration is also thought to be one of the contributory factors to the decline of crop farming on arable land in former bantustan areas.

3. How is land administered in the rural areas of South Africa at present, in pursuit of what kinds of objectives? Are these objectives relevant for smallholder and small-scale black commercial farmers? Are current land administration systems effective in supporting land rights holders, as well as wider developmental processes, and if not, why not?

It is widely acknowledged that in large parts of the country land administration has collapsed. This is particularly true in the former bantustan areas where old systems of permits granting permission to occupy permits not been replaced by any other form of recorded right. The failure of the Department of Land Affairs and its successor the Department of Rural Development and Land Reform to meet their constitutional obligations and pass legislation to ensure security of tenure has rendered many rural citizens vulnerable.

In the main, formal land use planning and control in many former bantustans has been abandoned, opening the space for localised informal land allocation and resource capture. On the 10 million ha of land acquired through the land reform programme, the land rights of beneficiary households remain opaque. Although the outer boundary of the land is recorded and the property is held by either a Communal Property Association or a Trust (in the case of Restitution and the early forms of land redistribution) the rights of individual members to use the land and the confidence to make investment remain largely unspecified and unsupported.

The leasehold system which underpins PLAS remains poorly supported and administered. This allows officials to manipulate land allocations, cancel leases and displace lessees with other more favoured individuals. The lack of clarity and transparency in the system has opened the door to elite capture and facilitated asset stripping on properties acquired by the state.

4. What are the key strengths and weaknesses of current systems of land tenure and land administration in South Africa, from the perspective of smallholder and small-scale black commercial farmers?

Poorly supported land holding entities and the failure to invest in the development of local land rights management systems has prevented optimal utilisation of land acquired through land reform. The reluctance to subdivide land has privileged joint ventures with 'strategic partners' – many of whom end up by being the primary beneficiaries of land reform as currently practiced. The critical functions of land administration have been overlooked and frequently conflated with tenure security. These combine

- juridical functions to allocate and adjudicate rights to land, delimit and register land parcels
- regulatory functions to determine land use controls
- fiscal functions related to rates, taxes and revenue collection
- enforcement functions to ensure that land users to fulfil their obligations and responsibilities and abide by relevant regulations.

While many smallholders may benefit from improved tenure security their livelihoods may depend on malleable systems of land administration, while systems that seek to collect revenue and enforce regulations may be inimical to smallholder survival.

5. What new directions for tenure reform have been proposed over the past two years by the High Level Panel of Parliament and the Presidential Advisory Panel on Land Reform, and how useful and relevant are these for smallholder and small-scale black commercial farmers?

The main recommendations relating to land tenure can be divided into two parts – those that focus on the rights of people living in the former bantustans, and those that focus on farm workers, dwellers and labour tenants. The HLP recommended that:

- The Communal Land Tenure Bill should be rejected;
- IPILRA should be respected and enforced by the DRDLR, by mining companies and traditional leaders. It should be amended and made permanent;
- Laws that have been interpreted to aid land grabs (the Traditional leadership and Governance Framework Act (TLGFA), the Minerals and Petroleum Development Act (MPRDA) and the Ingonyama Trust Act (ITA) need to be made explicitly subject to IPILRA;
 - The Ingonyama Trust Act should be repealed (or at least substantially amended) to bring KZN in line with national land policy, and secure land tenure for communities and residents concerned.
- A system of land records should be established that takes into account existing nested or relative rights.

HLP recommendations for farm workers and labour tenants were that:

- The ESTA Amendment Bill should be amended.
- The LTA should be amended to ensure that restitution claims are not prioritised over labour tenant claims;
- ESTA and LTA need to be properly enforced;
- A National Register of evictions should be set up, to record the off-register rights of those still living on farms.
- DRDLR must prepare a comprehensive, properly costed and funded implementation plan for the LTA;
 - Parliament should carefully monitor the DRDLR's progress on implementing the LTA.

A key recommendation in the HLP report is the enactment of a general Land Reform Framework Act and a Land Records Act. The HLP report considers the enactment of a Land Records Act as a vital element in providing the necessary institutional power to give effect the rights-based tenure laws.

The Expert Advisory Panel on Land Reform and Agriculture (2019) identifies tenure insecurity as a key factor exacerbating overall inequalities in land and contributing to the economic exclusion of the majority of South Africans with a particular focus on women and youth. The report proposes support for a mixed tenure model which accommodates a continuum of land rights from freehold and communal and which enables multilevel ownership arrangements.

The panel proposes a dedicated focus on land administration which it argues should be the fourth pillar of land reform. It recommends a separate tenure reform budget line be created, as already exists for restitution, so that support for land rights recordal, registration and administration is ring-fenced (Expert Advisory Panel: 87).

The panel calls on the President to assent to the Subdivision of Agricultural Land Act 64 of 1998 and sign it into law forthwith. "Further, the President should explicitly call on all organs of state to work together to expedite subdivisions of agricultural and non-agricultural land to make available smallholdings for poor people, for residential, business and productive processes. Subdivision of large holdings, for the purposes of land reform, is essential if it is to benefit the poor and contribute to a less concentrate and unequal pattern of landholding" (Ibid: 95).

6. What are the institutional and capacity requirements of effective tenure reform and land administration, with a particular focus on smallholder and small-scale black commercial farmers?

A series of legislative changes were introduced during the 1990s, using both approaches separately or combined. Moves to deracialise land law predated the transition to democratic government in 1994. Three decades later we see that the hierarchy of rights has endured, though in a less racialised form. Although the rights outside of the formal system are no longer determined by race, they do coincide to some degree with racial identities and norms, and to a large extent, poverty. The system of registration still defines formal property rights and no serious attempt has been made to record the majority of off-register rights that are managed according to a range of social norms. More recognition and support need to be given to systems that are best understood as 'social tenures' which are socially regulated by local norms rather than statutory rules.

Such rights are managed, usually locally or in families, according to norms and practices that differ from the regulatory framework of the Deeds Registry. Social tenures also recognise that different members of a community have access rights to various resources, the boundaries of which may change seasonally or to accommodate additional members.

These more flexible social and spatial relationships governing access to, and authority over land are odds with the Deeds registry rules that require clearly and accurately defined social and spatial units arranged in a one-to-one relationship. To change either of the two systems would be so fundamental as to change their very nature. Evidence has revealed that embedded social practices continue even after titles are issued, which renders the details on the title deeds inaccurate. The match between the information on the title deed and rights recognised on the ground widens further with the passage of time (Kingwill 2014 a, b, 2017).

South Africa has to invest in flexible land administration institutions and systems which are rooted in legal and normative pluralism and which can accommodate diverse systems of rights management. Currently there are no state institutions to record, administer, regulate, value and enforce rights, nor solve disputes and conflicts that arise across the landscape. These impact on smallholder producers who lack systemic support to clarify rights and facilitate transactions enabling secure access to land and resolve disputes. Currently the only way to settle land disputes and clarify rights is to approach the courts on the basis of Roman Dutch law. There are traditional courts ostensibly employing customary law, but these are rejected by many as authoritarian and gender unresponsive.

7. In designing an employment-intensive programme of land redistribution, what land tenure options should be offered to different types of beneficiary? What systems of land administration are required to oversee or support these tenure options, and how would current land administration systems need to be reconfigured to align with this objective?

The report highlights that in South African setting we need to distinguish between:

- land registration agendas as part of a narrow agenda to promote individual titling;
- land recordal and administration systems which form part of a broader socioeconomic rights initiative to:
 - secure and make transparent existing rights in land,
 - enable family tenure,
 - and assist vulnerable rightsholders whose property is off-register to protect their livelihood assets against arbitrary dispossession.

The table below proposes what needs to change to create tenure and land administration regimes which assist in securing accesses and registrable rights in land backed by systems of land administration which could contribute to developing an enabling environment for smallholder production in different settings.

Tenure setting	Tenure reform recommendations	Land administration recommendations
Former bantustans	Adopt the HLP recommendations to pass the Protection of Informal Land Rights Act to recognise beneficial occupation of land protect informal rights to land which are often shared and overlapping and governed by living customary law ensure that no person’s informal right to occupy land may be deprived without their consent protect those whose rights are off register and vulnerable paying particular attention to the land rights of women enable compensation for those deprived of informal rights in land	Train and resource independent facilitators to conduct land rights enquiries and facilitate democratic decision making Provide a public data base of all certificates of consent enabling deprivation of land rights approved in terms of PILRA to provide oversight over land deals Identify all the remaining paper-based PTO and quitrent land records in the former homelands, collate and digitise Rethink basic requirements for cadastral information and rights

Tenure setting	Tenure reform recommendations	Land administration recommendations
Ingonyama Trust	<p>Implement HLP and PAP recommendations to fundamentally amend or repeal ITA</p> <p>Protect the rights of people living on land administered by ITA against arbitrary deprivation and conversion to leasehold with a particular focus on the rights of women</p> <p>Refund lease payments levied by ITA</p>	<p>recordal in different settings across the continuum of land rights with special attention to communal tenure settings</p> <p>Pilot low cost, ‘good enough’ options to repurpose the cadastral and land records system to enable adequate description and registration of land rights in different settings across the continuum of land rights.</p>
Act 9/TRANCRAA Rural Areas	<p>Implement HLP and PAP recommendations to revitalise TRANCRAA process</p> <p>Clarify land rights and resolve disputes</p> <p>Clarify and support role of local municipality or communal property Association holding TRANCRAA land in the process of land rights recordal, management of local registers and rights transfers</p>	<p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p> <p>Develop institutional options for land rights recordal linked to spatial development planning and revenue collection at local municipal and district scales</p> <p>Specify the role and functions of traditional councils and land holding entities in local land administration, allocate budget and support capacity for this function</p> <p>Develop checks and balances that prevent corrupt and improper transactions in the land registry and dispossession of vulnerable rights holders</p>
Land acquired through community restitution claims	<p>Clarify and support role of local municipality or landholding entity holding restored land in the process of land rights recordal, management of local registers and rights transfers</p> <p>Develop and update registers of members and clarify individual rights in land – (residential sites, business sites in established settlements, grazing and arable rights.</p> <p>Clarify entry and exit procedures for membership</p> <p>Clarify member eligibility for a share of benefits from business enterprises that may be operated from the property</p> <p>Clarify member’s responsibilities to contribute to a pro rata portion of the property rates levied on the land,</p>	<p>Pilot low cost, ‘good enough’ options to repurpose the cadastral and land records system to enable adequate description and registration of land rights in different settings across the continuum of land rights.</p> <p>Develop processes and procedures for internal subdivision and the allocation of rights on subdivided land</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p> <p>Budget for, develop capacity and provide support for land rights administration by CPAs including an updated register of</p>

Tenure setting	Tenure reform recommendations	Land administration recommendations
	<p>together with other membership and service fees</p> <p>Clarify the liability of members for debts which may be incurred by the Association</p>	<p>members and the allocation of land use rights</p>
<p>Land transferred to large groups via land holding entities established through SLAG</p>	<p>Commission a research to review the status and sustainability of properties transferred through SLAG</p> <p>Agree responsibilities, procedures and assign capacity to wind up/liquidate failed projects and deregister defunct legal entities</p> <p>Develop procedures for subdivision of land and reallocation of rights on an ownership or leasehold basis</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes</p> <p>Include areas targeted for the creation of smallholdings within municipal spatial development frameworks</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p>
<p>Land transferred to land holding entities established through LRAD</p>	<p>Commission a research to review the status and sustainability of properties transferred through LRAD.</p> <p>Document and share lessons for land reform and land tenure</p> <p>Agree responsibilities, procedures and assign capacity to wind up/liquidate failed projects and deregister defunct legal entities where required</p> <p>Develop procedures for subdivision of land and reallocation of rights on an ownership or leasehold basis as may be appropriate</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes where appropriate</p> <p>Consider Act to enable retrospective endorsement of the title deeds of all land purchased through the land reform programme to give the state the right of first refusal to purchase land which comes up for sale</p>
<p>Land acquired through PLAS</p>	<p>Review the status quo with leases on 2200 farms purchased through this programme</p> <p>Revisit the State Land lease and Disposal Policy to review lease terms and options to own state land acquired through PLAS.</p> <p>Develop clear criteria for the allocation of farms in terms of this programme consistent with the principles in the proposed Land Reform Framework Act</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes</p> <p>Include areas targeted for the creation of smallholdings within municipal spatial development frameworks</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p>
<p>Farm workers and dwellers</p>	<p>Develop a clear policy framework to guide the implementation of section 4 of ESTA</p>	<p>Review and revise existing policy on farmworker housing and assess the appropriateness of the Operation Phakisa</p>

Tenure setting	Tenure reform recommendations	Land administration recommendations
	<p>Incentivise policy options which give access to land to farm workers and dwellers for cultivation and grazing by agreement with the landowner.</p> <p>Review policy for on and off-site settlement and make available tenure grants and dwellers to acquire land for housing and small-scale production</p> <p>Analyse the feasibility of delivering services to off-site settlements and the danger of creating rural poverty traps</p>	<p>proposals on the creation of ‘smart’ agrivillages.</p> <p>Develop policy and feasibility criteria for the establishment of rural agrivillages and hamlets.</p>
Labour tenants	<p>Appoint a Special Master</p> <p>Reconstruct the register of labour tenant claims</p> <p>Process claims</p> <p>Create clear guidelines for consultation around tenure arrangements on restored land and potential for subdivision of properties between different labour tenant families with pre-existing rights to the land</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes</p> <p>Include areas targeted for the creation of smallholdings within municipal spatial development frameworks</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p>
Commonage users	<p>Review the status quo with management and leases on municipal commonage purchased through this programme</p> <p>Revisit the commonage policy to review lease terms and the determination of user fees and responsibilities</p> <p>Develop clear criteria for the allocation of commonage use rights consistent with the principles in the proposed Land Reform Framework Act</p>	<p>Develop a register of municipal commonage land held by local and district municipalities</p>

Clearly it will require much more than security of tenure to reinvigorate land-based livelihoods in South Africa. While secure land rights provide an essential foundation for economic and livelihood opportunities, such rights also confer obligations. They make land rights holders visible to the state and to the payment of rates and taxes. In ‘grouphold’ contexts created by land reform recorded rights for households and individuals will come with responsibilities to contribute to the maintenance and upkeep of common property and shared infrastructure. The increase in overhead costs and related obligations associated with recorded and legally secure rights risks being unpalatable to poor and marginal households who may perceive an imbalance between costs and benefits and who would prefer accordingly to manage the risks and exploit the opportunities associated with informality and continued invisibility to the state. It will be crucial therefore to find a favourable balance between costs, responsibilities and tangible enhancement of opportunities and benefits.

“What people do with land is very complex, and not at all obvious. Let us not be too quick to suppose that we understand what is going on”.¹

1 Background

The CBPEP/GTAC Project: *Employment intensive land reform in South Africa: policies, programmes and capacities* aims to formulate a set of options for rural land reform in South Africa aimed at generating a large number of employment, self-employment and livelihood-enhancing opportunities through the promotion of small-scale agriculture. The anticipated project outputs include:

- formulating national policy guidelines on the promotion of employment intensive agriculture;
- designing programmes for implementation by national and provincial departments in conjunction with non-governmental partners;
- costing such programmes;
- conceptualizing the provision of relevant support services for those acquiring access to land in different settings, including provision of extension advice and support for marketing of produce.

1.1 Aims and objectives of this study

The overall aims of this thematic study are to identify the strengths and weaknesses of existing systems of land tenure and land administration in South Africa, and to explore the implications of these strengths and weaknesses for the promotion of employment-intensive land reform.

The specific objectives of the study are:

- to describe and characterize the range of land tenure systems found in South Africa at present, with a particular focus on the security of tenure of those who have obtained access to land through land reform and those living in communal areas, where most smallholder farmers are located;
- to describe the character of systems of land administration in South Africa at present and to assess their strengths and weaknesses, with a particular focus on rural areas;
- to assess the degree to which the tenure reform programme undertaken since 1994 has been effective in securing the land rights of black South Africans;
- to summarize and assess recent policy proposals for tenure reform and land administration emanating from the High Level Panel of Parliament and the Presidential Advisory Panel on Land Reform;
- to examine the implications of this assessment for a programme of land redistribution aimed at supporting smallholders and small-scale black commercial farmers and promoting employment-intensiveness, with a focus on the institutional and capacity requirements.

1.2 Research questions

The study seeks to address seven interlinked research questions:

¹ Ferguson, J. (2012). "How to Do Things with Land: A Distributive Perspective on Rural Livelihoods in Southern Africa." *Journal of Agrarian Change* 13(1): 166-174.

1. Through what systems of land tenure do farmers in South Africa hold land rights, and what are the key features of these systems (with a particular focus on smallholder and small-scale black commercial farmers, including land reform beneficiaries)?
2. How secure are these land rights, in both law and in practice, and in what ways do different tenure systems either support or constrain farmers in their agricultural production?
3. How is land administered in the rural areas of South Africa at present, in pursuit of what kinds of objectives? Are these objectives relevant for smallholder and small-scale black commercial farmers? Are current land administration systems effective in supporting land rights holders, as well as wider developmental processes, and if not, why not?
4. What are the key strengths and weaknesses of current systems of land tenure and land administration in South Africa, from the perspective of smallholder and small-scale black commercial farmers?
5. What new directions for tenure reform have been proposed over the past two years by the High Level Panel of Parliament and the Presidential Advisory Panel on Land Reform, and how useful and relevant are these for smallholder and small-scale black commercial farmers?
6. What are the institutional and capacity requirements of effective tenure reform and land administration, with a particular focus on smallholder and small-scale black commercial farmers?
7. In designing an employment-intensive programme of land redistribution, what land tenure options should be offered to different types of beneficiary? What systems of land administration are required to oversee or support these tenure options, and how would current land administration systems need to be reconfigured to align with this objective?

2 Key terms and concepts

This study hinges on the need for a clear understanding of the distinction between **land tenure** and **land administration** and the ways in which tenure (in)security and the presence/absence of coherent, affordable, citizen friendly, open systems of land administration either:

- enhance/undermine opportunities for employment intensive land reform
- enable/disable the emergence of dynamic systems of land-based production and distribution which enlarge livelihood opportunities and the social and economic well-being of poor households.

Manona et al (2018) reflect on the distinction between tenure and land administration.

2.1 Land tenure

Land tenure systems delineate how land is held, by whom and with what rights. They determine who can be on the land and the terms of their access, occupation and use. Tenure rights are mediated by nested social relationships customary law and statutes which clarify and limit individual and group rights and specify obligations. These set the terms through which individuals, groups or corporations hold and use land.

These terms can be analysed in terms of the breadth, duration and assurance of the rights in question.

- **Breadth** refers to the extent of the bundle of rights held in land, including the right to forbid others from exercising particular rights.
- **Duration** is the length of time that a given land right is legally valid - this has implications for short versus long term capital investments.
- **Assurance** implies that the rights have legal certainty for a specified duration.

The combination of these factors secures the land rights holder's entitlement to reap the benefits of labour or capital invested in the land

The rights associated with land tenure include:

- **Use rights** — the rights of a holder to utilise the land.
- **Transfer rights** — the rights of a holder to transfer their rights to someone else by means of sale, mortgage, leasing, renting or inheritance.
- **Exclusion rights** — the rights of a holder to exclude others from claiming use, access or transfer rights.
- **Enforcement rights** — legal, institutional and administrative provisions which guarantee and protect rights. (Feder and Feeny 1991)

2.2 Land Administration

Barry (1999) observes that land administration combines a number of operational systems, including:

- land registration system(s),
- cadastral surveying and mapping,
- land valuation and taxation regimes,
- building regulation administration,
- subdivision application and land development administration,
- land dispute and conflict adjudication.

Land administration is usually broken down into juridical, regulatory, fiscal and enforcement functions:

- The **juridical function** entails allocation of rights to land, delimitation of parcels, adjudication and registration (recording of rights).
- The **regulatory functions** comprise land use controls (all regulations).
- The **fiscal functions** are used to meet a range of economic and social objectives (e.g. revenue collection).
- The **enforcement functions** enforce users to fulfil their responsibilities and abide by relevant regulations.

As is detailed further below the recent report of the Presidential Advisory Panel has recommended that land administration be regarded as the fourth pillar/leg of land reform. This will require recognition of land administration systems as “a critical public good infrastructure” enabling implementation of “land policies in support of sustainable development and include institutional arrangements, legal frameworks, processes, standards, land information management and dissemination systems, and technologies required to support allocation, land markets, valuation, control of use, and development of interests in land”(Bennett, Tambuwala et al. 2013: 85).

2.3 Land tenure by numbers

According to Hornby et al. (2017) just under 60% of South African citizens hold land rights which are unrecognised by the formal property system. The table below provides an estimation the spatial settings where people's land rights are unrecorded and potentially vulnerable as there is no functioning land information management system designed give visibility to rights which are off-register.

Table 1: Off register rightsholders in different spatial settings across South Africa

Location/Category	No of people	% of SA Population
Communal areas	17 million	32.8%
Farm workers and dwellers	2 million	3.9%
Informal Settlements	3.3 million	6.3%
Backyard shacks	1.9 million	3.8%
Inner City Buildings	200 000	0.38%
Low Income Housing (RDP Houses) – no titles	5 million	9.6%
Low Income Housing with titles	1.5 million	3%
Total	30.72	59.7%

A large number of smallholder farmers and small-scale producers are to be found within the former bantustans and contemporary communal areas where land rights are increasingly uncertain. The recent signing of the Traditional and Khoisan Leadership Bill into law serves to erode the limited protections provided to rights holders in this context by the Interim Protection of Informal Land Rights Act. Although land reform projects do not feature in the list above, there is a strong argument that they should be included, as land in the earlier phases of land redistribution (SLAG and LRAD) and restitution is held by landholding entities such as Communal Property Associations and Trusts. However, these arrangements have often left the rights of individual members are undescribed and insecure. Likewise, lease arrangements entered into with the state for land acquired under the Proactive Land Acquisition Strategy (PLAS) remain insecure to arbitrary state action and administrative failure. With the inclusion of households acquiring land through land reform the percentage of the population with insecure or off register land rights rises to in excess of 60%.

3 Key features of smallholder tenure and land administration systems in different settings

In this section we examine how different tenure and land administration arrangements form part of a much wider array of forces which impact on smallholder and small scale black commercial producers in different spatial and agro-ecological settings, past and the present.

This, as Hay suggests, requires a “systematic investigation of the history of land, settlement, community and agriculture in a particular area over a long period of time, to show in depth how history relates to land reform policy” (Hay 2015: 17). This points to the need for an analytical framing that can span a wide range of contexts and which can provide a longitudinal perspective on how tenure (together with a range of other factors) influences local production activities.

3.1 Small-scale producers

in 2009 it was calculated that there were 2, 6 million black farming households based on statistics derived from South Africa’s Labour Force Survey and the General Household Survey produced by Statistics South Africa (Aliber and Hall 2012). It has been estimated that there are some 200,000 households – approximately 1 million people who can be classified as small-scale market-oriented producers. Cousins (2015: 6) argues that to date existing land reform and agricultural support programmes have been “strongly biased in favour of emerging black commercial farmers operating at medium or large-scale, despite rhetoric that asserts the importance of supporting smallholders”. He estimates that between 5000 and 10,000 black farmers have entered the commercial farming sector while between 100 and 250,000 rural households may have gained access to land at some point through different arms of the land reform programme.

However in a recent review it was estimated that there has been a high rate of attrition and that many households listed as beneficiaries of land reform no longer exercise their rights in this land (Aliber 2018). Overall around 250,000 small-scale black farmers sell farm produce primarily through informal marketing channels. In addition, there are around million rural households which owned some livestock. However, livestock holdings are deeply stratified with a minority of households owning majority of stock.

Cousins provides a breakdown of the agrarian structure in South Africa in 2014.

Table 2: A breakdown of South Africa's agrarian structure

Farmers	Numbers	Key features	Tenure regime
Top 20% of large-scale commercial farmers on private land; almost all white	7000	Sophisticated, specialised, capital intensive farmers, reducing the export of Agro processing and large retailers; produce bulk of produce perhaps as much as 80%	Private land owned by individuals, companies and family trusts
Medium to large-scale commercial farmers on private land; almost all white	9000	some farmers succeed, some struggle, some are unable to turn a living from farming alone	
Small to medium scale commercial farmers on private land; mostly white, some black	19,000	many cannot survive from farming alone; includes hobby farmers	
Small-scale black capitalist farmers in communal areas and in land reform context	5000 to 10,000	Many farmers earn income from off farm incomes and businesses in addition to farming	In communal areas and Act 9 reserves land rights held through a mix of historical quitrent and PTO certificates or leases issued by Ingonyama Trust
Market-oriented black smallholder farmers in communal areas and landform contexts supplying tight value	5000 to 10,000	Many grow fresh produce and irrigation, others are livestock producers, and a few engage in dryland cropping	

Farmers	Numbers	Key features	Tenure regime
chains (e.g. under contract)			Increasingly land occupation in former communal areas is undocumented
Market-oriented black smallholder farmers in communal areas and landform contexts and urban areas supplying loose value chains	200,000 to 250,000	Many grow fresh produce and irrigation, and others are livestock producers. Few depend wholly on farming	In land reform contexts land access and use rights derive from membership of a CC, a CPA or as a beneficiary of a Trust. In urban areas livestock producers often graze informally and lack access to land
Subsistence oriented smallholder farmers growing food for themselves, and selling occasionally	2 to 2.5 million	Most crop production takes place in Homestead Gardens, some of which are quite large. Occasional livestock sales by some	Commonage users and people who have acquired land through PLAS notionally acquire rights through leasehold, although in many instances no leases are issued

Adapted from (Cousins 2015) based on Statistics South Africa's agricultural censuses of 2002 and 2007; (Vink and Van Rooyen 2009) (Aliber, Maluleke et al. 2013)

As can be seen from the table above producers operate in widely differing tenure settings. However, the estimates are silent on the gender breakdown of the land rights holders in the different settings described above. The vast majority of white commercial and black capitalist farmers own the land on which they farm. Tenure arrangements in land reform contexts will vary widely with the land being held by communal property institutions (CPAs and Trusts), or being leased from the state.

As will be explored in depth below tenure arrangements may vary widely across the different communal area settings. In some instances, such as land administered by the Ingonyama trust in KwaZulu-Natal land rights holders have been turned into tenants, whereas in other settings social tenures backed by living customary law may provide secure tenure, even if these rights may be poorly protected by statute.

3.2 Communal land tenure in former bantustans

As Cousins (2007) has noted, the term 'communal tenure' incorporates a wide range of land use and occupation arrangements. The land areas designated in the schedule to the 1913 Land Act represented those with long histories of unbroken occupation. Much of the land in the former reserves and bantustans is owned by the South African Development Trust (SADT) established in terms of the Native Trust and Land Act of 1936.

This land is held under 'communal tenure' - a contested concept and a much-misunderstood property rights regime which has been significantly distorted by colonial administrators:

"These distortions were, in part, intentional endeavours by colonial powers to retain and codify versions of communal tenure that would best suit their interests. One of the main misconceptions espoused by colonial administrators was that common

tenure (sic) described a wholly collective system of land ownership that was void of notions of individual interest. (Clark and Luwaya 2017: 5)

These distortions have long been recognised elsewhere in Southern Africa.

The recent writings of anthropologists and historians have emphasized the ways in which the perspectives, concepts and meanings attached to African forms of land tenure arise as much from the framework of colonial history and the forms of evidence this produced, as from the nature of land holding itself. (Whitehead and Tsikata 2003: 69)

Under the colonial administration, the multiple types of authority and sets of claims over land and its products were glossed as communal tenure, which became incorporated into the developing body of customary law... “communal” tenure was profoundly shaped—though not determined—by the colonial situation, often serving state, private European, and elite African interests. (Peters 2009: 1317)

In the apartheid era land in the reserves and emergent bantustans was administered by increasingly authoritarian tribal authorities, hereditary chiefs and appointed headman who received salaries from the state (Ntsebeza 2003). Legislation such as the Native Administration Act of 1927, the Black Administration Act and the Bantu Authorities Act of 1951 served to consolidate the powers of chiefs and transform them into state functionaries with powers over traditional courts, tribal levies and land allocation.

Colonial and apartheid officials sought to elevate the powers of traditional leaders regarding decision-making over land rights. They sought to simplify and codify land rights allocation and management systems, which in practice were nuanced and layered with significant local variations.

The colonial and apartheid states also ignored and undermined communal tenure practices that emphasised exclusive use by individuals or families.

(Clark and Luwaya 2017: 6)

However, as state bureaucrats set out to purchase land to enlarge the reserves, this was managed within tightly regulated allocation system through the issue of Permission to Occupy (PTO) certificates. PTOs were often allocated within frameworks of land use planning and administration shaped by ‘betterment’ planning schemes. Betterment itself triggered forced removals within reserves and bantustans, where families were moved into ‘planned’ villagers with demarcated residential plots and garden sites, allocations of arable land and access to communal grazing camps. Officials sought to regulate the number of livestock on these camps through grazing controls and forced destocking measures (Scogings, de Bruyn et al. 1999).

Ostensibly betterment was promoted to counter environmental degradation resulting from the concentration of increasing numbers of people on very small areas of land.

Far from conserving the environment, developing agriculture and improving the quality of life in rural areas, betterment has had the opposite effect. A number of writers have argued, in fact, that the real motives underlying its implementation had nothing to do with environmental conservation and agricultural development, but more to do with ensuring a steady supply of migrant workers to the mines and

industries of white South Africa and, later, with control of the rural population.
(McAllister 1991 :116)

The legacies of betterment planning resulted in deep suspicion of state intervention regarding land-use management controls, as these have almost always eroded livelihoods and constrained access to land in the past. It can be argued this mistrust of state planning and land use schema persists today.

As noted above, tenure arrangements in the former bantustan areas are by no means uniform. In the Cape Province, colonial authorities encouraged individualization of land rights – something that was not pursued in Natal. In the Cape, the Native Locations and Commonage Act of 1879 enabled the creation of individual quitrent titles which coexisted with land reserved for communal grazing (Cousins and Claassens 2008). This approach was further elaborated through the Glen Grey Act, promulgated in 1894, which also sought to introduce a system of individual tenure based on a principle of “one man one lot” and the payment of quitrent. This policy has been characterized as:

“a deliberate and conscious attempt... to restrict rights which people had to land. Under the Glen Grey system, it was only the titleholder who was to have any rights to the land and... these rights were to be legally entrenched. The people were only going to be allowed to cultivate the land if it were registered in their names. By means of this measure any rights which the extended family might have had to were effectively eliminated”. (Ally 1985: 208-209)

However, the Glen Grey policy was quickly subverted by non-compliance. People who had been allocated land through the system did not follow officially designated procedures. They simply allocated land to their heirs, or to other land users by informal agreement. The new land users failed to apply to transfer the plot into their name and rather continued to pay the quitrent fees using the name of the original registered holder. Magistrate’s reports frequently recorded “improper occupation of land” and instances where “vacant or surveyed lands are being cultivated by individuals who have no right or claim to them.” (Ibid, 1985)

In 1910 the chief magistrate of the Transkeian Territories stated that “that while upwards of 38,000 titles to native allotments have been granted up to the present..., only 92 transfers were submitted for registration in the past nine months”. The magistrate went on to project that at this rate “even allowing for forfeitures and re-allotment, it would be two or three hundred years before all the titles changed hands” (Ally: 216). The magistrate cited these figures as evidence of “very widespread neglect on the part of registered holders to comply with the regulations governing transfer” (ibid).

As will be explored further below, the historical experience of quitrent holds important lessons for contemporary debates around the formalisation and registration of rights, illustrating the inappropriateness of promoting individual titling as a policy measure and as a prerequisite for growing the smallholder sector.

There are other portions of land in the former homelands where there is ambiguity over allocation and access rights. These include public land owned by municipalities adjacent to small towns. It has been argued that such land has potential “for the low intensity cultivation of food crops and (provision of) livestock grazing areas in South Africa’s former homeland towns” (Thornton 2009: 19). Case studies examining the use of such land emphasise the need to clarify the content of land use rights which may be informally allocated to local small-scale producers.

With the collapse of the bantustan system and the reintegration of the former homeland areas into newly demarcated provinces and municipalities as part of the democratic transition, so land administration in these areas fell apart, with land being allocated on an increasingly ad hoc basis and

land records falling into disarray. It was recognised that the land rights of people in the former homelands were now vulnerable to encroachment and/or outright dispossession. Section 25 of the constitution required that the government pass legislation to ensure tenure security for all. However, it was recognised that this would take some years to conceptualise and promulgate, so interim measures were required to protect people's land rights in these settings.

In 1996, Parliament passed the Interim Protection of Informal Land Rights Act (IPILRA) as a temporary measure to protect the land rights of people living in the former homeland areas. This recognised customary land rights as well as the rights of beneficial occupation in particular circumstances. The Act sought to provide protections for those people who occupied land through long-standing processes of custom and usage, but whose rights were un-recorded. It required the consent of the majority of rights holders before any decision could be taken which would deprive them of their rights in land. It set out procedures regulating the circumstances under which such deprivations could be made. However, IPILRA "provides no legal certainty about the nature of the rights it seeks to protect" (Clark and Luwaya 2017: 9) and has only been applied in a limited number of circumstances.

Cousins (2007) notes the diversity of *de facto* tenure arrangements within the former bantustans with marked differences in practice between more remote rural areas and rapidly urbanising contexts, as urban centres in these areas enlarged. As Cousins observes the emergence of informal land markets in areas adjacent to rural towns and larger cities "poses huge challenges to policy". In tracking the changing priorities of tenure policy, he notes that:

Government's initial approach to the question of how to give full legal recognition to the rights of people in 'communal' areas was based on a paradigm of transferring ownership from the state to groups or individuals. (Cousins 2007: 285)

However, several test cases revealed complexities and risks embedded in such an approach. These included how to:

- identify the owners and spatially delimit the unit of ownership;
- secure the specialised skills, time and resources required for local consultation processes;
- unpick and make sense of the nested and layered nature of rights in communal areas, given the consequences of the complex histories of forced removals, which frequently created conflicting and overlapping rights in land;
- mitigate the tendency for land rights enquiries to quickly surface nascent conflicts, claims and counterclaims concerning the legitimacy of the land rights of different occupiers.

In a bid to circumvent these difficulties, the Land Rights Bill (LRB) was drafted in 1998. This sought to create a category of protected rights on land owned by the state in the former reserves and bantustans.

Critically, the bill provided that the holders of protected rights could not be deprived of land without their consent, except by expropriation, for example when land is required for public purposes, and with compensation. The Minister of Land Affairs would continue to be the nominal owner of the land, but with strictly delimited powers. Protected rights vested in the individuals who use, occupy and have access to land, but in group systems protected rights would be relative to those shared with other members; individual rights must be relative to group rules, as decided on by the majority of members. (Cousins 2007: 286)

The definition of group boundaries remained complex and contested. The LRB sought to address this by conceptualizing boundaries as flexible and "determined with reference to who (which group of people)

is affected by a particular decision.”(Claassens 2000: 255). The LRB also sought to ensure that group rules would ensure fundamental protections for individuals, consistent with the Constitution. The LRB recognised that significant state capacity would be required for implementation and proposed that land rights officers would need to be based in each district, to administer the Act.

However, work on the Bill was terminated when Thoko Didiza replaced Derek Hanekom as Minister of Agriculture and Land Affairs, on the grounds that the LRB would be too complex and expensive to administer. The new Minister rather focused on the drafting of the Communal Land Rights Act (CRLA), subsequently passed in 2004. This sought to give the traditional councils wide-ranging controls over the occupation, land use and administration of land in the communal areas. However, CLRA was subsequently struck down by the Constitutional Court in 2010, on the grounds that there had been insufficient public participation in the process leading up to its adoption.

Undeterred, the Department of Rural Development and Land Reform proceeded with the process of drafting the Communal Land Tenure Policy which was published in 2014. This, like the CLRA proposed the transfer of ownership of the outer boundaries of portions of state-owned land in the former bantustans to traditional councils which would be empowered to allocate “institutional use rights” to individuals and families. This policy was widely criticised for its failure to create any mechanisms hold traditional councils to account. The disputed policy shaped the formulation of the Communal Land Tenure Bill. This gave communities the option to take a resolution (requiring a 60% majority) which would allow them to choose whether to have their land managed by:

- the traditional council;
- a landholding entity such as a Communal property Association;
- or another legal entity depending on the circumstances – e.g. the Ingonyama Trust.

At the same time however, the DRDLR published a draft policy paper on the future of CPAs which indicated that no new CPAs would be established in areas which fell under traditional councils – effectively nullifying the proviso in the CLTB that people could opt to establish a CPA to hold their land (Clark and Luwaya 2017).

3.2.1 Tenure, land administration and smallholder production in the former bantustan context

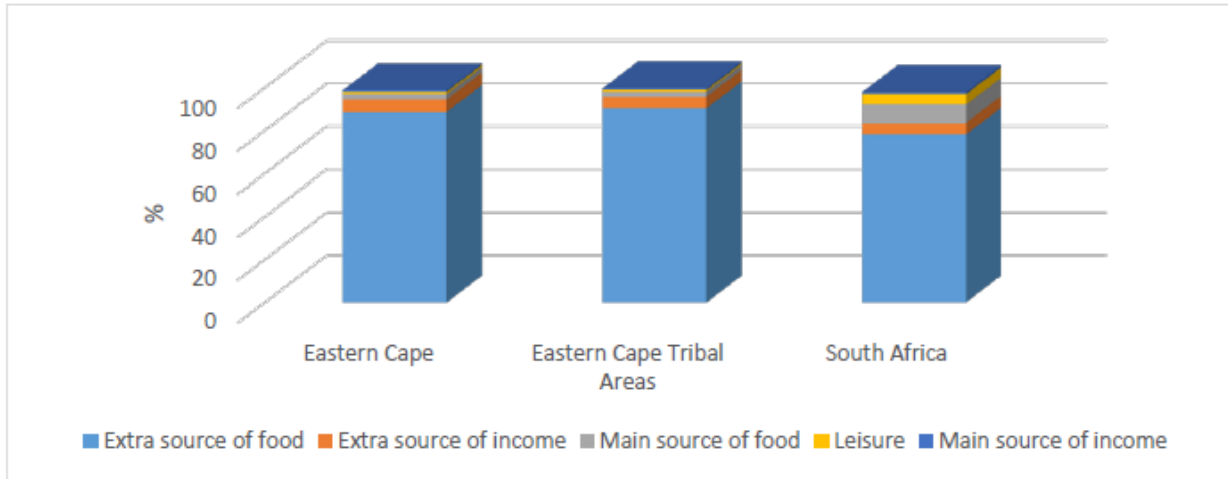
How have tenure arrangements and the collapse of land administration impacted on agricultural production in communal areas? There is a persistent narrative that “customary and communal land tenure systems are often poorly developed and as a result constrain investments in agriculture by smallholders” (Interacademy Council 2004 n.d.). This view surfaces in different forms within numerous policy documents and poverty reduction strategies developed across southern Africa.

However, locally, research findings caution against neat straight-line correlation. Structural and socio-economic factors appear to predominate as the drivers of deagrarianisation and the exponential decline in agricultural output in such settings.

While data and research on productive and distributive land use remain patchy, there are key studies worth noting, even if the findings may reflect contextual particularities and local histories determining land access and use.

In the Eastern Cape, a recent study analyses a range of survey data to conclude “that an overwhelming majority of... agricultural households (e.g. 90 per cent in the tribal authority areas) engage in agriculture to supplement their food resources”. However, the researchers caution that “very few households can be classified as surplus producers that either farm as a principal source of income (less than one per cent), or that sell their produce for extra income (about five per cent)”. (Rogan and Reynolds 2017 p. 18)

Figure 1: Reasons for farming given in the Eastern Cape highlighting the primacy of agriculture as an extra source of food.
 Source: Rogan and Reynolds (2017).



Source: Own calculations from the 2012 GHS.

Notes: The data are weighted.

While noting the tiny fraction of producers involved in production as a main source of food or income, the authors identify two beneficial outcomes of household production:

The first is through the ability of households that farm to avoid hunger or malnutrition by supplementing their diets through cultivation. Second, household production can reduce income poverty if households are able to sell their surplus production for cash (or in-kind goods) or redirect money that would have been spent on market procured food items by, instead, consuming food that they have cultivated themselves. (Rogan and Reynolds 2017: 7)

Recent research further analyses the decline of field-based agriculture in the former bantustan areas. Research in Mount Frere confirms that people are largely reliant on store-bought maize and that a negligible number of households (less than 2%) were able to subsist on maize which they grew themselves (Du Toit and Neves, 2007: 18). In many areas arable land lies fallow and much has been informally converted to grazing for livestock. People are largely limited to keeping poultry and cultivating vegetables and green mielies within fenced or better protected gardens on their homestead site. Research confirms that much arable land away from the homestead is no longer in production, even in those areas which have fertile soils, and which receive sufficient rainfall for crop production. The ubiquity of free ranging livestock makes it highly likely that those who still plant maize in their fields will find their crop damaged or destroyed. Few households can absorb this risk, given the high costs of land preparation and inputs.

These trends are further illustrated by de la Hey and Beinart who present a case study of Mbotyi in Mpondoland where they have conducted longitudinal research. They find that an array of structural factors, buttressed by changing social attitudes and gender relations, have contributed to dwindling agricultural production:

“The area of land cultivated has declined in a context of intensifying environmental pressures, decreased access to household labour, perceptions of risk, alternative income sources and evolving aspirations. However, our evidence suggests that

control of family labour lies at the heart of the problem. Household heads find it very difficult to mobilise labour, but cannot, or will not, employ paid workers. Changing aspirations among women and young people, as well as the relative freedom that they enjoy, has eroded patriarchal controls. Their sense of a good life does not generally include agricultural work; it is unlikely, in their eyes, to bring a significant additional income".(de la Hey and Beinart 2017: 769)

Du Toit observes how much of the discussion about land reform and support for small holder producers "seem to proceed in isolation from the basic facts of South African agrarian structure" (2018 p. 1088). He argues that the current approach to land reform which seeks to support emergent black commercial farmers "implemented in the teeth of climate change, and in the context of rapid agro-food restructuring...has no chance of success even on its own terms". The narrow focus on 'productionism' ignores important wider debates about what land reform is for, and associated questions about "the nature and design of South Africa's distributive order" (Ibid, p. 1089).

As Cousins has observed above the agrarian structure is highly stratified with relatively few large agribusiness ventures reducing as much as 80% of produce sold on through formal market chains. Within the communal areas there remains a marked absence of data. Available sources however indicate that stratification is less pronounced with respect to arable production, as much of this has been discontinued, or has shifted from fields to home garden areas. However, evidence suggests that where livestock ownership is concerned the majority of large and small stock are concentrated in relatively few and mostly male hands.

3.2.2 Understanding the combination of structural and social constraints currently limiting employment intensive agriculture in former homeland areas

At the continental level some scholars have long argued that the evidence of 'deagrarianisation' is overwhelming.

A growing number of surveys over the past two decades have signalled the widespread appearance of 'income diversification' and, by implication, occupational shifts in both rural and urban households. Borders between urban and rural areas have blurred in the process, as some urban households resort to farming and in turn rural households are increasingly engaged in non-agricultural activities, but there is no mistaking that the direction of overall change is towards a growing preponderance of non-agricultural activities.(Bryceson 1997: 2)

This income diversification identified by Bryceson is relevant to the emerging distinction between people who make use of land assets primarily for subsistence livelihoods augmentation purposes and those who can be described as market orientated small-scale producers for whom agricultural output makes a more significant contribution to their livelihood strategy. However, in the communal settings both subsistence and market orientated producers face enormous structural economic constraints.

Philip's research as part of the national Second Economy Strategy highlights the fundamental constraints which confront attempts to promote employment intensive agriculture in the communal areas. As Philip (2010: 2) has noted:

"The uneven burden of unemployment in poor areas is just one more feature of the deep levels of structural inequality in South Africa. This has its roots in key legacies of apartheid: the structure of the economy, spatial inequality, and inequality of access to human capital development".

She cautions that:

- the informal sector does not provide an easy entry point for self-employment;
- the penetration of products manufactured in the core economy to the remotest rural village limits the opportunities for small-scale manufacturing, which elsewhere would make a significant contribution to the rural economy;
- the increasing dependence of rural households on urban remittances and social grants, coupled with deagrarianisation, accelerated by the erosion of the rural institutional fabric with regard to land use planning and administration, together with mounting climate risk have all contributed to a steep decline in the contribution of agricultural activities to rural household livelihoods.

The rapid transformation of the food system in South Africa has seen the penetration of large supermarket companies exercising control throughout the value chain from production to point of sale. By 2014 four major companies accounted for 97% of sales within the formal food retail sector (Battersby and Peyton 2014).

The penetration of supermarkets as highlighted by Philip above also impacts on the potential for local agricultural production at both subsistence and market orientated scales.

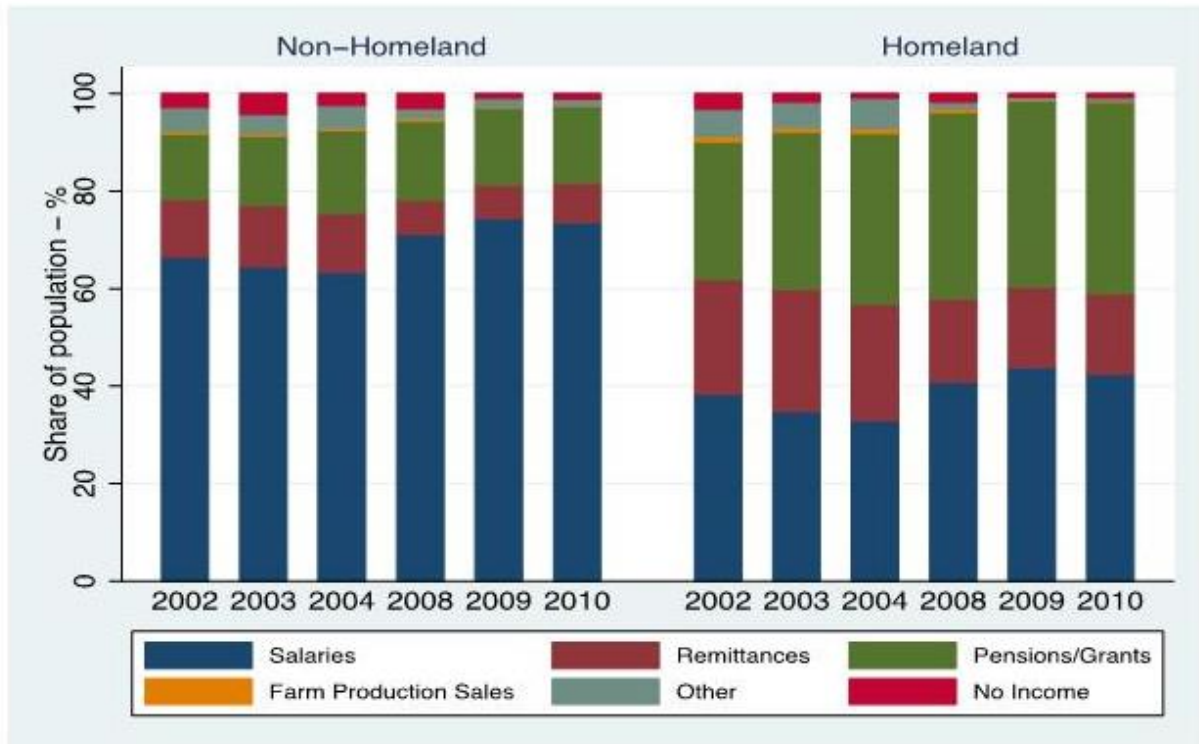
A closer examination of the supermarket model suggests it is inherently hostile towards smaller producers. The South African food retail market structure resembles that of industrialised countries rather than developing countries. Therefore, we should expect that the position of South African small farmers vis-à-vis supermarkets is similar to that of small farmers in industrialised countries, who are increasingly excluded from these value chains. (Heijden and Vink 2013: 68)

Neves and Du Toit (2013: 94) review the literature (Black and Khan 2002; Aliber 2003; Black 2010; Philip 2010) to corroborate how “the structural dynamics of urban-based, job-shedding, capital-intensive growth have only intensified since 1994, eroding remittances and migrants’ reinvestment in rural areas”. They present evidence of how rural households engage in “...complex repertoires of productive economic activity, which include – but are not limited to – agriculture” (2013: 101).

The chart below (Von Fintel and Pienaar 2014) draws on General Household Survey data to examine the different sources of income sustaining African households living outside and inside the former homelands. As one might expect, households residing in the former homeland areas survive on a mix of salaries, remittances and social grants, as well as the ‘grey slice’, denoting income from other unspecified sources.

The chart records that wage income dominates. However, as the contribution of income from social grants increases, so the share of income from remittances shrinks, as does the already negligible orange slice denoting sales of ‘farm produce’, along with the grey slice, representing income from other sources.

Figure 2 Main income sources of African households in homeland and non-homeland areas Von Fintel and Pienaar (2014)



Source: GHS 2002, 2003, 2004, 2008, 2009, 2010

In characterising the economic factors which shape the former bantustan rural economy Philip argues that the deeply skewed character of the South African economy is reflected in the agrarian structure which together with migration and changing gender relations drives the declining contribution of agriculture to rural livelihoods and constrains local economic activity, cementing dependence on remittances and social grants. She emphasises that the patterns exhibited in the figure above have structural roots.

This dependence is deeply structural. It is not a problem that can be fixed with a change of attitudes, but decades of such structural dependence have certainly taking a toll on people's sense of economic agency: their ability to change their material conditions and improve their quality of life through their own actions. (Philip 2010: 21)

Critically, she posits that:

These are key reasons why small-scale manufacturing and agro-processing take place at such a negligible scale in marginal areas and why there is such a litany of failure for the kinds of projects that so many small enterprise development programmes have favoured... Often these fledgling enterprises are in fact in raw competition with big capital in the core economy, and it's certainly not a level playing field. (ibid: 12)

Although she paints a sobering picture, Philip adds an important caveat, conceding that:

“That doesn't mean that there are no economic opportunities in such areas – there are, and these need to be optimised and supported”.

However, she argues that in general these opportunities “are limited, they cannot create jobs at the scale required and returns tend to be very low”. Clearly these findings must be central to the formulation of any strategy to promote employment intensive agriculture at different scales. They must also be offset by evidence of the persistence of small-scale production to augment household food security and provide opportunities for sales through informal and loose value chains.

The structural limitations posited by Philip have been revisited by Aliber (2017) who highlights emerging evidence of nodes of economic dynamism within the former homelands in the Eastern Cape. He distinguishes between urban and rural areas within the former homelands, noting that the rural areas have been depopulated, while the population in the urban parts has increased substantially. He notes that currently employment and self-employment are concentrated in community services, retail and construction, while less than 25% of jobs are in the informal sector.

Aliber confirms that with “the decline in self-provisioning through small-scale farming, towns have become much more the centre of rural villagers’ economic lives than was the case 30 or even 20 years ago”. In keeping with other research studies cited above Aliber notes that:

Households in the former homelands devote a large share of their total expenditure to food and beverages – yet it would appear that a relatively small share of this food originates from these same rural areas (which could have stimulated local economic activity and employment in rural areas). The notable exceptions – for example, in Peddie most of the meat sold in the butcheries originates from local black farmers – merely accentuates this fact. (Aliber 2017: 6)

The 20-year review on rural transformation (Van der Byl 2014) found that 21% of South Africans experienced difficulty in accessing food. This difficulty was higher in rural as opposed to urban areas where it was reported that only 24% of black households were involved in agricultural activities.

3.2.3 Women’s land rights, customary law and land reform

A wide range of scholarship has illuminated the varied obstacles which women must surmount to obtain equitable access to land and to secure their land rights. Clark and Luwaya (2017: 25) point to the colonial codification of customary law which reduced women to the status of minors and placed them under the authority of men. They note that “historically there have always been independent, unmarried women with access to land,” but that this did not fit with the narrative promoted by patriarchal colonial and indigenous authority.

A three province survey (Budlender, Mgweba et al. 2011) involving widespread consultations in Keiskammahoek in the Eastern Cape, Msinga in KwaZulu-Natal and Ramatlabama in North West Province, showed how women started to gain independent access to land in the period following the transition to democracy in 1994. However, the report also highlighted the general precarity of women’s land rights across a wide range of tenure regimes including areas:

- under quitrent title in the former Ciskei;
- where permissions to occupy (PTOs) had been issued on former SADT land;
- where land was allocated and administered in terms of localised systems of customary law;
- where labour tenant families had been awarded land through the land reform programme.

A wide range of examples of tenure insecurity and barriers to land access for women were identified. These included instances where:

- Marriages break down, or women are widowed, they may be evicted from their homes by their husband's families;
- Divorced women who seek to return to the homes where they were born, may be refused access by their brothers;
- Unmarried sisters may be forced out of their natal homes by their brothers, following the death of their parents;
- Married women frequently lack the right to independently access land, and are often treated as minors within customary law systems;
- Patrilineal systems prevent women from independently accessing residential sites as these are usually only allocated to men;
- Women are not represented in fora where decisions about land are taken, such as in tribal councils.
- Tribal courts frequently rule in favour of men, rather than women where land matters are concerned.

Despite all the constraints listed above, there are also numerous examples where women have been successful in obtaining access to land in their own right. These examples vary widely from place to place across the landscape. However, Claassens has observed that by and large where things had changed "the changes only applied to single women, that is widows and women who had never been married. Nothing really changed for married women" (Sepotokele 2018: 98)

Cousins et al (2011) have recorded one such example of change to accommodate the land rights of single women. They review how the Mchunu traditional council in Msinga had adapted and changed customary law norms in order to accommodate the rising number of women having children outside of marriage. This enabled the council to allocate residential sites to single unmarried women who have children, although this often came with the proviso that they could only access land near their father's homestead, so as to provide for protection and family oversight.

Although there are examples of the flexibility and adaptive capacity of living customary law responding to changing social circumstances in order to accommodate women's land needs, there remain strong arguments for a Land Reform Framework Act, as proposed by the High Level Panel. This, as Claassens proposes, would legally entrench the right to equitable access to land for women, and for poor and marginal people more broadly. In turn, this would "require government to report against criteria that include gender, race and poverty" (Sepotokele 2018) in monitoring progress towards the realisation of rights contained in Section 25 of the Constitution and other applicable sections of the Bill of Rights.

3.2.4 *Distributive uses of land*

Ferguson (2012) cautions that "discussions on land use and land reform often reduce the land question to the agrarian question". He notes that:

What people do with land is very complex, and not at all obvious. Let us not be too quick to suppose that we understand what is going on. When we see untilled fields, let us not be so quick to say that the land is 'unused'. When we see a smallholding, let us be careful about dismissing it as 'not viable' when we have not yet asked 'viable for what?'... Poor people often do use land to make their livelihoods. But the mechanisms that turn land into livelihoods are as much social as they are technical, and may turn less on producing goods than on accessing sources of cash and other support from others. Often, that is, land leads to livelihood via processes not of production, but of distribution... (U)nder the region's rather severe physical and

economic conditions – (which often make farming precarious at best, and at worst an out-and-out loss-making proposition) – using land in ways that are principally distributive rather than productive may well amount to making the best possible use of it.(Ferguson 2012: 169)

Research studies in the first decade of democracy (Rangan and Gilmartin 2002) indicated how women headed households constituted a significant portion of the population in communal areas with estimates ranging from a low of 15% to a high of 50% in certain settlements. In these settings where women lack direct access to land and livelihood resources access to natural resources on the commons provides an important safety net for poor and vulnerable households.

3.3 *Tenure and state development interventions*

The former homelands have provided the terrain for multiple and mostly failed state interventions, largely designed and imposed from above. These interventions reveal assumptions about who really has control over land in communal areas and are partly enabled by lack of clarity about the real rights of individual land holders. A selection of these programmes is briefly reviewed below. The majority have been ‘tech driven’, tenure and gender blind, saddling land rights holders with economic and ecological debt, while providing a secure stream of benefit to input suppliers.

3.3.1 *The Massive Food Production Programme*

Berliner (2015) records how between 2003 – 2008 R150 million food programme was implemented in the former communal areas of Amathole District of the Eastern Cape. This included the introduction of a number of GM crops promoted by an agro chemical company.

An external review was undertaken of this failed initiative characterising it as “a highly centralised agricultural project, imposed on extremely vulnerable farmers, incurring significant environmental costs, reduced soil fertility, caused loss of indigenous crop strains, and farmers, who had little or no say in the uptake of these projects, found themselves saddled with debt and no means to pay it off” (2015 n.p.). Uncertainties about tenure rights in the District have placed the state in a powerful position to impose development initiatives on local land rights holders, even if these may have the effect of further undermining their livelihood security and degrading natural assets.

3.3.2 *The Food Security Programme/ Green Revolution initiative*

This initiative involved delivery of ‘packages’ of tillage, GM Seeds, fertilisers, herbicides and insecticides providing benefits for contractors and almost no-one else. Ecological impacts associated with the dumping of agrochemical ‘solutions’ have been significant.

No less than six recently published scientific studies have found that GM maize contaminated the indigenous seed strain supplies of smallholder farmers in the Eastern Cape. Genetic contamination from the GM insect-resistant Bt-maize was found in fields, home gardens and local household seed holdings in a village where GM maize had been grown from 2001 to 2008.(Berliner 2015: n.p.)

3.3.3 *Communal areas and the NDP*

The changing context and the structural factors impacting on the rural economy seldom specifically inform the content of strategies and plans seeking to enlarge small holder agriculture. Chapter 6 of the National Development Plan makes proposals for an integrated and inclusive rural economy. What is striking about the chapter is how little analysis it provides of the historical and contemporary factors allude to in the preceding sections which shape the rural economy.

While the NDP places emphasis on irrigation this ignores the extent to which “the post-apartheid state has presided over the collapse of smallholder irrigation schemes previously supported by homeland parastatals” and the extent to which attempts to rehabilitate these schemes “have seen little return, or worse have resulted in perverse development outcomes” (Van Averbek, Dennison et al. 2011: 805).

Critiques of the NDP have taken different positions. Sender (2014) has argued for more state support to agriculture as a critical creator of employment while Cousins (2015) has argued for emphasis on a strategy of promoting small-scale agriculture that encourages ‘accumulation from below’.

Chapter 6 exhibits analytic shorthands and makes optimistic projections which do not appear to be firmly grounded in rural realities.

Traditionally, agriculture was a livelihood asset to the rural poor when other sources of income fell away. This role was always underdeveloped because of apartheid, but is diminishing further owing to increases in social grants and employment opportunities elsewhere. Agriculture, however, has the potential to expand if the necessary environment can be created. Better land use in communal areas has the potential to improve the livelihoods of the lease 370,000 people. (National Planning Commission 2012: 198)

The core focus of the NDP is on expanding commercial agriculture which is projected to have the potential to create 250,000 direct jobs and a further 130,000 indirect jobs. According to the drafters these employment opportunities could be created by picking “winning agricultural subsectors where the expansion in production and further value adding processes are sustainable over the long-term” (ibid 200).

The NDP states that:

The first major risk to the programme is that tenure security for black farmers in the communal areas and under the land reform programme will not be adequately addressed. As long as these farmers brackets especially women farmers) do not have security any, they will not invest, and agricultural production will not grow at the rate and pattern required for growth in employment.(Ibid: 204)

However, the NDP only makes vague recommendations as to how this tenure insecurity should be addressed:

Create tenure security for communal farmers. Tenure security is vital to secure incomes for all existing farmers and for new entrants. Investigate the possibility of flexible systems of land use for different kinds of farming on communal lands. (Ibid: 205)

3.3.3.1 Tenure and the revitalisation of irrigation schemes

The National Development Plan also emphasises the potential of smallholder irrigations as a source of employment. It is envisaged that the rehabilitation of collapsed smallholder irrigation schemes (SIS) could create as many as 300,000 job opportunities by 2020. This prompted the investment of R2 billion or R40000 a hectare into the establishment, revitalisation and rehabilitation of such schemes.(Fanadzo and Ncube 2018). However, the results of this investment are reported to be disappointing. Multiple factors are identified which contribute to the poor performance of revitalised schemes. Amongst these, tenure features prominently, although there are widely differing perspectives on the nature of the

problem and potential solutions. These mirror ongoing debates about land tenure security, women's land rights and the appropriateness of titling.

A 2010 review of proposed land tenure and land administration interventions to increase productivity smallholder irrigation schemes found that:

The institutions and tools to handle efficient land transactions, particularly in the form of leases, were in most instances not available. The reform of two old order forms of tenure, is proposed, to add to the variety of tenure options. It is recommended that quitrent tenure be transformed to a perpetual or long-term conditional state lease system and the PTO system to be transformed to usufruct or statutory rights which should both be underpinned by different levels of local level land administration system. (Manona et al. 2010: 3)

The review emphasised the importance of effective land administration systems on smallholder irrigation schemes to enhance tenure security and facilitate land-lease markets. This suggested that institutional capacity and back end systems were key ingredients required to enable land rights management and associated transactional processes on the ground. Research by Cousins in the Tugela Ferry area reveals an intricate interplay between different actors in the allocation of rights and the operation of an irrigation scheme established at the turn of the 20th century. Both Chiefs and government officials play a role in allocation plots while local farmers associations have been established to exercise an oversight function.

Rights to plots are socially and politically embedded. Most farmers have inherited their plots although some are occasionally reallocated to others who approach the chief through one of the committees and pay a khonza (affiliation) fee. Plots are considered to be family rather than individual property but control the production and income is exerted by the individual user. Most irrigation farmers are women and many obtain rights to plots through marriage. (Cousins 2012: 16)

A recent review of research (Fanadzo and Ncube 2018) indicates that on most smallholder irrigation schemes men are the registered plot holders, although women are predominantly responsible for production. There are continuing debates about the link between secure tenure, the value of land as collateral and the ability raise finance for production. As noted above, one school of thought sees the lack of ownership of land as the dominant constraint preventing smallholders from applying for production loans. However, as Manona et al. (2010) have argued, reform to strengthen existing forms of tenure and investment in the development of scheme-based land-administration systems could provide legal certainties for land rights and lease contracts. The work of Thomson suggests that the strengthening and adaptation of existing customary tenure systems to provide greater certainty and protection of exclusive rights can be effective in reducing the risk associated with agricultural production. However, questions still remain as to how far these measures would facilitate access to finance and provide security against loan default.

It is clear from this section that three factors impede the development of functioning transparent land rights recordal and equitable land administration systems:

- the failure to pass legislation to realise the rights to tenure security in communal settings as guaranteed in Section 25 of the constitution;
- the ongoing lack of clarity about the role of traditional leaders in former communal areas and their powers to allocate and administer land;
- lack of state support for land recordal and administration functions at local level.

While there is ample evidence that in mining affected communities there has been abuse of power by traditional authorities who have abrogated the land and tenure rights of rural citizens there is also a counter narrative where traditional authorities are responsive to the people they represent and provide support to enable customary tenure systems to adapt and provide a measure of security for all.

Perhaps the most extreme version involving the distortion of customary law institutions relates to the 2, 8 million ha of land which fall under the Ingonyama Trust which is briefly discussed below:

3.4 Ingonyama trust

The Ingonyama Trust was established through a deal between the National Party and the Inkatha Freedom Party just before the democratic transition in 1994. The Trust was established to manage 2.8 million ha of land owned by the former homeland government of KwaZulu.

This land vests in the Ingonyama, King Zwelithini, as trustee on behalf of members of communities defined in the Act. This was amended in 1997 to create the KwaZulu-Natal Ingonyama Trust Board to administer the land in accordance with the Act.

Research commissioned for the HLP noted a range of provisions in the Act intended to protect the land rights of Trust beneficiaries. The report highlighted acknowledgements by the Ingonyama Trust Board that “the people living on the land have strong rights to use the land in various ways...” but recorded that:

...despite these statements and the protective provisions contained in the Ingonyama Trust Act, the Trust has been subject to a great deal of controversy for failing to protect the land rights of people living on the land it administers. The Trust has come under fire for its ongoing conclusion of long-term surface lease agreements with mining companies, in terms of which it signs lease agreements with mining companies to enable mining activities on land which is often occupied and used by local communities. These agreements are sometimes concluded without proper community consultation and lead to the deprivation of use rights and access to land. (Clark and Luwaya 2017: 10).

The report noted that the Parliamentary Portfolio Committee on Rural Development and Land Reform “has raised serious concerns about the revenue received by the Trust and the apparent failure on the part of the Trust to reroute its revenue back to the beneficiaries of the Trust” (HLP 2017: 203).

The report of the High Level Panel noted that:

At the hearings people complained that they are currently more vulnerable to dispossession than they were before 1994. The problem is especially acute in areas where mining is taking place in former homeland areas, and in areas administered by the Ingonyama Trust in KwaZulu-Natal. People complain that traditional leaders and officials deny their land rights (including long-standing customary rights) and assert that traditional leaders have the sole authority to sign agreements with investors in respect of communal land.

The HLP recorded with concern that “the Ingonyama Trust Board has control over land in ways that far surpass anything the Minister of Rural Development and Land Reform has in all other provinces” (HLP 2017: 274).

The HLP report confirms that the ITB has been converting the original PTOs into lease agreements with a 40-year term. It highlights several onerous conditions in the lease agreements:

- lessees have to pay site rentals to the ITB, with rents escalating by 10% per annum;
- lessees are to fence their property within six months and to obtain written permission to build or make improvements;
- failure to pay the rent may trigger cancellation of the lease and enable the ITB to take over any building or structures on the land, when the site is vacated.

The HLP noted that in the 2015/16 financial year the ITB received rental income of more than 96 million rand. The HLP report records that “there is little evidence” that this revenue “is used for the benefit of communities or their material well-being” (2017: 275).

The section in the recent report of the presidential advisory panel on land reform and agriculture which deals with tenure in communal areas and related property rights surfaces differences among the panellists concerning the role of traditional leaders, land rights and land administration in communal areas.

However, in its recommendations the report echoes the HLP calling for the drafting of the permanent statutory protection and procedural safeguards for informal and customary land rights in the former bantustans in the form of the Protection of Informal Land rights Act. The panel also endorses recommendations from the HLP with regard to the Ingonyama Trust, stating that the act needs to be reviewed or possibly repealed.

Despite the differences in perspective among panellists on the role of traditional leaders the advisory panel report states that effectively “the Ingonyama Trust Act has perpetuated the existence of the KwaZulu homeland within a unitary state 25 years into the new democratic order” (Presidential Advisory Panel 2019: 46)

Space precludes undertaking a detailed analysis of the tenure and land administration particularities pertaining to each of the former homeland areas. Suffice it to say that there are many differences, as well as similarities between them. The current bid to pass the so-called Bantustan Bills is widely regarded as a means to render 17 million rural citizens as the subjects of traditional authorities and enable elite pacting and deal-making around mining and other natural resources. These factors all form part of the terrain which must be successfully navigated, if tenure rights are to be secured and labour-intensive employment creation from revitalised smallholder production is to be stimulated in communal areas.

3.5 Coloured Rural Areas

There are 23 coloured rural areas (CRAs) in four provinces (Western Cape, Northern Cape, Eastern Cape and Free State) where land historically reserved for people of mixed Khoisan and European descent is held in trust by the Minister of Rural Development and Land Reform². The majority of these CRAs originated in mission-linked settlements and related land acquisitions.

The Mission Stations and Communal Reserves Act (No. 29 of 1909) of the Cape Colony first brought a number of mission stations and independent reserves under statutory control.

The Act reaffirmed the principle of communal tenure in the reserves, although it made provisions for eventual subdivision of land. Subsequent legislation...made

² This section draws from <https://knowledgebase.land/act-9-rural-areas/> - Phuhlisani NPC's knowledge hub on land and reform.

provisions for the introduction of so-called betterment schemes, in which communal land could be divided into 'economic units' for selected individuals or small groups of farmers. (May and Lahiff 2007: 785)

Management Boards or *Rade* were established and chaired by the local magistrate. Selected government officials and local residents were appointed to sit on the board. In several areas there was popular resistance to these boards which were regarded as being unrepresentative.

The 1909 Act was replaced by the Coloured Persons Communal Reserves Act (No. 3 of 1961). This Act drew on definitions in the 1950 Population Registration Act which classified people into "White", "Native" (members of indigenous African groups) and "Coloured" who the Act defined as "not a white person or a native" (Wisborg 2006). Finally, the Rural Areas Act (No. 9 of 1987) was passed by the House of Representatives in the tricameral parliament, established in the dying days of apartheid. The drive to replace Act 9 with a new law, arose from local struggles in the 1980s to resist attempts by the state to privatise communal rangelands in the Northern Cape. This was attempted through the determination of economic units and the individualized allocation of land to larger stockowners, which the state characterized as 'proper' livestock farmers.

Act 9 was eventually replaced by the Transformation of Certain Rural Areas Act (No. 94 of 1998) — TRANCRAA. Although the Act was promulgated more than 20 years ago, the transformation process is far from complete. TRANCRAA communities have expressed the frustrations on numerous occasions. They called for a summit with the Minister, which took place in 2012. This resulted in a reconstituted task team to drive the transformation process, but the team was reportedly ineffective in its work, and there were calls at the National Land Summit in 2014 for the process to be reconstituted yet again.

Act 94 of 1998 legislates the process required for bone fide rights holders on the land to reach agreement on how the land should be held. This process should have been completed within a transitional period of 18 months, from the date gazetted by the Minister (17 July 2009). This should have enabled:

- a land rights enquiry to establish existing land use rights;
- a proposed land use development plan;
- compilation and verification of list of 'residents' as at 2 November 1998;
- proven consultation with the community on the choice of entity;
- a facilitated process to enable the community to decide on the type of entity to hold the land;
- a report to the Minister recommending the choice of entity/entities, who if satisfied with the recommendations, must then implement the transfer.

In most TRANCRAA areas there is an established residential area or declared township, with surveyed residential erven, business, community, transport and open-space zones. Commonage lands also exist to which individuals have use rights for cultivation and grazing. Land within the township vests in the local municipality, but residents/rights holders are required to decide whether they want the commonage land to also be administered by the municipality, or to be transferred to a Communal Property Association, or other approved landholding entity.

Section 4(2) of TRANCRAA states that, despite the provisions of any law regarding the disposal of municipal land in a township, the residents must be given reasonable preference to acquire Trust land in the remainder, that is the commonage and agricultural area outside the township (section 3(1)).

Where land outside the declared township is to be transferred to a landholding entity, the Minister must be satisfied that the arrangements make provision to balance security of tenure and protection of existing land use rights. This must accommodate:

- the needs of the residents as a whole;
- individual members of the entity;
- resident and future occupiers and users of the land;
- access to the common land in the public interest;
- processes which enable continuation or termination of existing use rights.

The Minister is required to ensure procedural compliance, so that where the consultations did not take place within the prescribed timeframe, or with the requisite attention to detail, the Minister may lay down conditions specifying particular steps, rights enquiries and processes of consultation which must take place to enable the drafting of community rules and regulations, which will govern the allocation and administration of the land into the future (Ward 2 forum 2017).

These processes have yet to be completed for the majority of TRANCRAA areas. This creates uncertainties concerning access and use of agricultural land in these areas, given that to qualify for state agricultural support, occupiers of land need to demonstrate that they have secure rights for at least a five-year period, to the land they plan produce on.

CRAAs range widely in size and access to landholding. In the Northern Cape, CRAAs are extensive. In areas such as Namaqualand land rights holders are reported to have benefitted extensively from acquisition of land in terms of redistribution, via the municipal commonage programme. Between 1996 and 2007 more than 1,8 million ha of extensive grazing land were acquired in Namaqualand, which increased access to land by 20% over a ten-year period.

Although considerable progress has been made with regard to the acquisition of commonage, the model of land-use and land administration poses many concerns. The model of land-use being implemented on the new commonage land in Namaqualand is based on the prevailing land-use practices of white commercial farmers in the area, rather than on the communal system prevailing on the older commonage. This new model involves individualisation of grazing holdings (occupiers pay for exclusive use of certain camps), enforcement of prescribed stocking rates (based on the concept of carrying capacity), and rotational grazing. (May and Lahiff 2007: 788)

Research, (Lebert and Rohde 2007) suggests that the newly acquired land has benefited local elites as opposed to the poor majority.

From a land tenure and administration perspective commonage has been thought to offer advantages in that it requires the establishment of a co-management institution, while the rules and regulations regulating access and use of the Commons can be formulated as municipal bylaws. This means that the state retains ownership of the land, allocates use rights and levies user fees. It also places obligations on the state, which remains responsible for maintenance of essential infrastructure on the land.

However, in practice many local municipalities are increasingly dysfunctional and lack the resources to manage commonage, maintain fencing and water points on the land. They may also lack capacity and political will to collect grazing fees from those who can afford to pay. This has meant that in Namaqualand infrastructure on the land has become run down, while stocking rates on the old commons are reported to be almost double those prescribed by the Department of Agriculture, and those on adjacent commercial farms (Benjaminsen, Rohde et al. 2006). The question remains as to how land tenure rights and residual grazing systems intersect with the contemporary management of extensive rangelands in the CRAAs. Climate change projections which forecast warming of between 5 – 8 degrees over the interior, coupled with drier conditions in the west of the country, pose serious

challenges to the sustainability of small stock farming, in already harsh circumstances. This suggests sharply increased pressure on available resources, which will require greater clarity on tenure rights and investment in localised land administration to prevent resource capture and exclusion by local elites.

In instances where land tenure rights remain unclear, opportunities are created for elites to capture the lion's share of land acquired through land reform in the TRANCRAA areas, and more broadly across the land reform programme. This is examined in depth in the following section.

3.6 Land reform

Individuals and households who have acquired land through different elements of the land reform programme frequently lack clarity concerning their individual and household tenure rights. Further, currently there is no meaningful state support to enable land holding entities to allocate and administer land rights of their members.

In 2009, the impact of inadequate programme design was assessed through a review of econometric data. This came to the worrying, if qualified, conclusion that land reform could have had unintended consequences for household food security of beneficiaries.

“Comparing beneficiary and non-beneficiary households with similar distributions for a rich set of covariates, propensity score matching estimates indicate that households who say they have received a land grant are more likely to report difficulties in satisfying their food needs than non-land grantees” (Valente 2009: 1542)

This was primarily because the land reform programme has focused primarily on enabling access to land without adequately engaging with the constraints that people acquiring land will face if they want to bring it into production, irrespective of scale. With limited post transfer support and where land reform offers few opportunities to pursue multiple livelihoods, many land reform beneficiaries who gain access to land have few options but to remain where they are currently living but move family members and resources between two locations. This has the potential to drain rather than enlarge household resources, particularly as transport costs continue to escalate.

Land holding entities lack capacity to record and manage rights or specify and enforce responsibilities of individual land rights holders. Such responsibilities include individual contributions to the maintenance and upkeep of resources - water points, fencing and related production infrastructure, together with a pro rata contribution to the payment of rates which are levied after the expiry of the 10-year exemption period on the land acquired through land reform.

3.6.1 Land restitution

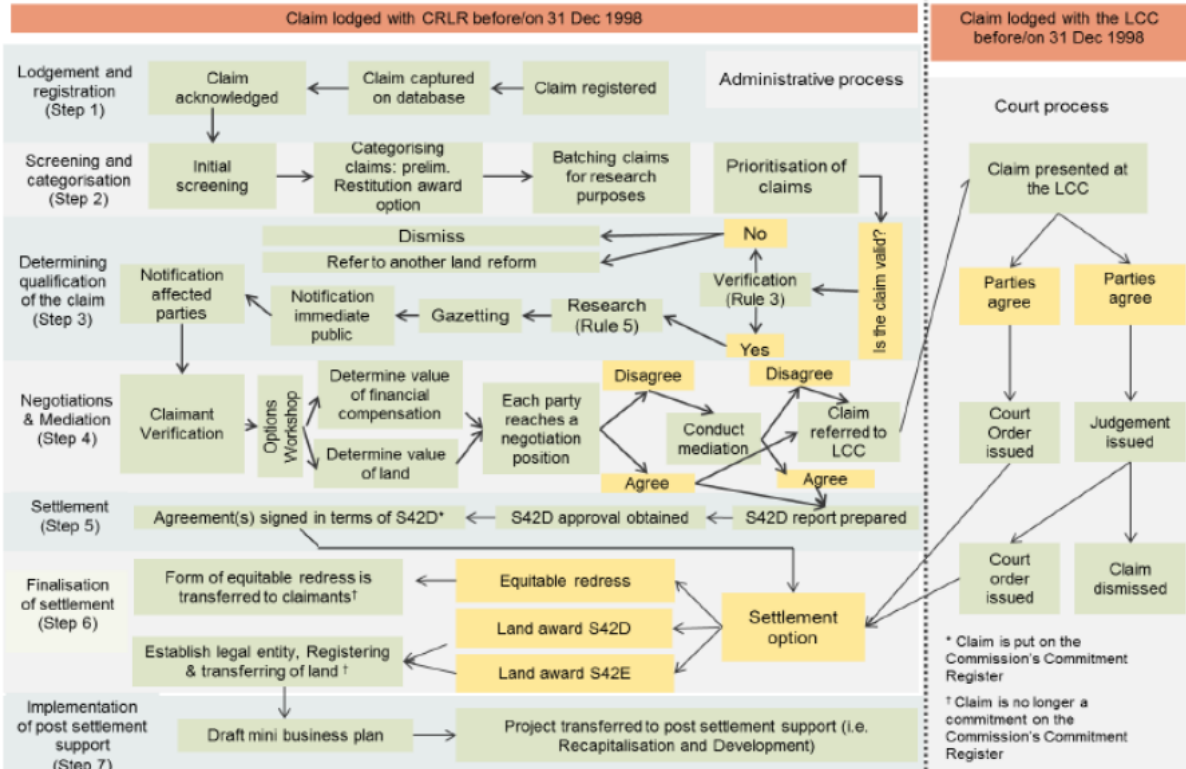
By 1998 63 455 claims were lodged by 31 December 1996 of which 3190 were dismissed. The deadline was subsequently extended to 31 December 1998 which boosted the total claims lodged to 79 696.

Research commissioned by the HLP estimated that more than 7 000 claims remained unsettled, while 19 000 old order claims were still to be finalised. It was calculated that at the current rate of processing 560 claims a year it would take 35 years to finalise existing claims. Researchers further estimated that it would take 143 years to settle the new claims lodged in terms of the Restitution of Land Rights Amendment Act of 2014. This process was subsequently halted by the Constitutional Court. Should the process be re-opened and a further estimated 397 000 additional claims are added, it could take another 709 years to settle and finalise these, if current processing rates remain constant.

3.6.1.1 Tenure and land administration issues in the restitution claim settlement process

An implementation evaluation of the restitution programme (Genesis Analytics 2014) produced a flow chart indicating the steps and pathways involved in the settlement of a land claim.

Figure 3: The Restitution claim settlement flow chart (Genesis Analytics)



In cases where a restitution claim involves a land award in terms of Section (42)(D) or Section (42) there is a significant silence on processes to formulate tenure arrangements and specify individual and household rights on the restored land. The only tangential reference to this appears in Step six with the establishment of a legal entity – usually a Communal Property Association to hold the land on behalf of *bona fide* claimants. This step focuses on the transfer of the property as a whole to the newly constituted legal entity. Thereafter implementation of ‘post settlement support’ envisages the drafting of the mini business plan and the transfer of responsibility for implementation to “post settlement support i.e. recapitalisation and development”. These steps rest on a series of unspoken assumptions:

- that the claimant community will continue with production already established on the restored land;
- that production will be undertaken on behalf of the claimant group;
- that members of the claimant community will remain off-site and will not settle on the land;
- there will be no formal or informal subdivision and individual rights in land will not be demarcated;

Tenure arrangements and the allocation of rights and responsibilities assume an additional layer of complexity in certain restitution contexts. In these instances, claimants have struggled to have land from which they were dispossessed restored and may seek to recreate the status quo which pre-existed before their dispossession.

Deborah James has documented the complex history of Doornkop from which residents were forcibly removed in 1974 and which was restituted 20 years later in 1994. She observes how “socio-economic differentiation in the community already entrenched when the former occupants were forcibly removed... re-emerged after the farms restitution and became entrenched in leadership/rank and file divisions. Those resettling on the farm relied on a mostly absent elite – whom they elected to the committee – to represent the interests”. (James 2006: 9)

James narrates how:

“By 2001 Doornkop been invaded by more than a hundred families of shack dwellers who claimed to have lived there in the pre-removal period. Indeed, some poorer CPA members had “sold” plots, illegally, to those “squatters”, in an attempt to augment their meagre incomes... The resulting crisis of leadership was exacerbated by uncertainty about exactly which land was owned by whom. Residents claim that if there had been certain of their specific property rights from early on (a matter of ownership), they – or their representatives, the CPA committee – would have been empowered to evict the squatters on their behalf before the problem escalated. Lack of certainty about property rights likewise caused vacillation amongst co-owners about holding other members of the CPA accountable.”(Ibid: 10)

James highlights how in the case of Doornkop (and arguably in many other CPAs) “a model of communality, combined with inattention to the precise nature and content of property rights has served to paralyse leaders”.

Despite the long democratic tradition of the land buyers at Doornkop and their independence from chiefly power since the 1800s, the problems emanating from the ineffectiveness of CPA style governance prompted some other members to reconsider the option of instating chiefly/customary authority to manage access to the land. James observes that:

Such sentiments, rather than being seen as a wholehearted endorsement of traditional leadership, represent a critical commentary on the opacity and ineffectiveness of CPA committees: groups of (mostly male) office-holders whose deliberations and machinations are a mystery to most, who fail to deliver on numerous promises of development, and who in many cases do not even live on the restored farms but travel there infrequently from the cities where they reside and work. Similar problems, widely reported, suggest profound flaws in the assumption – enshrined in the original legislation - that communal landholding would automatically be translated into harmonious and conflict-free leadership. Instead, there is a “breakdown of communication between the leadership and members”, as well as “inequitable allocation of assets based on self-help; mismanagement; the squandering of opportunity; a disregard for internal rules”. The result has been that “infrastructure and land are left to deteriorate” (Pienaar 2000:327). (Ibid: 12)

James searches for possible solutions created by this impasse and opts for a proposal put forward many years back by Kobus Pienaar who argued that if land holding entities are to be effective:

This requires making the state responsible to support the allocation and administration of the rights of individuals to use the land. The implication of this...would be to recognize that the state has a role to play in administering relationships, and regulating conflict, between co-owners, as much as it does between neighbours in a city context.

According to Pienaar (2000) in James (2006: 11):

Other property relations in society do get a lot of state support from local government, which helps to define your relationship with the street, your neighbours, the area in front of your house, and so on. There are public institutions, like the Deeds Registry, the Surveyor-General's office, which perform these functions. ... It is presumed that people in CPAs must take charge themselves, but no-one would expect this in the case of normal individually-owned property”.

From Doornkop to Schmidtsdrift oversimplified notions of ‘the community’, the failure to address land tenure and determine member’s individual/household land rights have surfaced complex conflicts of interest and values. Weak institutions, and the failure to conceptualise appropriate planning and support has come at a high cost and failed to unlock key assets for the benefit of the poor.

The poverty of restitution? The case of Schmidtsdrift

Schmidtsdrift was declared Crown Trust Land in 1827. Setswana-speaking Batlhaping and a number of Griqua clans lived together in the area. After the 1913 Native Land Act became law, the area was scheduled as the Schmidtsdrift Native Reserve.

In 1939 Schmidtsdrift was proclaimed a betterment area in terms Proclamation No 31 of 1930. Betterment planning was implemented in 1960. This involved a series of strictly enforced measures to control land use and grazing. These are said to have included a ban on ploughing in certain areas and the forced culling/auctioning of livestock. The betterment scheme resulted in people being moved from a more dispersed settlement pattern into six designated residential areas.

After 1948 the National party embarked on a series of measures to separate Griquas and Tswanas who both lived in the area and who had developed ties through intermarriage and a long history of co-existence.

This initially involved forcible relocation of Griquas to other areas. In the 1950s, to avoid such relocation a group of around 17 Griqua families in the Fonteintjie area opted to be reclassified as Tswanas. This enabled them to continue to occupy land at Schmidtsdrift.

Despite considerable state investment in the betterment planning it was subsequently decided to remove the whole Schmidtsdrift community. In early 1968 the apartheid regime forcibly relocated the community to “trust farms” which had been purchased north-east of Kuruman.

The forced removal served to disperse and divide people who had previously lived as neighbours. This meant that when the opportunity arose to reclaim lost land, people with historical rights at Schmidtsdrift acted independently to lodge competing claims on the land.

Representatives of the Batlhaping community, the bulk of whom lived in Kuruman and Kimberley, formed the Schmidtsdrift Tswana Community Trust and lodged their claim with the Advisory Commission on Land Allocation in 1992. The claim was rejected by ACLA and after a combination of community activism and negotiation was submitted to the newly established

Commission on Restitution of Land Rights (CRLR) in 1996. The CRLR also received competing claims on the same land from persons who identified themselves as the Kleinfonteintjie community - descendants of Griqua inhabitants previously residing at Schmidtsdrift.

After negotiations the Schmidtsdrift Community Development Trust and the Fonteintjie Community Trust signed a final settlement agreement which stipulated that both communities recognise that each had lost rights in the land and agreed to settle their respective claims as one. Following this agreement, the Schmidtsdrift Tswana Community Trust and the Fonteintjie Development Trust merged into the Interim Committee of the Schmidtsdrift CPA.

Clause 7 of the settlement agreement required that the two groups have equal representation in a single CPA, despite the fact that the Schmidtsdrift Tswana Community Trust, represented about 675 verified households while the Kleinfonteintjie Community contained about 85 verified households.

This clause has turned out to be highly problematic as it gave the Fonteintjie group who represented 12.6% of the claimant community a 50% representation in management. The 50% representation on the CPA Committee was interpreted by some to imply that Fonteintjie members were entitled to a 50% share in the property and subsequent revenue from diamond mining. The settlement agreement triggered a series of intractable disputes which neither mediation nor court proceedings could satisfactorily resolve. (de Satge, Mayson et al. 2010)

Both the cases of Doornkop and Schmidtsdrift highlight nascent social contestations, exacerbated by the passing of time and recast by the batching of restitution claims. These have threatened to overwhelm the restitution programme as a whole. In these settings processes to try and clarify and record individual land rights and entitlements to minerals and natural resources inevitably trigger disputes.

In the case of Schmidtsdrift, all the contesting actors and interest groups invoked the will of 'the community' to legitimate their positions and emphasise their popular support. This highlighted the plurality of 'communities' and interest groups, who in terms of the settlement agreement all made up the membership of the CPA. These included:

- local residents residing in different settlements on the property – some of whom were supportive of the CPA leadership, while others were vehemently opposed to it and refused to recognise its legitimacy;
- people on and off site who supported the return of traditional governance structures and who were variously allied with individuals claiming the status of chiefs;
- people with particular affiliations and claims on space and place who sought to return to establish new settlements in the area where they used to stay prior to dispossession;
- people of Griqua origin staying off site in surrounding towns, but who claimed grazing rights and entitlement to a share of benefits from diamond mining;
- people who had been dispossessed, but wished to continue to stay in the areas to which they were removed in Kuruman, who were doubly concerned about their tenure security on the land to which they had been removed, together with their rights and entitlements as former residents of Schmidtsdrift.

Schmidtsdrift, like many restitution cases provides insight into the enormous complexity involved in trying to reverse the social engineering of apartheid. The institutional and management capacity required to:

- record and maintain a register of members;
- allocate land and tenure rights;
- transparently manage a 24,000 ha landholding with both formal and informal settlement areas;
- allocate mineral and irrigation rights, while also dealing with increasing numbers of displaced people being evicted from surrounding farms and accommodated as tenants, or being informally allocated land on the property.

Unsurprisingly, the skills and costs of carrying out these functions completely outstripped both the capacity of members of the claimant community and officials from the relevant government departments and local municipality. The case of Schmidtsdrift raises serious questions about what can realistically be done to ensure equitable access to land, enhance livelihood opportunities and ensure sustainable resource management in socially contested and deeply stratified settings.

The identification and recordal of a legally defensible and socially equitable bundle of individual household rights in land and entitlements to land based resources seems fundamental here. Without this, and the backing of a state supported, publicly accountable, adequately resourced and capacitated management and land administration entity, key resources will be captured by powerful elites and the pro-poor goals of land reform will not be met.

3.6.1.2 Questions about the viability of the restitution programme

The viability of the restitution programme as a whole is questionable. It has been consistently undermined by pressure on the Commission to settle claims to meet arbitrarily imposed political deadlines. For example, in February 2002 President Mbeki set a target for the settlement of all land claims by 2005. When it became clear that this deadline could not be met, it was further adjusted to February 2008. In a bid to show reasonable progress and show evidence of accelerated claim settlement, the CRLR was forced into taking shortcuts – many of which proved fatal to the subsequent sustainability of the claims process. Of these shortcuts the most significant was the “artificial and unauthorised consolidation of claims... and, ultimately the finalisation of incomplete and legally flawed settlements”(Du Plessis 2018: 28).

The restitution programme was the subject of evaluation by the Department of Planning, Monitoring and Evaluation between 2013 and 2014. The evaluation covered implementation of the programme from January 1999 - 31st of March 2013 and an improvement plan was approved in August 2014.

However, as research commissioned for the report of the High Level Panel makes clear, many elements in this improvement plan have yet to be effectively implemented. The commission and the claimants are struggling with the consequences of the consolidation of claims which was undertaken to speed community claim settlement processes. However, this has created intensely complex problems, creating large dysfunctional groups of people “who in many instances have no shared identity, and in some instances have serious internal disputes with one another” (High Level Panel 2017: 249). The fatal flaws embedded in a vision where restitution somehow seeks to restore the past and make restoration of land seized through colonial and apartheid dispossession have made this dimension of land reform intensely difficult to implement.

3.6.2 Land redistribution

The land redistribution programme has evolved in clearly delimited phases since its beginnings within the Mandela presidency. The sections below briefly explore the evolution of the redistribution programme up to the present day.

Phase 1: Land redistribution via eligibility for settlement and land acquisition grants

Under the Mandela presidency land redistribution policy emphasised a pro poor focus. However, resources allocated to land reform were limited and concerns about maintaining equity between land reform beneficiaries and those in need of housing meant that the settlement and land acquisition grant was indexed to the value of an individual housing subsidy at the time. As a result, many households had to join together to pool their grants in order to make up the purchase price to acquire land through the market and the willing buyer willing seller mechanism. The settlement and land acquisition grant was augmented by a planning grant.

The first phase of the redistribution programme resulted in large groups of people taking ownership of a property which was then transferred to a landholding entity. These entities were either Trusts established in terms of the Trust Property Control Act or Communal Property Associations established in terms of the Act developed by the Department of Land Affairs, specifically for land reform purposes.

Concerns about the viability of this approach were twofold:

- How were large numbers of people were somehow supposed to derive benefits and/or a livelihood from a landholding which often had been unable to support the original white landowner and his workers?

This was particularly challenging since subdivision was not on the agenda and there was an assumption that new landowners continue with the same enterprises, but now under collective or group production.

- What to do about the 'rent a crowd' phenomenon where powerful and politically connected individuals colluded with officials to register relatives and others as co-applicants for grants in order to obtain singular ownership of a property?

The first phase of land reform was not exclusively concerned with the SLAG grant. There was also emphasis on other redistribution mechanisms including the acquisition of land for municipal commonage and state support for farm worker equity schemes which were introduced from 1997.

Phase 2: Land redistribution through LRAD

Under the Mbeki presidency the land reform programme started to shift away from its original pro-poor focus and concentrate on providing access to land and support for emerging black commercial farmers through the Land Reform for Agricultural Development programme (LRAD). A new grant formula offered a sliding scale in which the amount of the state's contribution was linked to the level of an individual's own contribution. This own contribution could also include loans from the Land Bank. This sought to do away with the large group projects in Phase 1.

Due to the relatively expensive nature of LRAD, there were few beneficiaries. Between 2001/02 and 2005/06, there were only about 3900 households benefiting per year, while between 2006/07 and 2008/09 there were fewer than 2000 households benefiting per year, despite annual expenditure in excess of R1 billion.

(Aliber, Mabhera et al. 2016: 34)

Proactive Land Acquisition Strategy (PLAS) and State Land lease and Disposal policy

PLAS was first introduced in 2006 and by 2010 was the sole land acquisition model for the redistribution programme. According to the report prepared by the Presidential Advisory Panel (2019) some 2200 farms have been purchased under the PLAS programme.

Unlike the previous land acquisition mechanisms where land was transferred in ownership to land holding entities, the state retained the ownership of the land acquired under PLAS and made it available to selected beneficiaries under a leasehold agreement. In most instances those gaining access to land through PLAS were required to enter into an agreement with a strategic partner.

It has been argued that after several land reform policy shifts "old-fashioned modernist orthodoxies... have shaped a contorted reform, centred on criteria of commercial 'viability' and governed by state officials, consultants agribusiness 'strategic partners' concerned with surveillance and control of 'beneficiaries' in 'projects' with precarious tenure on un-subdivided commercial farms now owned by the state" (Hall and Kepe 2017: 122).

PLAS land is allocated through the State Land Lease and Disposal Policy. This enables people accessing land through the programme to lease it for 30 years, renewable for a further 20 years, before they become eligible to take ownership of the property. However, in a study conducted in the Eastern Cape, no beneficiaries were found to have been issued leases on the land which they occupied. Hall and Kepe

observe that the resultant situation was “possibly the opposite of the vision of secure long-term rights for black South Africans which was at the core of land reform as envisaged in the 1990s” (Ibid: 126).

They identify how the insecure tenure status of people acquiring land through the PLAS programme has meant that:

“Other state institutions such as the provincial Department of Agriculture and Rural Development refused to deliver services or invest in their land uses. People are not able to access credit as financial institutions require some proof of their right to occupy. As a result, emerging commercial farmers, including those who have capital from other sources are being stymied in their farming operations”. (Ibid: 127)

They conclude that “South Africa’s land reform seems to have succumbed to the ingrained scepticism held by officials in successive departments of ‘native affairs’ and ‘bantú affairs’ about secure and independent land rights for black people”, and ask whether “without redistribution of power and wealth to those who are the ostensible beneficiaries, is it even land reform”? (Ibid: 128)

3.6.3 Tenure rights in landholding entities

In a comprehensive land tenure review (Manona, Kingwill et al. 2018) it was noted that according to the CPA Registrar in the Department of Rural Development and Land Reform (DRDLR), there were currently 1483 registered CPAs. In 2010, the Department reported to Parliament that there were also 1383 trusts, holding land acquired through land reform. In October 2015, the Department of Agriculture, Forestry and Fisheries reported to Parliament that there were 1788 agricultural cooperatives. However, there is no available data to indicate how many of the latter had obtained access to land through land reform.

Landholding entities, or communal property institutions (CPIs) are charged with a complex task of holding and managing property on behalf of the members of an association, beneficiaries of a trust or cooperative. As indicated in the case of Schmidtsdrift above, this presents particular challenges for elected office bearers and ordinary members, who have not undertaken such tasks previously. Particular skills are required to handle potentially conflictual issues, such as land allocation and distribution of assets, especially when there are powerful actors in the group or community. Where CPAs are established to hold land acquired through the restitution programme, the members may not have had to take decisions together before. In many instances, the systems and procedures for land rights allocation and management are not in place. In certain circumstances, the CPI may find its functions overlapping with those of traditional leaders and thus conflict develops between these two bodies.

In 2009/10 the CPA Annual Report highlighted widespread non-compliance with the CPA Act. CPAs were reported to be facing numerous challenges including:

- Executive Committees whose term of office had expired;
- Lack of business management skills;
- Conflicts amongst the membership;
- Contestations between CPAs and traditional leaders in some land reform settings.

A turnaround strategy was initiated in 2010, involving the ‘regularisation’ of 100 complex CPAs through the Land Rights Management Facility (LRMF). Lack of capacity to carry out core functions within DRDLR had led to the establishment of the LRMF, which draws on a panel of lawyers and mediators to help regularise CPAs. However, the process of regularisation envisaged by the LRMF has a very narrow remit. This focuses on ensuring that the barest minima of legal compliance with the Act: the holding of an annual general meeting, the preparation of reports and financial statements and their submission to the Department.

However, problems within CPAs are deeper and more systemic than the LRMF processes allow for. They require institutional capacity to be developed and supported over a long period of time. This must ensure that CPAs:

- are able to clarify on what basis membership is allocated – to individuals or households;
- have membership records;
- have the capacity to ensure that these records are regularly updated;
- can manage disputes that may arise with respect to the allocation of rights in land for residential stands, business premises, community facilities, arable allotments, grazing land, access to natural resources, water rights etc.

From a legal perspective the membership register is central to all aspects of CPI operations, reporting, decision-making and benefit sharing. In the absence of state support, very few CPAs have the capacity to maintain this register, with the result that there may be conflict and disputes over who is a member and what the individual rights of members entail.

Frequently there is insufficient clarity provided in the CPA Constitution regarding resource access, land allocation and management at household/individual membership scale. In most CPAs there are no land rights management structures and systems in place and no meaningful support from the state for this function. Often where land is utilised there has been informal transfers of rights, or appropriation of land and other resources by the powerful.

It is difficult to generalise about CPI functions because there is a wide variety of operational settings and many variations on the three scenarios listed in the table below.

Table 3: CPAs - diverse scales and operational settings

CPAs: diverse scales and operational settings		
<p>CPI has a relatively small reasonably socially homogenous group of members who obtained land through a legacy redistribution grant (SLAG or LRAD) who live offsite, but make use land for grazing and cropping.</p> <p>The CPI holds the land, controls access to the land and takes responsibility for maintaining on farm infrastructure and accessing state support.</p>	<p>The CPI obtains land through the restitution programme. Membership is stratified. A portion of the membership usually older, poorer and more vulnerable members may return to restored land to live on site.</p> <p>Other better off and economically active households continue to live offsite but may make use of land or claim a share of land-based resources to augment their livelihoods.</p> <p>A mix of commercial production and livelihood augmentation activities take place on an individual, group or partnership basis.</p>	<p>The CPI obtains land through the restitution programme. CPI membership is large and highly stratified.</p> <p>The landholding entity manages the membership lists and fulfils its responsibilities in terms of the legislation. It reaches agreement with the membership to establish other legal entities such as a trust or an operating company to plan and manage capital and skills intensive enterprises or enter into partnership arrangements.</p> <p>Other land may be allocated to members for individual grazing and cultivation.</p>

Organisations like Vumelana argue that the function of the CPA is to hold land on behalf of its members and that most problems and conflicts which CPAs have experienced, surface when they try to assume the

functions of an operating entity, responsible for running a business as well. Where CPIs acquire land with high value going concerns such as orchards or vineyards, (usually through Restitution) they need to establish another vehicle/legal entity to operate the businesses. However, this is frequently where conflict and power struggles arise. The structuring of the relationship between the CPA and the operating entity is complex and presents a range of social risks. The financial and business management functions assumed by the operating entity may create dependence on an external entity or strategic partner, which may also absorb the majority share of any profits. This may contradict the expectations of members and cause discontent. At the same time, these arrangements may create opportunities for elite pacts, corruption and misappropriation of resources. Strong and independent oversight mechanisms are required to prevent this from taking place.

3.6.4 *The absence of systems enabling the registration and administration of land and related resource rights*

in addition to the many difficulties faced by individual CPIs set out above, there is a further and more fundamental external problem - how to register, legally secure and enable transactions, linked to rights that may be granted to individuals who are members of such entities.

Even where a CPI may have sufficiently worked out tenure systems and land management structures and systems in place, there is nowhere, other than in the CPIs own systems that such rights may be registered - none of the relevant Acts require or provide for the registration of such rights to property. These rights are essentially off-register and extremely insecure - dependent on the internal capability and power dynamics within each of these CPIs.(Manona, Kingwill et al. 2018: 47)

3.6.5 *Municipal Commonage*

The 1997 White Paper on Land Policy emphasised the importance of municipal commonage as a means to provide access to land the poor residents in rural towns and settlements. It distinguished between traditional commonage which specified public benefit conditions in its title deed and newly acquired commonage land, either independently by municipalities or through land reform programme.

With respect to traditional commonage land “it became standard practice to regulate access to the commonage of a village in terms of municipal by-laws. As a rule, each village council adopted a set of prescribed standard by-laws to determine the content and nature of user rights, to provide for the allocation and ongoing administration of such rights, and to provide for the maintenance of the commonage”(Anderson and Pienaar 2003 p. 3).

By 2003 new commonage accounted for 31% of the total land transferred through the land reform programme, although 74% of commonage land was transferred in Namaqualand (Anderson and Pienaar 2003). At the same time interventions were made to expand access of smallholder livestock owners to traditional commonage held by municipalities prior to 1994 which had been almost exclusively leased out to white farmers.

Municipal commonage was characterised by land reform review commissioned in 1999 as an underperforming programme with regard to post transfer land use and management. Despite issuing a detailed commonage policy and operational manual in 2002 DLA and allocated minimal funds for the allocation of commonage land going forward. Land reform funds were rather allocated to the acquisition of land through the LRAD programme.

Anderson and Pienaar (2003) note that available data indicated that commonage users were predominantly men and that a number of factors including distance to the newly acquired commonage lands frequently limited the access of women to commonage resources. Also, in the vast majority of instances commonage land is allocated for grazing only. They identify diverse range of commonage users, often in competition with each other to gain the rights to graze their stock including “strong farmers and resource-poor farmers; commercial, part-time, income-supplementing and subsistence farmers; middle-class residents with additional stock investments, poor *inkommers* from the farms and migrant workers using the commonage to ‘bank’ income” (2003: 11).

Commonage management is reported to have collapsed in many instances, despite there being long recorded histories of commonage management and documented regulations and practices. Anderson and Pienaar highlight several examples of commonage land which has degenerated into an open access resource, where essential infrastructure such as fencing, grazing camps and water points are no longer maintained. In these instances, the municipalities have lacked capacity to institute grazing agreements, collect grazing fees and maintain commonage infrastructure together with commonage users.

The result has been self-help, dominance and exclusion of women and the poor, non-payment of user-fees, land degradation and severely reduced or minimal benefit to the few who manage to gain access. (Ibid: 13)

Despite this pessimistic assessment Atkinson (2013) notes that commonage farming remains widespread. She estimates that there are 2400 commonage farmers in the Free State alone, based on the estimate of 30 farmers per town across 80 towns in the province. She argues that:

Many commonage farmers are starting to behave like commercial farmers, even though they use municipal (state-owned) land. They often use other income sources to purchase inputs for their farming operations, showing a desire to invest in agriculture. They sometimes employ herders, thus creating jobs. Commonage is not used only by the poor, and certainly not only by men. Women participate fully as commonage farmers. (Atkinson 2013: 30)

Atkinson identifies pilot commonage schemes in the Free State where there has been improved levels of institutional support by the municipality and technical assistance provided by the Department of Agriculture. In these instances, it appears that the municipality has developed capacity to ensure that grazing agreements are in place, and fees are paid. She argues that these arrangements greatly assist commonage farmers, despite the higher rental payments being levied.

She advances a strong argument against one size fits all, standardised policy approaches, highlighting the need for a “very nuanced policy framework, variously catering for survivalist, small-scale, large-scale full-time and part-time farming; on government land, private land municipal land or communal land”. This needs to offer a range of user rights ranging from leasehold to ownership backed by appropriate institutional support. She argues that “the key challenges are institutional capacity, not the choice of specific property regimes” (Ibid: 33).

It seems clear that commonage does provide livelihood opportunities for the residents who own livestock and live in rural towns. However, this is a resource, which like anything else can be captured by elites and degenerate into the dystopian scenarios sketched by Anderson and Pienaar above. It is clear that in the commonage context, leasehold is the tenure form which enables access to the land. It is institutional capacity which will determine whether lease agreements are issued, and the terms of the leases enforced so as to secure a revenue stream to maintain essential infrastructure on the land.

3.6.6 Labour tenants

Labour tenant relations no longer exist. However labour tenancy was at the heart of struggles for land and tenure security which have extended for more than a century. The Land Reform Labour Tenants Act (No. 3 of 1996) seeks to protect the rights of labour tenants living on land owned by others but who have, or had, the right to use cropping or grazing land on a farm in exchange for their labour. Most labour tenants are found in KwaZulu–Natal, Mpumalanga and Limpopo provinces.

As colonial control extended over South Africa in the 1800s, settlers demarcated farms and Roman Dutch property law was extended over much land which Africans had occupied for generations. Those who had enjoyed ownership in terms of customary law retained occupancy but lost control over their land.

They were forced to comprehend how a piece of paper in the form of a title deed lodged in some distant bureaucratic office could deprive them of the land that they were born on, and where their ancestors were buried. (Cowling, Hornby et al. 2017: 3)

Their rights were diminished to those of occupiers, whose continuing access to and use of the land was at discretion of the new owners with registered title.

....by 1913, Africans had been effectively dispossessed of their de facto ownership. Those who wanted to access productive land were compelled to enter labour tenancy contracts. The contracts involved the patriarchal head of house entering agreements with white landowners to provide the labour of his children and his wives for free, in return for which he was provided land to build a home on, fields to plant crops on and grazing land for livestock. When farmers argue today that they make an important contribution to the country's economy, that food security for the growing cities depends on them, it is fitting to recall that the unpaid labour of children and women is inextricably woven into, and is the bedrock of what is today "the farm". (Hornby 2018 n.p)

Labour tenants retained their rights to stay on the farm and to graze and cultivate a portion of land in exchange for providing mostly free labour to the registered owners.

Over the years the state made numerous attempts to restrict and then abolish labour tenancy so as to transform labour tenants into wage labourers with no rights in land. However, these were unsuccessful because labour tenancy was perceived as providing benefits to farmers — particularly those who had yet to transition to more mechanised and labour-lean farming systems.

As state support for labour tenancy was withdrawn there was nothing in law to regulate relations between owners and tenants. This placed tenants at risk of having their historical rights diluted, or of being evicted from their land.

It was estimated that by the end of the 1980s, there were around half a million individuals operating within some sort of labour tenant system, "with some form of occasional wages in light of the official illegality of the system" (Cowling. M. et al. 2017: 5)

The Land Reform Labour Tenants Act (No. 3 of 1996) was passed to protect the occupational and land use rights of labour tenants as they existed on and after 2 June 1995. The Act provides a complex definition of a labour tenant and its interpretation has since been the subject of legal dispute. Section (xi) states:

“labour tenant” means a person

(a) who is residing or has the right to reside on a farm;

(b) who has or has had the right to use cropping or grazing land on the farm, referred to in paragraph (a), or another farm of the owner, and in consideration of such right provides or has provided labour to the owner or lessee; and

(c) whose parent or grandparent resided or resides on a farm and had the use of cropping or grazing land on such farm or another farm of the owner, and in consideration of such right provided or provides labour to the owner or lessee of such or such other farm, including a person who has been appointed a successor to a labour tenant in accordance with the provisions of section 3(4) and (5), but excluding a farmworker.

In trying to resolve labour tenant cases it has been disputed whether all three subsections of the definition must apply simultaneously, as this would exclude all first-generation labour tenants whose grandparents did not reside on the farm.

Likewise, any person otherwise qualifying as a labour tenant, but who had subsequently been paid a wage as a farmworker could also be disqualified in terms of the Act. This ambiguity encouraged landowners to make payments to convert tenants into wage workers, so as to undermine the possibility of labour tenant claims on the property.

To further complicate matters, there are cases of conflicting and overlapping labour tenant and restitution claims on the same property. In practice, restitution claims of those forcibly removed in the past have tended to be given priority, to the detriment of those labour tenant claimants who still reside on the land. This creates an impossible situation and heightens the possibility of conflict between restitution and labour tenant claimants. Research submitted to the HLP argued that labour tenant claims should be given precedence.

Despite the Act containing measures to prevent eviction of labour tenants and to criminalise owners guilty of illegal eviction, there is little evidence that the Act has been effective in preventing eviction. This in part is due to the ambiguities in the LTA definition, where labour tenants may be passed off as farmworkers.

A person who has narrowly missed out on being defined as a labour tenant could end up simultaneously losing their job, and would also render him or herself liable to be evicted from the only place that they can call home. The law as it currently stands does nothing to offer any form of protection in such circumstances. (Cowling, M. et al 2017: 14).

Chapter 3 of the LTA enabled labour tenants to apply to obtain ownership of land where they could show historical use and occupation rights. The deadline for these applications closed on 31 March 2001.

Some 20 324 applications were lodged by the deadline. But since then very few claims have been processed or settled. The Act has a fatal flaw in that it placed the Department at the centre of the claims process. Section 17 of the Act requires that any application for the acquisition of land and servitudes (to provide access to water, rights of way, etc) had to be lodged with the Director General. The drafters of the Act assumed that the Department would have adequate capacity to process these applications which was not the case. The failure to respond has meant that “in labour tenant litigation both the

labour tenant and the landowner can be held to ransom by the Director-General, whose non-compliance results in a breakdown of the entire process” (Cowling, M. et al. 2017: 15).

The Department of Land Affairs failed to allocate the necessary staff to implement the Act and process the claims. Institutional incapacity has meant that thousands of labour tenant claims vanished without trace. In the seventeen years which has passed since claims were submitted, many of the labour tenant claimants have died. The Department unilaterally sought to address some labour tenant claims via the redistribution programme.

Perspectives from the HLP report on the LTA

A review of the implementation of the LTA commissioned for the High Level Panel found that there have been significant problems in implementing the Act.

Progress has been stalled by the conflictual nature of court proceedings. The report confirmed the failure to allocate adequate resources for implementation. Despite there being an emphasis on alternative dispute resolution methods to settle labour tenant claims (similar to conciliation processes to address disputes in terms of the Labour Relations Act) this was not the approach in practice.

AFRA class action and the Constitutional Court ruling

The failure of the DRDLR to carry out its constitutional mandate has been the subject of a class action brought by the Association for Rural Advancement (AFRA) – a long established land sector NGO. On 8 December 2016, Judge AJ Ncube of the Land Claims Court ruled that the Department was in breach of its constitutional obligations and ordered that a Special Master of Labour Tenants be appointed to process claims. The judgement required the Special Master to report to the Court on progress.

The DRDLR was subsequently granted leave to appeal this judgment to the Supreme Court of Appeal (SCA) in 2016, arguing that the appointment of a Special Master violated the principle of the separation of powers. The SCA overturned the Labour Claims Court’s appointment of a special master, citing a “textbook case of judicial overreach” (Postman and Wicomb 2019: n.p.). The case was then referred on appeal to the Constitutional Court. In August 2019 a majority of judges in the court upheld the Land Claims Court’s (LCC) order to appoint a Special Master to assist the Department of Rural Development and Land Reform to process land claims.

This new development will turn attention to the ways in which the tenure of successful labour tenant claims can be secured and how land obtained through the claims process will be held.

3.6.7 Farm workers and dwellers

The tenure security of farm workers and dwellers have been made ever more precarious by rapid changes in the local and global agricultural policy and markets. In South Africa state expenditure on agriculture began to decline in the mid-1980s. Between 1987 and 1993, budgetary allocations to the white commercial farming sector were halved. South Africa’s admission into the General Agreement on Tariffs and Trade (GATT) in 1993 accelerated the economic deregulation and liberalisation of agriculture.

South African agriculture now operates under very different circumstances... Since 1994, South African agriculture has moved from being heavily protected by state subsidies and tariff barriers to being exposed to global competition... [in which] South African subsidies are now among the lowest in the world. (Atkinson 2007: n.p.)

These processes brought about deep structural changes in the sector. Large scale intensive farms dominated, focusing on the production of high-value products for export, as opposed to low-value, high-volume commodities for domestic markets (WWF 2009)

Farmworkers still remained unprotected by any form of central labour legislation by the early 1990s. Employment contracts with farmers were governed by common law, so farmers could retrench and evict farmworkers at will.

During the first decade of democracy in South Africa new policy and legislation was introduced to regulate labour relations and conditions of employment, address land reform, housing and tenure security for farm workers. Key legislation included:

- The Labour Relations Act (No. 66 of 1995);
- The Basic Conditions of Employment Act (No. 75 of 1997);
- The Unemployment Insurance Act (No. 63 of 2001);
- The Employment Equity Act (No. 55 of 1998);
- The Land Reform (Labour Tenants) Act (No. 3 of 1996);
- The Extension of Security of Tenure Act (No. 62 of 1997);
- The Housing Act (No. 107 of 1997). (ILO 2015).

While new policies and laws aimed to improve the lives of farmworkers, prevent arbitrary eviction and secure their rights, the process of re-regulation had many unintended consequences.

Wegerif et al (2005) estimate that there were approximately 4.3 million black Africans living on white farms in 1984. Between 1985 and 1995 they calculate that more than three quarters of a million people were evicted or displaced from farms throughout South Africa. According to their data, evictions spiked in 1992 (179 575 people evicted) linked to severe drought and associated layoffs on farms, and again in 1994 (122 626 people evicted) which they attribute to the promulgation of the Restitution of Land Rights Act and general uncertainty among employers associated with the trajectory of the transition to democracy.

Policies to raise worker wages and protect tenure rights were introduced at the same time as producers that were seeking to access highly competitive export markets faced expanded compliance responsibilities. By 2002 just 673 farms (1.6% of the total number of commercial farms) produced a third of total gross farm income, and 1 348 farms (5% of the total) produced more than half of total gross farm income (Vink and Van Rooyen 2009).

The slashing of state support for agriculture left many producers with little alternative but to cut costs. In this context, new policies and laws:

- created disincentives for commercial producers to provide and maintain on-farm housing;
- contributed to the further displacement/eviction of low skilled workers;
- accelerated the casualisation and externalization of large segments of the agricultural workforce.

Nkuzi Development Association has argued that the biggest weakness in ESTA “has been the failure of the Act to move farm dwellers out of an inferior tenancy arrangement to a situation of having their own land”.

Nkuzi notes that:

Section 4 of ESTA empowers the Minister to appropriate funds for “on-site and off-site developments.” However, the provisions of Section 4 make it very difficult to force an on-site settlement where the owner is unwilling and there is no right in the legislation for a farm dweller to claim security of tenure if the government is failing to provide it for them. (Nkuzi Development Association n.d)

A follow up report to hearings held by the South African Human Rights Commission in 2003 recorded that just 273 people had benefitted from the award of Section 4 subsidies – mostly in Gauteng.

In 2007 the SAHRC held follow up hearings to determine the progress made in relation to land tenure security, safety and labour relations on farms. The report highlighted how ESTA had impacted on secure access to housing for farm workers.

ESTA has had unintended and undesirable consequences...Attempting to privilege tenure security in isolation from a larger development programme to address living and working conditions on farms, has practically extinguished many of the other rights of farm dwellers and their families – such as the rights to adequate housing, health and education... It provides a disincentive to land owners and employers to improve on farm housing and facilities. (*South African Human Rights Commission 2008: 9*)

In the 2011 Green Paper on Land Reform the Department of Rural Development and Land Reform acknowledged that the implementation of ESTA has been overwhelmed by “total system failure”.

There is a strong view that the real problem in land reform in general; and, in the protection of the rights and security of tenure of farm-dwellers, in particular, may be that of a total-system failure (TSF) rather than that of a single piece of legislation, e.g., Extension of Security of Tenure Act (ESTA). (DRDLR 2011: 10)

The HLP and the Presidential Advisory Panel highlights the continued vulnerability of farmworkers and dwellers and the increasing number of evictions, noting that farm dwellers tenure remains “a poor relation within land reform policy”. The report recognises however that calling for a moratorium on evictions poses constitutional and legal problems. It follows the recommendations of the HLP to properly enforce Section 4 of ESTA and enable processes by which farmworkers can register to secure access to their own land and obtain security of tenure.

The 1997 the White Paper on South African Land Policy alluded to above restricted those eligible to benefit from land reform to:

- verified claimants of the Land Restitution Programme in terms of the Restitution of Land Rights Act, 22 of 1994, who require additional funds for meeting basic needs on restored land;
- landless people, or people who have limited access to land, especially women, who wish to gain access to land and settlement opportunities in rural or urban areas;
- farm workers and their families who wish to acquire land and improve their settlement and tenure conditions;
- labour tenants, and their families, who wish to acquire and improve the land which they hold or alternative land, in accordance with the Land Reform (Labour Tenants) Act, 3 of 1996;
- residents who wish to secure and upgrade the conditions of tenure under which they live;
- Municipal Councils to acquire land to be used as a commonage or to extend an existing commonage.³

Despite the stated objectives of the White Paper, farm workers have not been priority beneficiaries of land reform. Indeed, they have hardly benefitted from land reform at all. The policy focus with regard to farmworkers is primarily focused on attempts to secure tenure and prevent arbitrary eviction. However,

³ DLA (1997). White Paper on South African Land Policy. Pretoria, Department of Land Affairs.

even where this may be successful, security of tenure without the means to make a livelihood condemn farm dwellers to a marginal existence.

Research undertaken by PLAAS in Limpopo highlights how rapid change in the agricultural sector has progressively undermined the position of farmworkers and dwellers. These changes included rapid mechanisation and export led development and an increasing reliance on short contract seasonal labour.

There appears to be very little information available on the extent to which people living and working on farms desire to farm on their own account.

Simbi and Aliber (2000) undertook a survey which they asked farmworkers and dwellers in Dendron and Tzaneen whether they would wish farm for themselves. They found that workers who had not taken on specialised functions on the farm were more likely to be confident that they could make use of their general farming skills if the opportunity to farm independently arose. Where workers had taken on particular functions such as the repair of machinery, they were less certain of their abilities to farm on their own. Aspirations range from the desire to farm commercially to more modest goals of obtaining a plot to grow additional food for the family. There appears to be very little data available on the extent to which workers employed in the agricultural sector have access to land on the farms where they are employed and are encouraged to become involved in production for household food security or enabled to piggyback on existing systems to access markets.

The recent ILO report has signalled that attention needs to be paid on how to address the developmental challenge of securing homes, livelihoods and access to services for farmworkers both on farm. The report notes that “although there are examples of off-farm schemes to provide secure housing and livelihoods for former farm dwellers these have been the exception” (ILO 2015: 84).

4 Relative security of land rights and implications for small scale producers/smallholder farmers in different settings

The table below summarises the relative security of land rights in different settings across the landscape and what these mean for smallholder farmers.

Table 4: Relative security of land rights in different settings

Tenure setting	Relative security of land rights	Implications for smallholders and rights holders
Former bantustans	The PTO and quitrent systems have broken down. This affects 17 million people living in the former bantustan areas. There is no mechanism in place to record rights in land and to adjudicate conflicting and overlapping rights. Spatial planning, development control and land use regulatory measures are non-functional. Ad hoc site allocations are the norm. Households at risk of arbitrary dispossession or encroachment on land and resource entitlements. Management of common property	People may be dispossessed of their rights in land through land grabs and elite deals between chiefs, traditional councils and external investors such as mining houses and agribusinesses. The breakdown in land governance and administration has contributed to the decline of the smallholder arable production as there are no controls on where livestock may graze.

Tenure setting	Relative security of land rights	Implications for smallholders and rights holders
	<p>resources has declined in most instances. In some contexts, it has degenerated into open access which in favours capture by elites.</p> <p>IPLRA, the protective legislation is a temporary and renewed annually. It contains provisions to ensure that rights holders may not be dispossessed of their land without their consent. These provisions are not widely known or utilised. The Act has been poorly implemented and current draft legislation such as the TKLB seeks to further dilute IPLRA's protective capacity.</p>	<p>Arable land may be encroached on or reallocated for residential stands.</p> <p>Land with water and high productive value remains underutilised. Despite investment in revitalising irrigation schemes, many remain non-functional.</p>
Ingonyama Trust	<p>Land that people have lived on for generations has been converted to leasehold under the Ingonyama trust and occupiers are forced to pay rents.</p> <p>Evidence suggests that women's land rights are particularly vulnerable under the Ingonyama Trust</p> <p>The Trust operates with impunity and disregards the protections and requirements of prior informed consent contained within IPLRA.</p>	<p>Rights holders are reduced to tenancy on their own land.</p> <p>Additional disincentives to develop agricultural resources.</p> <p>Increasing incidence of traditional authorities abusing their powers of self-stated custodianship over customary rights.</p> <p>Lack of agency by land rights holders over customary lands where mining rights or other rights of natural resource extraction are authorised, or may be authorised in spite of protections in law.</p>
Act 9/TRANCRAA Rural Areas	<p>Land rights in the TRANCRAA areas remain in something of a vacuum as the transformation process which was supposed to be set in motion by TRANCRAA has experienced long process delays due to the incapacity of DRDLR.</p> <p>TRANCRAA creates options for land to held by municipalities or CPAs. In both instances institutional incapacity poses a threat to land administration, maintenance of infrastructure and creates opportunities for resource capture.</p>	<p>TRANCRAA communities are geographically delimited and have long settlement and land use histories. This provides some protection against arbitrary loss of land rights, although there is evidence of attempts by local elites to gain access to disproportionate allocations of grazing and arable land.</p> <p>The failure to implement TRANCRAA has opened space for informal allocations of land which put the rights of more vulnerable households at risk.</p>

Tenure setting	Relative security of land rights	Implications for smallholders and rights holders
		Inability to collect grazing fees threatens maintenance of essential infrastructure on the land
Land acquired through community restitution claims	<p>Restored land is held by a CPA or a Trust. Relative security of land rights and/or benefit sharing varies widely. Some claims have a settlement component, while others make claimants who remain offsite the equivalent of shareholders in enterprises managed on their behalf – often by a third party.</p> <p>Very few landholding entities owning rural land restored through community claims have had the capacity to determine individual household rights in land, beyond the allocation residential erven.</p> <p>Where land claims have a significant settlement component a township establishment process may be initiated which gives the local municipality responsibility for service provision.</p> <p>High levels of indigency and costs of providing services to remote settlements places a strain on municipal finances</p>	<p>Land and benefit sharing rights of households joined in a community claim remain unspecified in most instances. Household responsibilities to contribute to asset maintenance are also not addressed.</p> <p>The size of many community claims creates spaces for resource capture by powerful figures and elites, leading to further dispossession of claimant households.</p> <p>Restitution has not created many opportunities for smallholders with the exception of the sugar and forestry industries, although there are numerous concerns about the sustainability of smallholder production in the sugar sector.</p>
Land transferred to land holding entities established through SLAG	<p>In the first phase of land reform land was transferred to Trusts and CPAs in ownership. Many of the landholdings transferred could not meet the livelihood needs of members of the CPA/beneficiaries of the Trust. Many projects collapsed. In some instances, properties were abandoned or retained by a small core of residual members. Poor oversight of Trusts and CPAs resulted in elites selling off land and assets without the consent of members</p>	<p>No provision was made to identify rights of individual rights holders making up the membership of CPAs and Trusts.</p> <p>There was an emphasis on whole farm operation and group enterprise management which failed.</p> <p>Where properties have not been abandoned, or their assets stripped there may be potential for turnaround involving individual subdivision.</p>

Tenure setting	Relative security of land rights	Implications for smallholders and rights holders
Land transferred to land holding entities established through LRAD	<p>There is little data currently available which enables an assessment of the sustainability of properties transferred through LRAD.</p> <p>However, given that this programme consciously set out to restrict the number of beneficiaries and to require an own contribution, property ownership vested in small groups, families and individuals.</p> <p>In a family farming context rights in land were relatively easy to determine, although given high transaction costs to transfer title, informal transfers of land may take place.</p>	<p>Land in individual or family ownership could be ceded as collateral against production loans.</p> <p>Where family farming enterprises failed and entities were forced to declare bankruptcy, their land and other assets could be liquidated to cover their debts.</p>
Land acquired through PLAS	<p>Research indicates that many of the occupiers of the more than 2200 farms purchased through this programme do not have leases and are not paying the prescribed 5% of annual turnover.</p> <p>Rights in this setting are highly insecure and subject to the whims of the state which may allocate the property to other applicants/associates/cronies at will</p>	<p>There are strong disincentives for smallholders to invest in such an uncertain land rights context.</p> <p>There are also perverse incentives to asset strip properties purchased through this programme in a context where the state lacks oversight capacity and political will to manage state land assets.</p>
Farm workers and dwellers	<p>The tenure of farmworkers and dwellers is structurally insecure because they live on land owned by others.</p> <p>The Extension of Security of Tenure Act regulates the rights of owners and occupiers and specifies the circumstances under which an owner may apply to evict and occupier.</p> <p>While legal evictions do take place, anecdotal evidence suggests that many owners induce occupiers to leave properties by means of once off cash payments and relinquish their ESTA rights in the process.</p>	<p>It is unclear to what extent farmworkers and dwellers are involved in independent agricultural activity – whether this be in the form of home gardens, the allocation of land by the owner to enable cultivation or grazing.</p> <p>Whatever the case, the rights of farmworkers and dwellers to make use of this land, where it may be granted, remains dependent on their continued employment or ongoing good relationship with the landowner.</p>

Tenure setting	Relative security of land rights	Implications for smallholders and rights holders
	There has been little use of section 4 of the act which makes provision for on and off farm settlement and the award of tenure grants.	
Labour tenants	<p>Given the long-standing failure of the state to implement the Land Reform Labour Tenants Act, the land rights of many labour tenants have remained highly precarious.</p> <p>Landowners have often sought to make payments to them to establish contractual relations as farmworkers in a bid to extinguish labour tenancy agreements and the right of access to land grazing that these confer.</p> <p>Where Labour tenants claims that been lodged Labour tenants are at high risk of eviction.</p>	The recent decision by the Constitutional Court to require the Department of Agriculture, Land Reform and Rural Development to appoint a special Master to develop a plan for the processing of long outstanding labour tenant claims may create opportunities for labour tenants to gain access to land in their own right, creating potential for smallholder production.
Commonage users	Research suggests that in many instances commonage management has collapsed and that much of the land allocated to commonage is being grazed without planning oversight or development control. Grazing rights in this setting remain insecure.	<p>Commonage creates opportunities for small and medium livestock owners to graze their stock. However, the absence of commonage management and the running down of essential water and fencing infrastructure may serve to limit production potential.</p> <p>Given that majority of livestock owners grazing on commonage land sell livestock on informal markets, there is little data available to assess the social and economic value of these enterprises.</p>

It can be seen from the table above that smallholder producers across the landscape almost uniformly experienced significant levels of tenure insecurity which impacts on their productive potential. It can also be seen that there will be no benefits from one size fits all attempts at finding a solution. Strengthening tenure security will have a strong element of contextual specificity and will require nuanced and customised approaches appropriate to different tenure settings.

5 Land administration in different settings

5.1 Tenure security and smallholder production in communal areas

Is tenure a major factor influencing household involvement in agricultural production in the communal areas? How do the communal tenure regimes constrain or enlarge land-based/land linked livelihood opportunities and for who?

The section above highlights how agricultural production in the former homelands has changed with much arable production being restricted to fenced garden plots adjacent to people's homes. This has meant that much arable land has been returned to grazing and forms part of an expanded portfolio of grazing and other common property resources. It has been argued convincingly that natural resources (fuelwood, wild foods, building materials, medicinal products) make an important contribution to daily living and income generation and mitigate against income and asset poverty. (Shackleton, Shackleton et al. 2000, Shackleton, Shackleton et al. 2007, Shackleton, Campbell et al. 2008)

Use of such biological resources typically provides 15 to 25% of total income to rural households in South Africa, and for many households surpasses income from arable cropping and livestock combined. (Shackleton and Shackleton 2012: 1)

Importantly much of this income benefits women in vulnerable households. It is important to recognise that communal tenure regimes even where poorly supported and managed still provide essential safety nets for poor households. This has often been overlooked in the debate about how to bring underutilised land back into production the communal areas.

There is also research which examines cases of how the reinstatement of customary rules to reinforce exclusive rights to arable land have improved perceptions of tenure security and prevented damage to crops from the invasion of livestock. Research conducted in the Tugela catchment (Thomson 1996) asked the question why despite intense population pressure and acute poverty arable land was left idle in KwaZulu. The hypothesis was that there was no rental market to enable unused arable land to be utilised by others who could farm it. Such a rental market was only enabled once the tribal authority agreed to uphold rental contracts in customary courts and to set up a local oversight committee to agree on a planting date after which all livestock had to be removed from arable lands. The committee developed procedures for settling disputes and established rates of compensation to be paid in cases where livestock damaged or destroyed crops.

Others have argued that land rights will need to be privatised and individualised before land markets can be created and abandoned lands brought back into production. There has been heated debate on the merits and demerits of issuing title deeds for whose rights remain off register, and whether such a move would actually be socially and economically beneficial.

Kingwill has argued convincingly that the issuing of title deeds is unlikely to provide solutions and is much more likely to produce a range of unintended and undesirable outcomes. She highlights the lack of fit between neatly individualised and 'parcellised' conceptions of property and nested and layered African family property constructs.

The trajectory of the debate in the media and on public forums suggest that the issue is deeply polarised and mired in ideological considerations, with an alarming lack of understanding by many of the actual verifiable conditions on the ground... Individuals, families and community members hold a range of primary and secondary rights that are often layered, over each other. The human – land relationships are usually not one-to-one, and thus resist neat parcellisation or subdivision. If the

process of untangling these social webs is not conducted with an empathetic yet rigorous approach, issuing titles may unwittingly open up concealed cracks and trigger disputes for generations to come. (Kingwill 2018: n.p.)

Kingwill notes that a key characteristic of African family property systems in South Africa is that families frequently do not identify an individual within the family who is designated as the registered 'owner'.

"Hence title deeds fall rapidly and repeatedly out of date... because family members do not wish to record the proprietary relationship alone. This gives power to someone in the family to dispose of all, or some of the family's property unilaterally, a power that individual family members are not supposed to have. In the context of poverty, family property is an important safety valve to protect vulnerable members of the extended family. It is also a powerful symbolic social anchor in times of great uncertainty and transition.(Ibid: n.p.)

Kingwill's perspective aligns with that of Verdery who examined the process of re-creating of private property rights from the legacies of collective property nationalised under communism in the aftermath of the collapse of the Soviet bloc. This was a process demanding consideration of a complex array of factors:

First, I suggest that to understand property ..., one must go beyond defining it in terms of rights and obligations that assume individualised property subjects. I prefer instead a property analysis that invokes the total system of social, cultural and political relations and enquires into, rather than assuming the nature of property conceptions.(Verdery 1999: 103)

As Verdery suggests, this demands "a deeper enquiry into the very concept of property itself – what it means, and how property regimes are socially produced". This requires that when we examine what is known about land-based livelihoods and agricultural production in communal tenure settings we need to interrogate how the land is actually held, and the balance of powers, social and economic factors that either enhance or constrain its productive use. This calls for tools which assist with the understanding of the "intersection of interests and dispositions that serve to maintain complex property rights ...(and) how these rights are bound up with power relations, with social identities and notions of self, and with embeddedness in social networks" (Ibid p. 104).

5.1.1 Silences on tenure and gender

Available survey data which examines household food and agricultural production is frequently silent on tenure and gender relations. Data identifies 'households' whose representatives report that they are engaged in food production, but how they access and hold land, where and how this production takes place is often unclear.

Greenberg et al (2018) draw on the 2016 Community Survey to show that around 60% of food-producing households are found in KZN (23%), Eastern Cape (21%) and Limpopo (17%). Survey data confirms that the number of households involved in agricultural production continue to decline (Lehohla, 2016:4). This is a trend long identified in the literature:

Since 1950, Black rural homesteads have increasingly discontinued the cultivation of their arable allotments. Recent case studies in the Ciskei region of the Eastern Cape showed that only about 10% of the fields were ploughed annually (Hebinck and Monde, 2007; De Wet, 2011). At present, crop production occurs mostly in home gardens, explaining why farming now only serves as an additional source of food for

the large majority of Black households (Vink and Van Rooyen, 2009; Aliber and Hart, 2009). (Van Averbek, Denison et al. 2011: 801)

Case study research and localised surveys confirm that where agriculture is practised in the communal areas this is increasingly centred on the homestead. Croplands allocated to many rural households frequently lies fallow or has been informally converted to grazing.

An investigation by Connor and Mtwana (2017: 2) in the Eastern Cape examines the shift away from field cultivation to what they describe as “vestige production in gardens”. Importantly, however they anchor this activity in the social construction of ‘building the homestead’ (*ukwakha umzi*)” arguing that homestead production functions as one of the markers which indicate “the material, social and moral value of the homestead.” They examine how diversified homestead production contributes to “the ‘glue’ in maintaining household integrity and ultimately, agrarian identity”.

They identify key factors enabling home-based production to contribute to household livelihood security and create opportunities for local sales of surplus produce.

“Smallholder farming, of which garden cultivation is part of, is by no means uniform, and although under threat, has also managed to thrive in regions where water, labour and land can be accessed and managed in inventive ways”. (Connor and Mtwana 2017:4)

They highlight how water poverty remains a key constraint, limiting the potential of garden and field agriculture, coupled with the lack of fencing and grazing control.

6 Smallholder farmer perspectives on land tenure and land administration

it is difficult to accurately assess smallholder farmer perspectives on the impacts of land tenure uncertainty and land administration collapse on their production. This will emerge in more detail from the four municipality studies once completed.

Preliminary indications are that in certain settings there is contestation over the security of rights in land. Where rights remain undefined, or are insecure space is created for resource capture. The case of Schmidtsdrift discussed above, where individual land and resource rights remained unspecified, created fertile ground for elite capture. Powerful individuals were able to capitalise on uncertainty to enlarge their share of the commons and enclose land for their private benefit.

The findings of a recent report on elite capture in land redistribution highlights shortcomings in the state land lease and disposal policy which underpins the leasing of land through the proactive land acquisition strategy. This argues that there is “a need to rethink the leasehold system in land redistribution and ensure tenure security” (Mtero, Gumede et al. 2019: 8). The researchers find that “there is a lack of a clear pathway and a set of criteria on when and how beneficiary can exercise the option to purchase a farm and exit the lease arrangement”. The report highlights the concerns of several farmers over perceived weak land rights and tenure insecurity, noting how government officials emphasise that access to state land “is not for inheritance” (Ibid: 24).

The report also notes that uncertainty about land rights provides the space for “state officials to withhold leases and recapitalisation in order to elbow out ordinary people to make way for their preferred beneficiaries” (Ibid: 34). This gives rise to conflict and people who were originally on the land have refused to vacate in favour of the new leaseholder.

Overall the report highlights a fundamental land administration failure, in that across five provinces close to half of the occupiers of farms least in terms of the plus programme had not received long-term leases which specify their land rights. In many instances people occupied the land on the basis of loose

verbal agreements or interim caretaker arrangements. Often short-term leases which were issued for the period of probation envisaged by the PLAS programme have been allowed to lapse and had not been renewed.

Figure 4: Comparative tenure status of 62 farms Mtero et al: 48

ACCUMULATION TRAJECTORY	VALID LEASE		VALID CARETAKERSHIP		EXPIRED LEASE		EXPIRED CARETAKERSHIP		NO LEASE AGREEMENT		TOTAL	
	n	%	n	%	n	%	n	%	n	%	n	%
'DROPPING OUT' OF PRODUCTION	0	0	0	0	1	10	2	22	3	33	6	10
'HANGING-IN' AND NON-ACCUMULATION	4	12	0	0	3	30	1	11	2	22	10	16
'STEPPING UP' THROUGH REINVESTMENT	6	18	0	0	1	10	4	44	1	11	12	19
'STEPPING IN' AND 'STEPPING UP'	18	55	0	0	4	40	2	22	3	33	27	44
'STEPPING UP' THROUGH RECAPITALISATION	5	15	1	100	1	10	0	0	0	0	7	11
TOTAL	33	100	1	100	10	100	9	100	9	100	62	100
% OF TOTAL SAMPLE	53,2		1,6		16,1		14,5		14,5		100	

Figure 4 above indicates the marked prevalence of properties where the occupiers either had no lease with the state, or their lease or caretaker agreement had expired, suggesting a breakdown in land administration on land acquired by the state for land reform.

In all five provinces, farmers raised concerns about how the SL LDP policy is blind to the intergenerational aspect of farming. Successive family generations build on and invest in farming enterprises across decades. However, this long-term outlook and the commitment to farming are greatly undermined by the precariousness of the lease system. (Mtero, Gumede et al. 2019: 49)

The researchers conclude that the lease system has become synonymous with widespread tenure insecurity among land reform beneficiaries. They note that the “policy is not being properly and consistently implemented”.

In the Matzikama local municipality study it also became clear that there was no transparent formula for calculating and checking the appropriateness of the rent payable in terms of the leased land. In certain instances, beneficiaries who had access to irrigation land appeared to be paying less annual rent than livestock farmers leasing extensive grazing land.

6.1 Rights and obligations

Much of the focus on land administration and tenure security gravitates towards rights of people on the land. However, land administration also speaks to responsibilities and obligations of land users. This remains one of the particular blind spots with regard to how land is subsequently administered once it

has been acquired through land reform. Infrastructure and assets on the land require investment in maintenance. This means that individual land users who exercise rights through a CPA for example are required to make a contribution to the use and maintenance of these resources. However, the acknowledged failure to develop functioning land rights management and administration systems to effect (in)formal subdivision, agree and collect user fees threatens to undermine the sustainability of production and close off opportunities on land transferred through the programme. This creates the expectation that the state will have an ongoing responsibility to maintain and renew infrastructure on the properties.

Beneficiaries acquiring ownership of land through the SLAG, LRAD or restitution programmes are entitled to a ten-year exemption on the payment of property rates to the municipality. These rates make an important contribution to the municipality's revenue base for reinvestment in rural infrastructure. Accelerated land reform that effectively excises owners and occupiers from the obligation to pay rates, and which cannot enforce such payment once the exemption period expires, has the effect of placing increasing pressure on already overstretched municipal administrations.

7 Evaluating current land tenure proposals

7.1 Key proposals of the High Level Panel

The HLP report states that “[t]he failure to give legal effect to the tenure security provisions of the Constitution has emerged as a foundational issue throughout the Panel process” (HLP 2017: 59).

The HLP report covers numerous aspects of the failures of land reform, with a great deal of attention focused on the weaknesses in securing land tenure rights for those whose tenure is insecure.

Not since 1986, when the policy of forced removals was abandoned by the apartheid government... have rural people been as structurally vulnerable to dispossession as they are currently. (High Level Panel 2017: 260)

The HLP notes that throughout the 20th century there were restrictions on black people owning land. Almost all the land set aside for rural reserves under the 1913 Land Act and the 1936 Land Act was held in trust by the state. Occupiers of the land were issued Permission to Occupy certificates. After the democratic transition and the incorporation of the former “Bantustans” into the nine provinces, homeland land administration systems were abandoned and records lost. Today, 17 million South Africans live in the former homelands, now referred to as communal areas. The HLP report concedes that achieving tenure security for the communal areas in line with the Constitution is very difficult. To date the state has failed to address the challenges and develop systems to record and secure people's rights in land. As the people who suffered most from the Land Acts and forced removals, the HLP argued that these people “deserve particular protection and redress”.

The report approaches the problems of tenure insecurity in the context of the legacies of sharply differentiated orders of rights and powers over property in post-apartheid South Africa, mirrored in the spatially divided landscape and continued vulnerability of the tenure rights of the poor.

The HLP report highlights the ability of third parties or local power brokers to manipulate customary rights on ‘communal’ land. It notes that the Interim Protection of Informal Land Rights Act of 1996 (IPILRA) was passed to provide a safety net to give people in communal areas and elsewhere legal protection until new tenure reform laws were in place. But those laws were never passed. IPILRA has been renewed annually since its promulgation, but it “has been almost universally ignored” (especially when it comes to mining rights on communal land).

The report notes that contemporary attempts to pass laws relating to communal land tenure have boosted powers of traditional leaders, rather than making the tenure rights of community members more secure. The HLP found that a Communal Land Tenure Bill announced in 2017 assumes that people in the former homelands are tribal subjects (i.e. under the control of a traditional leader), and not equal citizens. The HLP doubts that the courts would support this view.

The HLP found that customary land rights - the rights of those who live on and work the land - are still being denied. Meanwhile the powers of traditional leaders have been boosted by the ways in which other laws are interpreted and put into practice. In particular, the HLP highlighted the negative effects of the Traditional Leadership and Governance Framework Act (TLGFA) and the Minerals and Petroleum Resources Development Act (MPRDA). The HLP highlighted that Parliament has failed to pass a law to secure tenure rights in communal areas, as required by the Constitution and government has failed to enforce the protection of informal land rights as defined in IPILRA. The HLP also highlighted problems with traditional councils established through the TLGFA and equivalent laws passed by provincial governments. It showed that they have not transformed themselves, as they are required to do under the law. Most traditional councils are not legally valid.

One aspect of the report focuses on the state's unwillingness to protect customary rights in the face of increasing corporate interests in acquiring mineral rights on 'communal' land, and the increasing incidence of traditional authorities abusing their powers of self-stated custodianship over customary rights. There is concern about the lack of agency by communal land rights holders over customary lands where mining rights or other rights of natural resource extraction are authorised, or may be authorised in spite of protections in law.

The report draws attention to continued tenure insecurity among rights holders of land that falls outside the formal property system (i.e. regulated by Deeds registration system) despite the enactment of an interrelated set of land rights laws passed in the 1990s in terms of the Constitution, that apply to distinct categories of vulnerable rights:

- Land Reform (Labour Tenants) Act (LTA) 3 of 1996;
- Communal Property Associations Act 28 of 1996 (CPA Act);
- Interim Protection of Informal Land Rights Act (IPILRA) 31 of 1996;
- Extension of Security of Tenure Act (ESTA) 62 of 1997;
- Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE) 19 of 1998;
- Transformation of Certain Rural Areas Land Act (TRANCRAA) 94 of 1998.

The HLP report states that “[t]he failure to give legal effect to the tenure security provisions of the Constitution has emerged as a foundational issue throughout the Panel process” (HLP 2017: 59).

The idea of strengthening land rights through a system of records or documentation is considered in the HLP report to have a powerful potential to elevate these rights to a more positive legal status and address or alleviate these complex problems.

The report covers the problems that have accumulated around the continued insecurity of land rights for each category of rights and their associated laws. It makes suggestions regarding possible expansion of the law, or amendments for strengthening each law. In addition, the report raises problems around the conceptualisation of law regarding communal land rights, which the government intends to enact as the Communal Land Rights Act. The report also raises the problems regarding related legislation on traditional authorities and their jurisdiction, including a law on traditional courts.

The main recommendations relating to land tenure can be divided into two parts – those that focus on the rights of people living in the former bantustans, and those that focus on farm workers, dwellers and labour tenants.

7.1.1 Communal areas

The HLP recommended that:

- The Communal Land Tenure Bill should be rejected;
- IPILRA should be respected and enforced by the DRDLR, by mining companies and traditional leaders. It should be amended and made permanent;
- Laws that have been interpreted to aid land grabs (the Traditional leadership and Governance Framework Act (TLGFA), the Minerals and petroleum Development Act (MPRDA) and the Ingonyama Trust Act (ITA) need to be made explicitly subject to IPILRA;
 - The Ingonyama Trust Act should be repealed (or at least substantially amended) to bring KZN in line with national land policy, and secure land tenure for communities and residents concerned.
- A system of land records should be established that takes into account existing nested or relative rights.

7.1.2 Farm workers, dwellers and labour tenants

Research commissioned by the HLP on tenure security for farm workers drew attention to the analysis in the Green paper that the failure to protect farm dwellers rights reflected a “total system failure and which required a total system redesign, coupled with effective institutional support and adequate funding” (Phuhlisani NPC 2016: 31). HLP recommendations included:

- The ESTA Amendment Bill should be amended. In its present form, the Bill fails to provide sufficient measures to ensure security of tenure for all occupiers;
- The LTA should be amended to ensure that restitution claims are not prioritised over labour tenant claims;
- ESTA and LTA need to be properly enforced;
- A National Register of evictions should be set up, to record the off-register rights of those still living on farms. It should be tied into a National Register of ALL off-register rights;
- DRDLR must prepare a comprehensive, properly costed and funded implementation plan for the LTA;
 - Parliament should carefully monitor the DRDLR’s progress on implementing the LTA.

7.1.3 Land rights recordal and land administration

A key recommendation in the report is the enactment of a general Land Reform Framework Act and a Land Records Act. The HLP report considers the enactment of a Land Records Act as a vital element in providing the necessary institutional power to give effect the rights-based tenure laws. The report’s strong endorsement of a land recordal system is understood to be a core element in land administration.

The Land Records Act would be a crucial component of a land administration system that provides robust forms of recourse to ordinary people seeking to assert and protect their land rights. Designing an integrated land records system as a component of a strong land administration system is an ambitious but necessary task. Without it, the other components of land reform are unlikely to deliver enforceable land rights to beneficiaries. (HLP 2017: 53)

The concept of a Land Records Act, if contextualised within a restructured land administration system, adds a new dimension to the analysis of tenure insecurity by providing a wider angle than legislation alone. The grounding of a land records system in land administration implies strengthening land governance institutions and restructuring the state apparatus to ensure that all rights recognised in law are legally regulated and enforceable. This approach addresses the acute distinctions that persist between systems of rights recognition through the formal registry system and newly recognised Constitutional rights that suffer from lack of systems of evidence validation, regulation and enforcement.

The continued weaknesses of off-register rights that are covered by protective legislation are attributed to fractured land administration institutions that are unable to perform their functions for implementing these laws, and thus in the process clarifying, strengthening, managing and enforcing these rights. The report makes it clear that these rights remain systemically weak despite the set of laws that protect all categories of vulnerable rights. This implies that despite these rights being visible in law, they continue to suffer from lack of systems of verification, conflict resolution and enforcement. The HLP report is explicit in this regard:

Legislative and policy frameworks have so far been ineffective at reflecting and recording the nature of the customary and de facto land rights that exist in practice for most South Africans. There has been a failure to fulfil the promise in Section 25(6) of the Constitution that people whose tenure is legally insecure as a result of past discrimination obtain secure rights to the land which they hold on the basis of customary law and socially legitimate everyday practices. (HLP 2017: 226) ... [D]espite the constitutional requirements of Section 25(6), implementation of tenure reform laws has been weak and ineffective (HLP 2017: 471).

The idea of rights 'recordal' is presented as a critical intervention to secure protected rights given their increasing vulnerability. However, the report accepts the conclusion from evidence presented in backing submissions that a focus on the registration of off-register rights alone will not be sufficient to solve the problem of vulnerability.

However, it has been argued out that most of the rights embedded in off-register tenure arrangements are, by their nature, not *registerable*. South Africa has a stringent and uncompromising system of spatial and legal conditions for registering rights and most of the rights that are not registered would not easily qualify (Phuhlisani NPC 2016: 66-70, 75, 79). This does not stop efforts to register them nonetheless, but evidence reveals that registering rights that do not fit the normative conditions of registration often unravel (Phuhlisani NPC 2016: 167-171; 127; Kingwill 2014 a & b).

In a review of the HLP report Manona and Kingwill caution that:

It is critically important that land administration is not reduced to land recordal. The general conditions that give rise to and sustain unregistered and unrecorded rights will not vanish in the short and medium term even if a land recordal system is introduced. This is a complex and nuanced issue requiring engagement with

customary and social systems of tenure recognition that rely on unwritten codes of social behaviour with regard to transmission of tenure rights among and within extended family systems. (Manona and Kingwill 2019: 8)

The reviewers emphasise “the need to develop a *range of institutions*, including adjudication and conflict resolution institutions to ensure that the introduction of a land records system provides a backbone for recognising rights, but does not result in invalidating rights that remain protected but unrecorded” (Ibid: 9).

7.2 Key tenure findings and proposals of the Presidential Advisory Panel

The Expert Advisory Panel on Land Reform and Agriculture (2019) identifies tenure insecurity as a key factor exacerbating overall inequalities in land and contributing to the economic exclusion of the majority of South Africans with a particular focus on women and youth. The report highlights the dualistic agricultural economy in which established white commercial farmers are able to collateralise their land to obtain access to finance and farmer support, while the tenure insecurity of black smallholders remains an obstacle to finance, support and markets.

The report proposes support for a mixed tenure model which accommodates a continuum of land rights from freehold and communal and which enables multilevel ownership arrangements. It argues that freehold and communal systems should not be regarded as polar opposites to each other and challenges the assumption that freehold is the only form of tenure which will enable capital investment in land and trigger productive growth.

The report argues that land tenure reform has an important contribution to make in realising meaningful land reform in South Africa (Expert Advisory Panel: 45) The panel original principles set out in the White Paper of 1997 to underpin tenure reform:

(a) Tenure reform must move towards rights and away from permits so that rights to land are legally enforceable.

(b) Tenure reform must build a unitary non-racial system of land rights for all South Africans, with a system of land registration, support, and administration which accommodates flexible and diverse systems of land rights within a unitary framework.

(c) Tenure reform must allow people to choose the tenure system which is appropriate to their circumstances.

(d) All tenure systems must be consistent with the Constitution’s commitment to basic human rights and equality, and group-based tenure systems must deliver the rights of equality and due process to their members.

(e) In order to deliver security of tenure, a rights-based approach must be adopted

The panel proposes a dedicated focus on land administration which it argues should be the fourth pillar of land reform. It recommends a separate tenure reform budget line be created, as already exists for restitution, so that support for land rights recordal, registration and administration is ring-fenced (Expert Advisory Panel: 87).

The report finds that “land reform in South Africa has yielded little success in establishing a new generation of sustainable household, small-scale and commercial black farmers”. The reason cited include “the absence of security of tenure and a lack of transfer of title deeds on the acquired portions

of land to beneficiaries and poor post settlement support ... At the heart of the problem is the poor capability of the state which is characterised by deficient coordination, limited and misaligned allocated resources... and further complicated by corruption” (Ibid: 11)

The panel foregrounds poor land administration which exacerbates the problems of tenure contributing to economic exclusion. The report records that “despite constitutional provisions, tenure insecurity remains a pervasive occurrence. People living in informal settlements, backyard shacks”, in inner city buildings, on commercial farms and in communal areas face challenges due to weak, informal and un-registrable tenure rights in law and in practice, due to governance failures” (Ibid: 12)

The report identifies “severe problems with the leasehold model in redistribution. In terms of the state land lease and disposal policy of 2013 these are meant to be 30-year leases, which lessees are meant to pay 5% of net annual turnover as rent. Beneficiaries are typically afforded conditional use rights, and in many cases do not have recorded rights – which means that even in cases where the state has bought land it has failed to redistribute land rights” (Ibid: 12)

The panel notes that “although the constitutional court judgements have affirmed and elevate the importance of giving voice to communities with insecure tenure rights, Parliament has failed to give comprehensive and permanent protection to land insecure communities”. The report notes that farm dwellers and labour tenants remain “the poor relation within land policy...and face continuing threats of eviction”. The panel urges Parliament to use its powers to “reform the current property law system in order to make, legally recognisable and registrable land rights” a reality for the black majority (Ibid: 30).

According to the panel, women constitute only 23% of the land reform programme beneficiaries (p 33). Panellists highlight “the imperative to give ample voice to rural women noting that traditional leaders, entrusted to take care of their communities are seen, in general is hampering rather than serving or protecting women and their rights” (p. 40). The panel notes that five laws affecting communal land tenure and governance including the Traditional and Khoisan Leadership Bill, the Traditional Leadership Governance Framework Amendment Bill, the Indigenous Knowledge Bill, the Communal Property Associations Amendment Bill and the Traditional Courts Bill “are inconsistent with one another, irrational and possibly unconstitutional” (pp. 97-98). With regard to the Ingonyama trust the panel states that this “has unilaterally assumed the role of a landowner by converting the people’s Permission to Occupy certificates (PTOs) to leases and charging them escalating rentals for occupying the same land on which they had lived for many generations” (Ibid: 43).

The report draws attention to acute urban insecurity of tenure noting that “approximately 80% of the South African population in urban areas have off register rights, or no rights to land tenure that are recognised in law”. (p. 35) However the panel cautions that “titling, on its own, has also not been proven to ‘be the be all and end all’ especially in societies where customary and communal forms of tenure particularly pervasive” (Ibid: 42).

The panel identifies the need for special interventions to support household and smallholder farmers to improve rural and urban incomes. It encourages preferential procurement by the state in the food sector so as to support access to markets by household and small-scale farmers and community enterprises. Targeted sectors should in school should include school feeding schemes, prisons, hospitals and the defence sector (Ibid: 85).

The panel makes important recommendations on budget allocations for land reform. It proposes that “the majority portion of the available budget for land reform be focused on two categories – (a) farm dwellers, labour tenants and subsistence farmers, and (b) smallholder farmers producing for local markets”. The report emphasises that “the state should prioritise smallholders, especially smallholders

who produce for their own basic livelihood needs and those who produce partly or wholly for markets, including informal markets. They will be the primary focus of the available state resources” (P. 96) while the remainder of state funds can be directed to medium- and large-scale commercial farmers, who are better situated to contribute their own capital and leverage finance from the Land Bank, commercial banks and other financing institutions”. (Ibid: 94)

The panel calls on the President to assent to the Subdivision of Agricultural Land Act 64 of 1998 and sign it into law forthwith. “Further, the President should explicitly call on all organs of state to work together to expedite subdivisions of agricultural and non-agricultural land to make available smallholdings for poor people, for residential, business and productive processes. Subdivision of large holdings, for the purposes of land reform, is essential if it is to benefit the poor and contribute to a less concentrate and unequal pattern of landholding” (Ibid: 95).

7.3 *Effectiveness of proposals for smallholder farmers*

At present it is too early to speculate on the uptake of the recommendations of the HLP and the Presidential Advisory Panel. At the time of writing it was reported that government had assented to 60 of the total of 73 recommendations made by the Presidential Advisory Panel. However exactly what this implies remains to be seen. There is a large gap between in-principle support for a proposal and concrete steps to ensure its implementation. The practical uptake of the proposals will be an important area for ongoing monitoring by small-scale producers, researchers and land activists.

8 Assessing institutional capacity requirements for effective land tenure reform and effective land administration

8.1 *The land administration status quo*⁴

The present system of land rights management comprise institutions inherited from the previous regime that configure the legal powers over property in a steeply hierarchical structure. At the apex is a system of legal recognition of ‘ownership’, which in the past was largely restricted to whites, and a range of other tenures with lesser legal status applying to the majority of South Africans. Ownership (which is legally defined as registered rights held in the Deeds Registry) centres on the cadastral system of surveying and registration. In the past this system was structured to recognise ownership along racial lines, since black people were generally denied legal ownership, and held mostly unregistered rights that were outside the cadastre.

The cadastral system that links a formally surveyed parcel of land to an identifiable owner (whether one or more persons) registered in the Deeds office is the defining feature of the formal property system in most countries, and its significance is central to any reform. This system circumscribes the relationship of the spatial to social unit as a one-to-one relationship that seldom matches the many-to-many relationships that characterise the social systems that are practiced among rights holders who are defined outside of the cadastral system.

Post-apartheid policy makers attempted to solve this inequitable structure of rights recognition in two ways:

- The deracialisation of land law in South Africa, by opening up registration to all South Africans. This necessitated formal surveying and registration to register rights.

⁴ This section draws extensively from a Phuhlisani NPC report prepared for the Open Society in partnership with PLAAS authored by Manona and Kingwill (2019)

- The extension of protection over existing rights regardless of registrability.

A series of legislative changes were introduced during the 1990s, using both approaches separately or combined. Moves to deracialise land law predated the transition to democratic government in 1994. These laws are still on the statute books, principally the Upgrading of Land Rights Act 112 of 1991 and the Land Titles Adjustment Act 111 of 1993. Legislation post-1994 sought to give effect to Section 25(6) of the Constitution to extend tenure security to all. A range of laws were enacted to apply to various categories of land tenure as listed in the Introduction above.

Three decades later we see that the hierarchy of rights has endured, though in a less racialised form. This suggests that the two approaches discussed above have not addressed the root of the problem. Although the rights outside of the formal system are no longer determined by race, they do coincide to some degree with racial identities and norms, and to a large extent, poverty. The system of registration still defines formal property rights and no serious attempt has been made to record the majority of off-register rights that are managed according to a range of social norms. These systems are best understood as ‘social tenures’ due to their socially responsive nature which are socially regulated by local norms rather than statutory rules.

Such rights are managed, usually locally or in families, according to norms and practices that differ from the regulatory framework of the Deeds Registry. For example, in many rural and urban contexts, properties are regarded as ‘family property’. Families regard themselves as ‘belonging’ to land in a way that does not identify any particular owner who would then have proprietary powers of alienation. However, the person on the title deeds is legally entitled to sell or subdivide the land. This mismatch leads to families not keeping registers up to date as it leads to family conflicts (Kingwill 2014). Social tenures also recognise that different members of a community have access rights to various resources, the boundaries of which may change seasonally or to accommodate additional members (Cousins 2008: 109-137).

These more flexible social and spatial relationships governing access to, and authority over land are odds with the Deeds registry rules that require clearly and accurately defined social and spatial units arranged in a one-to-one relationship. To change either of the two systems would be so fundamental as to change their very nature. Evidence has revealed that embedded social practices continue even after titles are issued, which renders the details on the title deeds inaccurate. The match between the information on the title deed and rights recognised on the ground widens further with the passage of time (Kingwill 2014 a, b, 2017).

8.2 Towards a recordal and land administration system that embodies legal and normative pluralism

There are no state institutions to record, administer, regulate, value and enforce rights, nor solve disputes and conflicts that arise across the landscape. Currently the only way to settle land disputes and clarify rights is to approach the courts on the basis of Roman Dutch law. There are traditional courts ostensibly employing customary law, but these are rejected by many as authoritarian and gender unresponsive. Kingwill and Manona (2019) argue that the only sustainable solution is to develop land administration institutions and systems which are rooted in legal and normative pluralism and which can accommodate diverse systems of rights management.

These systems have to articulate through a unified and integrated land administration system. In the absence of unified property law, protected rights require inclusive land information systems, data management, tenure and planning frameworks backed by solid administrative support. These must enable the enforcement of rights in different multiple settings while also providing benefits through state land administration systems. Such benefits include provision of universal addresses utilising the

What3Words system or equivalent, access to improved services, mediation and conflict resolution institutions, etc.

To be sustainable a land rights recordal system would need to be:

- decentralised at the point of recordal and maintenance;
- governed by sets of principles that accommodate local practices, rather than uniform rules;
- configured to accommodate a greater range of social and spatial variables than a title deed in order to accommodate access and succession by wider kin, such that no individual is defined as the sole 'owner' with powers to subdivide, sell, testate to heirs, etc, unless agreed in terms of family protocols;
- subject to institutions designed to mediate and resolve conflicts at local levels;
- recorded and updated locally which requires local capacity to record and update rights;
- recognised within a national system of land administration which includes the alignment of other elements of land administration, such as inheritance, planning, valuation and taxation.

While this is the desired trajectory it is clear that South Africa has a very long to go to even begin to transform the existing property rights, tenure security and land administrative systems. So, our task is the try to conceptualise what could be done in the short to medium term which would strengthen tenure security across the landscape and how this would give visibility and incentives to grow employment intensive smallholder production in varied rural and urban settings.

9 Enabling employment intensive land reform

The question remains as to what extent tenure insecurity and the predominance of off-register rights constrain the development of smallholder production and by association the potential for employment intensive land reform? To what extent do the constraints facing smallholders lie in tenure insecurity? How will increased security of tenure contribute to an expanded smallholder sector? How significant is tenure insecurity as a factor constraining smallholder development when measured against the structural economic factors at the heart of processes of “adverse incorporation and its consequences for landless people, small farmer and farm workers”(Du Toit 2009).

Mtero is clear about the limitations of the neo classical evolutionary theory of land rights which privileges titling and land registration:

Efforts to introduce formalisation of property rights as part of modernising indigenous forms of ownership and agriculture in general have not yielded the desired results. In most instances, formalisation of property rights has resulted in the obliteration of overlapping and multiple rights to land characteristic of customary forms of tenure. The failure of land titling and registration programmes implemented by various national governments with the aid of various multilateral organisations and donor agencies is widely documented.(2016 n.p)

The fundamentals of this approach to formalise land rights prioritise land registration as a means to:

- stimulate more efficient land-use, by increasing tenure security and providing incentives to invest in the longer-term management and productivity of the land;
- reduce transaction costs and enables the creation of a land market, allowing land transfers from less to more dynamic farmers and its consolidation into larger holdings. In urban areas, it enables a formal market for land and housing that helps to increase supply and reduce prices;

- provide farmers with a title that can be offered as collateral to banks, improving farmers' access to credit, and allowing them to invest in land improvements. In urban areas, land registration also allows owners to use land as collateral for loans and safeguards their investment in housing;
- provide governments with information on land-holders and size of plots, i.e. the foundation for a property tax system (Bromley 2009).

Mtero cites the findings of a recent systematic review (Lawry, Samii et al. 2017) which analysed both quantitative and qualitative studies to ascertain the impact of land property rights interventions on investment and agricultural productivity in developing countries. The systematic review concluded that there was no strong, direct causal link between tenure rights recognition and productivity, as well as income gains. It was noted that tenure rights recognition may contribute to productivity and increasing farm incomes, partly as a result of increased perceptions of tenure security and investments. Yet not all productivity and income gains may be attributed to the recognition of tenure rights.

So, in the South African setting we need to distinguish between:

- land registration agendas as part of a narrow agenda to promote individual titling;
- land recordal and administration systems which form part of a broader socioeconomic rights initiative to:
 - secure and make transparent existing rights in land,
 - enable family tenure,
 - and assist vulnerable rightsholders whose property is off-register to protect their livelihood assets against arbitrary dispossession.

9.1 Recommendations for tenure reform and land administration

The table below highlights what needs to change to create tenure and land administration regimes which assist in securing accesses and registrable rights in land backed by systems of land administration which could contribute to developing an enabling environment for smallholder production in different settings.

Table 5: Recommendations for tenure reform and land administration

Tenure setting	Tenure reform recommendations	Land administration recommendations
Former bantustans	Adopt the HLP recommendations to pass the Protection of Informal Land Rights Act to recognise beneficial occupation of land protect informal rights to land which are often shared and overlapping and governed by living customary law ensure that no person's informal right to occupy land may be deprived without their consent protect those whose rights are off register and vulnerable paying particular attention to the land rights of women	Train and resource independent facilitators to conduct land rights enquiries and facilitate democratic decision making Provide a public data base of all certificates of consent enabling deprivation of land rights approved in terms of PILRA to provide oversight over land deals Identify all the remaining paper-based PTO and quitrent land records in the former homelands, collate and digitise

Tenure setting	Tenure reform recommendations	Land administration recommendations
	enable compensation for those deprived of informal rights in land	Rethink basic requirements for cadastral information and rights
Ingonyama Trust	<p>Implement HLP and PAP recommendations to fundamentally amend or repeal ITA</p> <p>Protect the rights of people living on land administered by ITA against arbitrary deprivation and conversion to leasehold with a particular focus on the rights of women</p> <p>Refund lease payments levied by ITA</p>	<p>recordal in different settings across the continuum of land rights with special attention to communal tenure settings</p> <p>Pilot low cost, ‘good enough’ options to repurpose the cadastral and land records system to enable adequate description and registration of land rights in different settings across the continuum of land rights.</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p>
Act 9/TRANCRAA Rural Areas	<p>Implement HLP and PAP recommendations to revitalise TRANCRAA process</p> <p>Clarify land rights and resolve disputes</p> <p>Clarify and support role of local municipality or communal property Association holding TRANCRAA land in the process of land rights recordal, management of local registers and rights transfers</p>	<p>Develop institutional options for land rights recordal linked to spatial development planning and revenue collection at local municipal and district scales</p> <p>Specify the role and functions of traditional councils and land holding entities in local land administration, allocate budget and support capacity for this function</p> <p>Develop checks and balances that prevent corrupt and improper transactions in the land registry and dispossession of vulnerable rights holders</p>
Land acquired through community restitution claims	<p>Clarify and support role of local municipality or landholding entity holding restored land in the process of land rights recordal, management of local registers and rights transfers</p> <p>Develop and update registers of members and clarify individual rights in land – (residential sites, business sites in established settlements, grazing and arable rights.</p> <p>Clarify entry and exit procedures for membership</p> <p>Clarify member eligibility for a share of benefits from business enterprises that may be operated from the property</p>	<p>Pilot low cost, ‘good enough’ options to repurpose the cadastral and land records system to enable adequate description and registration of land rights in different settings across the continuum of land rights.</p> <p>Develop processes and procedures for internal subdivision and the allocation of rights on subdivided land</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p> <p>Budget for, develop capacity and provide support for land rights administration by</p>

Tenure setting	Tenure reform recommendations	Land administration recommendations
	<p>Clarify member’s responsibilities to contribute to a pro rata portion of the property rates levied on the land, together with other membership and service fees</p> <p>Clarify the liability of members for debts which may be incurred by the Association</p>	<p>CPAs including an updated register of members and the allocation of land use rights</p>
<p>Land transferred to large groups via land holding entities established through SLAG</p>	<p>Commission a research to review the status and sustainability of properties transferred through SLAG</p> <p>Agree responsibilities, procedures and assign capacity to wind up/liquidate failed projects and deregister defunct legal entities</p> <p>Develop procedures for subdivision of land and reallocation of rights on an ownership or leasehold basis</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes</p> <p>Include areas targeted for the creation of smallholdings within municipal spatial development frameworks</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p>
<p>Land transferred to land holding entities established through LRAD</p>	<p>Commission a research to review the status and sustainability of properties transferred through LRAD.</p> <p>Document and share lessons for land reform and land tenure</p> <p>Agree responsibilities, procedures and assign capacity to wind up/liquidate failed projects and deregister defunct legal entities where required</p> <p>Develop procedures for subdivision of land and reallocation of rights on an ownership or leasehold basis as may be appropriate</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes where appropriate</p> <p>Consider Act to enable retrospective endorsement of the title deeds of all land purchased through the land reform programme to give the state the right of first refusal to purchase land which comes up for sale</p>
<p>Land acquired through PLAS</p>	<p>Review the status quo with leases on 2200 farms purchased through this programme</p> <p>Revisit the State Land lease and Disposal Policy to review lease terms and options to own state land acquired through PLAS.</p> <p>Develop clear criteria for the allocation of farms in terms of this programme consistent with the principles in the proposed Land Reform Framework Act</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes</p> <p>Include areas targeted for the creation of smallholdings within municipal spatial development frameworks</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p>

Tenure setting	Tenure reform recommendations	Land administration recommendations
Farm workers and dwellers	<p>Develop a clear policy framework to guide the implementation of section 4 of ESTA</p> <p>Incentivise policy options which give access to land to farm workers and dwellers for cultivation and grazing by agreement with the landowner.</p> <p>Review policy for on and off-site settlement and make available tenure grants and dwellers to acquire land for housing and small-scale production</p> <p>Analyse the feasibility of delivering services to off-site settlements and the danger of creating rural poverty traps</p>	<p>Review and revise existing policy on farmworker housing and assess the appropriateness of the Operation Phakisa proposals on the creation of 'smart' agrivillages.</p> <p>Develop policy and feasibility criteria for the establishment of rural agrivillages and hamlets.</p>
Labour tenants	<p>Appoint a Special Master</p> <p>Reconstruct the register of labour tenant claims</p> <p>Process claims</p> <p>Create clear guidelines for consultation around tenure arrangements on restored land and potential for subdivision of properties between different labour tenant families with pre-existing rights to the land</p>	<p>Develop policy guidelines and procedures for subdivision and the creation of smallholdings appropriate for different land capability classes</p> <p>Include areas targeted for the creation of smallholdings within municipal spatial development frameworks</p> <p>Adapt spatial and land tenure information systems to recognise social tenures and fuzzy/dynamic boundaries while ensuring gender equity with respect to land and property rights</p>
Commonage users	<p>Review the status quo with management and leases on municipal commonage purchased through this programme</p> <p>Revisit the commonage policy to review lease terms and the determination of user fees and responsibilities</p> <p>Develop clear criteria for the allocation of commonage use rights consistent with the principles in the proposed Land Reform Framework Act</p>	<p>Develop a register of municipal commonage land held by local and district municipalities</p>

Of course, the key residual question is who will take responsibility to address these various complex and often contested issues and where does the capacity lie to systematically address recommendations of such a wide-ranging nature? Currently there is no obvious answer as the trajectory taken by the state, particularly with respect to the rights of 18 million rural citizens suggest that policy and law are moving in the opposite direction to the thrust of what is recommended here.

10 Conclusion

This paper has attempted to provide a comprehensive overview and analysis of different landholding and tenure scenarios found across the landscape in South Africa. As the paper has demonstrated these scenarios are highly diverse and require customised and localised approaches to find solutions. Tenure security can be conceptualised both as a defence and as an opportunity.

Many of the recommendations and legislative measures proposed by national enquiries and panels are primarily defensive in nature – recognising that poor and vulnerable households are at risk of dispossession or having their rights diluted without their informed consent.

The link between tenure security and a new approach to employment intensive land reform which aims to revitalise economic and livelihood potential in underutilised land or land acquired through the land reform programme remains less clear. It has been strongly argued that tenure security cannot be reduced to land rights recordal, but must be grounded new user-friendly systems of land administration and the development of institutions that enable citizens to make more effective use of their land rights and realise its distributive and productive potential.

However, by themselves such measures are unlikely to be sufficient to overcome the deep structural impediments shaping the contemporary agrarian economy. Clearly it will require much more than security of tenure to reinvigorate land-based livelihoods in South Africa. While secure land rights provide an essential foundation for economic and livelihood opportunities, such rights also confer obligations. They make land rights holders visible to the state and to the payment of rates and taxes. In 'grouphold' contexts created by land reform recorded rights for households and individuals will come with responsibilities to contribute to the maintenance and upkeep of common property and shared infrastructure. The increase in overhead costs and related obligations associated with recorded and legally secure rights risks being unpalatable to poor and marginal households who may perceive an imbalance between costs and benefits and who would prefer accordingly to manage the risks and exploit the opportunities associated with informality and continued invisibility to the state. It will be crucial therefore to find a favourable balance between costs, responsibilities and tangible enhancement of opportunities and benefits.

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