AGRI SA's COMMENTS TO
THE LAND TENURE SECURITY BILL 2010

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INTRODUCTION

WHO IS AGRI SA?

1. Agri SA is a representative body for commercial farmers in South Africa. There are, at present, about 40 000 commercial farmers in South Africa. As such it has an interest in the draft Land Tenure Security Bill 2010.

AGRI SA's BROAD VIEW

2. This comment on the Bill focuses on the broader conceptual issues. It is not intended to be a complete deconstruction of the Bill nor is it intended to be a commentary on how the 'nuts and bolts' of the Bill have been constructed.

3. Agri SA, in principle, supports the objectives in the Bill. Some aspects of the Bill are particularly welcomed, like those that create a mediation mechanism to address disputes before they go to court.[1]

4. The objects of the Bill are set out in section 2:

> The objects of the Act are:
>
> (a) To promote and protect the relative rights of persons working on farms, persons residing on farms and farm owners;
>
> (b) To enhance the security of tenure of persons residing on farms;
>
> (c) To create conditions conducive to peaceful and harmonious relationships on farms and in farming communities; and
>
> (d) To sustain production discipline on land in the interest of food security.

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[1] Although Agri SA supports alternative dispute resolution, section 44 of the Bill lacks sufficient detail and may, consequently, be ineffective at introducing alternative dispute resolution. Section 44 can be contrasted with the somewhat more detailed requirements concerning alternative dispute resolution set out in ESTA and the LTA.

5. Agri SA is of the view that however commendable the objectives in paragraph 4 may be, the proposed Bill cannot achieve the stated objectives. Discussions that have centered around the Bill identify two other objectives (not specifically identified in section 2) that the Bill strives to achieve. The first is to make commercial farming more accessible to historically disadvantaged people; and the second is to improve upon the provisions in the current law that regulate evictions from farms. Agri SA point out, from the onset, that there are obvious tensions between the objectives themselves. The new eviction laws, for example, may enhance the security of tenure of persons residing on farms (section 2(b)) but they do not necessarily create conditions conducive to peaceful and harmonious relationships on farms (section 2(c)). Similarly, the broad objective that seeks to promote and protect the relative rights of various people working, residing and owning farms (section 2(a)) does not always produce an outcome compatible with the broad objective of sustaining production discipline in the interests of food security (section 2(d)). Similarly, the broad objective that the Bill has in making commercial farming more accessible to historically disadvantaged people, realistically, is difficult to reconcile with Agri SA's members' broad objective which is to operate productive and profitable commercial farms.

6. First, there are vital practical constraints to making commercial farming accessible in the manner proposed in the Bill. There will be unfortunate and unintended consequences if the Bill is permitted to stand in its current form. The idea that commercial farming should be made more accessible to previously disadvantaged people is supported by Agri SA, but the idea that it can be achieved by allowing other peoples' existing commercial farms to be used in order to do so is not. Agri SA's objection needs to be understood in the context of the delicate balance that currently exists on commercial farms.

Farms have limited resources. Few farms can sustain multiple and diverse farming operations on the same land. Most (if not all) commercial farms are already farmed to capacity. These farms generally seek to employ the 'best farming practices'. This includes the optimal utilisation of fertilisers, pesticides, crop rotation, grazing rotation, inoculations, etc. Farms need strict control. Problems are created by uncontrolled farming activities on the land. The Bill will introduce a lack of control into commercial farming operations and this, in turn, will have severe consequences for the landowner.

7. Second, the Bill will not promote and create greater food security nor will it create jobs and contribute positively to the country's economy. It is an issue of national importance and priority that South Africa's productive commercial farms are not impeded from feeding the nation's people.

8. Third, there are serious problems with the lengthy, bureaucratic and costly eviction procedures in the Bill. These make it very difficult for landowners to evict farm residents, even when eviction is justified. The paradox is that this could lead to reluctance on the part of the landowners to grow their operations if that would mean that they may be saddled with the problems that non-eviction brings.

9. The Bill is more likely to cause conflict between landowners and farm residents than it is likely to promote harmony between them. That is so because the landowner and the farm resident have competing (and sometimes conflicting) interests in the same piece of land. Conflict in the relationship is the most likely outcome that will be produced by the competing rights.[2]

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[2] The Bill, it seems, operates from the premise that relationships on farms are not harmonious. In our view most farmers do have good relationships with their staff. Farmers rely heavily on this

THE LIKELY IMPACT OF THE BILL

10. The seemingly open-ended rights that the Bill gives to people residing on farms in section 15(1) are too far-reaching.[3] This renders it unworkable and unacceptable.

11. Whilst Agri SA recognises that people residing on farms should ideally be able to become commercial farmers in their own right, no one should have an unfettered right to do commercial farming on land that belongs to someone else. That is so because the agricultural landowner has a limited and fragile resource at his/her disposal on which to conduct a business and ultimately produce food. If other people residing on the farm are also given rights to utilize the farm in competition with the landowner, it will become very difficult, if not impossible, for the landowner to keep on farming profitably. It is a national priority that our country has profitable and productive commercial farms.[4]

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good relationship. For that reason, even without legislative intervention, one finds many farms that accommodate staff in harmonious conditions. There are also many farming communities that have built schools, as an example, for people residing on farms. Agri SA therefore reject the assumption upon which the Bill begins, namely, that relationships on farms are not good. Bad relationships are in the minority.

3 An analysis of these rights has been undertaken in paragraphs 16 to 35 (below).

4 Thus, in section 16(2) of the Bill, for example, it is crucial that one of the duties of a person residing on a farm should be not to interfere with or detrimentally impact on the farming activities or production capacity and output on that farm. The general limitation clause in section 15(2) does not go far enough. It simply provides that the rights given to people residing on farms, in section 15(1), are subject to any reasonable condition imposed by the landowner “in order to safeguard life or property”. What needs to be safeguarded is the productive and commercially viable farming operation.

12. Few farms can, in any event, sustain multiple and diverse farming operations on the same land. More than 50% of commercial farmers are small businesses with an annual turnover of less than R300 000. These farmers will simply not survive if they are forced to share their land and resources with others.[5]

13. Currently, in terms of ESTA, activities such as keeping livestock, cropping and erecting structures can only be exercised with the permission of the landowner or the person in charge of the farm. The new Bill does not seem to require permission from the landowner. Agri SA suggests that the need for permission is essential. The Bill could, of course, helpfully articulate the circumstances when consent should not unreasonably be withheld. Agri SA would support such a provision. But permission *per se* cannot be dispensed with altogether. One of Agri SA's affiliates, in Kwa-Zulu Natal, points out that there are in excess of 17 000 labour tenant claims in that province alone. One of the greatest challenges facing farmers in that province, as is evidenced from these claims, is non-compliance with agreements concluded between farmers and farm residents on keeping livestock and on grazing them. The problem confronted by farmers is that these agreements are largely ignored. Thus, the suggestion from our Kwa-Zulu Natal affiliates is to introduce a penalty if the requirement to farm or to graze 'with

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[5] Attached, as Annexure **A**, is feedback that Agri SA received from VINPRO who is the representative organisation for 4 500 wine grape producers in South Africa. This document highlights some of the difficulties, peculiar to wine farmers, that may be experienced when farm residents are given access to their land to pursue their own diversified farming operations. It is also apparent from these remarks how wine farming is struggling to break even, economically, on land that is comparatively expensive (in relation to other kinds of farming land). The document also highlights the devastating consequences that the Bill could produce for wine farming in South Africa. Given that the wine industry annually exports about half of the total wine produced in this country, with an annual value of more than R 6 billion, the effect of decreased production on wine farms for the economy as a whole is potentially enormous.

permission' is breached. One suggestion is that a breach ought to justify an eviction. This must be understood in the context of the consequences that farmers can suffer when these kinds of agreements are breached. A breach could introduce serious diseases that may deplete or wipe out a farmer's entire herd. Foot-and-mouth is particularly prevalent in Kwa-Zulu Natal and it cannot be controlled if farm residents do not adhere to certain stringent requirements.

14. Other complications also arise concerning quality issues connected to international agreements concluded in the agricultural sector when multiple farming is done on the same land. Many types of farming are subjected to stringent international standards, such as Global GAP, which may be compromised by uncontrolled activities on the farm by farm residents. This may jeopardise the export status of that product and eventually the export earnings of the country. This will be prejudicial to the country's economy. In this regard:

    14.1 The VINPRO document (Annexure A) makes the point that wine producer-compliance with quality standards is critical. These quality control standards are contained in IPW (Integrated Production of Wine), WIETA (the Agricultural Ethical Trade Initiative of South Africa) and WCS (the Wine Certification Scheme) requires disciplined controls on all commercial wine farming land. Activities on the farm are carefully scrutinised. Multiple farming operations of a varied and diversified nature will compromise these standards and could lead to a resultant loss in foreign income if exports decline.

14.2 Agri SA also received a comment from one of its members who is a dairy farmer:

> The ownership of livestock by farm residents, if uncontrolled, is totally unacceptable for commercial dairy farmers for the following reasons: Diseases communicable and other (my herd is worth in excess of R 16 million and has been closed since 1971); risk of genetic dilution (unregistered bull on the farm); not permitted under stringent export accreditation requirements; not permitted under GAP; does not comply with bio-security protocol. What about liability? If a disease is brought onto my farm, for example foot-and-mouth, as a consequence of the uncontrolled farm residents' livestock activity, the claim could run into several millions of rands and who would be liable to pay for this?

14.3 Agri SA also received this comment from a farmer who produces maize used in cereals commonly found in breakfasts:

> The concept of traceability of products has become a huge issue in many overseas markets and any breach of sanitary or food status standards may lead to imports from South Africa being jeopardised. A consequence of this could be that contracts with certain South African farmers get cancelled pursuant to these kinds of breaches. Related to this are commercial farmers that want to farm in a niche market which requires strict control. One of these is the organic (GM free) niche market where farmers have to represent the conditions under which their farming operation takes place. Thus, on breakfast cereal packaging, representations that produce is organic and farmed in GM free circumstances must be true. The problem for farmers is that this truth is compromised or cannot be authenticated where uncontrolled activities occur on the farm, the

> problem is made even worse because the new Consumer Protection Act of 2008 makes producers liable for products that do not comply with certain standards. The more people that farm on the same land and the less control that a farmer has over those activities increases the risk that hygienic standards and other standards are compromised.

14.4 In a similar vein Agri SA received the following comments from another member:

> The only way that the production potential of farm animals on commercial farms can be improved is to make use of superior genetic material. Stud breeders, for example, must adhere to very strict regulations regarding the breeding and certifying of parentage. They must also comply with very strict phyto sanitary regulations. These regulations and the safeguards that they impose push up the cost of farming to commercial farmers. The entire operation will be compromised if there is insufficient control over the activities on the farm and over the people that are also entitled to use the farm. Poultry farming is a good example. If farm residents are allowed to keep their own poultry livestock on the farm (separate from the commercial farmer's birds) then the commercial part of the farming operation will be jeopardised by illnesses such as airborne bird flu. Poultry is highly susceptible to infection where farming operations are not strictly controlled.

15. Hardship is caused when landowners must make their farms available to others to also farm on. This may undermine the farmer's own operation and compromise it. The land is not always capable of supporting more farming.

There could be problems with resources on the land (such as a shortage of water, etc).[6]

PERSONS RESIDING ON FARMS

WHO ARE THEY?

16. The following categories of people qualify as *persons residing on farms* in terms of clauses 7 and 11:

    16.1 Lawful residents;

    16.2 Unlawful residents; and

    16.3 Labour tenants.

17. 'Lawful residents' in clause 7(1):

    17.1 These include:

        17.1.1 Any person who resides on someone else's farm, and who *has consent or another right in law to do so*; and

        17.1.2 The family of such a person (even if they do not reside on the farm and do not have consent or any other right in law to do so).

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6 Some farmers have questioned whether these new emerging black commercial farmers that derive this benefit are liable to contribute to some of the expenses that attach to the land that they are using.

17.2 This category is not limited to farm workers and their families. It includes everybody who lawfully resides on the farm including commercial tenants, farm managers and people with limited real rights of occupation such as usufructuries.

18. ‘Unlawful residents’ in clause 7(1):

18.1 These include:

18.1.1 A person who resides on someone else’s farm who once *had consent or another right in law to do so*; and

18.1.2 The family of such a person (even if they do not reside on the farm and never had consent or another right in law to do so).

18.2 This category includes all unlawful residents on a farm provided only that they once had consent or another right in law to live on the farm. It is not limited to farm workers and their families. It also includes former commercial tenants, farm managers and people with limited real rights such as usufructuries.

18.3 Clause 11(1) specifically includes anybody who previously resided on or used land with the consent of the owner and has continued to do so for at least one year after the owner’s consent was lawfully withdrawn. This provision seems superfluous because these people already qualify as farm residents in terms of clause 7(1).

19. ‘Labour tenants’ in clauses 7(2) and (3) include current and certain former labour tenants.

20. The implication of the definitions of ‘persons residing on farms’ broadens the scope of the Bill compared to the breadth under ESTA and the LTA. The Bill is therefore not merely a consolidation of these two statutes but in fact a new piece of legislation that goes far wider than both of them.[7]

WHAT ARE THEIR RIGHTS?

Introduction

21. The rights of farm residents are listed in clause 15(1) and are subject to the limitations imposed by clauses 15(2)[8] and 16(2)[9]. Their rights may conveniently be classified as land rights, service rights and personal rights, although there is some overlap between them.

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[7] The policy suggests that the Bill is a consolidation of ESTA and the LTA. It is in fact impractical to marry them into one single piece of legislation because labour tenants and farm workers are two distinct categories of people with a completely different history, different circumstances, and different requirements.

[8] Clause 15(2) states that ‘the rights of the persons residing on farms are subject to any reasonable condition imposed by the owner of such land in order to safeguard life or property on the land’.

[9] Clause 16(2) provides that ‘a person residing on a farm must not (a) intentionally or unlawfully harm any person occupying the land; (b) intentionally or unlawfully cause damage to the property of the owner; or (c) assist any person who does not reside on the land to unlawfully establish new dwellings on such land’.

<u>Land rights</u>

22. Clause 15(1) says that farm residents *may exercise* any of the following rights:

    22.1 The right to own livestock and to grazing land for their livestock (clauses 15(1)(a) and (b)).

    22.2 The right to crop (clause 15(1)(c)).

    22.3 The right to do commercial farming of any kind (clause 15(1)(n)).

    22.4 The right to build houses and homesteads (clause 15(1)(e)).

    22.5 A right of reasonable access to pathways (clause 15(1)(d)).

    22.6 The right to visit others and be visited by them (clause 15(1)(f)).

    22.7 The right to bury members of their family on the farm, to have access to burial grounds and to have access to ancestral land (clauses 15(1)(g) and (h)).[10]

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[10] Prior to the 2001 amendment to ESTA, there was no right to burial without the landowner's consent. Then came the 2001 amendment which gave occupiers the right to bury a deceased member of the family who, at the time of death, was residing on the land. But ESTA qualified this right in section 6(2)(dA) to instances where an established practice already exists. Now the Bill proposes relaxing this qualification by conferring a general right of burial on persons residing on farms. That goes too far. Additionally, burials fall within the jurisdiction of provincial and local authorities. Section 15(1)(g) may contradict provincial legislation and/or municipal by-laws that regulate burials for health and safety reasons. There is also a constitutional impediment to national government making legislation that falls within the functional competence of provincial and local authorities. Burials and cemeteries fall within Schedule 5, Part B of the Constitution.

23. Farm residents may exercise these rights without the owner's consent. The rights themselves are open-ended which means that the farm residents may also determine how and on what scale they exercise these rights without the owner's consent. The right *to do commercial farming* is perhaps the most far-reaching of these rights. It seems to entitle farm workers to undertake any commercial farming of any kind and on any scale without the owner's consent.

Service rights

24. Clause 15(1) says that farm residents *may exercise* the following rights to goods and services:

    24.1 The right of access to clean water (15(1)(j)).

    24.2 The right of access to electricity (15(1)(k)).

    24.3 The right of access to development (15(1)(l)). We do not know what this right means.

    24.4 The right to education (15(1)(p)) and the right not to be denied or deprived of access to educational services (15(1)(m)). The former right seems to include the latter and we do not know why both are listed.

24.5 The right not to be denied or deprived of access to health services (15(1)(m)).

24.6 The right of access to skills (15(1)(n)). We do not know what this right means.

25. Most of these rights are rights of access to goods and services. Such a right normally means that the goods and services must be made available to farm residents at prices they can afford. It is not clear however on whom the duty is imposed to make these goods and services available to them. We infer that the intention is to oblige the owner to do so. It is particularly incongruous for the following reason. Sections 26 and 27 of the Constitution entitle everyone to access to the same goods and services. They impose the duty on the state to make the goods and services available to everyone. They limit the state's duty to do so however, by requiring it merely to take reasonable measures within its available resources to make the goods and services available to the public. Clause 15(1) accordingly seems to shift this duty from the state to the owner and imposes a heavier duty on the owner than the Constitution imposes on the state, because the owner must provide access to the goods and services and not merely take reasonable measures to do so.

Personal rights

26. Clause 15(1) confers the following personal rights on farm residents:

26.1 The right to work in compliance with the labour laws (15(1)(o)). This right suggests that a farm resident may literally demand employment.

It would be superfluous if it merely meant that those of them who are employed, are entitled to work in accordance with the labour laws.

26.2 The right to reasonably practise culture (15(1)(i)).

26.3 The right to family life (15(1)(q)).

26.4 The right to dignity (15(1)(r)).

Limitation on the rights

27. The only limitation of the rights of farm residents, is that they may not cause harm to anybody or damage to any property on the farm. Clause 16(2) prohibits them from doing so. Clause 15(2) entitles the owner to impose reasonable conditions on the exercise of their rights but only *to safeguard life or property on the land.*

THE FLAWS IN THE SCHEME

28. We have dealt with the flaws as follows:

28.1 The rights vest in all residents;

28.2 The rights conflict with those of the owner;

28.3 Rights are given to unlawful residents;

28.4 The rights are unlimited; and

28.5 The rights violate the Constitution.

The rights vest in all residents

29. We suspect that the intention was to vest farm residents' rights only in farm workers and their families. Clause 7 read with clause 15(1) however vest the rights in *all* residents including existing and former commercial tenants, farm managers and holders of limited real rights such as usufructuries.

Conflicts with owner's rights

30. Clause 13(1)(a) provides that a farm owner may exercise any of his rights in terms of the Constitution and other laws, including the *right to property*. These rights include the owner's common law right to the exclusive use and enjoyment of his farm in whatever way he sees fit. This right is irreconcilable with the farm residents' property rights in relation to the same farm. There is accordingly an inherent conflict between these provisions which is incapable of resolution. The Bill does not say where the owner's rights end and the farm residents' rights begin and does not create any mechanism for making that determination.

31. Clause 12 might have been meant to serve this purpose but it does not. It says that everybody *must respect the rights of every person*. But it begs the question of what those rights are.

The rights of unlawful residents

32. All the farm residents' rights also vest in terms of clause 7(1), in all unlawful residents of a farm, provided only that they once lawfully resided on it. There is no justification for this largesse conferred on unlawful occupiers.

<u>The rights are often inappropriate</u>

33. It is inappropriate to confer all the rights including all the property rights on all farm residents under all circumstances. They for instance entitle the residents of a game farm to plant and harvest crops and keep and graze livestock. In that regard:

33.1 Agri SA objects to the right of any person who resides on a farm to own livestock and not to be restricted in any way when doing so. This is simply not practical or feasible. Some farms are not suitable for livestock farming and are used for other purposes such as intensive cropping or horticulture or game farming. Even on livestock farms, the numbers will always have to be restricted by the limited carrying capacity of the land. The same goes for the right to crop.

33.2 There is also the complex issue of animal husbandry. Notifiable and contagious diseases are becoming more prevalent in recent times. One of Agri SA's members, the Graaff Reinet Woolgrowers Association, has stressed that unless good animal husbandry is practiced there is simply no way that they can feasibly allow their workers to own livestock. That is because different farms breed different types of animals and one farm may only stock one particular breed. It is imperative that cross-breeding is prevented. Of course this raises other issues: What about game farms which do not have any domesticated animals in their business? Surely farm workers cannot keep domesticated animals on game farms. Similarly, it would seem difficult to understand that farm workers on a sugar cane farm or on a flower farm should be permitted to have cattle.

33.3 Livestock require a grazing plan. Animals do not live in one fenced-off area year in and year out. This is not sustainable and will lead to land degradation. Grazing fields are rotated but this means that farmers need to make vast amounts of land available in order to graze livestock and to rotate the grazing. A free right given to farm workers to own and graze livestock amounts to a major inroad into the rights of the landowner.

33.4 Other complications also arise, as has been pointed out in paragraph 14 above.

The rights are unlimited

34. Perhaps the most serious flaw is that farm residents' rights, and particularly their property rights, are wholly unlimited. The right in terms of clause 15(1)(n) *to do commercial farming* is perhaps the best example. It confers the right on all farm residents under all circumstances to undertake any commercial farming on any scale and in any manner. The absurdity of such a right is manifest. The same goes for all the other property rights which are also equally open-ended and unconstrained.

The rights violate the Constitution

35. The rights given to farm residents violate the Constitution in the following respects:

35.1 They probably constitute an *expropriation* in that they take away rights of the owner and give those rights to farm residents. In terms of

sections 25(2)(b) and 25(3) of the Constitution, property may only be expropriated subject to the payment of just and equitable compensation. There is no mention in the Bill of the landowner being entitled to compensation.

35.2 The rights conferred on farm residents are hopelessly vague in that their scope cannot be determined. This vagueness is particularly pernicious because clause 12 requires the owner to respect the rights of all farm residents and clause 46(2) makes it a serious criminal offence not to do so. These features render the scheme unconstitutionally vague.

EVICTIONS

INTRODUCTION

36. There are problems with the eviction procedures. The two main problems are that the Bill makes evictions too difficult and too expensive to evict on the one hand; and that the process relies too heavily on the involvement of a competent local government on the other.

37. Problems are created by entrenched rights to residency. Sprawling communities can develop and these bring the potential for crime. Farmers are extremely soft targets and are particularly vulnerable to crime.[11]

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[11] Agri SA is essentially concerned about two different kinds of crime. The first is violent crime which manifests itself as farm murders and rapes. But the second type of crime, equally crippling, is theft of produce and stock.

38. We have created a hypothetical set of facts which demonstrate how difficult and protracted the eviction process is.

A HYPOTHETICAL EVICTION

39. The eviction procedure set out in the Bill is a complicated and convoluted process. The process must begin with the landowner giving the farm resident 30 days' notice that his rights of residence have been terminated. Written notice must also be served on the Municipal Manager and the Land Rights Management Board. Should the farm resident not vacate the residence after the expiry of the notice period given, a further notice must be served on all parties in which the landowner indicates his/her intention to apply to court for an eviction order. The subsequent process must involve a probation officer's report on the overall effects of the eviction. The process must, of necessity, also include the finding of available alternative accommodation. Then the matter can proceed to court and a court order can be obtained. But even once the order has been obtained, it can only be executed after two months. During this period the court must consider a plan that has been devised by the Municipal Manager, the Land Rights Management Board and the landowner.

40. The process set out in the Bill is far more complicated and convoluted than the eviction procedure was under ESTA. It is well-known in the industry that ESTA did not work because its provisions were difficult to implement. One wonders how much more difficult it will be to implement the eviction procedures under the Bill.

41. But there is an added difficulty. The lengthy and convoluted eviction process can only begin after the farm resident's employment has been lawfully terminated in accordance with the labour laws of our country. Section 20(1) provides that:

> A person who resides on land as part of the conditions of employment, may be evicted upon lawful termination of the employment contract in accordance with the provisions of the Labour Relations Act of 1995, provided that a formal process of eviction under the provisions of this Act have been followed.

42. And then section 20(4) goes on to state that:

> Any dispute over whether a person residing on farm's employment was terminated as contemplated… shall be dealt with in accordance with the provisions of the Labour Relations Act of 1995, and the termination shall take effect when any dispute over the termination has been determined in accordance with that Act.

43. It is thus clear that a two-part process needs to be followed. In the first part, the farm resident cannot be evicted until he has been lawfully dismissed in accordance with the provisions of our labour laws; and then, and only then, can the landowner begin evicting under the long and convoluted procedure articulated above in paragraph 50. The problem is that the first part is even longer and more convoluted than the second.

44. By way of illustration, we have constructed a hypothetical example in which a landowner wants to evict one of his workers who is resident on the farm because he does not want to work. We have chosen this blatant example because, in the circumstances, there can be no debate about the justification

behind the worker's eviction. The legislated process to be followed could look something like this:

44.1 It is apparent from clause 20(4) of the Bill that if the worker disputes the termination of his employment, the eviction can only take effect once the employment dispute has been determined in accordance with the Labour Relations Act. In that regard –

44.1.1 Suppose that on 1 June 2011 the landowner confronts the farm resident and sets up a process under which the farm resident receives a fair hearing, which process is endorsed by our labour laws. The farmer formulates the charges, allows the farm resident to consider those charges and construct a defence. The landowner gives the farm resident 14 days within which to do this.

44.1.2 Thus, on 14 June 2011, a formal disciplinary hearing takes place. At the conclusion of this hearing, the landowner decides that he will dismiss the farm resident. Suppose that the farm resident notifies the landowner within 30 days of his intention to try and resolve the matter at the Council for Conciliation, Mediation and Arbitration (CCMA).

44.1.3 By 14 July 2011 the farm resident notifies the landowner of his intention to proceed to the CCMA. Section 135(2) of the Labour Relations Act requires that a CCMA

Commissioner must attempt to resolve the dispute within 30 days of the matter being referred to the CCMA.

44.1.4 Let us suppose that the CCMA Commissioner does indeed entertain this dispute on 14 August 2011 which is within the 30-day period. Suppose, however, that he is unable to resolve the dispute. In that event section 136(1)(b) of the Labour Relations Act states that within a further 90-day period the Commissioner at the CCMA may refer the dispute to arbitration.

44.1.5 The matter proceeds to arbitration within this 90-day period on 14 November 2011. The CCMA finds in favour of the landowner and endorses the farm resident's dismissal. The farm resident can, in terms of section 145 of the Labour Relations Act, apply to the Labour Court to review the Commissioner's ruling. That application must, however, be brought within 6 weeks in terms of section 145(1)(a) of the Labour Relations Act.

44.1.6 The aggrieved farm resident then consults an attorney who prepares the application to review the Commissioner's decision. Suppose that the farm resident launches the application to the Labour Court on 1 January 2012 which is within the 6-week period.

44.1.7 The review, however, usually take between 12 months and 18 months to be heard in the Labour Court. Suppose that, in this case, it takes 15 months (which is mid-way between 12 months and 18 months).

44.1.8 The Labour Court hears the review on 31 March 2013. The judge in the Labour Court dismisses the review and finds that the landowner correctly terminated the farm resident's employment. The farm resident can, of course, appeal this decision to the Labour Appeal Court.

44.1.9 We point out that an appeal to the Labour Appeal Court could take anywhere between 12 to 18 months. We have not reckoned it in as part of this hypothetical example because an appeal is not typical of every labour dispute. Thus, even without an appeal the process under the Labour Relations Act would commence on 1 June 2011 and terminate on 31 March 2013, some 21 months later (even assuming that there is no subsequent appeal to the Labour Appeal Court).

44.1.10 Thus, the first part of the eviction process, namely the lawful termination of the employment relationship under the Labour Relations Act, from beginning to end, takes a minimum of 21 months but can take up to 3 years if there is an appeal. Only then is the landowner entitled to commence with the eviction proceedings.

44.2 The owner must first give 30 days' notice to the worker in terms of clause 23(1)(a). Say the owner gives the notice the day after the Labour Court judgment on 1 April 2013 and it expires on 30 April 2013.

44.3 The owner must then give three months' notice to the worker, the municipality, the Board and the DG in terms of clauses 22(1) and 23(1)(b). If the owner gives the notice on 1 May 2013, it expires on 31 July 2013.

44.4 On 31 July 2013 the three-month notice period expires, however, during this time a probation officer's report needs to be prepared (in terms of section 23(2) in the Bill) and the local municipality needs to find the farm resident alternative accommodation (read section 20(11) together with section 23(2) in the Bill).

44.5 At this point an eviction order can be obtained from a court depending on the probation officer's report and on the municipality's ability to find the farm resident suitable alternative accommodation. Suppose that this all happens and that the landowner chooses to apply to court for the eviction order.

44.6 On 1 August 2013 the landowner launches an application to court to have the farm resident evicted. For the sake of this hypothetical example we will assume that this application is prepared, instituted, set down and, heard and decided upon within one month.

44.7 Thus, on 1 September 2013 an eviction order is granted – some 27 months after the process commenced.

44.8 The Bill then contemplates, in section 25(1), that a further period of two months must lapse before the eviction order can be executed. At best for the landowner, therefore, the farm resident will only be able to be evicted during the course of November/December 2013.

45. The hypothetical example illustrates the complicated and convoluted eviction process set out in the new Bill. In that regard we point out the following four features:

45.1 We have taken a blatant case of a worker who refuses to work where there can be no debate about the justification for his eviction. And yet, it takes almost three years to have him evicted if all goes well. Experience however shows that it invariably takes much longer because there is a potential for delay at every step along the way.

45.2 The owner is entirely dependent on the co-operation of the probation officer in terms of clause 23(2) and on the municipality and the Board in terms of clause 25. If they do not have the capacity or the will to co-operate in the process, the owner may be indefinitely stymied.

45.3 In terms of clause 20(11) and by implication in terms of clause 25, the owner may not evict the worker at all and must indefinitely accommodate him if there is no alternative accommodation available for the worker. It shifts the burden of the state to provide accommodation to homeless people on to the owner, even in an

egregious case such as this one where the owner is indefinitely obliged to provide accommodation to a worker who refuses to work.

45.4 But even at best for the owner, if the process works as it should in that there are no delays along the way and it culminates in an eviction order which is successfully executed, it still takes from June 2011 to December 2013, that is, a period of 30 months, to have the worker evicted. During this period the worker's rights in terms of clause 15 are protected. It means that the owner must continue providing him with accommodation and services such as water and electricity while he remains entitled to continue keeping livestock, grazing them on the owner's land, cultivating crops and even doing commercial farming for his own account.

46. It needs to be recognised that there are situations where the relationships between land owners and occupiers/ex-employees has broken down to the extent where it is unwise and impractical to require those people to live together. A complete breakdown in the relationship is a recipe for conflict if those parties are forced to live together. For that reason, eviction should always be possible and the requirements for a legal eviction should not be made so strict, or the process so expensive, that it becomes virtually impossible to evict people from a farm. In that regard, Agri SA attach, as Annexure **B**, a document that it presented to the Portfolio Committee on Agriculture and Land Affairs on the problems currently experienced with farm evictions. The new Bill does not, in Agri SA's opinion, improve the situation and these comments remain valid in the context of evictions under the new Bill.[12]

DECONSTRUCTING THE PROVISIONS

47. Chapter 5 in the Bill deals with the *management of evictions*. We have set out our comments in relation to the offending provisions in the Bill.

Problematic words and phrases

48. The definition of an *eviction*, in section 19(1) and (2) is extremely wide. Agri SA objects to the refusal to allow a burial, the closure of schools and interference with the performance of cultural practices being categorised as an ‘eviction’. These may well amount to a restriction of the farm resident’s section 15(1) rights in which case they ought to be subject to a general limitation of rights provision, but they cannot also be listed as evictions which are not subject to any limitation at all.

49. The Bill refers to an *arbitrary* eviction although the term has not been defined. This is a departure from the terminology employed in ESTA which merely distinguishes between ‘legal’ and ‘illegal’ evictions. Given that the term ‘arbitrary’ has acquired a specific meaning within constitutional law, clarity on its meaning in the context of this Bill is required so as to avoid confusion. Agri SA suggests that the distinction employed in ESTA, between legal and illegal evictions, is preferable.

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[12] One of Agri SA’s affiliated members has suggested that a CCMA-type process for dealing with evictions may be preferable to the current court process envisaged in ESTA and indeed in the new Bill.

The State's involvement

50. Although the purpose of section 20 is itself laudable, it will in all likelihood prevent many evictions from taking place. One of the main problems is that the eviction process is conditional upon the state's provision of alternative land and housing. Experience has shown that the majority of local authorities lack the capacity to provide suitable alternative accommodation. The rights of the farm resident need to be balanced against those of the landowner on the one hand and the country's need for food security on the other.

51. It is not clear whether section 20(1) will apply before or after the court has ordered an eviction. It is important that the Bill clearly establishes when in the prescribed process these provisions are triggered and whose responsibility it will be to oversee the process. If it is the intention that government departments should become involved, provision must be made for a period during which these departments must execute their functions so as to prevent a situation where the process is held to ransom by non-participation.

52. In Agri SA's view it is not practical to require the landowner and local municipality to jointly submit a plan regarding suitable alternative land as set out in section 25(2). This duty should be on the municipality only. Even then, Agri SA is concerned about the lack of planning and capacity in many rural municipalities.

Section 20(11)

53. Section 20(11) provides that:

An eviction may not result in persons affected being rendered homeless or vulnerable to the violation of other human rights.

54. The section renders the owner remediless in the event of an eviction order being granted where there is no alternative accommodation available for the person that stands to be evicted. The section provides that an eviction may not result in a farm resident being rendered homeless. The point is that even if the landowner overcomes all of the hurdles placed by the complicated and convoluted eviction process, he may still ultimately not be able to actually evict the farm resident if there is nowhere for that person to go to. This provision effectively demonstrates how the state has shifted the duty to provide housing because even if the landowner does everything as he ought to, he can still get stymied right at the end – with the effect that the farm resident cannot be evicted from the land at all.

55. This could, effectively, amount to an unconstitutional infringement of the landowner's property rights because it would, effectively, mean that the state would be using private property belonging to X to discharge its own constitutionally mandated housing obligation owed to Y. The state cannot do this without compensating the landowner. The Bill, as currently formulated, makes no provision for compensation.[13]

<u>The process is long and convoluted</u>

56. The point has already been made with reference to the hypothetical example that we constructed.

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[13] See the recent (and as yet unreported) judgment of Spilg J in *Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Ave & Another* [2010] ZAGPJHC JHC 3.

57. One of the main complaints of landowners against ESTA has been its lengthy procedures. Section 22 now requires a 3-month notice period whereas ESTA only required a 2-month period. The process of eviction will therefore become even more protracted. Section 22 read together with section 23 effectively creates a 4-month process before an eviction application can be heard. And then, in terms of section 25, a further 2-month period must elapse between the court granting an eviction order and the person(s) actually being evicted. This makes evictions even more difficult and even more protracted. If evictions are made too difficult then farmers may be discouraged from expanding their operations and employing more workers. To this it should be added, of course, that the eviction process can only start once the farm worker has been lawfully dismissed.[14] The process will take between 3 to 4 years.[15]

<u>The probation officer's report</u>

58. The probation officer's report referred to in section 23(3) should be compiled by a person with the appropriate knowledge and skill required to do so. The compiling of the report should not be left to merely any officer employed by the state. Such person should hold proof of his or her appointment for purposes of this section. The section should further state the following requirements which are consistent with lessons learned from evictions jurisprudence emanating from the Land Claims Court:

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[14] Section 20(1) of the Bill provides that 'a person who resides on land as part of the conditions of employment, may only be evicted upon lawful termination of the employment contract in accordance with the provisions of the Labour Act of 1995...'.

[15] See paragraphs 39 to 46 (above).

58.1 The report should be provided within a reasonable period after it was requested, perhaps 60 days, where after the eviction may proceed without the report;

58.2 The report should be compiled after consultation with both the property owner or person residing on the land and/or their legal representatives; and

58.3 The report should not deal with the merits of the matter. It should only provide feedback on the matters for which feedback is required in the section.

59. The probation officer's report should not amount to evidence in subsequent proceedings. The determination of how an eviction order will affect the constitutional rights of a person that stands to be evicted should rest with the court (as the judiciary) and not an official within the executive arm of government. Section 23(3), in Agri SA's submission, needs to be reworded.

<u>Various</u>

60. Section 19(2)(g) deals with the keeping of livestock. This section needs to be qualified, however, to the extent that permission ought to be obtained from the landowner to keep livestock. A person residing on land should not be permitted to benefit from unlawful conduct. This section is also unilateral in that it does not take cognizance of the availability of grazing on the farm. Farms are not generic and circumstances and resources on farms may vary. The section needs to be flexible enough to accommodate these variations.

61. Section 24 does not deal with the family members of the person who had direct permission to reside on the farm. Agri SA is of the view that unless their rights are terminable simultaneously with the termination of that person's rights (and the court also grants an eviction order against them) the burden on landowners will be unmanageable. That is so because a landowner is obliged to provide accommodation to people that he has no relationship with. The discretion provided for in this section should not apply in circumstances where the Bill expressly provides the grounds for the lawful termination of a person's right of residence, such as the instance where a person's right to reside on the farm is dependent upon an employment agreement and where such employment agreement is lawfully terminated.

THE EVICTION PROCESS IS UNCONSTITUTIONAL

62. The eviction process, which entrenches a landless person's rights to live on the land of another person until the municipality finds such other person alternative accommodation, is unconstitutional.[16]

63. The added security of tenure and difficult eviction procedure is said to have a constitutional basis in section 26(3) of the Constitution which states that 'no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances...' The Constitution thus places an obligation on the state to offer a measure of protection to landless/homeless people.

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[16] Section 20(11).

64. The Constitution places a positive obligation on the state to redress housing problems that have their origin in the old pre-Constitutional apartheid laws which expressly denied security of tenure to certain race groups. The Bill can comfortable be understood as the result of a legislative attempt by the state to discharge these positive constitutional obligations.

65. The state has certain obligations, inter alia, to provide some form of security of tenure to landless people and to ensure that they are not, in the eviction process, left destitute and without somewhere to live. This is a positive obligation of a socio-economic kind that the state has to its subjects. The state also has an obligation to redistribute white-owned land to black people.

66. The Bill is a legislative device employed by the state to discharge its own constitutional obligations. But the state does not fulfill its duty of providing secure tenure by giving these people access to state property, rather it makes use of private property.

67. A law will amount to an effective expropriation where the state acquires property rights from a private landowner and transfers these to another person. A law can also amount to an effective expropriation where the state itself acquires rights or benefits in private property.

68. It is arguable that the Bill effectively expropriates. On a less formalistic approach (as followed in the Canadian and Australian courts) there is an expropriation because the state derives a benefit when it uses private property to discharge its own constitutional obligations. But even on the more formalistic approach (as followed in the Malaysian and Zimbabwean

courts) the Bill amounts to an expropriation because there is a transfer of rights, facilitated by the Bill, from the landowner to the farm resident.[17]

69. According to section 25(2)(b) property may only be expropriated 'subject to compensation, the amount, timing, and manner of payment, of which must be agreed, or decided or approved by a court.' The problem with the Bill is that there is no talk at all of compensating the landowner who has had to accommodate these farm residents.[18]

FOOD SECURITY

70. There are misconceptions about the creation of food security. Productivity on farms may be hampered. There can be no national food security without productive and profitable farming. For that reason Agri SA welcomes the inclusion, in section 2(d) of the Bill, of *production discipline* and *food security* as stated objectives that the Bill seeks to achieve.

71. The mention of 'food security' is good as this is critical for a stable, peaceful and successful country. The country cannot afford to lose production on more farms as a result of land reform measures.

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[17] Iain Currie & Johan de Waal *The Bill of Rights Handbook* (4ed) define an expropriation to the effect that it '…occurs where the state takes away property and either keeps it for itself *or transfers it to someone else*' (our emphasis).

18 Even if it does amount to an expropriation, the awarding of compensation is unacceptable and totally impractical. Even if compensation is paid, the profitability and economic sustainability of the farming enterprise would in many cases have been rendered worthless.

72. Agri SA draws attention to food shortage problems created in Zimbabwe by misdirected attempts at land reform, ultimately done at the expense of preserving the viability and sustainability of productive and profitable commercial farms.[19] South Africa can (and must) avoid a potential food crisis by keeping, as the main focus, the productive and commercial viability of farms. The attainment of any other objects in the Bill should never be sought at the potential cost of our national commitment to food security.

73. Two different categories of people – the landowner and person residing on the land – have different objectives in respect of the use of the land. The starting point should always therefore be that the existing farming operation be treated as the central and most important concern. Consequently, the rights of people residing on farms must always be balanced against the landowner's rights. That is so because the exercise of any rights by people residing on the land effectively amounts to a limitation of an owner's right to the free and undisturbed use of his/her property. This means that any existing rights that the farmer has will be infringed by the creation of these 'new' rights in the Bill.

74. Signs of eroding food security are apparent as a consequence of failed land reform programmes. An article appeared on 28 February 2009 in the *Sunday Times* newspaper, authored by Bongani Mthetwa, detailing howSouth Africa's food security is under threat. Agri SA isthe view that the Bill will

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[19] 'The lie of the land' *News Africa* (5 January 2011) reports that since the land reform programme was implemented in Zimbabwe the number of commercially viable farms has dwindled from around 4000 to just under 300. The United Nations World Food Programme attributes Zimbabwe's national food crisis to the beneficiaries of land reform being unskilled and ill-equipped to run commercial farms.

add to the problem unless it places the productive viability of commercial farming operations as a top priority. The article is attached as Annexure **C**.

75. Household food security is not the same thing as national food security. Whilst subsistence farming can create household food security, large productive and commercially viable farms are crucial for achieving national food security. Impeding the profitability and production of commercial farms in the interests of stimulating subsistence farming could sacrifice national food security on the altar of household food security.

THE FAILING OF LAND REDISTRIBUTION

76. Agri SA appreciates that the Land Reform Programme is animated by an obvious tension. On the one hand government has an obligation to give previously disadvantaged people greater security of tenure in land owned by white farmers. On the other hand government has an obligation to re-distribute more land to black people for farming (it has undertaken to distribute 30% of all agricultural land to black people by the year 2025).[20] We point out that it is not clear what constitutes *agricultural land* for this purpose. There is a debate as to whether 'agricultural land' is a reference to all arable land in South Africa including land currently held by the state, or whether it is a narrow reference only to 'agricultural land currently owned by whites'. The debate has not yet been settled.

77. In Agri SA's view there are a number of reasons why the Land Reform

[20] The Centre for Development and Enterprise published a research report compiled by a credible collection of academics in May 2008 titled *Land Reform in South Africa: Getting back on track* in which they record that only 4,1% of commercial agricultural land has, to date, been redistributed.

Programme failed. Essentially:

77.1 Budgets have been wholly inadequate, yet, even so, there have been years when the Department has under-spent;

77.2 In 2009 the Department ran out of money and was not able to meet their obligations to pay for the farms that they had bought for redistribution purposes;

77.3 Post-settlement support is completely inadequate and many farms have now lost their productivity; and

77.4 The programme is plagued by corruption within government.

78. But government has not been distributing the land as it should have. Its failure to re-distribute white-owned land to previously disadvantaged people cannot be allowed to stand as the justification for creating legislation that simply allows previously disadvantaged people to live and farm on white-owned land. Rather, the land redistribution leg of the land reform programme needs to be properly managed.

79. The criticism held by some is that it seems easier to give black people greater security of tenure in white farms than it is to actually expropriate those white farms, pay for them, and ultimately distribute them to black people.

80. As things currently stand, the land security tenure pillar of the Land Reform Programme needs to do more work than it was initially designed to do because it has to over-compensate for the impoverished land redistribution pillar. Agri SA is of the view that many of the problems created by the Bill

can be avoided if government recommits itself to land re-distribution.

CONSTITUTIONAL ANALYSIS

81. The starting point is a recognition that:

81.1 Agri SA supports, in principle, the objects of the Bill. Agri SA recognises the need for land tenure security.

81.2 The method chosen to achieve its objectives is, however, impractical and unworkable. The draft Bill goes too far and, in the process, renders itself incapable of actually achieving the desired objectives set out in section 2 of the Bill.

81.3 The Bill is said to deal with difficulties that existed with the LTA and ESTA. In Agri SA's view both the LTA and ESTA should be amended where problems have been exposed, rather than drafting an entirely new piece of legislation. There is no need to reinvent the wheel.

82. The Bill creates a completely new relationship between people and the land. It introduces the concept of *relative rights*. Agri SA's comment to this is that:

82.1 The current property rights system is essential to the manner in which commercial farmers conduct their farming operations;

82.2 Farming is an important and indispensable part of our economy and, indeed, the basis of our national food security;

82.3 The Bill unnecessarily tampers with this settled system of property rights; and

82.4 The way in which this settled system is tampered with is not conducive to commercial farming nor is it healthy for national food security and indeed our economy.

83. In reality it simply does not work to have a number of farming operations, conducted by a number of people, competing on the same land. There is also an important difference between subsistence farming and commercial farming. Whilst farm labourers could perhaps enjoy subsistence farming (which is a limited operation on the farmer's land) they should not be able to conduct their own commercial farming operations on the farmer's land.[21] That is so because:

83.1 Modern commercial farms are highly geared and highly financed operations. They are also highly specialised and occur on a sophisticated and technical level.

83.2 These farming operations could be severely compromised and that, in turn, could have detrimental economic repercussions on the country's agricultural investments. South Africa's broader economic welfare could be compromised. Investment in the agricultural sector will decline if the security that banks have in the land belonging to a

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[21] Section 15(1)(n) gives people residing on farms the 'right to do commercial farming'.

farmer is undermined. It is inevitable that the banks will find less value in commercial farms if those farms lose productivity and profitability.

83.3 The agricultural sector is not limited to only farming operations but also embraces other ancillary and incidental sectors, for example, industries that supply goods and services to farmers; industries that process farming products; and the retail sector that sells these goods onward to the public. They are all connected to farming and will be damaged if commercial farming is compromised. The knock-on effect for the economy will be far-reaching. This unhappy consequence needs to be safeguarded as a matter of national priority.

84. The Bill goes further than it needs to in order to achieve its stated objectives. Essentially:

84.1 Section 25 in the Constitution offers protection to people that their settled property rights will not be unreasonably and unjustifiably infringed.

84.2 The inroads made into the landowner's rights are intrusive and, at the least invasive end of the spectrum, amount to a deprivation of property. At the most invasive end of the spectrum the deprivation may in fact amount to an expropriation.[22]

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[22] *First National Bank of SA Ltd t/a Wesbank v Commissioner for SARS* 2002 (4) SA 768 (CC) stands as authority for the proposition that a deprivation is a restriction, limitation, or interference with property whereas an expropriation, which is a subcategory of deprivation, occurs where the deprivation is so serious that it actually amounts to a transfer of rights from X to Y.

84.3 The deprivation may be unconstitutional because it is substantively arbitrary in that the Bill is not actually capable of achieving the purpose for which it was designed (thus rendering it irrational) or because it causes undue hardship for the landowner (on the basis of proportionality).[23]

84.4 There are some provisions that are arguably *compulsory acquisitions* or *takings* in the true sense. These probably amount to an unconstitutional expropriation because there is no provision in the Act for this to be done against an undertaking from the state to compensate the landowner. Other deprivations, whilst not going as far as an expropriation, may nevertheless be interpreted as constructive expropriations or what the American jurisprudence refers to as *eminent domain*.

85. Agri SA is sympathetic to the problem that the country has in redressing previous injustices and unfair racially-based land distribution. It appreciates that there is a segment of our society that needs legislation to be implemented in order to assist them with fitting comfortably into South African society. A workable solution to this needs to found, but the Bill (however laudable) does not provide the answer. Agri SA, therefore, takes the view that:

85.1 Better access to land is most certainly part of the solution; but

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[23] Paragraph 65 of *FNB* (footnote 14 above).

85.2 The difficulties associated with this Bill make it an unsuitable vehicle for achieving this because it is quite simply too invasive and may in fact produce the exact opposite result to the one intended.

86. The Bill does not strike a balance (as its main aim or objective announces) between the rights of the land owner on the one hand and the rights of the farm resident on the other. The Bill places the burden of South Africa's landless and homeless problem squarely on the shoulders of a select few individuals. The rationale for the state having to compensate landowners who are expropriated is to spread that burden amongst all tax payers. Individuals should not have to shoulder this burden alone. It is a burden that all tax payers jointly shoulder when they pay their taxes to the state and compensation is then paid from those same state coffers.

87. The Bill is inherently irrational:[24]

87.1 It seeks to achieve harmony in the relationship between farmers and people residing on farms. If anything, its provisions are more likely to go a long way to creating conflict in that relationship; and

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[24] *Pharmaceutical Manufacturers Association of South Africa v President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para 85 reminds us that "it is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution.

87.2 It is supposed to achieve food security but may in fact achieve the exact antithesis because farmers will be less inclined to employ workers on the land (on the one hand) and productivity of profitable commercial farms could decline (on the other) because of the disproportionate burden placed on landowners.

88. The Bill is inflexible. Farmers seem to attract the same level of obligation irrespective of their differing circumstances, for example, it seems to matter not whether the farmer has the means and resources to meet the obligations nor does it seem to matter whether the land is able to accommodate additional workers, their families, and their livestock and crops.[25]

CONCLUSION

89. Agri SA is of the view that, although ESTA has been hugely unpopular with landowners, it is not true that the legislation has failed in its purpose, which is the regulation of evictions. Admittedly ESTA has not been working properly but this is not because of a shortcoming with the legislation but rather because government has not implemented the legislation properly. The legislation can work well if government properly implements and manages

[25] The comments of VINPRO, attached as Annexure A, points out that wine farms are cultivated intensively and other crops and livestock will often not be practical or feasible on these farms. As it is, wine farms are smaller than most other commercial farms (more than 80% of wine farms in South Africa are less than 40 hectares in size). There is simply not enough land to sustain economical wine grape production in the long terms. If commercial wine farmers are forced into sharing their land with farm residents there will simply not be enough land and resources to sustain the industry. The problem becomes even more acute if this limited land is not used under vine but is, instead, used by farm residents to grow other crops, like vegetables, or else to bring livestock onto. The farmers will, quite simply, not be able to survive.

it. This will, however, cost money and government must be willing to put money into making ESTA work. Most of the problems that have emerged in the ESTA and the LTA jurisprudence can be cured by legislative amendments to the existing statutes. There is no need to re-write the law. This new Bill creates more problems than it solves. [26]

90. Agri SA also acknowledges that the land redistribution pillar of the Land Reform Programme has not been functioning as it should be. Previously disadvantaged people can, if it is properly implemented, use their own land to do commercial farming on. That solution is, with respect, infinitely better than allowing them to use somebody else's farm.

91. More dialogue is needed and Agri SA is willing participants in that.

Agri SA
17 March 2011

[26] Ruth Hall 'Evaluating Land and Agrarian Reform in South Africa' occasional paper published by PLAAS (School of Government at the University of the Western Cape) in *Land Tenure* suggests, after extensive field research, that the main shortcoming of ESTA is not the legislation itself but rather the government's failure to implement it in the proper manner. Some of these failings include a lack of awareness and education, a lack of institutional co-ordination, and a lack of institutional capacity. These problems can all be remedied.