

# South African Farming – New Rules!

Cattleman's Conference

John Purchase

Agbiz

15 March 2018



# Key legislation developments

## 1. Financing & Industry legislation

- National Credit Amendment Bill, Competition Amendment Bill & Animal Feed Bill

## 2. Climate Change Mitigation

- Carbon Tax Bill and others

## 3. Natural Resource Legislation

- New Water Bill and PDALFA

## 4. Labour matters

- National Minimum Wage Bill & Labour Relations Amendment Bill

## 5. Land Reform

- RALHB, Property Valuation Regulations, Communal land Tenure Bill, ESTA Bill, Restitution and **“Expropriation without Compensation”**

# 1. Financing & Industry legislation

## National Credit Amendment Bill:

- Regulation 19 (13) places an obligation on credit providers to submit prescribed information about consumers to credit bureaus;
- A guideline document was published in January 2018 but there are still concerns around the reporting template
- Agbiz has held 3 workshops with the NCR and their service provider (SACRRA) to streamline the process;
- A dedicated reporting template is being developed to cater for agricultural finance;
- A draft template will be workshopped within the next 2 weeks;
- Thereafter all agribusinesses will be 'on-boarded'.

# 1. Financing & Industry legislation

## National Credit Amendment Bill:

### **Revision of the Affordability Assessment Regulations:**

- During the workshops with the NCR, it was identified that the current Regulations to the NCR outlining the manner in which affordability must be assessed, are not in-line with the risk criteria applied in the agricultural sector;
- A workshop with the NCR and their service provider was held on the 9<sup>th</sup> of February 2018 to revise these regulations for agricultural finance;
- Draft amendments to the Regulations will surface in 2018.
- Further Amendments from Portfolio Committee unsecured lending.
- Agbiz submission to Parliament

# 1. Financing & Industry legislation

## Competition Amendment Bill:

- Bill just been tabled at NEDLAC
- Aims to regulate concentration in certain economic sectors, including in the agro-food value chain especially
- Mechanisms proposed to measure concentration
- Bill will provide powers for deconcentration.

# 1. Financing & Industry legislation

## Feeds and Pet Food Bill:

- Break up of Act 36 Of 1947: *Fertilizers, farm feeds, agricultural remedies and stock remedies Act.*
- Agbiz facilitated two workshops on behalf of DAFF, with last one on 24 October 2017.
- Conflicting positions in industry made consultation and development of Bill necessary and challenging
- Good progress though and soon ready to go to Parliament.
- NEDLAC process in my opinion not necessary.

## 2. Climate Change Mitigation

- Carbon Tax Bill and extended legislative framework:
  - Tax levied per ton of carbon dioxide released;
  - Only levied directly on large emitters (installed capacity of more than 10MW);
  - But will affect clients indirectly through **levy on fuel used and electricity consumed**;
  - **Allowances** for trade exposure, benchmarking and carbon sequestration.
  - Public consultation and Parliamentary process to run parallel.

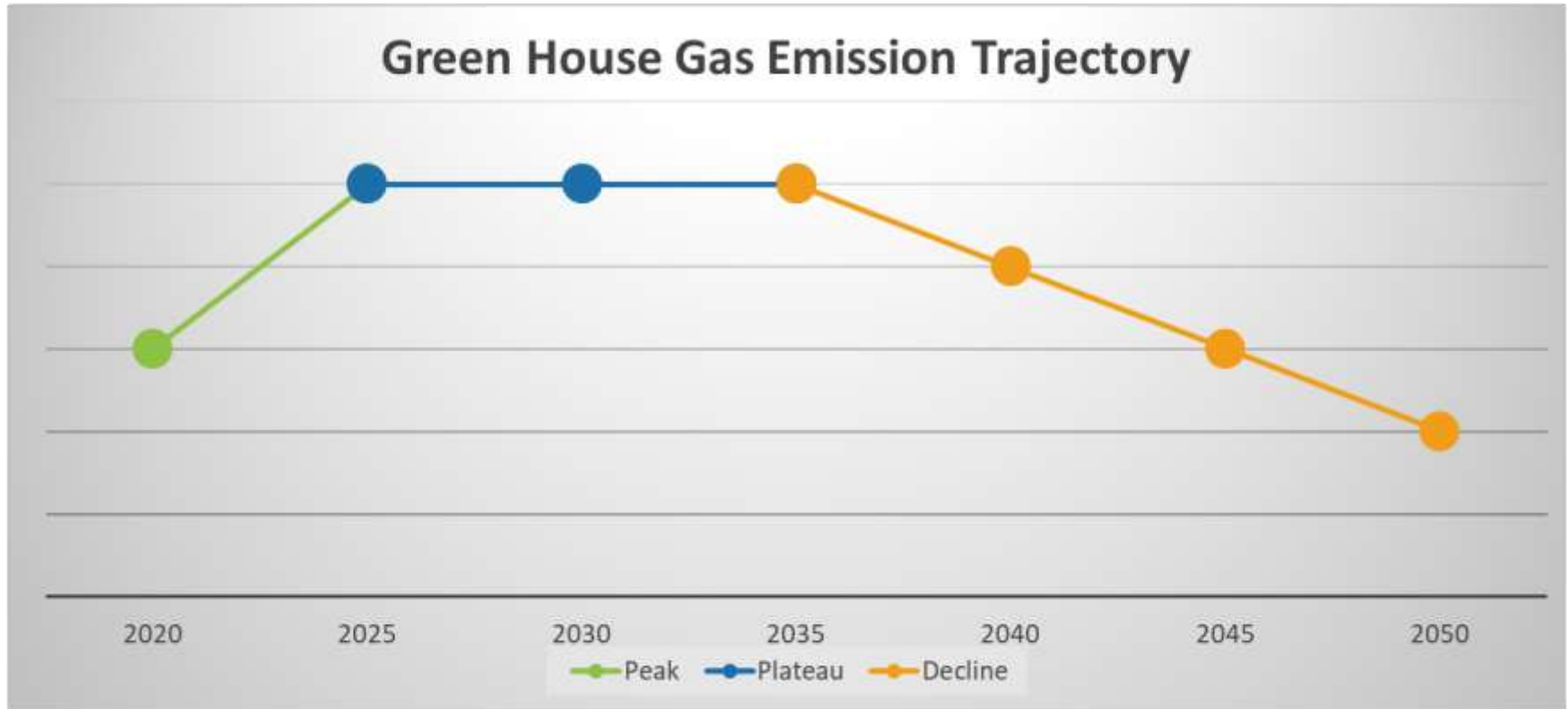
# New legislative mechanisms

## Green House Gas reporting Regulations:

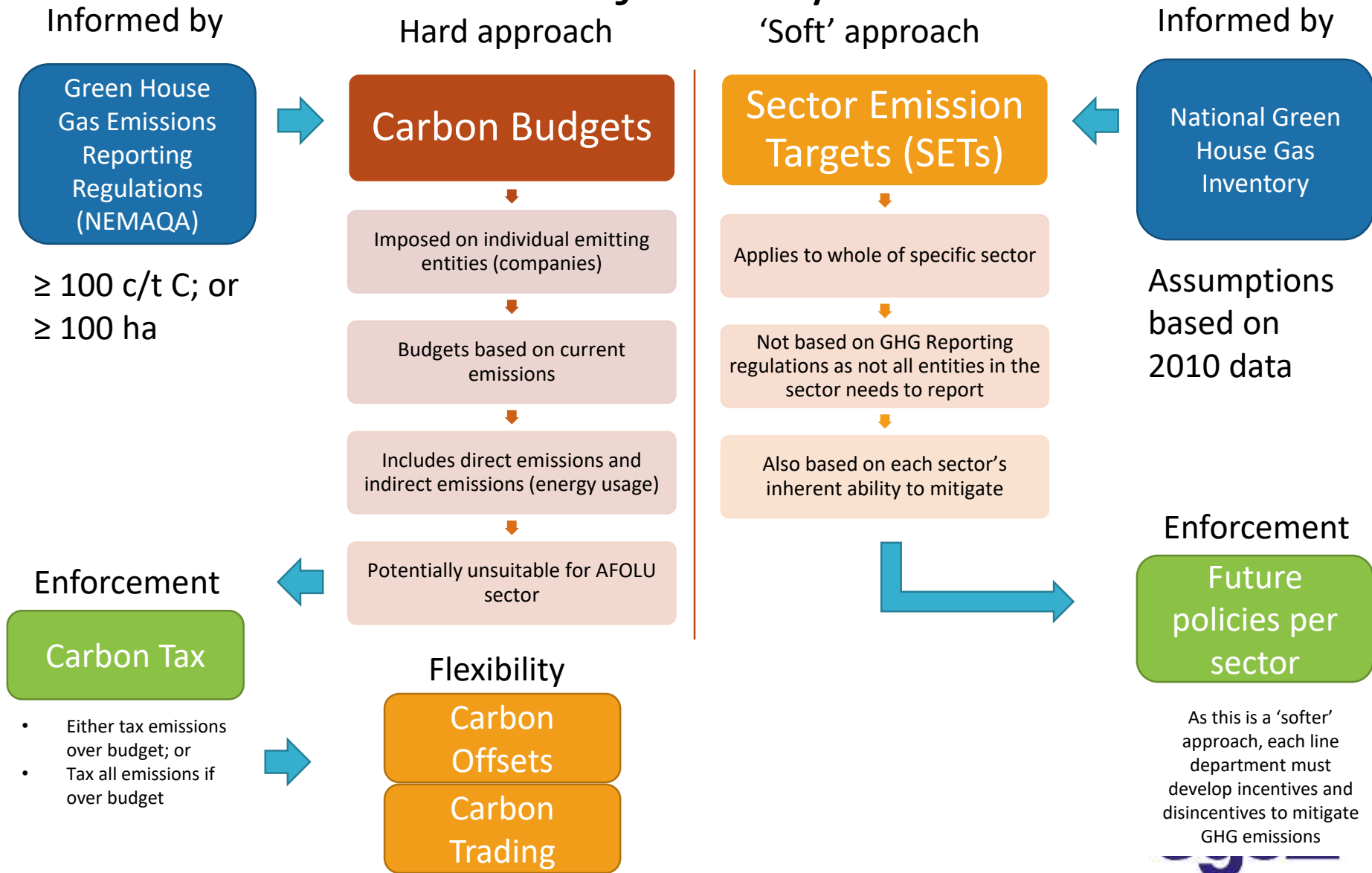
- Published in terms of the National Environmental Management: Air Quality Act;
- Entered into operation on the 3<sup>rd</sup> of April 2017;
- Entities that fall under 'category A' must have submitted their annual Green House Gas (GHG) emissions to DEA by the 3<sup>rd</sup> of May 2017, and thereafter on the 31<sup>st</sup> of March every year, these include:
  - Food processing, beverage and tobacco processors with boiler design capacity  $\geq 10$  MW (th) net heat input;
  - Agriculture, forestry or fish farms with boiler design capacity  $\geq 10$  MW (th) net heat input;
  - Owner of forestry land  $\geq 100$  ha; and
  - Specific thresholds for the producers of lime and other chemicals.
- The specific thresholds and reporting requirements can be obtained from the Technical Guidelines for Monitoring, Reporting and Verification of GHG emissions by Industry (DEA; 2017).
- The reporting will become relevant in the context of Carbon Budgets that will be explained below.



# SA's Post 2020 Climate Change Mitigation *'peak, plateau, decline trajectory'*



# Post 2020 mechanisms to achieve trajectory



# 3. Natural Resource Legislation

## New Water Act:

- Secure water rights NB!
  - ROI, value of the land, business plan etc. all greatly depend on ability to lawfully use water for irrigation.
- Agriculture by far the biggest water user
  - 67% of water used for irrigation
- Water use likely to come under increasing pressure from industrial and domestic demand.
- Much stronger focus on water reform expected;
  - Minister clearly stated at the AFASA congress that water reform is a priority for government

# Setting the scene – a Department in crisis

Auditor-General reporting to Parliament on the 4<sup>th</sup> of October:

Programme	Budget amount (R'000)	Spent amount ('000)	Budget spent	Goals achieved
Administration	R1 547 743	R1 504 930	97,2%	85%
Water Planning and Information Management	R749 656	R695 604	92,8%	67%
Water infrastructure development	R12 130 318	R12 082 462	99,6%	28%
Water and sanitation services	R778 488	R1 070 757	137,5%	83%
Water sector regulation	R318 392	R281 685	88,5%	35%

# Department in crisis

## Capacity concerns

- DG & 1 DDG on suspension;
- Probe underway by the Public Protector and a Special Investigative Unit (SUI) investigation underway;
- Only 2 out of 9 Catchment Management Agencies (CMAs) established;
  - Breede-Gouritz & Inkomati-Usuthu
- Uncertainty as to future institutional arrangements – may revert back to 1 national Departments with branches
- Water User Associations still functioning well.

# Policy imperatives

- Dept. has repeatedly stated that there is a need to consolidate the National Water Act with the Water Services Act.
- Stronger focus on water reform expected.
- National Water Policy Review (2013):
  - Prohibiting water rights trading;
  - Applying a 'use-it or lose-it' approach;
  - Possibly link water to BBBEE status or other transformation measure.
- New legislation not published yet but the Portfolio Committee deems it a priority.

# Water use rights – strategic considerations

- Current Act makes provision for ‘old order’ (i.e. Existing lawful use) and ‘new’ rights (i.e. Water Licence);
- ELU based on historical use, but may be a barrier to water reform (cannot reallocate limited supply of water if all existing users’ rights continue unabated).
- Unclear whether ELU will still be recognised in new legislation;
  - *S25 (8) – ‘No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform...’*
- *Goede Wellington case* based on NWA – need for transformation one of many considerations.
- Water reform likely to play a central role in new Water Bill;
- New legislation not published yet, but Portfolio Committee deems it a priority;

# Water use rights – strategic considerations

- What if new legislation does not recognise ELU?;
- Would it constitute an expropriation for which compensation is required?
- Position still very unclear:
  - A water right is ‘property’ in terms of the Constitution, but there are very strong parallels between this situation and that of mineral rights under the MPRDA.



# Water use rights – strategic considerations

Strategic question: best positioning to ensure continued security of supply for legitimate water users?

- Ensure good BBBEE rating;
- Strategic consideration: Could be advantageous to convert ELU to water licence if new Bill does away with ELU to promote water reform.

Downside = limited timeframe

- Criteria for obtaining a licence settled under s27 of NWA;
- Process: **New Regulations Promulgated 24 March 2017**;

# New Regulations

## Water licence application procedure

- Draft published in 2015 – final version promulgated March 2017;
- No consultation on changes made to draft and final;
- Areas of concern:
  1. Onerous public consultation procedure; and
  2. Provision of financial security.

## Process

- No formal commentary period as Regulations are in force; but
- Met with DWS via BUSA;
- Highlight concerns through a detailed submission;
- DWS with legal team will look at our points and consider amending Regulations accordingly.

# New Regulations

2. Provision on financial security by applicant
  - Similar to 'mine rehabilitation fund';
  - Power to request security for rehabilitation in Act - discretionary;
  - Asking for criteria to be included in Regs to indicate when this will be required.

# Revision of the National Water Resource Strategy

- We are engaging with DWS through BUSA on the revision of the NWRS;
- This strategy will ultimately inform the new Water Bill to be finalised in the 2018/2019 financial year;
- Service provider appointed to lead review
- BUSA inputs:
  - Simplified institutional arrangements:
  - Either establish CMAs or abandon in favour of national department with regional branches;
  - 1 CMA concept?
  - Look at turn-around strategy for Department in NWRS;
  - Prioritise bilateral platforms and MoU with BUSA.

# Water 'master plan'

- Water master plan overarching policy for raw water and sanitation services;
- Includes water reform, infrastructure development, water regulation etc.
- On-going consultations on draft version, to be approved by Cabinet and formally published for public comments in March.

# Water Tariffs – short term outlook

## Proposed Raw Water Tariffs for 2018/19

- Notice was given in the GG that the water research tariff has been increased by 6.79%;
  - This is however a relatively small portion of the raw water tariffs as it will amount to an additional 0.063 cents increase per ha of irrigation.

## Proposed increased for 2018/2019 financial year:

- Water Resource Management:
  - Ranges from 0% - 14.6% increase;
    - capped by PPI (4.6%) for charges that exceed 1.5 c/m<sup>3</sup>
- Water Resource Infrastructure:
  - Ranges from 0% - 14.6% increase
    - Depreciations charge capped at 1.5 c/m<sup>3</sup> plus PPI
    - Operation & maintenance cost increased limited to 50% p.a.

# 3. Natural Resource Legislation

## Preservation and Development of Agricultural Land Framework Bill (PDALFB):

### The process at a glance:

- **Delicate balancing act within BUSA** between agricultural and mining interests;
- Bill had to be redrafted following legal opinion on constitutionality;
  - Certain functions moved to local and provincial government.
- Diverse business interests moving towards common ground:
  - DAFF's consent needed for certain non-agricultural activities on agricultural land;
  - Trying to reduce duplication in processes with NEMA EIA requirements.
- Agricultural interests gaining recognition but trying to avoid additional red tape as far as possible.

# 4. Labour matters

## **National Minimum Wage Bill:**

- NMW & BCEA amendment Bill submitted to Parliament;
- NMW Bill to introduce a cross-cutting minimum wage of R20 per hour as of 1 May 2018;
  - R18 per hour for Agriculture in 2018, must 'catch up' with NMW by 2020;
  - Minimum wage includes worker contribution to social security but excludes employer contributions & other benefits.
- Sectoral Determinations to continue regulating non-remuneration aspects & NMW to regulate all wages;
- Regulations to apply for exemption currently in Nedlac, to be released simultaneously with Bills.



# 4. Labour matters

## **Labour Relations Amendment Bill :**

- Aimed at labour market stability;
  - Introduces secret ballots prior to strikes; and
  - Picketing rules to be agreed to before picketing.
- 
- NMW & LRA amendment Bill part of a compromise agreement reached at Nedlac – seen as a ‘package deal’;
  - As such, BUSA will supply limited comments in Parliamentary process so as to prevent agreements from unravelling.

# 5. Land Reform

## **Regulation of agricultural Landholdings Bill (RALHB):**

### Progress:

- Comments submitted;
- Bill sent to Nedlac;
- Sent back as comments not incorporated;
- Revised Bill but no real changes;
- BUSA insisted on bilateral;
- Nedlac Task Team – put concerns on record.
- Bill just been withdrawn by Government

# 5. Land Reform

## Property Valuation Regulations:

- Office of the Valuer General (OVG) mandated to value land identified for land reform at 'just and equitable' rate;
- Regulations designed to give 'content' to the 'just and equitable' principle in section 25 (3) of the constitution;
- Came up with the following formula:

'value' = (current use value + market value) – subsidies

Effects:

- 'current use value' is not the same as 'productive value'!
- 'current use value' is the net income generated by the property and expressly excludes its optimal or best use.
- Will result in an under-valuation as it does not take the potential of the land into consideration but rather the current income generated.
- Presumably aimed at 'punishing' underutilized or 'lifestyle farms'
- Negative long term effect

# 5. Land Reform

## Communal land Tenure Bill:

### Content:

- Provides for title deeds to be transferred to communities;
  - But at Minister's discretion.
- Communities can decide on nature of individual rights within communal land (use rights, lease or title);
- Communities can opt for CPAs, Trusts or Traditional Authorities as a governance structure.

### Agbiz comments:

- Transfer of title deeds a positive step for agricultural development;
- Preference for ownership has nothing to do with common law v communal law notions of property;
- It is simply a practical consideration;
  - Ownership most legally secure form of tenure in SA + rates highly by international measures;

# 5. Land Reform

## **Extension of Security of Tenure Amendment Bill (ESTAB):**

- One of three pillars of land reform, the other two being Restitution and Redistribution
- Contentious Bill – protection of property rights at the core of legal arguments
- Now stuck in Parliament for more than two years.

# 5. Land Reform

## Restitution of Land Rights Amendment Bill:

Reopening the lodgement period:

- 2014 Amendment Bill declared unconstitutional due to a faulty public consultation process;

Effect:

- New Bill could reopen the lodgement period up to 2021;
- Despite talks of a pre-colonial land audit, no provision for pre1913 claims as this could require a constitutional amendment

Agbiz comments:

- Broadly supportive of restitution, but must take place quickly and efficiently to prevent prolonged uncertainty;
- As far as Agbiz's membership is concerned –
  - NB that the owners are properly compensated to maintain integrity of land market, collateral value and property rights.

# 5. Land Reform

## **“Expropriation without Compensation”:**

*This is the most important issue on the table as it can overshadow all of the land reform legislation discussed.*

*Withdrawal of all other Land Reform legislation, pending outcome of Constitutional Amendment.*

# Expropriation without compensation

What is expropriation?

- In the event where the state needs property for a public purpose or in the public interest, the state must have the power to acquire property even if the owner is not willing to sell;
- Most governments have this power under some name or another:
  - ‘expropriation’ – SA & continental Europe;
  - ‘compulsory acquisition’ – UK & anglophone countries;
  - ‘state’s right of eminent domain’ – USA
- **No consent required, but subject to compensation.**
- Section 25 of the South African Constitution does currently allow for expropriation, but subject to ‘just and equitable’ compensation.



# Expropriation within Constitution

## Section 25:

“(2) Property may be expropriated only in terms of a law of general application-

- (a) for a public purpose or in the public interest; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of Compensation and the time and manner of payment must be **just and equitable**, reflecting an **equitable balance between the public interest and the interests of those affected**, having due regard to **all relevant circumstances, including-**

- (a) the **current use** of the property;
- (b) the **history of the acquisition** and the use of the property;
- (c) the **market value** of the property;
- (d) the extent of **direct state investment and subsidy** in the acquisition and beneficial capital improvement of the property; and
- (e) the **purpose** of the expropriation.”

# Expropriation in practice

What does this mean?

- Provision seldomly used in the past 22 years;
- Courts have had precious little opportunity to give content to s25;
- We still do not know exactly what a ‘just & equitable’ amount may be;
- But it is not the same as market value – deviation will depend on the circumstances of each case;
- Former Constitutional Court Justices Sachs and Moseneke have both come out strongly in favour of retaining the current wording:
  - section 25 is a flexible mechanism;
  - designed to strike a balance between the individual and the needs of the public;
  - It is already a carefully crafted compromise;
  - LAND REFORM CAN BE EFFECTED USING THE CURRENT SECTION 25.

# Findings of the High-Level Panel

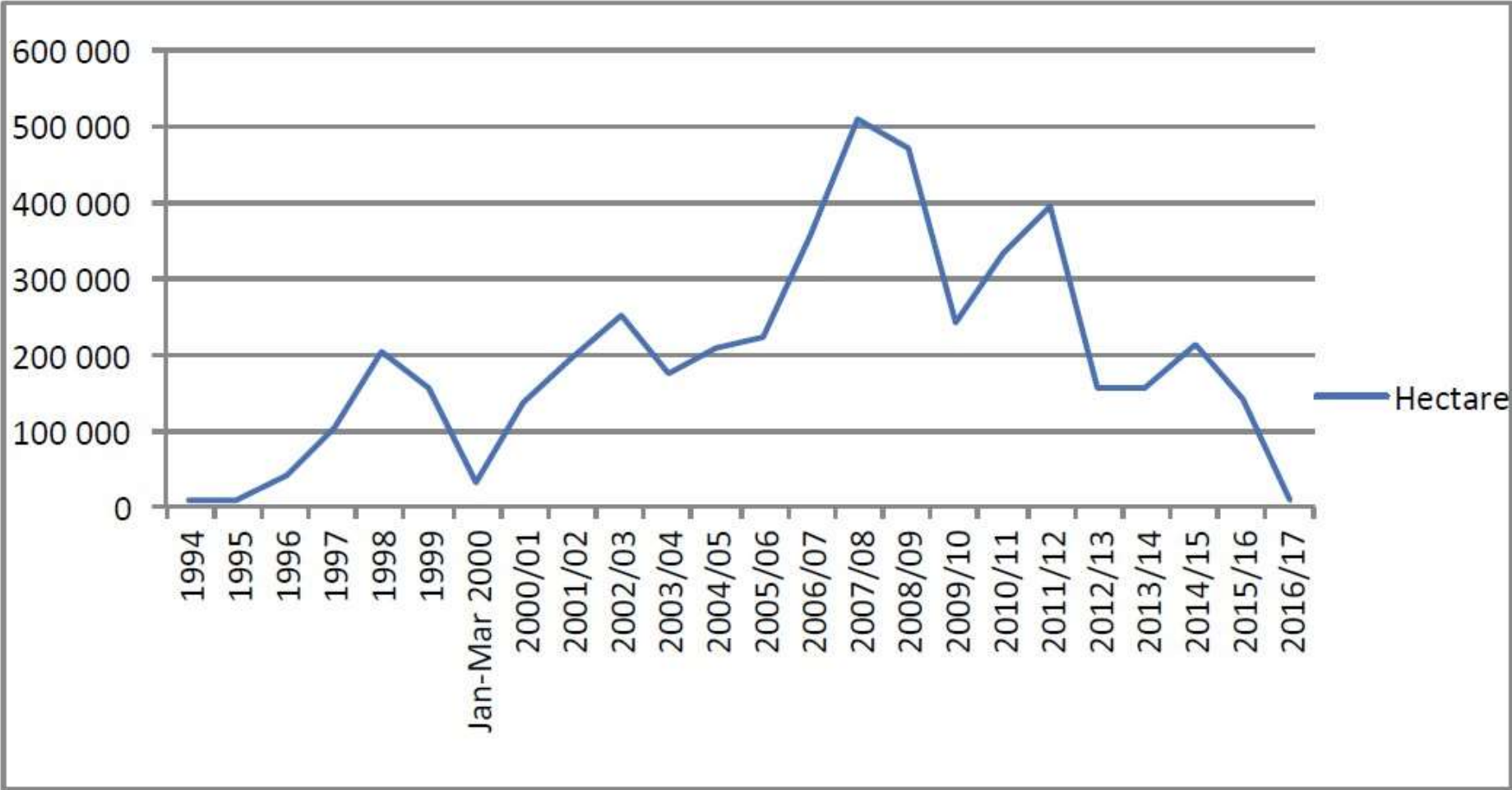
The High-Level Panel chaired by former President Motlante made the following findings:

- The requirement to pay compensation is not the biggest stumbling block to the land reform programme;
- Poor implementation, legislative gaps, corruption and a reluctance to transfer ownership as identified as the biggest stumbling blocks.

## **Recommendations:**

- Urgently finalise legislation to regulate communal land tenure which recognises a continuum of right; and
- Enact framework legislation for land redistribution which:
  - Regulates beneficiary selection;
  - Regulates land identification;
  - Provides for the transfer of ownership; and
  - Provides for various forms of landholdings (individual & collective).

**Figure 3.1: Amount of land transferred through land redistribution, in hectares per year**



\* Sourced from the High-Level Panel’s report on page 301



# Proposed amendment

**At the ANC's 54<sup>th</sup> elective conference in December 2017, it was announced that:**

- 1. The Constitution must be amended to allow for expropriation\* without compensation; provided**
- 2. It must pass a so-called 'sustainability test' in that it must not harm the economy, the financial sector or endanger food security.**

- \*It is unclear whether the proposal is to allow for all property to be expropriated without compensation (i.e. moveables, intellectual property etc.) or only agricultural land.

# Potential effects

**Agbiz launched an extensive media campaign** to highlight the consequences and focused on the following issues:

## 1. The effect on the financial sector

- Commercial banks, DFIs and agribusinesses have over R170 billion invested into agriculture (farm debt) and many loans are securitised using the value of the land;
- If the value of the land is destroyed, it could endanger the R170 debt owed by farmers to financial institutions;
- This in turn would place huge strain on the banks and the depositors whose savings are used to extend credit.

## 2. Accessing credit;

- If land is no longer seen as credible security, commercial and emerging farmers may struggle to access credit to finance their business operations;

## 3. The price of food will increase

- If farmers cannot access credit, then they will not be able to farm optimally and we will need to import agricultural commodities at import parity price, thereby increasing the price of basic food items.

# Potential effects

4. Communal farmers will continue to be marginalised;
  - There is currently a Bill out for comments which seeks to transfer ownership to approximately 20 million communal land occupiers currently living on state land;
  - Whilst the state is finally willing to give them ownership, they will be 'short-changed' as expropriation without compensation will destroy the value of their land.
  
5. Win-win solution not out of reach yet:
  - We can still achieve a win-win outcome without changing the Constitution if the state focuses it's resources on acquiring ownership for those who do not need large tracts of land for commercial farming;
  - State focuses on buying small plots for farm workers, labour tenants etc. who merely need security of tenure and small plots for subsistence production;
  - To transform the commercial sector the state should focus its resources on blended financing models where private-sector capital can be unlocked on a Public-Private-Partnership basis.
  - Agbiz & the Banking Association South Africa has already developed a co-financing model whereby land reform beneficiaries can access 'soft-loans', but the state has been very slow to take up this offer.

# Some media coverage

## Business Day

Land seizures are complex, costly and unwise  
— just ask Zimbabwe

**Someone, somewhere, pays the price for expropriation without compensation — often it is the entire country**

23 February 2018 - 06:12 Johann Kirsten and Wandile Sihlobo

The ANC made a landmark decision in the December 2017 conference, where it indicated that it would start the process towards a constitutional amendment of Section 25 to make possible land redistribution without compensation. This is a marked shift in policy, and comes at a time when land reform (through the state and the market) has made more progress than experts and policy makers care to admit.

28 February 2018

## Agbiz response to Parliament's resolution on land expropriation without compensation

“Agbiz has noted with deep concern the principle resolution on expropriation of land without compensation that was agreed to in Parliament yesterday”, Dr John Purchase, CEO of Agbiz, said today. “While the principle decision has been taken within the context of *‘ensuring food security, economic growth and radical economic transformation’*, it effectively erodes property rights that are the very foundation to the values and principles related to individual liberty and economic freedom. These are the drivers of a country's prosperity and are internationally accepted as fundamental rights. The resolution essentially goes against the ethos and spirit of the current South African Constitution which is grounded on the founding principles of freedom, equality and human dignity”.

## Fin24

### Researchers plot 4 outcomes for land expropriation without compensation

Feb 26 2018 17:25

Cape Town - The ANC's policy decision on land expropriation without compensation could result in four possible outcomes, according to [a paper by Wandile Sihlobo, Theo Boshoff and Sifiso Ntombela](#), researchers at the Agricultural Business Chamber (Agbiz).

In the paper, they explore alternative legal theory which could relate to land expropriation and compensation. They make it clear, however, that their discussion of possible alternatives is not based on already settled law.

16 February 2017

### Agbiz response to Minister Gugile Nkwinti's push for land expropriation without compensation

This week Rural Development and Land Reform Minister Gugile Nkwinti told Parliament during the debate on the State of the Nation (SONA) address that a pre-colonial audit of land ownership, use and occupation is needed to speed up socio-economic reform. The minister said, once the audit has been completed, a single law should be developed to address the issue of land expropriation without compensation. Dr John Purchase, Agbiz CEO responded that even if flagged as political rhetoric, the minister's push for expropriation without compensation is unacceptable and irresponsible. “Such a government programme would be totally outside of the spirit and letter of the current and negotiated Constitution of South Africa,” he said.





# Process

- 1. National Assembly passed a motion to mandate the Constitutional Review Committee to consider an amendment**
  - 241 voted in favour, 83 against
  - Review committee = proportionate representation
- 2. Public hearings to be held;**
  - Constitution prescribes that the public must be afforded an opportunity to provide inputs;
  - Agbiz will certainly participate
- 3. Vote in National Assembly & NCOP;**
  - Two thirds majority required + 6 provinces;
- 4. Signed into law by President:**

# Where does that leave us?

- The specific nature of the amendment still unknown and can hopefully still be influenced but an amendment of some sort seems very likely;
- Still unsure how to strike a balance with economic sustainability – much dialogue/consultation now;
- Qualifiers may move from rhetoric and find expression in test of amendment;
  - Only rural land?
  - Only underutilised land?
  - Absentee landlords, farms in deceased estates (NDP)?
  - Other?

# Red-herrings

Avoid these red-herrings!

1. Opinion that 75% majority in the National Assembly is required to amend section 25;
  - The argument was made in the media that property rights is a fundamental part of the rule of law, and as such one requires 75% opposed to a 2/3 majority to amend section 25;
  
2. The term 'land grabs';
  - A 'land grab' takes place outside of the law;
  - Even if no compensation is payable for expropriation, one still has the following fundamental rights:
    - Not to be evicted from one's home without a court order;
    - Right to just administrative action and a fair procedure;
    - Not to be arbitrarily deprived of property (must take place within the law);
    - To challenge unlawful state action in the courts.

# Capital Assets in Agriculture

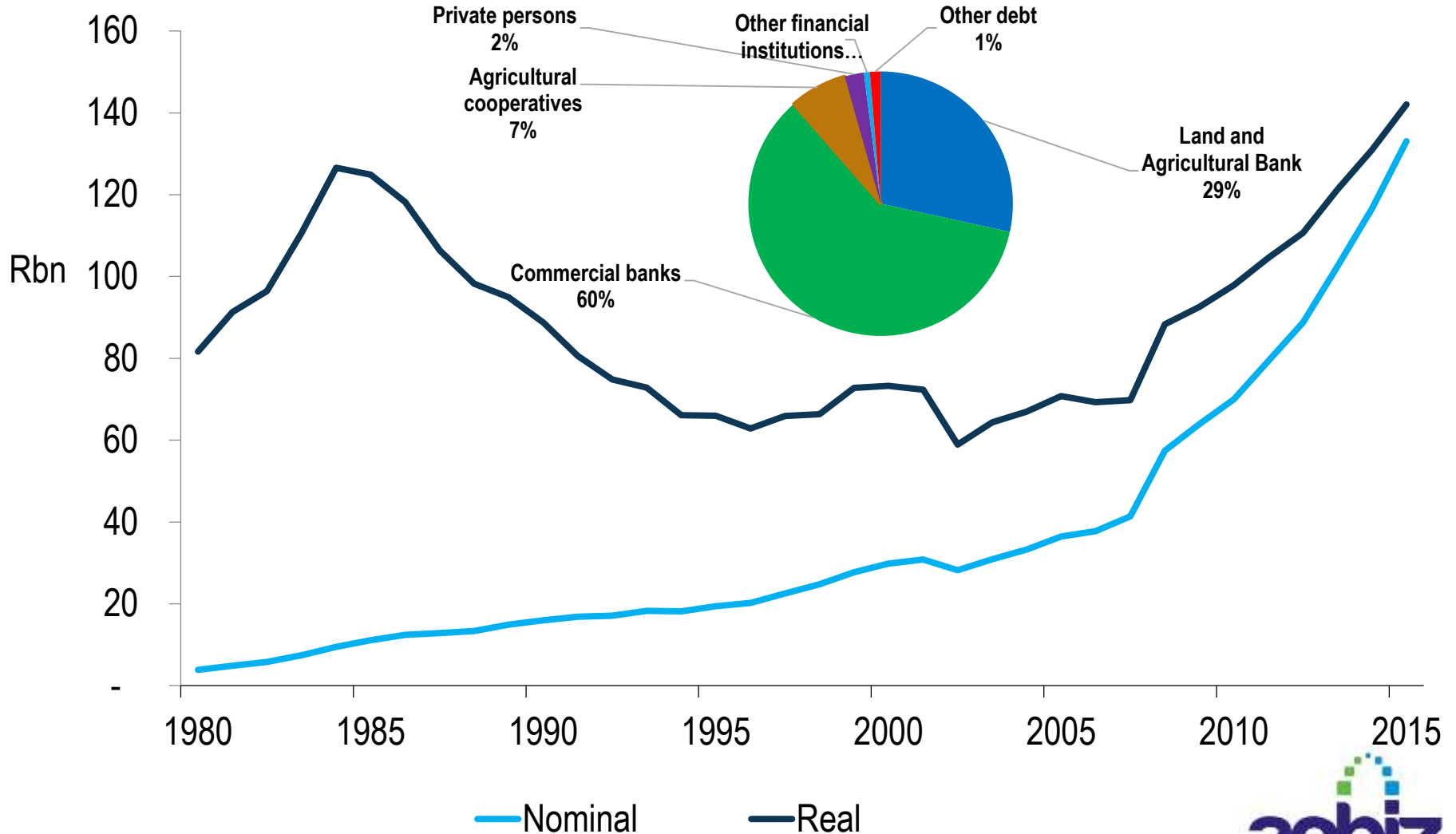
- Estimated value of capital assets at 30/6/2016: R421 billion
- Estimated value of capital assets a year earlier: R384 billion

Indicating an increase of 9,6% from 2015 to 2016.

- Total value of capital assets constituted as follows:
  - Land and fixed improvements: R219 billion (52,1%)
  - Livestock : R137 billion (32,7%)
  - Machinery and implements: R64 billion (15,2%)

# Risk to collateral, “expropriation without compensation”

- Total agriculture farm debt



Source: DAFF, Agbiz Research



# What does this mean for financiers?

- Still uncertain if it will take place, and if so when?
  - Recommendation due by 30 August, but will still need to be debated and voted on;
  - Expropriation Bill? – withdrawn from PC...
- Agbiz busy talking to major stakeholders behind the scenes and coordinating a process with other role players (Agri SA, BASA, AFASA & TAU) to come up with workable alternatives;

**Way forward and focus: Influence Constitutional Review Committee constructively.**

# Thank you!

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