

White Paper

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WHITE PAPER ON SOUTH AFRICAN LAND POLICY APRIL 1997

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Land ownership in South Africa has long been a source of conflict. Our history of conquest and dispossession, of forced removals and a racially-skewed distribution of land resources, has left us with a complex and difficult legacy. To address the consequences of this legacy, the drafters of the South African Constitution included the following three clauses:

@ A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property, or to equitable redress.

@ The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

@ A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.

The three key elements of the land reform programme - restitution, redistribution and tenure reform - address each of these constitutional requirements.

The policy set out in this document arises primarily from lessons gained from work on the ground over the last three years. The White Paper is also the outcome of an extensive process of public consultation.

The content of the White Paper ranges from general statements of principle to detailed information on the state financial assistance programme which will make it possible for more people to own land. It includes programmes to provide security of tenure to people who are vulnerable, and to prevent unfair evictions. A central concern has been to translate the government's commitment to social justice and the alleviation of poverty into a set of concrete land reform and land development programmes, legislation and procedures.

It is my sincere hope that this document will be closely and carefully read by all groups, organisations and individuals who are concerned with ensuring that our country's land policy is directed towards the achievement of equity, stability, poverty reduction and growth. The Department of Land Affairs (DLA) will distribute the White Paper to all interested parties throughout the country. It will also be producing supplementary material to ensure that as many people as possible, from community members through to developers, have the information they need to play their part in the successful implementation of land reform.

I would like to thank all those who contributed to the many drafts that preceded this final version of

the White Paper, and who spent long hours ensuring that it is a clear and accurate statement of South African land policy.

DEREK HANEKOM

Minister of Land Affairs

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FOREWORD

The Land Affairs White Paper sets out the vision and implementation strategy for South Africa's land policy; a policy that is just, builds reconciliation and stability, contributes to economic growth, and bolsters household welfare.

THE LAND POLICY PROCESS AND RESPONSES TO THE GREEN PAPER

The White Paper on Land Policy is the culmination of a two and a half year process of policy development, consultation and lessons from early implementation.

Milestones in this process have been:

@ the DLA Framework Document on Land Policy, May 1995;

@ the Draft Statement of Land Policy and Principles, discussed at the National Land Policy Conference held on 31 August and 1 September 1995;

@ the Green Paper on South African Land Policy, 1 February 1996.

The Green Paper on Land Policy was distributed widely. Written submissions were solicited from the public. In addition, over 30 workshops were held with a wide range of stakeholders and community groups, many of them in remote areas of the country. The introductory section of the White Paper summarises the written responses as well as the comments made at the Green Paper workshops.

These inputs have guided the Department of Land Affairs in its endeavours to ensure that the land policy put forward in this White Paper takes account of people's deepest concerns in regard to land. It has to be recognised, however, that counter proposals are often difficult to reconcile and compromises have had to be found.

LAND POLICY

Current land ownership and land development patterns strongly reflect the political and economic conditions of the apartheid era. Racially-based land policies were a cause of insecurity, landlessness and poverty amongst black people, and a cause of inefficient land administration and land use. Land policy must deal with the following in both urban and rural environments:

@ the injustices of racially-based land dispossession;

@ the inequitable distribution of land ownership;

@ the need for security of tenure for all;

@ the need for sustainable use of land;

@ the need for rapid release of land for development;

@ the need to record and register all rights in property; and

@ the need to administer public land in an effective manner.

The case for government's land reform policy is thus four-fold:

- @ to redress the injustices of apartheid;
- @ to foster national reconciliation and stability;
- @ to underpin economic growth; and
- @ to improve household welfare and alleviate poverty.

By helping to create conditions of stability and certainty – both nationally and at household level – land reform is essential for sustainable growth and development in South Africa. It is a precondition for the success of government's growth, employment and redistribution strategy.

The government's land reform programme is made up of the following principal components:

@ Land Restitution, which involves returning land (or otherwise compensating victims) lost since 19 June 1913 because of racially discriminatory laws.

@ Land Redistribution makes it possible for poor and disadvantaged people to buy land with the help of a Settlement/Land Acquisition Grant.

@ Land Tenure Reform is the most complex area of land reform. It aims to bring all people occupying land under a unitary, legally validated system of landholding. It will devise secure forms of land tenure, help resolve tenure disputes and provide alternatives for people who are displaced in the process.

The Department of Land Affairs has made substantial progress in laying the foundation for a flexible, 'needs-based' approach to these programmes and for ensuring that it facilitates delivery throughout the country. Success will depend on a wide range of services in support of land reform, requiring complementary working arrangements between national departments, various levels of government, and partnerships with the private and non-government sectors. The White Paper emphasises the importance of local participation in decision-making, gender equity, economic viability, and environmental sustainability in the implementation of the land reform programmes.

ISSUES AFFECTING LAND POLICY

A range of issues which must be addressed if the proposed land policy is to be effective. These issues relate to:

- @ the interpretation of land-related clauses contained in the new Constitution;
- @ the nature and level of state intervention in the land market for the purpose of land reform;
- @ the institutional challenges to be overcome if the land policy is to be implemented;
- @ a number of environmental issues relating to land reform;
- @ need to secure finance for people acquiring land with modest capital grants;
- @ the need to remove the practices which discriminate against women acquiring land;
- @ the budgetary constraints faced by the land reform programme;
- @ other factors affecting the implementation of the restitution, redistribution and tenure programmes.

Constitutional issues

The Bill of Rights in the new Constitution guarantees existing property rights; but it simultaneously places the state under a constitutional duty to take reasonable steps to enable citizens to gain equitable access to land, to promote security of tenure, and to provide redress to those who were dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices.

The Constitution confers the right to equality before the law and the right to equal protection and benefit of the law. It states further that equality includes *the full and equal enjoyment of all rights and freedoms*. In relation to land reform, this requires positive action by government. Specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects.

Other constitutional issues affecting land policy include the allocation of powers and responsibilities to national departments and provincial governments to administer land and promote and/or support land reform. There is a need to coordinate the functions of the different spheres of government. This is necessary both because of the constitutional requirement of cooperative government, and in order to achieve effective government.

Land market issues

In formulating its land reform policy, government has endeavoured to take account of the widely conflicting demands of the various stakeholders and the implications of any specific course of action on the land market and investment in South Africa. The government is committed to a land reform programme that will take place on a willing-seller willing-buyer basis. Rather than become directly involved in land purchase for the land redistribution programme, government will provide grants and services to assist the needy with the purchase of land.

Given limited fiscal resources and increasing competition between different budgetary priorities, government grants have to be affordable in macro terms. At the same time, they must provide a resource that can bring real benefit to the needy. For the time being, the allocation of the Settlement/Land Acquisition Grant per qualifying person has been set at R15 000. The White Paper emphasises the need to reduce the burden of fees and duties related to land purchase and to generate additional funds for those wishing to enter the commercial farming sector.

Institutional issues

The Department of Land Affairs is facing a severe shortage of trained personnel as the demand increases for services under the various programmes. Without a substantial increase in staff for this important work, the land reform programme will not be able to meet existing demands or long-term targets.

Other institutional issues facing the Department relate to:

- @ the rationalisation and integration of land administration and related legislation of the former homelands;

- @ the establishment of a transparent and equitable system of public land management;

- @ the involvement of affected communities in land development decisions;

- @ ensuring that adequate post-settlement support is provided for those acquiring land under the programme;

- @ assisting the majority of poor people to obtain credit in order to complement government grants and services for land acquisition and settlement.

Environmental issues

The land reform programme, which aims to reduce poverty, diversify sources of income and allow

people more control over their lives and their environment, is expected to reduce the risk of land degradation. Nonetheless, the land redistribution programme is not without environmental risks.

One of the challenges of land reform is to relieve land pressure without extending environmental degradation over a wider area. Unless projects are properly planned and the necessary measures are put in place to govern the zoning, planning and ultimate use of land and water resources, the programme will result in productive land being used unsustainably. The White Paper emphasises the need for the new owners to be the principals in the planning process. Planning should not be taken over by outsiders, who will bear no responsibility for the long-term maintenance of the land involved. A related issue is how to provide for subdivision of agricultural land to meet the land needs of small-scale farmers in a manner that prevents conversion of land to other uses.

Land restitution issues

Key issues facing land restitution are how to:

- @ ensure that the rural and urban claimants who were dispossessed of land after 1913 receive restitution in the form of land or other appropriate and acceptable remedies;

- @ ensure that appropriate administrative and financial arrangements are developed and implemented to respond to the thousands of claims within the time limits set;

- @ respond to claims in urban areas where land has been redeveloped and changed hands since removal of the claimants;

- @ ensure the constructive participation of all role players – the Commission, the Land Claims Court, current land owners, national, provincial and local government, and the claimants themselves.

Land redistribution issues

Issues of relevance to land redistribution include:

- @ how to respond appropriately to the widely differing needs and aspirations of people for land, in both urban and rural areas, in a manner that is both equitable and affordable, and at the same time contribute to poverty alleviation and to national economic growth;

@ how to address the urgent and immediate cases of landlessness and homelessness which often result in land invasions;

@ how to make available commonage for poor residents of rural towns who wish to supplement their incomes.

Land tenure reform issues

Tenure reform is faced with the following major challenges:

@ how to upgrade the variety of highly conditional land tenure arrangements currently restricting the tenure security and investment opportunities of black South Africans, both in urban and rural areas;

@ how to resolve the overlapping and competing tenure rights of people forcibly removed and resettled on land to which others had prior rights;

@ how to strengthen the beneficial aspects of communal tenure systems and at the same time bring about changes to practices which have resulted in the erosion of tenure rights and the degradation of natural resources;

@ to make government services available to communities which do not have legally secure rights to the land on which a development is to take place;

@ how to extend security of tenure to the millions of people who live in insecure arrangements on land belonging to other people, especially in the predominantly white farming areas.

Budgetary issues

Until recently, the binding constraints on the progress of the land reform programme have been limited staff capacity and an inadequate institutional infrastructure. As these problems are overcome, the delivery of land is expected to be seriously constrained by an inadequate budget. Current budget allocations for land reform constitute less than one half of 1% of the national budget, excluding interest payments. Land reform has been allocated about one twentieth of the proposed spending on rural infrastructure. In order to meet a significant share of the demand for land, the Department of Land Affairs will have to increase its funding and staff capacity. The Department is at present compiling its estimates to the year 2000/01 in accordance with the instructions of the Department of State Expenditure for the preparation of the proposals for the Medium Term Expenditure Framework. The expansion of the Land Reform Programme will be planned within the parameters set by this framework.

THE LAND REFORM PROGRAMMES

The White Paper explains the purpose and implementation strategy of each of the three land reform programmes.

Land redistribution

The purpose of the Land Redistribution Programme is to provide the poor with land for residential and productive purposes in order to improve their livelihoods. The government provides a single, yet flexible, redistribution mechanism which can embrace the wide variety of land needs of eligible applicants. Land redistribution is intended to assist the urban and rural poor, farm workers, labour tenants, as well as emergent farmers.

The Land Redistribution Programme enables eligible individuals and groups to obtain a Settlement/Land Acquisition Grant to a maximum of R15 000 per household for the purchase of land directly from willing sellers, including the state.

Priorities: Redistribution projects will give priority to the following:

@ to the marginalised and to women in need;

@ to projects which can be implemented quickly and effectively.

In each case, viability and sustainability of the projects must be demonstrated. Government will ensure a geographical spread of projects and a diversity of project types, covering different beneficiary sectors, different land uses, and different tenure arrangements.

Land invasions: Government will not give priority to people or groups who participate in land invasions, nor will threats of land invasions be rewarded by special treatment. Rather, government undertakes to work with organised groups of landless people to resolve their problems.

Overcoming discrimination against women: Government will uphold the provisions of the Constitution which outlaws discrimination against women. Within the redistribution programme, this will require the removal of legal restrictions on women's access to land, the use of procedures which promote women's active participation in decision-making, and the registration of land assets in the names of beneficiary household members, not solely in the name of the household head.

Farm workers are singled out for special attention in the Land Redistribution Programme, being one of the most insecure sectors of the population. Government will direct the subsidy to the farm workers and their families in a way which improves tenure security and at the same time contributes to reconciliation and harmony. The Settlement/Land Acquisition Grant can be used in a number of ways to achieve these aims.

Labour tenants are another category of rural dwellers who are particularly vulnerable, with specific land needs. The objectives of the *Land Reform (Labour Tenants) Act, 3 of 1996*, are twofold. On the one hand, the Act provides for the protection of the existing rights of labour tenants. On the other hand, it makes provision for the acquisition of land for labour tenants who will be able to access the Settlement/Land Acquisition Grant for this purpose.

Partnerships with the private sector will be supported which have the potential to widen the scope and efficiency of the land reform process. The Settlement/Land Acquisition Grant can be used to purchase a share in land and infrastructure provided that it broadens the base of land ownership, offers security of tenure and raises the incomes of the grantees. Such cooperative arrangements can greatly improve farm production and the income of the partners.

Rural finance: The White Paper explains how government plans to provide financial services for land reform beneficiaries. The measures that are being taken draw substantially on the conclusions of the Presidential Commission of Enquiry into Rural Financial Services (the Strauss Commission).

It is proposed that:

@ the Post Office will be given a central role in rural areas providing information on available government grants and financial packages, on the

roles of different parastatal and private sector financial institutions, as well as administering repayments where needed;

@ support will be given to a greater number of rural financial institutions such as NGOs, community banks and village banks, as well as private sector service providers, to enable them to make financial services available in rural areas;

@ a state-supported financial package will be introduced for (a) the state funding of a risk sharing agreement and (b) a set of subsidies to help land reform beneficiaries get a foothold in commercial farming.

The Department of Agriculture is ultimately responsible for taking forward the above proposals.

Valuation: Where state funds, including government grants, are used to subsidise the purchase of private land, the DLA and the Department of State Expenditure require that a fair price be paid. This will usually be 'reasonable market value'. This is defined as a price which is comparable with recent sales in the locality and one which is endorsed by an independent valuer and/or the Land and Agricultural Bank. The White Paper provides information on the underlying principles involved in valuing land and explains the facilitative role of government.

Land restitution

The purpose of the Land Restitution Programme is to restore land and provide other remedies to people dispossessed by racially discriminatory legislation and practice. This will be done in such a way as to provide support to the process of reconciliation and development, and with regard to the over-arching consideration of fairness and justice for individuals, communities and the country as a whole.

The government's policy and procedure for land claims are based on the provisions of the Constitution and the *Restitution of Land Rights Act, 22 of 1994*. The White Paper elaborates four aspects: qualification criteria, forms of restitution, compensation (for both claimants and landowners), and urban claims.

A restitution claim qualifies for investigation by the Commission on Restitution of Land Rights provided that the claimant was dispossessed of a right in land after 19 June 1913, as a result of racially discriminatory laws or practices, or was not paid just and equitable compensation.

Claims arising from dispossession prior to 1913 may be accommodated by the Minister in terms of preferential status in the Land Redistribution Programme providing that claimants are

disadvantaged and will benefit in a sustainable manner from the support.

Restitution can take the form of:

- @ restoration of the land from which claimants were dispossessed;
- @ provision of alternative land;
- @ payment of compensation;
- @ alternative relief comprising a combination of the above; or
- @ priority access to government housing and land development programmes.

The state will compensate certain successful claimants in a just and equitable way where restoration of the land or other remedies are not appropriate. Land owners whose land is expropriated for the purposes of restoring land to successful claimants will be compensated in a just and equitable manner.

In order to deal with the multiple complications of the anticipated urban restitution claims:

- @ claimants will be encouraged to form groups for each affected town, suburb or former group area to submit and/or negotiate the settlement of their claims jointly;
- @ former residents will be afforded the opportunity to participate in shaping the future of the areas which are still available for development;
- @ successful claimants will be afforded the opportunity to acquire property in development projects located in their former areas;
- @ individual portions of land for residential and related uses will be restored where it is fair and feasible to do so;
- @ any compensation paid at the time of dispossession will be taken into account when calculating reparatory compensation, if any.

Within this framework, the Department of Land Affairs may provide a special planning budget to each city, town or suburb from which a substantial number of restitution claims arise.

Land tenure reform

Tenure reform is a particularly complex process. It involves interests in land and the form that these interests should take. In South Africa, tenure reform must address difficult problems created in the past. The solutions to these problems may entail new systems of land holding, land rights and forms of ownership, and may therefore have far-reaching implications. For these reasons policy in respect of tenure reform has to be developed with extreme care. In order to ensure this, a two year period was set aside for consultation on tenure policy, for the implementation of test cases and for the preparation of legislation. In the interim, a number of measures have been introduced to deal with urgent and pressing matters. A separate Green Paper on Land Tenure Policy will be released at the end of 1997.

The principles guiding the policy development process and the programme of action that is being undertaken are as follows:

- @ tenure reform must move towards rights and away from permits;
- @ tenure reform must build a unitary non-racial system of land rights for all South Africans;
- @ tenure reform must allow people to choose the tenure system which is appropriate to their circumstances;
- @ all tenure systems must be consistent with the Constitution's commitment to basic human rights and equality;
- @ a rights based approach and adjudicatory principles have to be adopted which recognise and accommodate *de facto* vested rights (ie those which exist on the ground);
- @ new tenure systems and laws should be brought in to line with the situation as it exists on the ground and in practice.

The White Paper points out that, under the Bill of Rights in the new Constitution, the government is obliged to develop a law which sets out the types of vested interests in land which were undermined by discriminatory laws and the measures necessary to ensure that such interests in land are legally secure.

The principal tasks necessary for developing the Land Tenure Reform Programme are set out in Section 4 of the White Paper. Rights of affected land holders will be formalised only in response to requests. A programme of forced land titling will not be undertaken. There is limited capacity within government to respond to the urgent requests which are being made. Because there will be extensive areas where tenure reform may not take place for many years, interim measures that entail a limited reform of regulations governing access to, and control over, land are being established.

Financial Grants of the Land Reform Programme

The Department of Land Affairs offers a set of grants in support of the Land Reform Programme, applicable in varying respects to each of the three principal programmes – restitution, redistribution and tenure reform.

The Settlement/Land Acquisition Grant is set as a maximum of R15 000 per beneficiary household, to be used for land acquisition, enhancement of tenure rights, investments in internal infrastructure, and home improvements.

The Grant for the Acquisition of Land for Municipal Commonage is to enable primary municipalities to acquire land in order to extend or create a commonage for the use of qualifying persons.

The Settlement Planning Grant is to be used to enlist the services of planners and other professionals, to assist the beneficiaries in preparing project proposals and settlement plans.

The Grant for Determining Land Development Objectives provides for under-resourced, poor or rural local authorities to undertake a strategic planning process to set Land Development Objectives in terms of the *Development Facilitation Act, 67 of 1995*. Land Development Objectives require local authorities to set out a development vision for their area and to consult with local stakeholders and other relevant parties.

Eligibility, disbursement procedures, tenure and settlement options, and methods of accessing the grants are explained in Section 4 of the White Paper. These grants are intended to assist the following categories of people:

@ landless people, especially women, who wish to gain access to land and settlement opportunities in rural or urban areas;

@ farm workers and their families who wish to improve their settlement and tenure conditions;

@ labour tenants and their families who wish to acquire and improve the land which they hold or alternative land;

@ residents who wish to secure and upgrade the conditions of tenure under which they live;

@ beneficiaries of the Land Restitution Programme;

@ dispossession cases which fall outside the ambit of the *Restitution of Land Rights Act, 22 of 1994*.

LAND DEVELOPMENT, PUBLIC LAND MANAGEMENT AND ADMINISTRATION

Land development

The prime purpose of government's land development policy is to establish procedures to facilitate the release of appropriate public land for affordable housing, public services and productive as well as recreational purposes. In settlements which have been established in remote locations, without formal planning, land development involves upgrading services and infrastructure *in situ*.

Spatial and physical planning: Racial segregation has made South Africa's towns, cities and rural settlements extraordinarily inequitable and costly to service. Restructuring the laws and institutions which supported apartheid's spatial and physical planning is a complex task. Land development policy must cater for a wide variety of needs and circumstances. To proceed effectively, land development requires:

@ a coherent and integrated institutional, financial and legal framework;

@ clearly defined responsibilities, roles and powers for land development planning and regulation at all levels of government;

@ a national land use planning and management system coordinated between departments and between tiers of government;

@ the capacity to involve the people affected in planning and

implementation of the actions required to satisfy their needs and facilitate development.

The *Development Facilitation Act, 67 of 1995*, is seen as an essential means of achieving these conditions. The Department of Land Affairs, as the principal department responsible for the Act, will provide advice and assistance to provincial and municipal authorities to enable them to introduce the measures needed. As major urban and rural landholders, government agencies are in a unique position to release land for social upliftment and economic development.

Public land management

Public land includes land held by provincial and national governments, as well as land held by local authorities and parastatals. State land is land which is held by the national and provincial governments, but excludes local authority and parastatal land. This includes former SADT land and land already allocated to communities and individuals in the former homelands and former coloured reserves.

Land development requires an information system for public and state land which supports land development. A database is therefore being established to detail all public and state land holdings. It is expected that all parastatals will enter their land holding information as well.

The White Paper describes the power of attorney which has been finalised whereby the provincial departments of Agriculture administer state land which is held by the Minister for Agriculture and Land Affairs outside the former homelands. An agreement for the disposal of state land has been reached with the Department of Agriculture to ensure a cooperative approach to the settlement of farmers.

The Department of Public Works and the Department of Land Affairs have agreed on the rational allocation of responsibilities for the management and disposal of state land. The agreement recognises the need to rationalise the custodianship, administration and disposal functions of the two departments. It defines areas of competency and responsibility and procedures by which decisions on the allocation and use of this land can be reached at a decentralised level.

Land administration

In the long run, as part of the Land Tenure Reform Programme, government is committed to the transfer of the land, that is in the nominal ownership of the state, to its real owners. In the meantime, numerous local tenurial problems need to be overcome and administrative uncertainties addressed. Section 5 of the White Paper sets out the guiding principles and the interim strategy for dealing with both the permit system and uncertainties as to the responsibilities of different tiers of government in relation to the different categories of state land. The interim strategy has been developed for the administration of land in proclaimed towns inside the former homelands, on

former SADT land, as well as in rural settlements and villages in these areas.

INSTITUTIONAL ARRANGEMENTS FOR IMPLEMENTATION

Rationale

The arrangements for implementation, described in Section 6 of the White Paper, emphasise the importance of:

- @ an integrated approach to the delivery of land and support services requiring the development of close working relations with the departments and levels of government;

- @ partnership arrangements with the private sector, NGOs and community based organisations;

- @ a monitoring and evaluation system that can track the progress of land reform.

The Department of Land Affairs has undergone many structural changes since 1994. There are now three branches in the Department.

- @ Deeds and Surveys is concerned with management of the deeds registration, land surveying and land information systems.

- @ Land Reform Policy is concerned with developing policies and systems for land reform, and with land use and development issues.

- @ Land Reform Implementation is responsible for the primary implementation agencies, namely the Department's nine provincial offices.

The Department is currently engaged in a decentralisation process which will give greatly enhanced functions and authority to the Directors of the provincial offices. The Department of Land Affairs recognises the decentralisation of functions and authority as a necessity for the efficient and effective delivery of land reform.

Decentralisation is also seen within the broader context of institutional arrangements for land reform. Efficient and effective delivery requires that the Department of Land Affairs' provincial offices create the widest possible land reform implementation capacity by funding, contracting and building the capacity of service providers in provincial government, local government, the private sector and the NGO sector.

Transformation: Delivery of land reform will require the transformation of the DLA from a traditional state bureaucracy to one that is responsive, service oriented and is adequately staffed with skilled personnel which reflect the racial, gender and disability composition of the South African population. The Department has established a Transformation Unit which is serving as a catalyst for the change process.

Division of land-related functions

Land reform is a national competency. It is the responsibility of the national government to ensure a more equitable distribution of land ownership, to support the work of The Commission on Restitution of Land Rights and to ensure that a programme of land tenure and land administration reform is implemented. It is the responsibility of provincial governments to provide complementary development support to beneficiaries of land reform. Provincial governments have concurrent competencies with national government with regard to critical areas – such as rural and urban development and agriculture – that effect the sustainability of land reform.

The experience of the land reform programme over the past two years has demonstrated the critical importance of establishing a clear understanding between national and provincial governments of their respective roles and responsibilities in regard to land reform.

Much of the land administration function is likely to be delegated or assigned to provincial government. Eventually it may be appropriate for most of these functions to be located at the local government level. This would bring the situation in rural areas into line with those in urban areas where substantial land administration functions, particularly those relating to planning and development control, are already vested in local authorities.

The long-term success and sustainability of the land reform programme is, to a large extent, dependent on the ability of potential beneficiaries to be able to access the programme easily. This requires the provision of services close to the local level. Building the capacity for this will be a long term process. It will require strong support at the provincial level.

The Provincial Offices of the Department are key institutions in the implementation of the land reform programme. They are responsible for ensuring that the government's land reform policy is implemented and for liaising with provincial government in land reform matters. Co-ordinating arrangements between the provincial DLA office and the provincial government departments are currently being discussed in each province. The precise allocation of functions between the DLA regional offices and the provincial authorities will vary according to negotiated arrangements.

Facilitation services and dispute resolution services are two key services in support of land reform. They will be provided by government, either directly, or through agency agreements with non-government or private sector service providers. The first aims to ensure that prospective beneficiaries are given the necessary support to apply for appropriate assistance; and the second aims to provide both conflict prevention and conflict resolution skills amongst a cross-section of participants in the land reform process.

Land information: The Department is also reorientating its service to meet the land information needs of all South Africans, in particular those currently outside the formal land ownership system. While the country's land records and survey operation are of a high standard, the registration and cadastral system covers only the freehold sector and state land outside the former homelands. The challenge is to devise ways of recording rights in land as envisaged under the Land Tenure Reform Programme.

Concluding comment

A sound land policy is one of South Africa's preconditions for the attainment of peace, reconciliation and stability, without which economic growth and secure livelihoods cannot be achieved. Effective land programmes will also contribute directly to increasing production and to poverty alleviation. The White Paper encourages the reader to view *our land* in this perspective: as a cornerstone in the development of our country.

Since 1994, the Department of Land Affairs has developed a comprehensive and far-reaching land reform policy and programme as its contribution to national reconciliation, growth and development. The White Paper on Land Policy is the culmination of a two and a half year process of policy development, consultation and implementation.

The Reconstruction and Development Programme (RDP) provided a set of guidelines and principles that gave direction to the initial process of formulating the land reform policy and programme. By May 1995, with almost a year of experience behind it, the Department of Land Affairs issued a Framework Document on Land Policy. This was the starting point for an extensive process of public consultation on land policy issues. Over 50 organisations, including farmers' associations, NGOs, government departments and concerned individuals, responded to the Framework Document. At the same time, a series of task teams of experts with knowledge in the different areas of land policy worked to refine and develop the different issues. This work, together with the public comments, was then incorporated into a Draft Statement of Land Policy and Principles that was the basic document discussed at the National Land Policy Conference held on 31 August and 1 September 1995.

This historic conference was attended by over one thousand delegates from all walks of life and from all parts of the country. The majority of the conference delegates were representatives from disadvantaged communities and most were from rural areas. The conference document was hotly debated. All participants voiced strongly-held views as to the correct way forward in regard to land policy. These views, together with feedback from the implementation process, were again taken into account in formulating the Green Paper on Land Policy.

The Green Paper, containing a series of firm proposals on a wide range of policy issues, was distributed widely in February 1996. Once more, submissions were solicited from the public and over 50 written responses were received. In addition, a series of workshops were held in each province where the Green Paper was presented to a wide range of stakeholders and community groups. Over 30 of these workshops were held, many of them in remote areas of the country, and most of them were conducted in more than one language.

The Department is indebted to all who have contributed to the land policy debate. Public concerns about land matters have been taken into account when reviewing policies and programmes. The inputs received through this process have significantly guided the Department of Land Affairs in its endeavours to ensure that the land policy put forward in this White Paper reflects the deepest concerns of our country's people in regard to land. The following is a summary of the public responses to the Green Paper on Land Policy.

1.2.1 Issues raised at Green Paper workshops

In the course of these workshops, aspects of land policy set out in the Green Paper were questioned by participants. Generally, people felt that the land reform programme should not rely on the willing-seller principle and that land should be made available free to the poor and disadvantaged. Further, they argued that there was no guarantee that land redistribution would improve people's livelihoods unless a wide range of support services were provided.

People felt that:

The Settlement/Land Acquisition Grant

@ the Settlement/Land Acquisition Grant of R15 000 was too little;

@ the definition of a 'qualifying household' discriminated against women;

@ where people leased land, they should be able to use the Settlement/Land Acquisition Grant for farming expenses.

Support services and finance for farmers

@ low interest loans to supplement the grant should be made available to beneficiaries of the grant – the Agricultural Credit Board and the Land Bank should relax their requirements;

@ there should be free agricultural and farm management training;

@ the support previously given to white farmers should now be available for black farmers.

Government intervention in the land market

@ underutilised farm land should be expropriated;

- @ there should be restrictions on the size and number of farms that an individual could own;
- @ there should be a special tax on private land;
- @ absentee landlordism needed to be investigated;
- @ a property clause should not be included in the new Constitution.

Valuation and compensation

- @ the present asking prices were too high – compensation should be paid only on on-farm investments and improvements;
- @ valuation criteria should take account of the history of land acquisition – the subsidies the owner had received and the profit made on the farm, the environmental damage from past agricultural practices and the use value for future owners;
- @ valuation should exclude the value of all investments made by farmers.

Land administration and tribal authorities

At the Green Paper workshops, there were widely different opinions on the future involvement of tribal authorities and chiefs in land administration. Those in favour believed that:

- @ the state should not hold the land on behalf of black people – chiefs should get the title deeds, chiefs should redistribute the land;
- @ there would be problems if land were bought by subjects and not by tribes as the subjects would be separated from the tribes.

Those against the involvement of the chiefs, believed that:

- @ communities falling under chiefs should get their own title deeds;
- @ government should do away with PTOs;
- @ chiefs should not accept bribes;

@ the lack of security of tenure on communal land in urban areas hampered development.

Farm workers

The Department's policies regarding tenure security were felt to be inadequate. People wanted:

@ farm workers to be given secure tenure;

@ more coordination between the Departments of Land Affairs and Labour, because evictions sometimes related to labour disputes ;

@ farm workers to be given the right to acquire the land they had lived on for a long period of time;

@ more information to be provided to farm workers about the schemes proposed by the DLA.

At the same time, some people wanted the tenure rights of farmers, and their right to sell the property for agricultural purposes, to be safeguarded.

Public land

People wanted:

@ the policy on accessing parastatal land to be made clearer;

@ the public land data base to be completed;

@ the million hectares of state land available to be redistributed immediately;

@ priority to be given to sorting out the chaotic situation in trust lands;

@ assistance to enable people to access commonage held by local authorities – people wanted the land to be leased at an affordable price and not at the rates paid by commercial farmers.

Land Restitution

People felt that:

@ the 1913 cut off date should be scrapped;

@ tenants forcibly removed in urban areas should benefit from the land restitution programme;

@ people should be compensated for lost minerals rights on land taken by the government – compensation should be fair and market related.

Institutional framework for land administration

There were calls for:

@ the roles and responsibilities for land administration at the different levels of government to be clarified;

@ land offices to be located close to the people;

@ the clarification of relations between tribal authorities and local authorities;

@ black farmers to be represented on land reform institutions;

@ trusts, committees and councillors responsible for implementation to be democratically elected;

@ land administration at local level adequately to represent the interests of land users;

@ better coordination between different departments;

@ more clarity on the nature of the partnership between NGOs, CBOs and government.

1.2.2 Written submissions on the Green Paper

A wide range of views were expressed by the different stakeholders: For example:

Commercial farmers and farming organisations

@ All submissions from this group were strongly in favour of a constitutional clause protecting property rights.

@ Other submissions were concerned about:

- the criteria for assessing compensation due to land owners;
- the need to take a firm stand against land invasions;
- the subdivision of land into uneconomical units;
- communal ownership, especially the problem of ‘free riders’; and
- the Green Paper’s stance on the viability of small-scale farms.

@ The need was expressed for a user-friendly, accessible national land data base.

Non-Governmental Organisations

@ The Centre for Applied Legal Studies made a submission on tenure rights in tribal land.

@ The submissions from the National Land Committee and Transvaal Rural Action Committee echoed many of the concerns raised by black rural communities at the Green Paper consultative workshops and in their written submissions (see below).

Black rural communities

@ Most felt that the R15 000 Settlement/Land Acquisition Grant was far too small an amount to allow them to get a foothold in agriculture. There was also concern on the definition of a qualifying household in the Green Paper.

@ Concerns were expressed about:

- the willing-seller approach and the problems raised by inclusion of a property rights clause in the Constitution;
- the 1913 cut off date in the *Restitution of Land Rights Act*;
- the high transaction costs involved in land transfers.

@ Many felt that policy on the roles and rights of women should be explicitly integrated into the White Paper.

Planners

@ The issue of transparency in the appointment of planners was raised.

@ The necessity to plan for support during and after transfer of land was emphasised; and for formalising the process of participation.

Financial institutions

@ These came out in support of the proposed market based approach to land reform, but expressed concern that it should not unduly distort the operation of the land market. They were in support of a national, user-friendly land data base.

@ Concern was expressed about the need to safeguard property rights in the Constitution.

@ They advocated support and training during and after transfer of land.

Provincial government departments

@ Many submissions were made in respect of the manner in which the DLA planned to value land, including the willing-buyer, willing-seller approach.

@ Concern over communal ownership was raised and the problem of free-

riders was highlighted.

@ The KwaZulu-Natal government made a range of comments on provincial autonomy.

Statutory organisations and national government departments

@ Many of these organisations felt that environmental issues (national and cultural) should be integrated into the White Paper.

The issues raised, both in the written submissions and the Green Paper Consultative Workshops, have been carefully considered. The policy development process which has taken place in the past year has addressed many of the issues raised. It has to be recognised, however, that counter proposals by stakeholders are often difficult to reconcile and compromises have to be found.

Our land is a precious resource. We build our homes on it; it feeds us; it sustains animal and plant life and stores our water. It contains our mineral wealth and is an essential resource for investment in our country's economy. Land does not only form the basis of our wealth, but also our security, pride and history.

Land, its ownership and use, has always played an important role in shaping the political, economic and social processes in the country. Past land policies were a major cause of insecurity, landlessness, homelessness and poverty in South Africa. They also resulted in inefficient urban and rural land use patterns and a fragmented system of land administration. This has severely restricted effective resource utilisation and development.

Land is an important and sensitive issue to all South Africans. It is a finite resource which binds all together in a common destiny. As a cornerstone for reconstruction and development, a land policy for the country needs to deal effectively with:

@ the injustices of racially based land dispossession of the past;

@ the need for a more equitable distribution of land ownership;

@ the need for land reform to reduce poverty and contribute to economic growth;

@ security of tenure for all; and

@ a system of land management which will support sustainable land use patterns and rapid land release for development.

Land policy should ensure accessible means of recording and registering rights in property, establish broad norms and guidelines for land use planning, effectively manage public land and develop a responsive, client-friendly land administration service.

At present, the central thrust of land policy is the land reform programme. This has three aspects: land restitution, land redistribution and tenure reform. The success of these elements of the programme is dependent in the long run on more than merely access to land. The provision of support services, infrastructural and other development programmes, is essential to improve the quality of life and the employment opportunities resulting from land reform.

This necessitates a constructive partnership between national, provincial and local level administrations. The successful delivery of land reform depends not only on an integrated government policy and delivery systems, but also on the establishment of cooperative partnerships between the state and private and non-governmental sectors.

Our vision is of a land policy and land reform programme that contributes to reconciliation, stability, growth and development in an equitable and sustainable way. It presumes an active land market supported by an effective and accessible institutional framework. In an urban context our vision is one where the poor have secure access to well located land for the provision of shelter. The land reform programme's poverty focus is aimed at achieving a better quality of life for the most disadvantaged.

Land reform aims to contribute to economic development, both by giving households the opportunity to engage in productive land use and by increasing employment opportunities through encouraging greater investment. We envisage a land reform which results in a rural landscape consisting of small, medium and large farms; one which promotes both equity and efficiency through a combined agrarian and industrial strategy in which land reform is a spark to the engine of growth.

If these goals are to be realised, major constraints have to be overcome (see Box 2.1). The means by which government intends to achieve this is set out in subsequent sections of this White Paper.

The case for the government's rural land reform programme and its scope and content were clearly set out in the initial policy document of the RDP in 1994:

Land is the most basic need for rural dwellers. Apartheid policies pushed millions of black South Africans into overcrowded and impoverished reserves, homelands and townships. In addition, capital intensive agricultural policies led to the large-scale eviction of farm dwellers from their land and homes. The abolition of the Land Acts cannot redress inequities in land distribution. Only a tiny minority of black people can afford land on the free market.

A national land reform programme is the central and driving force of a programme of rural development. Such a programme aims to redress effectively the injustices of forced removals and the historical denial of access to land. It aims to ensure security of tenure for rural dwellers. And in implementing the national land reform programme, and through the provision of support services, the democratic government will build the economy by generating large-scale employment increasing rural incomes and eliminating overcrowding.

The RDP must implement a fundamental land reform programme. This programme must be demand-driven and must aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers. As part of a comprehensive rural development policy, it must raise rural incomes and productivity, and must encourage the use of land for agricultural, other productive or residential purposes.

The land policy must ensure security of tenure for all South Africans, regardless of their system of land-holding. It must remove all forms of discrimination in women's access to land.'

(Source: RDP: a policy framework, ANC, 1994, pages 19-20)

In urban areas, access to land is similarly a prerequisite for a successful urban development programme. Government at all levels, including local authorities, should strive to overcome all obstacles which may hamper equitable access to well located land. Implementation of appropriate urban and rural land policies and land management practices is required to overcome a primary cause of inequity and poverty. Realization of these policies is necessary to reduce living costs, occupation of unsafe land, environmental degradation and urban and rural vulnerability, affecting all people, especially the poor.

As anticipated in the 1994 RDP policy framework, government's response to land reform has three major elements:

Redistribution aims to provide the disadvantaged and the poor with access to land for residential and productive purposes. Its scope includes the urban and rural very poor, labour tenants, farm workers as well as new entrants to agriculture.

Land Restitution covers cases of forced removals which took place after 1913. They are being dealt with by a Land Claims Court and Commission, established under the *Restitution of Land Rights Act, 22 of 1994*.

Land tenure reform is being addressed through a review of present land policy, administration and legislation to improve the tenure security of all South Africans and to accommodate diverse forms of land tenure, including types of communal tenure.

The government has adopted a two-pronged approach. On the one hand it is striving to create an enabling policy environment and on the other hand it is providing direct financial and other support services.

In the 2½ years since the current government came to power, much has been achieved, in terms of both policy development and land reform implementation

(see Box 2.2).

The importance of land reform in South Africa arises from the scale and scope of land dispossession of black people which has taken place at the hand of white colonisers. For most of this century, indeed since the *Natives Land Act, 1913*, rights to own, rent or even share-crop land in South Africa depended upon a person's racial classification.

Millions of black people were forced to leave their ancestral lands and resettle in what quickly became over-crowded and environmentally degraded reserves – pools of cheap migrant labour for white-owned farms and mines. Under the *Native Trust and Land Act, 1936*, black people lost even the right to purchase land in the reserves and were obliged to utilise land administered by tribal authorities appointed by the government.

Black families who owned land under freehold tenure outside the reserves before 1913 were initially exempted from the provisions of the *Natives Land Act*. The result was a number of so-called 'black-spot' communities in farming areas occupied by whites. These were the subject of a second wave of forced removals which took place from the 1950s through to the 1980s.

The government expelled most of these farmers to 'homelands', often without compensation for their lost land rights. Dispossession forced successful black farmers to seek employment as farm labourers.

Meanwhile, the South African government continued to intervene in the administration of land within the homelands, where tribal chiefs were accorded special land-ownership rights and far-reaching powers over land allocation, often beyond those normally sanctioned under

customary law. Some blacks who were moved from freehold land, and others removed from outlying pockets of tribal lands, became tenants of the South African Development Trust (SADT), which bought up farm land occupied by whites for the consolidation and enlargement of the homelands.

Some 3.5 million people were removed from rural and urban areas between 1960 and 1980. It was only from 1978, with the introduction of the 99-year leasehold system and in the mid-1980s with the abolition of influx control, that the state acknowledged that black people should have permanent land rights in urban areas. Yet land rights in rural areas have remained tenuous.

The land reform programme addresses this legacy. It aims to create stability, provide resources for the creation of livelihoods, and contribute to the establishment of viable and well-located urban and rural settlements.

The principles on which the government's land reform policy is based are set out in Box 2.3. The following paragraphs highlight some key policy issues.

The primary reason for the government's land reform measures is to redress the injustices of apartheid and to alleviate the impoverishment and suffering that it caused. Because of the enormity of the injustices, the measures proposed can only go a small way to compensate people for the loss of their land, their homes and their capital assets. The primary focus of land reform is the 'historically disadvantaged' – those who have been denied access to land and have been disinherited of their land rights.

Land reform can make a significant contribution to the alleviation of poverty and injustice caused by past apartheid policies in both urban and rural areas. Given the poverty focus of the programme, it prioritises areas of greatest need. Much of the country's most severe poverty is located in rural areas, where the poorest ten per cent of the people are Africans and where women-headed households are particularly impoverished. Three-quarters of the children in rural areas are in households living below the minimum acceptable subsistence level. Land reform aims to help in redressing the appalling inequality of incomes and to provide the largely impoverished black rural population with basic needs and more secure livelihoods. For the urban poor, access to land, secure tenure and phased provision of services is a key means of avoiding land invasions and resultant instability.

The historical legacy of South Africa necessitates land reform. Resentment over land dispossession runs deep in our society. It threatens to boil over, causing social and economic dislocation through the illegal occupation of land – invasions of public and private land in both rural and urban areas.

Without a significant change in the racial distribution of land ownership, there can be no long-term political stability and therefore no economic prosperity.

In rural areas the vision of government encompasses both productive and residential land uses. It envisages a well-balanced mix of farming systems and rural enterprise (livestock, annual and perennial crops as well as farm-forestry) with land held under a variety of forms of tenure by individuals, companies and communities. The objective is a flourishing rural landscape consisting of large, medium and small farms and enterprises developed by full-time and part-time farmers. A more balanced allocation of land and resources, partnerships between farm workers and farm owners leading to increased productivity, as well as the provision of secure tenure for all rural people are all part of this vision.

In an urban landscape the objective is to address urban landlessness and homelessness by directing development of affordable housing and services to unused or under-used land within present urban boundaries and close to employment opportunities. The distortions which have resulted from planning according to apartheid and segregation policies have to be redressed. Land use fragmentation, according to race and income, entrench social divisions and potential conflict.

2.5.3 Economic arguments for land reform

Land reform is not only a means of correcting past injustices and bringing reconciliation and peace to the country. There are other vital economic benefits for society generated by land reform. For example:

@ Major cost savings resulting from a more rational use of urban land: Low density development makes inefficient use of investments in infrastructure and amenities and reduces accessibility to social and economic opportunities. It imposes high costs and time wastage on society in terms of journeys to work and amenities. Efficient and speedy release of suitably located land at the required rate and scale is a prerequisite for achieving the aims of the overall urban development strategy.

@ More households will be able to access sufficient food on a consistent basis: The absence of household-level food security has devastating consequences, most notably on the physical and mental development of children. Access to productive land will provide the opportunity for putting more food on the table and providing cash for the purchase of food items.

@ Opportunities for Small Scale Production: Comparative international research notes that smaller sized agricultural units are often farmed more intensively, and are more labour absorbing. There are over a hundred thousand small scale and subsistence farmers in South Africa who could be assisted by the land redistribution programme to expand their land resource base through purchase or lease. The land reform programme thus offers the potential for more intensive irrigated farming, for contract

farming in important sectors of the agricultural economy such as cotton, timber and sugar, and the potential to intensify agricultural production in areas of high agricultural potential.

@ Land reform can make a major contribution towards addressing unemployment, particularly in rural areas and small towns: In rural areas, the rate of unemployment ranges from 40% among poor households to 58% among the poorest. This situation could deteriorate further as the number of young people entering the work force increases by over 2% every year. (*Source: Rural Development Strategy of the Government of National Unity, October 1995.*) Because the direct and indirect costs of creating jobs in urban areas are very high, innovative strategies are needed to help rural people find work where they live. It is generally accepted that per unit investment in agriculture and services has the potential to create many livelihoods. In international experience, an area of high potential arable farm land normally produces considerably more livelihoods, if divided into small family-operated farms. This also applies to off-farm employment through the multiplier effect on the local economy. Therefore, redistributive land reform and the provision of support services is central to the government's employment strategy and to reducing the mounting cost of the welfare budget.

@ Land reform will support business and entrepreneurial culture: Property rights are critical for gaining access to capital for investment in entrepreneurial activity - either through selling the asset or through getting finance on the strength of it. In developed economies, 70% of the credit which new businesses raise is secured by using formal titles as collateral for mortgages. The African population has been deprived of this economic opportunity, which stifled property and business related opportunities.

@ Land reform can have important favourable environmental impacts in both urban and rural areas: Tenure security is a precondition for people to invest in land improvements and encourages environmentally sustainable land use practices.

Redistributive land reform cannot in itself ensure national economic development, but it is a necessary condition for a more secure and balanced civil society. It is an essential precondition for the success of government's growth, employment and redistribution strategy. In contributing to conditions of stability and certainty, land reform is a necessary element of sustainable growth.

This chapter outlines the main policy issues that must be addressed if the land reform programme is to achieve its aims.

There are several constitutional issues which affect government's land policy.

The allocation of powers and responsibilities to national and provincial governments has a fundamental impact on the implementation of land reform, including the administration of state land. Institutional arrangements must have regard to these constitutional powers and responsibilities.

The Bill of Rights in the new Constitution guarantees existing property rights; but it simultaneously places the state under a constitutional duty to take reasonable steps to enable citizens to gain equitable access to land, to promote security of tenure, and to provide redress to those who were dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices.

3.1.1 Allocation of land-related responsibilities

In terms of the Constitution, deeds registration, land survey and land reform are the responsibility of national government. This includes the three key elements of land reform: redistribution, restitution, and tenure reform.

However, provincial governments also have responsibility in a number of functional areas which are closely related to land reform. These are mainly areas where national and provincial governments have concurrent responsibility in terms of Schedule 4 of the Constitution. They include agriculture, environment, soil conservation, housing, regional planning, and urban and rural

development. Local governments also have constitutional functions which affect land use and planning. And traditional authorities also carry out land-related functions in terms of customary law.

All three spheres of government and traditional authorities have functions which require land administration. However, at present most of the legislation dealing with land administration has been assigned to the Minister for Agriculture and Land Affairs.

3.1.2 Co-ordinating the functions of the different spheres of government

There is a need to coordinate the functions of the different spheres of government. This is necessary both because of the constitutional requirement of cooperative government, and in order to achieve effective government. Examples of this include the following:

@ Schedule 4 describes areas of concurrent national and provincial legislative competence. Section 146 of the Constitution prescribes how such conflicts are to be resolved. However, legislation should be harmonised to avoid conflicts wherever possible.

@ Section 44 of the Constitution also gives the national Parliament the power to legislate under certain circumstances on matters falling within the functional areas of exclusive provincial legislative competence, listed in Schedule 5. This national 'over-ride' power applies where it is necessary to maintain economic unity, to maintain essential national standards, and to establish minimum standards for the rendering of services. Again, it is desirable that legislation and administration should be harmonised to avoid the need for intervention in terms of section 44.

@ Close cooperation is necessary in the carrying out of the respective functions of national, provincial and local governments to ensure the most appropriate and effective use of land.

@ The Minister is authorised to assign or delegate functions of the national government to provincial or local

government. The different spheres of government need to cooperate to ensure that administration is carried out at the most appropriate level.

@ Land administration functions need to be analysed to identify which sphere of government is constitutionally competent to carry them out, and also to identify what assignments and delegations are desirable. This may require some variation between provinces and local governments.

All of this points to the need for the closest cooperation between the different spheres of government on land matters, to ensure successful delivery of services.

3.1.3 Responsibility for land reform

It is the responsibility of the national government to ensure a more equitable distribution of land, to support the work of the Commission on Restitution of Land Rights and to implement a programme of land tenure and land administration reform.

On the other hand, it is the responsibility of provincial governments to provide complementary development support (for example, infrastructure, agricultural support services) to those participating in the land reform programme. In this respect, there must be close cooperation between national and provincial governments to ensure that beneficiaries of land reform enjoy services provided by the provinces as envisaged by Schedules 4 and 5 of the Constitution.

3.1.4 Deeds and survey

Surveying is necessary for the identification of a piece of land and the title deed records the rights registered in favour of or against that land. Surveyor-generals' offices examine and approve all cadastral surveys, and compile and maintain plans showing the relationship of the various parcels of land to each other. The registrars of deeds register deeds and maintain records relating to all registered parcels of land. The control of these operations is vested by statute in the Minister for Agriculture and Land Affairs, and to ensure uniform countrywide standards surveys and deeds are a national function.

3.1.5 Property clause

Effective land reform requires an appropriate constitutional framework. The property clause was highly disputed in the constitutional negotiations, and was one of the last issues to be resolved. The new Constitution seeks to achieve a balance between the protection of existing property rights on the one hand, and constitutional guarantees of land reform on the other hand. The property clause itself now provides clear constitutional authority for land reform. The equality clause also provides clear authority for a programme aimed at achieving substantive equality.

The government is committed to a land reform programme that will take place on a willing-seller

willing-buyer basis where possible. However, where this is not possible, the state must be able to expropriate land required in the public interest. The new Bill of Rights expressly recognises that the public interest includes ‘the nation’s commitment to land reform’ .

Where land is acquired for land reform through purchase or expropriation, the state is obliged by the Constitution to pay ‘just and equitable’ compensation. The definition of ‘just and equitable compensation’ makes it clear that it will not permit profiteering or undue capital gains at the expense of the public.

3.1.6 Eliminating discrimination in women’s access to land

A key contributing factor to women’s inability to overcome poverty is lack of access to, and rights in, land. Discriminatory customary and social practices are largely responsible for these inequities. Power relations that impede women’s attainment of productive and fulfilling lives operate from the domestic to the highest public level. Legal restrictions also impede women’s access to land and the financial services to develop it.

Although women play a decisive role in the development of their community, their access to political and economic power is not commensurate with their numbers, needs and contributions. Leadership is often dominated by men who assert that they have their own traditions and culture, and do not require the interfering advice of government officials on how to handle gender relations. This situation partly explains the current lack of women’s participation in the programme.

Section 9 of the Constitution confers the right to equality before the law and the right to equal protection and benefit of the law. It states further that equality includes *the full and equal enjoyment of all rights and freedoms*. In relation to land matters, like many other matters, this requires positive action by government.

Specific strategies and procedures must be devised to ensure that women are enabled to participate fully in the planning and implementation of land reform projects. These have yet to be adequately formulated. Because women generally have less power and authority than men, much more attention must be directed to meeting women’s needs and concerns. Unless this is done, existing gender inequities in the allocation of land rights could be exacerbated by the programme. In other countries, gender neutral land reform policies and programmes have had a negative, rather than positive effect on gender equity. These issues must be addressed in the context of national and international developments (see Box 3.1).

In formulating its land reform policy, government has endeavoured to take account of the widely conflicting demands of the various stakeholders and the implications of any specific course of action on the land market and investment in South Africa.

There are those who demand that land should be taken from those who have too much of it and that it should be distributed free to the landless. They favour drastic state intervention to redistribute land. There are others who insist that land should be allocated only to those who can prove that they can use it productively and that, in any case, private land is sacrosanct and land should only be transferred on the basis of willing-buyer and willing-seller.

Government has studied the above arguments, as well as attempts at land reform in other countries. The challenge is to find a way of redistributing land to the needy, and at the same time maintaining public confidence in the land market. The reality is that the poor and the landless are not in a position to acquire land at market prices without assistance from the state. This is because the market price of land usually includes a premium, over and above the capitalised value of agricultural profits. Poor farmers will therefore not be able to repay loans out of farm profits and will need financial assistance from the state in addition to, or instead of, credit. In the urban situation, the poor also depend on the state for assistance in the acquisition of land. Without a programme of state support and targeted intervention, land reform will not be possible.

Government believes that if there are to be grants for land acquisition, then they should be modest so that as many eligible people benefit as possible. At the same time, the grant must be sufficient to ensure that a real benefit is provided and that its effect will be a real improvement in quality of life and household income.

Given limited fiscal resources and increasing competition between different budgetary priorities, the subsidy level must be affordable in macro terms and must also be able to provide a resource that can bring real benefit. The Department of Land Affairs faces the dilemma of whether to provide a high level of subsidy to a small number of people, or whether to provide a modest subsidy to a higher number of beneficiaries. For the time being, the allocation per qualifying beneficiary has been set at R15 000. The level of the subsidy will be kept under review. This subsidy level means that the Settlement/Land Acquisition Grant alone will not provide the resources necessary for a person to enter the commercial farming sector. It is not, however, the intention that the grant should fulfil this function on its own. It is for this reason that great emphasis has been placed on the need to leverage additional resources.

Excessively high land transaction costs are a disincentive to the public to register transfers of ownership. This has a number of negative consequences affecting the

collateral value of land, tenure security and the operation of the land market.

The Department is investigating these costs with a view to reducing the burden on potential beneficiaries of land reform. Transaction costs comprise:

@ cadastral survey, comprising pre-surveying expenses and actual survey costs;

@ valuation fees;

@ conveyancer's fees;

@ stamp duty, payable on leases, mortgage bonds, collateral bonds, etc;

@ deeds registry fees;

@ transfer duty, or VAT where the seller is a VAT vendor.

Cadastral surveys may be needed in the subdivision of undeveloped land. The fees charged by land surveyors are fully negotiable, but for the purchaser of a small parcel they can be high. Current practice is that valuation fees are calculated according to a time charge or a fee based on the value of a property. The latter is usually 0.1% of the property value. Lower fees can be negotiated; not all valuers insist on *ad valorem* rates. Stamp duty can be waived in certain instances. Deeds registration fees are nominal, approximately only 1% of total transfer costs, and are not considered to be restrictive.

Land reform beneficiaries presently pay high transfer duties when they acquire private land. Transfer duty is paid out of the R15 000 Settlement/Land Acquisition Grant in the case of private land acquisition and thus reduces the capital amount available for land purchase. However, transfers of state land in terms of the *Provision of Certain Land for Settlement Act, 126 of 1993*, are exempt from transfer duty.

The DLA believes that land reform beneficiaries should be exempted from transfer duty. However, it has as yet not been able to obtain agreement to this. Instead, a ruling has been obtained that VAT should be zero-rated on services procured with government grants where the seller is a VAT vendor. In practice this means that where the seller of land is a VAT vendor the beneficiaries buying the land pay 0% VAT. As either VAT or transfer duty is paid, this means that no transfer duty needs to be paid. If, however, the seller is not a VAT vendor then transfer duty has to be paid. This means that different groups of beneficiaries have to pay different amounts, depending on the status of the seller. This is clearly an unsatisfactory

situation.

Land reform beneficiaries acquiring land on a group basis, do not qualify for the limited exemptions from transfer duty which only apply to individual purchases. Many land reform beneficiaries buy land as a group. A related problem is that the amount of transfer duty payable is dependent on the legal entity undertaking the purchase. If the legal entity is an individual, the transfer duty is between 5 and 8 % of the purchase price. If a joint enterprise such as a closed corporation acquires land, the transfer duty can be as high as 10%. As a large number of land reform beneficiaries are forming joint legal entities their transfer duty may be high.

Presently, the exemption from transfer duty only applies to land acquisition in cases where land is bought by a natural person (ie not a trust or close corporation) for full ownership of unimproved land, the value of which is in excess of R24 000 and which is acquired to be improved with a habitable dwelling (ie not for farming or a business), or land already improved with a habitable dwelling up to R60 000.

Finally, a major factor contributing to the escalating transaction costs is the excessive fees levied by estate agents in concluding a deal between two parties. Although their part in a transaction may be very limited, they normally charge a service fee of approximately 7% of the purchase price. On the other hand, it must be stated that it is not compulsory to make use of their services and their fees can be negotiated.

The possibility of the introduction of a rural land tax, as a means of raising rural local government revenue, and as a policy instrument to complement a non-confiscatory land reform programme, has been the subject of much debate. Land taxes can exert a downward pressure on land prices. They can also be a disincentive to speculators holding land merely with a view to selling it when prices rise.

At the request of the Minister for Agriculture and Land Affairs, the entire question of a land tax was included in the terms of reference of the Commission of Enquiry into Certain Aspects of the Tax Structure of South Africa (the Katz Commission). A specialist sub-committee was set up to investigate the issue.

In the Third Interim Report of the Commission, published in November 1995, the sub-committee stated that there was no reason in principle why a rural land tax should not be given serious consideration, primarily as a source of revenue for rural local authorities. There was sufficient international experience with the implementation of such a tax, and its imposition would not represent a new tax in South Africa.

The sub-committee stated that such a tax should be levied at a local government level. It did not recommend the implementation of a national land tax on agricultural land. It proposed further research into the possible introduction of a local level rural tax.

In September 1996, it published a discussion document on this work and invited public

comment. In its discussion document the Katz Commission's land tax sub-committee proposes the drafting of framework legislation (to be included in proposed amendments to the *Local Government Transition Act*) to provide for the levying of a land tax at the primary level rather than by district councils, because:

@ property rates are presently levied at the primary level in the case of metropolitan and non metropolitan urban local government;

@ it is vital that a sound structure of local government financing should be established if local government is to assume its rightful place in democratic society;

@ primary local government structures have no other tax base to exploit;

@ if the tax is levied at primary level, and the benefits accrue to the local taxpayer, acceptance and compliance will be higher and administrative costs lower;

@ interest groups are well represented at the primary level which should counter mismanagement of land tax revenues.

The sub-committee proposes that all land (ie privately owned land, state-owned land and tribal land and land used for any purpose) within the jurisdiction of the local councils be included in the tax base and levied on the improved market value of the land. It further suggests that the tax be levied on the owner and/or occupier to a maximum of 2% per annum for all land in all jurisdictions.

The Department of Land Affairs awaits the outcome of the on-going public consultation with interest. It has also drawn attention to the fact that there are a number of practical difficulties that will have to be overcome if the tax is to be implemented in tribal areas.

The land reform programme has taken some time to get off the ground. The reasons for this are easy to understand. It is an entirely new programme which was kick-started in 1995 by the Land Reform Pilot Programme. At that time, a small core of dedicated staff, many of them newly recruited from NGOs, were plunged into a programme which, at the operational level, was entirely new. Many of the legal instruments and procedures with which they had to grapple were ill suited to land reform. There were other serious institutional problems (described in subsequent sections) which hampered their work.

Lack of staff capacity has been a continuing constraint and, as the public demands for land reform increase, a source of major concern. Of the current complement of approximately 2 400 DLA staff, more than three quarters are engaged in the vital survey and deeds registration services, and

corporate services (for example, personnel, finance, legal, communications) of the Department.

Only 447 posts, at national and provincial level, are available for land reform policy development and implementation. Until late 1996, only 304 of these posts were filled. Recruitment has been proceeding steadily in recent months and training programmes for new staff are underway.

Increased efficiency is being sought by out-sourcing community facilitation and project planning work to non-statutory service providers and by decentralising decision making to the provincial offices. This is expected to lead to a more effective, innovative and flexible, customer-oriented service. It is also expected to enhance the morale of field staff, hitherto dependent on Pretoria for routine decisions. Even with these improvements in efficiency, and by working extra hours, the number of staff needed to respond to the demand for services under the various programmes is inadequate. The limited staff available for the implementation of the Land Tenure Reform Programme is a particular concern.

The Department recognises that government must strive to reduce the size of the public sector payroll. However, it is necessary to face the harsh fact that without a substantial increase in personnel for this important work, the land reform programme will not be able to meet existing demands or long-term targets.

The many different pieces of land legislation and systems of land administration across the country are an apartheid legacy. In the former homeland areas, in particular, the situation is chaotic. Very often, day-to-day administration and record-keeping have broken down, leading to insecurity and uncertainty as to the lawful holders of land rights. Land records have been lost, permits and other documents have been issued without regard to legal requirements, very often because the laws are unclear. The laws are often unwieldy; even routine decisions have to be made at Ministerial, Parliamentary, or even Presidential level.

After the April 1994 election, all the former homeland legislation was drawn up to the President's office and from there it was assigned to a national Minister or a Premier, dependent on whether the legislation in question dealt with a national or provincial matter. The Minister for Agriculture and Land Affairs has been identified as the responsible Minister for national land legislation.

Section 239 of the Interim Constitution required that, before state land could be transferred, a certificate had to be issued confirming whether the land was vested in national or provincial government. This was done by reference to the function for which the land was used or intended to be used on 27 April 1994. It created the requirement for an additional administrative process in relation to all state land transfers.

The process of delegating and assigning the relevant legislation has been facilitated by the passage of the *Land Administration Act, 2 of 1995*, which provides a mechanism through which the delegation of legislation to Premiers and officials in the service of both national and provincial government can take place. It also provides for the assignation and/or amendment

of legislation. In addition to this, the State Land Disposal Acts that were in force in the former homelands have been repealed and replaced by the (RSA) *State Land Disposal Act, 48 of 1961*. This Act was amended to allow the power of the President to dispose of state land in these areas to be assigned to the Minister for Agriculture and Land Affairs and for the delegation of these powers to a Premier.

A number of key pieces of land administration legislation have been delegated in particular parts of the country, in terms of the *Land Administration Act*. The most important of these is Proclamation R188 of 1969 and its derivatives which govern land administration outside proclaimed towns in the former homelands (see Box 3.2).

Proclamation R293 of 1962, which provides for the administration of land in proclaimed townships in these areas, has been assigned to provinces, but it also contains non-schedule 6 functions which require consideration. These assignments and delegations have provided the means for administrative continuity in the areas affected. Proclamation R188 still needs to be delegated to outstanding areas. However, this in itself will not remove underlying problems. These include the fact that the staff who implemented the legislation in the past may not still be in place, that the administration of the system has been prone to corruption in some areas, and that the legislation itself is apartheid based and authoritarian and does not comply with constitutional requirements.

The long-term solution to the land administration problems described above, is closely linked to the tenure reform programme described in Section 4.15. Many of the land administration problems exist because the land is nominally owned by the state. Transfer of this land to the *de facto* owners will rationalise the situation and reduce the administrative responsibilities of government. In order to achieve this, a series of interim measures have been developed and agreed on with the Provinces. These are described in Section 5.12.

The existing public land management system in the country is fragmented, uncoordinated, non-transparent and inequitable (see Section 5.6). It lacks a coherent information system and is characterised by a lack of clarity in regard to the roles, responsibilities and policies of different institutions involved in the administration, planning and disposal of public land. The need for a set of national norms and standards to ensure the effective use of state and public land as an asset in support of land reform is long overdue.

The existing legislative framework for land development is inappropriate, apartheid based and duplicative. It was enacted to implement apartheid-based separation of residential, business and other locations. This resulted in a confused and complex legislative and institutional framework that varies from province to province and within provinces, where former homeland legislation and procedures were in force. This legislative environment is further complicated by the lack of coordination and integration in planning and legislation affecting different sectors.

Finally, the budgetary system and its inherent tendency towards the creation of inter-departmental competition for resources, is itself a disincentive for the coordination necessary for an effective land

delivery system.

3.8.1 Lack of community involvement in land development

Sustainable land development requires the participation of affected individuals and communities as partners in the process. Communities often experience problems gaining access to information about land development opportunities and processes. In addition, unorganised communities are not able to express a realistic demand for land. Informal initiatives such as land invasions are frequently perceived as more effective mechanisms for land release, especially in the context of slow public delivery.

Landlessness and overcrowding in the former homeland areas and inappropriate farming methods on commercial farms have given rise to severe land degradation and soil erosion. Although there is a lack of data on the extent and rate of land degradation, there is sufficient evidence to indicate that South African soils are deteriorating rapidly due to poor management practice and inadequate monitoring and enforcement. There is a severe risk of increased environmental degradation if preventive and improved resource management measures do not accompany the land reform programme and land development in general.

Responsibility for natural resource management is spread over different national and provincial ministries, each carrying out their jurisdictions as specified by the specific Acts. This means that the institutional framework, as well as the legal system, generally fail to facilitate integrated approaches to land use, including the protection of the natural environment. The *Physical Planning Act, 125 of 1991*, the *Environmental Conservation Act* and the *Conservation of Agricultural Resources Act* assume integration of environmental management in land use planning. However, at the administrative level, environmental management practices remain sectoral and fragmented.

For the beneficiaries of land reform, accessing land is the first step in a long-term process of development. After farm land has been transferred, government has a responsibility to provide assistance with farm credit, farm-inputs and marketing. Advice and assistance may be needed to facilitate the productive use of the land, as well as the provision of rural infrastructure (eg water supplies, drainage, power supplies, roads). In an urban context, assistance may be needed with the provision of services, including transport facilities, social services, and local economic development opportunities.

Prime responsibility for most of these development initiatives lies with provincial and local government. Without this support, land reform projects can be severely handicapped. The success of the land reform programme thus hinges on the degree of cooperation between the different tiers of government and the extent to which there is a common vision of land reform and subsequent development. Over the past two years considerable progress has been made in developing this common understanding of the programme and in establishing the institutional frameworks necessary to realise it. There are, however, a number of issues that

must still be addressed. These include:

@ the necessity for planning procedures to be kept simple in land reform projects that originate from situations of crisis and that require urgent action;

@ the importance of establishing coordinating structures between national and provincial government at provincial level that have clear mandates and authority;

@ the need to ensure that land reform projects and plans are integrated into provincial development plans and budgetary cycles;

@ the structuring of agricultural extension services to meet the needs of the entire spectrum of land reform beneficiaries, including subsistence producers; and

@ measures to ensure coordination of land reform development plans between provincial departments.

One of the RDP guidelines to the implementation of the Land Reform Programme was that government resources, such as grant funds, should be ‘leveraged’. This meant that grants should be used to encourage complementary contributions from a range of local/provincial government, non-government and private sector agencies for economic, social and infrastructural developments. For example, it was expected that local and provincial governments would contribute towards the development needs of land reform beneficiaries, such as the provision of infrastructure and agricultural support. In practice, accessing this additional support has often been difficult.

The R15 000 Settlement/Land Acquisition Grant is essentially a capital grant. It is intended for land purchase, investments in infrastructure, home improvements, livestock, machinery and fencing. The amount available for capital investment for non-land items depends on the proportion of the grant allocated to the land component. More often than not, the major portion of the grant goes towards land purchase and the resources remaining for the acquisition of other capital items are extremely scarce.

For many land reform beneficiaries, access to mortgage finance and credit for working capital and inputs may not be a major concern. However, an increasing number of beneficiaries have developed business plans whose successful implementation requires access to credit and other financial services in order that production and income generation on their newly acquired land can take place. A serious concern for these people, operating in a market economy, is that they need to take care not to over-extend themselves financially and thus risk the possibility of default and the ultimate loss of their land.

Access to credit for disadvantaged and small producers is very difficult. The majority of rural people still have very limited or no access to formal financial services. On the one hand there is a modern and sophisticated financial system which serves the full range of financial needs for a small proportion of the South African population. On the other hand, there is micro-lending and an informal sector attempting to serve the majority of the population in both urban and rural areas. This situation has been created by the fact that in the past land and agricultural financing institutions, in both the private and the public sector, only catered for commercial farmers. Recently, financial institutions, in the public sector in particular, have begun to change their policies to extend assistance to small and black farmers. However, it is still very difficult for land reform beneficiaries and especially for people accessing land in groups, to obtain assistance.

The need for major institutional, policy and legal reform in regard to land and rural financing was identified as a priority. A Presidential Commission of Enquiry into the Provision of Rural Financial Services (the Strauss Commission) was established in 1995 to make recommendations on what reforms would be needed to create an enabling environment for the provision of rural financial services to formerly disadvantaged people. Its report was produced in 1996. Its key recommendations are outlined in Section 4.5. A programme of action for their implementation is being developed.

Any programme which reduces poverty, diversifies income and allows people more control over their lives and their environment, should serve to reduce the risk of land degradation. The worst environmental health conditions and natural resource degradation occurs around informal settlements, where people have few assets and minimal control over their surroundings.

The objectives of the land reform programme, aimed as they are at the alleviation of poverty, should ameliorate the current levels of environmental destruction associated with the crowding of large numbers of poor people on marginal, erodible and often dangerous land.

Nonetheless, the land redistribution programme is not without environmental risks. One of the challenges of land reform is to relieve land pressure without extending environmental degradation over a wider area. Unless projects are properly planned and the necessary measures are put in place to govern the zoning, planning and ultimate use of the land, the programme could result in land being used unsustainably, and scarce, good quality arable land being converted to residential uses.

Prior to disbursing the Settlement/Land Acquisition Grant, the Department requires that

grant applicants, with the assistance of planners, prepare a feasibility study, which among other things, includes an assessment of the environmental consequences of the proposed undertaking. This requires the applicants to consider the suitability of the natural resources for the proposed production system, and the environmental impact of the proposed residential development. Community facilitators are provided to help community planning for sustainable land use.

While being concerned about the possible adverse environmental impact of land reform, the Department is also aware that, for too long in South Africa, inappropriate planning norms have been imposed upon black people. The Department believes that it is essential to take due account of what the grant applicants themselves believe will improve their lives and not to lose sight of the very limited choices that poor people have. By actively participating in the planning process, both the applicants and the officials will learn what options are practicable and possible. The assessment of environmental sustainability should not be the prerogative of officials alone.

The land reform debate has focused attention on the *Subdivision of Agricultural Land Act, 70 of 1970*. Although the above Act was primarily designed to prevent the subdivision of farms into uneconomic units, it is believed that its principal role has been to operate as a zoning regulation and prevent land subdivision for residential purposes and unauthorised change of use. There is general agreement that the *Subdivision of Agricultural Land Act* must be phased out to free up the land market (see Box 3.3). Its repeal should be accompanied by statutory provisions to protect high potential agricultural or environmentally sensitive land, where it is considered necessary. Under the *Development Facilitation Act, 67 of 1995*, a tribunal may impose conditions relating to land use. However, the capacity of the authorities to enforce compliance, once land has been occupied, will be limited.

In many countries, concern for resource conservation is reflected in laws which govern the zoning of land and prevent unauthorised change of use. The *Subdivision of Agricultural Land Act* should be replaced with the type of zoning regulations which can prevent unauthorised loss of precious agricultural land or damage to other natural resources. Zoning regulations should be based on national norms, monitored and enforced at provincial and local level by the appropriate government bodies. Depending on their scale, proposed changes in land use would require sanctioning at different levels of government; the greater the change, the higher the level.

The definition and delineation of zones will require proper consultation with the various role players and interest groups. It is apparent that effective measures for zoning and the regulation of land use in rural areas will take several years to put in place.

In the meantime, the application of the *Subdivision of Agricultural Land Act* will not be allowed to frustrate land reform. A study is under way to determine the effect of the Act on land ownership, land use and the operation of the land market, including land prices. Revised regulations covering exemptions to the Act are being drafted. These will enable subdivision surveys for land reform to be routinely approved by the Surveyor General and for interests to be registered by the Registrar of Deeds. In these cases, the requirement for them to be

referred to Pretoria for approval by the Minister will be waived.

Land physically locates people's sense of being – past and present. For many, interest in land is simply for residential purposes. But for a substantial minority, in addition to being a place to live, land has potential productive value. The reasons why people need land and the role that it can play in alleviating poverty differs widely – between urban and rural, and within urban and rural settings.

3.15.1 Urban areas

Many people were prevented by apartheid from acquiring access to urban land. They found themselves kept out of, or removed from, urban areas in terms of the pass laws, or were prevented by racially discriminatory legislation from acquiring legal occupation of well-located land. The backlog caused by all of these restrictions has created a large and unsatisfied need for secure access to well-located urban land. One consequence of this is land invasion and other forms of irregular occupation of land. Another consequence is a very uneven pattern of urban land prices which forces the poor to locate in inaccessible and remote areas and face high transportation costs and long travelling distances or crowd into poverty-stricken and crime-ridden enclaves closer to employment.

In many informal urban residential settlements tenure is insecure, confused and requires clarification. Registers are incomplete or non-existent, the rights conferred by various forms of tenure are uncertain and not well understood and many people have no formal confirmation of their land rights. For the people concerned, as well as for good local governance and national stability, regularisation of tenure is urgently needed.

Rapid urbanisation is creating enormous pressure on urban land. It is taking place in the absence of clear and coordinated policies and strategies to provide for speedy land delivery, management and development. In the absence of these actions, informal settlements and land invasions will continue to grow in number and complexity.

3.15.2 Land invasions

Landlessness and land invasions are a stark reality in South Africa. Delays in the release of land and slow delivery of housing programmes have exacerbated the problem, as have unrealistic expectations, and a lack of information, particularly with regard to the time it takes to transfer land. This has led to urban land invasions and subsequent evictions by local and provincial authorities and ongoing legal disputes. In rural areas, the eviction of farm workers and labour tenants has resulted in a swelling of the numbers of landless and destitute people, and invasions of public or privately owned land often follow. State land has been invaded in some areas where there is no

proper supervision or control. Some community groups who have been involved in planning land and housing developments on identified land have found their development brought to a halt by land invaders. Illegal extraction of rent or the 'selling' of sites by individuals who plan and lead land invasions is also prevalent.

The invasion and illegal occupation of land is a threat to stability and development. It can only be prevented by a dynamic programme that provides effective solutions to the problems of overcrowding and landlessness. This matter is further pursued in Section 4.8.1.

3.15.3 Rural areas

In the rural areas land is needed for a variety of purposes where conditions are very complex and diverse. For example, land is needed by farm workers, labour tenants, and women who need to grow food to feed the family. It is needed by farm workers who want access to land to graze a few stock. In any one community, there are likely to be those who are landless, some who have access to a small patch of land for cultivation, as well as a minority who are able to produce a surplus and wish to produce more. Few or many of these people may be employed from time to time on commercial farms or elsewhere. It is important that the redistribution programme is designed in a manner which will allow it to respond to different needs and circumstances in appropriate ways so that it contributes to the alleviation of poverty and to economic growth.

Municipal commonage provides opportunities for land reform, primarily because it is public land which does not need to be acquired, there is an existing institution which can manage the land, needy residents live next-door and have certain rights to this land. A reallocation of commonage to poor residents who wish to supplement their incomes, could help address local economic development and provide an inexpensive land reform option. However, there are a number of constraints, primarily related to the fact that not all local authorities are willing to assist poor residents to obtain access to the commonage.

The term commonage is traditionally given to land, owned by a municipality or local authority, that was usually acquired through state grants or from the church. It differs from other municipally owned land in that residents have acquired grazing rights on the land, or the land was granted expressly to benefit needy local inhabitants. Municipal commonage is not the same as communally owned land held in trust by the state and usually occupied and administered by tribal authorities.

Regrettably, many rural towns remain mini-citadels of apartheid with all public and private assets, including the commonage, in the hands of the white population. Its use

for charitable purposes has been usurped. A practise has developed whereby the land is auctioned and leased to the highest bidder at market rates for private use. Leases are often for periods in excess of 3 years. This practice clearly excludes poor residents. Historically, the commonage had a public character. Current use is often in violation of the purpose for which the land was originally granted.

Municipalities have become dependent on the revenue generated by leasing the commonage to the highest bidder. Consequently, many are now reluctant to make the land available to poor people. Although this is understandable, it is often the case that another portion of the commonage is being leased at a nominal fee to an exclusive club or utilised for a golf course. Ways need to be found to encourage municipalities to reorientate their policies to benefit the majority of their residents.

The precise legal position of each commonage will depend on the specific conditions under which the land was granted, or the conditions contained within the title deed of the land. In general, municipalities may not alienate the land without the consent of the Premier and must make it available for the use and benefit of inhabitants of the land. In most provinces these powers are exercised by officials under the MEC responsible for Local Government.

Municipalities throughout the country are empowered to set aside land under its control for the pasturage of stock and for the purposes of establishing garden allotments. They may make by-laws to regulate and control the use and protection of such lands and the kinds of stock which may be pastured, restrict the number of stock per householder, restrict or prohibit the use of certain of the council's land for pasturage and prescribe appropriate charges. These measures are contained in a number of Municipal/Local Authority Ordinances. However, despite the fact that municipalities have legislative competence over land allocation and management, many councils are not aware of these powers or of how to exercise them.

In other cases, municipalities are not prepared to consider making commonage available to people who they view as relative newcomers who will cause them administrative and management difficulties.

The Department of Land Affairs is committed to ensuring that existing commonage land is used as far as possible for land reform purposes, and will support the purchase of additional land for commonage purposes where this is necessary

(see Section 4.12).

Forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa and no settlement of land issues can be reached without addressing such historical injustices. The Interim Constitution provided a framework for the restitution of land rights, instructing the legislature to put in place a law to provide redress for the victims of acts of dispossession that took place after 1913, in the form of restoration of the land that was lost, or alternative remedies. Accordingly, Parliament

enacted the *Restitution of Land Rights Act, 22 of 1994*, creating the Commission on Restitution of Land Rights and the Land Claims Court.

3.17.1 Rural land claims

Rural claimants suffered dispossession under a variety of policies, including clearance of 'black spots' and 'poorly situated areas', betterment schemes, cancellations of provisos in title deeds and acquisition of land by the former South African Development Trust. Many rural claimants received no compensation or only nominal recompense. By April 1997, almost 3 000 rural claims had been submitted to the Commission, of which a great number were large group claims.

3.17.2 Urban land claims

More than 130 000 families, involving 73 000 properties, were dispossessed under the *Group Areas Act, 1950*, the *Community Development Act, 1966*, and the *Resettlement of Blacks Act, 1954*. Some received consideration for their property by the state. Others, following the proclamation of racial residential areas, were forced to sell on the open market under circumstances which favoured buyers. Since then, much urban land has been developed and changed hands, or has been earmarked for the provision of land and housing for disadvantaged communities. Difficult negotiations lie ahead for all stakeholders. In a number of cases it will not be feasible to restore the land from which the claimants were moved, and demands on the government to provide alternative compensation (land and/or financial resources) will be great. By April 1997, 12 130 urban claims had been submitted to the Commission on the Restitution of Land Rights.

3.17.3 Responsibility to restore land rights

Considering the fact that more than 3,5 million people and their descendants have been victims of racially based dispossession and forced removal during the apartheid era, it is clear that a mammoth responsibility rests on the shoulders of the state to give effect to restitution of land rights. The task is a huge and complex one, and initial progress in the concluding of cases has been slow. However, significant progress has been made in the establishment of institutions, policies and systems to advance the restitution process. Quicker, simplified procedures for less complicated cases are also being developed.

Ultimately, successful conclusion of cases and implementation of restitution orders depends on the constructive participation of a variety of role players, including the Commission, the Land Claims Court, current land owners, national, provincial and local government, and the claimants themselves.

Until the 1990s, it was government policy that black people should not own land. In townships and ex-homeland areas, the form that land rights took was generally subservient, permit-based or 'held in trust'. The land was generally registered as the property of the government or the South African Development Trust. In many areas, the administration of this land was inefficient and chaotic so that people who have lived on land for generations may find that they have no legal right to the land in question, even if nobody disputes that they are the rightful owners of the land. Some people have Permission to Occupy certificates (PTOs). Others do not.

This creates legal insecurity and makes it difficult for people to protect their land, whether from confiscation, or from others coming to settle amongst them. Residents who may have lived on land for decades can find it sold by others who purport to own it.

It also causes confusion and unnecessary disputes. There are many communal areas which have been occupied by groups, communities or 'tribes' for decades and sometimes over 100 years. These groups regard themselves as the owners of the land; it is only because of racially discriminatory laws that their ownership is not reflected in the title to the land. Because the land is registered as state property, local and provincial authorities may decide to use it without realising the nature of the underlying ownership. This is often resisted by the group with the historical rights to the land. These situations all too often degenerate into a power struggle between the different parties claiming ownership of the land.

In general the problems which are caused by the lack of legally enforceable rights to land include the following:

- @ vulnerability to interference or confiscation of rights whether by the state or other people;

- @ difficulty in securing housing subsidies and other development finance;

- @ no administrative support for the system of land rights which operates in practice, which in turn contributes to internal breakdowns and administrative chaos giving rise to abuses of power by officials, some chiefs and powerful elites – the position of the poor and the vulnerable is exacerbated by the lack of legal certainty and administrative protections;

@ unscrupulous individuals take advantage of the lack of enforceable land rights to bring others onto the land in exchange for money and to bolster their personal power.

These difficulties are not limited to people who live in ex-homeland areas and townships. During the last decades millions of people illegally established homes in the 'whites only' parts of South Africa. They did so because they had no other means of living near to employment. A pattern of land occupation was created which is unlawful, but to some extent legitimate. It is legitimate because most South Africans acknowledge that such people had no alternative means of acquiring land. Over time, such settlements have become a fact of life. They need to be brought within the ambit of a stable legal system.

As a result of racial land laws, over 80% of the population was squeezed into the townships and the ex-homeland areas. This has resulted in endemic overcrowding, poverty and extreme pressure on the land. As indigenous tenure systems came under pressure, agricultural land had to be sacrificed in order to meet basic housing requirements. This was a crisis adaptation and one of the first priorities of tenure reform must be to relieve this overcrowding rather than to consolidate it. No tenure system can function effectively under the population density which has become the norm in certain areas.

The problem is further compounded by the fact that different tenure systems and rights exist on top of each other. Often people were forcibly removed and 'resettled' on land to which others had prior rights. People evicted from white farms were ordered by magistrates to go and settle in black freehold areas. Thus it is commonplace that there are overlapping and competing tenure rights to the same land. One group may claim ownership because they have traditionally owned the land for generations, another because Pretoria awarded the land to them and gave them documents to this effect. In other situations, there are people who were accepted within tenure systems as 'refugees' 60 years ago who now claim independent rights to stay there, while the 'host' owners want to use the land for the agricultural purposes to which they have always aspired.

In order to stabilise such complicated situations in a way which accommodates the vested interests and needs of all parties, it will often be necessary for the government to make additional land available so that those who have the weaker rights are provided with a viable alternative when land rights are formalised.

Communal tenure systems exist in large parts of the country. In recent years these systems have been characterised as 'backward' and measures were introduced which attempted to privatise and convert communal systems into individual ownership

(see Box 3.4). The way in which this took place often resulted in a confiscation of land rights. For example, land which had previously been jointly utilised by a group was converted into a small number of 'full economic units' and awarded to a minority, whilst the majority of the group lost all access to land. Some chiefs were involved in the confiscation of communal land for their own personal gain as were some ex-homeland officials and politicians. Because the legal status of the communal land was weak, there was no easy redress against such dispossession.

These interventions did not acknowledge that communal systems are based on pre-existing joint rights to land. Once the rights underlying the system are recognised and the principle of freedom of choice is upheld, it follows that changes to communal systems can take place only on the basis of agreement by the members.

3.20.2 Rights of members under communal systems

Whilst there are communal systems which function democratically and uphold the rights of all members there are others which do not. There are parts of the country where the rules and practices of communal tenure discriminate against women, both in respect of access to land and in terms of their ability to participate effectively in decision making structures. There are also tribal authorities which do not function democratically and which operate in ways which undermine the constitutionally entrenched basic human rights of members.

The government is under an obligation to ensure that group-based land holding systems do not conflict with the basic human rights of members of such systems, nor of other residents living in communal areas. The challenge is to find a way in which the procedures governing the exercise of group-based rights ensure that all rights holders are able to participate effectively in decisions regarding their joint land asset, and that the rules of such systems are consistent with the principle of equality.

3.20.3 Internal breakdown within communal systems

Many communal systems are suffering from internal breakdown. Individuals flout group rules and there is no means to discipline them, partly because of legal uncertainty in respect of the status of the group's rights, partly because old authority systems have broken down and there is nothing legitimate with which to replace them.

There is a highly developed body of law in South Africa to regulate and support group ownership systems such as companies, trusts, share block schemes and sectional title schemes. This protects the members and beneficiaries of such schemes from abuse and sets out clear procedures and remedies in the event of malpractice. Communal ownership of land needs similar legal and administrative support to enable it to function effectively. A first attempt in this regard has been made with the *Communal Property Associations Act, 28 of 1996*.

Many black tenure systems are characterised by endemic violence. This can be attributed to severe overcrowding, desperate land hunger, the insecure status of most forms of black land rights which then gives rise to disputes and uncertainty, and to the lack of institutional and administrative support for those tenure systems.

A related problem is that of land invasions onto vacant land, or land which is not tightly controlled. Because many people are desperate and have no other viable way of obtaining access to land they may resort to invading land. There are 'warlords' who take advantage of this desperation and lead invasions. Thus it is that land has become increasingly to be transacted by violence almost on the model of frontier wars. A group will consolidate itself on land and then defend that land base as its power base. Poor individuals will ally themselves with the warlord or patron who heads the group both in terms of cash payments and in terms of political allegiance and even 'military' support.

To the extent that systems are informal and there is no administrative and policing backup they are vulnerable to powerful individuals moving in and establishing their own private system of extortion and invasion. Group systems are particularly vulnerable unless administered by strong institutions with recourse to legal and policing back up.

As already stated, many South Africans had and have no option but to live in informal settlements around the cities. Many of these settlements have existed for years and represent an established form of vested rights in land. A *de facto* system of land rights exists on the ground, even if it is not legally confirmed. Until such areas are brought within the ambit of the law and functional land administration systems are established, they remain vulnerable to exploitation by unscrupulous individuals. In this context urban tenure upgrading programmes are a necessary first step to achieving stability.

The lack of clarity of the status of black land rights often mitigates against service provision and infrastructural development. Government departments and development agencies are reluctant to finance community schemes when the community does not have legally secure rights to the land on which the development takes place. There are related problems to do with service provision peculiar to most tenure systems. For example, there have been problems with the building of schools on land which is privately owned, whether by a 'tribe' or by a grouping of individuals who all own different plots. Another problem in areas made up of individually owned plots is that often no areas have been set aside for schools, roads or clinics. These then either have to be built illegally on land which is owned by private individuals, or the state has to expropriate servitudes over land belonging to many different people. This is often so complicated, costly and difficult that the proposed development gets delayed indefinitely.

Women are discriminated against under many types of tenure arrangements. The most widely recognised form of discrimination is that practised under tribal and communal tenure which has already been referred to. However, there are also many ways in which imposed colonial and apartheid administrative rulings and laws discriminated against women. Furthermore, even under private tenures women are discriminated against in terms of family law and inheritance provisions.

Measures which restrict women's rights to participate in decision making structures in terms of land management and community issues often have just as discriminatory an affect as directly land related discriminatory measures.

A major cause of instability in rural areas are the millions of people who live in insecure arrangements on land belonging to other people. They have had to do so because of structural reasons. They had and have simply no alternative place to live and no alternative means of survival. This structural situation is the result of literally hundreds of land related racially discriminatory laws introduced and enforced under colonialism and apartheid. It is the reason why current and prospective evictions are so devastating. The evicted have nowhere else to go and suffer terrible hardships. The victims swell the ranks of the absolute landless and the destitute. They find themselves at the mercy of other land owners for refuge. If no mercy is shown, land invasion is an unavoidable outcome. Because the root cause of the problem of insecurity of tenure under these circumstances is a structural one it requires a structural solution.

The crisis in the predominantly white commercial farming areas is particularly severe. Evictions have reached endemic proportions. They are fuelled by the current lack of certainty in respect of farm worker tenure policy and laws pertaining to land rights and security of tenure for current and long term occupants of rural land. It is thus imperative that key interventions be made urgently and in such a manner as to contribute to a climate of certainty and stability.

Government has a duty to intervene to remedy the situation. It recognises that sweeping interventions to upgrade occupational rights could have unintended consequences and result in even more evictions by land owners and the casualisation of farm labour. It is seeking therefore to accommodate the mutual interests of both occupiers and owners. The *Extension of Security of Tenure Bill, 1997*, is a measure designed to achieve that goal.

Land reform is strategically important for redressing injustices due to apartheid, reducing

rural poverty and contributing to the government's growth, employment and redistribution strategy. Current budget allocations reveal that money provided for land reform makes up less than a half of 1% of the national budget, excluding interest payments. Land reform has been allocated about one twentieth of the proposed spending on rural infrastructure. These numbers serve to illustrate that the funding of land reform is not commensurate with its importance.

In an assessment for the Department of Land Affairs, *The Macroeconomic Room Within Which Land Reform Will Take Place in South Africa*, by the Land and Agriculture Policy Centre, February 1996, the budgetary implications were considered from several angles. The main conclusion drawn was that in order to meet a significant share of the demand for land, the Department of Land Affairs will have dramatically to increase both its capital budget and staff capacity. Increasing both the capital budget and institutional capacity is a prerequisite for achieving widespread income and welfare effects.

The Department is at present compiling its expenditure estimates to the year 2000/01 in accordance with the instructions of the Department of State Expenditure for the preparation of proposals for the Medium Term Expenditure Framework. The expansion of the Land Reform Programme will be planned within the parameters set by this framework.

The government's land reform programme is made up of the following principal sub-programmes: Land Redistribution, Land Restitution and Land Tenure Reform.

Land Redistribution makes it possible for poor and disadvantaged people to buy land with the help of a Settlement/Land Acquisition Grant. Land Restitution involves returning land, or compensating victims for land rights, lost because of racially discriminatory laws, passed since 19 June 1913. Land Tenure Reform is the most complex area of land reform. It aims to bring all people occupying land under a unitary legally validated system of landholding. It will provide for secure forms of land tenure, help resolve tenure disputes and make awards to provide people with secure tenure.

The Land Reform Programme will be implemented through the legal mechanisms listed in Box 4.1 and an ongoing legislative programme.

The purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women, as well as emergent farmers. Redistributive land reform will be largely based on willing-buyer willing-seller arrangements. Government will assist in the purchase of land, but will in general not be the buyer or owner. Rather it will make land acquisition grants available and will support and finance the required planning process. In many cases, communities are expected to pool their resources to negotiate, buy and jointly hold land under a formal title deed. Opportunities are also offered for individuals to access the grant for land acquisition. The land distribution strategy is shown in Box 4.2.

The government's approach, as set out in this White Paper, involves a single, yet flexible, redistribution mechanism which can embrace a very wide range of land reform beneficiaries including the very poor, labour tenants, farm workers, women, individuals and new entrants to agriculture. The mechanism can be adapted to ongoing circumstances. It depends largely upon voluntary transactions between willing-buyers and willing-sellers, which should result in dispersed land acquisition and settlement, as against block settlement in designated areas. Expropriation will be used as an instrument of last resort where urgent land needs cannot be met, for various reasons, through voluntary market transactions.

The challenge for government has been to devise and implement a programme which responds even-handedly to each segment of the land market in order to provide access to the range of clients seeking to obtain land: from the poorest, especially female-headed, single parent families to emergent black entrepreneurs. The programme also needs to accommodate different land uses.

Rather than allocate different levels of resources to different beneficiary groups, all eligible applicants are provided with the same level of state support in terms of the level of grant awarded. While seeking to give priority to groups of poor households, government also recognises the importance of encouraging individual enterprise and initiative.

The Ministry for Agriculture and Land Affairs accepts its unequivocal responsibility to create an enabling environment with regard to financial services for land reform beneficiaries. The measures that are being taken to establish such an environment draw substantially on the conclusions of the Presidential Commission of Enquiry into Rural Financial Services (the Strauss Commission). The key recommendations of the Commission are reflected below.

4.5.1 The need for small, timeous and efficient dispensing

Equally, the challenge to rural financial institutions is to be able to make smaller quantities of working capital available efficiently without incurring overwhelming transaction costs. So far NGOs have made the best provision of critical small loans (R300 to R3 000) with women as their most successful and enduring clients.

4.5.2 Information needs

Information is a critical need in rural areas. The Strauss Commission found that the non-availability of information was a critical impediment to rural development at different levels. In some cases, it is difficult to pass on information in rural areas. This is especially the case with farm workers. In other cases, the state functionaries themselves have not been fully aware of state policy.

It is imperative that the state finance information flows to rural areas. There are two important proposals in this regard. The first proposal envisages a dynamic developmental role for the Post Office wherein it would be a centre in rural areas providing information on government grants, financial packages and the roles of different parastatal and private sector financial institutions. The second proposal envisages the state making funding available for the employment of information agents by rural organisations.

4.5.3 Support for outreach

The web of formal financial institutions thins out dramatically as it spreads from rural service towns deeper into the rural areas which are less populated and less well served with infrastructure.

The Strauss Commission proposed that the state should take responsibility to foster a greater number of rural financial institutions such as NGOs, community banks and village banks as well as make existing resources work more effectively, for example develop the delivery potential of the Post Office and create incentives for private sector banks. It was suggested that NGOs should benefit from increased state support and that donor funding attracted by NGOs should merit the award of matching grants.

4.5.4 The private sector and agency agreements

One incentive for the private sector to engage more fully would be for the proposed financial package to be available to them and not only to parastatals and NGOs. It is also suggested that the greater use of agency agreements be vigorously pursued; NGOs, for example, find the physical

administration of loan repayments can be costly because of time and distance - using the Post Office to administer repayment would solve this stumbling block. Similarly the Post Office does not have loan agents and yet its institutional effectiveness will be limited if it continues a savings only policy. Agency agreements may provide the answer to this issue

4.5.5 The role of parastatals

The Strauss Commission recommended that state responsibility to co-ordinate the provision of a balanced range of trustworthy financial services, especially in the context of land and agricultural finance, would be through the appointment of a commercially oriented parastatal institution to champion the cause of rural communities.

It was therefore duly recommended that the Land and Agricultural Bank be suitably transformed to provide both land acquisition mortgage finance as well as finance for agriculturally related activities. The current network of the Land and Agricultural Bank would need to be both rationalised and extended to serve the new clientele. The network could also be extended through the use of agency agreements and one would expect a close working relationship with the Post Office to occur.

4.5.6 A cautious approach to subsidised credit

Land Reform beneficiaries have expected the government to come up with subsidised finance, especially interest rate subsidies, as this form of support was commonly made to farmers by past governments.

However, apart from placing a strain on the state fiscus, subsidised interest rates for land purchase increase the demand for land and hence increase the market price for land, without increasing its productive worth. Hence a subsidy on interest rates results in higher land prices and rates of indebtedness and this outcome is not desirable. The Strauss Commission clearly proposed that interest rate subsidies for land acquisition should not be considered.

The Strauss Commission however did not entirely reject the use of subsidies. It, for example, proposed that in the interest of getting more institutions to operate in rural areas, subsidies be used to finance the higher transaction costs of institutions delivering finance. It also proposed a set of guiding principles to be used for the design of any other subsidies that government might consider to be necessary, ie transparent, defined, targeted with clear policy objectives and for a limited period.

4.5.7 A state-supported financial package for land reform beneficiaries

There are two aspects to the state assisting in creating an enabling environment for land reform beneficiaries. The first is to assist with the flow of funds into a new market, which is weak, and in which the private sector may not be easily willing to risk their funds. The second possible area of support from the state is to assist land reform beneficiaries and entrepreneurs to get on their feet

through training and through offering a set of conditions which assists them, especially in the first few years of establishing their business. The Strauss Commission, responding to these two considerations recommended (i) the state funding of a risk-sharing agreement and (ii) a set of 'sunrise' subsidies. The Department of Agriculture is ultimately responsible for taking forward the proposals, if accepted, and in acquiring and distributing the state budget required to implement the proposals through the financial institutions.

4.5.8 A risk-sharing agreement

Both parastatals and private sector financial institutions are profit-oriented and have a reluctance to lend to higher risk clients - the beneficiaries of land reform are likely to be placed in this category.

The intention of a risk-sharing agreement, successfully pursued in other countries, is that the state provides a fund which acts as both an incentive and a safety net to financial institutions which begin to lend to a newly targeted clientele. The state undertakes to underwrite a percentage of the loan in the event of non-repayment. The Strauss Commission proposed the order of 80:20, as this has worked successfully in other countries, but this is subject to negotiation. The principle of the risk share is that the risk should be large enough (20 %) to ensure that lenders will behave rigorously, but also small enough that the risk of losing is not too great a disincentive.

4.5.9 'Sunrise' subsidies

The Strauss Commission proposed that the following financial 'sunrise' subsidies be considered to support land reform beneficiaries: a graded entry to repayment, a flexible repayment system, a discount subsidy.

@ Graded repayment: The principle of a graded entry to repayment is that the loan beneficiary does not repay the full interest immediately. For example, it is proposed that in year 1, 60% of the interest is paid, in year 2, 75% and 90% in year 3 with full payment being made from year 4 onwards. The payment instalments from year 4 are higher than if a 100% repayment rate had been adopted from the beginning.

@ Flexible repayment: The principle of flexible repayment would be to accept a certain minimal payment of the loan, but that repayment should also be tied to income flows and when the season is more financially successful, the client is expected to pay off a greater portion of the loan.

@ Discount subsidy: This is a subsidy designed to provide an incentive to reward performance. The proposal is that the interest rate would be reduced for timely repayment. Performance subsidies may also be applied to the fees for training courses, wherein training courses are offered on a loan conversion basis - the trainee who passes the course gets the costs converted to a grant award.

Where state funds are used to subsidise the purchase of private land, the DLA and the Department of State Expenditure require that a fair price be paid. This will usually be 'reasonable market value'. This is defined as a price which is comparable with recent sales in the locality and one which is endorsed by an independent valuer and/or the Land and Agricultural Bank. A valuation based on market value must capture location-specific factors such as proximity to settlements and the risk of land invasion or stock theft. This is, however, qualified by the factors set out in the compensation formula prescribed by the Constitution for expropriation.

Expropriation will be considered in situations where there is no reasonable alternative land and the owner either will not sell, or will not negotiate a fair price. In considering what is a fair price, regard must be had to the compensation formula set out in the Bill of Rights. Section 25(3) of the Constitution states:

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

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

4.6.1 The role of government in valuation

The role of government in the land valuation process is that of a facilitator, provider of information and a guardian of the principles set out above. Government has a responsibility to ensure that state resources are wisely used and that prices negotiated are just and equitable. The Department of Land Affairs is therefore required to appraise all land transactions concluded under the Land Reform Programme.

Government will endeavour to ensure that would-be buyers negotiate directly with would-be sellers in setting the price of a piece of land to be acquired. As facilitator, the Department of Land Affairs,

or its appointed agents, has an obligation to explain clearly to grant applicants the rules with regard to valuation:

@ Purchasers do not have an inalienable right to a particular piece of land at any price.

@ The concept of willing-buyer willing-seller is only effective if potential buyers are able to walk away and buy elsewhere.

@ If the price is excessive and cannot be negotiated down to a fair value as defined above, buyers must consider reasonable alternatives.

@ Purchasers should be encouraged to negotiate the price down in order to obtain the best value for 'their money' and reserve as much of their Settlement/Land Acquisition Grant as possible for the purchase of other much needed capital items.

The cost of land valuation must be paid from the Settlement Planning Grant. The Department will provide guidance on acceptable fees for valuations. It may also pay for communities to hire a negotiator to assist them in the process of purchase. This will enable government to remain at arm's length, while at the same time strengthening grantees' capacity to achieve the best price.

In the case of valuations to determine compensation in expropriation cases, the work is carried out by the Land Affairs Board of the Department of Public Works. Procedures for the valuation of state land are discussed in Section 5.8.3.

Under the programme, the government provides a number of grants and services. To varying degrees and in different ways, the grants and services are applicable to the three land reform programmes: Restitution, Redistribution and Tenure Reform. Details on these grants are given in Sections 4.21 – 4.26 of the White Paper. They are summarised in Box 4.3.

The primary source of direct financial assistance to potential beneficiaries will be the Settlement/Land Acquisition Grant. Of critical importance is the fact that the grant will be used as flexibly as possible. The grant is set at a modest level and is in line with the grant administered by the Department of Housing, intended to assist in providing minimum shelter conditions for first-time house owners. Similarly the Settlement/Land Acquisition Grant is intended to provide a modest dwelling and/or a productive land ownership opportunity.

The grant is currently set at R15 000. It is an umbrella one in the sense that any government assistance for either land purchase or basic needs provision will be debited against the R15 000 per household maximum subsidy. The allocation of the grant will be registered on the same national data base as the National Housing Subsidy. A household may apply for

both, and in any order, but cannot qualify for more than R15 000. This flexible application of the grant acknowledges the links between rural and urban households, and places responsibility on the beneficiary to choose when and how to apply the once-off subsidy.

It is expected that the majority of beneficiaries of the Settlement/Land Acquisition Grant will be the rural poor. Special emphasis will be placed on targeting women. Many of these poor are resident on farms; some may be farm workers, others are unemployed. These potential beneficiaries may have a preference for a land acquisition opportunity within the area where they have family, and possibly tribal ties. There are also considerable numbers of landless persons who are former farm workers, and on being made redundant, have clustered on the periphery of rural towns. It can also be expected that people resident in former homeland areas will be looking forward to an opportunity to access additional land or to use the grant to secure their tenure

(see Box 4.4 for potential uses of the grant).

The level at which the grant is set and the means by which it is accessed have meant that the majority of land reform beneficiaries have formed themselves into groups to access land collectively. The Department of Land Affairs is aware that there are many potential beneficiaries who would like to access land individually or as an individual family. Work is being undertaken to establish simple procedures to allow individuals to access the Settlement/Land Acquisition Grant in order to meet their land needs. Measures being examined include expedited subdivision of land to encourage individual or family smallholder ownership.

Redistribution projects will be ranked in priority order according to the following criteria:

@ The most critical and desperate needs will command government's most urgent attention. Priority will be given to the marginalised and to the needs of women in particular.

@ In view of the limited institutional capacity to deliver and the need to reward initiative, priority should be given to projects where the institutional capacity exists to implement quickly and effectively.

@ Viability and sustainability of projects must be ensured by giving attention to: the economic and social viability of intended land use; fiscal sustainability by the local authority; environmental sustainability; proximity and access to markets and employment; availability of water and bulk infrastructure.

@ Government will ensure a wide geographical spread and a diversity of land redistribution projects throughout the country. Different types of beneficiaries, land uses and tenure arrangements will be supported

in order to address the multiplicity of needs.

Across the country, urban areas are struggling to cope with increases in the scale and rate of increase in homelessness and landlessness. This increase has far overtaken the rate at which housing can be provided at present. The problem is exacerbated by the insecure tenure that characterises many informal settlements.

The DLA appreciates the pressing and serious nature of urban landlessness. However, its role has to be played within the context of a multi-sectoral urban development programme and it is necessarily confined to the delivery of land and secure tenure through the development of an appropriate enabling policy and legislative framework.

The urban land reform programme thus has two elements. The first is directed towards measures that will result in the alleviation of landlessness through the provision of land. Here the DLA has been piloting a programme with the Gauteng Provincial Government. It involves using part of the Settlement/Land Acquisition Grant to buy land as a first tranche of the subsidy (see Box 4.5). If successful, it is anticipated that it will be replicated elsewhere.

The second element is the delivery of secure tenure to people in the places where they presently reside. Programmes to identify and describe land parcels, and to register land rights are the key elements of this and are discussed more fully in the Land Tenure section of this White Paper.

The measures in the *Development Facilitation Act* that provide for the rapid release of land for development, as well as for the initial registration of tenure in such a way that subsidy money will flow at an early stage in the process, have the potential to ease considerably the pressures on the delivery process.

4.8.1 An adequate response to land invasions

The instability, conflict and uncertainty in relation to property rights that is caused by land invasions has been discussed in Section 3.15.2. Land invasions are increasing in the absence of suitable land being identified and assembled for affordable housing. They hamper efforts to release land in a planned manner and result in 'queue jumping' for the housing subsidy and for land. Government, while strongly discouraging land invasions, does not believe that the only solution lies in evictions, which are often a route towards confrontation and civil disturbance. Evictions as a solution to land invasions are a measure of last resort and should only be considered after all other possible alternative solutions have been explored, including commitments to organised groups of

landless people for the delivery of land within specific time frames. Where evictions are the course of action decided upon, this should only be after due process has been followed.

In the final analysis it is the delivery of appropriate land at a rapid pace that is the solution to land invasions.

From both a cost perspective, and from the need to minimise conflict and stabilise communities, it is preferable, that where it is possible and appropriate, *in situ* upgrading of tenure and regularisation of land rights is seen as a solution to land invasions. In particular, the upgrading of tenure in these situations, may provide individual households with sufficient security and ownership to give them independence from 'warlords' seeking to extract rent from them in return for land.

This position does not in any way imply governmental support for land invasion as a means of acquiring land. Government maintains its right to take legal action against land invaders. It is also determined that land invasions or threats of land invasion will not be rewarded with special treatment.

Finally, the high cost of urban land in well-located areas, relative to available subsidies, makes an investigation of urban land prices and the means to make the expenditure of subsidy funds most effective, an essential step. The DLA is currently investigating mechanisms for the financing and release of better located land in urban areas for settlement by the poor.

There are about 1,2 million farm worker households in South Africa. They constitute one of the poorest and most insecure sections of our population. The channelling of settlement grants to farm workers is problematic because their housing is tied to employment. Termination of employment results in loss of housing and any benefit provided by government. In the past, subsidies were provided to the farm owner for farm worker housing. Government now wishes to direct the subsidy to the farm workers and their families in a way which would improve tenure security and at the same time contribute to a more equitable ownership of land and to reconciliation and harmony.

The Settlement/Land Acquisition Grant can be used in a number of ways to achieve these aims, in diverse situations. There are two main settlement options for farm workers.

4.9.1 Off-farm settlement options

These entail the purchase of land and establishment of housing and service infrastructure close to existing farm employment and other employment opportunities.

Such options would be more viable where a number of farm workers apply as a group for assistance to establish an 'agri-village'. Another option is settlement in nearby towns, in which case the workers concerned would be eligible to apply to the Provincial Housing Board for a housing subsidy. There are also instances where farmers and farm workers negotiate an arrangement in which a part of the farm is sub-divided.

4.9.2 On-farm settlement options

Settlement options range from schemes in which agreements between the parties cover investment in farm worker housing and amenities only, to schemes in which investment includes equity shares in the farming enterprise as a whole. Several innovative schemes are being piloted by land owners and their employees. The feasibility of others is being studied. Options include:

(a) A contractual agreement between the state, farm worker and the farm owner, in which the farm worker and his/her family use the grant to enhance the housing stock and/or non-bulk service provision on the farmer's land, subject to the right of occupancy for the farm worker and his/her family.

The agreement should also ensure that the farm worker will be financially compensated by the owner for any improvements effected by the farm worker, in terms of own investment and as a beneficiary of the grant, should the occupancy be terminated; and that the funds would be reinvested to provide for alternative settlement opportunities.

(b) An equity share-holding arrangement between the farm worker and the farm owner whereby the value of the grant which is invested in the farm enterprise is held as an equity share by the farm worker.

In these equity schemes, farm workers obtain part ownership of a farm on which they work, thereby sharing in its capital growth, profits and risks. Where government grants are involved, the state needs to be reassured that the investment of public funds is justified and that the interests of the intended beneficiaries - the farm workers - are adequately safeguarded. The state needs to be assured that government grants are adequately matched by funds provided by the farm owner. Such schemes must pass the acid test, namely that they significantly improve the security of tenure of the farm-worker, contribute to land redistribution, reconciliation and harmony.

4.9.3 Partnerships with the private sector

Private sector initiatives in land reform are partnerships/agreements between recipients of the Settlement/Land Acquisition Grant and owners of private businesses, which broaden the base of land ownership, offer security of tenure and raise incomes of the grantees. The Department of Land Affairs, together with organised agriculture, believes that successful partnerships should be actively developed. The Department supports initiatives which have the potential to widen the scope and efficiency of the land reform process, and promote the sharing of risks and responsibilities. Recipients can use their grant to purchase a share in the land and the infrastructure that is critical for the productive use of the land. Such cooperative arrangements can greatly improve farm production and the income of the partners.

Qualifying schemes have to be land based and involve the immediate provision of tenure security for the grantees. Enhanced security of tenure is the principal criterion and has to be part of the written agreement between the Department, the grantees and other participants. The Settlement/Land Acquisition Grant must be used for acquiring land and productive assets.

Box 4.6 summarises some initiatives proposed by the private sector. Some of these are presently being piloted. Clear lines between eligible and ineligible schemes cannot be easily specified in advance. Each partnership proposal will be assessed on its merits. The Department is committed to playing a direct and active role in leveraging financial resources to increase the financial and economic viability of land reform. Provincial Directors have authority to follow up initiatives, accessing specialist advice where and when necessary to support farm workers and landowners to prepare partnership agreements. A private sector help desk has also been established in the DLA Head Office, Pretoria.

As labour tenants are a specific category of rural dwellers who are particularly vulnerable, with specific land needs, the *Land Reform (Labour Tenants) Act, 3 of 1996*, was passed by Parliament. The Act was retrospective which means that all labour tenants are protected by this Act as of 2 June 1995. The objectives of the Act are twofold. On the one hand, the Act provides for the protection of the existing rights of labour tenants. On the other hand, it makes provision for the acquisition of land for existing labour tenants who will be able to access the Settlement/Land Acquisition Grant for this purpose. The Act applies only to Labour Tenants as defined by the Act and excludes other categories of rural land dwellers, such as farm workers, tenants on farms or persons who would have qualified as labour tenants were it not for the fact that they unilaterally ended their labour contract with the farm owner.

Chapter 2 of the Act provides for protective tenure for labour. Tenants cannot be evicted simply because the owner decides to give them notice, but only when they have breached the contract or are guilty of misconduct, or the owner has very specific needs for land. In the event of eviction, the process has to follow particular procedures. Only the Land Claims Court can order the eviction of a labour tenant. Magistrates are obliged to refer eviction applications to this court if the evictee can establish that he/she falls under the Act.

Chapter 3 of the Act deals with the right of labour tenants to acquire the land which they occupy, or use. This section of the Act aims to promote negotiations between the parties at a local level to reach a settlement. In the case of failure to reach agreement, the matter will be referred to arbitration *via* the President of the Land Claims Court. This will necessitate the establishment of a panel of arbitrators by the Minister for Agriculture and Land Affairs in consultation with the Minister of Justice.

It is essential that gender equity be ensured in the land redistribution and land reform programme so that women achieve a fair and equitable benefit. This requires the following:

@ The removal of all legal restrictions on participation by women in land reform. This includes reform of marriage, inheritance and customary law which favour men and contain obstacles to women receiving rights to land.

@ Clear mechanisms in both project planning, beneficiary selection and project appraisal to ensure equitable benefit from the programme for women and men. The Department of Land Affairs will promote the use of gender-sensitive participatory methodologies in project identification and planning. Planners and facilitators will be required to assist the women in the communities with which they work to identify their priorities and act on them.

@ Specific provision for women to enable them to access financial and support services. The Ministry for Agriculture and Land Affairs will develop policy and mechanisms that will enable women to gain access to opportunities in agricultural production.

@ Specific mechanisms to provide security of tenure for women, including the registration of assets gained through land reform in the name of women as direct beneficiaries.

@ Training in gender awareness and participatory gender planning for all officials and organisations involved in implementing the land reform programme.

@ Develop a partnership with NGOs/CBOs who are often a key source of support to women. This partnership can strengthen community-based women's groups who are engaged in campaigns to increase women's awareness of their rights in land as well as assist the Department to build the necessary capacity to implement land reform which is gender equitable.

@ Ensuring that those involved in land reform are equipped to undertake a gender analysis which involves systematically examining the roles, relations and processes with a focus on power imbalances and access to resources.

@ Ensuring that the monitoring and evaluation system for the land reform programme provides the information necessary to monitor women's participation.

All of the above points refer not only to redistribution but are also applicable to the Land Restitution and Tenure Reform programmes. A Women's Rights in Land sub-directorate has recently been established in the Department. It is responsible for ensuring that all the Department's policies and programmes properly fulfil the requirement for gender equity.

In large parts of the country, in small rural towns and settlements, poor people need to gain access to grazing land and small arable/garden areas in order to supplement their income and to enhance household food security. The Department of Land Affairs will encourage local authorities to develop the conditions which will enable poor residents to access existing commonage, currently used for other purposes. Further, the Department will provide funds to enable resource-poor municipalities to acquire additional land for this purpose.

4.12.1 Policy and legislative environment

Legislative competence for municipal commonage rests with provincial and municipal authorities, some of whom are already engaged in initiatives to support poor residents in gaining access to this land. The Department will offer assistance for the development of appropriate provincial policy, legislative frameworks and administrative systems for the maintenance and use of municipal commonages for land reform purposes, if so requested by provincial or local government. Support will be given to municipalities requiring assistance to determine how to regulate the relationship (using by-laws and/or by private agreement) between the user group, themselves and legal authorities.

Examples of management plans between users and a local authority are available.

The Department of Land Affairs has been informed of a number of situations where commonages are not being used for the public purposes set out in the title deeds to the land, and where there is a demand for the land by poor people within the community. This has raised the question of whether this land should be requisitioned for its original purposes. The Department of Land Affairs is at present considering this.

In addition, consideration is being given to the possibility of buying out existing leases (that were signed prior to the local government elections) under the following conditions: if there is a desperate and urgent need for access to the commonage which cannot wait until the lease expires; the lessee is willing to be bought out; and where the municipality concerned has no financial resources to enable it to do this itself.

4.12.2 Grant for the Acquisition of Land for Municipal Commonage

The Department of Land Affairs will offer a Land Acquisition Grant to primary tier local authorities to enable them to buy land to create or extend a commonage for use by poor and disadvantaged residents for agricultural purposes. An application should be made by the Local Authority which must include information about the intended beneficiaries.

The Land Acquisition Grant will be disbursed by a provincially-based committee convened by the DLA provincial office, in consultation with the relevant provincial department responsible for administering the Municipal/Local Authority Ordinance governing the commonage.

The amount of the grant in each case will be determined by the DLA provincial office, taking into account the availability of funds and the principles of fairness and equity. Details of this grant are given in Section 4.24.

The goal of the restitution policy is to restore land and provide other restitutionary remedies to people dispossessed by racially discriminatory legislation and price, in such a way as to provide support to the vital process of reconciliation,

reconstruction and development. Restitution is an integral part of the broader land reform programme and closely linked to the need for the redistribution of land and tenure reform. The *Restitution of Land Rights Act, 22 of 1994*, and the Constitution provide a legal framework for the resolution of land claims against the state, where possible through negotiated settlements. The Land Claims Court is responsible for adjudicating claims. The government has set itself the following targets:

@ a three-year period for the lodgement of claims, from 1 May 1995;

@ a five-year period for the Commission and the Court to finalise all claims; and

@ a ten-year period for the implementation of all Court orders.

Experience locally and internationally has shown that the finalisation of claims and implementation of restitution awards can be a difficult and very lengthy process. Progress will therefore be evaluated periodically, and it may be necessary to review time frames and develop measures to address any delays which may occur.

4.14.1 Justice and equity

In developing an appropriate approach to restitution claims, it is important to identify the different ways in which people have been prejudiced through dispossession. In this regard a broad distinction can be made between the following:

@ dispossession leading to landlessness;

@ inadequate compensation for the value of the property; and

@ hardship which cannot be measured in financial or material terms.

Restitution policy is guided by the principles of fairness and justice. At the heart of this is the recognition that solutions must not be forced on people. The restitution process is driven by the just demands of claimants who have been dispossessed. They have a right to restitution in one form or another. The Department and the Commission will encourage claimants and others to come together to resolve claims. Where this cannot be achieved, the Land Claims Court will decide the case in accordance with the provisions of the Constitution and the Act.

The principles of fairness and justice also require a restitution policy that considers the broader development interests of the country and ensures that limited state resources are used in a responsible manner. To be successful, restitution needs to support, and be supported by, the reconstruction and development process.

The parameters of the restitution process are determined by the Constitution and the *Restitution of Land Rights Act*. Further policy is being formulated on the basis of these parameters. For the purpose of the White Paper, the following areas of policy are elaborated on: qualification criteria, forms of restitution, compensation, and urban claims.

The Constitution and the *Restitution of Land Rights Act* create a right for certain dispossessed people to claim restitution. Claimants should apply to the Commission on Restitution of Land Rights before 1 May 1998. The Commission will deal with those claims which qualify for investigation.

Since the start of the Commission's work, over 14 000 cases have been lodged, but only a few have been processed. Ways are being sought to take unnecessary pressure off the Commission to enable it to deal with the more difficult or complex cases. Legislation will be tabled to enable claimants in less complicated cases to have direct access to the land Claims Court with the leave of the Court.

A restitution claim will be accepted for investigation in terms of section 2 of the *Restitution of Land Rights Act* and section 121(4) of the Interim Constitution where the claimant was:

@ dispossessed

@ of a right in land

@ after 19 June 1913

@ under or for the object of furthering the object of a racially discriminatory law, or

@ was not paid just and equitable compensation.

(In terms of the new Constitution, the fourth condition is: *dispossessed as a result of past racially discriminatory laws or practices.*)

The claimant should have had a registered or unregistered right or interest. Such a right may have been established by occupation of the land for a substantial period. It is not limited to a right recognised by law. It is not limited to ownership rights, and it may include certain long-term tenancy rights and other occupational rights.

Recognition is thereby given to the fact that racial laws may have prohibited certain claimants from obtaining legal rights on account of their race.

The following examples, given in (a) and (b) below, may be considered by the Commission as qualifying for investigation in terms of the acceptance criteria.

(a) *The Black Administration Act, 38 of 1927, the Development Trust and Land Act, 1936, the Group Areas Act, 1950, 1957 and 1966, the Community Development Act, 1996 and the Black Resettlement Act, 1954* were used to remove, evict and expropriate 'black spot' communities, unregistered and deregistered labour tenants and disqualified urban dwellers.

(b) Persons who were dispossessed as a result of threats of state action under racial land laws may also qualify. So-called voluntary removals and voluntary sales occurred when inducements of alternative land were made or after racially segregated residential areas were declared, but before final expropriation happened. In certain cases, apparently race-neutral laws such as the *Slums Act* and the *Prevention of Illegal Squatting Act* were used to effect racial zoning. In other cases, state action under discriminatory law played a secondary role in the process of dispossession, and private parties contributed to the discriminatory act of dispossession.

If dispossession occurred in the form of expropriation under certain legislation, the claimants must show that they did not receive just and equitable compensation at the time of dispossession, taking into account the circumstances of the dispossession.

The Constitution does not allow the Land Claims Court to consider compensation claims arising from dispossession prior to 19 June 1913. This is the date when the *Native Land Act* was promulgated. It heralded the formal adoption of territorial segregation as the leading principle of post-Union land policy. The 1913 cut-off date recognises that systematic dispossession predated the post-1948 grand apartheid era of legally sanctioned forced removals. However, although dispossession took place during the colonial era prior to 1913 through wars, conquest, treaty and treachery, the government believes these injustices cannot reasonably be dealt with by the Land Claims Court.

The government believes it is not possible to address pre-1913 claims through a judicial process such as that laid out in the *Restitution of Land Rights Act* or Aboriginal Title Arguments that have been used in countries such as Canada and Australia. In South Africa, ancestral land claims could create a number of problems and legal-political complexities that

would be impossible to unravel:

@ Most deep historical claims are justified on the basis of membership of a tribal kingdom or chiefdom. The entertainment of such claims would serve to awaken and/or prolong destructive ethnic and racial politics.

@ The members of ethnically defined communities and chiefdoms and their present descendants have increased more than eight times in this century alone and are scattered.

@ Large parts of South Africa could be subject to overlapping and competing claims where pieces of land have been occupied in succession by, for example, the San, Khoi, Xhosa, Mfengu, Trekkers and British.

To what date should the clock be put back? Would it be possible for the courts to verify the historical land claims? On what basis would the legitimate descendants be identified and apportioned compensation?

The government's land redistribution programme must address the present-day effects of this historical dispossession. In cases of established merit, priority access to the programme may be granted.

4.14.3 Historical claims pre-1913 and labour tenants

There will be numerous claims from people who fall outside the scope of the *Restitution of Land Rights Act*, either because they did not have a 'right in land' as defined in the Act because they were not dispossessed as a result of racially discriminatory laws and policies, or because they were dispossessed prior to 19 June, 1913. The Department is committed actively to seek alternative remedies. Cases of unfair dispossession of land which are not provided for in the *Restitution of Land Rights Act*, will be accorded priority status in the land reform programme. Furthermore, the Commission is empowered to make recommendations to the Minister on alternative remedies for such claimants.

Remedies must take into account the specific context of each category of potential claimant:

@ Historical claims arising from dispossession prior to 1913 should be accommodated within the discretion of the Minister. Preferential status could be granted to such claims in land redistribution and development programmes providing they are disadvantaged and will benefit in a sustainable manner from a land based support programme.

@ For technical reasons certain categories of labour tenants fall outside

the *Restitution of Land Rights Act*. They should be given preferential status and financial assistance in land redistribution and land development programmes. Specific legislation for labour tenants, the *Land Reform (Labour Tenants) Act, 3 of 1996*, makes provision for existing labour tenants to acquire land.

@ The claims of those dispossessed under 'betterment' policies, which involved the forced removal and loss of land rights for millions of inhabitants of the former Bantustans, should be addressed through tenure security programmes, land administration reform and land redistribution support programmes.

4.14.4 Forms of restitution

People who were dispossessed, as defined in the *Restitution of Land Rights Act* and the Constitution, have a right to restitution. What has to be resolved is the form in which the right will be recognised. The constitutional right to claim restitution does not mean that each and every successful claimant will receive a piece of land, a house and/or an amount in compensation. The overriding principle of fairness and equity dictate that each case must be treated on its merits. However, the constitutional right to restitution does, at the very least, guarantee each successful claimant the right to participate in formulating a restitution package to give recognition to such claims.

Many claimants feel strongly about returning to the particular land from which they were removed. Others want another form of recognition of their loss and violation of their human rights. The restitution process does not prescribe the outcome of each claim, but provides a framework and various options which can be used to arrive at an appropriate solution through negotiation by the parties or adjudication by the Land Claims Court.

Restitution can take the following forms:

@ restoration of the land from which claimants were dispossessed;

@ provision of alternative land;

@ payment of compensation;

@ alternative relief including a package containing a combination of the above, sharing of the land, or special budgetary assistance such as services and infrastructure development where claimants presently live; or

@ priority access to state resources in the allocation and the development of housing and land in the appropriate development programme.

The principle is that preference should be given to the restoration of land. Any compensation that was received at the time of removal, and any improvements to the property since dispossession will have to be taken into account when structuring the package for restoration. At the same time, the process of restoration should be supported by providing restitution beneficiaries priority access to

land-focused support programmes in terms of a Settlement/Land Acquisition Grant or the National Housing Subsidy which is set at a maximum of R15 000 per household. It is vital that the intention of claimants who wish to return to the land is noted and the implications and feasibility of restoration determined, as early as possible in the restitution process, in order to enable the necessary planning and preparation.

Certain successful claimants may be able to access other grants and services of the Land Reform Programme which are summarised in Box 4.3. Preferential treatment will be given to people who show initiative in resolving claims through locally negotiated settlements, or other innovative means.

Where land is awarded, the Land Claims Court may determine the manner in which rights are to be held and set conditions to ensure that all dispossessed members of a community shall have access to the land, on a basis which is fair and non-discriminatory towards any person, including women and people whose rights were not formally recognised due to racially-based measures of the past.

4.14.5 Compensation

(a) Compensation to claimants

The state will have to compensate certain successful claimants where restoration or other remedies are not appropriate. These claimants would be persons who held rights in land which were taken from them with inadequate or no compensation. The Interim Constitution entitles such claimants to just and equitable compensation. The applicable portion of Section 123(4)(a) reads as follows:

The compensation...shall be...just and equitable taking into account the circumstances which prevailed at the time of the dispossession and all other factors as may be prescribed by the (Restitution of Land Rights Act, 1994 [such as factors listed in Section 34]), including any compensation that was paid upon such dispossession.

It is impossible to prescribe fixed rules for the determination of just and equitable compensation to claimants. However, the principle would be to compare the compensation that was received at the time of dispossession with the compensation for the land to which the claimant would have been entitled had he or she been expropriated in terms of the provisions of Section 28(3) of the Interim Constitution read with the *Expropriation Act*. This difference should serve as the basis for calculating the compensation to claimants.

In practice, it may prove very difficult to make such calculations. Ways will be sought on a case-by-case basis, through negotiations between the parties, to determine the appropriate compensation amounts. Should negotiations fail, the Court should determine the amounts payable.

(b) Compensation to land owners

The question of compensation for privately owned land needed for restitution is dealt with in sections 28(3) and 123(2) of the Interim Constitution. Section 123(2) provides that where land is expropriated for compensation, this shall be subject to the payment of 'just and equitable' compensation calculated in the manner provided for in section 28(3). The relevant portion of Section 28(3) reads as follows:

.....where any rights in property are expropriated..., such expropriation...shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a Court of Law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

The underlying principle is that while an owner should be fairly compensated for what he or she paid for or invested in the land, he or she should not make a profit at the expense of the public as a result of any special benefits that were given. This principle remains the same under the new Constitution.

Ultimately it is the Courts, and not the Department, that have the power to determine what is 'just and equitable' compensation. However, the Department has a mandate and an obligation to enter into negotiations with the relevant role players to try to settle the issue of compensation prior to referral of the matter to the Courts. The Department will enter such negotiations in terms of guidelines derived from the 1995 report of the Ministerial Committee Regarding the Determination of Land Values. In terms of those guidelines, the calculation of 'just and equitable' compensation should have regard to the following factors, amongst others that may be relevant in particular circumstances:

@ the actual price which was paid by the present owner at the time of acquisition;

@ the market value of the land including improvements at the time of acquisition;

@ the present day market value of the land, but excluding improvements made by the owner;

@ the contributing value of beneficial improvements made to the property by the owner since time of acquisition (a 'beneficial improvement' being an improvement which adds to the market value of the property); and

@ the value of any special benefits which the owner received from the State, eg low interest rates, subsidies, etc.

There are a number of factors which complicate the resolution of urban claims.

@ A large number of investigations will be required to deal with the overwhelming numbers of individual claims before any remedial compensation is granted.

@ There are multiple overlapping claims in respect of individual properties involving original owners, long-term tenants and even sub-tenants.

@ The changing land use patterns and pressing needs for housing and redevelopment in urban areas have to be weighed up against the need for restoration.

On the other hand, the restitution programme provides the opportunity to initiate a process of healing, re-integrating and reconstructing the cities and towns that still bear the scars of racial zoning.

Although the above mentioned conditions are particularly prevalent in urban areas, they also apply to many rural cases. The following guidelines are presented to ensure a fair and streamlined procedure to deal with these cases:

(a) Claimants will be encouraged to form groups for each affected town, suburb or former group area to jointly submit and/or negotiate the settlement of their claims. There will be general guidelines and rules for membership and allocation, but the group should be involved in the definition of what the appropriate solution in their particular case would be.

(b) Former residents of areas such as Pageview, District Six and Cato Manor should be afforded the opportunity to participate in shaping the future of the areas which are still available for development. Where appropriate, available alternative land could also be included in the development projects. The nature of this participation in the planning process should be the subject of negotiations, but should recognise that there are broader public interests which should also be considered in the planning process. It is important that this process be driven by local needs and concerns.

(c) Successful claimants should be afforded the opportunity to acquire property within the framework of the above mentioned development projects. Where appropriate, these participants will be offered

development assistance within the framework of the housing programme for the area. The Act provides a number of mechanisms to support development-directed group resolution (see Box 4.8). Moreover, other statutory instruments, such as the *Development Facilitation Act*, the *Communal Property Association Act*, and Housing Subsidy Guidelines for Institutions may further bolster group restitution initiatives. The beneficiaries of housing programmes who do not qualify for restitution could also be included in group development projects.

(d) Individual portions of land for residential and related uses where it is fair and feasible to effect such actual restoration. In these cases, claimants would be returned and may be expected to contribute to the acquisition costs on a market related basis, taking into account any compensation received at the time of dispossession.

(e) Compensation to individual claimants: Any compensation paid or other consideration received at the time of dispossession will be taken into account when calculating reparatory compensation, if any. Participation in development projects does not exclude individual claims for reparatory compensation.

The Department will play a central role in coordinating the urban restitution policy. It will work with appropriate authorities to identify land that potentially can be used for group initiatives. Within the framework of the restitution and land reform budget, the Department will, if financially feasible, provide a special restitution (planning) budget to each town and city (or parts of cities and suburbs) affected by apartheid residential segregation and from which a substantial number of restitution claims originate. The local authority should be the driving force to bring local negotiation processes to fruition. Local authorities that show initiative in the restitution programme will get priority consideration for planning budgets. The Department, in cooperation with provincial government and Provincial Housing Boards, will give special attention to the plight of victims of urban dispossession who lack shelter and security of tenure.

Private sector and other civil society initiatives will be crucial for the viability of locally negotiated group restitution projects. A National Urban Restitution Task Team is being considered to bring the relevant role players together and provide direction to the urban restitution process. In addition, Urban Restitution Steering Committees at provincial level may be necessary for areas where large numbers of claims are clustered, such as the Western Cape, the Eastern Cape, KwaZulu-Natal, and Gauteng.

Tenure reform is a particularly complex process. It involves interests in land and the form that these interests should take. In South Africa, tenure reform must address difficult problems created in the past. The solutions to these problems may entail new systems of land holding, land rights and forms of ownership, and therefore have far-reaching implications. For these reasons policy development

in respect of tenure reform has to be done with extreme care. In order to ensure this, a two year period was set aside for consultation around tenure policy, for implementation of test cases and for the preparation of legislation. In the interim, a number of measures have been introduced to deal with urgent and pressing matters that cannot wait. A separate Green Paper on Tenure Policy will be released at the end of 1997. The guiding principles that are informing the policy development process and the programme of action that is being undertaken are described below.

@ Tenure reform must move towards rights and away from permits:

This entails a commitment to the transformation of all 'permit based' and subservient forms of land rights into legally enforceable rights to land.

@ Tenure reform must build a unitary non-racial system of land rights for all South Africans: This entails a commitment to developing a system of land registration, support, and administration which accommodates flexible and diverse systems of land rights within a unitary framework. It embodies a commitment to do away with the second class systems of tenure developed exclusively for black people.

@ Tenure reform must allow people to choose the tenure system which is appropriate to their circumstances: In the past, governments imposed various forms of tenure with disastrous results. There is a commitment to supporting and developing a variety of tenure options which people may then choose between. In particular, it is accepted that both group based and individually based ownership systems play valuable roles under different circumstances and the match between the circumstances and the system must be made by the people affected.

@ All tenure systems must be consistent with the Constitution's commitment to basic human rights and equality: For example, group based tenure systems must deliver the rights of equality and due process to their members.

@ In order to deliver security of tenure a rights based approach has been adopted: Because of overcrowding and the legacy of forced overlapping of rights, there is a risk that tenure reform and upgrading could result in dispossession and heightened insecurity for those who are currently most vulnerable. To avoid this, all tenure reform processes must recognise and accommodate the *de facto* vested rights which exist on the ground. Vested interests would include legal rights, as well as interests which have come to exist without formal legal recognition.

In instances where overlapping and conflicting rights make it impossible for different vested rights to be upgraded within one area, it will be necessary to accommodate vested rights on additional land. The Settlement/Land Acquisition Grant or other appropriate compensation will be used to

assist people to acquire land in instances where others have stronger rights to the land which is currently occupied. The acceptance that tenure reform will require the acquisition of additional land in specific circumstances will ensure that tenure reform and upgrading of rights happens in a way which does not lead to internal evictions which would undermine the principle of security of tenure. It also addresses the reality that most tenure problems are exacerbated, if not caused, by severe land shortages and overcrowding.

@ New tenure systems and laws should be brought in line with reality as it exists on the ground and in practice: Previous legal reforms which have attempted to impose new systems on top of an existing situation have failed or been irrelevant. The recognition of *de facto* systems of vested rights in land as a starting point for solutions is fundamental to tenure reform. Adjudicatory principles are being developed to measure current interests in land, and commensurate entitlements to tenure rights, either on currently occupied land, or elsewhere. The most basic form of vested rights in land is established occupation. This must not be jeopardised unless viable and acceptable alternatives are available. Another important form of established vested rights is long term historical ownership of the land which exists in practice but which is not recognised in law.

Two important pieces of legislation dealing with tenure have been passed by Parliament in 1996. These are the *Interim Protection of Informal Land Rights Act, 31 of 1996*, and the *Communal Property Associations Act, 28 of 1996*. The first is a holding mechanism that prevents violation of existing interests in land until new long-term legislation is in place. The latter provides a means through which people wanting to hold land jointly and in groups can organise their tenure. In addition, the *Upgrading of Land Tenure Rights Act, 112 of 1991*, was amended to bring it in line with tenure policy (see Boxes 4.9, 4.10 & 4.11).

The new Constitution guarantees:

25 (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the

extent provided by an Act of Parliament, either to tenure which is legally secure, or to comparable redress.

25 (9) Parliament must enact the legislation referred to in subsection (6).

These provisions put the Department of Land Affairs under a constitutional obligation to develop a law which sets out the types of vested interests in land which were undermined by discriminatory laws and a mechanism to convert such interests into legally secure tenure rights. The rights based approach and adjudicatory principles are being developed to fulfil this task.

Tenure reform delivers security of tenure in diverse ways. For example: by the award of independent land rights and secure lease agreements; through protection against eviction; by membership of a group based system of land rights or through private ownership. There are a series of key tasks that are necessary in order to develop the government's tenure reform programme. The most important of these are the following:

@ Develop the mechanisms for 'upgrading' *de facto* vested interests in land into legally enforceable rights: Adjudicatory principles to assess and quantify current vested interests in land will be finalised and set out in law. A procedure is being developed which involves all stakeholders in situations of overlapping rights in the process of putting forward concrete proposed solutions. The solutions are assessed against criteria that will measure factors such as the extent to which they adequately and fairly encompass the rights of all occupants of the land, cost effectiveness and public interest. If they meet the criteria then government funding in the form of settlement subsidies and compensation (where appropriate) will be made available. This approach is being tested and adapted through the implementation of test cases.

Once it has been assessed and finalised the criteria and procedures for government funding of the process will be set out in law. This process will entail a review of the *Upgrading of Land Tenure Rights Act, 112 of 1991*.

@ Protection for occupants of privately owned land: Where informal land rights exist on land which is privately owned, the rights of the current owners are at issue, and in most instances the upgrading of formal rights in such situations would amount to expropriation of the rights of current owners. At the same time farm workers and other people on privately owned land are vulnerable to evictions in terms of old apartheid laws such as the *Prevention of Illegal Squatting Act*. Tenure reform requires that legislation be promulgated which protects the rights and interests of both

owners and occupants.

The bias in our law towards the rights of owners as against other occupants, results in evictions being allowed which are unfair and cause major social, political and economic dislocation. In this context it is necessary to revisit the current laws governing evictions and develop proposals that limit the circumstances and procedures which govern evictions.

Alternatives which enable people to escape their status as insecure and subservient on land belonging to others must be created, including the provision of additional land on which people can enjoy independent land rights. Without additional land the extreme overcrowding and pressure on land which is the root cause of tenure breakdown remains untouched.

It is also necessary to develop a law which regulates and protects the rights of occupants on land belonging to others. An analogy is protective tenancy measures.

The Department has recently published a Bill intended to address this situation. The *Extension of Security of Tenure Bill* addresses the relationship between occupiers and owners, as well as the circumstances under which evictions can take place, and the procedures to be followed.

The Bill is underpinned by the following four principles:

@ The law should prevent arbitrary and unfair evictions.

@ Existing rights of ownership should be recognised and protected.

@ People who live on land belonging to other people should be guaranteed basic human rights.

@ The law should promote long-term security, either on the land where people are living at the moment, or on other land. Government should actively assist owners and occupiers to find these long-term solutions, and reward the creation of locally based solutions which involve the joint efforts of the parties concerned.

The Bill is applicable in all areas except proclaimed townships and therefore affects relationships between owners and occupiers in a wide range of rural and peri-urban situations.

@ **Forms of ownership:** Another key issue relates to forms of ownership. All land which is redistributed, restored or awarded to beneficiaries must be registered in one or other form of ownership. Apart from registering individual ownership, the *Communal Property Associations Act* provides one vehicle for group ownership, as do currently available legal forms such as companies, share blocks and trusts, but other options need to be provided which are appropriate to specific circumstances (see Box 4.11).

A point of departure in the 'upgrading context' is that the 'rights enquiry process' would establish

whether the rights at issue are group based or individual. Where the rights belong to a group the group must be able, by democratic majority, to choose what form of land holding system best suits their needs. They may choose to individualise their rights but this decision would be valid only if it was taken by the majority of rights holders. One of the challenges of the new forms of ownership is that they must be flexible and accommodate change over time. The laws in terms of which they are created must also provide for adequate rules and institutions to support the efficient functioning of that particular form of ownership. They must also protect the rights of members from abuse under group systems and uphold the basic human rights guaranteed in the Constitution of the country.

@ Family based ownership: This issue arises in the context of township houses, informal settlements, trust towns and some ex-SADT areas which were effectively allocated to individual families. When the government transfers an asset to people who have been recognised as the *de facto* rights holders it must ensure that the rights of all of the *de facto* rights holders are secured in the process. Otherwise the intervention may inadvertently weaken the position of some of the people who have previously shared the informal right. If the rights are vested in one person, that person suddenly acquires power relative to the other inhabitants of the land or house, which he did not previously have. This created serious consequences of internal eviction and family breakdown under the legislation which provided for the conversion of leasehold. People who had previously been equal in their insecurity are now sharply divided when security is vested in one person, generally a male 'head of household'. Experience has shown that it is often women and old people who lose rights in this process.

At the moment the only legal solution in this context has been for the people affected to form family trusts and similar institutions. This is expensive and puts a heavy burden on the process. Thus a new form of family ownership which will be simple and easy to administer is being investigated to address the problem.

@ Group based rights: The *Communal Property Associations Act, 28 of 1996*, is a new vehicle. Early implementation experience has shown the need for an amendment to allow for internal sub-division and registration of individual rights to areas within Communal Property Association boundaries. The Act is not applicable as a conversion mechanism from pre-existing informal communal systems. Furthermore the intricate process of establishing a Communal Property Association is too complex and requires too much input to be an effective option in mass based conversion processes where tens of thousands of families are members of one group.

@ Rights under communal ownership systems: The rights enquiry process will establish which forms of land occupation qualify as rights of underlying ownership. There is a commitment to recognise and provide legal protection for such rights. It will also differentiate between rights which are fundamentally group based and those which operate as

individual rights. In the case of group based indigenous ownership rights this will entail the transfer of land nominally owned by the state to such groups.

In the interim the Department of Land Affairs is of the view that such areas should be treated as privately owned land. There are many areas which have belonged to particular groups or tribes since time immemorial. There are also areas where groups purchased land but did not get title. Instead, in both cases the land is registered in the deeds office as "state owned". This is an anomaly created under colonialism and apartheid. In such instances the rights of the long term holders of the land should be treated as ownership rights. This means that no tier of government or government department has the right to treat the land as state owned. Instead the rights holders must be consulted in all matters pertaining to their land rights. Anything less would amount to confiscation of historical or indigenous land rights.

When formal transfer takes place, it must enable the members of such group systems to exercise and protect their land rights effectively through democratic processes. Accordingly the ownership of the land will vest not with chiefs, tribal authorities, trustees or committees but in the members of the group as co-owners of the property.

It will be set out in law that the members of the landowning group will have the power to choose the structure which represents them in decisions pertaining to the day to day management of the land and all issues relating to members' access to the land asset. A majority of members would also be able to set aside unpopular decisions made by the land management structure.

The law will also provide for protections pertaining to equality and rights for women. Any decision which discriminates against women would be invalid. In order for the rights and protection enshrined in the envisaged law to be effective, no transfer of land to group based systems will happen until there has been a process of information sharing and discussion with the members of the land holding group.

It is recognised that there are many areas in which the system of customary land tenure is popular, functional and relatively democratic. It would be unnecessary and even dangerous to interfere with such functional systems, especially while there is no proven better alternative. However, there are also areas where abuse by chiefs and tribal authorities is endemic and women are severely discriminated against. It is intended that the above measures would enable functional and popular traditional systems to continue operating, while providing a strong and guaranteed route for a majority of dissatisfied members to replace control over land by illegitimate structures with new democratic institutions.

The Department of Land Affairs does not believe that the above measures are in conflict with customary law. They provide recognition and protection for indigenous land rights and vest the ultimate ownership and control over the land with the members of a group as is the case under customary law. The requirement that traditional systems adapt to accommodate the changing position of women is also not fundamentally threatening to customary law. There are many deeply traditional areas where these changes are happening spontaneously.

These measures are necessary in order for tenure reform to conform with the Constitution and will provide redress to members of group systems whose basic human rights have been abrogated. Much of the land which will be transferred to group ownership is currently held in trust by the Minister for Agriculture and Land Affairs. He or she is under a fiduciary duty to ensure that the

form of transfer of ownership accommodates and protects the rights of all the beneficiaries of the trusts which will be wound up at the point of transfer to full ownership.

One of the options available to members of group ownership systems will be to convert their rights into individual ownership as long as the decision is taken by democratic majority. They may also choose to individualise only certain areas and impose particular conditions in these areas. The Department will develop forms of ownership which accommodate different choices including a combination of individually owned areas within group ownership systems. This may be done by amending existing laws to make current legal options accessible to people living under isolated rural conditions. The intention is to provide people with a range of options from which they can choose, it is also to design the systems to be flexible to accommodate change over time.

While the Department of Land Affairs is committed to the recognition and protection of pre-existing land rights which were undermined by colonialism and apartheid, it is equally committed to protecting and upholding the basic human rights of all South Africans. In particular the rights of members of group based land holding systems must be protected, especially the process of inclusive decision making in all matters pertaining to the management of the jointly held land asset.

In some provinces chiefs and tribal authorities have been involved in processes which appropriate land reform projects to themselves rather than to all the intended beneficiaries, or to all the members of the tribe which owns the land. This is counter to our policy and measures are being put in place to ensure that such misappropriation of land reform assets cannot take place.

Unfortunately the Department's acceptance of group based land holding systems and the recognition of historical land rights has been construed by some chiefs as an opportunity to consolidate their own personal power. The Department will not condone land reform measures being used to bolster individuals or small groupings of people. A process of monitoring and evaluation will be set up to assess whether we do in practice balance our joint goals of protecting group-based historical land rights and protecting the human rights of members of group-based systems. The test will be whether the members of group-based systems are able to make and challenge decisions in relation to their shared land asset in ways which reflect the views of the majority of members.

@ Gender equity in tenure reform: Tenure reform could have unintended consequences that would have a negative impact on the rights of women. To guard against this, the gender implications of all new measures will have to be assessed and steps taken to guard against certain dangers. The most obvious of these is that any process which formalises current rights will often formalise women's exclusion from access to land. For example, Permission to Occupy certificates have generally been allocated to male household heads. Were they to be upgraded into ownership by the permit holder they would almost invariably be upgraded to the male head of household. He is often a person who has left to work in the city and may have established a second family there. If he gets upgraded alienable ownership it creates an incentive to sell the land and could leave the rest of the family vulnerable to dispossession.

It is for reasons such as this that far reaching protections for women will be built into the new forms

of ownership and the procedures for upgrading rights. The equality clause in the Constitution makes this a requirement. The *Communal Property Associations Act* already has important provisions in this regard and mechanisms to enforce the rights of women. Tenure reform provides key opportunities to build protection for the rights of women into the new forms of ownership which are being developed, in particular family based rights and group ownership systems.

The process of formalising and securing land rights which has been described previously will happen slowly and on request by the affected rights holders. A programme of forced land titling will not be undertaken. If the people affected do not deem it in their interests to go through the process of formalising land rights then experience elsewhere has shown that they will not maintain the system and the whole process will have been an irrelevant wastage of state resources. Furthermore, there is limited capacity within government to respond even to the areas where urgent requests for untangling and formalisation of rights are being made.

Both of these factors imply that there will be extensive areas where tenure reform does not take place for many years. In the interim much of the land in the former homeland areas remains registered as state owned. The people living on this land do not have the legal capacity to protect or control this land. If the land belonged to them the powers and duties of ownership would be devolved to them. However, whilst it still belongs to the state the question of the administration of these areas remains a government responsibility. The existing permit based Permission to Occupy system contradicts many of the tenure principles described above. It is prime apartheid legislation that will remain in force in many places for some time to come. To deal with this, interim measures that entail a limited reform of regulations governing access to and control over land are being established. These are described in the section dealing with land administration. (see Section 5.12 – 5.13).

The Department of Land Affairs offers the following grants in support of the Land Reform Programme. To varying degrees and in different ways, each of these is applicable to each of the main Land Reform focus areas, ie restitution, redistribution and tenure reform. In summary, these are:

(a) Settlement/Land Acquisition Grant: This grant is currently set at a maximum of R15 000 per qualifying person, to be used for land acquisition, enhancement of tenure rights, and investments in infrastructure, home improvements, and farm capital investment

according to the plans put forward by applicants.

(b) Grant for the Acquisition of Land for Municipal

Commonage: This grant is to enable primary municipalities to acquire land in order to extend or create a commonage for the use of qualifying persons.

(c) Settlement Planning Grant: This grant is to be used to enlist the services of planners and other professionals, who will assist the applicants in preparing grant applications.

(d) Grant for determining Land Development Objectives

(LDOs): This grant provides for under-resourced, poor or rural local authorities to undertake a strategic planning process to set 'land development objectives' (under Section 28 of the *Development Facilitation Act, 67 of 1995*), on the understanding that this provides a framework for decision making on the allocation of resources for land reform and settlement.

Applications for the above mentioned grants can be made by, or on behalf of, the following:

@ Landless people, or people who have limited access to land, especially women, who wish to gain access to land and settlement opportunities in rural or urban areas.

@ Farm workers and their families who wish to acquire land and improve their settlement and tenure conditions.

@ Labour tenants and their families who wish to acquire and improve the land which they hold or alternative land, in accordance with the *Land Reform (Labour Tenants) Act, 3 of 1996*.

@ Residents who wish to secure and upgrade the conditions of tenure under which they live.

@ Successful claimants of the Land Restitution Programme in terms of the *Restitution of Land Rights Act, 22 of 1994*, who require additional funds for meeting basic needs on restored land.

@ Dispossession cases which fall outside the ambit of the

Restitution of Land Rights Act.

@ Municipal Councils to acquire land to be used as a commonage or to extend an existing commonage.

The objective of the Settlement/Land Acquisition Grant is to improve land tenure security and to extend property ownership and/or access to productive resources to the historically disadvantaged and the poor.

To this end the grant can be used :

@ in part, or in its entirety, to acquire rural or urban land for residential purposes, agricultural production and small business development;

@ in part, to purchase capital items for the development of the land acquired with the grant;

@ in part, to secure, upgrade and register tenure rights;

@ in part, to effect homestead and land improvements through the provision of on-site basic infrastructure such as water, sanitation, internal roads, top structures and fencing (bulk infrastructure and connectors to internal services, for example, electricity, roads, water and sanitation, are not covered by the grant);

@ in part, or in its entirety, to acquire equity in an existing agricultural enterprise as long as security of tenure is ensured;

@ in part, or in its entirety, for successful claimants of the Land Restitution Programme in terms of the *Restitution of Land Rights Act, 22 of 1994*, who require additional funds for meeting basic needs on restored land or for purchasing additional land.

It is understood that the focus of this grant is to assist those who in the first instance have land needs and security of tenure needs. Where mainly water provision or housing is sought, the applicant should be directed to another more appropriate institution, such as the Department of Water Affairs and Forestry or the Department of Housing.

Being eligible in no way ensures that a grant will be awarded. Rather, eligibility determines whether an application will be considered. The award of the grant will depend upon the approval of a grant application, including a business plan where required by the Department.

Qualifying persons: In line with the Department of Housing guidelines in the 'Housing Subsidy Scheme' Manual (November 1995), any person who complies with the criteria laid down in this section may qualify for a grant , if he or she is married (in terms of the Civil Law or in terms of Customary Union) or habitually cohabits with any other person; or if he or she has proven financial dependants. For the purposes of the grant, the word "spouse" includes any partner with whom an applicant under the Scheme habitually cohabits. A person shall qualify for the maximum amount of the subsidy only if:

@ he or she is lawfully resident in South Africa;

@ he or she is legally competent to contract;

@ the gross monthly household income of his or her household does not exceed R1 500;

@ neither that person nor his or her spouse has previously derived benefits from the grant or the Housing Subsidy Scheme, or any other state funded or assisted housing subsidy scheme, which conferred benefits of ownership, leasehold or deed of grant or the right to convert the title obtained to either ownership, leasehold or deed of grant.

Single persons (of either sex) without dependants will not normally qualify for the grant. In cases where it can be reasonably established that this regulation unfairly acts against a single needy person without dependants, the Department official responsible will use his or her discretion in deciding whether a grant should be awarded. Qualifying persons may apply individually or as groups. Qualifying persons which have an average household income of less than R1 500 per month are eligible for the grant. For groups, average household income must be less than R1 500 per month. Although a means test for groups will not be applied as a matter of routine, in certain cases investigations may be conducted by the relevant authority and thereafter a decision made on the eligibility of the group.

The grant to an eligible person currently has an upper limit of R15 000 per qualifying person. Whether any grant money will be awarded at all, and if so, how much, depends upon the decision of the Provincial Director of the Department of Land Affairs after consultation with the relevant structures.

Grants awarded to applicants who have applied as a group, must be disposed of according to collective decision making, as determined in the group's charter or constitution. The pooling of grants does not preclude catering to differences among applicants in terms of how the money may be used, for example, the group may agree that some applicants will benefit more in terms of agricultural land than housing, while other group members will benefit more in terms of housing than land.

Disbursement of the grant for capital items (for example, livestock, machinery, wind pump) to be used in agricultural production and settlement, but excluding seasonal inputs (for example, seeds, fertilizers), will be subject to the following conditions.

@ The allocation of the grant for this purpose reflects the informed decision of the beneficiaries.

@ It is linked to the acquisition of land.

@ In cases where capital items are to be bought on the land to be acquired, these should be valued and specified separately as part of the valuation of the property being considered for purchase.

Any government assistance for either land purchase or on-site services (excluding grants for provision of connector and/or bulk infrastructure) will be debited against the grant and/or the Housing Subsidy. To effect this, the grant will be registered on the same national data base as the national Housing Subsidy. A qualifying person may apply for both, and in any order, but cannot qualify for a total of more than R15 000. Also, any settlement benefits received from the government since 1 April 1994 will be taken into consideration in deciding the value of the subsidy which a qualifying person may obtain.

The grant may be applied to the acquisition of state land, where this is available and has been identified for redistributive purposes. The value of the state land would be debited against the grant for which the applicant qualifies.

The burden is on the applicant to consider carefully in advance how to use this once-off resource. By choosing to use the grant in a certain way, the applicant may have to forego other possible uses, particularly if the applicant has already drawn near the maximum. There should be flexibility in terms of how an applicant may seek to secure grant finance over time. For example, the applicant may apply for and be awarded a portion of the R15 000, and may then re-apply for an additional portion at some later date.

Until an award of a Settlement/Land Acquisition Grant is approved, the applicant(s) will generally not be in a position to make a firm offer on a particular piece of land. Properties offered for sale should nonetheless be identified and their affordability assessed on the basis of what share of the Grant might go towards land purchase and the size of their own contribution.

The grant will not necessarily cover the total costs involved in land

acquisition and development. Own equity, loan financing and other sources may have to be tapped, either in terms of a partnership agreement or according to some other arrangement, for example, as may be developed in the course of the planning processes assisted through the Settlement Planning Grant.

The grant will be applied in a flexible way – to allow local initiatives to be accommodated in a range of different land acquisition and tenure situations. For example:

@ in which land is to be acquired and held under individual or communal freehold tenure;

@ in the conversion of an insecure form of tenure to a more secure form;

@ in equity schemes;

@ in off-farm and on-farm settlement options for farm workers.

The grant can be obtained on application to the Department of Land Affairs. This must include a business plan. Depending upon the circumstances, the applicant(s) may need the assistance of a planner, who may be financed through the Settlement Planning Grant (see Section 4.25)

The application will be reviewed by the relevant Provincial Director of the Department of Land Affairs. The Provincial Director will obtain advice from the relevant provincial and municipal structures and departments and thereafter make decisions on grant applications in terms of the criteria set out above (see Section 4.22). The response to an application could be outright rejection (for example, if it does not fall within the brief of the Department of Land Affairs), rejection with suggestions for re-submission (for example, application may have merit, but needs refinement), partial approval (for example, only some of the group's intentions are considered worthy of funding at the time), or full approval. The review of the grant applications will be flexible and informative. The Department of Land Affairs will draw on its accumulated experience as much as possible to communicate with applying groups as to how they may improve their applications .

The grant is to enable primary local authorities to acquire land to extend or create

a commonage for the purpose of establishing schemes involving the productive use of the land resources (for example, food gardens, arable, grazing, wood fuel and other veld products, eco-tourism) by or for the benefit of poor and disadvantaged residents. Ownership would be retained by the municipality which would lease the land to qualifying applicants.

The Department of Land Affairs will consider applications from primary level municipalities, subject to the following conditions being met :

- @ the applicant provides an undertaking to lease the land thus acquired to its poor residents;
- @ a plan is provided by the municipality showing how the land will be used, developed and managed;
- @ potential users have participated in the process and have indicated a willingness to contribute payments within their means;
- @ the application is accompanied by a full disclosure of the municipality's books and information on its existing land and leasing arrangements;
- @ a contribution is forthcoming from the municipality for the purchase and/or development of the land to be acquired;
- @ the applicant makes a commitment to budget to meet the demands of its poor residents, especially in relation to leasing its land;
- @ the purchase price of the land to be acquired reflects prices obtained in market-related sales of land in the locality.

To ensure that the land acquired with the grant is used for the intended purposes, a notarial deed of perpetual servitude will be endorsed on the title deed.

The application for the grant will be appraised by the Provincial Director of the Department of Land Affairs. The recommendations of the relevant provincial authorities and other key role players will be solicited in considering the application. In determining the level of the grant the following criteria will be considered:

@ the total amount of money available for acquiring Municipal Commonage within the financial year and the expected demand for such grants;

@ the principle of fairness and equity;

@ the level of need of residents – the most critical needs will receive priority;

@ the number of residents who will benefit – the principle being to maximise the benefit while maintaining sustainable land use;

@ the number of women who will benefit directly;

@ the viability of the land use plan and the administrative institutions in place to manage this.

The grant is to assist poor communities to plan for the acquisition, use and development of land and for the mobilisation of resources required to do this.

The grant is designed to support each of the Department's three sub-programmes, namely restitution, redistribution and tenure reform. The grant can assist applicants for the Settlement/Land Acquisition Grant. It could also be used to support land reform initiatives undertaken by other institutions, for example, local authorities and NGOs (for example, churches) who wish to use their own land resources to implement land reform projects.

The grant enables those engaged in land reform initiatives to select and appoint Department of Land Affairs-accredited planners and other professionals from private firms and NGOs, with whom they will collaborate on a strategy for land reform. The services which can be covered by the grant include legal and financial-planning assistance, land use planning, infrastructure planning, land valuation, and assistance with land purchase negotiations, including the formation of a legal entity.

There are two principal planning phases that may be financed through the Settlement Planning Grant:

@ preliminary settlement, land use, and/or business planning, contributing to the preparation of a Settlement/Land Acquisition Grant Application;

@ detailed settlement, land use, and/or business planning, after land transfer.

A given applicant may seek to take advantage of one or the other, or both. In certain restitution cases, the grant may be made to claimants early on in the negotiation process, on conditions to be determined on a case-by-case basis.

Applicants for the Settlement Planning Grant can be made by, or on behalf of, lawful citizens or permanent residents of the Republic of South Africa, listed in Section 4.22.

The Settlement Planning Grant (estimated at 9% of the project cost) is intended to be disbursed in two stages: 3% for feasibility study and 6% for detailed design. Provincial Directors should use their discretion in deciding how much to allocate at each stage. For projects of average size and complexity, the initial stage payment for feasibility study will usually be adequate. Only the large and complex projects would require a second instalment to pay for a detailed settlement plan.

9% of the total project cost should be seen as a reasonable upper limit to allocate to planning, rather than a hard and fast rule. Proposals to spend sums in excess of that amount on planning will be examined closely. The twin dangers of over-planning and over-expenditure on planning are ever present.

In cases involving land restitution and land tenure reform, the amount of the grant will be determined on a case-by-case basis.

Interested parties wishing to acquire land under the Land Redistribution Programme should make contact with the office of the Department of Land Affairs within the province concerned. They should provide information about the applicants, where they are looking for land and clarify what the land is to be used for. If the request for assistance is appropriate, and with the assistance of the relevant departmental official, they should complete a Registration-of-Interest Form. A request for a Settlement Planning Grant will then be

prepared, on their behalf, by the official concerned and submitted to the relevant Provincial Director.

Many situations may require a range of skills. In these instances, a lead planning agent will be selected who, by agreement with the applicant, sub-contracts under a consortium arrangement for planning.

The grant may be obtained by under-resourced, poor or rural local authorities for use in preparing Land Development Objectives in terms of the *Development Facilitation Act, 67 of 1995*. Land Development Objectives require local authorities to set out a development vision for their area and to consult with local stakeholders and other relevant parties in the preparation of this. Where the Department of Land Affairs funds the preparation of Land Development Objectives, a condition of the grant is that land reform planning is undertaken as part of the exercise. It is hoped that this will begin to ensure that land reform is harmonised with broader development plans. For the land reform programme in both a rural and an urban context to be sustainable, it requires support services and infrastructure that enable people to make productive use of the land. Land reform also exerts additional pressure for the provision of services – water, sanitation, infrastructure, housing, agricultural extension and so on. The long-term success of land reform is closely bound up with the extent to which it is an integral part of local and provincial level planning.

The Department of Land Affairs hopes that in the medium-term, land reform planning will become an integral part of all Land Development Objectives, whether or not they are funded by it. Embodying this in statute may require amendments to the *Development Facilitation Act*.

Applications for a grant should be made by the concerned provincial or local government authorities, or organised community structure, to the Department of Land Affairs.

The merits of the application will be considered and the applicant notified in writing of the decision, together with any conditions deemed necessary. In determining the amount of the grant, the scope and content of the planning brief of the planners, and other professionals concerned, will be taken into consideration,

as well as the funds available.

Physical planners use the term *land development* to describe the process of identifying, acquiring and releasing land and water resources for development - for housing, for schools and hospitals and other public services, for recreational facilities, for business premises and for productive infrastructure. In townships and settlements where building and settlement have taken place without formal planning, land development is concerned with upgrading and ameliorating physical conditions. Land development policy therefore has to cater for a wide variety of needs and circumstances.

In the context of land reform, land development policy is designed to establish a framework and procedures to facilitate the speedy release of suitable land for urban and rural development programmes which will benefit those who were marginalised by previous apartheid policies.

5.3.1 Problems in rural areas

In the past, rural land use planning was strongly polarised. One system was developed to serve the needs of large-scale commercial farming. It stressed specialised and exclusive land uses, with the *Subdivision of Agricultural Land Act, 70 of 1970*, being the main instrument to implement zoning regulations, based on questionable notions of economic units of farming land (see Box 3.3).

The other system was devised for the very different circumstances of overcrowded black labour-reserve areas, mostly in the former Bantustans. 'Betterment planning' stressed the concentration of population and rigid demarcations of land uses. This undermined the livelihoods of rural people who depended on a combination of income sources. Small-scale farming, where it has survived, has been forced to conform to labour reserve policies and betterment planning. In some areas, this has led to distant arable lands being abandoned in favour of intensively cultivated gardens near the homestead, often on plots too small to produce significant benefits.

The regulations governing land use in these areas are derivatives of the regulations promulgated in terms of the *Black Administration Act, 38 of 1927*. These regulations, whether contained in various versions of the betterment or R188 regulations, are authoritarian, have inappropriate punitive measures and have no provision at all for public participation. The regulations hand responsibility for administration to magistrates who must consult with tribal authorities. In many areas, these regulations are not administered at all. There is a serious need for a new land use planning and a development planning and control system responsive to the needs of people living in these areas.

5.3.2 Problems in urban areas

Urban land use patterns in South Africa's towns and cities have been brought about by a combination of social and economic forces, apartheid planning and approaches to physical planning which have frequently been adopted from First World countries. Geographic segmentation of urban areas according to race and class, urban sprawl and disparate levels of service provision and access to urban amenities in different areas, make South African cities extraordinarily inequitable.

Deconcentration and decentralisation policies have given rise to isolated settlements on the urban fringe which are functionally dependent on the urban centre. Racial segregation and the resulting townships located on the urban periphery have exacerbated sprawl. It has been reinforced by low density development, which makes insufficient use of investments in the provision of urban infrastructure and amenities.

Urban sprawl also imposes high costs and time wastage on society in terms of journeys between residential areas and places of economic opportunity and social amenity. It increases the capital costs (particularly of the provision of services) and operating costs of urban infrastructure

(especially transportation). The poor are adversely affected by dispersed urban development, being effectively trapped in many parts of the city by the high cost and lack of transport.

There are a variety of constraints to the identification of well located land to improve access for the urban poor to the city. These include zoning regulations and, until now, a reluctance by some local authorities to take responsibility for identifying and releasing land for development. Objections to new developments from existing communities also have to be resolved. Legislative constraints and the high cost of land assembly have resulted in the scarcity of land for low income housing.

5.4.1 Creating a coherent and integrated legislative framework

Current legislative incoherence must be transformed into an integrated, efficient and equitable planning and development system that establishes a balance between the public interest and private property rights. It must foster a financially, socially and environmentally sustainable approach to land development and the spatial integration of towns and cities and establish speedy land development procedures. Furthermore, clarity should be created at each level of government in relation to responsibilities in land development. The *Development Facilitation Act, 67 of 1995*, discussed below, is seen as a key means of achieving this.

The Department of Land Affairs, as the principal department responsible for the Act, has an important role to play in supporting various departments and levels of government in the implementation of their powers and responsibilities for planning and regulating land development in terms of this Act.

5.4.2 Reforming the institutional framework

To achieve clearly defined roles and responsibilities for both the private and public sector and the different levels of government in land development, effective and appropriate institutions and public participation in the land development process are required.

The devolution of responsibility to lower-tier governments, in order to deal with diversity in land supply and demand, financial resources and institutional capacity, will not be effective without properly functioning local institutions. Resources and support to develop this capacity at local level must be accorded priority by both national and provincial governments.

The Development and Planning Commission established in terms of the *Development*

Facilitation Act, 67 of 1995, has the reform of planning frameworks and the clarification of institutional roles and responsibilities as a key element of its work. The Commission's terms of reference have been curtailed and its time-frames shortened in order that its recommendations can be incorporated into policy and law as soon as is possible. The Commission's revised terms of reference are as follows:

@ to elaborate on and provide mechanisms and procedures for the effective use of the Chapter One general principles of the Act and to establish mechanisms for monitoring compliance with these principles;

@ to analyse and assess all existing planning legislation and its consistency with the Act; and to devise appropriate mechanisms for establishing a framework for planning at national, provincial and local government levels;

@ to investigate instruments that may be used for the establishment and administration of appropriate land use planning and control systems for both urban and rural areas, at local government level.

5.4.3 National land use planning

A coordinated land use management system within national government and between national and other tiers of government is necessary. This requires a coordinating capacity to manage land use planning at national government level, as well as inter-governmentally. Decisions about optimal use of state land would be an important aspect of this work.

To develop and establish such a system, an inter-departmental committee at national government level should be established. This body would need to define the scope of coordination, develop the principles, criteria, institutional framework and decision-making processes necessary for its effective functioning.

The existing Forum for Effective Planning and Development, that brings together national departments and provincial MECs responsible for planning, may well be the appropriate body to oversee the establishment of this capacity. The scope and content of its work should be resolved by that body in relation to a broad spatial, strategic and national development plan. A priority task will be to work with the role players in the public and private sector to set in train the processes needed for the definition and delineation of zones (ie areas of high agricultural potential; priority conservation areas; residential areas; and industrial development) essential for the sustainable development of the nation's resources.

The establishment of a coherent and accessible framework for land development will be achieved only in the longer term. However, in the short term, impediments to speedy land release threatens the success of urban and rural development programmes. In order to provide a means to speed up land development processes, pending thorough-going reform of planning and land development frameworks, the *Development Facilitation Act* has been formulated.

The Act will facilitate appropriate and speedy land delivery by establishing:

@ nationally uniform norms and standards in relation to land development;

@ national legislation in parallel to provincial (inherited) laws as an alternative to more appropriate mechanism for rapid land delivery;

@ a mechanism for early registration of tenure in order to facilitate the flow of housing finance and reduce the costs of holding land; and

@ a National Development and Planning Commission to investigate and make recommendations on a land development framework for the country.

A feature of the Act is the legal requirement for structured interaction and consultation between various departments and levels of government.

The Act has the potential to usher in a new era of principle-led planning. General principles relating to land development have been formulated to promote efficient and integrated land development. Future land developments will be considered with reference to these principles which constitute a nationally-binding set of norms. The elaboration of these principles in order to give greater guidance to provincial and local governments rests primarily with the Minister for Agriculture and Land Affairs.

Box 5.2 summarises the general principles, which apply to all land development, which are set out in the Act.

The *Development Facilitation Act* introduces measures to facilitate and expedite land development projects. It aims to overcome bottlenecks in existing regulations

to accelerate land development, especially the delivery of serviced land for low-income housing.

A key innovation is a provision for ‘staged’ tenure. This will allow for tenure security to be provided at an early stage in the land development process. This will allow a greater proportion of subsidy finance to be used for physical improvements, through minimising the holding costs of undeveloped land. The subsidy will therefore be made available at an earlier stage than is the case at present.

‘Staged’ tenure will also assist in other settlement situations, including those where a phased provision of services is likely. This means that people settling on unserviced land will be able to acquire tenure security immediately, and hence, an inducement to invest in improvements.

The *Development Facilitation Act* makes provision for the formulation of 'land development objectives', or development performance measures, at local government level, as a fast track alternative to current time consuming procedures. In this way the development intentions and performance of local government can be assessed by provincial governments. Land development objectives are important tools to guide land development decisions with reference to goals to development in that particular area as well as with regard to the availability of resources in the area. Some local authorities, especially rural institutions, may need to be supported in the formulation of these objectives, in order to avoid delays in decision-making. The process of setting Land Development Objectives must be harmonised with the Integrated Development Plans required in local government legislation. Discussions on this are in progress between the Department of Land Affairs and the Department of Constitutional Development and Provincial Affairs.

The *Development Facilitation Act* operates in parallel with existing land development and planning legislation. Its key implementation mechanism is the establishment of provincial development tribunals which will be responsible for government approvals of land development under the Act, and will permit faster development decision-making, conflict resolution between stakeholders and greater community involvement in land development.

The tribunals will be staffed from the public service and land development experts. They are new institutions that will need to be established and resourced. The new tribunals may be flooded with applications under the *Development Facilitation Act*, which could aggravate likely resource constraints and be used for applications which could be accommodated by the existing legislation. Provinces may need to prioritise the nature and scope of land development applications to be dealt with through the tribunals in their early stages of formation.

The National Development and Planning Commission, to be established under the *Development Facilitation Act*, will investigate a new legislative and policy framework for land development and planning in South Africa. Its purpose is to advise national government and, if so requested, provincial government on future policies and laws dealing with land development procedures.

The Commission is seen as a key initiative for the achievement of an integrated, efficient and equitable development and planning system. It provides for provincial nominees (from the public and private sector) to sit on the Commission or, alternatively, for the provinces to set up and fund their own Development and Planning Commissions to investigate provincial land development issues. The Act requires that the Commission, apart from government officials, will be made up of representatives of suppliers of goods and services in the land development

industry, representatives of the intended beneficiaries of land development and experts in areas such as land registration, engineering standards, planning, the environment, transportation, etc.

The *Development Facilitation Act* allocates appropriate roles and responsibilities to the different tiers of government with respect to land development. It also requires far greater co-ordination than hitherto, between the different government institutions involved in the land delivery system.

Public land includes land held by provincial and national governments, as well as land owned by local authorities and land belonging to parastatals or other enterprises wholly owned by government. State land is land which is held by the national and provincial governments, but excludes local authority and parastatal land. It includes former SADT land and land already allocated to communities and individuals in the former homelands and former coloured reserves. Although the ownership and hence the extent of government control over this land varies, public land is a national resource, the uses of which should be governed by a policy that supports the government's macro-economic, human development and redistribution goals.

There are a broad range of policy issues in relation to public land. For example, there is concern that the asset should be effectively managed in the public's best interest; that the tenure rights of those who beneficially occupy public land should be secure; and that public land should be properly allocated for land reform and for the national development programme.

The Land Development Policy, discussed above, is taken as the overarching framework within land use and development decisions around public land should be made. Government's key responsibilities in regard to public land include the following:

@ to ensure the release of state and public land as a resource for sustainable development;

@ to create an accessible and accurate and comprehensive information system on public land holdings;

@ to establish, in consultation with other tiers and departments of government, clear and transparent criteria for the development or disposal of state and public land;

@ to establish acceptable mechanisms for public consultation on the use of state and public land;

@ to clarify the roles and responsibilities of different tiers and departments of government in regard to public land.

To ensure an effective and transparent system of public land management in South Africa, it is important to clarify the roles and responsibilities of the different tiers of government, and of other authorities in relation to the administration, planning and disposal of public land. In so doing, a range of factors need to be considered, including relevant constitutional provisions and the establishment of clear mechanisms and procedures to facilitate co-operative governance

The division of state-owned land between national and provincial governments was dealt with by section 239 of the interim Constitution. Section 239 provided for the classification of state land as national or provincial state land. The new Constitution therefore does not deal with the vesting of state assets, as this was already dealt with by the interim Constitution. On 27 April 1994, all state land vested in either the national government or a provincial government, in accordance with the principles set out in section 239. Item 28 of Schedule 6 of the new Constitution re-enacts the previous 'section 239 certificate' provisions of the interim Constitution. As before, certificates are to be issued by a 'competent authority' (currently the Minister for Agriculture and Land Affairs) who is responsible for confirming whether the land has vested in national or provincial government.

Within national government, clarity is also required in relation to state land management. At present, the *State Land Disposal Act, 48 of 1961*, as amended, splits responsibility for this land between the Minister of Public Works and the Minister for Agriculture and Land Affairs. The Minister of Public Works is responsible for former RSA land and the Minister for Agriculture and Land Affairs, for the former South African Development Trust land and for land within the former homelands. This division creates substantial administrative difficulties.

5.7.1 The agreement with the Department of Public Works

The Department of Public Works and the Department of Land Affairs have recently reached an agreement on the rational allocation of responsibilities for the management and disposal of land (see Box 5.4). The agreement recognises the need to rationalise state land custodianship, administration and disposal functions into distinct and complementary roles and responsibilities between the two departments.

The agreement not only defines areas of key competency and responsibility, but also establishes a mechanism through which decisions can be made on the allocation and use of this land. The mechanism and the structures underpinning them are based on the principle that decisions around use of state land are best taken at a decentralised level and through a cooperative process of land identification and negotiation around its use by the relevant authorities.

5.7.2 State land planning committees

The Minister for Agriculture and Land Affairs holds a large quantity of state agricultural land. A Power of Attorney in respect of the administration and disposal of this land has been made out in favour of the national Department of Agriculture. This Department will take responsibility for delegating its responsibilities under the Power of Attorney to provincial Departments of Agriculture that wish to assume them.

The principle underpinning the allocation and disposal of this land, and the procedures through which this is to take place, is governed by a framework for co-operation that has been agreed between the Department of Agriculture and the Department of Land Affairs.

The foundation of this co-operation is an agreement on the harmonisation of policies on land reform and agriculture with respect to the planning, disposal, financing and servicing of settlement projects, and the joint planning of individual settlement projects in such a way that this will both inform and be informed by policy on land reform and agriculture.

Close liaison between the two departments at a national level, as well as co-operation with Provincial governments on the development of policies and provincially based strategies and guidelines for the disposal of state land is fundamental to the success of this policy.

Joint State Land Planning Committees will be established on a project level for the purpose of managing the compilation of a Settlement Project Plan for the properties concerned. As in the case of the State Land Disposal Committees, officials of both national departments, as well as provincial authorities and other identified parties will be part of this structure.

The Settlement Project Plan will contain all information relevant to the allocation or disposal of identified properties and will include in addition to a physical description of the land, a consultation strategy for the project; the criteria to be used for the selection of beneficiaries, including small-scale farmers; the financing arrangements for the project and the subsidy amounts involved; the pricing policy to be applied in cases of sale and lease; and an implementation strategy that will identify all authorities and institutions that will be involved in the project.

5.7.3 General obligations

Holding of state land by one department or tier of government, does not mean that other state agencies do not have obligations in relation to it. Responsibilities with regard to the allocation and use of state land are also regulated by public law and statute. It is therefore possible for national government to exercise functions in relation to state land which vests with provincial government, or public land which is held by local government. For example, the *Upgrading of Land Tenure Rights Act, 112 of 1993*, vests with the Minister for Agriculture and Land Affairs and applies to townships where land is held by the provincial government. Another example is that of the *Development Facilitation Act* which lays down uniform norms and standards for land development which is applicable to all public land in the country.

The holding of land on behalf of the state brings with it criminal and civil liabilities and the legal competence to enter into contractual arrangements relating to the land. The holder is also responsible for maintaining an asset register and is accountable to the Auditor General. In view of the legal and practical consequences of holding state land, clear lines of responsibility need to be drawn.

As is stressed above, government agencies, as major urban and rural landholders are in a unique position to make an important contribution to national development by releasing land for social upliftment and economic development. This must be done in a socially responsible and economically sensible manner. Both the need for land, especially for the poor and dispossessed, and the development potential of the land, should be considered when determining its use and allocation.

The different levels of government should have a constructive attitude to the disposal of public land for development, in addition to responding positively to requests for its use. The creation of a governmental capacity to identify potential developments for a particular piece of land within the context of national, provincial and local development plans is a key element of this. The State Land Disposal committees described above provide the means for a process of land identification and categorisation to be undertaken jointly by all three spheres of government.

Within this categorisation process to be undertaken by these committees, a prioritisation of land uses and a hierarchy of needs must be developed to guide decision making. As already stated, the use of land for state domestic purposes, as well as the earmarking of land for restitution - either as land to be returned to claimants, or as compensatory and alternative land - are high priorities. The allocation of land for redistribution purposes has a high priority in a rural context. In an urban context, the use of state land for social infrastructure, including housing programmes, small and medium enterprise development and urban agriculture are priority uses.

Each piece of state land should be examined in relation to a hierarchy of needs and uses before any disposal decisions are taken. Consistent with this is a position that the sale of state and public land on the open market should be considered only if the land is unsuitable for state-assisted development. Furthermore, the funds generated through the disposal of state land should be used, where possible, in support of further land acquisition for development purposes.

In situations where there is no clearly identified eligible community which might acquire the land, its disposal or allocation should take place through a range of mechanisms, including calls for proposals from the public for the development of the land, open tender, invited tender and, as a measure of last resort, public auction. In cases where these forms of disposal are chosen, the transparency and legitimacy of the process will depend significantly on the extent to which information is widely disseminated to all interested parties, including the basis on which decisions are to be made.

5.8.1 Public consultation processes around the disposal of state land

Clearly structured public participation and consultation is essential for decision making on the allocation and use of public land. Time and resources invested in the process significantly reduces conflicts due to dissatisfaction with decisions. The consultation process, however, does need to be carefully devised, with the roles and expectations of different players, as well as the decision making processes involved, clearly defined from the outset.

In cases where state or public land is allocated as part of the land reform programme to qualifying beneficiaries, the land reform services that apply generally would be made available. These include the provision of grants to facilitate community planning for the use of the land and its development.

5.8.2 Guidelines for land pricing

State land has a value which should be taken into account when it is transferred to beneficiaries of the Settlement/Land Acquisition Grant, even if it is a book value. For fairness sake, the formula set out in Section 4.6 for the valuation of private land should be used for state land, which should be sold or transferred at a just and equitable price, usually based on an analysis of comparable market sales. Where there are no comparable sales data for the locality, prices of comparable land in a similar area should be used. Other proxies, for example the prevailing rental values in informal land markets in the area, may provide a basis for valuation.

5.8.3 Guidelines for leasing state land

Until such time as a permanent use for available state land has been decided, it is necessary for government to ensure that the land is used beneficially through short term leasing, ie up to three years.

The procedure to be followed in the advertisement of the land, the selection of beneficiaries and the management of lease agreements should be fair and open to public scrutiny. In the selection of beneficiaries, preference should be given to the disadvantaged and the poor. Care should, however, be taken to ensure that the land is used productively and in a sustainable way. In the case of agricultural land, it would be appropriate to give preference to people with farming experience, including farm workers, labour tenants and small farmers.

Rental payable should be market based, although there should be flexibility in the application of this general rule in line with the 'sunrise' subsidies proposed in

Section 4.5.9.

It is clear that the effective implementation of the policy proposals made above, rests to a significant extent on the availability and accessibility of information regarding the location, current and potential future uses and value of state and public land. Without such a data base, the current confusion, lack of coordination, and missed opportunities for strategic land use decisions will continue.

A register of state land is being compiled. It draws on information within the Department of Land Affairs, including that which can be drawn from the cadastre. It will also include relevant information that will be collected during the compilation of the Register of State Assets by the Department of Public Works. The development of the DLA register of state land is being done in such a way that changes in land use and disposals can be recorded and the database regularly updated.

At present, there is no legislation, apart from the directive in the *Restitution of Land Rights Act*, that a register of public land should be established, that requires parastatals and local authorities to publicise information on their land assets and uses.

There are many parastatals in South Africa, each governed by their own founding statute and with differing mandates and responsibilities to government. All of these bodies hold land. In some cases their land holdings are extensive and spread throughout the country in both urban and rural areas. Transnet, for example, owns in excess of 50 000 properties. There is no easy means of accessing information on parastatal land, its location or planned usage. In many cases, parastatals themselves may not be aware of the full extent of their land holdings.

It is proposed that the state land inventory be broadened to become an inventory of public land, and that parastatals will enter details of their land-holdings into it.

The incorporation of parastatal land into the public land register, as discussed above, will facilitate public access to a key area of information regarding public land. It will make it easier to identify parastatal land that is not intended for core business purposes and that may be able to be accessed for a range of development purposes, including for land reform purposes.

Local authorities, like the parastatals, are major holders of public land. This land is often well-located and would be suitable for social infrastructure. In many cases,

over the past years, local authorities have tended to use their land as a source of revenue, and have drawn upon provincial land assets for low-cost housing and other social purposes.

National schemes which assist local authorities to acquire commonage for agriculture for their poor residents, or land for affordable housing, will require that, where possible, local authorities also contribute to the proposed developments. Local authorities will be asked to demonstrate their good faith in this regard by entering their land holdings in the public land register.

The commitment by national government to create a land administration and land reform implementation capacity at the most decentralised level of government possible implies the establishment of measures to support the process of building a capacity to deal with land issues at a local government level. This is referred to in the institutional arrangements for implementation in the following chapter.

The problems in the current land administration system have been described in Section 3.6. In the long run and as part of a tenure reform programme, government is committed to the eradication of the permit based system of land administration and land control, and to the transfer of land that is in the nominal ownership of the state, to its real owners. In the interim, the administrative problems that have been identified must be addressed. In order to do this, an interim approach has been developed in consultation with the Provinces. This strategy is outlined below. It deals with both an interim approach to permit based systems as well as clarifying the roles and functions of, and relationships between different spheres of government in relation to identified categories of land. It is based on the guiding principles set out below.

5.12.1 Guiding principles

The principles guiding an interim approach to land administration are as follows:

@ Permit based systems of land administration and control should be abolished as part of the tenure reform programme which is a major element of the national land reform programme.

@ The reform of land administration legislation should address

the desirability for there to be uniform legislation governing township establishment and other development within a province. In other words, all legislation and mechanisms for township establishment and other developments should apply right across the province. This means the probable replacement of former homeland and other apartheid laws by legislation that is applicable province-wide.

@ The provinces have land of their own that requires management and administration, and also have a responsibility for certain land administration matters that are assigned or delegated to them. In carrying out these responsibilities, they have a responsibility to ensure that the rights and interests of existing occupants of state land are recognised and protected.

@ The national government has a similar responsibility with regard to land which it administers. When a transfer of ownership of national state land to a province or other party is contemplated, the Minister will take steps to ensure that township establishment or other development does not violate any rights or interests of occupants of the land.

@ The present laws applying to former homeland and SADT areas contain a mix of ownership and governance functions. This derives from the system of trusteeship which located the state as both the owner and the administrator of land. It is necessary at all times to distinguish clearly between those functions which arise from *ownership* and those which arise from responsibilities for *governance*.

@ Schedule 4 of the new Constitution provides that development functions on this land are in the first instance the responsibility of the provinces. Land use planning and control measures are similarly provincial matters exercised within the framework of national norms and standards.

@ Section 239 of the interim Constitution vested land in national or provincial governments, depending on the function for which it was used or intended to be used on 27 April 1994. The purpose of the certificates issued in terms of section 239 and in terms of item 28 of Schedule 6 of the new Constitution is to enable the land to be registered in the name of the appropriate government. This is necessary in order to make it possible for the land to be legally transferred.

@ The state carries out various functions of governance in relation to land.

The fact that a particular government performs functions in relation to land, does not necessarily require it to be the owner of that land. National government may have governance responsibilities in relation to provincial state land, other public land and private land. Provincial governments may have governance responsibilities in relation to national state land, other public land and private land.

@ The ownership of state land must be identified in relation to the function for which the land is used, and whether the land is held by the state on a nominal basis on behalf of others. It is possible for both tiers of government to have responsibilities in relation to the land, regardless of whether it is owned by provincial or national government.

The above guiding principles delineate the separate and joint responsibilities of different tiers of government in relation to land administration. They identify key areas where co-operation between the different tiers is essential. They emphasise that the interests of the occupiers of land must be carefully considered in making decisions.

The eradication of the permit-based systems of land administration, as part of the tenure reform programme, will ensure that the laws and regulations that govern the lives of black people, in the former homeland areas and on former SADT land, will be no different to those that govern other South African residents. Attaining this will take considerable time. The proposed interim solution that is set out below is both a holding measure and a step along the way to achieving the transition. Interim measures must neither exacerbate existing problems, nor impose new administrative systems that will themselves require substantial capacity building in the short run.

The following interim strategies have been developed for the administration of land in proclaimed towns inside the former homelands and on former SADT land, as well as for rural settlements and villages in these areas. The strategy is intended to bring a degree of administrative certainty and constitutional compliance to a situation which until now has been chaotic and confused. Its successful implementation is dependent on a close working relationship between national and provincial government in this regard.

5.13.1 Proclaimed towns in the former homelands and on former SADT land

Proclamation R293 of 1962 and its derivatives are the key pieces of legislation regulating the administration of these areas. The proposals made here are in relation to its provisions, and bearing in mind that procedures laid down in the various pieces of

legislation may vary from area to area.

Division of functions: The functions related to establishment and administration of townships, as well as the lease and disposal of land within townships, vest in the provincial governments and are exercised within the framework of the national norms and standards applicable to these functions. The Department of Land Affairs is responsible for functions related to the registration of deeds of grant and rights of leasehold. The provincial governments are responsible for the preparation and lodging of the documents which are necessary for registration to take place.

Assignment of functions: The regulations governing the development and administration of townships have been assigned to provincial governments with the exception of the regulations applicable to the former homeland areas in the Free State and Gauteng and the regulations issued under the *KwaZulu Land Affairs Act, 1992*. These outstanding assignments will be carried out.

Rationalisation of legislation: There is a need to rationalise legislation and bring the laws that apply in these areas in line with the rest of the country. This could be done through the repeal of R293 and its replacement by existing laws such as provincial township ordinances, the *Development Facilitation Act* and other legislation. Alternatively, it could be done through the promulgation of new legislation as is currently the case in the Western Cape and Gauteng. Provincial Governments are responsible for making such changes. The Department of Land Affairs has a responsibility to ensure that the rights in land which follow from this can be registered in terms of laws of general application. It is also responsible to repeal the regulations dealing with the registration of deeds and grants and leasehold rights, where this is required.

There are some important land ownership issues to be resolved in the proclaimed towns in the former homelands and on former SADT land

Section 239 certificates: The sale of state-owned land in these townships is restricted by, *inter alia*, the fact that for the most part Section 239 certificates have not been issued in these areas. The identification of the areas for which this must be done is a priority activity. The issuing of these certificates should be linked to an agreement between national and provincial government to ensure that those properties in townships, which are used for national state domestic purposes, are transferred back to national government when township registers have been opened and title can be transferred.

Transfer of land for township establishment: Provincial governments need to identify state land earmarked for township establishment. Where this land is certified as national government land, submission should be made for the transfer of this land from national government to provincial or local government. In addition, provincial governments are responsible for ensuring that municipal land, public spaces and, where appropriate, properties available for lease or sale are transferred to the local government. Legislation is being prepared to facilitate this by making it possible to transfer these properties to local authorities by way of an endorsement on the title deed.

Rights of occupiers: In the past, township establishment has taken place, without consent, on land which is registered in the name of the state, but which in fact belongs to individuals and communities. In this process, the rights and interests of these occupiers have not been adequately protected. This should not be allowed to take place in future. If it does, the provincial governments responsible are liable for compensation of the owners. In addition, before national government land is transferred for township establishment, the Minister will need to be satisfied that township establishment does not violate any rights or interests of occupiers on the land.

Disposal of land: Provinces should have the power to dispose of land which they own. To achieve this they can either enact their own legislation, or have the functions in terms of the *State Land Disposal Act, 1961*, as it applies to the former homeland areas and former SADT land, delegated to them under that Act. Provinces could request the same delegation in relation to provincial state land outside these areas from the Minister of Public Works.

5.13.2 Rural settlements and villages

Given the land administration issues set out in Section 3.6 and Box 3.2 (regarding Proclamation R188), the proposed strategy is as follows:

Land allocation

@ Proclamation R188 of 1969 and its derivatives will be amended so as to ensure that constitutional requirements for equality, due process, and representation in decision making are observed in the regulations. In doing this, an attempt will also be made to achieve greater uniformity in the various versions of R188 within and possibly between provinces.

@ In recognising the extent of administrative breakdown and the realities on the ground, the requirement for compulsory PTO registration will be done away with, except where it is locally desired and where provincial and local government have the capacity to implement it.

@ Where the system continues to apply, the rules for the allocation and registration of allotments should be amended to embody gender equality, the family as the unit of occupation and the right to inheritance.

@ Where the PTO system is not enforced, existing allocation processes should be allowed to continue subject to a minimum set of rules in terms of democracy, equality, fair process and the protection of existing rights.

@ Where the allocation process is abused, provision will be made for lodging of complaints and for the development of an institutional and legal capacity to act effectively in regard to these. In this regard, the location of personnel dealing with land issues at a district council level, would facilitate the receipt of complaints and dispute resolution. Provision will also be made for an appeal mechanism to deal with cases where agreement cannot be reached.

@ The regulations will be repealed as soon as tenure reform legislation is introduced.

Land use: The design of an appropriate mechanisms to implement land use control measures at a local level and outside of urban areas will be a priority focus of the Development and Planning Commission provided for in the *Development Facilitation Act*. This will result in a rationalisation of legislation that will in all likelihood mean the repeal of these sections of the regulations. In the interim, the regulations will be amended to achieve greater uniformity in the application of the different versions of R188. Provision will be made for greater community participation in land use planning and control. The location of personnel dealing with land issues at a district council level will facilitate the development of a land use planning capacity in these areas. Consideration will be given to the establishment of land use planning officers at provincial and possibly at lower levels of government.

Division of functions: The national Tenure Reform Programme has as its key area of concern, the rights in land of the people living in these areas. National government has a responsibility for these areas in relation to this programme.

The conflation of ownership and governance functions in the legislation applicable in these areas, means that government is often carrying out functions that are not its inherent responsibility. The Tenure Reform Programme will separate these functions, so that ownership can be transferred from the state to the communities and individuals on the land. This will allow government to carry out its governance functions. The owners of the land will assume full responsibility for ownership responsibilities that include land allocation. Until this happens, however, the state has a residual responsibility for the administration of this land as nominal owner. The responsibility for the allocation functions is vested in national government until ownership is transferred. Responsibility for the registration of land rights in these areas also vests in national government.

Adopting the same approach as for proclaimed townships, where land in these areas is used for national government functions, responsibility for its administration rests in national government. Where the land is used for Schedule 4 functions, the provincial government is responsible for administering the land, and where appropriate, for transferring this responsibility and/or ownership to local government. The administration of land use planning and control measures in regard to this land is also a provincial matter, subject to national norms and frameworks.

Where vacant land in these areas is available for redistribution purposes, the land allocation function vests in national government.

Assignment of functions: All the Schedule 4 functions in the R188 type regulations with the exception of those applying in the former Transkei, Ciskei and KwaZulu Natal have been assigned to the provinces. The President will be requested to assign the outstanding regulations, subject to such amendments as he deems necessary for effective implementation. It is recommended that the proposed amendments described in Section 5.13.1 be made.

Delegation of functions: The non-Schedule 4 functions in the R188 type regulations have only been delegated to the provinces as they apply in the former Transkei and Ciskei and outside the former homeland areas. Once the regulations have been amended as discussed above, the functions should be assigned or delegated to provincial, district or local government.

The institutional arrangements described in this chapter are based on three important operational principles. These stress the need for an integrated approach to land reform delivery, for a delivery system that includes a wide range of service providers, and for on-going evaluation of the effectiveness of the measures established to achieve this. The principles can be summarised as follows:

@ Government, where appropriate, must enter into partnership arrangements with the private sector, NGOs and community based organisations. Implementation mechanisms and procedures must facilitate this cooperation.

@ Coordination of departments and levels of government, and sound working arrangements between national, provincial and local level administrations is fundamental to the success of land policy.

@ A monitoring and evaluation system that can track the progress of land policy measures, and that can provide timeous feedback to managers and the public, is a key element in ensuring that policy measures are able to achieve their intended goals.

To overcome the institutional problems and constraints to the implementation of land reform, the following measures are necessary:

@ the further rationalisation of legislation,

@ human resource development in the governmental and non-governmental sector,

@ capacity building at community level, and

@ inter-sectoral and inter-governmental collaboration in policy formulation and programme implementation.

Above all there is the need to co-opt a range of statutory and non-statutory service providers to support land reform. Unlike other service-providing departments, the Department of Land Affairs has relatively few personnel outside its national office. Yet, a widely deployed cadre of well-trained

field staff is essential to inform people of their entitlements, to advise and assist them and to facilitate the legal processes of land acquisition. Experience in other countries demonstrates that shortage of administrative capacity for land reform is a recurring problem.

While it is important to work with a range of service providing agencies, it is necessary to plan for the establishment of an efficient service-oriented land administration in the long term - one which has the capability to work with individuals and community groups as well as outside agencies. This is especially important given the fact that while land transfers are a once off event, there is an on-going need for an institutional capacity to maintain and administer the rights in land obtained through the land reform programme. This entails a permanent capacity to deal with issues such as land disputes, land zoning, registration, sub-divisions and land use issues.

In many countries, lack of staff capacity has often stemmed from the fact that land reform is perceived as an emergency or transitory phase and has tended to rely heavily on staff from other field departments and NGOs to support land reform at grass roots level. While NGOs have forged successful partnerships with government organisations in support of land reform, experience with the part-time deployment of other government staff for the implementation of land reform has been less satisfactory. The training of a core of provincial and local level field staff to service land reform and land administration is essential. The strategy is outlined in Box 6.1.

The Department of Land Affairs has undergone many structural changes since 1994. An extensive investigation was conducted to reorganise the Department for the huge task of land reform. There are now three branches in the Department. **Deeds and Surveys** is concerned with management of the deeds registration, land surveying and land information systems. **Land Reform Policy** is concerned with developing policies and systems for land reform, and with land use and development issues. **Land Reform Implementation** is responsible for the primary implementation agencies, namely the Department's nine provincial offices. The Department is currently engaged in a decentralisation process which will give greatly enhanced functions and authority to the Directors of the provincial offices. The demands on the Department will change as the land reform process develops. The structure of the Department will be kept under review to ensure that functions are appropriately placed, and that the structure meets changing needs.

The Department of Land Affairs recognises the decentralisation of functions and authority as a necessity for the efficient and effective delivery of land reform. The Department is at present engaged in an intensive process of translating the vision of a decentralised organisation into a practical implementation programme.

Decentralisation is seen within the context of transformation within the Department of Land Affairs

and the South African public sector in which line departments are being given increased authority by central agencies (for example, the Public Service Commission and the State Tender Board). The Department is in the process of transforming work and management practices and attitudes in accordance with these new arrangements. It is busy strengthening its provincial offices by locating increased functions and authority to make decisions at this level, at the point where there is direct contact with the Department's primary customers, namely the potential beneficiaries of the land reform programme.

Decentralisation is also seen within the broader context of institutional arrangements for land reform. Efficient and effective delivery requires that the Department of Land Affairs' provincial offices create the widest possible land reform implementation capacity by funding, contracting and building capacity of service providers in provincial government, local government, the private sector and the NGO sector.

6.5.1 Transformation strategy

Achieving the goals of land reform requires the transformation of the DLA from a traditional public service organisation to one that is responsive to its environment, is service oriented and is adequately staffed with skilled personnel representative of the South African population.

In April 1995, the Department of Land Affairs established a Transformation Unit that has served as a catalyst for the transformation process. The Department has also established a Transformation Committee that is responsible for co-ordinating and monitoring the implementation of transformation initiatives.

The Department's transformation priorities are:

- @ transforming service delivery to provide an efficient and effective service that is responsive to the needs of its customers and is accountable to the tax payers;
- @ building a department that is representative of the South African population;
- @ developing human resources both within and outside the Department.

6.5.2 Transforming service delivery

Land reform is a new programme that requires a new approach that is developmental and service oriented. Transformation of the Department requires:

- @ redesigning its systems and procedures to meet the needs of the users of

services;

@ decentralising functions and authority to its provincial offices as a first step towards the long term vision of locating land services at the local level;

@ rationalising posts within the DLA and reallocating posts to the provincial offices to strengthen service delivery capacity;

@ developing service standards with clearly defined outputs, targets and performance indicators, in consultation with the users of the Department's services;

@ regular monitoring and evaluation to improve service delivery.

6.5.3 A representative department

The Department has developed an Affirmative Action and Equal Employment Opportunity Policy Framework that was negotiated and accepted on 11 September 1996 and subsequently approved by the Department of Public Service Administration. This was the result of an extensive and inclusive consultation process with all stakeholders including trade unions with members in the Department, departmental management, the Workers' Forum, the Gender Forum, non-unionised employees and disabled people's organisations.

The framework aims to achieve the transformation of the Department by improving representativeness across all occupational classes and post levels. It will mean increased employment of persons from disadvantaged groups who are committed and sensitive to the needs of communities, as well as having a strong sense of purpose and contribution to land reform.

The framework defines affirmative action as a programme of action which redresses the racial and gender imbalances relative to personnel already in the service of the Department and that promotes policies which will result in a workforce which reflects the racial, gender and disability composition of the population.

It also refers to practices that ensure that people disadvantaged by past policies or unequal access to education and training because of discrimination based on race, gender, disability, health etc are enabled to acquire employment and training appropriate to their skills.

This effectively means the implementation of empowerment initiatives. Empowerment in this context refers to the holistic transformation of the Department in the direction of employment equity in the public service. It includes:

@ the removal of disabling infrastructure: laws, policies, prescripts and structures;

@ the removal of psycho-social barriers: attitudes, prejudices and stereotypes;

@ the creation of enabling infrastructure through:

- the provision of appropriate forms of education and training to harness the maximum potential of all employees, especially for those identified as disadvantaged;
- the recognition of skills, experience and training before and during employment in the public service, as well as appropriate qualifications obtained outside the public service;
- appropriate modification of the physical environment to meet the needs of persons with disabilities;
- transformation of the socio-cultural environment in the workplace to generate an ethos that is tolerant appreciative and respectful of diversity.

6.5.4 Human resources development

The transformation of service delivery and the building of a representative department has to be underpinned by a sound human resources development (HRD) strategy.

The Department of Land Affairs is committed to the effective mobilisation, development and utilisation of human resource capacity as this will be critical for the success of institution building and management programmes, as well as for the success of the transformation process more generally. Accordingly, a coherent strategic framework for human resource development is in the process of being developed.

The framework will have as its purpose the development of an optimal fit between the needs of the employer, the job, the organisation and the environment, so that employees reach their desired level of satisfaction and performance, and the organisation meets its goals.

The strategic framework for effective human resource development will entail the following:

@ staff training;

@ the development of effective and life-long career development paths for all categories of jobs in the Department;

@ an improvement in employment conditions;

@ the introduction of effective appraisal systems, and the use of incentives to reward individual and team performance;

@ basing promotion and career advancement on performance rather than on seniority or qualification.

The Department's HRD priorities are:

@ conducting orientation programmes for new staff and reorientation programmes for existing staff;

@ building skills in land reform implementation within the Department and amongst external service providers in the government and non-government sectors;

@ development programmes for managers, middle managers and first line supervisors to equip them in managing service delivery, managing resources, managing people with diverse backgrounds and managing change;

@ providing financial assistance to staff to undertake further study that will benefit the Department.

In 1997 the Department will finalise its HRD Strategy that will outline goals for human resources development, programmes to be implemented and targets to be achieved.

Land reform is a national competency. It is the responsibility of the national government to ensure a more equitable distribution of land ownership, to support the work of the Commission on Restitution of Land Rights and to ensure that a programme of land tenure and land administration reform is implemented. It is the responsibility of provincial governments to provide complementary development support to beneficiaries of land reform. Provincial governments have concurrent competencies with national government with regard to critical areas - such as rural and urban development and agriculture - that affect the sustainability of land reform.

The experience of the land reform programme over the past two years has demonstrated the critical importance of establishing a clear understanding between national and provincial governments of their respective roles and responsibilities in regard to land reform. This understanding must be backed up by institutional arrangements that are capable of ensuring that delivery of land and related development takes place effectively.

It has been agreed that institutional relationships in relation to the land reform programme will be negotiated within each province, allowing for provincial diversity within a national framework. There is, however, general agreement that a

formal arrangement is needed to enable the national Department of Land Affairs and the relevant provincial government to consult regularly on issues such as project and beneficiary selection, budgets, and on the development implications of land reform projects. In general, it has been agreed that the form that this arrangement should take is that of a co-ordinating body, with a clear mandate and authority, on which sit DLA provincial officials and those of the provincial government administration. This should facilitate the integration of provincial land reform plans into provincial plans.

It is also important that departments within a province are involved in this process. As part of the process of negotiating institutional arrangements, this issue is being addressed on a province by province basis.

It is envisaged that in the medium-term, the process of compiling Land Development Objectives in terms of the *Development Facilitation Act, 67 of 1995*, at a local authority level, will facilitate the integration of land reform plans into local government development plans, and through this into provincial planning.

In the long-term, the vision is for a decentralisation of functions to the local government level. The long-term success and sustainability of the land reform programme is to a large extent dependent on the ability of potential beneficiaries to be able to access the programme easily, and to have a clear understanding of what assistance they can get from government. The commitment to decentralised delivery in the long term is founded on a belief that this is the only viable way to ensure effective participation in the programme. Providing services close to the local level, where delivery can most effectively take place, requires the development of a local-level land administration. Building the capacity for this will be a long-term process. It will require strong support at the provincial level.

Much of the land administration function is likely to be delegated or assigned to provincial government. Eventually it may be appropriate for most of these functions to be located at the local government level. This would bring the situation in rural areas into line with those in urban areas where substantial land administration functions, particularly those relating to planning and development control, are already vested in local authorities.

An important element of this vision of a decentralised delivery capacity is the notion of a land office staffed by land officers that would be located within local government. The land offices and their staff would be responsible for elements of the land reform programme, as well as for on-going land administration functions such as:

@ the allocation of user rights (in the case of communal and public land),

@ imposition of restrictions on the use of land,

@ authorization of change of use and land subdivision;

@ settlement of land disputes, and

@ assistance with the preparation of land development objectives consistent with the *Development Facilitation Act*.

This local level capacity would also be able to assist key elements of the land reform programme in the following ways:

@ Under the Land Redistribution Programme, a local Land Office would advise and assist eligible people to access government grants and with the legal processes involved in land acquisition and transfer including the registration of deeds at the Deeds Office. Assistance would also be provided in the identification of land, assessment of productive potential (through the local agricultural extensionist) and advice on valuations.

@ A local Land Office, should assist with public information, awareness and education of the Land Restitution Programme, advise and assist claimants with making their claims and with the implementation of Court orders.

@ With regard to the Land Tenure Reform Programme, a local Land Office, with the support of provincial DLA staff, would assist with rights' adjudications; and ensure that rights are registered at the Deeds Office. Requests for upgrading of tenure rights would be registered in local offices.

@ In districts where the *Land Reform (Labour Tenants) Act, 3 of 1996*, is applicable, local Land Offices would need to be provided with special capacity to administer the Act.

@ The local Land Office would also advise and assist owners and occupiers in matters relating to the legislation extending tenure security to farm dwellers.

The detailed institutional arrangements, as well as the timetable for the establishment of these local offices, is expected to vary from province to province and will depend on local capacity and circumstances. A number of models have been proposed thus far.

They include the following:

- @ establishing a satellite office of the provincial office of the DLA at a decentralised level and close to district government;
- @ establishing a facilitation service at a district level that could at some future stage be linked to local government;
- @ providing resources, including training by DLA, to district government to appoint staff to deal with land issues;
- @ seconding staff in the employ of the DLA to district government to work on land reform and land administration issues.

6.8.1 DLA's provincial offices

The Department of Land Affairs is responsible to ensure that land reform and land administration services are delivered effectively and speedily through accessible and efficient institutions. In order to achieve this, the DLA as a national government department has a commitment to building a strong presence at the provincial level. The Provincial Offices of the Department are key institutions in the implementation of the land reform programme. These offices are seen as the front-line of land reform delivery.

They are responsible for liaising with provincial government in land reform matters and for ensuring that the programme is co-ordinated with broader provincial development plans and priorities. Co-ordinating arrangements between the provincial DLA office and the provincial government departments are currently being discussed in each province. The precise allocation of functions between the DLA regional offices and the provincial authorities will vary according to negotiated arrangements. The exact form these structures will take, their functions and relationships, will be determined by the conditions specific to each province. The overall purpose will be to provide a framework for consultation on arrangements for land administration, land reform projects, and on how financial allocations for the programme should be spent.

The work of the DLA provincial offices will include:

- @ planning and coordinating land reform programmes;
- @ appraising projects and recommending expenditure to budget;
- @ assisting the restitution process;
- @ implementing court orders;

- @ finalising annual work plans and budgets;
- @ contracting service providers;
- @ controlling expenditure;
- @ facilitating projects;
- @ monitoring;
- @ liaising with provincial and local authorities to secure development and support services;
- @ building capacity that will allow land reform and land administration services to be delivered at a local government level;
- @ communicating information about the land reform programme;
- @ jointly convening and running the provincial state land disposal committee that will be responsible for making recommendations about the allocation of state land;
- @ providing input to the policy-making process.

6.8.2 National

DLA, at national level, has responsibility for:

- @ the formulation of policies that will ensure redistribution of land, tenure reform restitution of land, and land development; and
- @ the setting of national norms and standards with regard to land matters;
- @ the management of national restitution, tenure reform and redistribution programmes;
- @ procurement of funds and allocation of budgets;
- @ the coordination of inter-governmental relations in land delivery;
- @ advising and assisting provincial DLA offices with negotiation and the administration of agency agreements, partnership arrangements, and powers delegated to other tiers of government;
- @ advising and assisting provincial offices in the implementation of programmes and projects;
- @ negotiating the settlement of restitution claims on behalf of the state;
- @ managing a national monitoring and evaluation programme.

All the provinces have responsibility for certain land related functions. Provincial governments have the general responsibility to:

(a) Perform functions relating to land matters and which emanate from:

@ the ownership of land by the province;

@ provincial legislative programmes in respect of Schedule Four functions of the new Constitution;

@ executive authority assigned or delegated by the President or the Minister for Agriculture and Land Affairs;

@ powers of attorney or agency agreements;

@ to provide the delivery of land-related services where third tier government is not available or unable.

(b) Perform tasks related to the implementation of national land reform programmes. This primarily entails:

@ integration of redistribution, tenure reform and restitution projects into regional development plans, and into urban and rural development plans where no local government capacities exist;

@ development and administration of settlements established for beneficiaries of redistribution, tenure reform and restitution projects;

@ provision of ongoing support, development assistance and administrative services to settled communities.

The lists above indicate that the land-related responsibilities of the provinces have a wide scope. Within provincial governments responsibility for them may be located within one department, or as is more common, may be split between different departments. Whatever the situation, it is critical that within provincial government responsibility for land matters is clearly located and a staff capacity created to carry out the work. This will facilitate the assumption of responsibility for the management of state land on a day-to-day basis, liaison with the Department of Land Affairs, and provide a centre for the co-ordination of provincial development services in areas where land reform projects occur.

Government wishes to enlist the support of the private sector wherever this is possible and practical. A variety of constructive proposals for support to land reform have come from commercial farming interests (see Box 4.6 and Section 4.9.2 - 4.9.3). The Department has gone a long way in defining the options available for commercial farmers and corporations when they choose to sell or lease land to emerging farmers, enter into partnerships or establish agri-villages. A private sector-initiatives help desk has been established in the national office in Pretoria, but the responsibility for driving this element of the programme lies with the provincial offices of the Department.

The land reform programme emphasises the key role of the non-governmental sector in supporting rural and urban development and land reform policies. Organisations in this sector have established strong links with communities involved in land struggles and have been instrumental in enabling communities to articulate demands for land. Those who stress good governance and transparency and argue for participation, see a role for NGOs greater than as mere deliverers of services. They seek to involve NGOs and CBOs in the policy dialogue and in decision making. In this connection, the strengthening of NGOs and CBOs as separate, specialist institutions is important. Partnerships with these organisations will maximise the benefit of land reform initiatives to local communities.

The Department is aware that, beyond the organised NGOs operating in the land and rural development sectors, there is a large and diverse pool of experience and expertise which must be included if the land reform process is to meet its development objectives. Consisting of self-employed individuals, private companies and independent consultants, these non-statutory service providers (many of whom have their roots in the NGO sector) offer a wealth of experience and skills necessary for the cost-effective implementation of sustainable development programmes. The Department will seek to involve these service providers at all levels of the land reform process, to complement the work of participating NGOs and statutory agencies, and to help focus and strengthen the respective advantages of each category of service provider. Affirmative action criteria, that take into account factors such as race, gender and national spread, should be used in the appointment of consultants.

Until such time as the local Land Offices can be staffed and established, a

facilitation service has been arranged by the Department to ensure that prospective land reform beneficiaries have access to necessary information and are empowered to apply for assistance. The functions of this service, which is provided by government directly and through an agency agreement with non-governmental service providers using the Community Facilitation and Support Fund, are:

- @ providing information to prospective beneficiaries, explaining the Land Reform Programme processes to them, and offering advice on the variety of options available for settlement;**
- @ pro-actively identifying and mobilising individuals or groups who may benefit from land reform;**
- @ assisting with applications for government assistance;**
- @ facilitating the establishment of legal entities and providing advice with respect to legal issues;**
- @ assisting prospective beneficiaries in approaching formal financial institutions and in investigating the local land market;**
- @ assisting prospective beneficiaries with the selection and appointment of valuers if required;**
- @ linking with provincial and local government authorities and other line function Departments with specific reference to bulk and internal infrastructure supply;**
- @ facilitating the appointment of a planner, and the planning process;**
- @ ensuring community participation in the planning process;**
- @ ensuring the participation of women in decision making and the planning process;**
- @ assisting the beneficiaries to identifying settlement needs; and**
- @ ensuring that eligible beneficiaries are empowered to access necessary long term services and assistance.**

Substantial conflicts have emanated from land related issues and land reform initiatives. The government believes that the success of land reform will be contingent upon its ability to manage conflict by pre-empting, preventing and resolving disputes.

Although some land reform legislation includes dispute resolution mechanisms, a

dispute resolution system has been developed which can effectively manage the range of land-related disputes that will arise in the course of the Land Reform Programme.

A National Land Reform Mediation Panel has been established whose members are available to implement dispute resolution procedures in specific situations upon application.

The administering agent appointed by the DLA to manage the Mediation Panel will receive applications for land-related dispute resolution services from any one of the following: the DLA Provincial Director; the head of the provincial government department responsible for land matters; or a Land Claims Commissioner. Upon such application, a mediator will be assigned.

Access to the Mediation Panel is being arranged for Tribunals established in terms of the *Development Facilitation Act*.

A recurring problem in land reform in other countries has been the inadequacy of survey and land tenure records and a lack of information on what exists on the ground and how land is utilised. Where these do not exist or have been destroyed the progress of land reform can be seriously frustrated. A related issue is the lack of adequate public information on land reform programmes and their performance.

South Africa's survey and land record systems are of a high standard. Over decades, South Africa has developed a modern land registration and cadastral system to cover the freehold sector and state land outside the former homelands. This system is, however, not at present comprehensive as it is mainly concerned with serving the land ownership forms which were available primarily to white people. The cadastre faces a major challenge in the need to both maintain existing standards of excellence as well as expand to service the entire South African population. Specific needs will arise in the following areas:

@ a speedy, reliable and cost-effective system of demarcating land and recording the identity of those who are entitled to occupy it, as part of the process of rapid release to meet the pressing need for land in the urban areas. The *Development Facilitation Act, 67 of 1995*, is an important step in this

direction;

@ a reliable and cost-effective system of recording rights to land which are established in the process of tenure reform;

@ a reliable and cost effective system of recording the rights of those who are entitled to use and occupy land which is held on a communal basis. The *Communal Property Associations Act, 28 of 1996*, creates an initial framework for the development of this system.

In the process of transforming the system, it may be desirable and necessary to make some changes to the system of describing and registering property in land in order to accommodate options which are appropriate to the circumstances of poor people (see Section 4.15, Land Tenure Reform) and are both simpler and cheaper. A working group has been established by the DLA to investigate this.

In the spirit of the new democracy, the Department is obliged to make information freely accessible to Parliament and the public. This requires that a Monitoring and Evaluation System for Land Reform is put in place to provide information on the process, its impact and to identify problems at an early stage so that managers can take the necessary corrective action.

The Department is now re-orienting its service in order to meet the land information needs of all South Africans, especially the landless. These needs include not only land tenure data, but also people's requirements for information on their entitlements under the various land reform programmes, the availability of land, and the progress of land reform in their locality and the country generally.

An up-to-date land information system is essential as a basis for effective planning, development and control of land resources.

Land information has traditionally been stored and conveyed on maps and plans, but modern technology also allows spatial data to be made available in numeric form, ie digital form. The advantage of holding maps in digital form is that they can be transmitted and kept up to date more easily. Computerization has greatly increased the potential for developing land information systems. Of primary importance is the use of specific, generally accepted key data fields that will facilitate the exchange of data between systems and role players. Norms and standards are essential to standardise procedure and processes.

To coordinate land information, a National Land Information System (NLIS) is being established to make available land information to government agencies and the public in accordance with approved standards. The system consists of a computerised database containing spatially-referenced, land-related information and the procedures for the

systematic collection, updating, processing and distribution of data.

Land information is a valuable asset and must be protected, including the state's copyright. Pricing policies for the supply of land information by the Department need to be reviewed. The costs of collecting, holding and supplying information are high and, where users have the capacity to pay, these costs must be recovered.

It is recognised that certain users, both internal and external, will require support in assembling and integrating the data required. Support will have to be provided to ensure that land information is used to its fullest potential.

6.15.1 Cadastral information system

The offices of the surveyors-general have established a spatially based cadastral information system providing information on the location and extent of all land parcels, third party rights, servitudes and leases.

An associated document imaging system holds the cadastral documents in electronic form. Ongoing tasks undertaken by the surveyors-generals include:

- @ capturing all existing information into the new system;
- @ noting all new subdivisions and maintaining the database;
- @ devising ways of transmitting this constantly changing information to the users; and
- @ linking the information with the Deeds Offices' records with particulars of ownership and transfer details.

Users may then customize this information by adding their own data, such as land use, valuation or nature of improvements.

The functions of the surveyor-general performed in the former TBVC states, have been rationalised and the whole country is now served from surveyor-general's offices in Pretoria, Pietermaritzburg, Bloemfontein and Cape Town.

6.15.2 Topographic information system and aerial photography

Topographic information includes physical features, such as heights, mountains, rivers, lakes or forests, and built features, such as towns, roads, railways and dams or powerlines. Decision makers need to know the positions of these features so that they can make informed judgements for orderly

development. The national mapping organisation, which is part of the Department of Land Affairs, has complete coverage of the country at 1:50 000 scale, providing a comprehensive inventory of topographic information. Since maps tend to get out of date, the entire 1:50 000 series is being converted into digital form. The database will be continuously updated and users will be able to access the latest information.

An aerial photograph, being a record of the land at the instant it was taken, is an invaluable source of information, and subsequent photography of the same location shows how the land has changed. This is useful for detecting environmental degradation and other physical changes to the land, including new human settlement. To minimise duplication, the national mapping organisation co-ordinates all aerial photography required or undertaken by all tiers of government.

6.15.3 Deeds

The Department maintains centralised modern deeds registries which are computerised and form part of a wide area network. This allows for the decentralised availability of information. Continuous updating, changes and enquiries are done from eight deeds offices. The system contains records of all formal (ie legal) land transactions and information on all registered deeds as well as supplementary documentation.

The Department provides an on-line enquiry facility (AKTEX) that allows external users (for example, attorneys, estate agents, banks) to access the deeds database. Soon the direct faxing of deeds and documents from microfilms to consumers will be available. As the deeds office is managed in terms of a trading account, users have to pay a fee for specific types of enquiry. Users can also obtain ordinary copies of registered deeds and documents.

An advisory service aims to ensure that the public can make effective and efficient use of available information. For claimants under the *Restitution of Land Rights Act, 22 of 1994*, the deeds office is a vital source of information

The Department acknowledges the importance of a unitary land registration system. It is for this reason that the eight deeds offices of the former Republic of South Africa, the four deeds offices of the former TBVC states, one sub-office and six registration offices in the former 'self-governing territories' are to be rationalised. These offices are administered centrally by the Department of Land Affairs in order to establish a unitary land registration system for the whole Republic.

Records of land registration are and must be comprehensive and therefore all transactions in respect of land units are recorded from its inception. These records together with all related documents and deeds must be maintained and kept as public records. This, together with the records of the surveyor general discussed above, serve as a basis for a proper land information system.

6.15.4 Surveying and registration for diverse tenure options

As part of tenure reform, the Department of Land Affairs is committed to the recognition of diverse

forms of tenure. Individuals and communities should have a choice as to the form of tenure they prefer. This requires attention to be given to methods of identification of land, as well as appropriate methods of registration of the rights of individuals involved, possibly at a more local level. The introduction of new methods and standards for survey and deeds registration and the options available in this regard are at present being researched. It is already clear that the main system of surveying and registration is flexible and can accommodate different types of tenure. The approach is likely to be one that creates appropriate sub-systems of identification and registration within well-defined and recorded areas of the main system of surveying and registration. Convertibility from one form of tenure and registration to another form within a unitary overall system is an important requirement.

6.15.5 Cost and affordability

Two aspects of the cost implications of the system of surveying and registration of rights in land need attention: the general cost to the economy and the cost relative to the value of the land in question

The general cost is covered either directly by the consumer or indirectly by the taxpayer via the budget. In order to allow the deeds registries to cope with the expected increase in the volume of work as a result of land reform and housing programmes, they have been put on a trading account with a per fee transaction. Limitations on the government budget would otherwise not have allowed the necessary expansion. Through economy of scale, the rationalisation of small offices and appropriate use of technology the cost per registration is kept to a minimum. To promote free competition in conveyancing, statutory fees have been abolished.

Likewise the fees of surveyors are no longer fixed by statute but are negotiable. The surveyors-general offer a free service to government departments in the issuing and awarding of tenders for State Surveys. The principle of user pays for certain of the services provided by the surveyor-general is being investigated.

The costs of surveying and registration are real costs in the development of land and cannot be wished away. (Transfer duty, stamp duty and taxes are not part of the actual registration cost).

Nevertheless, these costs are prohibitive to entrants at the lower end of the property market. While avoiding hidden subsidies through artificial lowering of costs, the Department of Land Affairs is investigating means of reducing the cost of the identification of land parcels in the system described. The use of aerial photography can play a role, especially where this is also required by the state for other purposes.

The investigation into innovations in the deeds registration and surveying system is expected to report on its findings in 1997.

6.15.6 The monitoring and evaluation system for land reform

The DLA has established a specialist component within the organisation to monitor and evaluate its Land Reform Programme. This decision was deemed necessary in light of the following factors:

@ Land Reform is a new programme and as such needs constant feedback as to the efficiency of its processes and impact. Such feedback is necessary for timeous adjustments to ensure relevant and efficient delivery systems.

@ Implementation of the programme involves the contribution of a range of role-players, often with diverse interests. It is necessary to access such perspectives and focus these positively towards land reform delivery;

@ The government is committed to transparency and accountability and the M&E component, through its work, aims to maximise efficiency, ensure that details of the programme implementation are adequately communicated and that the programme meets the policy objectives.

The Directorate carries out the following specialist functions:

@ **Strategic Information Support** assumes responsibility for the data and draws upon a national data system to track progress within land reform. The DLA has a sophisticated computer system which makes it possible to have on-line information about key indicators of land reform (such as the number of projects and the stage at which the projects are) for each of the programmes. It also analyses data and presents ‘stage-at’ reports to management. This information is made available to the public.

@ **Monitoring and Evaluation Implementation** co-ordinates the data gathering exercise countrywide. It makes use of provincially-based organisations to assist in the process of data collection and analysis. In its work it interacts with all role players in land reform and is able to assess the degree to which the different role players contribute to the success of projects.

@ **Impact Analysis and Research** assists in the development of methodologies to capture information and analyses the impact of the Land Reform Policy on the programme. It develops thematic reports which feeds regularly into the Policy Committee of the DLA.

6.15.7 Communications approach

The Department is developing appropriate communication channels within government and the public domain. Their design recognises the need for different levels of information dissemination, depending on the message and the target audience, and allowing for continuous feedback on policies and implementation from the stakeholders involved.

Among the measures being developed are:

@ a network of communication officers at national and regional level;

@ a range of communication methods including radio and television programmes, videos, development theatre, information technology (the Internet), posters, brochures and manuals.

Communication initiatives use existing media networks to ensure the widest dissemination and avoid costly duplication.