

REPUBLIC OF SOUTH AFRICA

**LAND RESTITUTION AND
REFORM LAWS AMENDMENT
BILL**

(As introduced in the National Assembly as a section 75 Bill)

(MINISTER FOR AGRICULTURE AND LAND AFFAIRS)

[B 9—99]

REPUBLIEK VAN SUID-AFRIKA

**WYSIGINGSWETSONTWERP OP
GRONDHERSTEL- EN
GRONDHERVORMINGSWETTE**

(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp)

(MINISTER VIR LANDBOU EN GRONDSAKE)

[W 9—99]

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GENERAL EXPLANATORY NOTE:

[] Words in bold type in square brackets indicate omissions from existing enactments.

 Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Restitution of Land Rights Act, 1994, so as to effect certain textual improvements; to amend the provisions regulating entitlement to restitution; to authorise the Deputy Land Claims Commissioner to act in the stead of the Chief Land Claims Commissioner if the office of the Chief Land Claims Commissioner is vacant; to make provision for the appointment of acting regional land claims commissioners under certain circumstances; to amend the requirements for the publication of the notice of a claim; to authorise any interested party to apply for the rescission or variation of an order of the Land Claims Court or the setting aside or variation of certain agreements; to do away with the need for a claim to be referred to the Court where the interested parties have reached agreement as to how a claim should be finalised and to authorise the Minister to make an award of a right in land, pay compensation and grant financial aid in such a case; to authorise regional land claims commissioners to refer claims to the Court; to extend the powers of the Court; to grant the Court in any interlocutory or preliminary hearing or pre-trial proceedings the discretion to decide upon the appointment of one or more assessors; to provide that a claimant may be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant where the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land; to make provision for financial aid to a claimant who has entered into an agreement regarding the finalisation of a claim; to abolish the statutory mechanism providing for the waiving of rights contained in section 42D; to amend the Land Reform (Labour Tenants) Act, 1996, so as to empower an arbitrator and the Court to determine, prescribe or amend the terms on which a labour tenant occupies or uses land; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of section 1 of Act 22 of 1994, as amended by section 1 of Act 78 of 1996 and section 2 of Act 63 of 1997

1. Section 1 of the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) (hereinafter referred to as the principal Act), is hereby amended by the substitution for the definition of “restoration of a right in land” of the following definition:

“ ‘restoration of a right in land’ means the return of a right in land or a portion of

land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices;”.

Entitlement to restitution

2. (1) A person shall be entitled to restitution of a right in land if—
- (a) he or she is a person **[or community]** dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices **[or a direct descendant of such a person]; [and] or**
 - (b) he or she is the executor of a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
 - (c) **[the claim for such restitution is lodged not later than 31 December 1998]** he or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who—
 - (i) is a direct descendant of a person referred to in paragraph (a); and
 - (ii) has lodged a claim for the restitution of a right in land; or
 - (d) it is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
 - (e) the claim for such restitution is lodged not later than 31 December 1998.
- ~~[(1A)]~~(2) No person shall be entitled to restitution of a right in land if—
- (a) just and equitable compensation as contemplated in section 25(3) of the Constitution; or
 - (b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.
- (3) If a natural person dies after lodging a claim but before the claim is finalised and—
- (a) leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate alone or, failing the executor, the heirs of the deceased alone; or
 - (b) does not leave a will contemplated in paragraph (a), the direct descendants alone,
- may be substituted as claimant or claimants.
- (4) If there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession.”.

Amendment of section 7 of Act 22 of 1994

3. Section 7 of the principal Act is hereby amended—
- (a) by the substitution for subsection (3) of the following subsection:

“(3) If the office of the Chief Land Claims Commissioner is vacant or if the Chief Land Claims Commissioner is absent or unable to perform any or all of his or her functions, the Deputy Land Claims Commissioner shall act in his or her stead and whilst the Deputy Land Claims Commissioner so acts, he or she shall perform all the functions of the Chief Land Claims Commissioner.”; and
 - (b) by the insertion after subsection (3) of the following subsection:

“(3A) If the office of a regional land claims commissioner is vacant or if a regional land claims commissioner is absent or unable to perform any or all of his or her functions, an acting regional land claims commissioner appointed by the Minister shall act in his or her stead and whilst the acting regional land claims commissioner so acts, he or she shall perform all the functions of the regional land claims commissioner.”.

Amendment of section 11 of Act 22 of 1994, as amended by section 5 of Act 78 of 1996 and section 7 of Act 63 of 1997

4. Section 11 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection: 5
 “(1) If the regional land claims commissioner having jurisdiction is satisfied that—
 (a) the claim has been lodged in the prescribed manner;
 (b) the claim is not precluded by the provisions of section 2 [(1) or (1A)]; and
 (c) the claim is not frivolous or vexatious [and], 10
 [(d) **no order has been made by the Court in terms of section 35 in respect of rights relating to that land**]
 he or she shall cause notice of the claim to be published in the *Gazette* and shall take steps to make it known in the district in which the land in question is situated.”; 15
- (b) by the substitution for subsection (4) of the following subsection:
 “(4) If the regional land claims commissioner decides that the criteria set out in paragraphs (a), (b) and (c) [and (d)] of subsection (1) have not been met, he or she shall advise the claimant accordingly, and of the reasons for such decision.”; 20
- (c) by the substitution for subsection (5) of the following subsection:
 “(5) (a) If after an order has been made by the Court as contemplated in section 35 [in respect of a right or rights in land, no person may lodge a] or an agreement has been entered into as contemplated in section 14(3) or 42D, it is shown that another claim was lodged in terms of this Act in respect of [that] the land [without the leave of the Court] to which the order or agreement relates, any interested party may apply to the Court for the rescission or variation of such order or the setting aside or variation of such agreement. 25
 (b) The Court may grant such an application, subject to such terms and conditions as it may determine, or make any other order it deems fit.”; 30
 and
- (d) by the insertion after subsection (5) of the following subsection:
 “(5A) Where an appeal is pending in respect of an order of the Court contemplated in section 35, an application for the rescission or variation of such order under subsection (5) shall be made to the Constitutional Court or the Supreme Court of Appeal, as the case may be.”. 35

Amendment of section 11A of Act 22 of 1994, as inserted by section 6 of Act 78 of 1996

5. Section 11A of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words: 40

- “(2) Where during the investigation of a claim by the Commission the regional land claims commissioner having jurisdiction has reason to believe that any of the criteria set out in paragraphs (a), (b) and (c) [and (d)] of section 11(1) have not been met, he or she shall publish in the *Gazette* and send by registered post to—”. 45

Amendment of section 14 of Act 22 of 1994, as amended by section 7 of Act 78 of 1996 and section 10 of Act 63 of 1997

6. Section 14 of the principal Act is hereby amended—

- (a) by the substitution for subsection (1) of the following subsection:
 “(1) If upon completion of an investigation by the Commission in respect of specific claim— 50
 (a) the parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation;

- (b) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation; or
- [(c) the parties to any dispute arising from such claim reach agreement as to how the claim should be finalised and the regional land claims commissioner is satisfied that such agreement is appropriate; or]**
- (d) the regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court,
the **[Chief Land Claims Commissioner]** regional land claims commissioner having jurisdiction shall certify accordingly and refer the matter to the Court.”;
- (b) by the substitution for subsection (3) of the following subsection:
- “(3) If in the course of an investigation by the Commission the interested parties enter into a written agreement as to how the claim should be finalised and the regional land claims commissioner having jurisdiction certifies in writing that he or she is satisfied with the agreement and that the agreement ought not to be referred to the Court, the agreement shall be effective only from the date of such certification or such later date as may be provided for in the agreement.”;
- (c) by the insertion after subsection (3) of the following subsection:
- “(3A) If the regional land claims commissioner having jurisdiction is of the opinion that—
- (i) a question of law arising out of the agreement needs to be resolved;
 - (ii) there is doubt as to whether or not all parties who have an interest in the claim are parties to the agreement;
 - (iii) there is doubt as to the validity of the agreement or any part of it;
 - (iv) there is doubt as to the feasibility of the implementation of the agreement;
 - (v) the agreement does not comply with section 42D(2);
 - (vi) the agreement is not just and equitable in respect of any party;
 - (vii) the agreement is contrary to any provision of the Act;
 - (viii) the authority of any signatory is in doubt;
 - (ix) the agreement is vague or contradictory;
 - (x) the parties to the agreement agree that it is desirable that the agreement be made an order of Court;
 - (xi) the agreement ought to be referred to the Court for any other good reason,
- he or she may refer the matter to the Court.”;
- (d) by the substitution for subsection (4) of the following subsection:
- “(4) A referral under subsection (3A) shall be accompanied by a copy of the relevant deed of settlement and a report containing—
- (a) concise information about the background to the claim and the settlement;
 - (b) information necessary for the Court to establish whether or not it has jurisdiction;
 - (c) the reasons for the referral of the matter to the Court; and
 - (d) the regional land claims commissioner’s recommendations, if any, as to how the matter should be dealt with.”; and
- (e) by the addition to subsection (6) of the following proviso:
- “: Provided that the Court may, on good cause shown, condone any noncompliance with the provisions of this section.”.

Amendment of section 22 of Act 22 of 1994, as amended by section 1 of Act 84 of 1995, section 10 of Act 78 of 1996 and section 13 of Act 63 of 1997

7. Section 22 of the principal Act is hereby amended—

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- (a) by the insertion in subsection (1) after paragraph (cD) of the following paragraph:
 “(cE) to determine any matter involving the validity, enforceability, interpretation or implementation of an agreement contemplated in section 14(3), unless the agreement provides otherwise;”; and 5
- (b) by the addition to subsection (2) of the following paragraph:
 “(c) the power to decide any issue either in terms of this Act or in terms of any other law, which is not ordinarily within its jurisdiction but is incidental to an issue within its jurisdiction, if the Court considers it to be in the interests of justice to do so.”. 10

Amendment of section 28 of Act 22 of 1994, as amended by section 14 of Act 78 of 1996 and section 18 of Act 63 of 1997

8. Section 28 of the principal Act is hereby amended by the substitution in subsection (4) for subparagraph (ii) of the proviso of the following subparagraph:
 “(ii) any interlocutory or preliminary hearing or pre-trial proceedings, unless the Court decides otherwise;”. 15

Amendment of section 35 of Act 22 of 1994, as amended by section 20 of Act 78 of 1996 and section 25 of Act 63 of 1997

9. Section 35 of the principal Act is hereby amended—
- (a) by the substitution in subsection (1) for the proviso to paragraph (a) of the following proviso: 20
 “: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant or the latter’s ascendant, unless—
 (i) such other claimant is or has been granted restitution of a right in land or has waived his or her right to **[restitution]** restoration of the right in land concerned”; or 25
 (ii) the Court is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land”; 30
- (b) by the substitution for subsection (3) of the following subsection:
 “(3) An order contemplated in subsection (2)(c) shall be subject to such conditions as the Court considers necessary to ensure that all the **[dispossessed]** members of the community concerned shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including **[a woman and]** a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.”; 35
- (c) by the substitution for subsection (5) of the following subsection: 40
 “(5) If—
 (a) the Court orders the State to; or
 (b) in terms of an agreement contemplated in section 42D, the State must,
 expropriate land, a portion of land or a right in land in order to restore or award it to a claimant, the Minister shall expropriate such land, portion of land or right in land in accordance *[mutatis mutandis]* with **[the provisions of the Expropriation Act, 1975 (Act No. 63 of 1975): Provided that the owner of such land or right shall be entitled to the payment of just and equitable compensation, determined either by agreement or by the Court according to the principles laid down in section 25(2) and (3) of the Constitution: Provided further that the procedure to be followed by the Court in the determination of such compensation shall be as provided in sections 24 and 32 of this Act]** subsection (5A).”; and 45
 50
- (d) by the insertion after subsection (5) of the following subsection: 55

“(5A) The Minister has the power pursuant to an order of the Court under section 35(1) or an agreement in terms of section 42D, to expropriate land, a portion of land or a right in land in order to restore or award it to a claimant, *mutatis mutandis* in accordance with the Expropriation Act, 1975 (Act No. 63 of 1975), and may perform the functions of the Minister of Public Works in terms of that Act: Provided that the owner of such land, portion of land or right in land shall be entitled to just and equitable compensation, determined either by agreement or by the Court as prescribed by the Constitution, with due regard to the provisions of section 12(3), (4) and (5) of the Expropriation Act, 1975: Provided further that the rules of the Court made under section 32 shall govern the procedure of the Court in the determination of such compensation.”.

Amendment of section 38B of Act 22 of 1994, as inserted by section 29 of Act 63 of 1997

10. Section 38B of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

“(1) Notwithstanding anything to the contrary contained in this Act, any person who or the representative of any community which is entitled to claim restitution of a right in land and has lodged a claim with the Commission not later than 31 December 1998 may apply to the Court for restitution of such right: Provided that leave of the Court to lodge such application shall first be obtained if—”.

Amendment of section 42C of Act 22 of 1994, as inserted by section 30 of Act 63 of 1997 and amended by section 4 of Act 61 of 1998

11. Section 42C of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) The Minister may from money appropriated by Parliament for this purpose and on such conditions as he or she may determine, grant an advance or a subsidy for the development or management of, or to facilitate the settlement of persons on, land which is the subject of an order of the Court in terms of this Act or an **[award] agreement in terms of section 14(3) or 42D**, to—

- (a) any claimant to whom restoration or the award of a right in land has been ordered;
- (b) any **[person] claimant** who has **[waived any or all of his or her rights to relief in terms of] entered into an agreement contemplated in section 14(3) or 42D**;
- (c) any person resettled as a result of an order of the Court.”.

Substitution of section 42D of Act 22 of 1994, as inserted by section 30 of Act 63 of 1997

12. The following section is hereby substituted for section 42D of the principal Act:

“Powers of Minister in case of certain agreements

42D. (1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land, **[and that person has entered] he or she may enter** into an agreement **[in terms of which he or she has waived any or all of his or her rights to relief under this Act, the Minister may, after consultation with the Commission and on such conditions as he or she may determine—]** with the parties who are interested in the claim providing for one or more of the following:

(a) The award to the claimant of land, a portion of land or any other right in land [and, where necessary, acquire such land, portion of land or other right in land]: Provided that the claimant shall not be awarded

land, a portion of land or a right in land dispossessed from another claimant or the latter's ascendant, unless—

- (i) such other claimant is or has been granted restitution of a right in land; or has waived his or her right to restoration of the right in land in question; or
- (ii) the Minister is satisfied that satisfactory arrangements have been or will be made to grant such other claimant restitution of a right in land; [or]

- (b) [pay] the payment of compensation to such [person] claimant; [or]
- (c) [make] both an award and [pay] payment of compensation to such [person] claimant;
- (d) the acquisition or expropriation by the State of such land, portion of land or other right in land;
- (e) the manner in which the rights awarded are to be held or the compensation is to be paid or held; or
- (f) such other terms and conditions as the Minister considers appropriate.

(2) [Expenditure in connection with the exercise of the powers conferred by subsection (1) shall be defrayed from moneys appropriated by Parliament for that purpose.] If the claimant contemplated in subsection (1) is a community, the agreement must provide for all the members of the community concerned to have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of such community to the members of the community.

(3) The Minister may delegate any power conferred upon him or her by subsection (1) or section 42C to the Director-General of Land Affairs or any other officer of the State or to a regional land claims commissioner.

(4) The Director-General of Land Affairs may with the consent of the Minister delegate to any officer of the State or a regional land claims commissioner any power delegated to the Director-General under subsection (3).

(5) Any delegation under subsection (3) or (4) may be made either in general or in a particular case or in cases of a particular nature and on such conditions as may be determined by the Minister or the Director-General of Land Affairs, as the case may be, and the Minister or the Director-General is not thereby divested of any power so delegated.

(6) Expenditure in connection with the exercise of the powers conferred by subsection (1) shall be defrayed from moneys appropriated by Parliament for that purpose.

(7) The provisions of subsections (1) to (6) and section 42C shall apply *mutatis mutandis* in respect of an agreement entered into before the commencement of the Land Restitution and Reform Laws Amendment Act, 1999, in terms of which a claimant has waived any or all of his or her rights to relief under this Act.”.

Amendment of section 33 of Act 3 of 1996, as amended by section 42 of Act 63 of 1997 and section 5 of Act 61 of 1998

13. Section 33 of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), is hereby amended by the insertion in subsection (1) after paragraph (e) of the following paragraph:

“(eA) determine, prescribe or amend the terms on which a labour tenant occupies or uses land;”.

Transitional provision

14. All proceedings which were pending before a court upon the date of promulgation of this Act, must be disposed of in accordance with section 2 of the principal Act as substituted by section 2 of this Act, unless the interests of justice require otherwise.

Short title and commencement

15. (1) This Act shall be called the Land Restitution and Reform Laws Amendment Act, 1999.

(2) The provisions of sections 2, 3 and 4 shall be deemed to have come into operation on 2 December 1994.

**MEMORANDUM ON THE OBJECTS OF THE LAND RESTITUTION
AND REFORM LAWS AMENDMENT BILL, 1999**

1. The experience of the past four years has brought to light legislative and institutional shortcomings in the present structure of the land restitution process. These lead to undue delays, with negative implications for claimants, landowners and the property market in general. In July 1998 the Minister for Agriculture and Land Affairs therefore established a Restitution Review Committee to investigate the entire process of restitution, including the legislative framework, processes and institutions implementing restitution. The Land Restitution and Reform Laws Amendment Bill, 1999, arises out of this investigation and proposes certain amendments to the Restitution of Land Rights Act, 1994 (Act No. 22 of 1994) ("the Act"). These amendments are of an urgent nature and are aimed at speeding up the restitution process and rectifying some of the legislative shortcomings. The most important amendments in the Bill are those providing for a shift in emphasis from the present judicial process where virtually every claim must be dealt with by the Land Claims Court ("the Court"), to a more administrative process which will allow for the mass processing of claims. This will not affect the rights of claimants and other affected parties, who will retain the right to have a matter decided by the Court. Further legislative amendments will be needed and will be introduced to Parliament at a later stage after the details have been worked out and after all affected parties have been consulted. The further envisaged amendments will need to be carefully done and should not be rushed.

2. Several questions have arisen from the present provisions of the Act providing for entitlement to restitution, with regard to the rights of descendants and the position of deceased estates. *Clause 2* aims to clear up any confusion which may exist. An executor of a deceased estate dispossessed of a right in land is now expressly authorised by the new section 2(1)(b) to claim restitution of such a right. Where a person who was dispossessed has died without lodging a claim, the direct descendant of such a person is entitled to claim provided he or she has no ascendant who is a direct descendant of the deceased and who has lodged a claim (section 2(1)(c)). Section 2(3) makes it clear that a natural person who has been dispossessed will be entitled to bequeath his or her right to restitution and that the executor of the deceased estate in question may be substituted as the claimant in the event of such a bequest. Where such a person dies without leaving a will, the law of intestate succession will not apply and his or her direct descendant or descendants may be so substituted and will inherit the right to restitution (section 2(3)). In the case of direct descendants entitled to restitution, the right or equitable redress must be divided not according to the number of individuals but by lines (section 2(4)).

3. *Clause 3(a)* of the Bill provides for the amendment of section 7(3) of the Act to authorise the Deputy Land Claims Commissioner to act in the stead of the Chief Land Claims Commissioner if the latter position is vacant. The present wording of section 7(3) deals with the situation where the Chief Land Claims Commissioner is absent or unable to perform his or her duties. The Act does not deal expressly with the situation where the position of Chief Land Claims Commissioner is vacant. The office of the Chief Land Claims Commissioner is vacant at present, and the amendment is therefore needed to clarify the position. There is also a need for an acting regional land claims commissioner to be appointed to perform the functions of a regional land claims commissioner under similar circumstances. *Clause 3(b)* addresses this need.

4.1 Section 11(1)(d) of the Act at present provides that the regional land claims commissioner having jurisdiction must be satisfied that no order has been made by the Court in terms of section 35 of the Act in respect of the land in question, before causing notice of the claim to be published. *Clause 4(a)* deletes section 11(1)(d). The reason for this deletion is that section 11(1)(d) slows down the restitution process and is not in line with *clause 4(c)*, which will allow an interested party to apply to the Court for the rescission or variation of such an order. A further reason for the deletion of section 11(1)(d) is that it may be unconstitutional, because it may deprive a claimant who has a valid restitution claim of his or her right to restitution in the case where a court order has already been issued.

4.2 *Clause 4(b)* substitutes section 11(4) and is a consequential amendment arising out of the amendment effected by *clause 4(a)*.

4.3 Any interested party is authorised by *clause 4(c)* to apply for the rescission or variation of an order of the Court or the setting aside or variation of a settlement agreement, where it is shown that another claim in respect of that land in question was lodged prior to such order and the entering into of such an agreement. The amendment contained in *clause 4(c)* will also enable a regional land claims commissioner to assist a claimant in enforcing his or her right to restitution where a court order has already been made.

4.4 Where an appeal is pending in respect of an order of the Court, and an application is lodged for the rescission or variation of an order of the Court or the setting aside or variation of a settlement agreement in terms of the new section 11(5), it will be necessary to make such an application to the relevant Court of appeal. *Clause 4(d)* effects the necessary amendment.

5. *Clause 5* amends section 11A(2) and is a further consequential amendment arising out of the amendment effected by *clause 4(a)* and discussed in paragraph 4.1.

6. Section 14(1)(c) of the Act at present prescribes that the Chief Land Claims Commissioner must refer a settlement agreement arising from a restitution claim to the Court where he or she is satisfied that the agreement is appropriate. This provision causes unnecessary delay in the restitution process. Where all the parties agree, there is no reason why the matter should be dealt with judicially. The judicial process is slow and costly, while an administrative procedure whereby the parties are allowed to enter into a settlement contract which is immediately enforceable will ensure that claims will be finalised without delay. It is also more appropriate that the regional land claims commissioners with whom claims are lodged, rather than the Chief Land Claims Commissioner, should refer appropriate claims to the Court. *Clause 6* of the Bill provides that only some claims will in future be referred to the Court by regional land claims commissioners. This clause proposes the following administrative procedure for the finalisation of settled claims:

6.1 *Clause 6(a)* deletes section 14(1)(c) of the Act and a new section 14(3) is contemplated by *clause 6(b)*, which provides that where the interested parties have reached agreement as to how a claim should be finalised, the regional land claims commissioner having jurisdiction has a discretion whether to certify that he or she is satisfied with the agreement and that the agreement ought not to be referred to the Court. If the regional land claims commissioner so certifies, the agreement is not referred to Court and is effective from the date of certification or later date provided for in the agreement.

6.2 In some cases it will not be appropriate to finalise the settlement agreements administratively, and those settlement agreements will have to go to Court. *Clause 6(c)* prescribes the circumstances under which such settlement agreements may be referred to the Court. In terms of a new section 14(3A) a settlement agreement may be referred to the Court where the regional land claims commissioner is of the opinion that—

- 6.2.1 a question of law arising out of the agreement needs to be resolved;
- 6.2.2 there is doubt as to whether or not all parties who are interested in the claim are parties to the agreement;
- 6.2.3 there is doubt as to the validity of the agreement;
- 6.2.4 there is doubt as to the feasibility of the implementation of the agreement;
- 6.2.5 the agreement does not comply with the new section 42D(2) (see paragraph 12 hereunder);
- 6.2.6 the agreement is not just and equitable in respect of any party;
- 6.2.7 the agreement is contrary to any provision of the Act;
- 6.2.8 the authority of any signatory is in doubt;
- 6.2.9 the agreement is vague or contradictory;
- 6.2.10 the parties to the agreement agree that it is desirable that the agreement be made an order of Court;
- 6.2.11 the agreement ought to be referred to the Court for any other good reason.

If the above circumstances are not present, the agreement will in most cases be referred to the Minister and he or she is then authorised to deal with it in terms of the proposed section 42D (see paragraph 12 hereunder).

6.3 *Clause 6(d)* prescribes that a copy of the relevant deed of settlement and a report by the regional land claims commissioner containing the information mentioned in the new section 14(4) shall accompany a referral to the Court.

6.4 Where a claim is referred to the Court it is presently prohibited in terms of section 14(6) of the Act from making any order unless the Commission has followed the provisions of section 14. In practice the Commission sometimes does not comply with section 14 in every respect. In many cases there are good reasons why a provision has not been complied with and where no prejudice has been caused by such non-compliance. *Clause 6(e)* now allows the Court to grant condonation under these circumstances, whereafter the relevant proceedings will continue.

7. The increasing number of cases considered by the Court have shown the need for legislative amendments to extend the powers of the Court and the President and judges of the Court have requested certain amendments. *Clause 7* of the Bill proposes by the insertion or addition of new provisions that the Court should be granted the power—

7.1 to determine any matter involving the validity, enforceability, interpretation or implementation of a settlement agreement (section 22(1)(cE) in *clause 7(a)*); and

7.2 to decide any issue which is incidental to an issue within its jurisdiction (section 22(2)(c) in *clause 7(b)*).

8. In terms of section 28(4) of the Act at least one assessor must assist the Court at contested hearings. The proviso to section 28(4), however, creates certain exceptions. One of these exceptions is contained in subparagraph (ii) of that proviso, which provides that an assessor shall not be necessary in the case of an interlocutory or preliminary hearing or pre-trial proceedings. In practice it does, however, happen that a hearing or proceeding contemplated in subparagraph (ii) of the proviso to section 28(4) finally disposes of the matter in question, and that the Court has to make a decision in respect of factual disputes. This means that the presiding judge may need an assessor in the course of such hearing or proceedings without being able to appoint him or her. *Clause 8* substitutes subparagraph (ii) of the relevant proviso in order to authorise the presiding judge to appoint one or more assessors under these circumstances.

9.1 The proviso to section 35(1)(a) of the Act prohibits the Court from awarding a right in land to a claimant where such right was dispossessed from another claimant. No provision is however made for the situation where such other claimant is not the original dispossessed person but is a descendant of that person. A claimant should also, subject to certain exceptions, not be awarded a right in land where the right was dispossessed from the ascendant of another claimant. *Clause 9(a)* contains the necessary further prohibition. The exceptions contained in the proviso currently do not provide for the case where satisfactory arrangements have been or will be made to grant a claimant a particular type of relief under the Act, but the claimant is not satisfied with such redress and insists that he or she be granted another type of relief, for instance restoration of the right in land in question. In such a case a claimant should not be able to rely on the proviso for the enforcement of such a claim, especially where large numbers of people are involved. The new proviso now grants the Court the necessary discretion.

9.2 *Clause 9(b)* deletes the word “dispossessed” in section 35(3). If a claimant is a community dispossessed of land, *all* the members of the community and not only the members of the community who were personally dispossessed should be entitled to have access to the land in question.

9.3 The Court pointed out in the *Farmerfield Communal Property Trust restitution case* (Case No : LCC35/97; Judgment handed down on 23 November 1998) that it is not clear that the Minister for Agriculture and Land Affairs is empowered to exercise the powers conferred on the Minister of Public Works by the Expropriation Act, 1975 (Act No. 63 of 1975), in relation to the expropriation of land ordered in terms of section 35(1)(a) read with section 35(5) of the Restitution Act. This lack of clarity regarding the powers of the Minister for Agriculture and Land Affairs arises from the present wording of section 35(5). *Clause 9* proposes that section 35(5) be substituted and that a new section 35(5A) be inserted to remove any doubt in this respect.

9.4 The present section 35(5) only authorises the Court to order expropriation to

restore land or a right in land. The amended section 35(5) now makes provision that the Court may order the State to expropriate where land, a portion of land or any right in land is awarded by the Court.

9.5 The new section 35(5A) further authorises the Minister of Land Affairs to expropriate in the case of a settlement agreement in terms of the new section 42D, where such agreement makes provision for expropriation. It also empowers the President of the Court to make rules under section 32 of the Act to govern the procedure of the Court in the determination of compensation in expropriation cases. Such compensation will be determined as prescribed by the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), with due regard to certain provisions of the Expropriation Act, 1975 (Act No. 63 of 1975).

10. *Clause 10* of the Bill amends section 38B(1) of the Act, which provides for direct access to the Court by any person who or the representative of any community which is entitled to claim restitution of a right in land. In view of the fact that no claims may be lodged after 31 December 1998, only claimants who have lodged their claims with the Commission not later than that date qualify for direct access after the commencement of the Bill.

11. To ensure that claimants will be encouraged to enter into settlement agreements contemplated in the new sections 14(3) and 42D, provision is made in the proposed section 42C(1), substituted by *clause 11*, that the Minister may grant an advance or a subsidy for the development or management of, or to facilitate the settlement of persons on, land which is the subject of an agreement in terms of section 14(3) or which is awarded in terms of the substituted section 42D. The deletion of paragraph (b) of section 42C(1), which refers to waiving of rights, is in line with section 42D, which abolishes the statutory mechanism of waiving rights.

12.1 *Clause 12* of the Bill substitutes section 42D of the Act to enable the Minister to exercise the powers mentioned in that section in respect of a settlement agreement not incorporated in an order of Court. The Minister will therefore be able in terms of section 42D(1) to award to a claimant who has entered into such an agreement land, a portion of land or any other right in land and, where necessary, acquire or expropriate land, a portion of land or other right in land. Compensation may also be paid or an award made and compensation paid to such a claimant. To bring section 42D(1) in line with section 35(1)(a) it is necessary to add a new proviso to section 42D(1) to prohibit the Minister, subject to certain exceptions, from awarding land, a portion of land or any other right in land to a claimant which was dispossessed from another claimant or the latter's ascendant.

12.2 In order to deal effectively with a claim by a community and to ensure that all the members of the community shall have access to the land awarded or the compensation paid in terms of section 42D, powers similar to those exercised by the Court in terms of section 35(2)(c) and (3) are conferred upon the Minister by section 42D(1)(e) and (2).

12.3 Provision is made in the new section 42D(3), (4) and (5) for the delegation and subdelegation of the powers conferred upon the Minister.

12.4 In view of the fact that a settlement agreement will no longer have to be made an order of Court, it is envisaged that claimants will no longer utilise the present statutory mechanism of waiving their rights in order to obtain land or compensation. It is also not necessary or appropriate that the provisions of section 42D which relate to the waiving of rights remains, where claimants can enforce their rights administratively in terms of the new provisions of section 42D. *Clause 12* therefore deletes such provisions regarding the waiving of rights. Provision is however made that the Minister may exercise the powers conferred by the new section 42D in respect of waiver agreements entered into before the commencement of the Bill.

13. *Clause 13* amends section 33(1) of the Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996), by the insertion of a new paragraph (eA) granting an arbitrator and the Court the power to determine, prescribe or amend the terms on which a labour tenant occupies or uses land. The need for these additional powers arises from the application of Act No. 3 of 1996, and the amendment has been requested by the President and judges of the Court.

Departments/bodies/persons consulted

The following departments, bodies or persons have been consulted:

- The Department of Justice
- The Department of Finance
- The Department of State Expenditure
- The President and judges of the Land Claims Court
- The Commission on Restitution of Land Rights
- The Chief State Law Adviser

Parliamentary procedure

The State Law Advisers and the Department of Land Affairs are of the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.