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RESOURCES
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South African Farm Workers Equity Schemes: A Promise Unfulfilled





November 2025

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I. Introduction

The Legal Resources Centre ("LRC") prepared this Report regarding farm worker equity schemes ("FWES") in South Africa due to persistent short-comings in the program.¹ We have undertaken this analysis to document the history and current operations of the program, as well as any short-comings in the program fulfilling its objective. The LRC's goal in this regard is for the program to fulfil its promise to the many farmworkers the program was intended to benefit.

FWES were initiated in South Africa by the private sector during the early 1990s and later adopted by the Department of Land Affairs ("DLA"), as part of a land reform program to benefit farm workers.² The DLA and its successors are referred to as the "Department of Land Reform" or the "Department." FWES are arrangements in which farm workers, and small-scale farmers ostensibly acquire an equity interest in a commercial farm or an agricultural processing company through a "workers' trust." In the context of land reform, FWES are primarily financed through Department grants. In theory, farm worker beneficiaries in a trust obtain voting rights and beneficial interests (dividends and capital gains) in proportion to their financial investment. The incentive for farm owner participation is additional funding for their farming enterprise. Previous farm owners and their associates will most often serve as trustees of the trusts.

Substantial government resources have been used for FWES. Since the introduction of FWES, "hundreds of equity schemes have been rolled out, a majority of which are located in the Western Cape. By 2013 almost ZAR700-million had been paid to privately-owned farms, and almost 24 thousand hectares of land had been redistributed."³ While FWES are a cornerstone of land reform designed to benefit farm workers, in practice, farm workers rarely receive compensation from their ownership interests and may even face eviction if they raise complaints. Often dividends were seldom and irregularly paid, and of the 88 FWES established between 1996 and 2008, only 9 had declared dividends at all.⁴ Despite raising concerns, farm worker beneficiaries at several farms did not receive an explanation for the low payment rate.⁵ A recent 2023 study found that farm worker participants reported obtaining few or no benefits from FWES.⁶ By all accounts, a central problem with FWES is that the schemes have operated pursuant to general governmental pronouncements and guidelines,

¹ The LRC is an independent public interest law centre with offices throughout South Africa. We work with partners and marginalised communities to harness the power of the law to promote social justice, fight for equality and realise the human rights enshrined in the South African Constitution. The LRC thanks the Friends of the LRC for support in preparing this Report and the international law firm of Dechert LLP for its research assistance.

² S.L. Knight and M.C. Lyne, *Perceptions of Farm Worker Equity-Share Schemes in South Africa*, 41 AGREKON 356, 358 (2002). ("Farm worker equity-sharing projects were initiated by the private sector in the early 1990's. Equity-sharing arrangements were thought to be suited to farming enterprises where it would be better to change the ownership structure of the enterprise rather than divide the land into smaller units. . . . In 1997 the Department of Land Affairs extended its programme to finance worker interests in equity-share schemes."); see Marinda Weidman, *Who Shaped South Africa's Land Reform Policy?*, 31 POLITIKON 219, 220 (2004) (explaining that in South Africa, there are several types of land reform programs, such as restitution programs that enable those who were dispossessed of their land to file claims for land restitution or financial compensation, and tenure reform programs that seek to secure property rights for tenants in the former "homelands" and farms, protecting them from arbitrary evictions); DEPARTMENT OF LAND AFFAIRS: LAND REFORM POLICY COMMITTEE, PROCEDURES FOR FARM WORKER EQUITY SCHEMES 1 (1997) ("Farm worker equity schemes have been adopted by the DLA as a specific type of redistribution project. This is not, however, a separate land reform programme, but part of the land redistribution programme."). This Report is limited to FWES, which is a type of land redistribution program.

³ CORRUPTION WATCH, LAND CORRUPTION AND DISCRIMINATION – RESEARCH FINDING SOUTH AFRICA 14 (Oct. 2023), https://www.corruptionwatch.org.za/wp-content/uploads/2023/10/Land-Corruption-Publication_R4_Digital_FINAL.pdf. 700 million ZAR translates to approximately 56 million GBP or 93 million USD in today's values.

⁴ Ben Cousins, *Land Reform in South Africa is Sinking. Can it be Saved?* (May 2017), <https://mokoro.co.uk/land-rights-article/land-reform-south-africa-sinking-can-saved/> (describing the failures of FWES).

⁵ CORRUPTION WATCH, LAND CORRUPTION AND DISCRIMINATION – RESEARCH FINDING SOUTH AFRICA 15 (Oct. 2023), https://www.corruptionwatch.org.za/wp-content/uploads/2023/10/Land-Corruption-Publication_R4_Digital_FINAL.pdf.

⁶ *Id.*

but no actual legislative or regulatory processes. Overall, FWES have made no meaningful change in the working or living conditions of farm workers.⁷

This examination of FWES includes:

- A timeline of important events affecting FWES.
- Historical and current Constitutional support and guidelines for land reform focusing on FWES.
- Farm worker demographics demonstrating the importance of land reform that affects farm workers.
- FWES framework overview and evaluation documenting the implementation of this land reform program.
- An analysis of workers' trust agreements.
- An examination of the current FWES failings.
- Suggestions of possible remedies under the Trust Property Control Act.
- Lessons from other legal jurisdictions.
- Recommendation for FWES moving forward.

II. FWES Events Timeline

Governmental actions affecting South African land rights of Black Africans, including farm workers, began well before the Natives Land Act, 1913. For this Report, however, the Land Act is a good starting point for appropriate context. The timeline below briefly highlights important events affecting farm worker equity schemes ("FWES").

Relevant Organizations

- Department of Land Affairs later called the Department of Rural Development and Land Reform ("DRDLR") from 2009 to 2019, merged into the Department: Agricultural, Land Reform and Rural Development ("DALRRD") in June 2019, dalrrd.gov.za. The DALRRD and the other noted land departments are collectively referred to as the "Department of Land Reform" or the "Department."
- Directorate: Evaluation and Research ("D: E&R"), governmental organization that periodically evaluates DRDLR programmes.
- National Employment Fund ("NEF") provides support to black-owned and managed businesses, nefcorp.co.za.

⁷ Este Beerwinkel, Nkanyiso Gumede and Katlego Ramantsima, *Farm Worker Equity Schemes*, PLAAS (June 10, 2019), <https://plaas.org.za/farm-workers-equity-schemes/>.

Date	Selected Events Regarding Farm Worker/Tenant Rights
1913	Natives Land Act, 1913 (Act No. 27 of 1913) Limited native (black) land ownership to “scheduled native areas,” about 7% of the country and later 13% through the 1936 Native Trust and Land Act of South Africa. The apartheid government thereafter conducted a mass relocation of black people to poor homelands and to poorly planned and serviced townships.⁸
1991	Abolition of Racially Based Land Measures Act, 1991 (Act No. 108 of 1991) Repealed the Natives Land Act. However, “[i]n 1994, 87% of land was owned by whites and only 13% by blacks as a result of the Natives Land Act.”⁹
1994	Apartheid Formally Ends
1996	Constitution of the Republic of South Africa The 50/50 Policy, discussed <i>infra</i>, is premised on, among other things, the Constitution and the laws of the Republic, particularly Section 25 of Constitutional. Section 25 addresses the rights of individuals not to be arbitrarily “deprived of property.” Also, property may be expropriated only “for a public purpose or in the public interest,” which includes “the nation’s commitment to land reform” and the “public interest” expressly includes “the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources.” The provision further provides that 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.”¹⁰ See Section III of this Report.
1996	Land Reform (Labour Tenants) Act, 1996 (Act No. 3 of 1996) (the “LTA”)

⁸ See 1913 NATIVE LAND ACT CENTENARY, <https://www.gov.za/news/events/commemorative-events/1913-natives-land-act-centenary> (last visited 25-2023-11).

⁹ DIRECTORATE: EVALUATION AND RESEARCH, DIAGNOSTIC EVALUATION OF STRENGTHENING THE RELATIVE RIGHTS OF PEOPLE WORKING THE LAND: 50/50 POLICY FRAMEWORK 1 (Mar. 2017) [hereinafter 50/50 POLICY].

¹⁰ *Id* at 6.

	A law intended to provide tenant farm laborers and their families with certain rights to occupy the part of a farm where they live. However, evictions of farm dwellers remained a problem. From 1984 to 2004, for example, almost 1.7 million people were evicted from farms. This “reveals startling weaknesses in the legislation passed since 1994 to protect the rights of farm dwellers.”¹¹
1997	Directorate: Redistribution Policy and Systems, “Procedures for Farm Worker Equity Schemes” (PC.DOC.9/1997) A report by the Directorate: Redistribution Policy and Systems (“D: RP&S”) outlined the procedures that should be followed when implementing farm worker equity schemes. The report notes, “Farm worker equity schemes are being used for the sole purpose of acquiring capital. [Thus, farm worker equity schemes] should be carefully studied to determine the feasibility of such a venture and agreements between the parties involved must be signed.” The D: RP&S report recommends that land redistribution should consist of five phases: project identification; feasibility preparation; designation & transfer; development; and support services. Designation is not necessary when farm workers do not become owners under a farm worker equity scheme.
1997	Extension of Security of Tenure, 1997 (Act No. 62 of 1997) A law designed to prevent unfair evictions of blacks from land outside of townships. However, as with the LTA, discussed <i>supra</i>, evictions of farm dwellers remained a problem.¹²
2006	Endulini Sundays River Development Trust, IT 836/2006 [E] (2006) Sample representative workers trust analysed in Section VI of this Report.
2009-2011	Este Beerwinkel, <i>Nkanyiso and Katlego Ramantsima: Farm Worker Equity Schemes</i>, PLAAS (June 10, 2019) “Following exposés about equity schemes failing to deliver to farm workers, Gugile Nkwinti, former minister of the

¹¹ Marc Wegerif, Bev Russel, and Irma Grundling, *Still Searching for Security: The Reality of Farm Dweller Evictions in South Africa*, NKUNZI DEV. ASSOC. AND SOC. SURVS., 41 (2005); see also 50/50 POLICY at 2.

¹² *Id.*

	Department of Rural Development and Land Reform (DRDLR), issued a moratorium on new schemes in 2009.”¹³ Department of Rural Development and Land Reform, “The lifting of moratorium on Farm Equity Schemes” (Mar. 2011)
2011	DRDLR, “Green Paper on Land Reform” (August 2011) (the “Green Paper”) The Department’s vision of land reform included a “system of land tenure, which ensures that all South Africans, particularly rural blacks, have a reasonable access to land with secure rights, in order to fulfil their basic needs for housing and productive livelihoods.”¹⁴ The Department also noted that a systems approach seems necessary and appropriate in addressing complex and emotive challenges such land reform. “The failure to protect the rights and security of tenure of farm workers and dwellers is a good illustration of this point. There is a strong view that the real problem in land reform in general; and, in the protection of the rights and security of tenure of farm-dwellers, in particular, may be that of a total-system failure ... rather than that of a single piece of legislation, <i>e.g.</i>, Extension of Security of Tenure Act.”¹⁵ <i>Comparative land reforms</i> noted in Asia (China), India, Latin America (Brazil, Mexico and Chile), and Africa (Egypt).¹⁶
2014	Department of Rural Development and Land Reform, Final Policy Proposals on “Strengthening the Relative Rights of People Working the Land” (Feb. 2014) A series of policy proposals from the DRDLR describing the history and background of land reform and redistribution policies in South Africa, and recommendations on how land redistribution should be handled going forward. A key part of the proposals is that land redistribution be based on “a system of collective ownership” in which the government provides funding to pay for ownership shares of farm workers via an Investment and Development Fund (IDF). The IDF is used to purchase the farm workers’ a 50% equity share in a farm and is jointly owned by the parties. This system provides the government management rights over the IDF but not voting rights; preserving the historical farm

¹³ Este Beerwinkel, Nkanyiso and Katlego Ramantsima, *Farm Worker Equity Schemes*, PLAAS (June 10, 2019), <https://www.plaas.org.za/farm-workers-equity-schemes/>.

¹⁴ DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, GREEN PAPER ON LAND REFORM 4 (2011), https://www.gov.za/sites/default/files/gcis_document/201409/landreformgreenpaper.pdf.

¹⁵ *Id.* at 10.

¹⁶ *Id.* at 8-9.

	worker's rights to the control and management of the farm and preventing "double compensation by avoiding government funding going directly to historical owners of the land.
2017	Directorate: Evaluation and Research, "Diagnostic Evaluation of Strengthening the Relative Rights of People Working the Land: 50/50 Policy Framework" (Mar. 2017) D: E&R, as mandated by the DRLR, published an evaluation of the policy on strengthening of relative rights of people working the land (also known as the "50/50 policy"). The policy referred to farm workers obtaining equity rights in commercial farming operations. In evaluating the policy's pilot program, the D: E&R, among other things: • Questioned the capacity of the NEF to manage the program, including managing the money. • Noted the policy targets farm workers that have worked at a farm for an extended period, which was not defined. The first policy draft stipulated 10 years, which led to long-term farm workers being fired. • Highly recommended honouring the project management process.¹⁷ With the recommended reforms, the D: E&R stated that the 50/50 policy should "open doors" for farm workers and farm dwellers to become co-owners and to participate in managerial decisions and benefits. The policy also should resolve "land tenure insecurities" existing on farms.¹⁸ See Section V of this Report.
2017	Sun Orange Workers Trust (2017) Sample representative workers trust analysed in Section VI of this Report.
2021	Proposed Amendments to the South African Constitution to Allow for the Expropriation of Land On December 7, 2021, the South African Parliament failed to pass proposed amendments to Section 25 of the Constitution.¹⁹ The proposed amendments would have allowed for the expropriation of land without compensation if such

¹⁷ 50/50 POLICY at xxxii and xxxiii.

¹⁸ /d. at 18.

¹⁹ Sakhile Mokoena, *National Assembly Fails to Pass Constitution Eighteenth Amendment Bill* (Dec. 9, 2021), <https://www.parliament.gov.za/news/national-assembly-fails-pass-constitution-eighteenth-amendment-bill>.

	expropriation was “for purposes of land reform” contemplated by Section 25(8). That Section provides that no provision of Section 25 “may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination.” ²⁰
2022	Trust Property Control Act, 1988 (Act No. 58 of 1988) was amended by General Laws (Anti Money-Laundering and Combating Terrorism Financing) amendments Act, 2022 (Act. No. 22 of 2022) The amendments provide for the establishment and maintenance of registers of trust beneficial owners by trustees and the Master of the High Court. The amendments as drafted, among other things, to address shortcomings in the South African framework regarding trust beneficial ownership transparency.²¹ While not the focus, the amendments may have significant implications for FWES workers’ trust. See Section VIII of this Report.
2023	Corruption Watch, “Land Corruption and Discrimination – Research Finding South Africa,” (Oct. 2023) After providing an overview of the “land question” in South Africa and a pattern of racial equality, Corruption Watch concluded that: Farm worker equity schemes are a case study in the challenges of effective governance. [] ... [W]orkers feel as though they have been failed. The result of this failure is that patterns of discrimination persist. Disadvantaged workers still lack equal opportunities to participate in agriculture to the same extent that larger commercial, and mostly white-owned, farms have.²²

III. South African Constitution

As background to understand the historical context of land redistribution and reform in South Africa, an examination of the adoption of Section 25 of the Constitution of South Africa (the “Constitution”) is required. Section 25 provides past victims of land dispossession the right to land restitution, imposes a duty on the state to facilitate access to land on an

²⁰ Const. 18th Am. Bill, (B 18—2021) (S. Afr.), https://www.parliament.gov.za/storage/app/media/Bills/2021/B18_2021_Constitution_Eighteenth_Amendment_Bill/B18_2021_Constitution_Eighteenth_Amendment_Bill.pdf.

²¹ General Laws (Anti Money-Laundering and Combating Terrorism Financing) amendments Act, 2022 (Act. No. 22 of 2022) (S. Afr.), <https://www.gov.za/documents/acts/general-laws-anti-money-laundering-and-combating-terrorism-financing-amendment-act>; see Amendments to the Trust Property Control Act, 1988 (Act No. 57 of 1988), https://www.justice.gov.za/m_statements/2023/20230504-Trusts-AmendmentSummary.pdf.

²² Corruption Watch, LAND CORRUPTION AND DISCRIMINATION – RESEARCH FINDING SOUTH AFRICA 17 (Oct. 2023), https://www.corruptionwatch.org.za/wp-content/uploads/2023/10/Land-Corruption-Publication_R4_Digital_FINAL.pdf.

equitable basis, and allows the state to expropriate land so long as it is in the public interest or for public purposes and subject to compensation.²³ The government policy to strengthen farm worker rights to obtain equity interests in commercial farming operations (the “50/50 Policy”), which is the focus of this analysis, is premised on, among other things, Section 25 of the Constitution.²⁴ Section 25(5) is most applicable as it reads that:

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*.²⁵

Other subsections of Section 25 provide some guidance regarding how this requirement may be implemented. Section 25(2) provides for the circumstances under which property may be expropriated, including that such expropriation must be in the public interest or for public purposes and subject to compensation. Section 25(4) expressly includes “the nation’s commitment to land reform, and reforms to bring about equitable access to all South Africa’s natural resources” in the “public interest.”

Section 25 had been the subject of substantial debate and negotiation prior to its adoption on 8 May 1996. An interim constitution that came into effect on 27 April, 1994 (the “Interim Constitution”) included a right to “acquire and hold rights in property,” provided that “[n]o deprivation of any rights in property shall be permitted otherwise than in accordance with a law” and required compensation for expropriation, but did not require the state to take measures to enable citizens to gain access to land.²⁶

The adoption of the Interim Constitution was followed by a general election on 27 April 1994, in which voters elected the individuals who would represent them in the National Assembly and Senate, which together would make up the Constitutional Assembly. As the deadline neared for adoption of the Constitution, and with nearly all other provisions agreed, the Constitutional Assembly remained deadlocked on the property clause (Section 25), focusing particularly on whether the proposed language failed to adequately protect the rights of property owners.²⁷ This tension can be traced to the allocation of land ownership at the time, with whites owning “the vast majority of the land, despite comprising a small minority of the population.”²⁸ While the African National Congress (“ANC”) had taken the view that there should be no absolute right to property, the National Party (“NP”) was focused on ensuring that existing property rights were protected. The ANC and the NP ultimately agreed to a compromise on how land reform would be addressed.

To effect this compromise, the language proposed with respect to Section 25(8) was revised so that it was expressly subject to a limitations clause in Section 36(1). Dullah Omar, of the ANC, who reported this agreement to the Constitutional Assembly, explained that the issue being addressed was land and that the proposed clause was intended to simultaneously

²³ S. AFR. CONST., 1996.

²⁴ 50/50 POLICY at 6. The 50/50 Policy also relied on:

- Section 26 addressing the right to “adequate housing;”
- Section 27 providing that individuals have a right to “health care services” and “sufficient food and water;” and
- Section 36 providing that any limitations on the noted rights must be “reasonable and justifiable.”

²⁵ S. AFR. CONST., 1996 (emphasis added).

²⁶ S. AFR. (INTERIM) CONST., 1993.

²⁷ *See id.* at 206.

²⁸ Jackie Dugard, *Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?*, 9 CONST. CT. REV. 135, 138 (2019).

provide protection from the arbitrary deprivation or expropriation of property while addressing the legacy of past illegitimate practices. As revised, Section 25(8) reads:

No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).²⁹

As a counterbalance to Section 25, Section 36(1) requires that property rights be limited only to the extent that the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,” such as the nature of the right and less restrictive means to achieve the purpose.³⁰

Section 25 also provides some guidance concerning how the meaning of “equitable” should be determined in connection with compensation for expropriation of property. Section 25(3) requires that compensation reflect: “an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances” and provides a non-exclusive list of factors to be considered.³¹

In the years since the certification of the Constitution, a number of programs have been implemented in connection with Section 25(5), including farm worker equity schemes (“FWES”) and the 50/50 Policy. However, as discussed in other Sections of this Report, these programs have not successfully altered patterns of land ownership or land rights.³²

In *Unpacking Section 25*, Professor Jackie Dugard observed that with respect to Section 25, “the courts have on the whole interpreted deprivation quite widely and, concomitantly, interpreted expropriation quite narrowly.”³³ This means that while the courts have generally taken a broad view of what constitutes deprivation of property, not all deprivation constitutes expropriation requiring compensation. In particular, the Constitutional Court has generally required that expropriation requires state acquisition of property in the public interest,³⁴ although exceptions exist.³⁵ When determining appropriate compensation, the South African government has generally pursued a “market-value driven compensation approach [...] not mandated by the constitution.”³⁶ South African courts, however, have endorsed a two-factor test where they look first to the market-value of the property expropriated and then adjust the value through the application of an open-ended list of factors that includes to the extent relevant, but not limited to, the factors set forth in Section 25(3) of the Constitution.³⁷

In *Msiza v Director-General, Department of Rural Development and Land Reform & Others* (2016), the Land Claims Court of South Africa considered compensation under the Labour Tenants (Land Reform) Act 3 of 1996, and specified that:

²⁹ S. AFR. CONST., 1996.

³⁰ *Id.*

³¹ *Id.* Section 25(3) expressly includes the current use of the property, history of the acquisition and use of the property, market value of the property, extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property and purpose of the expropriation as factors to be considered.

³² Jackie Dugard, *Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?*, 9 CONST. CT. REV. 135, 137 (2019).

³³ *Id.* at 145.

³⁴ See, e.g., *Harksen v Lane NO & Others* [1997] ZACC 12.

³⁵ See *Arun Property Development (Pty) Ltd v City of Cape Town* [2014] ZACC 37.

³⁶ Jackie Dugard, *Unpacking Section 25: What, If Any, Are the Legal Barriers to Transformative Land Reform?*, 9 CONST. CT. REV. 135, 148 (2019).

³⁷ See, e.g., *In Re: Ash and others v Department of Land Affairs* [2000] ZALCC 54 at paragraph 34-35; see also, *Msiza v Director-General, Department of Rural Development and Land Reform & Others* [2016] ZALCC 12.

Market value is not the basis for the determination of compensation under section 25 of the Constitution where property or land has been acquired by the State in a compulsory fashion. The departure point for the determination of compensation is justice and equity. Market value is simply one of the considerations to be borne in mind when a Court assesses just and equitable compensation.³⁸

Some commentators have argued that, in fact, under certain circumstances it might be permissible to provide no compensation through the application of Section 25. The South African Human Rights Commission has also expressed the view that expropriation of land is “just and equitable in appropriate circumstances” and that the root cause of the failure of land reform in South Africa is a result not of the Constitution but of “the ineffective implementation of land reform programmes.”³⁹ In 2018, the Commission suggested that a law of general application be created in terms of Section 25(8) to expressly allow for expropriation without compensation.⁴⁰

In 2018, the National Assembly of South Africa established a Constitutional Review Committee to consider a constitutional amendment expressly allowing for expropriation without compensation. The Committee concluded that “Section 25 of the Constitution must be amended to make explicit that which is implicit in the Constitution, with regards to Expropriation of Land without Compensation, as a legitimate option for Land Reform, so as to address the historic wrongs caused by the arbitrary dispossession of land, and in so doing ensure equitable access to land and further empower the majority of South Africans to be productive participants in ownership, food security and agricultural reform programs.”⁴¹ The bill was introduced in 2021.⁴² However, the South African Parliament did not pass the proposed amendments.⁴³

Although there is debate around the circumstances under which expropriation is permitted and the degree of compensation required, there is no question that the Constitution supports land redistribution and reform programs, such as the 50/50 Policy and FWES.

IV. Farm Worker Demographics

The importance of South African land reform is also supported by Country's demographics. According to the 2022 South African Census, the Republic has a population of 62.2 million with Black Africans representing 81.4%. 13.8% of the total households are identified as involving in agricultural activity and of those 2.46 million agricultural households, 2.23 million or 90.8% are Black African households.⁴⁴

³⁸ *Msiza* [2016] ZALCC 12, at paragraph 29.

³⁹ SOUTH AFRICAN HUMAN RIGHTS COMMISSION, SOUTH AFRICAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE JOINT CONSTITUTIONAL REVIEW COMMITTEE REGARDING SECTION 25 OF THE CONSTITUTION (2018) at 10.

⁴⁰ *Id.* at 12; see also Kevin Hopkins and Carl Adendorff, *Nurturing the Land: Is it necessary to amend s 25 of the Constitution for Land Reform*, De Rebus (2018) (“If one imagines the amount to be represented as a continuum, then ‘zero’ compensation will be on the one side whereas ‘market value’ will be on the other end. The Constitution gives the state the right to compensate a private property owner any amount along the continuum, provided that, whatever the amount may be, it is just and equitable in the circumstances regard being had to the five considerations in s 25(3)(a) to (e).”).

⁴¹ REPORT OF THE JOINT CONSTITUTIONAL REVIEW COMMITTEE ON THE POSSIBLE REVIEW OF SECTION 25 OF THE CONSTITUTION (2018).

⁴² Const. 18th Am. Bill, (B 18—2021) (S. Afr.), https://www.parliament.gov.za/storage/app/media/Bills/2021/B18_2021_Constitution_Eighteenth_Amendment_Bill/B18_2021_Constitution_Eighteenth_Amendment_Bill.pdf.

⁴³ Sakhile Mokoena, *National Assembly Fails to Pass Constitution Eighteenth Amendment Bill* (Dec. 9, 2021), <https://www.parliament.gov.za/news/national-assembly-fails-pass-constitution-eighteenth-amendment-bill>.

⁴⁴ Statistics South Africa, Statistical Release P0301.4 – Census 2022, https://census.statssa.gov.za/assets/documents/2022/P03014_Census_2022_Statistical_Release.pdf.

The Census numbers, however, are undoubtedly under counted.⁴⁵ Suffice it to say that the status of farm workers represents a core aspect of South Africa. Moreover, as the South African Human Rights Commission has highlighted, “[f]arm workers, in general, form a vulnerable and marginalised group due to a number of social and economic conditions. Farm workers are predominantly of low income, low skills, and low educational levels; and in some instances, may comprise of immigrants without the necessary authorisation to reside or work in the Republic [of South Africa].”⁴⁶

V. FWES Overview and Framework

A. Origins of FWES Programs: 1990s – 2009

South Africa’s land reform initiatives, formally launched in 1994 in the wake of apartheid.⁴⁷ They were guided by a “willing buyer, willing seller” principle, which envisioned the sale of land between private parties to effect the transfer of land to disadvantaged peoples.⁴⁸ The market-led approach was not mandated by the South African Constitution – and, in fact, the South African Constitution would have authorized an approach relying on governmental expropriation and redistribution to effect land reform. Nevertheless, the “willing buyer, willing seller” approach had become the cornerstone of the land reform program by the late 1990s.⁴⁹ It was during this period and in this context in which FWES first appeared.⁵⁰ For these reasons, FWES are viewed as having originated in the private sector. FWES were thought to be well suited to large-scale farming enterprises.⁵¹ The technical nature of large vineyard and orchard operations were thought to make parceling and distributing the land to a large number of individuals infeasible.⁵²

Though initiated in the private sector, in 1997, FWES were officially recognized by the South African Government as a legitimate means of land reform.⁵³ The South African Department of Land Affairs began using its resources to finance farm worker’s participation

⁴⁵ Statistics South Africa, Post-Enumeration Survey Statistical Release – Census 2022, <https://census.statssa.gov.za/assets/documents/2022/P030152022.pdf>.

⁴⁶ SOUTH AFRICAN HUMAN RIGHTS COMMISSION, FARM WORKERS AND HUMAN RIGHTS, <https://www.sahrc.org.za/home/21/files/FINAL%20Farm%20Workers%20and%20Human%20Rights%20Educational%20Booklet.pdf>; S.L. Knight, M.C. Lyne, and M. Roth, *Best Institutional Arrangements for Farm-Worker Equity-Share Schemes in South Africa*, 42 AGREKON 228, 244 (2003). Evidence suggests that high rates of illiteracy among farmers may exacerbate the issue of negotiating with management. According to a 2003 study, more than 40% of farm workers in the Western Cape of South Africa were illiterate when they became shareholders, and few FWES provided basic literacy training.

⁴⁷ Boyce Tom, *Reviewing Farm Worker Equity Schemes: A Case Study of Saamwerk Wine Farm in the Overberg Region, Western Cape*, 23-24, 27 (MPhil, University of Western Cape, 2006), <https://core.ac.uk/download/pdf/58913043.pdf> (“South Africa’s land reform programme to transfer land from ‘Whites’ to Africans was to be carried achieved through the market-led approach based on the willing buyer-willing seller principle.”); see also Robin Palmer, *Farm Equity Schemes in South Africa* 1 (2000), <http://www.caledonia.org.uk/land/documents/farm-equity.pdf> (“Farm Equity Schemes were initiated by the private sector in the mid-1990’s to contribute to the land reform programme.”).

⁴⁸ Edward Lahiff, *Willing Buyer, Willing Seller: South Africa’s Failed Experiment in Market-Led Agrarian Reform*, 28 THIRD WORLD QUARTERLY 1577, 1580 (2007), <https://pov-tc.pbs.org/pov/downloads/2010/pov-promisedland-willingbuyer.pdf> (“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.”).

⁴⁹ *Id.* (“The concept of ‘willing buyer, willing seller’, had become the cornerstone of policy. Such an approach was not dictated by the South African Constitution, which makes explicit provision for expropriation for purposes of land reform and for compensation at below market prices.”).

⁵⁰ DEPARTMENT OF LAND AFFAIRS: LAND REFORM POLICY COMMITTEE, PROCEDURES FOR FARM WORKER EQUITY SCHEMES, 1 (1997) (“Farm worker equity schemes have been adopted by the DLA as a specific type of redistribution project. This is not, however, a separate land reform programme, but part of the land redistribution programme.”).

⁵¹ S.L. Knight and M.C. Lyne, *Perceptions of Farm Worker Equity-Share Schemes in South Africa*, 41 AGREKON 356, 358 (2002). (“Farm worker equity-sharing projects were initiated by the private sector in the early 1990’s. Equity-sharing arrangements were thought to be suited to farming enterprises where it would be better to change the ownership structure of the enterprise rather than divide the land into smaller units.”).

⁵² *Id.* (“Equity-sharing arrangements were thought to be suited to farming enterprises where . . . the enterprise is indivisible due to technical, managerial or natural resource constraints.”).

⁵³ *Id.* (“In 1997 the Department of Land Affairs extended its programme to finance worker interests in equity-share schemes.”).

in FWES. The government's embrace of FWES was a recognition of the "importance of partnership agreements or joint ventures between the private sector and land reform beneficiaries as an essential step towards broadening the base of land ownership."⁵⁴ Funding to South African farm workers was first made available in the form of Settlement/Land Acquisition Grants.⁵⁵ Subsequently, Settlement/Land Acquisition Grants were replaced by a program called Land Redistribution for Agricultural Development, through the government made larger grants.⁵⁶ From 1997, the Department of Land Reform primarily provided farm worker financing through government grants.⁵⁷ At the same time, the government contemplated some funding from the private sector to better ensure FWES success.⁵⁸

The structuring of the FWES arrangements would start with a farm owner's operating business entity, which owned the farm (agricultural) land and other business assets. Either directly or indirectly through a holding company, the farm owners would convey a percentage (usually 25 to 40%) of the operating company interest to a "workers trust".⁵⁹ The original owners would continue to hold the remaining interest in the operating company. The original owners would procure a government grant or occasionally private financing for farm workers to "acquire" interests in the trust.⁶⁰ See a basic FWES organizational diagram below:

⁵⁴ Boyce Tom, *Reviewing Farm Worker Equity Schemes: A Case Study of Saamwerk Wine Farm in the Overberg Region, Western Cape*, 33 (MPhil, University of Western Cape, 2006), <https://core.ac.uk/download/pdf/58913043.pdf>.

⁵⁵ Edward Lahiff, *Willing Buyer, Willing Seller: South Africa's Failed Experiment in Market-Led Agrarian Reform*, 28 THIRD WORLD QUARTERLY 1577, 1580 (2007), <https://pov-tc.pbs.org/pov/downloads/2010/pov-promisedland-willingbuyer.pdf> ("Until 2000 redistribution policy centered on the provision of the Settlement/ Land Acquisition Grant (SLAG), a grant of R16 000 available to qualifying households with an income of less than R1500 per month.").

⁵⁶ *Id.* ("Since 2001 SLAG has been effectively replaced by a programme called Land Redistribution for Agricultural Development (LRAD), which was introduced with the explicit aim of promoting commercially oriented agriculture but claimed to cater to other groups as well.").

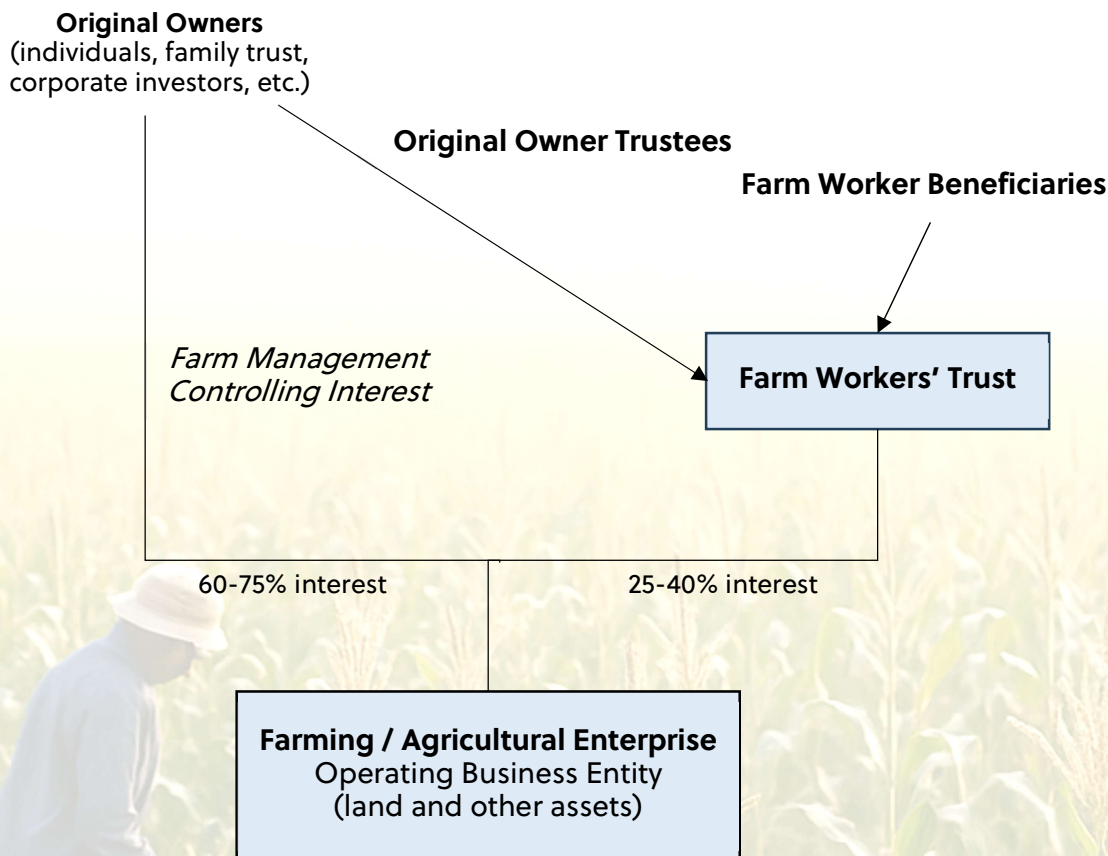
⁵⁷ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, A REVIEW OF EXPERIENCES OF ESTABLISHING EMERGING FARMERS IN SOUTH AFRICA 12 (2009), <https://www.fao.org/3/i1385e/i1385e.pdf> ("Initially farm workers had to finance their equity through loans, but from [1997] onwards the DLA allowed farm workers to use their SLAG grants.").

⁵⁸ Este Beerwinkel, Nkanyiso Gumede and Katlego Ramantsima, *Farm Worker Equity Schemes*, PLAAS (June 10, 2019), <https://plaas.org.za/farm-workers-equity-schemes/> ("The schemes involved private sector co-funding, as state subsidies were too limited"); S.L. Knight & M.C. Lyne, *Perceptions of Farm Worker Equity-Share Schemes in South Africa*, 41 AGREKON 356, 358 (2002) ("[F]arm worker equity-share schemes co-financed by the private sector and the DLA jointly are more likely to succeed financially than are projects that attract only DLA funding, because private lenders and investors have a financial interest in the project's success.").

⁵⁹ Helen KingHo Or, *Land Reform in the South African Wine Industry: Reviewing Equity Sharing Scheme in Stellenbosch* 69 (August 2011) (unpublished thesis for M.Sc. in International Development Studies, University of Utrecht) (describing the structure of Farm Worker Equity Schemes).

⁶⁰ *Id.*

Typical FWES Organizational Structure



The farm worker beneficiaries ostensibly owned trust interest providing them with certain rights such as voting for trustees and equity interests entitling them to a share of the profits/dividends from the farming enterprise.⁶¹ The trustees, who most often were the original owners and their associates, were supposed to act on behalf of the farm workers, while simultaneously continuing to manage in the farming enterprise.⁶² Theoretically, the trustees – as fiduciaries – would advocate for the workers' social and economic interests. In theory, the workers equity ownership would boost their income by entitling them to dividends paid out of the farm's earnings.⁶³ FWES also were thought to have the potential to empower farm workers in other ways, such as increasing their level of participation in management decision

⁶¹ M.C. Lyne & M. Roth, *Establishing Farm-based Equity-share Schemes in KwaZulu-Natal: Lessons from USAID's Basis Research Programme* (2024), https://pdf.usaid.gov/pdf_docs/Pnade748.pdf.

⁶² Boyce Tom, *Reviewing Farm Worker Equity Schemes: A Case Study of Saamwerk Wine Farm in the Overberg Region, Western Cape*, 32 (MPhil, University of Western Cape, 2006), <https://core.ac.uk/download/pdf/58913043.pdf>. According to several LRC-reviewed trust deeds a certain number of trustees should be farm workers. However, this may or may not have taken place.

⁶³ Ruth Hall et al., *What Land Reform has Meant and Could Mean to Farm Workers in South Africa* (June 2001), <https://www.researchgate.net/publication/268383244> ("In some cases workers who work and hold shares in an enterprise that is profitable have received dividends (their share of profits) and continue to hold an asset that is equal to or greater than the initial investment of their land reform grant.").

making.⁶⁴ Nevertheless, because the original owners created the FWES on behalf of the workers and controlled the operations, there were concerns any benefits accruing to workers.⁶⁵

B. FWES Moratorium: 2009-2011

By the mid to late 2000s, evidence had mounted that FWES had not delivered the benefits they were designed to provide to farm workers. Of 88 FWES established between 1996 and 2008, only 9 had declared dividends.⁶⁶ Various studies revealed other failings of FWES, including: lack of empowerment of farm workers, lack of tenure security for resident farm workers, poor working relations between farm owners and farm workers, and “free rider” problems in which farm workers did not contribute to the enterprise but expected to receive dividends.⁶⁷

The “willing seller, willing buyer” model was identified as a contributor to FWES’ shortcomings. Farm owners initiated FWES and, as a result, their interests drove the applications for grants and how terms of the FWES were negotiated with farm workers. While, in theory, the market-led approach could have led to farm owners transferring their property at market-value to disadvantaged people, farm owners more often found ways to exploit the system for their own benefit. In struggling industries, for example, farmer owners facing financial problems would initiate equity schemes to obtain an injection of capital into their businesses.⁶⁸ Farm owners also viewed FWES as a means of transferring risk or otherwise partially exiting a struggling business.⁶⁹ In other cases, corruption was more outright, with the agreed upon rights of farm workers being disregarded by farm owners. Farm workers, would be denied their opportunities to vote or be represented in the organization.⁷⁰

Farm workers also often did not receive distributions of the farming enterprise’s earnings that were due to them.⁷¹ Moreover, FWES resulted in unequal relations between farm management and farm worker beneficiaries, with beneficiaries often “given perfunctory status on the Board of Directors as a ruse to diffuse possible tensions.”⁷²

⁶⁴ J.B. Eckert et al., *Perceiving a New Future: Empowering Farmworkers Through Equity Sharing*, 13 DEVELOPMENT SOUTHERN AFRICA 693, 695 (1996) (discussing benefits of FWES).

⁶⁵ Boyce Tom, *Reviewing Farm Worker Equity Schemes: A Case Study of Saamwerk Wine Farm in the Overberg Region, Western Cape*, 32 (MPhil, University of Western Cape, 2006), <https://core.ac.uk/download/pdf/58913043.pdf>. (“[FWES] are usually created by management on behalf of the workers. There are concerns about the significance of benefits accruing to workers as a return on their investment.”).

⁶⁶ Ben Cousins, *Land Reform in South Africa is Sinking. Can it be Saved?* (May 2017), <https://mokoro.co.uk/land-rights-article/land-reform-south-africa-sinking-can-saved/> (describing the failures of FWES).

⁶⁷ Press Release South African Government, *The Lifting of Moratorium on Farm Equity Schemes* (Mar. 12, 2011), <https://www.gov.za/news/media-statements/lifting-moratorium-farm-equity-schemes-12-mar-2011> (identifying issues with FWES).

⁶⁸ Ruth Hall et al., *What Land Reform has Meant and Could Mean to Farm Workers in South Africa* (June 2001), https://mokoro.co.uk/wpcontent/uploads/what_land_reform_has_meant_to_farm_workers_sa.pdf (discussing structural issues with FWES).

⁶⁹ *Id.*

⁷⁰ DEPARTMENT: RURAL DEVELOPMENT & LAND REFORM, *STRENGTHENING THE RELATIVE RIGHTS OF PEOPLE WORKING THE LAND 19* (2013), <https://www.datocms-assets.com/7245/1574922523-policy-proposals-strengthening-the-relative-rights-of-people-working-the-land-2013.pdf> (“Unequal relations between equity partners (established landowners) and worker beneficiary shareholders (farm workers/dwellers) have meant that the latter are not able to effectively participate in decision making processes, with beneficiaries often ‘given perfunctory status on the Board of Directors as a ruse to diffuse possible tensions’.”).

⁷¹ CORRUPTION WATCH, *LAND CORRUPTION AND DISCRIMINATION 14* (2023), https://www.corruptionwatch.org.za/wp-content/uploads/2023/10/Land-Corruption-Publication_R4_Digital_FINAL.pdf.

⁷² DEPARTMENT: RURAL DEVELOPMENT AND LAND REFORM, *STRENGTHENING THE RELATIVE RIGHTS OF PEOPLE WORKING THE LAND 19* (July 30, 2013), <https://www.datocms-assets.com/7245/1574922523-policy-proposals-strengthening-the-relative-rights-of-people-working-the-land-2013.pdf>.

Concerns about corruption and the ineffectiveness of FWES led to the minister of the Department of Rural Development and Land Reform to impose a moratorium on FWES beginning in 2009.⁷³

C. Reinstitution of FWES: 2011 to Present

In 2011, the Department of Rural Development and Land Reform revived FWES.⁷⁴ The moratorium was lifted after an investigation into what FWES needed to cause them to operate more effectively.⁷⁵ Among the characteristics identified for the successful implementation of FWES were: clear criteria for eligibility for receipt of government funds; training in both technical and management skills as a joint effort between government and farm ownership; and involvement of all participants in the business as equal shareholders.⁷⁶

Multiple governmental projects were proposed after the lifting of the moratorium that seemed to contemplate a more active role for the South African government in the establishment and oversight of FWES.⁷⁷ Overall, however, South Africa's land reform program has failed to attain coherence and the government's role in FWES remains unclear.⁷⁸

Despite the lack of formal guidelines, funding remains available to farm workers seeking to participate in FWES. The Recapitalization and Development Programme is the South African government's agricultural support program and is currently administered by the Department of Rural Development and Land Reform.⁷⁹ The program was launched in 2010 and remains in effect. The Recapitalization and Development Programme focuses exclusively on farming enterprises at the centre of land redistribution efforts and supports land reform beneficiaries with, among other things, cash grants.⁸⁰ The cash funding available through the Programme appears to supersede earlier forms of government funding that were used to support FWES.⁸¹ The Programme appears to specifically contemplate FWES. On a webpage of the South African Government describing the Recapitalization and Development Programme, an application for a grant to receive funding for participation in a FWES can be accessed.⁸² The application itself reveals certain requirements that applicants need to fulfil,

⁷³ Este Beerwinkel, Nkanyiso and Katlego Ramantsima, *Farm Worker Equity Schemes*, PLAAS (June 10, 2019), <https://www.plaas.org.za/farm-workers-equity-schemes/>.

⁷⁴ Press Release South African Government, *The Lifting of Moratorium on Farm Equity Schemes* (Mar. 11, 2011), <https://www.gov.za/lifting-moratorium-farm-equity-schemes>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Ben Cousins, *Land Reform in South Africa is Sinking. Can it be Saved?* (May 2017), <https://mokoro.co.uk/land-rights-article/land-reform-south-africa-sinking-can-saved/> (describing pilot programs launched after the FWES moratorium).

⁷⁸ *Id.* ("The objectives and strategic thrust of land reform remains unclear, and the key categories of people intended to benefit are not specified clearly enough. This is partly because it has not been conceived of as part of a wider process of agrarian reform aimed at restructuring the class structure of the rural economy.").

⁷⁹ Ndidzulafhi Nenngwekhulu, *Financial Analysis of the Recapitalisation and Development Programme in South Africa* (Jan. 2019) (dissertation for MSc. Agric, University of Pretoria), https://repository.up.ac.za/bitstream/handle/2263/70454/Nenngwekhulu_Financial_2019.pdf?sequence=1&isAllowed=y ("The Recapitalisation and Development Programme (RECAP) is the government's agricultural support programme administered by the Department of Rural Development and Land Reform.").

⁸⁰ *Id.* ("RECAP was established to focus exclusively on recapitalising farms acquired through different land reform programmes (DRDLR, 2010). RECAP supports land reform beneficiaries with cash grants, mentorship and capacity building to finance infrastructure development, acquisition of mechanisation, entrepreneurial support, production inputs, market support and value chain integration.").

⁸¹ Ben Cousins, *Land Reform in South Africa is Sinking. Can it be Saved?* (May 2017), <https://mokoro.co.uk/land-rights-article/land-reform-south-africa-sinking-can-saved/> ("The Recapitalisation and Development Policy Programme replaces all previous forms of funding for land reform, including settlement support grants for restitution beneficiaries.").

⁸² S. AFR. GOV., *RECAPITALIZATION AND DEVELOPMENT PROGRAMME*, <https://old.dalrrd.gov.za/About-Us/RADP#:~:text=Recapitalization%20and%20Development%20focuses%20on,agricultural%20properties%20in%20distress%20acquired>.

including the submission of a business plan, an accountant's letter and proof of a bank account.⁸³

A second policy that the Directorate: Evaluation and Research ("D: E&R") prepared, as mandated by the Department of Land Reform, sought to establishing a better framework for FWES following the lifting of the moratorium. The policy titled "The Strengthening of Relative Rights for People Working the Land" or the "50/50 Policy" was proposed in 2013 and published in 2014.⁸⁴ The 50/50 Policy Framework envisioned a form of FWES as a central component to land redistribution reform.⁸⁵ It contemplated farm owners voluntarily transferring approximately 50% (but at least 40%) of the equity in their farm enterprises to a workers' trust. Funding from the government and the private sector would continue to finance farm worker equity in the trust.⁸⁶

However, in evaluating the 50/50 Policy pilot program, the D: E&R, among other things:

- Questioned the capacity of the National Employment Fund ("NEF") to manage the program, including managing the money.
- Noted the policy targets farm workers that have worked at a farm for an extended period, which was not defined. The first policy draft stipulated 10 years, which led to long-term farm workers being fired.
- Highly recommended honouring the project management process.⁸⁷

With certain recommended reforms, the D: E&R stated that the new policy should "open doors" for farm workers and farm dwellers to become co-owners and to participate in managerial decisions and benefits. The policy also should resolve "land tenure insecurities" existing on farms.⁸⁸ While it is unclear the extent to which the FWES structure described in "50/50 Policy" has been implemented, the government has signalled its intent to continue using FWES as part of its land redistribution efforts. For example, the Department of Agriculture, Land Reform and Rural Development lists FWES as one of its planned policies as part of its strategic plan for 2020-2025.⁸⁹

These initiatives indicate that South Africa has, to an extent, discarded the willing-buyer, willing-seller approach to land reform. That view is supported by a bill passed in 2016 that allows the compulsory purchase of land in the public interest. The bill enables the government to expropriate land for the public interest and compensate the original owners at a fair value.⁹⁰ It is unclear to what extent this legislation has been utilized to effect land-reform.

⁸³ *Id.*

⁸⁴ DEPARTMENT: RURAL DEVELOPMENT AND LAND REFORM, STRENGTHENING THE RELATIVE RIGHTS OF PEOPLE WORKING THE LAND 19 (July 30, 2013), <https://www.datocms-assets.com/7245/1574922523-policy-proposals-strengthening-the-relative-rights-of-people-working-the-land-2013.pdf>.

⁸⁵ 50/50 POLICY at 5 ("A combination of share-equity and co-management is the key to achieving the underlying objectives of the 50/50 policy framework.").

⁸⁶ *Id.* at 10, 100, 131 ("There are two main sources of financing the worker-equity: the DRDLR will deposit funds from the Land Reform Programme into the NEF to finance 50-50 projects; and/or private sector financing will be used.").

⁸⁷ *Id.* at xxxii and xxxiii.

⁸⁸ *Id.* at 18.

⁸⁹ DEPARTMENT OF AGRICULTURE, LAND REFORM AND RURAL DEVELOPMENT, STRATEGIC PLAN 2020-2025 18 (2020), <https://faolex.fao.org/docs/pdf/saf216434.pdf>.

⁹⁰ OCED, AGRICULTURAL POLICY MONITORING AND EVALUATION, <https://www.oecd-ilibrary.org/sites/8bd37901-en/index.html?itemId=/content/component/8bd37901-en> ("The bill enables the state to pay for land at a value determined by a

Simultaneously, however, the South African government ostensibly continues to contemplate an active role of private sector participants in the establishment of FWES. As mentioned above, applications for financial grants through the Recapitalization and Development programme require that a business plan be submitted. The concept of a business plan has been developed in the context of other South African governmental programs that have centred on “the need to create a nation united in diversity . . . to ensure a more equitable distribution of the benefits of economic growth and to reduce inequality”.⁹¹ Government guidelines, presented alongside the application for share-equity arrangement funding, stress that a business plan is a powerful tool for raising money and acquiring private sector support.⁹² While not stated explicitly, the government appears to be leaving open the option for FWES to be financed by third-party financiers and investors.

As reviewed in Section VII of this Report, FWES still struggle to provide their intended benefits for farm workers. Widespread corruption hinders land reform programs from operating effectively.⁹³ The problems that plagued FWES prior to the moratorium appear extant, with some critics observing that “farmers use the equity schemes to get out of debt”.⁹⁴ Farm Worker participants in FWES have reported that their situation has not improved since joining an FWES.⁹⁵ Participants reported seeing few or no benefits from FWES. For example, farm workers reported experiencing multiple year-long periods without receiving dividends.⁹⁶ Farm workers also expressed concerns regarding lack of transparency and access to information about the FWES. They report never being told the details of the scheme but rather being made to sign papers without receiving a full understanding of the scheme.⁹⁷ While FWES were meant to empower farm workers, many report being excluded from decision making regarding the operating of the business. They report being excluded from shareholder meetings and being denied access to information pertinent to the business.⁹⁸

The failings of FWES have left many farm workers discouraged. The failures are largely attributed to lack of government involvement and oversight.

VI. Representative Trust Agreements

This document compares two representative trust deeds that utilize the FWES scheme: Endulini Sundays River Development Trust (2006) (“Sundays River”), and Sun Orange Workers

government adjudicator and then expropriate it for the “public interest”, ending the willing-buyer, willing-seller approach to land reform.”).

⁹¹ DEPARTMENT OF AGRICULTURE, FORESTRY AND FISHERIES, AGRICULTURAL BUSINESS PLAN GUIDELINES 3 (2011), [https://old.dalrrd.gov.za/doaDev/AgricDevFinance/BusinessPlanGuidelines\(VIS\).pdf](https://old.dalrrd.gov.za/doaDev/AgricDevFinance/BusinessPlanGuidelines(VIS).pdf).

⁹² *Id.* (“A business plan can be used as a powerful sales document for raising money. A business plan is a prerequisite for engaging with a venture capitalist, and/or investors.”).

⁹³ Melusi Ncala, *Farm Worker Equity Schemes a Failure of Both Government and Farm Owners*, CORRUPTION WATCH (Nov. 27, 2023), <https://www.corruptionwatch.org.za/farm-worker-equity-schemes-a-failure-of-both-government-and-farm-owners/> (“[P]olicies relating to communal property associations, the building of Reconstruction and Development Programme houses, and several other government innovations, were highly compromised by unscrupulous officials, fraudulent businesspersons, and unethical traditional leaders. . . . The Department of Agriculture, Land Reform and Rural Development knows about these goings-on, but opts to look the other way because some of their officials are complicit and because they fear to kick the hornets’ nest. . . . One such instance of secrecy relates to a review of a policy called Farm Worker Equity Schemes that commenced in the 1990s. It is another example of political elites and corporations in the agriculture sector lining their collective pockets with state funds at the expense of labour tenants.”).

⁹⁴ Nicola Daniels, *Calls for Farmworker Equity Schemes to be Scrapped and Replaced*, CAPE TIMES (Oct. 27, 2023), <https://www.iol.co.za/capetimes/news/calls-for-farmworker-equity-scheme-to-be-scrapped-and-replaced-04735bb9-d067-4031-bf91-527c08a7693b>.

⁹⁵ *Id.* (“Farm worker equity schemes were designed to raise up disadvantaged workers, but few participants felt that their situation had changed.”).

⁹⁶ CORRUPTION WATCH, LAND CORRUPTION AND DISCRIMINATION 15 (2023), https://www.corruptionwatch.org.za/wp-content/uploads/2023/10/Land-Corruption-Publication_R4_Digital_FINAL.pdf. In one case, it was reported that workers received a payment in the mid-2000s and did not receive a second until 2022. In other cases, dividends were paid seldom and irregularly.

⁹⁷ *Id.*

⁹⁸ *Id.*

Trust, IT 52/2006 (2017) ("Sun Orange"). Each trust owns approximately 40% of its respective fruit farm. The stated purpose of each trust is to financially benefit the farm workers, who acquire beneficial interests in the trust with funds from a government grant. A majority of the farm worker beneficiaries of Sun Orange also must be Historically Disadvantaged South Africans ("HDSAs"). Both trust deeds give the trustees—who are often the original farm owners—virtually absolute authority to determine what trust profits are paid to the farm worker beneficiaries.

- Sundays River: "The Trustees shall have the right in their entire discretion ... to vest any part of the income or capital of the Trust Fund in the Beneficiaries"
- Sun Orange: The Beneficiaries have the right to "[r]eceive a proportionate share of the profits and/or the Trust Fund that the Trustees decide to distribute each year."

These are the key similarities of the two trust deeds.

Nevertheless, there are key differences between the Sundays River and Sun Orange trust deeds. For Sundays River, the trust deed appears to provide the trustees themselves with the authority to appoint additional trustees as needed; however, each separate farm unit must be represented by one trustee "living and working" on the farm. While the Sundays River books must be audited each year, the farm workers do not have an explicit right to review the audited financials. For Sun Orange, the trust deed provides that the trustees are elected by the farm workers at an annual meeting. In addition, as noted above, a majority of the Sun Orange trustees must be HDSAs. The trust is, furthermore, required to have its books audited annually, and the Sun Orange farm worker beneficiaries have an explicit right to review the audited financial statements.

Another key difference is dispute resolutions. Sundays River's trust deed does not provide for a mechanism to resolve disputes among the trustees and beneficiaries; however, protectors ostensibly monitored the performance of the trustees for the first ten years of the trust. Thereafter, the trustees did not have protector oversight. For Sun Orange, an arbitrator is given final authority to resolve disputes for trust matters.

In sum, the Sundays River trust gives farm worker beneficiaries ostensibly fewer rights than the Sun Orange trust. In practice, however, it is unclear whether the farm worker beneficiaries of either trust see any distributions of profits, among other problems reported to the LRC, as discussed after the chart.

Following is a side-by-side comparison of key terms of the trust deeds:

	Endulini Sundays River Development Trust, IT 836/2006 [E] (2006) ⁹⁹	Sun Orange Workers Trust, IT 52/2006 (2017)
Farm Background	Started by the Ferreira family, the Endulini Sundays River Fruit farm is a leading fruit exporter, located in the Eastern Cape province. The Endulini Sundays River	Sun Orange Farm is citrus fruit farm in the Eastern Cape province. The Sun Orange Works Trust, established in 2001, owns 40% of the farm.

⁹⁹ The trust deed for the Endulini Development Trust (2005) is virtually identical (other than factual information such as the settler and initial individual protectors) to the trust deed for the Endulini Sundays River Trust (2006).

	Endulini Sundays River Development Trust, IT 836/2006 [E] (2006) ⁹⁹	Sun Orange Workers Trust, IT 52/2006 (2017)
	Development Trust reportedly holds 41% of the farm enterprise. The Land Reform Department assisted the farm workers to buy shares in the Trust through the Land Redistribution for Agriculture Development (LRAD) programme.¹⁰⁰	In 2003, the Sun Orange Farm was Fairtrade certified.¹⁰¹ In 2017, the Trust became part of a Rural Development and Land Reform programme that allowed the government to acquire a stake in the farming enterprise on behalf of the workers and to purchase the land to provide tenure security for the farmworkers, according to the minister of the government agency.¹⁰² In 2022, the Department of Economic Development gave notice that a black-owned investment management firm, African Pioneer Foods (Pty) Ltd (AP Foods), proposed to acquire shares in the Trust.¹⁰³
Stated Objectives	The trust shall, among other things: • “[P]urchase with funds provided by the National Department of Land Affairs, farmland or shares in a company the owner of farmland;” • “[P]rovide for the upliftment, empowerment and financial benefit of the beneficiaries;” and • “[A]ssist the beneficiaries through training to gain the management skills and expertise necessary to become farmers in their own right....” ¶ 2.1.	The main objects of the trust are, among other things: • “To empower all Beneficiaries by increasing their wealth and improve their socio-economic well-being;” ¶ 2.2.1. • “To hold and manage the shares in the company in order that any dividends received may be distributed to Beneficiaries....”; ¶ 2.2.3

¹⁰⁰ See Nomazima Nkosi, *Farm shares scheme row*, HERALD LIVE (Feb. 9, 2019), <https://www.heraldlive.co.za/weekend-post/your-weekend/2019-02-09-farm-shares-scheme-row/>; Joseph Chirume, *Farm workers demand dividends from black empowerment scheme*, GROUNDUP (Nov. 13, 2018), <https://www.groundup.org.za/article/eastern-cape-farm-workers-demand-shares-owed-them/>.

¹⁰¹ Fairtrade Foundation, IMPACTS OF FAIRTRADE IN SOUTH AFRICA, Impact Briefing Paper (June 2010).

¹⁰² Admin Author, *EC farm workers trust takes ownership of thriving citrus farm*, ALGOA FM (Oct. 6, 2017), <https://www.algoafm.co.za/local/ec-farm-workers-trust-takes-ownership-of-thriving-citrus-farm>.

¹⁰³ Government Gazette, No. 46688 (8 July 2022).

	Endulini Sundays River Development Trust, IT 836/2006 [E] (2006) ⁹⁹	Sun Orange Workers Trust, IT 52/2006 (2017)
Settlor/Founder	Espie Ferreira	Sun Orange (Proprietary) Limited
Beneficiaries	"The initial beneficiaries ... will consist of all employees and spouses ... on having been employed for two years or longer ... on condition that each of them be allocated funds by the National Department of Land Affairs to enable them to acquire land." ¶ 17.1 "All newcomer employees ... after spending two years in the employ of the [the company] on condition that they be allocated Government funds to acquire an interest in the trust or come to some financial arrangement with the trustees regarding such acquisition." ¶ 17.2.	"[A]n Initial Beneficiary...must accept long-term employment and as a permanent employee of the company...." ¶ 7.1 [T]he beneficiaries ... shall always comprise HDSAs [Historically Disadvantaged South Africans] that are permanent employees and long-term contract employees. ¶ 7.2. [A new Beneficiary must be Appointed as a long- term employee.] ¶ 7.3.
Trustees	3-7 trustee. "There shall be not less than 3 (three) and not more than 10 (ten) trustees." If at any time the number of trustees falls below 3 (three) ..., <i>the remaining trustee or trustees shall ... assume some other person or persons to act with him or them so as to bring the number up to 3 (three)</i> and if they fail to do so within sixty (60) days, the Beneficiaries, shall make the necessary appointment or appointments ... Notwithstanding the aforesaid <i>each separate farm unit shall be represented by one (at least but not more than one) trustee living and working on such separate farm unit.</i>" ¶ 5.1. "The office of a trustee shall be vacated if he resigns or the majority of beneficiaries on the farm unit which he represents request him/her to so resign" ¶¶ 5.7.5, 5.7.6	4-7 trustees. "There shall at all times not be less than 4 (FOUR) and no more than 7 (SEVEN) Trustees ..., with the Beneficiaries being entitled to nominate 4 (four) Trustees, the IDC [Industrial Development Corporation] being entitled to nominate 1 (one) Trustee and the DRDLR [Dept. of Rural Development and Land Reform] being entitled to nominate 1 (one) Trustee;" ¶ 5.1.4. "[T]he Board of Trustees shall always comprise HDSAs in the majority of elected Trustees and preferably one or more of the Trustees shall be a female HDSAs...." ¶ 5.2.1. "The DRDLR, IDC and the beneficiaries shall each be entitled nominate persons to the Board...." Further, the Trustees shall be entitled to appoint an additional Trustee who shall be independent of the company,

	Endulini Sundays River Development Trust, IT 836/2006 [E] (2006) ⁹⁹	Sun Orange Workers Trust, IT 52/2006 (2017)
	"Except with respect to his duties as a trustee, a trustee may be employed for reasonable compensation by the trust in a full-time or part-time capacity (whether as an employee or as an independent contractor)" ¶ 10.3	beneficiaries, the IDC and the DRDLR. ¶ 5.2.3. <i>"The election of the Trustees will always be done at an Annual General Meeting...."</i> ¶ 5.2.6. "A Trustee will cease to act as Trustee when . . . more than [66%+] of the Beneficiaries in attendance vote for him to be removed." ¶ 5.4.1.7. "Trustee should not receive any benefit from the income or capital of the Trust apart from reimbursement of expenses, Trustees' fees and their entitlement as Beneficiaries." ¶ 5.9.2.
Protectors	"Director of the Department of Land Affairs or his representatives and LIEB VENTER and WILLIAM GEORGE MELVILLE are hereby appointed as the first protectors of the trust" ¶ 7.1. "The function of the protectors shall be to monitor the performance of the trustees" ¶ 7.2. "[P]rotector shall remain in office for so long as [120] months." "When the protectors shall cease to hold office, the trustees shall thereafter be entitled to exercise all the powers granted to them in terms hereof, without reference to ... protectors." ¶ 7.5. "The protectors shall annually consider and approve the determination by the trustees of the capital accounts and income appointment to beneficiaries." ¶ 7.6.	N/A
Audits / Recordkeeping	"Proper books of account of the trust shall be kept and such books together with all other	"The Trustees shall ensure that proper records and books of account are kept...." ¶¶ 5.1.3., 5.11.

	Endulini Sundays River Development Trust, IT 836/2006 [E] (2006) ⁹⁹	Sun Orange Workers Trust, IT 52/2006 (2017)
	papers and documents connected with or relating to the trust." ¶ 8.1. <i>"The books of the trust shall be audited. The trustees shall prepare a set of financial statements...each financial year..." ¶ 8.3</i> <i>[Note: There does not appear to be any explicit right in the trust deed for Beneficiaries to access financial statements.]</i>	"The Board of Trustees will hold an Annual General Meeting within 2 (two) months of the company adopting and publishing its audited annual financial statements where they will provide feedback to the Beneficiaries..." ¶¶ 5.1.2, 6.2.3. <i>"The Trust's auditors must value a Beneficiary's share in the Trust Fund on an annual basis..., by doing a valuation ... and allocating a proportional value to each Beneficiary's share." ¶ 7.7.1.</i>
Annual Meetings	<i>[Annual meetings are not addressed in trust deed.]</i>	<i>"An Annual General meeting (AGM) will be held 60 (sixty) days after the audited financials... are adopted...." ¶ 5.12.1.</i> "Written notice of AGM must be given to all Beneficiaries at least 30 days prior to the date of the AGM." ¶ 5.12.2.
Distributions / Profit Sharing	<i>The trustees shall have the power, "for the purpose of allocating or distributing funds ... to determine, as they in their absolute discretion shall consider fit, to what extent receipts shall be treated as income and to what extent they shall be treated as capital ... and any determination made by the trustees in terms of this sub-clause shall be final and binding and not open to challenge by anyone." ¶ 11.19.</i> <i>"The balance of the income remaining after [any costs and expenses] (hereinafter referred to as "the net income" [¶ 3.6]) shall be dealt with in accordance with the provisions herein set out." ¶ 12.2.</i> <i>"The Trustees shall have the right in their entire discretion ... to vest any part of the income or capital</i>	<i>The Beneficiaries have the right to "[r]eceive a proportionate share of the profits and/or the Trust Fund that the Trustees decide to distribute each year." ¶ 7.6.1.2.</i>

	Endulini Sundays River Development Trust, IT 836/2006 [E] (2006) ⁹⁹	Sun Orange Workers Trust, IT 52/2006 (2017)
	<i>of the Trust Fund in the Beneficiaries...</i> The Trustees shall ... annually at the end of its financial year determine the value of the vested interest of the beneficiaries." ¶ 12.3. "Except and until any benefit or award is actually paid over to or transferred into the name of a Beneficiary, there shall be no vesting of any rights in terms of the Trust to a Beneficiary...." ¶ 12.4. "[T]he Trustees shall have the power to apportion income or capital in favour of a Beneficiary without actually paying over such income or capital to the Beneficiary...." ¶ 12.5.	
Dispute Resolutions	<i>[Dispute resolutions are not addressed in trust deed.]</i>	"Any Beneficiary who has a problem with a Trustee...that he has not been able to resolve personally, may submit his problem to the Board of Trustees..." ¶ 8.2.1. "Should the Trustees not be able to Resolve the dispute, it shall be referred to a mediator...or to arbitration;" ¶ 8.2.3. "The decision of the Arbitrator shall be final and binding upon all parties." ¶ 8.2.7.
Trust Termination	"The trust shall be dissolved upon a resolution to that effect passed by a two-thirds majority of the trustee" ¶ 14. [Note: Beneficiaries do not have direct right to dissolve the trust, although a majority of beneficiaries in the same farm unit may ask for their representative trustee to resign.]	"The Trust may be terminated if more than 2/3 of the Beneficiaries vote for it to be dissolved . . ." ¶ 10.1.

Even though the two representative trust documents have different terms, there have been numerous reported problems with these types of trusts. For example, the Sundays Rivers trust reportedly has distributed “millions of rands to beneficiaries over the years,” but certain former beneficiaries of the trust have claimed that they did not in fact receive dividends they were entitled to; others have claimed they do not even know how much their dividends are because they are not allowed to see the company’s financial statements.¹⁰⁴

VII. Current FWES Failings

A. Corruption Watch

The reported problems with FWES and representative trusts (discussed in the prior Section) are consistent with the findings of a 2013 *Corruption Watch* report.¹⁰⁵ Corruption Watch is a non-profit organization that uses public reports to expose and challenge corruption in South Africa. The 2013 report noted that public information on FWES is limited but pointed out an unpublished government report that provides some insight. Since the introduction of FWES, for example, “hundreds of equity schemes have been rolled out, a majority of which are located in the Western Cape. By 2013 almost ZAR700-million had been paid to privately-owned farms, and almost 24 thousand hectares of land had been redistributed.”¹⁰⁶

In conducting its own research, Corruption Watch interviewed 35 members of eight farm businesses located in the Western Cape. Each participant discussed their experiences of FWES, with many articulating numerous serious issues. Perceptions of corruption amongst beneficiaries were high despite initial hopes for sharing in the benefits of farming operations.¹⁰⁷ Corruption Watch found problems in the implementation of FWES in the following areas, among others:

- *Dividend Payment Problems.* Although the exact terms of each scheme differ, FWES beneficiaries are expected to receive dividends corresponding to their equity share. However, several participants reported obtaining few or no benefits from the scheme. In one case it was reported that workers received a payment in the mid-2000s and did not receive a second until 2022. In other cases, dividends were paid seldom and irregularly. Despite raising concerns, beneficiaries at several farms did not receive an explanation for the low payment rate.¹⁰⁸
- *Financial Statement Shortcomings.* While some interviewees were occasionally provided financial statements (displayed on screens during meetings and management presentations); this was a rare occurrence. When workers raised their concerns, they were often ignored, being told that “business was not looking good” and that they “should sell their shares if they were not happy.”¹⁰⁹
- *Lack of Business Transparency.* Several participants who were interviewed expressed concern regarding a lack of transparency concerning business

¹⁰⁴ See Nomazima Nkosi, *Farm shares scheme row*, HERALD LIVE (Feb. 9, 2019), <https://www.heraldlive.co.za/weekend-post/your-weekend/2019-02-09-farm-shares-scheme-row/>; Joseph Chirume, *Farm workers demand dividends from black empowerment scheme*, GROUNDUP (Nov. 13, 2018), <https://www.groundup.org.za/article/eastern-cape-farm-workers-demand-shares-owed-them/>. We have not been able to find any publicly-available reports regarding the Sun Orange trust, good or bad.

¹⁰⁵ CORRUPTION WATCH, LAND CORRUPTION AND DISCRIMINATION – RESEARCH FINDING SOUTH AFRICA 17 (Oct. 2023), https://www.corruptionwatch.org.za/wp-content/uploads/2023/10/Land-Corruption-Publication_R4_Digital_FINAL.pdf.

¹⁰⁶ *Id.* at 14.

¹⁰⁷ *Id.* at 15.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

operations. In one case, participants explained that they were never told the details of their scheme. They simply received papers, which they were told to sign so that the farm owner could receive government funding. Beneficiaries also lacked clear guidance from public officials on how FWES were intended to operate. Once workers had agreed to participate in a scheme, they rarely received information on the financial status of their shares, despite their legitimate concerns.¹¹⁰

- *Non-Inclusive Governance.* A range of participants indicated that they had been excluded from shareholder meetings and were unable to participate in management decisions. On one farm, farm workers nominated four trustees who would attend meetings on their behalf. However, when the farm went bankrupt, the trustees and farm workers suspected they had not been given access to all of the relevant information. Consequently, many workers signed over their shares without fully understanding the causes and consequences of the bankruptcy. Workers on another farm were also represented by trustees. However, the farm workers explained that they had no say in who was appointed and were given no information regarding trustee decisions.¹¹¹

The FWES issues that Corruption Watch documented resulted in “a strong perception” of corruption amongst interviewees.¹¹² When beneficiaries received fewer dividends than expected, when businesses went bankrupt without warning, or when beneficiaries were asked to sell their shares back to the farm owner, many believed that they had been taken advantage of. “Some believed that farm owners benefited from government grants without providing the support and payments they should have under the terms of their agreement. However, a lack of oversight and regulation means that these terms are often obscured: individuals do not know what the farm owners’ obligations are, and have few avenues to report their concerns, beyond internal channels.”¹¹³

Few farm workers felt that FWES had changed their situation. While some workers received dividends when times were good, conditions on farms remained hard, and workers reported labor rights violations.¹¹⁴ One of the biggest concerns related to land and housing.¹¹⁵ Farm workers were commonly “unsure of their entitlements, or whether they were being treated fairly in relation to their housing situation. Because FWES typically grant beneficiaries a share in the business (rather than the land they work), tenure security remains weak.”¹¹⁶

Corruption Watch concluded their report by observing:

Farm worker equity schemes are a case study in the challenges of effective governance. The novel design of the scheme, which seeks to redress historic harms by democratising agricultural systems, represents the best of South African ingenuity.

But governance failures, including a lack of transparency, oversight, resourcing, and effective implementation means that the ambition of the scheme has not been fulfilled. Instead, workers feel as though they have been failed. The result of this failure is that patterns of discrimination persist. Disadvantaged workers still lack equal

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 16.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

opportunities to participate in agriculture to the same extent that larger commercial, and mostly white-owned, farms have.¹¹⁷

B. Khanyisa Educational and Development Trust

The Khanyisa Education and Development Trust ("KEDT") is an organization devoted to organizing and protecting the rights of farm workers.¹¹⁸ KEDT conducted interviews with beneficiaries of three different FWES: the Bono Scheme ("Bono"), the Khangela Trust Farm in Ado ("Khangela"), and the Galactic Trust ("Galactic").¹¹⁹ The interviews investigated the conditions of beneficiaries of these FWES and whether the farm worker beneficiaries' rights were being adequately met. The interviews underscore the failure of FWES to deliver on their promises of financial stability and improved living conditions for farm workers, highlighting a need for greater transparency, fairer distribution of benefits, and more substantial support:

- *Inconsistent and Insufficient Payments.* Bono beneficiaries reported initial annual dividend payments of approximately ZAR15,000, however, annual dividends decreased to ZAR2500 per person by March 2024 – dividend amounts are dependent on how much the farm makes after all deductions.¹²⁰ Additionally, Bono beneficiaries receive a cow or goat in December and ZAR2000 each January for children's school costs, but this amount fluctuates as well and has been as little as ZAR1000.¹²¹ There is no other financial assistance provided to Bono beneficiaries throughout the year. A beneficiary of Khangela reported receiving ZAR27,000 annually as an "*isibonelelo*" or allowance, which includes ZAR3000 for children's schooling and food parcels valued at ZAR4000.¹²² Lastly, a beneficiary of Galactic received a total of only ZAR4500 in 2009 and 2010 after a five-year work contract.¹²³
- *Lack of Transparency and Control.* Beneficiaries of Khangela and Galactic complained of a lack of communication for the farm owners. Khangela beneficiaries stated that they are often compelled to agree to anything the farm owners say out a fear of being fired and losing benefits. Furthermore, beneficiaries claim no information from Khangela is provided on how the farm is doing or how dividends are paid, and there is suspicion that the farm owner is deducting ZAR7000 from their yearly allowance.¹²⁴ One Khangela beneficiary stated that he feels oppressed regarding the administration of Khangela; decisions are made without consulting beneficiaries. A Galactic beneficiary stated there is no explanation given why more dividends are not being paid, and the only person benefitting from the FWES seemed to be the farm owners. He further stated that "According to some forms that we signed in the event of my death, my children were supposed to get my share," but his work was terminated in 2011, and he has "received no other dividends since then until now."¹²⁵

¹¹⁷ *Id.* at 17.

¹¹⁸ See <https://www.pils.org.za/injured-farm-workers-need-justice-and-compensation/>

¹¹⁹ Email interview transcript by the Khanyisa Education and Development Trust with: Xolisile Sam and Sizakele Kleinboo, Bono Scheme; Whisky Caweni, Khangela Trust Farm in Ado; and Ester Buyelwa Kota, Galactic Trust (May 2024) [hereinafter *KEDT Interview*].

¹²⁰ *Id.*

¹²¹ For context ZAR1000 is equal to roughly \$55 USD annually for educational expenses.

¹²² KEDT Interview.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

- *Minimal Impact on Beneficiaries' Lives.* A beneficiary of Khangela reported that their life was no better off after joining the FWES, stating they have not "experienced any noticeable impact" on their quality of life.¹²⁶ A beneficiary of Galactic reported their life felt worse off after joining the FWES, stating "The only difference I have seen is that the farm owners [are] the only one[s] benefitting and not us. There is no difference in our lives at all. In fact, the situation seems to have gotten worse. I have not benefitted in any noticeable way. I am still living in the same shack I have lived since becoming a beneficiary. It feels like we are being oppressed, and it seems like people are exploiting us. They use our identity documents merely to show diversity on the farms, but we do not reap any benefits from it".¹²⁷

C. LRC First-Hand Experience

In addition, in LRC's first-hand experience working with several farmworker beneficiaries, the clients have reported:

- *Dividend Payment Problems.* Farm workers received no information explaining why they have not received dividends or why there has been a reduction in the amount they receive from the trust.
- *Non-Inclusive Governance.* Farm workers received no information regarding whether the trusts hold annual meetings. Often, the beneficiaries are not even aware of the identity of the current trustees, leaving them with no meaningful opportunity to address these problems.
- *Financial Statement Shortcomings.* Farm workers were not furnished with audited financial statements.

D. Rural and Farmworkers Development Organisation

The activist, Billy Claasen, the executive director of Farmworkers Development Organisation, has recently observed that, "Farmers use the equity schemes to get out of debt and get rich. Workers still get evicted even though they are a shareholder, they get put off their own farm. Then when they want to do an application for RDP housing, they are told they already benefit from the system".¹²⁸ In his view, "Government must scrap it (FWES) and create a new empowerment model where workers get shares in the land and in the business".¹²⁹

Comparing documented reports demonstrates there is a massive gap between FWES policy objectives and implementation: trust documents do not reflect how trusts are actually managed; there are severe shortcomings in the benefits provided to farm workers and a lack of government oversight over FWES programs.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Nicola Daniels, *Calls for Farmworker Equity Schemes to be Scrapped and Replaced*, CAPE TIMES (Oct. 27, 2023), <https://www.iol.co.za/capetimes/news/calls-for-farmworker-equity-scheme-to-be-scrapped-and-replaced-04735bb9-d067-4031-bf91-527c08a7693b> ("Farm worker equity schemes were designed to raise up disadvantaged workers, but few participants felt that their situation had changed.").

¹²⁹ *Id.*

VIII. Possible Remedies under the Trust Property Control Act

Recognizing these widespread shortcomings in management of FWES trusts, the question becomes what potential remedies may be available to the beneficiaries under South African trust law.

The framework of South African trust law is a mixture of English, Roman-Dutch and South African law. The Trust Property Control Act No. 57 of 1988 (the "Act"), as amended by (i) the Justice Laws Rationalisation Act 18 of 1996 – Government Notice 632 in Government Gazette 17129 dated 19 April 1996 and (ii) the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act 22 of 2022 - Government Notice 1535 in Government Gazette 47815 dated 29 December 2022 (the "Amendment Act") (the "Amended Act"),¹³⁰ forms the framework in which trusts operate.

The Amendment Act has been implemented to provide for, amongst others, the establishment and maintenance of registers of beneficial owners of trusts by trustees and the Master of the High Court and the recording of the details of accountable institutions by trustees. As discussed *infra* in Section II, one of the intended purposes of the Amendment Act and the related regulations is to address shortcomings in South Africa's regulatory framework in addressing beneficial ownership transparency. Indeed, the Country is obliged, as a member of the Financial Action Task Force (FATF), to ensure that its regulatory environment is geared towards international standards in anti-money-laundering and combating financing of terrorism.

A. Breach of Fiduciary Duty

A trustee's fiduciary duty under South African law includes:

- Duty of care: A trustee must act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another.¹³¹
- Duty of impartiality: A trustee must avoid conflicts of interest between personal interests and those of the beneficiaries.¹³²
- Duty of independence: A trustee's independence is crucial, as stated in the Land and Agricultural Development Bank of SA v Parker case of 2005. This stems from the functional separation of a trustee's control over trust property from any personal benefit of such assets.
- Duty of accountability: Trustees must maintain proper accounts and report to beneficiaries when requested, as established in the Doyle v Board of Executors case of 1999 and Mia v Cachalia case of 1934.

¹³⁰ General Laws (Anti Money-Laundering and Combating Terrorism Financing) amendments Act, 2022 (Act. No. 22 of 2022) <https://www.gov.za/documents/acts/general-laws-anti-money-laundering-and-combating-terrorism-financing-amendment-act>; see Amendments to the Trust Property Control Act, 1988 (Act No. 57 of 1988), https://www.justice.gov.za/m_statements/2023/20230504-Trusts-AmendmentSummary.pdf.

¹³¹ *Id.* at Section 9(1).

¹³² See *Jowell v Bramwell-Jones* case (2000).

Trustees must act in the best interests of the beneficiaries, taking greater care with trust assets than with their own affairs, and avoiding business risk as much as possible.¹³³

In addition, the Court in the *Doyle v Board of Executors* case of 1999 held that trustees have a duty to provide *full trust administration reports and accounting records to trust beneficiaries*, and even to contingent beneficiaries born later, dating back to the time the discretionary trust was established.¹³⁴

B. Violations of Trust Property Control Act

Trustees have certain enumerated obligations under the Amendment Act, including in particular:

- Obligation to establish and maintain beneficial ownership registers: Trustees are required to establish, record and keep an up-to-date record of detailed information relating of beneficial owners of trusts.¹³⁵
- Obligation to lodge beneficial ownership registers with the Master of the High Court: Trustees are required to lodge the registers of the prescribed information of beneficial owners of trusts with the Master of the High Court electronically on a platform that must be provided by the Master of the High Court.¹³⁶
- Obligation to give access to beneficial ownership information to law enforcement agencies: Trustees are required to make information contained in the beneficial ownership registers available to specified entities and authorities.¹³⁷
- Obligation to make certain disclosures to accountable institutions and to record details of accountable institutions: Pursuant to sections 10(2) and 11(1)(e) of the Amended Act, trustees are required to disclose to accountable institutions that they engage with, as trustees, that the relevant transaction or business relationship relates to trust property and to record the prescribed details of accountable institutions that trustees use as agents to perform their functions or from which trustees obtains services.¹³⁸

¹³³ See *Estate Richards v Nichol* case (1999) (confirming this standard).

¹³⁴ This concept was more recently affirmed in the case of *Weir-Smith v Master of the High Court of South Africa, Gauteng Division, Pretoria* (2020).

¹³⁵ See Regulation 3C of the Amendment Act ("A trustee must keep a record of the following information relating to each identified beneficial owner of the trust, in the register contemplated in section 11A(1) of the Act: (a) The full names; (b) date of birth; (c) nationality; (d) an official identity document number or passport number, indicating the type of document and the country of issue; (e) citizenship; (f) residential address; (g) if different from residential address, the beneficial owner's address for service of notices; (h) other means of contact; (i) if the person is a registered taxpayer in the Republic, the person's tax number; (j) the class or category of beneficial ownership under which the person falls; (k) the date on which the person became a beneficial owner of the trust; and (l) where applicable, the date on which the person ceased to be a beneficial owner of the trust. (2) Where a beneficial owner is a minor, a trustee must also keep a record of the information referred to in sub regulation (1) in respect of the minor's legal guardian. (3) A trustee must keep a certified or verified copy of an official identity document or passport of each identified beneficial owner of the trust, and the information recorded in terms of sub regulation (1)(a) to (d) must appear the same way as it appears on the certified or verified copy of the identity document or passport.").

¹³⁶ See Regulation 3D of the Amendment Act.

¹³⁷ See Regulation 3E of the Amendment Act.

¹³⁸ Regulation 3B of the Amendment Act requires that trustees record the following details of accountable institutions: the name of the accountable institution; if the accountable institution is a person other than a natural person, the registration details of such person; if the accountable institution is a natural person, the official identity document number or passport number of the natural person, indicating the type of document and the country of issue; if the trustee used or uses the accountable institution as an agent to perform the trustee's functions, the nature of those functions; if the trustee obtained or obtains services from the

A trustee who is found to have violated the noted provisions will be liable to pay a fine of up to R10 million, imprisonment for a period of up to five years, or both such fine and imprisonment.¹³⁹

C. Violations of the Trust Deeds

The Act also provides a mechanism to seek remedies based on a trustee's failure to perform a duty imposed upon them by the trust instrument.¹⁴⁰ Such causes of action could be based on, for example: failure to provide copies of financial statements; failure to distribute dividends; failure to maintain adequate records; and/or failure to hold annual meetings (or to properly notify beneficiaries of such meetings).¹⁴¹

In the context of FWES trusts, both farm worker beneficiaries and governmental authorities may have claims against trustees based on breaches of fiduciary duty, violations of the Act and the Amended Act, and violations of applicable trust deed provisions. However, the failures of FWES programs are so pervasive and ongoing that one-off lawsuits undoubtedly would not cure the country-wide land reform objectives the FWES was designed to address.

IX. Relevant Comparative Legal Jurisdictions

In the DRDLR Green Paper on Land Reform (August 2011) (the "Green Paper"), the Department's vision of land reform included a "system of land tenure, which ensures that all South Africans, particularly rural blacks, have a reasonable access to land with secure rights, in order to fulfil their basic needs for housing and productive livelihoods".¹⁴² The Green Paper briefly referenced comparative land reforms in other jurisdictions, in particular:

Land Reform Experience Elsewhere

- Asia
 - China
 - India
- Latin America
 - Brazil
 - Mexico
 - Chile
- Africa (Egypt)¹⁴³

accountable institution, the nature of those services; if the trustee entered into a "single transaction," as defined in the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), with the accountable institution, the date on which the transaction was entered into and the nature of the transaction; and if the trustee entered into a "business relationship," as defined in the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), with the accountable institution, the date on which the business relationship was entered into and nature of the business relationship.

¹³⁹ See Section 19 of the Amended Act ("If any trustee fails to comply with a request by the Master in terms of section 16 *or to perform any duty imposed upon the trustee by this Act*, the trust instrument or by any other law, the Master *or any person having an interest in the trust property* may apply to the court for an order directing the trustee to comply with such request or to perform such duty.") (emphasis added).

¹⁴⁰ See *id.*

¹⁴¹ See *infra*-Section VI for a more detailed analysis of the trust instruments for two representative trusts, including a comparison of key provisions in those trust instruments.

¹⁴² DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM, GREEN PAPER ON LAND REFORM 4 (2011), https://www.gov.za/sites/default/files/gcis_document/201409/landreformgreenpaper.pdf; see II Events Timeline, *supra*.

¹⁴³ *Id.* at 8-9.

The following is a more in-depth analysis of land reforms in these jurisdictions and a note of possible lessons, if any, for South Africa.

A. Asia

Green Paper China. The Green Paper noted that:

China replaced the Commune System with a two-layer management system—household contract responsibility system and granting farmers self-management rights; it replaced monopoly over purchase and marketing, allowing farmers the right to exchange farm produce freely; and it transformed the single collective ownership into various [quasi-] private ownerships, where the farmer can dispose of assets.

The Green Paper seems to be referencing the transition from the Second to Third land reform in China. For context, below is a summary the First, Second, and Third land reforms.

First (1950-53): Agrarian Reform Law of 1950. The Chinese Communist Party legally and physically confiscated certain types of landlords' land (e.g., feudal generation, ruling class, rural magnate, and gentry/clan) and then redistributed such lands to peasants, mostly in the form of private ownership. Thus, for the first time in the last 2000 years of China's history, over 300 million peasants obtained their own plot of farmland, providing them the means of production necessary to sustain a livelihood through agricultural work.

Second (1956-1960): Collective Farms. In conjunction with the Great Leap Forward (1958-1962), which is generally viewed as a policy failure due to its disastrous economic and social impacts, China adopted the Soviet Union's collective farms policy (i.e., kolkhoz). The collective farms policy prohibited private ownership and family farms; instead, collectives (usually established at the village level) became landowners and farm operators. While this reform was a more efficient means of production, eventually, individual farmers lost their incentives to work hard, and the system crumbled. At the same time, wealthy peasants with large farmlands also resisted this movement because the collectives' distribution primarily correlated to the labour performed, while the size of the land contributed was deemphasized.

Third (mid/late 1970s): Two-Tier Ownership System (i.e., Household Responsibility System). Faced with stagnated agricultural productivity, China abandoned collective farming. Instead of requiring households to work collectively, the government assigned each individual farm family "use rights" to a certain plot of farmland (note that legal ownership was still with the village/community) and entitlement to whatever yields they could produce. Villages maintained their own records, and villagers and the local officers sought consensus decision-making, as many were communist idealists. Nonetheless, farmers could appeal to higher authorities for intervention if there was "unfairness" in farmland allocations.¹⁴⁴

Lessons Learned for South Africa. China's modern history suggests that individual production and equitable treatment are best achieved when farm workers have a level of land rights where they can personally benefit from their effort. However, the land rights do not necessarily have to reach the level of private ownership. China's history also suggests this

¹⁴⁴ See generally, Bureau for Econ. Growth, Agric., & Trade etc., U.S. Agency for Int'l Dev., *China: Lessons from a successful land rights reform-Briefing Paper* (Oct. 2009), https://pdf.usaid.gov/pdf_docs/PA00J759.pdf; Kang Chen, Gary H. Jefferson & Inderjit Singh, *Lessons from China's Economic Reform, Research Paper Series - Enterprise Behaviour and Economic Reforms: A Comparative Study in Central and Eastern Europe and Industrial Reform and Productivity in Chinese Enterprises, Transition and Macro Adjustment Div., Pol'y Res. Dept., World Bank* (Jan. 1992), <https://documents1.worldbank.org/curated/zh/169101468914762305/pdf/Lessons-from-Chinas-economic-reform.pdf>.

system potentially necessitates all stakeholders having an interest in achieving equitable resolutions and a functional regional supervision with access to higher authorities for dispute resolutions.

Green Paper India. The Green Paper commented that:

India introduced the following reforms: it regulated sharecropping; provided legal protection against eviction; and provided homestead plots.

The Green Paper's note concerning legal protection against eviction is likely a reference to provisions of the Land Reforms Act of India. This Act provides a level of security for sharecropper farmers with respect to their occupancy of the land they farmed. Under this regime, even though sharecroppers ostensibly had permanent land use rights and such rights were inheritable, tenancies could still be revoked. Thus, sharecroppers could be evicted if landlords wished to take the land back for personal cultivation. Moreover, under the Land Reforms Act, sharecroppers had to register with the government to avail themselves of the Act's protections, which they often failed to do due to intimidation from landlords.

The statement regarding the regulation of sharecropping appears to be a reference to a governmental program called Operation Barga. Operation Barga was a land reform movement implemented in the rural part of the Indian state of West Bengal. The aim of the initiative was to enhance the rights of local sharecropping farmers and provide them with a path to land ownership. Prior to Operation Barga, Indian sharecroppers' rights were governed largely by the Land Reforms Act of India.

Operation Barga served as a means of legal empowerment for sharecroppers. Operation Barga aimed to register sharecroppers so that they could receive the protection of the Land Reform Act which would, among other things, enhance a sharecropper's legal ability to challenge an eviction by a landlord. The program is viewed as a success as it resulted in a significant increase in the percentage of sharecroppers registered with the government. Two provisions in the legislation implementing Operation Barga also aimed to assist sharecroppers in becoming landowners. The legislation gave sharecroppers priority rights to purchase land if their landlords decided to sell. It also established a means for the government to provide grants to sharecroppers wishing to purchase land.

In addition, it is worth noting a more recent development that has occurred since the publication of the Green Paper. Namely, in 2016, the Indian state of Uttar Pradesh removed a general prohibition against agricultural land leasing. Restrictions on land leasing had been implemented across India and date back to the period shortly following the country's independence. Though originally designed to curb abusive landlord practices, restrictions on leasing had a detrimental effect on landless farmers, who were driven to enter into informal leases that had no legal effect or protections. In 2016, leasing restrictions were removed in Uttar Pradesh and leases of up to fifteen years were permitted. Formalizing the lease process appears to have benefitted both tenants and landowners, affording each a degree of assurance that the terms of the lease are recognizable and enforceable under the law.¹⁴⁵

The Green paper's statement concerning homestead plots likely refers to legislation enacted in several Indian states that granted agricultural labourers ownership rights in the land they worked. The legislation allowed for farm workers to purchase land at a steep discount to its market price. The acquisition of these rights reduced the risks that farmworkers

¹⁴⁵ See generally, Rupsha Dasgupta, *Operation Barga: An Exercise in Legal Empowerment?* (2011), <https://lup.lub.lu.se/luur/download?func=downloadFile&recordId=2155651&fileId=2155654>.

could be evicted from the land on which they lived. Different schemes were adopted to allocated homestead land to poor rural households. A common component of each has been co-funding by the local and national governments. The provision of homestead plots to landless farmworkers has yielded multiple benefits and has generally improved economic and food security among this population.¹⁴⁶

Lessons Learned for South Africa. India's land reform reflects an approach that relies more heavily on government intervention than the approaches to land reform in South Africa. South Africa has embraced systems of land reform that generally rely on free market dynamics. While the transfer of land always will involve some element of market dynamics, the relative success of land reform in India suggests that the active intervention of government authorities and an effective regulatory regime is necessary to effect meaningful change. The South African government should also consider ways in which tenant farmers and landowners are being incentivized to *not* participate in land reform. As the experience in Uttar Pradesh shows, informal landlord-tenant relationships may proliferate if land reform programs are not carefully designed.

B. Latin America

Green Paper Brazil. The Green Paper observed that:

Brazil embarked upon selective expropriation with compensation; viable family smallholder farms receiving government support, serving the domestic market, while large-scale commercial farms serve export markets; and combined market-related strategies with traditional land management systems in a complementary manner.

The Green Paper seems to be referring to the legal framework in place in Brazil with respect to land management and exploitation. In the early 20th century, land distribution in Brazil remained highly concentrated, with no significant legal reforms addressing land inequality. The acquisition of land was primarily through purchase, maintaining the status quo established by the Land Act of 1850.

Under the military regime, the 1964 Land Statute (the "Land Statute") was enacted to address agrarian issues.¹⁴⁷ This statute aimed to modernize agriculture and reduce social unrest by creating government institutions responsible for implementing agrarian reform policies. The reforms included land redistribution and the modernization of agricultural practices. However, the strategy focused on modernizing large landholdings through subsidized rural credit rather than redistributing land to small farmers. The Land Statute and state-led land reform created property rights insecurity on rural lands as it permitted land expropriation for land uses that do not fulfil a social function. However, the law failed to clearly define what uses constitute a social function.

The first National Agrarian Reform Plan was launched in 1985, aiming to settle 1.4 million families in five years. However, the government expropriated less than 5 million hectares, far below the target. The plan faced significant implementation challenges, including bureaucratic inefficiencies and resistance from large landowners. Under President

¹⁴⁶ See generally, Tim Hanstad et al., *Larger Homestead Plots as Land Reform?* (2002), https://landwise-production.s3.amazonaws.com/2022/03/Hanstad_Larger_Homestead_Plots_as_Land_Reform_International_Experience_and_Analysis_from_Karnataka_2002-1.pdf.

¹⁴⁷ *Law No. 4.504, of Nov. 30, 1964*, Presidência da República, Casa Civil, Subchefia para Assuntos Jurídicos (Braz.), <https://faolex.fao.org/docs/pdf/bra10487.pdf>.

Fernando Collor (1990-1992), land reform efforts stalled. President Fernando Henrique Cardoso revitalized land reform efforts during his first term, expropriating over 7.5 million hectares and settling more than 20,000 families. The Cardoso administration's approach was more decentralized, with a higher number of processes established across various regions. This period saw increased conflicts and land invasions, particularly involving the Landless Workers' Movement ("MST"), the largest social movement in Latin America. During his second term (1999-2002), the focus shifted from expropriation to negotiated land reform, emphasizing voluntary land transactions and market-based solutions to land redistribution. This approach aimed to reduce conflicts and improve the efficiency of land redistribution by involving landowners in the process.

In summary, the 20th century in Brazil saw significant legal changes and efforts to address land concentration. Key legal reforms included the Land Statute, the creation and merging of agrarian institutions, and various national agrarian reform plans. Despite these efforts, land concentration remained a persistent issue, influenced by macroeconomic factors and social movements advocating for land rights. The Brazilian government is seen as having been slow in implementing land reform and in expropriating (with compensation) and redistributing idle and underutilized lands; this in turn has resulted in the rise of the MST and others, who mobilize rural workers to organize invasions as a means of forcibly acquiring land. In the meantime, legal protections have been accorded to the landless, tenants, indigenous, and Afro-Brazilian communities, but their rights have not been secured. Forced evictions have been reported disproportionately affecting Afro-Brazilian communities, indigenous peoples, and women. Reports of evictions accompanied by excessive use of force, arbitrary detentions, harassment, or extrajudicial executions by the military police have also been reported. Nowadays, many indigenous lands continue to be encroached upon by landless peasants (campesinos), gold miners, and others.¹⁴⁸

Lessons Learned for South Africa. Pursuant to its Constitution and the Land Statute, Brazil has initiated numerous programs to facilitate access to land for the landless through state-led approaches. This has involved expropriation and redistribution of idle or unproductive lands, settlement on government-owned lands, market-assisted land reform providing subsidized loans to the landless for purchase of farms, and tenure regularization for indigenous and Afro-Brazilian communities. While South Africa has relied on free market dynamics, integrating elements of Brazil's approach could help address land inequality. However, it would be crucial to adapt these strategies to the South African context, ensuring transparency and equity to avoid issues like bureaucratic inefficiencies and resistance from large landowners. South Africa also should establish clear legal frameworks to ensure land reform fulfils its social functions and provides robust protections for vulnerable communities. By learning from Brazil's successes and challenges, South Africa can develop a more effective and just land reform program tailored to its unique needs.

Green Paper Mexico. The Green Paper noted that:

Mexico had mixed experience: nationalization in 1910; redistribution in 1935; denationalization in 1946; and a peasant revolt in 1970 resulted in the takeover of land owned by foreigners, turning it into collectives.

¹⁴⁸ Centre on Housing Rights and Evictions (COHRE), *Annual Progress Report 2008 (2009)*, https://issuu.com/cohre/docs/cohre_annualprogressreport2008; Roque Roldán Ortega, *Models for Recognizing Indigenous Land Rights in Latin America*, World Bank Environment Department, Paper No. 99 (2004), <https://acervo.socioambiental.org/sites/default/files/documents/C1D00045.pdf>.

The Green Paper refers to the history and land reform in Mexico. Which can be summarized as follows:¹⁴⁹

Before the 1910 Mexican Revolution, most of the land in post-independence Mexico was owned by wealthy Mexicans and foreigners, leaving smallholders and indigenous communities with minimal productive land. During the colonial era, the Spanish crown safeguarded the holdings of indigenous communities, which primarily practiced subsistence agriculture, as a counterbalance to the *encomienda* and *repartimiento* systems. In the 19th century, Mexican elites consolidated large estates (*haciendas*) across the country, while smallholders, many of whom were mixed-race mestizos, participated in the commercial economy.

The Mexican Revolution, spanning from 1911 to 1946, significantly altered the agrarian landscape by reversing land concentration trends and initiating extensive agrarian mobilization. This period saw the weakening of the traditional landlord class, making their previous dominance impossible to restore. The post-revolutionary Mexican state aimed to control this mobilization, prevent further major peasant uprisings, and stifle the re-establishment of indigenous community power.

During the revolution, leaders implemented immediate land reforms without formal state intervention. They led peasants to divide large sugar haciendas into plots for subsistence agriculture and drafted the Plan of Ayala, which called for land reform and led to rebellion against the government. Despite opposition these reforms were recognized by President Alvaro Obregón.

From 1915 to 1920, land reform was a significant issue. A decree aimed to counter Zapatism and provided peasants with land, emphasizing the re-emergence of the *ejido* (i.e. lands that were traditionally controlled by communities). However, the Agrarian Decree did not call for wholesale expropriations, and the lands expropriated were often of poor quality. Carranza's government (1915-1920) established a bureaucracy to manage land reform, limiting sweeping changes favourable to the peasantry. Although Carranza resisted land reform, he could not block the adoption of Article 27 of the 1917 revolutionary constitution, which recognized villages' rights to land and the state's power over subsoil rights. Under Alvaro Obregón's presidency (1920-1924), land reform continued but at a slow pace. Obregón distributed 1.7 million hectares, mostly non-cultivable land, to maintain social peace. His successor, Plutarco Elías Calles (1924-1934), generally blocked land reform measures and sided with landlords, distributing 3.2 million hectares, primarily non-agricultural land.

President Lázaro Cárdenas (1934-1940) revitalized land reform, distributing 18.2 million hectares, including expropriations from U.S. nationals. Cárdenas created collective *ejidos* to maintain commercial viability for crops, ensuring they remained productive for domestic and export markets. His reforms dismantled the hacienda system and organized peasant leagues into the National Confederation of Peasants (CNC).

Starting with Miguel Alemán's government (1946-1952), previous land reform efforts were significantly rolled back, allowing entrepreneurs to rent peasant land. In 1970, President Luis Echeverría initially declared land reform dead but later initiated significant reforms due to peasant revolts. In 1988, Carlos Salinas de Gortari amended Article 27 of the Constitution,

¹⁴⁹ Thomson Reuters Practical Law – Agricultural Law in Mexico; *Land Reform in Mexico*, Wikipedia, https://en.wikipedia.org/wiki/Land_reform_in_Mexico#:~:text=In%201935%20land%20reform%20began,together%2C%20a%20400%25%20increase.

making it legal to sell *ejido* land and allowing peasants to use their land as collateral for loans. Despite these changes, land regulation remains permitted in Mexico under Article 27.

Lessons Learned for South Africa. Mexico's land reform experience underscores the importance of active government intervention and a robust regulatory framework. Unlike South Africa's reliance on free market dynamics, Mexico's successful reforms, particularly under Lázaro Cárdenas, demonstrate that state-led initiatives are crucial for effective land redistribution. However, later policies under Miguel Alemán and Carlos Salinas de Gortari, which allowed market forces to dominate, highlight the risks of undermining reform goals. For South Africa, the key takeaway is to balance market mechanisms with strong government oversight. Additionally, the government should address informal landlord-tenant relationships and design incentives to ensure active participation in land reform.

Green Paper Chile. The Green Paper observed that:

Chile expropriated large farms in the 1960s, turning them into co-operatives for peasants and small farmers. There was a reversal in 1974, after the assassination of President Allende, with the re-instatement of elite family farms. Regulatory reforms were introduced on land rentals and subdivisions in the 1980s.

The Green Paper seems to be referring to the evolutions of the legal framework in place in Chile with respect to land management and exploitation. Which can be summarized as follows:¹⁵⁰

In the early 20th century, demands for land reform emerged in Chile. However, these demands were largely ignored by the radical governments, which prioritized urban industrialization over agricultural reform. By the early 1960s, the idea of land reform gained traction, receiving support from both the Catholic Church and the United States through the Alliance for Progress.

During the administration of Jorge Alessandri in 1962, the first land reform law was enacted, allowing the distribution of state-owned land to peasants. This was followed by a more comprehensive land reform law in 1967 under the Christian Democrat government of Eduardo Frei Montalva. This law not only gave legal status to farmers' syndicates but also led to the expropriation of 1,400 land holdings, totalling 3.5 million hectares. The Catholic Church also began distributing its lands to peasants during this period. Additionally, Chilean communists, socialists, and Christian Democrats formed agricultural syndicates in various regions, furthering the land reform efforts.

When the popular unity government led by Salvador Allende came to power in 1970, it continued the land reform process, aiming to expropriate all large estates. Approximately 59% of Chile's agricultural lands were redistributed during this period.

Indigenous involvement in the land reform, particularly by the Mapuche-Huilliche communities in the Valdivia province, also was significant. From 1970 to 1973, there were at least 19 protests and land redistributions by indigenous communities. These actions, although underreported, played a crucial role in pushing for legal changes that improved indigenous

¹⁵⁰ *Chilean Land Reform*, Wikipedia, https://en.wikipedia.org/wiki/Chilean_land_reform#:~:text=Demands%20for%20a%20land%20reform,for%20Progress%2C%20from%20the%20United.

rights and land ownership. These legal reforms simplified the redistribution process, facilitating indigenous land ownership and integration into the system.

Following the 1973 coup that ousted Allende and brought Pinochet to power, the new regime oppressed individuals and organizations that had benefited from the land reform. In 1974, the military dictatorship initiated an agrarian counter-reform, returning about 30% of expropriated lands to former owners and auctioning an additional 5%. Cooperative lands were divided into individual properties. The neoliberal economic policies of the Pinochet dictatorship led to a new generation of rural capitalists. However, many peasants, lacking capital or credit, sold their lands, resulting in a reconcentration of land ownership, which was even more pronounced than in 1955.

Lessons Learned for South Africa. Chile's land reform experience offers several lessons for South Africa. A balanced approach that addresses both small farms and large estates can create a more equitable agricultural sector. Strengthening institutional support and creating a robust legal framework to protect new landowners' rights is crucial. Building a coalition of support from various sectors, which may include religious organizations, political parties, and civil society, could provide broad-based backing for reforms. That being said, South Africa has embraced systems of land reform that generally rely on free market dynamics and while the transfer of land always will involve some element of market dynamics, the relative early success of land reform in Chile suggests that the active intervention of government authorities and an effective regulatory regime is necessary to effect meaningful change.

C. Africa (Egypt)

Green Paper Egypt. The Green Paper commented that:

On the African continent the Egyptian experience provides interesting lessons on land reform. Legislation was passed in the 1950s, limiting farm size to a maximum of 42 [hectares] per individual; limiting rental rates; and setting minimum lease durations.

Beginning in 1952, Egypt implemented a series of land reform laws, beginning with Decree Law No. 178 of Sept. 9, 1952 (the "Agrarian Reform Law"). It is this law to which the Green Paper refers. The Agrarian Reform Law was designed to address a system that had "resulted in a complete concentration of agricultural land in the hands of a very few, while the majority of farm people were either labourers or owners of very small pieces of land."¹⁵¹ Prior to the passing of the Agrarian Reform Law, nearly 75% of Egyptian peasants owned less than an acre of land; less than .1% of landowners owned 20% of all cultivated land while 94.1% of landowners owned only 35% of all cultivated land.¹⁵²

The Agrarian Reform Law contained a variety of measures intended to benefit small landowners, peasants, agricultural labourers and tenants. These included provisions providing for the expropriation of land from landowners whose holdings were in excess of the maximum amount and redistribution of such land small landowners or landless peasants, maximum rental values, and minimum lease durations of three years. The Agrarian Reform Law also contained a number of other measures that reformed the way in which land could be sold, purchased and maintained, including a provision preventing subdivision below five

¹⁵¹ Hassan A. Dawood, *Agrarian Reform in Egypt: A Case Study*, 30 *Current History* 331, 331-38 (1956), <http://www.jstor.org/stable/45309548> (Last visited June 19, 2024).

¹⁵² Gabriel S. Saab, *The Egyptian Agrarian Reform: 1952-1963*, at 9 (1967).

feddans, and established agricultural cooperatives that landowners who had benefited from the reform were compelled to join.¹⁵³

Perhaps the most significant component of the Agrarian Reform Law as it relates to the question of land redistribution in South Africa was a provision that, subject to certain exceptions, the amount of land an individual could own was limited to 200 feddans.¹⁵⁴ The Agrarian Reform Law provided for compulsory expropriation of any land holdings exceeding the legal limit over a five-year period. Compensation for this expropriation was provided for by the Agrarian Reform Law. The purchase price was set by the law and paid by the government in the form of 30-year bonds bearing interest at the rate of 3%. Landowners were also permitted to sell land in excess of 200 feddans directly, provided that the purchaser of their land was in possession of ten feddans or less at the time of purchase.¹⁵⁵ Land that was expropriated by the government was redistributed to agricultural labourers and tenants with holdings of less than five feddans. The average amount of land received by an individual was 2.4 feddans. These recipients were required to pay for the land received in instalments over a period of 40 years.¹⁵⁶

The Agrarian Reform Law was amended several times throughout the 1950s and 1960s to further restrict the amount of land that could be owned by individuals. In addition, certain land holdings, including those of the royal family, were taken without compensation. By 1969, the maximum land holding was 50 feddans.¹⁵⁷ Ultimately these reforms resulted in the redistribution of approximately 1/7th of arable land in Egypt to small landowners, tenants and the previously landless to nearly 2 million beneficiaries.¹⁵⁸ Simultaneously with these reductions in the amount of land that could be held by individuals, compensation for such expropriation was also reduced. In 1964, the government cancelled all interest payments on the bonds that had served as compensation for expropriated land. The government also declared that the bonds themselves could not be redeemed.¹⁵⁹

Beginning in the 1970s, however, following the death of Gamal Abdel Nasser, many of the reforms of the 1950s and 1960s were undone. This process culminated in the passing of Law 96 in 1992, which took effect in 1997. Law 96, among other things, allowed landlords to charge market-based rent and provided for tenancies of only one year, renewable at the landlord's option.¹⁶⁰

Lessons Learned for South Africa. Egypt's Agrarian Reform Law represented a sweeping set of reforms and resulted in the redistribution of a not insubstantial portion of arable land in the country. The law initially provided that compensation would be provided for expropriated land which would likely make such expropriation permissible under South African law as well. Many contemporaries believed that the reforms represented by the Agrarian Reform Law represented a successful approach to decreasing inequality in land ownership.¹⁶¹ This view is also supported by current scholarship that suggest that these

¹⁵³ Dawood, *supra* note 151, at 336.

¹⁵⁴ A feddan is equal to .42 hectares.

¹⁵⁵ Stella Margold, *Agrarian Land Reform in Egypt*, 17 Am. J. Econ. & Soc. 9, 9-19 (1957), <http://www.jstor.org/stable/3484862> (last visited June 21, 2024).

¹⁵⁶ Ray Bush, *Land Reform and Counter Revolution*, in *Counter Revolution in Egypt's Countryside: Land and Farmers in the Era of Economic Reform* 9-10 (Ray Bush ed., 1988).

¹⁵⁷ David F. Forte, *Egyptian Land Law: An Evaluation*, 26 Am. J. Comp. L. 273, 275 (1978).

¹⁵⁸ Bush, *supra* note 156, at 8.

¹⁵⁹ Forte, *supra* note 157, at 275.

¹⁶⁰ Bush, *supra* note 156, at 17-18.

¹⁶¹ Stephen Brooke & Gabriel Koehler-Derrick, *When Redistribution Exacerbates Poverty: Evidence from Gamal Abdel Nasser's Land Reforms* (Paper prepared for the 2020 AALIMS Conference, v. April 6, 2020).

reforms were effective in reducing inequality in Egypt.¹⁶² There is, however, some debate over the success of Egypt's reforms in alleviating inequality. In particular, some scholars criticize the compulsory membership in the cooperatives established by the Agrarian Reform Law.¹⁶³

X. Conclusion

While substantial government resources have been used for FWES, the program has made no meaningful change in the working or living conditions of the vast majority of farm workers. Trust deeds designed to implement the program are turned into meaningless pieces of paper. Trustees likely are not complying with their fiduciary responsibilities, the Trust Property Control Act or the requirements of the trust deeds themselves. By all accounts, a central problem with FWES is that the schemes have operated pursuant to general governmental pronouncements and guidelines, but no actual legislative or regulatory processes.

Moreover, the vision of land reform outlined in the 2011 Green Paper prepared by the National Department of Agriculture, Land Reform and Rural Development has not come close to being accomplished. The Department sought a "system of land tenure, which ensures that all South Africans, particularly rural blacks, have a reasonable access to land with secure rights, in order to fulfil their basic needs for housing and productive livelihoods." Considering the comparative legal jurisdictions noted in the Green Paper, any meaningful FWES reforms must be extensive and systemic to fulfil the program's promise.

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¹⁶² See, Tamer ElGindi, *The Inequality Puzzle in Egypt: What Do We Really Know?* 25 Arab Stud. J. 100, 100-43 (2017), <https://www.jstor.org/stable/26528975> (last visited June 21, 2024) ("Studies before the onset of the 1952 revolution indicate that inequality in land ownership was rampant. . . . Studies of the 1960s and 1970s, however, illustrate a downward trend in inequality levels, which scholars attributed to Nasser's land reforms.").

¹⁶³ Brooke & Koehler-Derrick, *supra* note 161. ("Nasser's package of post-1952 land reforms redistributed land to Egypt's peasants, yet simultaneously institutionalized labour immobility and depressed earning potential among beneficiaries. By distributing land and a limited, rather than full, suite of rights, land reform failed to produce the expected benefits.").