

Your Ref:

Our Ref:

12 July 2017

The Chairperson Portfolio Committee Rural Development and Land Reform

Attention: Adv. Ms Phumla Nyamza
Parliament Cape Town

Dear Madam

RE: CPA amendment bill: B12 of 2017

COMMUNAL PROPERTY ASSOCIATIONS AMENDMENT BILL, 2101

1. In response to the invitation to comment on the bill by Friday July 2017 and our telephone conversation on Monday 10 July 2017 we reiterate our concern that Bill B12 [CPAAA] cannot be considered in isolation of the draft bill of the DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM NOTICE 510 of 2017 "COMMUNAL LAINO TENURE BILL" or draft CLTB. The two processes should have been aligned and should still be aligned as much as possible.
2. Both the CPAA and the draft CLTB face the challenge of strengthening family or household right and giving meaningful roles and functions for governance structures, whether it is the a CPA committee or a recognized, reconstructed and partly elected traditional council. Another route it to focus on strengthening individual and family rights through the augmentation of the Interim Protection of Informal Land Rights Act, and

we believe that not enough has been done to promote the self executing IPILRA with appropriate regulations supporting it to address certain of the shortcomings of the CPAAA and the draft CLTB.

3. We made extensive submissions to the DRDLR on the then draft CPAAA in June 2016 and a very inadequate and misdirected SEIA that accompanied it. We attach our submissions of 13 months ago because they are still very relevant as our well motivated submissions, including constitutional problems with the bill, have still not been addressed. We shall summarise these again and present it to you in any oral presentation.

4. Since June 2016 one significant thing did happen. The Presidency and the DPME produced a much improved final SEIA. We quote from the problem statement of the SEIA because it departs significantly from the problem statement presented to you portfolio committee by the department a few months ago.
 - *The creation of Community Property Associations (CPAs) has resulted in families and communities with no relationship or joint history being bound together under this form of land holding structure;*
 - *Some CPAs were created on the basis of interim establishment provisions that have resulted in challenges of improperly verified beneficiaries;*
 - *There are no mechanisms to control who comes and settles in the community;*
 - *Where CPAs have been established in areas administered by Traditional Authorities, tensions and conflicts have surfaced; and,*

- *There is increased tenure insecurity for more vulnerable individuals (i.e. youth, women, the elderly and other persons already residing on land acquired by CPAs).*

5. We notice a significant departure from the DRDLR’s findings that the CPAs problems are self inflicted, compared to the DPME’s recognition that there are often design and establishment issues that set these entities up to fail.

6. The December 2016 SEIA of the DPME raises the problem of non alignment between the CPAA and the draft CLTB. In effect the ownership responsibilities and functions of the CPAs and their committees are downgraded and those of compliant Traditional Councils upgraded. The SEIA of December recommended the following clauses of provisions “to be amended.” These were ignored in the bill presented to your National Assembly:

7	References in the CPA AB of the relationship between the aim and content of the CPA AB and that of other existing legislation relating to land reform, management and administration, as well as to traditional leadership	Insert clause providing for the relationship between the aim and content of the CPA AB and that of other existing legislation relating to land reform, management and administration, as well as to traditional leadership
9	References to the possibility that a CPA may be established by traditional communities who already have traditional councils (in the case where the HF were to decide that a CPA is the LAI of choice)	INSTITUTIONS: OPTIONS FOR LAND ADMINISTRATION INSTITUTION Insert clause providing that CPA may be established those communities that already have traditional councils (in the case where the HF were to decide that a CPA is the LAI of choice)

17	17. A brief memorandum setting out the background to, and linkages between, the CPA AB and the CLB, with reference to, amongst others, similarities, principles, institutions created by the two Bills, etc.	Draft a brief focused memorandum setting out the background to, and linkages between, the CPA AB and the CLB, with reference to, amongst others, similarities, principles, institutions created by the two Bills, etc
19		REGULATIONS AND NOTICES Draft and publish regulations and notices in respect of the CPA AB whilst CPA AB is being processed internally in the Department and in government, before going to Parliament - in order to ensure that the CPA AB can be implemented immediately after enactment and sent by the President

7. In addition we believe that the Financial Services Board and the FIPFA Act should be made applicable to CPAs and TCs under the TLGFA so that curators and statutory managers can be appointed for defaulting community commercial enterprises.

8. Just for your interest, the draft CLTB contains the following clauses that impacts on the CPAA:

"communal property association" means a communal property association as defined in section 1 of the Communal Property Associations Act, 1996 (Act No. 28 of 1996);

"community" means a group of persons whose rights to land are derived from shared rules determining access to land held in common by such group regardless of its ethnic, tribal, religious or racial identity and includes a traditional community;

9. 4. (1) This Act applies to-

- (a) communal land which is vested in the State, or which at any time vested in-
- (i) a government contemplated in the Self-Governing Territories
 - (b) Constitution Act, 1971 (Act No. 21 of 1971);
 - (c) (ii) the governments of the former Transkei, Bophuthatswana, Venda or
 - (d) Ciskei; and
 - (e) (iii) the South African Development Trust; (b) land restituted to a community
 - (f) in terms of section 26(7) of the Constitution;
- (c) land in respect of which equitable access to land is provided to a community
- as contemplated in section 25 (5) of the Constitution; and
- (d) land in respect of which the Minister has, by notice in the Gazette, determined that this Act applies.
- Choice on land administration
- 28. (1) A community issued with Deed of Communal Land must, within
- a period of 24 months from the date of such issue, by a resolution supported and
- adopted by not less than 60% of households of that community, choose either-
 - (a) a traditional council ;
 - (b) a communal property association; or
 - (c) any other entity as may be approved by the Minister,
- to manage and administer communal land on its behalf.
- (2) The procedure for arriving at and adopting a resolution
- contemplated in subsection (1) must be-
 - (a) as prescribed; and
 - (b) facilitated by an independent person or organisation as determined by the
 - (c) Minister.
- (3) A communal property association administers communal land
- in accordance with the Communal Property Associations Act: Provided that in the
- event of any inconsistency between this Act and the Communal Property
- Associations Act relating to the administration of communal land, this Act
- supersedes the Communal Property Associations Act.
- From the memo:
- Clause 28 requires a community to choose an entity that will assist the community in administering its
- communal land. This is an entity that will run the affairs of the community in relation to land
- administration on a day to day basis. Communities can choose a traditional council, a communal
- property association or any other entity approved by the Minister.
- There have been conflicts in the past and some are current wherein some entities are fighting with
- communities for the control of communal land and its natural resources. The purpose of these
- provisions is to ensure that whatever entity is chosen, it is an entity that is governed by law so that the
- Department can have recourse in instances where challenges arise relating to land administration.

10. We propose that your portfolio committee be fully briefed by the department and civil society, and perhaps even a pre briefing discussion with the Mothlanthe HLP before the CPAAA is considered in disjuncture

with the proposals for IPILRA and the draft CLTB. In the circumstances we request:

- Opportunity to address you and or your management committee about the law reform initiatives currently under way;
- 21 days to prepare a further memo on the articulation between the CLTB draft and the CPAA.

We look forward to hearing from you about our proposal.

LEGAL RESOURCES CENTRE

Per:



Henk Smith, Thabiso Mbhense, Wilmien Wicomb

Annexed: LRC comprehensive submission to DRDLR 2016 including legal opinion on constitutionality.

Your Ref: Gazette No. 39960
Our Ref: HS/CPA

6 June 2016

The Director-General: Rural Development and Land Reform
Attention: Adv. Sello Ramasala
Private Bag X833
PRETORIA
0001
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By e-mail to: CPABill@drdlr.gov.za

Dear Sir

**RE: CPA draft amendment bill:
COMMUNAL PROPERTY ASSOCIATIONS AMENDMENT BILL, 2016**

1. In response to the invitation DEPARTMENT OF RURAL DEVELOPMENT AND LAND REFORM NOTICE 262 OF 2016 No. 39960 GOVERNMENT GAZETTE, 29 APRIL 2016, the Legal Resources Centre (“LRC”) submits its comments herewith.
2. The contents of this submission:

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3. Our summarised position on each of the topics is set out in the third column:

2	Application of the Act: labour tenants	The draft bill purports to extend the operation of the Act. But the power to cover further communities beyond restitution communities already exists in the principal Act. The amendments are unnecessary and in fact gives the minister further unilateral powers in respect of certain restitution communities.
3	CPAs: ownership and management functions	The current and future CPAs are stripped of their ownership functions and powers.
4	Disposal of land, ministerial consent and first option	The ministerial consent and the department's first option amount to an unlawful and unconstitutional taking
5	Customary law and CPAs	The draft bill misses the opportunity to provide in terms for <ul style="list-style-type: none"> • Customary law principles, procedures and institutions to be developed and be accommodated in the CPA regime • Post settlement support to be consolidated in both the restitution and CPA regimes.
6	The legislative process and lack of public participation; Way forward	The preceding consultative process is misleading and did not cover or request the areas covered by the draft bill
appendices	Legal opinion on the constitutionality of the draft amendment bill in relation to existing CPAs	Conclusion: the cumulative effect of the intrusion on the property rights of restitution communities amounts to an unconstitutional unlawful taking of property, incl <ul style="list-style-type: none"> • No choice as to CPA holding land; • Requirement for a general plan; • Ministerial consent and departmental first option;
	Notes to the	The SEIA does not comply with the presidential

	misdirected SEIA	guidelines for SEIAS
	Notes to the annual report on CPAs 2015	The SEIA does not articulate with the AR

Introduction to and Background to the LRC

4. The Legal resources Centre (“LRC”) is a leading public interest law centre established in 1979 as an independent, non-profit public interest law centre. In its earlier years the LRC challenged the tools of oppression used by the apartheid government to oppress millions of South Africans. Since 1994, the LRC has tried to tap the transformative potential of the new Constitution, to make it a living document for the people of South Africa. The LRC seeks to enable clients to assert and develop their rights, to build respect for the rule of law and constitutional democracy and to contribute to the development of human rights jurisprudence and the social and economic transformation of society. It uses a range of strategies including impact litigation, law reform, engaging development processes, training and networking in South Africa and beyond to find creative and effective solutions.
5. While the strength of the LRC lies in strategic impact litigation, whereby we secure precedent setting judgments for broader communities, we believe a multi-faceted approach - drawing on advocacy, strengthening the public interest legal sector, engaging in regional and international platforms, law reform and human rights awareness workshops - creates and reaffirms an enabling environment whereby marginalised and vulnerable groups are able to assert and are supported in asserting their rights. Our theory of change is rooted in the assumption that marginalised groups and communities will draw on their improved awareness about their rights and how to access these rights to engage and demand the realisation of their rights in their own lives. Where this can happen in an enabling environment, communities can access their rights and the rule of law becomes a tool through which to advance democracy, equality and development.
6. The LRC represented and continues to represent citizens and communities in litigation involving customary law and its status. We appeared on behalf of clients in the Constitutional Court in the matters of *Bhe*, *Richtersveld* and *Shilubana*. Our clients include the communities that successfully challenged the constitutionality of the Communal Land Rights Act of 2004

(*Tongoane and Others v The Minister of Agriculture and Land Affairs and Others* CCT 100-09). The LRC, with Webber Wentzel attorneys, represented the four communities of Kalkfontein, Makuleke, Makgobistad and Dixie in a challenge on the constitutionality of the Communal Land Rights Act of 2004. The Act was declared unconstitutional by the Constitutional Court in May 2010. Prior to the institution of legal proceedings on the CLRA, the LRC and its clients made extensive written and oral representations to the department and to parliament on the problematic and unconstitutional aspects, both procedural and substantive, of the CLR Bill.

7. *Mwelase & Others v Director-General for the Department of Rural Development and Land Reform and Others* is a class-action case against the Director-General (“the D-G”) and the Minister (“the Minister”) for the Department of Rural Development and Land Reform (“the Department”). The LRC represents *Mwelase & Others* who are demanding of the Department to process and refer all matters and/or applications for acquisition of land lodged with them by labour tenants residing mainly in the provinces of Kwa-Zulu Natal (KZN), Free State (FS) and Mpumalanga (MP). It is very important to note that there are a number of applications for acquisition of land lodged with the D-G in terms of Section 16 and 17 of Land Reform (Labour Tenants) Act No. 3 of 1996 (“the LTA”), and the most affected provinces are KZN, FS and MP. These applications for acquisition of land were lodged before 31 March 2001 but to date most of those applications have never been processed. In some of them, the D-G has only issued notices in terms of Section 17 of the LTA. These labour tenants are suffering great prejudice and abuse every-day and some of them have already been evicted by the farm owners.
8. When the LTA was promulgated the primary objective was the empowerment of labour tenants so as to enable them to access the benefits and protections of Government's land reform program and land laws and also to acquire land that they were using on 2 June 1995. Sections 16 - 18 of LTA were included in the LTA in order to compensate labour tenants for providing labour on farms without being paid. It should be noted that some of the labour tenants were paid in kind (allowed to reside, grow crops and graze animals) as opposed to cash, for the provision of labour on farms.

9. The LTA was promulgated due to the mandate given to the legislature by Section 25 (6) of the Constitution of the Republic of South Africa, Act No. 108 of 1996.
10. As a result, the Director-General's failure to execute his duties (send section 17 notices and referring matters to Court in terms of section 18 of the LTA) does not only violate the provisions of LTA, but also the provisions of the Constitution of the Republic of South Africa, Act No. 108 of 1996.
11. The D-G and the Minister through an order made by the Land Claims Court have been directed to file the reports with the court containing the statistics of the current status of labour tenant applications, showing a schedule indicating the status of each individual labour tenant claim, together with a plan for the further processing of all outstanding labour claims. The reports and the plan shall also be served to the LRC as the representatives of Mwelase and AFRA.
12. The LRC also has significant experience in representing Communal Property Associations, for example in the Ebenheaser and Khomani San matters.
13. We note, following the Constitutional Court, the valuable role played by customary law in regulating land rights and decision making in rural areas and the need for indigenous legal processes to be recognised. As the Constitutional Court, we are also acutely aware and concerned about the historical distortion of customary law and inappropriate codification and recordal thereof. In particular, we are concerned about the manner in which new laws - including the Traditional Leadership and Governance Framework Act ("the Framework Act"), the draft National Traditional and Khoi San Leadership Bill of 2015 and the unpublished draft Traditional Courts Bill of 2016 bolster unilateral chiefly power and undermine indigenous accountability mechanisms and living customary law. The laws are criticised for entrenching the colonial and apartheid distortions and divisions that were central to the creation of the Bantustan/homeland political system and used to justify the denial of equal citizenship to all South Africans.
14. The statutory regulation of customary law should not prevent it from developing in consonance with the Bill of Rights as envisaged in section 39(3) of the Constitution. No policy or legislative reform may stifle such

development without constitutional justification for doing so. As we point out below, the Constitutional Court has made it clear that legislation such as the CPA Act enters an arena already regulated by customary law – and must respect and promote the law and principles to bring these in line with the Constitution. However, we are concerned that despite pronouncements by the Constitutional Court, the CPA amendment bill seems to ignore the implications it has on customary law governance systems which it purports to replace.

15. This memo is in response to the invitation to comment on the draft Communal Property Association Amendment Bill and will deal with the following areas:
 - a. Application of the Bill and whether CPAs will be promoted in additional counsel areas;
 - b. Ownership and management functions;
 - c. Disposal of CPA land, ministerial consent and first option to department;
 - d. What is missing from the bill:
 - Developmental support to CPAs;
 - Customary law and CPAs
 - e. Public participation and the draft bill.
16. The draft bill cannot be read by itself to understand the importance of its provisions. The draft bill is not accompanied by a memorandum explaining the purpose of the various clauses. There is however a Social and Economic Impact Assessment (SEIA) on the draft bill. A SEIA is now, since May 2015, prescribed for all new law before cabinet approval. As we shall explain below and as set out in the appendix, this SEIA obscures rather than clarifies the purpose of the bill and its various policy positions.
17. This draft bill was preceded by earlier draft bills, although the earlier versions were not published for public comment. The draft bill was also preceded by policy statements and some of them will be referred to below in order to fathom the purpose of certain divisions of the draft bill.
18. Before getting to the substance of our submission we wish to point out the following:

- a. The draft bill is unconstitutional in a number of aspects as will be evidenced from our submissions below. The draft bill should therefore be withdrawn;
 - b. The draft bill and a number of provisions proposed have not been called for by the public and are not warranted. A proper public participation process should be followed before a redraft be published for comment;
 - c. The draft bill contains a number of drafting errors and the public cannot be expected to comment on a draft bill with obvious drafting errors.
19. For present purposes we cite a few examples of what we believe are drafting errors:
- a. Clause 7(a) amends section 7(2)(a) dealing with the adoption of the constitution by the inclusion of a proviso requiring a sixty percent quorum of “the total number of households with ownership or leasehold rights present or represented at the meeting voting in favour of such adoption.” This insertion raises a number of questions. Are there any households with ownership rights at the time of the adoption of the constitution? Did the drafter blindly follow his quorum provisions in clause 12? We deal with this later. But in any event, the new proviso is at odds with section 8(2)(f) which provides for a majority decision by members of the community, and renders section 7(2)(c) rather obsolete... without repealing it.
 - b. Clause 1(d) introduces a new definition of the crucial term “community” in the following manner: “community” means a group of persons, including labour tenants contemplated in section 2(6), *whose rights to a particular property are determined by shared rules **under a written constitution*** and which wishes or is required to form an association as contemplated in section 2.” It contemplates that the community already has a constitution. This makes little sense. It presumes that communities claiming restitution, applying for redistribution or getting a labour tenant award already have constitutions, or need to quickly adopt such, before they become eligible for consideration of CPA status, preparing and adopting fresh constitutions and entering an application process for CPA status.

- c. Clause 9(e)¹ attempts to amend section 9(7) but the proposed amendment is unrelated to section 9. It probably relates to section 8 and section 8(7).² We have pointed out below that the appointment or election of members of the association does not make sense. The clause may attempt to create a trustee – beneficiary relationship between a committee member of the association and the community, but as we explain below, the association will not be the owner of the land and a member of a management committee cannot ordinarily Act as a co-trustee for a legal entity being the community. Acting in breach of this circular responsibility, assuming that the intention is to amend section 8(7), invokes a criminal offence under section 14(1)(b).

20. It is appropriate to at this stage point to the new membership provisions prescribed for associations. They are puzzling and we cannot fathom the purpose of providing for the election of members of the association plus the election of committee members. We submit that as the provision stands, it creates uncertainty.

- a. Clause 20(a)³ introduces a new requirement for the election of members of the association that must be provided for in the constitution. Note that this is not for the election of office bearers. Office bearers are dealt with under item 13 of the schedule. Membership qualifications are dealt with in items 5 and 6. Now item 3A also requires election of association members, for a period of 5

¹ (e) by the substitution for subsection (7) of the following subsection:

”(7) A person **[appointed to a committee of an association shall stand in a fiduciary relationship to the members of the association.]** appointed or elected to an association or committee shall stand in a fiduciary relationship to the community.

² Note that section 9(1)(e)(e)(vi) remains untouched:

(vi) the committee members shall have fiduciary responsibilities in relation to the association and its members, and shall exercise their powers in the best interests of all the members of the association, without any advantage to themselves in comparison with other members who are similarly placed.

Given that the constitution of a CPA constitutes a binding agreement (contract) between the CPA and its members (s 8(6)(e) of the CPA Act), the rules of a CPA will be enforceable in contract by the CPA. We are also of the view that the committee of a CPA can probably enforce the constitution and any rules made thereunder on the basis of the CPA Act itself, ie as species of statutory rights.

³ 3A. Election of members of the association for a term not exceeding five years.

years only. Item 9 provides for the termination of membership. The regulations under the Act require the committee to report to the DG about the termination of any membership during the reporting period. Now the drafter of the draft bill states that members of the association must also be elected to serve for not longer than 5 years.

- b. Clause 7(b) attempts to insert a new section 7(2)(cA) requiring the authorising officer, at the constitution adoption meeting, to report on the “election of members of the association” by adult members of the community. As we have seen above the constitution must provide for election of members as required by the proposed item 3A of the schedule to the Act.

We cannot explain the meaning of item 3A and section 7(2)(cA).

- 21. We consider the “general plan” provisions, i.e. clause 3 and the proposed section 2B,⁴ as equally puzzling and inconsistent.

- a. The CPA annual report of the department makes it clear that the intention was to implement the “wagon wheel” with this 8 line provision.⁵ That wording did not set a general plan as precondition

⁴ General plan for property

2B. (1) Before property contemplated in Section 2 is registered in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937), the Department shall have a general plan for such property prepared and approved in terms of the Land Survey Act, 1997 (Act No. 8 of 1997).

(2) The general plan contemplated in subsection (1) shall outline parts of the property reserved for-

(a) economic, social, environmental and sustainable development and infrastructure investment for the entire community;

(b) crop fields, grazing land, water ways, wood lands, conservation, recreational and any other purpose for the entire community;

(c) the provision of economic, social and other services for the entire community; and

(d) sub-divided portions for residential, industrial and commercial purposes.

(3) The Minister may prescribe the format for the general plan.

⁵ The following insertion will be made to the CPA Amendment Bill in order to give effect to the Wagon Wheel: “2A In respect of land or property contemplated in Section 2: (a) the Department shall have a general plan for such property prepared and approved in terms of the Land Survey Act, 1997 (Act No. 8 of 1997); (b) the general plan contemplated in paragraph (a) shall outline portions of the property: (i) to be used for commercial, business, industrial, investment and related purposes; and, or (ii) to which all members of the community will have access; and (iii) to be allocated to individual households; and or (c) the portions allocated to individual households shall be registered in terms of the Deeds Registries Act, 1937 (Act No. 47 of 1937).”

- for any transfer, although, admittedly, it only mentioned transfers iro individual household portions;
- b. On the face of it, a general plan would be a precondition for any transfer in future, including a transfer to a new CPA community under the proposed section 2A, and 1500 general plans would need to be prepared within two years iro all existing CPAs in order to continue qualification as CPAs in terms of the proposed section 18A(7).
 - c. Read with the wagon wheel graphic, parts of the community land would be set aside for 4 different purposes ie
 - i. Community Investment purposes ie mining;
 - ii. Production and reproduction purposes ie grazing and conservation;
 - iii. Community services ie schools;
 - iv. Private ie residential and commercial.
 - d. Post-settlement support and a tenure plan is not a requirement under policy or law,⁶ but a spatial plan is a precondition before any land can be transferred under restitution and involving a CPA in the institutional arrangements, there must be a general plan.
 - e. We submit that the condition is onerous and undermines the constitutional property rights of restitution communities.

Application of the Bill with regards to Labour Tenants and Relationship with Traditional Council Areas

22. Regarding the scope and application of the Act, the starting point is that the Act applies to certain communities. Under the principal Act there are three categories of communities that may apply for CPA status, namely restitution communities, redistribution communities or communities otherwise assisted by the state, and other disadvantaged communities so approved by the minister.

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1. It is to be noted that the wording in the annual report suggests that the individual plots will be titled and that the wording is silent on who would hold the title on the outer boundary.
 2. The policy statements, eg the CPI tenure model wagon wheel presented these policy statements holds that the outer boundary title would be held by a CPI or local government.

⁶ Note that the Recap policy does not require a capitalisation plan before transfer takes place. Neither does the CPA Act per items 7 and 10 require a tenure plan as pre conditions for transfer.

23. The draft bill creates further categories. Strictly speaking, the communities ostensibly catered for under the draft bill, are already covered by the Act.
24. Regarding the first category of restitution communities two further sub-categories are created by clause 2 namely section 42D by way of agreement⁷ and section 42E by way of expropriation. Section 42D and section 42E provides for executive or administrative restitution by the minister compared to court adjudicated or approved restitution. Section 42D provides for settlement agreements where the minister and claimant communities may set consensual conditions and the manner in which rights may be held. On the face of it these cannot be unilateral conditions and, under the Restitution Act, a claimant community can of course turn to the court to ensure fair conditions.
25. The draft bill introduces a further power to the minister relating the section 42D and section 42E. It states that the minister can order the condition that a CPA be formed.⁸ This is a new power not authorized by the Restitution Act and not canvassed in any of the policy documents preceding the draft bill or the restitution amendment Act hearings.
26. The draft bill extends the application of the Act explicitly to labour tenants who are awarded restitution of their land in terms of the Land Reform (Labour Tenants) Act of 1996. Labour tenancy was prevalent in former white South Africa outside of homelands.
27. The explicit inclusion of labour tenants is not necessarily required in statute law for the CPA regime. A court including the Land Claims Court can order restitution or award of land subject to the establishment of the CPA under both the Restitution of Land Rights Act of 1994 and the Land Reform (Labour Tenants) Act of 1996. We identify three further problems with the way in which labour tenants were included:
28. First, it is disturbing to see that, in an attempt to note the means by which labour tenants acquire land in terms of the Land Reform (Labour Tenants)

⁷ "(1) If the Minister is satisfied that a claimant is entitled to restitution of a right in land in terms of section 2, and that the claim for such restitution was lodged not later than 30 June 2019, he or she may enter into an agreement with the parties who are interested in the claim

⁸ (b) which is entitled to restitution in terms of Act No. 22 of 1994, and which community has entered into an agreement with the Minister as contemplated in section 42D of that Act, where **the Minister has ordered restitution on condition that an association be formed** in accordance with the provisions of this Act;

Act No. 3 of 1996, the Bill only makes reference to section 22. This creates confusion. There are different ways in which labour tenants can acquire land or ownership of land. Labour tenant claim/application can be resolved through agreement (s 18 of Land Reform (Labour Tenants) Act No. 3 of 1996). Labour tenants can also acquire land through advances or subsidies granted by the Minister of Rural Development and Land Reform (ss 26 and 27 of Land Reform (Labour Tenants) Act No. 3 of 1996).

29. Second, the Land Reform (Labour Tenants) Act No.3 of 1996 allows labour tenants to acquire the land that they used for residential, grazing and cropping. The Bill implies that the land acquired by labour tenants will be owned communally and further that labour tenants would not be given opportunity to choose. It does not deal with instances whereby the land will be acquired by individual household (s). We submit that labour tenants must be given a choice whether to own land individually or communally.
30. Third, the land can also be acquired through subsidies provided by the Minister of Rural Development and Land Reform to occupiers (s 4 of the Extension of Security of Tenure Act No. 62 of 1997). The Bill does not mention the Extension of Security of Tenure Act No. 62 of 1997.
31. With regards to CPA's in traditional council areas, the principal Act does not exclude the possibility of CPAs being established in traditional council areas. The principal Act of course preceded the enactment of the Framework Act.
32. The draft bill does not change this situation.
33. Whilst the law does not prescribe that CPAs cannot exist in areas where traditional councils can also exist, the policy statements of the government has not been clear, or have expressed themselves against CPAs in traditional council areas of jurisdiction.
34. Firstly the "Restructured Draft Policy Paper" entitled "Communal Property Associations and the Rural Economy Transformation Model" dated 14 May 2014 is explicit about this issue. It says, at para. 2.2.4 at page 10 that "new CPAs will be established in areas where no traditional authorities exist." With regard to existing CPAs already established in communal areas with traditional authorities, the policy statement states that the department will assist with the management and administration of the CPAs through

“assisting with harmonizing of relationships and providing clarity in respect of roles and responsibilities”. It continues that “traditional authorities will be supported to function as moral authorities in these areas”.⁹

35. This policy is un-ambivalent as it states that new CPAs will not be encouraged in communal areas. The handful of CPAs amongst the 1500 CPAs currently in communal areas will become a dying breed.
36. The SEIA is not clear as to whether CPAs are the current landholding entity inside homelands or not. This is explained in the appendix.

Property Ownership and Management Functions

37. The draft bill creates a new legal entity, namely the community. Clause 7(e) states this: “(5) A community that has registered a constitution and an association acquires juristic personality.” As explained below this entity will now become registered owner of communal property.

But the association, most probably with the same membership as the community, will also retain or acquire legal personality on registration of the constitution by virtue of section 8(6).¹⁰

38. Clause 3 and the proposed section 2A state that the community will become the registered owner.¹¹

⁹ The 2012 NAREG draft CPA policy, draft zero, is perhaps less ambivalent. It stated:

Regulating the incidence of CPAs

While creating the idea of CPAs remains relevant in instances where land or rights in land are awarded to a community or group of people that desire to hold the land communally, within the Commercial farming and even government owned lands, where indigenous systems of land governance and communal tenure have persisted such as in Homelands reserved for the Black majority, the CPAs shall not be encouraged or promoted by government. Whereas these shall not be prohibited in law, the creation of CPA's in former Homelands shall be negotiated within the existing and hopefully improved land administration system being proposed for Communal Areas (e.g. through the “Wagon Wheel”).

¹⁰ (6) Upon the registration of an association - (a) the association shall be established as a juristic person, with the capacity to sue and be sued; (b) the association may acquire rights and incur obligations in its own name in accordance with its constitution;

¹¹ “Transfer of property

2A. The Minister must transfer property contemplated in section 2 in the name of the community or the name preferred by the community.

Concomitantly the draft bill in clause 8(e) attempts to remove the power of an association to hold property by repealing the power to acquire and dispose of immovable property and replacing it with a power to administer and manage property now owned by the community.¹²

39. The issue of whether a CPA will hold and own land or whether it will only be responsible for management and administration and ownership vesting elsewhere, is not dealt with in any of the policy statements that preceded the draft bill.
40. The draft bill creates new uncertainty. Clause 3 and the proposed Section 2B contemplate registration of property in the deeds office. This implies that there will be ownership and transfer of ownership transactions and registrations. The property contemplated in Section 2B refers to a property to which “a community” as defined in Section 2 of the principal Act is entitled or is to receive as restitution award or as redistribution grant.
41. Clause 3 and the proposed Section 2A states that “the Minister must transfer property contemplated in Section 2 in the name of the community or the name preferred by the community”. This means that “the community” as defined in Section 2 will get transfer of the property.
42. The implication is that the Communal Property Association will not own property. Property will be owned by “the community” now achieving legal entity status by the operation of the new section 7(5), section 2A and section 2B for purposes of the CPA regime and for purposes of the Deeds Registries Act.
43. The draft amendment bill does not explain how “the community” will transact or deal with its property. This will be dealt with further below when the amendments to Section 12 are considered.

¹²“(c) the association may [sic], subject to the provisions of its constitution [-

- (i) **acquire and dispose of immovable property and real rights therein; and**
- (ii) **encumber such immovable property or real rights by mortgage, servitude, or lease or in any other manner”] administer and manage communal land on behalf of a community.**

44. The draft bill envisages that the CPA qua association will not own or hold property. Clause 8(e) amends Section 8(6)(c). It deletes the power of an association to acquire and dispose of immovable property. This power to own land is replaced with the power to “administer and manage communal land on behalf of a community”.
45. The draft bill does not explain what happens to CPAs currently owning land and whether their powers will also be diminished in this manner. We deal below with the issue of retrospectivity, extinguishment, expropriation and compensation of a compulsory taking of property, ownership rights and the powers associated with it.
46. At this stage it is appropriate to point to the transitional provisions in clause 19 which introduces a change of name for all current communal land owned by CPAs. Sub-clause 7(on page 91 of the draft bill published in government gazette of 29 April 2016) states that “communal land registered in the name of an association must, within twenty four (24) months from the date of commencement of this Act, be registered in the name of association and the name of the community or name preferred by the community”. This provision, clumsy as it is, is not just about a name change but is about all CPAs, within two (2) years, losing its title deeds.
47. The loss of ownership and title of land by the association is further confirmed in the amendments to the schedule to the principal Act where the rights of members to the association’s property are changed to the rights of members to “communal land”.
48. There are of course various problems relating to expropriation and compulsory taking, and those are set out in the opinion attached dealing with the unconstitutionality of these provisions.
49. Finally, we submit that it is unfortunate that the Bill does not address or provide measures to alleviate the existing problems which have been identified by communities in CPAs. These problems include resolving internal disputes within CPAs, handling of funds derived from business initiatives, appointment and election of office bearers. The Act provided that the DG would provide assistance to CPAs and that the internal problems within CPAs would be addressed at that level. Many communities have reported to us that they have not been assisted by the DGs office. They state that instead of investigating and providing support to CPAs the DG

refers the CPAs back to the Regional/Provincial offices, to deal with the problems.

50. The Bill has introduced a Communal Property Association Office (CPA) and a Registrar. It suggests that the previous role of the DG would be replaced by the Registrar who is appointed by the Minister. It is submitted that the establishment of the office does not provide a solution to the existing institutional problems experienced by CPAs. It is submitted that the best solution would be to engage the affected communities regarding the creation of this office in order to ensure that the existing internal problems would be addressed. We have made further submissions on the importance of public participation below.

Disposal of land, ministerial consent and first option

51. Clause 3 and the proposed section 2B leads to much debate. For present purposes we deal with the new quorum provision, ministerial consent and the department appropriating the first option to purchase.
52. It is worth quoting the convoluted wording of clause 12 and the proposed section 12(1)(a) in full. We have re formatted the clause in order to make our points clear.

“Approval for certain transactions

12. (1) An association may not [dispose of or encumber or conclude any prescribed transaction in respect of the whole or any part of the immovable property of the association, or any real rights in respect thereof,] –

(a) sell... or encumber communal land or immovable property of the community ... or purchase any immovable property,

without the written consent of the Minister

and without a resolution supported by at least 60% of the total number of households with ownership or leasehold rights present at a meeting where such resolution was adopted:

Provided that if an association decides to sell communal land or immovable property, notice of such intention must be given to the Director- General

and the Department shall have the first option to purchase such immovable property:

Provided further that the Department must, within three months from the date of receipt of such notice, inform the association whether it intends purchasing the immovable property or not, and if it decides to purchase, such purchase must be concluded within nine months from the date of receipt of the notice;

53. Our main concern is with the double barreled disposal condition of ministerial consent plus first option. This makes the department and the minister complicit in setting the price and enforcing a decision or not to sell onto a community. This amounts to a deprivation of a property right of a kind that invokes compensation and constitutional compliance in respect of restitution cases. This is the subject of our attached advocate's opinion.
54. But even if ministerial consent could be justified in terms of policy and limited to non-restitution communities, then the first option remains discriminatory against communal ownership.
55. We further point to:
 - a. The association does not have the statutory power to decide about land of which it is not the owner. According to section 2A the community is the owner and the draft bill's architecture makes the association a mere manager of community owned land. The negative prohibition and circumscribed power of the association does not imply legally that the association has the power to decide on transactions about community owned land. The community must still decide about community owned land. The draft bill does not say how a community, despite having separate legal personality from the association makes decisions. The community and the CPA is now saddled with further transaction prohibitions. It requires a special quorum, ministerial consent and, for 12 months, price determination by the department.
 - b. Even if the minister gives consent and does not withdraw such consent during the 12 month period, the department can sit on its hands for one year whilst the property devalues.
 - c. The 60% quorum has two major problems. Firstly it is impracticably high and unprecedented in corporate law. Secondly it does not have meaning. Without regard to membership requirements in the

constitution of an association and without regard to the schedule to the Act, it introduces a new voting constituency, the household. It also qualify the households to those that own or lease either portions of the community land, or have such ownership or leasehold rights. There are two problems with this constituency. In practice only a handful of the current 1500 CPAs have household ownership or leasehold rights. Second, there is no appreciation that perhaps in certain CPAs only a small elite may hold ownership/leasehold rights and the majority or community and or association members and households may hold other use rights. A small elite should not dictate. This possibility is now promoted by the draft bill.

- d. The registrar must approve the purchase of a tractor and a wheelbarrow by any CPA.

Customary law

56. In its August 2015 decision in the *Bakgatla ba-Kgafela* matter,¹³ the Constitutional Court found that:

The [CPA] Act is a visionary piece of legislation passed to restore the dignity of traditional communities. It also serves the purpose of transforming customary law practices¹⁴ [...] The Act seeks to transform customary law and bring it in line with the Constitution. At the same time,

¹³ *Bakgatla-Ba-Kgafela Communal Property Association v Bakgatla-Ba-Kgafela Tribal Authority and Others* (CCT231/14) [2015] ZACC 25; 2015 (6) SA 32 (CC); 2015 (10) BCLR 1139 (CC).

¹⁴ The Court continues: *For example, in some traditional communities where communal land is held and controlled by a traditional leader, women are excluded from the allocation of land for individual occupation and use. This practice is inconsistent with the equality clause in the Bill of Rights which prohibits discrimination based on, among other grounds, gender or marital status. This inconsistency necessitates the development of customary law as mandated by section 39(2) of the Constitution. This duty has been affirmed by this Court in a number of cases. Customary law remains in force to the extent that it is in line with the Constitution and Acts of Parliament dealing with matters to which customary law applies. Under the Act unmarried women who are members of traditional communities enjoy rights equal to those held by men, when it comes to access to communal property, and management of the affairs of an association. The democratic principles set out in section 9 of the Act also curb the general power of removal in terms of which traditional leaders banished people from their neighbourhoods for political reasons and without any hearing. Before the establishment of a democratic order in this country, courts held that banishment orders issued by traditional leaders were not contrary to the principles of natural justice despite the fact that those on whom such orders applied were not given a hearing before the orders were issued. In later decisions the banishment orders issued by traditional leaders were called "trekpass" orders. The traditional leader was required to consult the tribal council only before issuing the order. The case law referred to here shows that, by executive decree, traditional leaders restrained the personal freedom of members of their communities. This brought about untold suffering to those on whom the trekpass orders applied.*

the Act extends the fruits of democracy to traditional communities that are still subject to customary law. This is the context in which these provisions must be read and understood.

57. In the earlier *Tongoane*¹⁵ judgement, setting aside the Communal Land Rights Act of 2004, the Court said “[c]ommunal land and indigenous law are [...] so closely intertwined that it is almost impossible to deal with one without dealing with the other”. And further, “[T]he field that CLARA now seeks to cover is not unoccupied. There is at present a system of law that regulates the use, occupation and administration of communal land”.
58. It is thus imperative that the CPA Act recognizes the existence and importance of customary law as the system of law that regulates the use and occupation of communal land currently, and further seek to transform that customary law to bring it in line with the Constitution, where that may not be the case. The Act occupies a space already occupied by an operating legal system.
59. At a level of principle we are in favour of CPAs recognizing and promoting existing and current customary law rules that work for them. We emphasise, however, that the recognition of customary law as it operates on the ground does not necessitate the inclusion of traditional leaders or traditional authorities in administrative functions. That was made clear by the Constitutional Court in the *Bakgatla ba-Kgafela* judgement.
60. CPA constitutions or subsequent agreements between a CPA and its members regarding user rights may recognize living local law without necessarily codifying all or some of it. Similarly, the institutions of customary law may be recognized and participate in CPA activities and even get seats on CPA committees in terms of CPA constitutions. But customary law has many institutions and institutional arrangements at various levels which ought not to be limited to chiefs or traditional leaders recognized under the Bantu Administration Act of 1951 with an afterlife under the Framework Act of 2003.
61. We suggest that the CPA Act should expressly:
- a. Recognize that it regulates a space – namely communally held land – already occupied largely by customary systems of law, whether

¹⁵ *Tongoane and Others v Minister for Agriculture and Land Affairs and Others* [2010] ZACC 10; 2010 (6) SA 214; 2010 (8) BCLR 741 (CC).

these systems provide a role for statutorily recognized traditional structures or not;

- b. Provide mechanisms, where desirable, for the implementation of the Act to enable the recognition of the applicable customary systems and, where necessary, transform these in the interest of democratizing the rural areas and bringing the applicable customary law in line with the Constitution.

62. The resolutions of the African National Congress 52nd National Conference held in Polokwane in December 2007 are relevant to the law-making initiatives of the governing party in Parliament. Various resolutions under the chapter heading 'Rural Development, Land Reform and Agrarian Change' are relevant to the context in which the CPA policy and amendments are being considered.

The party resolved to:

□ "Strengthen the voice of rural South Africans, empower poor communities and build the momentum behind agrarian change and land reform by supporting the self-organisation of rural people; working together with progressive movements and organisations and building forums and structures through which rural people can articulate their demands and interests..."

□ "Build stronger state capacity and devote greater resources to the challenges of rural development, land reform and agrarian change..."

□ "Ensure that the allocation of customary land be democratised in a manner which empowers rural women and supports the building of democratic community structures at village level, capable of driving and coordinating local development processes. The ANC will further engage with traditional leaders, including Contralesa, to ensure that disposal of land without proper consultation with communities and local governments is discontinued."

The legislative process, public participation and way forward

63. We have considered a number of documents and policy statements in the preparation of this memo and in the evaluation of the public participation process leading to the publication of the draft bill. These include:

- a. SPEECH BY THE MINISTER OF RURAL DEVELOPMENT AND LAND REFORM, NKWINTI, G. E. (MP) WORKSHOP ON COMMUNAL PROPERTY ASSOCIATIONS BIRCHWOOD HOTEL, BOKSBURG 09 November 2012

- b. The various commission reports of the 2012 CAP summit; A DRAFT CONCEPT DOCUMENT ON CPA NATIONAL CONFERENCE;
- c. 2014 LAND TENURE SUMMIT COMMUNAL PROPERTY ASSOCIATIONS DISCUSSION DOCUMENT; RESTRUCTURED DRAFT POLICY PAPER COMMUNAL PROPERTY ASSOCIATIONS AND THE RURAL ECONOMY TRANSFORMATION MODEL 14 MAY 2014; Communal Land Tenure Policy: Communal Land Tenure Policy Framework presented at the Land Tenure Summit 2014; Final Policy Proposals on "Strengthening relative rights of people working the land" presented at the Land Tenure Summit 2014 Post Land Tenure Summit 2014 plan of action;¹⁶
- d. NAREG documents of 2011 and 2012 including: CPA LAND POLICY : FOR DISCUSSION BY THE WORKSTREAM – draft zero
 - b) Legislative amendments workstream report to the national reference group dated about 4 June 2012 or attached to emails of that date;
 - c) Powerpoint dated 2-3 June 2012
 - d) Annexure research by Prof Kariuki dated 3 June 2012¹⁷
 - e) Draft Communal Property Associations Amendment Bill 2011 version 2 of 25 April 2011
 - f) Master of the High Court memo about restitution trusts dated 18 March 2011
 - g) Budlender SC opinion on the master's memo dated 4 April 2012 dealing with the conversion of restitution trusts
 - h) Draft

¹⁶ On the Communal Property Association commission the recommendations were: The community must decide on the type of governance structure whether it be Communal Property Association, Tribal Authority or Trust Separate Communal Property Associations governance structure from its investment and development structure; Provincial and District structures must provide monitoring and performance assessment to Communal Property Associations; The relationship of Communal Property Associations to the Integrated Development Plans and municipalities must be clarified; The Communal Property Associations Office must have National, Provincial and District Offices; There must be guidelines on how Communal Property Associations officials deal with concerned groups; There must be guidelines for Communal Property Associations groups to follow before their concerns can be considered; and The Communal Property Associations policy should clarify what happens when a member or head of household dies. Proposals for a Land Rights Ombudsman required further work both in policy and the creation of legislation.

¹⁷ The "Annexure research towards the development of the communal areas land reform programme (CALRP) Consolidated annexure report, Sunday 3 June 2012 by Samuel Kariuki comes to a similar conclusion, namely that content of constitutions is often unknown or misunderstood by CPA members and rights have been poorly defined.² He asserts that there is relatively widespread agreement that the root of the above mentioned problems stems not so much from difficulties of group management of land than the entirely insufficient lack of support CPAs have received from government bodies. The complex process of compiling and maintaining records of land tenure rights has proved too much for most CPAs, which received minimal assistance from the DLA.

terms of reference establishing the work stream and project steering committee for annual reports to parliament

64. The CPA policies and statements are preceded by a number of dedicated investigations on the scope of the challenge facing independent land holding entities established under the land reform programme in South Africa. These include a number of studies funded by the department. At least seven recent major review reports have made it clear that it is only in exceptional cases that there is equity in access amongst members of land reform projects. The major problem identified in a number of these is pertinently stated as related to the determination of land rights and their management:

The future of the programme and the extent to which it meets its constitutional obligations will be determined by the extent to which we are able to support participants to clearly determine and manage land and resource rights both now and in the future. This requires the development of robust land-holding entities and a programme to revitalise and rehabilitate entities and projects which have fallen into difficulties.¹⁸

65. The Council for Scientific and Industrial Research's (CSIR) review of Communal Property Institutions (CPAs and Trusts) of May 2005 review reports on the absence of allocation of benefits and rights and an overwhelming rate of production failure. The study found that the majority of CPIs were dysfunctional in terms of allocation of individual resources and the defining of clear usage rights, responsibilities, powers and procedures for members and the decision making body.

66. The research and the consultation processes did not call for ministerial oversight, spatial planning conditions and removal of ownership powers of CPAs.

67. Clearly the NAREG process, the summit and the action research outlined above point to the challenge to address, the a) membership definition, b) the profiling of members, c) the clarification and securing of their rights. We submit that this is what must be addressed in a draft bill and not further

¹⁸ 2008 02 00: The Settlement and Implementation Support Strategy (SISS) review findings - This report is part of a process that was funded by the Belgian Technical Corporation in collaboration with the Department of Land Affairs (DLA) to develop a ten year strategy for post settlement support.

control mechanisms from above, sometimes ideologically motivated and involving ministerial consent, and denial of constitutional ownership powers.

68. We therefore propose that law reform should be aimed at dedicated institutional support and maintenance plus strong and clearly defined tenure rights to identified or identifiable individuals and families.
69. Institutional support may come through a dedicated, well-resourced and clearly empowered CPA office and registrar. However the current wording of the draft bill does not describe or promote a comprehensive service to CPAs. Instead it focuses on compliance controls and reporting to parliament.
70. The definition of rights may or may not require statute reform. In 2011 we proposed a rewrite of the regulations to address membership, procedural and substantive rights. In 2012 and subsequently we formally filed the Kobus Pienaar regulations amendment proposal to you. We have considered the proposal for regulation amendment again, and we have no hesitation to formally propose that this draft be considered by you. We attach it as appendix D.

In conclusion

71. We propose that the draft bill be withdrawn and reconsidered for a number of reasons including:
- a. A number of the amendments proposed were not part of the discussions and the public participation process up to now
 - b. A number of the amendments proposed are badly drafted, and/or ill-conceived and contradicting or incompatible with other provisions in the Act or the draft bill itself;
 - c. A number of proposed amendments are cumulatively and on their own of doubtful constitutional validity and some are outright discriminatory and unconstitutional.
72. We propose that the department embark on a participatory and inclusive drafting and consultation process, starting with an amendment of the regulations to strengthen the relative rights of individuals and families in the 1500 current CPAs and future CPAs. There is so much goodwill towards the support and maintenance of land reform entities that this opportunity should not be squandered.

Thank you for the opportunity to make this submission.

Yours faithfully

LEGAL RESOURCES CENTRE

Per: [SIGNED]

Appendix A:

Opinion on the constitutionality of the Amendment Bill with relation to existing CPAs

1. The CPA Amendment Bill could be read to apply retrospectively to expropriate property that belongs to existing CPAs, and/or deprive existing CPAs of their property rights. These deprivations flow from two provisions of the Bill:
 - 1.1. Section 9 which prevents CPAs from owning property and limits their role to administering and managing communal property. As we understand the Bill, ownership will be vested in a newly created legal entity, 'the community';
 - 1.2. Section 12 which requires a CPA to obtain the consent of the Minister or the Registrar for any transactions regarding either immovable or movable property.
2. It is not clear from the Bill whether these provisions are meant to apply retrospectively. Put differently, it is not clear whether the Bill envisions that existing CPAs with existing rights in land will be deprived of their ownership, and that their existing rights in the land will be partly expropriated by the state in favour of the Minister and/or the Registrar.
3. There is a strong presumption against retroactive legislation. As the Supreme Court of Appeal has explained, it is an "*important legal rule forming part of what may be described as our legal culture ... that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the Legislature clearly intended the statute to have that effect*".¹⁹ The basis of the presumption against retrospectivity and the requirement that it can be rebutted only by express terms or clear implication is "*elementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly*".²⁰ In this instance, it is the choice of a community to form a CPA on the basis of an assumption that the CPA had certain rights. The Bill – if it operates retrospectively – will take away those rights, and therefor undermined the ability of communities to decide how to regulate their ownership of their land.

¹⁹ *National Director of Public Prosecutions v Carolus and Others* 2000 (1) SA 1127 (SCA) at para 31

²⁰ *Carolus* (n 19 above) at para 36, quoting *Landgraf v USI Film Products et al* 511 US 244 (1994) at 265 (Stevens J).

4. The only relevant provision is the new proposed s 18A(7) which requires CPAs to register property in the name of the CPA and the community within 2 years. However, it is not clear what happens if the CPA refuses to change the registration of its land, and whether the new ss 9 and 12 will apply to existing CPAs rights. Given the strong presumption against retrospective legislation, we assume not.
5. If we are incorrect, and the Bill is meant to apply retroactively to existing CPAs, then it is plainly unconstitutional for the following reasons:
 - 5.1. It violates the principle of legality. The principle of legality prohibits retroactive legislation that operates in an oppressive or harsh manner taking into account all the relevant circumstances. We submit that this legislation is plainly oppressive as it undermines the existing constitutional rights that communities have to the land which was taken from them under discriminatory laws.
 - 5.2. It is an expropriation without compensation contrary to s 25(2) of the Constitution. CPAs currently own land in their own names. If it operates retrospectively, the Bill takes those rights away and grants part of them to the Minister and the Registrar. By requiring the consent of government officials before a CPA may use its land, the Bill grants rights that used to inhere solely in the CPA to the state. That is an expropriation. The Bill does not provide any compensation to CPAs.
 - 5.3. The Bill deprives existing CPAs of their rights arbitrarily contrary to s 25(1). We can see no justification for requiring CPAs to require the consent of the Minister or the Registrar before exercising their rights over their property. Any benefit is plainly disproportional to the violation of the rights of the members of the community to their land, and to be able to own the land through the mechanism they endorsed when they acquired the land.
6. Even if the Bill does not operate retrospectively, it would violate s 25(7) of the Constitution which entitles all those who were deprived of property after 1913 in terms of racially discriminatory laws or practices to "*restitution of that property or to equitable redress*". The Bill will deny those people who have rights under s 25(7) to restitution because it makes their ownership of the property as a community subject to the will of the Minister and the Registrar. That is less than what was taken away from them. It is also not equitable redress because there is no legitimate basis for the Minister to exercise control over land that belongs to a community, through a CPA.

Appendix B

2015 SEIA

COMMUNAL PROPERTY ASSOCIATIONS AMENDMENT BILL SOCIO-ECONOMIC IMPACT ASSESSMENT

Quantification of the Economic ImpAct of the Bill in South Africa.

1 December 2015

The report was prepared by Urban Econ, paid for by the UNDP, and for the department.

The report purports to fulfill requirements of the Presidency relating to Regulatory ImpAct Assessments and SEIAs, which since May 2015 is a requirement for all new legislation including amendment legislation.

This note relates a number of points raised in the SEIA and briefly comments thereon.

Purpose of the draft Bill according to the SEIA:

1. On page 43 of the SEIA the following is stated: ...*“The main aim of the proposed CPA Amendment Bill will be to remove the potential of “duality” where Traditional Authorities and CPAs co-exist in the same area and will also promote clear roles and responsibilities that will ultimately enhance the impAct of development initiatives in this area and ensure the attainment of the overall objective of Agrarian Transformation”.*
2. Elsewhere, on page 36 the assertion is made that the CPA Amendment Bill was introduced to address inherent risks identified during the implementation of the CPA Act No.28 of 1996. *“The main risk identified in the current Act is the lack of clarity in relation to governance in areas where Traditional Authorities and CPAs co-exist and tenure insecurity issues”.*

Labour Tenants and CPA Members

3. The SEIA distinguishes between *“labour tenants”* and *“CPA Community Members”*. Various assumptions are made in respect of each category.

4. It was assumed that there are 45,000 labour tenants, each entitled to 12 hectares of land. The costs associated the implementation of the draft bill in respect of labour tenants amounts to R860 million and in respect of CPA community members to R3.23 billion. [para.15 on page 4 of the SEIA].
5. The assumptions regarding the number of quotes of the CPA community members set out on pages 37 and 38 of the SEIA. On page 40 the table states that the number of CPA members are 169 000. According to this table there are no CPA members in the Western Cape, 6 000 in the Northern Cape and 1 000 in the Free State. The costs of the implementation of the Bill in respect of each CPA member is assumed to be R19,000. The source stated for the figure, i.e. the number of CPA members, is said to be the CPA annual report of the department for 2014/2015. [at the end of this appendix we reproduce the table and its first column as it appears in the 2015 annual report. We started a recount of the of the CPA members listed in the 2015 annual report. The results appear in the third to fifth columns. There is no correlation between the SEIA table figures and the annual report figures.]

Economic Impacts

6. The SEIA makes various assertions about the potential economic impacts of the Bill. It states the following on page 29: *“The proposed Bill will stimulate the economy in rural areas and as a result assist in poverty alleviation. New employment opportunities created through the Bill will also contribute to the reduction of higher employment rates in these areas. The rural areas have an immense skill gap in the supply of specialist’s skills and the proposed Wagon Wheel Development Model could potentially help cater for this skill gap”*.
7. On page 5 in the summary in paragraph 17 the following is stated: *“Total expenditure amounting to R4.1 billion on the implementation of the CPAA Bill is expected to stimulate production in the South African national economy by a total of R18.9 billion over the 10-year period. In addition, GDP is expected to increase further by a total of R5.84 billion. In terms of job opportunities and income, both are expected to increase by a total of 15, 090 and R5.02 billion over the 10-year period”*.

Some questions:

8. The SEIA deals with once off labour tenant validation and registration of land including sub-divisions and general plans, but excluding the cost of land acquisition. The costs of administration through CPAs are included.
9. Regarding the category “*CPA community members*” the SEIA is completely ambivalent. On the one hand it lists numbers which it sources from the existing CPA register and the 2015 annual report, and these numbers are then used to cost the Amendment Bill. It does not take into account growth, and more CPAs being registered.
10. On the other hand in the text of the SEIA it refers to these CPAs being situated in the former homelands. The SEIA appears to be confused on the subject matter of its report. Examples of references to the CPAs being situated or aimed at former homelands are the following:
 - 10.1. The total estimated cost to deliver the CPA Amendment Bill to Labour Tenants as well as CPA Members in the former homelands in South Africa is outlined in table below.[p 40 of the 2015 SEIA]
 - 10.2. The first step of the analysis was to determine where the former homelands were located nationally, which is displayed in the following map (Map 4-1). [p 36]

The only plausible conclusion is that the WEIA understood that all existing CPAs are situated in former homelands in traditional council areas. The SEIAs starting point was wrong.

11. The table below reflects numbers of CPA members according to the SEIA and the annual report respectively:

Province	Number of CPA Members according to the 2015 SEIA	Recounted Number of CPA members according to the annual report 2015	Total number of CPAs	CPAs with membership numbers
Free State	910	3089	58	31
Eastern Cape	12 124	25634	200	170
Gauteng	4 912	3595	41	29
KZN	17 862			
Limpopo	49 744			
Mpumalanga	23 395			
North West	54 094			
Northern Cape	6 079	29336	78	57
Western Cape	-	8859	24	15
Total	169 120			

Appendix C

Annual Report on Communal Property Associations of the Department of Rural Development and Land Reform 2014/2015

1. The Director-General explains that the pilot phase of regularisation, i.e. addressing the operational problems of non-compliant CPAs are varied and include challenges within the entities and other challenges created *“by lack of monitoring and evaluation of the Activities of the CPAs”*. i.e. with the department.
2. A total of 48 CPAs were registered during the reporting period and the total number of registered CPAs are 1 428 [para.3 on page 9] a total of 48 of the 1 428 CPAs were trained by officials during the reporting periods.
3. Paragraph 8 on page 124 reveals that of the 1 428 registered CPAs, 284 were compliant and the balance did not comply with the provisions of the Act and the Regulations according to this report.
4. The report concludes that there is a dire need for additional capacity in provinces to deal with the operational challenges of CPAs.
5. The conclusion also says that *“billions of Rands were invested in the acquisition of land and other assets for CPAs. Very little institutional capacity was created in the past to ensure the optimal use of the productive assets of CPAs”*.
6. The issue of legislative amendment was also raised in the report. The conclusion states that a number of amendments will be made to the principal Act, the thrust being to institutionalise rights of members and to create the necessary structures that will enhance good corporate governance by CPAs.
7. On page 9 in paragraph 3.3 it is stated that SEIA has been commissioned. There it is explained that the insertion will be made in the CPA Amendment Bill to provide for a general plan, subdivision of land in categories where portions of land are to be used for commercial and other purposes, for all members of the community to have access, and to be allocated to individual households. It is said that this is in order to give effect to the Wagon Wheel.

Draft amendments proposed to the current CPA regulations

These proposals have been formulated on the basis of feedback from the CPA Task Team meetings and a provincial consultation process..

The establishment of the legal entity is but one of series of arrangements that need to be forged for groups of people to hold and manage land. These amendments to the regulations are proposed to ensure that appropriate institutional arrangements are made for the purposes of establishing functional entities.

The proposed regulatory prescribed process will therefore not necessarily lead to the establishment of a CPA but it may result in devising a range of different sets of institutional arrangements which may or may not include the establishment of a new or separate institution.¹ It could for instance result in the land being transferred to a Municipality as commonage or subdivided into residential sites to be transferred to the occupants, **or in smallholdings, to be transferred in ownership to individuals..**

One of the main issues that the regulations seek to ensure is that the allocation process (in greenfield situations) and rights confirmation process (where people are already on the land) must be done prior to the transfer of the land. The only opportunity to formulate and adopt rules for allocation and to then allocate in terms of rules to use, is at the outset. To address these issues later would seem nigh impossible. It would seem that one only has one bite at the cherry. It will probably require legislation to address the problem that result from non-allocation / self-help particularly in so-called “rent-a-crowd” redistribution CPAs.

As noted in the Scoping report, the draft regulations also seek to highlight the difference between procedural rights of members (as members) and the land use rights that members may acquire if such rights are confirmed or allocated. It also emphasises the necessity that systems for rights administration support should be devised.

The key addition to the existing set of regulations is a proposal that a process for rule formation be conducted prior to transfer – starting with land use, user right allocation / confirmation, rights administration and, only as a final step, concluding the constitution.

¹ There are many types of institutions, some of which are also organizations (like banks, local governments, or courts) and others which are not (like money, taxation, or the law). An institution is a complex of norms and behaviours that persists over time by serving some socially valued purpose, while an organization is a structure of recognised and accepted roles (Uphoff 1986: 8-9). Institutions can be organisations, and vice versa. Marriage, for example, is an institution that is not an organization, while a particular family is an organization (with roles) but not an institution (with longevity and legitimacy). “The family”, on the other hand, is both an institution and an organization. We will be concerned here with institutions that have an organizational basis. (Uphoff 1992)

**draft amendments to the CPA regs:
REGULATIONS IN TERMS OF THE COMMUNAL PROPERTY ASSOCIATIONS ACT**

Definitions

1. In these regulations a word or expression to which a meaning has been assigned in the Act bears that meaning and, unless the context otherwise indicates -

“the Act” means the Communal Property Associations Act, 1996 (Act No. 28 of 1996);

“communal property bodies” mean provisional associations contemplated in section 5 and associations contemplated in section 8 and similar entities contemplated in section 2 of the Act, or any combination thereof, and “bodies” has a corresponding meaning.

“constitution” means the constitution establishing the CPA and, unless the context indicates otherwise, includes to mean a similar entity’s founding document or constitution as a trust, other association or company and, includes to mean land use rules.

Registration of a communal property body

Amendment to lay out how user and other rights should be registered. It is not envisaged that such rights will be registered as real rights in the deed registry office, but that the department needs to support committees and or individual to ensure that their rights to use and benefit are recorded in registers and that there is some form of documentary proof.

- 2.(1) An application for registration of a communal property body must be substantially in the form of, forms A1 – A8 for provisional associations contemplated in section 5, forms B1 – B9 for associations contemplated in section 8 and forms C1 – C6 for similar entities contemplated in section 2 of the Act.
- (2) The Registration Officer must register a communal property body as a provisional association, an association or a similar entity in the manner set out in these regulations when the Director-General notifies him/her that he/she has consented to such registration in terms of section 5(3) or section 8(3) or that the Minister has made certain provisions of the Act applicable to a similar entity in terms of section 2(3).
- (3) When registering such a body the Registration Officer must -
- (a) record the information in the Register and file the documents and information which are specified in regulation 3 for safekeeping in the Register of Communal Property Associations, which are applicable to the body being registered; and
- (b) issue a registration certificate substantially in the form of Form D in the Schedule to these regulations in duplicate, one of which he/she must retain on record and the other which he/she must forward to the body concerned.

Register to be kept by the Registration Officer

- 3.1 The Registration Officer must keep a register known as the **Register of Communal Property Associations** that shall be a public record.
- 3.2 The Register must consist of computer, written or any other records or a combination of them and must include an index, files and other components that the Registration Officer may consider necessary or advisable for the implementation of the Act and these regulations.
- 3.3 The register must contain the information relating to all registered bodies which are specified by the Act and these regulations or which are necessary for the implementation of their provisions, including -
- 3.3(a) an **index** containing (in respect of each separate body which is registered) -
- (i) a registration number consisting of the letters “CPA”, followed by an oblique or slash “/”, followed by a two-digit number representing the last two digits of the year of registration, followed by an oblique or slash “/”, followed by a four-digit sequential number representing the separate number allocated to each consecutive body which is registered, followed by an oblique or slash “/”, followed by a letter which must be “P” in the case of a provisional association and “A” in the case of an association and “S” in the case of a similar entity;
 - (ii) the name of the body which is registered and its address and that of its agent or representative (if any);
 - (iii) a similar entity’s number (if any) which was allocated to it by the Registrar of Companies, the Master of the Supreme Court or any other official in terms of any other law;
 - (iv) the date of registration of the body in terms of regulation 2;
 - (v) the date of de-registration of a registered body;
 - (vi) a reference to the number/s allocated by the Department of Land Affairs to any file/s it may have concerning the body or the community it represents;
 - (vii) in the case of a similar entity, a list of the sections and subsections of the Act which are applicable to the body concerned, and a reference to any qualifications or conditions imposed by the Minister in terms of section 2(3) of the Act;²

²Proposed amendment to the Act: Section 2(3) provides that only sections 8, 9, 10, 11, 12, 14 or 16 could be made applicable. Section 2(3) needs to be amended to include that “the minister may on application of a community make the section 6 and 7 applicable to a community. This means that a community who seeks to establish a trust of section must follow the procedure and may get assistance contemplated in section 6. Also, it extends the meaning of “association” as used in section 1(i) (since it is included as a ‘community’ in section 1(iv)). Further, Section 2(3) also needs to be amended to include section 13 only in so far as it relates to placing a similar entity under the administration of the DG. This means that a similar entity could also be placed under the administration of the DG. However in the case of a Trust, its sequestration must be governed in terms of the Trust Property Control Act and in the case of a Section 21 Company or

- (viii) the date/s on which any amendment/s of the body's constitution were accepted by the Director-General;
- 3.3(b) a **file** in respect of each separate body which is registered bearing the registration number referred to in regulation 3(a)(i) and the body's name and containing the following additional **information**, namely:
- (i) the land reform project type and the legislation in terms of which land and financial assistance was made and the available and the subsection of Section 2 in terms of which the provisions of the Act applies;
 - (ii) the title deed number and extent of land to which the registered body has acquired a right;
 - (iii) a description of the geographical location of the land;
 - (iv) a brief factual description of the land, its current uses and potential and possible uses (land use planning issues such as extent and number of arable allotments, dry land grazing, etc. including other economic features and potential (for instance it is part of a National Park, other resources such as water, minerals, etc).
 - (v) a brief description of what the community intends doing with the land;
 - (vi) past land tenure systems and practices;
 - (vii) Initial number of members;
 - (viii) number of persons and number of families who intend taking occupation of the land or who are already on the land and an estimation of numbers and time frame for future occupation;
 - (ix) a brief description of the history of the group or community became constituted and significant features of the group (such as: gender; age; languages; clan or tribe and tribal authority affiliation, where applicable);
 - (x) a brief description of the manner in which and sources from where income for community members who intend will be derived from and in the case of members already in occupation, is derived from;

An amendment must be drafted to ensure that the Department supports the initial determination of rights and confirms the existing rights, in addition to requiring that these rights are allocated to women on the same basis as to men.

other associations of persons, the liquidation or sequestration will take place in terms of the applicable legislation

- 3.3(c) a **file** in respect of each separate body which is registered bearing the registration number referred to in regulation 3(a)(i) and the body's name and containing the following **documents** -
- (i) the duplicate registration certificate;
 - (ii) the Director-General's consent to the registration of the body concerned or, if that body is a separate entity, a copy of the *Gazette* in which the notice referred to in section 2(3) of the Act appeared;
 - (iii) the constitution which was adopted by or imposed on the body concerned and which has been endorsed by the Director-General as having been accepted by him/her or as having been approved by the Minister as stipulated in section 5(5) of the Act, together with the date of such acceptance or approval;
 - (iv) any amendment to the body's constitution which has been adopted by the body concerned and which has been endorsed by the Director-General as having been accepted by him/her, together with the date of such acceptance;
 - (v) a certified copy of a similar entity's founding document or constitution as a trust, other association or company;
 - (vi) a certified copy of a similar entity's certificate of registration as a trust, association or company including a Certificate to Commence Business in the case of a company;
 - (vii) the registration forms as prescribed in regulation 2;
 - (viii) annual reports;
 - (ix) any information, reports, returns and other documents which the registered body is required by the Act and these regulations to lodge with the Director-General or the Registration Officer.

In order to account for the proper process of the allocation of rights and to maintain registers of rights to record transactions and membership registers, the CPA office must be expanded.

Access to information and copies of documents

4. A member of the public is entitled to information retained in the Register of Communal Property Associations and copies of documents on file on payment of a fee which is payable in un-cancelled revenue stamps and which is the total of R5,00 plus R0,20 per page of any document copied, whether certified or not.
5. Each member of a CPA will be furnished with a copy of the constitution in the mother tongue of the majority of the members or such language as the member elect at the adoption meeting.

NEW SECTION - Choosing land hold and management arrangements; this outlines the steps the DB must go through after considering the initial constitution, including details concerning the meeting at which a constitution is proposed for adoption.

6. Steps concerning the drafting of land use rules and the constitution of the entity:³

Upon granting assistance as contemplated in Section 6(1) of the CPA Act, the DG shall require the officer in the Department of Land Affairs or other person designated to provide the community with assistance in terms of Section 6(2) to ensure that the steps set out in this regulation are taken.

The extent of the process and the depth of the regulation 6.12 report must be related to the impact that the different steps will have on the association and the rights and interests of members.⁴

6.1 Preparatory steps:

1. Inform the local authority of the intention of establishing an entity and its aims and objects in terms of the Act.
2. Ensure that community members are aware of different sets of institutional arrangements to hold and manage land. The arrangements may include the conclusion of agreements with private and public entities and the establishment of separate commercial entities or public entities as envisaged in the Municipal Systems Act.
3. Democratically elect an interim community representative committee to guide the drafting process. The interim committee shall include representatives from local and/or tribal authorities and other relevant stakeholders; provided that the quorum provisions of the committee will be such that the community representatives on the committee will at all times constitute a majority.
4. Facilitate a process in terms of which the interim committee will prepare and adopt a plan of action for the completion of the steps in terms of the Act.

6.2 Steps concerning Membership:

Facilitate a process in terms of which the community will be in a position to:

1. formulate the principles / criteria for the identification of other persons entitled to be members of the community;
2. formulate a procedure for resolving disputes regarding the right of other persons to be members of the community;

³ The starting point here is to first work out which members get what and to then clinch the rules to determine the content and nature of rights and to then, in relation to the types of use rights and systems for the administration of such rights, make a decision about the entity that should own the land.

⁴ In other words, if the required arrangements are on a small scale, few people, limited land use potential, the land has merely been divided up in a couple of homestead garden allotments, the process and report will only cover the essential aspects.

3. compile a list of the names and, where readily available, identity numbers of the intended members of the association who comply with the aforesaid criteria and who will be entitled to participate in the decision-making processes in terms of the regulation 6 process.⁵
4. clarify the content of the procedural rights of members with reference to section 9(1)(c) and clearly distinguish between the rights that members may have as members and other rights that members may have or may receive in future to use land or benefit from it.

6.3 Steps concerning land use and planning:

Facilitate a collective understanding of the community's prioritised land use needs in relation to the number of persons in occupation of the land and the developmental potential of the land and other resources.

In the case of establishing an entity with regard to land that has already been occupied and/or used by a community, enquire and prepare a report on:

- the current and possible future different types of land use and the names of users and / or occupiers;
- the current and possible future options (if any) of physical division of the land with regard to different land uses (for instance, the excision of a portion of land for township establishment);

In the case of land that has not yet been acquired, occupied and or used, enquire and prepare a report on:

- the purposes for which it may be used; and
- the options (if necessary) for physical division of the land with regard to different land uses;

Insert an amendment here to ensure that CPA committees provide members with a written document describing the physical boundaries of the land and the attributes of the rights allocated where rights relate to a specific piece of land.

Residential land: Obtain the regulation 9(1) information concerning residential settlement and investigate facilitate arrangements with relevant stakeholders involved to provide for residential settlement and services. If a township is not to be established, facilitate a process for the formulation of rules regulating land use for residential purposes.⁶

⁵1, 2 and 3 here merely unpacks the requirements of section 5(2)(d) and Item 5 of the Schedule to the CPA Act.

⁶9(1)(c) a sketch layout plan of the development intended to be carried out, showing the number and approximate sizes of sites to be created; (d) an indication of the nearest existing township and its approximate distance from the land concerned; (e) a description of the existing and the intended future use of the land concerned (whether developed or not); (f) an indication of the services to be provided as part of the development and who will

Facilitate and cause to be prepared a **General Plan** indicating areas of exclusive use, areas of communal use, or if no physical division.

6.4 Steps concerning the formulation of “ordinary” land use rules:

In the case of establishing an entity with regard to land that has already been occupied and/or used by a community:

Investigate and prepare a summary of the land rights history of the community with reference to key historic events and previously and currently applicable laws;

Determine the main forms of current use that requires regulation. These may include the following (excluding residential settlement):

- rain fed seasonal crop allotments and homestead gardens;
- permanent perennial crop allotments;
- irrigated land;
- allocated grazing encampments;
- common pastures;
- woodlots and other natural resource uses; hunting; fishing . . . ⁷

Rights determination: Identify the users of each type of land use right and determine the extent of different uses (extent of land and boundary determination, numbers of animals, frequency of use or period of use);

Determine the established practice in relation to existing rules, previously applicable or currently applicable laws with regard to each type of “ordinary” land use, including:

- what users / holders of the rights may do on the land without needing to obtain permission: (may build a stock post; may fence the land; may plant certain crops during certain periods, etc.)
- the duration of the right; whether the right may be ceded upon death; to whom it may be allocated; whether and under what conditions it may be re-allocated; whether the a use right may be “sold, donated or exchanged” out and out and what the required arrangements to do so may be; what the arrangements may be for temporary session (may one “sub-let”?);
- the process for new applications and criteria to be met by an applicant and how the process is managed;

maintain them; (g) written information regarding who will carry out and who will finance any intended development.

⁷ The issue here is that commonage grazing rights require a different set of rules to dry land allotments. The content and nature of grazing rights on the commonage is very different to the content and nature of a persons right to “lease” a grazing camp. Over time, standard sets of regulations which could be adapted to different circumstances could be developed.

- objective criteria to guide the selection of a successful applicant if more than one applicant applies (opportunities are limited and resources scarce – criteria may include need, relationship to the previous user, place of residence, ability, etc.);
- resource management and maintenance of infrastructure and payment of maintenance and/or administration fees or rental;
- administration of records;

Devise a process for the confirmation of existing land use rights.

In a case where the land has not yet been acquired, occupied and used, enquire and prepare a report on all the aspects above including the process for allocation of rights, except for those aspect which are obviously not applicable.

Facilitate and compile a register listing the holders of land use rights and provide for a system for the updating and maintenance of the register.

6.5 Steps concerning land management, including the maintenance of infrastructure:⁸

Facilitate a process in terms of which the community will be in a position to decide on the options for the management of the land and the construction and maintenance of infrastructure on it with regard to different types of land use and service delivery.

6.7 Steps concerning the formulation of “extraordinary” land use guidelines / rules:

(guidelines to regulate the allocation of land for special projects concerning tourism, conservation, large scale irrigation, joint ventures, public private partnerships and for unsolicited proposals. A draft set of such policy guidelines has been prepared in Afrikaans and has been attached. The main problem is that unless a plan for different types of use have been agreed to before hand, it will in future become very difficult for the community to engage in other than ordinary activities on the land due to the provisions of section 12(1).)

6.8 Steps concerning the management and allocation of proceeds from land and related resources:

Facilitate a process in terms of which the community will be in a position to decide on how income or profit that has been or may be generated from the use of land and related resources may be managed, distributed and d and allocated.⁹

⁸ Note that land management options are being considered prior to the options on how the land should be held (owned by a CPA, owned by another private or public entity, or merely leased from the current owner).

⁹CPA constitutions have in cases (Dirisanang – NC) provided for share holding arrangement. The position is fraught with complexity. If the constitution leads to the result that more than 20 members hold shares and that they are carrying on any business that will give rise to a sharing of profits, if profits are made, the CPA constitution will be in conflict with section 30 and 31 of the Companies Act, and it will be unlawful. CPAs should also not do business. Counsels opinion is being obtained to establish with greater clarity whether CPAs may not as

6.9 Steps concerning dispute resolution:

Record disputes with regard to rights in land and invoke procedures and processes used to resolve or adjudicate such disputes, including whether provisions concerning tenure redress may be required.

Assist in the formulation and writing up of a set of rules to guide or determine dispute resolution.

6.10 Steps concerning the choice of institutional arrangements:

In view of the outcomes of the previous steps, facilitate a process in terms of which the community will be in a position to decide on different sets of institutional arrangements regarding the holding and the management of the land or different portions of the land according to different sets of rules.¹⁰

Obtain feedback and objections from community members regarding land hold and land management proposals.

Ensure that objections and comments are substantially dealt in the development of options.

If consensus cannot be found on an acceptable set of arrangement, to convene and settle decisions by way of a community vote.

6.11 Steps concerning the preparation of a draft constitution and for its adoption:

Facilitate the finalisation of a draft constitution, agreements and land use rules.¹¹

6.12 Requirements of the section 6(2) designated officer's report to the DG:

The report on the community participatory process and on the outcomes of the above steps will be prepared and submitted to the DG together with copy of the proposed constitution and land use rules for consideration in terms of section 6(3).

in any event be legally prevented from making a profit for distribution to its members. If CPAs embark on business ventures, it should establish an appropriate commercial entity to undertake such an endeavor.

¹⁰ It needs to be borne in mind that the entity that holds the land need not necessarily be the one that manages the land. Additional special purpose entities could also be established to pursue a specific land use endeavour (for instance a joint venture commercial entity).

¹¹ Note that the constitution needs to make provision that with its adoption and the adoption of land use rules, the allocation (in the case of a greenfield project) and confirmation (in the case where members are already in occupation) of land use rights will be sanctioned in terms of section 12(2). This means that the committee is then given the authority to deal with the allocations as part of a series of transactions and that 12(1) authority is not required each time an allocation is made.

The report will contain the information necessary for the completion of the index and files referred to in regulation 3.3, including a copy of the register in terms of which land use rights have been allocated to members.

The report will in addition:

- cover the items listed in schedule attached to the Act;
- contain the information demonstrating that the community is a community as defined in section 2;
- make proposals as to how a meeting or meetings should be convened for the adoption of the constitution in terms of section 7.

The report will refer to additional arrangements that may be necessary to secure appropriate and functional institutional arrangements, including **support** concerned with:

- the process for the allocation or confirmation, recordal and administration of land rights;

Draft amendments to regulations to ensure that the Department provides legal administrative support to CPAs with regard to the administration of the substantive rights (grazing rights (rights to keep a set number of stock); rights to allotments; water; rights to share in benefits – may be in the form of dividends of access).

- the resolving of disputes concerned with conflicting and overlapping rights in land;
- conducting a land rights enquiry and rights determination process;
- tenure redress;
- land management;
- land and infrastructure maintenance;
- the opening of a township register and transfer of residential sites;
- the provision of services;
- financial and other assistance to facilitate any intended development;
- establishment of any municipal entity in terms of the Municipal Systems Act and conclusion of “service delivery agreements” in terms of the Municipal Systems Act;

The report will include any other information reasonably required by the Director-General relating to the right to occupy and use land and the settlement of the community on such land.¹²

¹² See section 5(2)(g) of the Act.

7. Adoption of the constitution (land use and management arrangements):

- (1) After consideration of the Section 6(2) designated officer's report and the proposed constitution the Director-General must determine -
 - (i) the date/s and time/s of the meeting/s at which a constitution is to be proposed for adoption;
 - (ii) the method/s to be used for giving notice to the members of the community concerned of such meeting/s;
 - (iii) the venue for the meeting/s; and
 - (iv) the agenda for and the procedure (including the voting procedure) to be followed at such meeting;

after consultation with the committee or representative of the community and having regard to the particular circumstances of the community.
- (2) The Director-General may determine that a notice of a meeting must be given using one or more methods and may stipulate any lawful method that he/she considers may be effective under the circumstances.
- (3) When the Director-General appoints an authorised officer referred to in section 7(2) he/she must notify the community of such officer's name and address.
- (4) *The community concerned must by no later than 7 days before the applicable meeting provide the authorised officer with proof, to the authorised officer's reasonable satisfaction, that the notice/s of the applicable meeting have been given as determined by the Director-General.*
- (5) The **authorised officer's** Section 7(2) of the Act report to the Director-General must include -
 - (a) the information and documents referred to in sub-regulation 7(1); and
 - (b) a copy of the minutes of the meeting including the community's resolution and, if the constitution and/or was adopted at the meeting, a copy of such constitution.

Duty to provide information

- 8(1) A communal body must on request provide the Director-General and the Registration Officer respectively with all the information and documents to which each of them is entitled, or which each is required to possess in terms of the Act and these regulations, including the information and documents that are reasonably necessary for the purposes of the Act and regulations
- (2) The Registration Officer may refuse to register a communal body until he/she has received all the required information and documents concerning such body.

Insert an amendment here to ensure that members have written agreements defining their rights and obligations to use the communal resource.

Application for exemption of land from laws¹³

9. An application for the Minister to determine that one or more pieces of land shall be exempted from the provisions of one or more laws referred to in section 8(8) must be in writing and directed to the Director-General and must include or be accompanied by -
- (a) a copy of the title deed of the land;
 - (b) a copy of the diagram of the land, or if the application relates to a portion only of the land, a diagram or sketch plan of such portion indicating its approximate location, boundaries and size;
 - (c) a sketch layout plan of the development intended to be carried out, showing the number and approximate sizes of sites to be created;
 - (d) an indication of the nearest existing township and its approximate distance from the land concerned;
 - (e) a description of the existing and the intended future use of the land concerned (whether developed or not);
 - (f) an indication of the services to be provided as part of the development and who will maintain them;
 - (g) written information regarding who will carry out and who will finance any intended development;
 - (h) such reasons or other information that may support the application.
 - (i) The Director-General may, before submitting an application to the Minister for a decision, request the written comment of any provincial or local authority having jurisdiction over the land.

Documents and information to be furnished

10. A communal body must, *in addition to the documents referred to in Regulation XX (above)* annually and within 2 months of the date on which its body's Annual General Meeting is held, furnish the following information and documents to the Director-General substantially in the form of Form D -
-

¹³ This is a contentious provision only in so far as is concerns township development because municipalities are not geared: to internally reticulate services on private land (they only bring it up to the boundary of the portion of land or erf); to collect services charges and rates from occupants on private land, except from the owner of the bigger portion of land, and as a consequence, will not be geared to cause the equitable share / indigent policy subsidy to kick in. I the clause needs a rework.

- (a) the names and where readily available the identity numbers, and the addresses of the members of the body's governing body elected at the Annual General Meeting indicating what office (if any) is held by each of them;
 - (b) the names and where readily available the identity numbers and the addresses of all new members whose names do not appear on the most recent membership list previously furnished to the Director-General;¹⁴
 - (c) copies of -
 - (i) the body's annual balance sheet or financial statements which have been independently verified as approved by the Director-General; and
 - (ii) the minutes of all general meetings of the members of the body which were held since the registration of the body or the previous Annual General Meeting, including the minutes of the last Annual General Meeting;
 - (d) a list of all **dealings in land or rights to land** involving the body during the period since the registration of the body or the previous Annual General Meeting, which created, altered or extinguished any right to land held by the body itself or by any of its members; - Provided that the due and lawful allocation of "ordinary" land use rights to members in terms of the community's adopted land use rules need not be furnished to the DG if the community has maintained its records concerning the allocation of ordinary land use rights.
 - (e) any other information and documents required by the Director-General which he/she requires to enable him/her to carry out his/her duties in terms of the Act and these regulations.
11. The list referred to in regulation 10(d) must in respect of each transaction (except for transactions concerning "ordinary" land use rights duly allocated and recorded) identify-
- (a) the parties to the transaction;
 - (b) the land affected by the transaction;
 - (c) the right affected by the transaction;
 - (d) the nature of the transaction;
 - (e) the reasons for the transaction; and,
 - (f) the purpose and manner in which proceeds from the transaction will be applied.

¹⁴ This is to *onerous a requirement – membership records are simply not maintained*. The fact that principles for the identification exist and procedure for resolving disputes, should be sufficient. The more important aspect concerns the maintenance of a register of rights. Attention needs to be given as to the maintenance of such registers could be supported.

12. The Director-General may in a particular instance and on good cause shown to him/her extend the time for compliance with regulation 8 or waive compliance with some of or all the provisions of regulations 10 and 11.
13. The Director General will refer the annual report to the Registration Officer whose duty it will be to update the information on the file regarding membership, committee members, etc.

Termination of membership or land use rights of a member

- 14.¹⁵ When a member's membership of a "communal body" (?) or where the duly allocated right to use land of a member has been terminated for any reason the body must provide the following information and documents to the Director-General-
 - (a) the name and where readily available the identity number and the previous address and any forwarding address of the former member concerned;
 - (b) the reason for such termination;
 - (c) copies of any documents that are relevant to the termination;
 - (d) details of any compensation paid or payable to the former member;
 - (e) if the membership or land use right concerned was or is to be allocated to any other person/s in the place of the former member, the name and if readily available the identity number and the address of such other person and his/her relationship to the former member;
 - (f) if a hearing was held to decide on such termination -
 - (i) the date and venue of the hearing;
 - (ii) who chaired and who attended the hearing;
 - (iii) whether the former member was present and/or represented;
 - (iv) the charges (if any) put to the former member and the finding on each charge;
 - (v) what other sanctions (if any) were considered; and
 - (g) any other relevant information or documents requested by the Director-General.

¹⁵ These provisions require an overhaul. The grounds for termination need to be defined, so as to exclude termination by consent, or termination as a result of a voluntary transaction, termination as a result of death, etc. Standard clauses in the form of a proforma constitution that needs to form part of these regulations need to provide for the principles according to which compensation needs to be determined.

Appeals to the Minister

15. An appeal to the Minister against a decision of the Director-General must be in writing and include -
 - (a) a copy of the relevant decision if it is in writing;
 - (b) a description of the decision sufficient to identify it, including the date, place and content of the decision and, if known, the names of the persons by and to whom it was conveyed, if the decision was verbal;
 - (c) copies of any documents which are relevant to the appeal;
 - (d) the reasons for the appeal;
 - (e) the appellant's contention as to what the decision should have been;
 - (f) proof by way of affidavit or otherwise of the date on which the appellant became aware of the relevant decision; and
 - (g) the appellant's postal address.
16. The original appeal must be lodged with the Minister and a copy with the Director-General within 90 calendar days of the date on which the appellant became or should reasonably have become aware of the relevant decision.
17. The Director-General must lodge his/her written answer to the appeal with the Minister and post a copy thereof to the appellant within 30 calendar days of the date on which the appeal was lodged.
18. The appellant may within 14 calendar days after receipt by him/her of the Director-General's answer lodge a reply thereto with the Minister and with the Director-General.
19. The Minister may -
 - (a) at any time request either party to furnish him/her and the other party with such further information and documents that he/she considers necessary for the finalisation of the appeal, within a time to be determined by him/her; and
 - (b) decide the appeal either with or without hearing oral representations by both parties as he/she may decide;

and must convey his/her decision to both parties.

Insert a section here which puts in a place an annual monitoring and evaluation system to monitor CPAs; results from this should be presented to parliament as required by Section 17 of the Act.