A comparative analysis between prescribed valuation methodology and the judicial interpretation of just and equitable compensation

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ABSTRACT

When the Property Valuation Act was passed in 2014, the Office of the Valuer-General was established to create valuation capacity within the state and assist the Minister with valuing land identified for acquisition as part of the land reform programme. As envisioned in the Green Paper on Land Reform, the Office of the Valuer-General was created to facilitate the shift from acquisitions based on the willing-buyer, willing-seller principle, towards acquisitions based on just and equitable compensation as prescribed by section 25 of the Constitution. Regulations were also promulgated in 2018 prescribing a formula to be used by the Valuer-General when valuing properties identified for acquisition by the state under land reform legislation.

This legal regime places an obligation on the Valuer-General to determine the value according to a formula which mirrors the calculation of just and equitable compensation for expropriation in section 25 (3) of the Constitution. If a valuation conducted under these requirements can accurately predict a value that reflects just and equitable compensation, it can assist to inform the Minister's offer during expropriation proceedings or when negotiating a purchase price for the property. It is assumed that an accurate valuation will promote efficient land reform by assisting the parties to reach agreement, thereby avoiding the costs and time value lost to litigation about the quantum of compensation.

A detailed analysis reveals and inconsistency between the flexible approach followed by the judiciary when applying listed and unlisted factors to determine just and equitable compensation for expropriation, and the codified formula prescribed by Regulations to the Property Valuation Act. The judicial approach to interpreting just and equitable compensation is supplemented by a limited comparative legal study looking at the interpretation of Article 14.3 of the German Basic Law by the German Federal Constitutional Court and the European Court of Human Rights.

The inconsistency is, however, unlikely to affect the constitutional validity of the Property Valuation Act. Recent caselaw confirmed that a valuation by the Valuer-

General does not oust the jurisdiction of the courts to determine just and equitable compensation nor does it bind the Minister when formulating offers of compensation. A comparative legal study with similar legislation enacted in Australia and Eastern European countries suggests that statutory valuation bodies can influence the calculation of compensation to a varying degree but never assumes the role of a final arbitrator to the exclusion of a court. Domestic caselaw and foreign, persuasive authority suggests that a valuation by the Valuer-General can at best be used to inform an offer of compensation and should not offend section 25 of the Constitution as the court remains the final arbitrator of just and equitable compensation.

Amendments to the Expropriation Bill and the Regulations to the Property Valuation Act can clarify the Valuer-Generals' role in expropriation proceedings and improve the accuracy of its valuations vis-à-vis just and equitable compensation.

Key words

Valuation, value, compensation, just and equitable compensation, expropriation, acquisition, Property Valuation Act, Expropriation Act, Expropriation Bill.

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LIST OF ABBREVIATIONS

BGB	German Civil Code
BVerfGE	Entscheidungen des Bundesverfassungsgerichts (Judgements of the German Federal Constitutional Court)
Can. J.	Canadian Journal of Law & jurisprudence
Colum. J. Transnat'l	Columbia Journal of Transnational Law
Dick. J. Int'l L.	Dickinson Journal of International Law
ECHR	European Court of Human Rights
FCSC	Federal Claims Settlement Commission
Fed. L. Rev.	Federal Law Review (Australia)
Harv. L. Rev.	Harvard Law Review
Hofstra L. Rev.	Hofstra Law Review
Iowa L. Rev.	Iowa Law Review
PELJ	Potchefstroom Electronic Law Journal
PLAAS	Institute for Poverty, Land and Agrarian Studies
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Journal of Public Law
Stell LR	Stellenbosch Law Review
Sydney L. Rev.	Sydney Law Review
Syracuse J. Int'l L. & Com.	Syracuse Journal of International Law and Commerce

TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Vand. L.	Vanderbilt Law Review
Windsor Y B Access Just	Windsor Yearbook of Access to Justice
U.N.S.W.L.J.	University of New South Wales Law Journal
U. Toronto L. J.	University of Toronto Law Journal
Yale J. Int'l L	Yale Journal of International Law

Chapter 1 Introduction and problem statement

1.1 Problem statement

1.1.1 Background to the study

Of all the indignities brought about by the separation of races in South Africa during the colonial and *Apartheid* eras, inequitable access to land is arguably the most enduring. Wars of dispossession during colonial times was followed by a host of racially discriminatory laws[1] specifically put in place by the *Apartheid* government to systematically displace black[2] people from land they traditionally laid claim to. By 1936, a mere 13% of the country's land mass was set aside as areas where black South Africans could hold a right in land.[3]

Upon democratic rule, South Africa embarked on a three-tiered programme of land reform to achieve social redress and rectify the skewed patterns of land ownership still prevalent in South Africa. The constitutional drafters sought to elevate this objective by embodying it in the fundamental rights to gain access to land on an equitable basis,[4] secure tenure[5] and to have land dispossessed as a result of racially discriminatory laws or practices restituted or receive equitable redress.[6] The drafters also made provision for the state to expropriate property for a public purpose or in the public interest,[7] subject to just and equitable compensation.[8] Inclusion of the

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1 *Black Land Act* 27 of 1913; *Black Administration Act* 38 of 1927; *Development Trust and Land Act* 18 of 1936.

2 Reference to back people or a black person is used as defined in the *Employment Equity Act* 55 of 1998 and includes African, Indian and Coloured people.

3 Section 1(2) of the *Black Land Act* 27 of 1913; s 6(1) of the *Black Administration Act* 38 of 1927; s 2(1) of the *Development Trust and Land Act* 18 of 1936. See also Kloppers and Pienaar 2014 *PELJ* 683; Van Wyk 2013 *SAPL* 91.

4 Section 25(5) of the Constitution of the Republic of South Africa, 1996 (hereinafter the *Constitution*).

5 Section 25(6) of the *Constitution*.

6 Section 25(7) of the *Constitution*.

7 Section 25(4)(a) of the *Constitution* defines public interest as including the nation's commitment to land reform.

8 Section 25(2)(b) of the *Constitution*.

public interest qualification serves to confirm that the state can use its powers of expropriation[9] to give effect to land reform.[10]

The extent to which the land reform programmes have met their respective targets remain contested,[11] however, there is broad consensus that land redistribution and restitution has not progressed at the rate originally envisaged.[12]

At its 53rd National Conference in Mangaung, the African National Conference announced[13] that it would seek to speed up the acquisition of land for reform by abandoning the 'willing-buyer, willing-seller' policy in favour of acquiring land for reform at a 'just and equitable' value.[14] This was subsequently adopted as state

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9 Du Plessis 2014 *PELJ* 807; Van der Walt *Constitutional Property Law* 426-427; It is argued that the inclusion of both public purpose as well as public interest in the formulation of section 25(2)(b), read with the express reference to land reform in section 25(4)(a), negates the possibility of an expropriation for the purposes of land reform not being regarded as falling within the public interest merely because it is undertaken to transfer property from one private person to another. Although not in the context of land reform, it was confirmed in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corp (Pty) Ltd and Others* 2009 (5) SA 661 (SE) that an expropriation can be in the public interest where it benefits an individual.

10 For the purposes of this dissertation the term 'land reform' is used to refer to land restitution, redistribution and tenure reform collectively.

11 According to the Department of Rural Development and Land Reform 2018 http://www.ruraldevelopment.gov.za/publications/land-audit-report/file/6126; 72% of privately-owned land outside of metropolitan municipalities are still owned by white individuals. This figure is however disputed by Agri SA 2017 https://www.agrisa.co.za/wp-content/uploads/2017/11/AgriSA_Land-Audit_November-2017.pdf; Kapuya and Sihlobo 2017 https://www.businesslive.co.za/bd/opinion/2017-06-06-land-policies-try-to-solve-imaginary-issues-at-expense-of-real-problems/; Figures could not be obtained regarding the extent to which ownership patterns in urban areas have altered as a result of land reform programmes.

12 Gen Not 1954 in GG 16085 of 23 November 1994. In 1994 the Reconstruction and Development Programme set down the target to transfer 30% of all agricultural land through the land redistribution programme and settle all restitution claims within five years. The redistribution target was later revisited to 2014 and a revised target was set in Chapter 6 of the National Development Plan to redistribute 20% of agricultural land in each district. The restitution programme was also not finalised in the original time period envisioned as the lodgement process was reopened in 2014); *Restitution of Land Rights Amendment Act* 15 of 2014.

13 African National Congress "53rd National Congress Resolutions" 25.

14 Interestingly, the resolution did not specifically state that expropriation would be used to acquire the land, it merely made the proposal to replace the 'willing buyer willing seller' with 'Just and equitable' principle in the *Constitution* immediately where the state is acquiring land for land reform purposes. The *Constitution* only prescribes just and equitable compensation in relation to the expropriation of property, one could therefore argue that the mode of acquisition is implicitly limited to expropriation. However, s 42D of the *Restitution of Land Rights Act* 22 of 1994 (hereafter referred to as the *Restitution Act*) makes provision for the payment of just and equitable compensation in the context of a settlement agreement to acquire the property under claim. As such it remains uncertain whether this decision sought to limit the mode of acquisition to expropriation.

policy in the *Green Paper on Land Reform of 2011*.[15] To assist the state in executing this resolution, the *Property Valuation Act*[16] was enacted, prescribing that property identified for land reform purposes must be valued according to a formulation mirroring the calculation of just and equitable compensation for expropriation contained in section 25(3) of the *Constitution*.[17] *Regulations* were furthermore promulgated[18] which prescribes a formula that valuers must use in arriving at a just and equitable value[19] using the factors set out in section 25(3)(a) to (e) with a predetermined weighting and application of each factor.

The *Property Valuation Act* and *Regulations* place the obligation on valuers to apply a formula derivative of the Constitutional formulation reserved for the calculation of compensation upon expropriation, to value land identified for land reform.[20] If a valuation conducted by the *Valuer-General* under the prescribed valuation formula can accurately determine the value of the property being acquired by applying the criteria contained in section 25 of the *Constitution* to determine compensation, it could assist negotiating parties[21] to reach agreement and reduce the likelihood of a

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15 Gen Not 369 in GG 34607 of 19 September 2011 (Hereafter referred to as the *Green Paper*).

16 17 of 2014 (hereafter referred to as the *Property Valuation Act*).

17 Section 1 of the *Property Valuation Act* defines 'value' as follows:
"[F]or the purposes of section 12(1)(a), means the value of property identified for the purposes of land reform, which must reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all the relevant circumstances, including the –
(a) Current use of the property;
(b) History of the acquisition and use of the property;
(c) Market value of the property;
(d) Extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) Purpose of the acquisition."

18 Gen Not 1322 in GG 42064 of 30 November 2018 (hereinafter referred to as the *Regulations*).

19 Section 12(1) of the *Property Valuation Act* states that the *Valuer-General* must have regard to the prescribed criteria and guidelines when valuing property identified for land reform.

20 Section 12(1)(a) of the *Property Valuation Act* simply refers to valuations conducted "Whenever a property has been identified for – (a) purposes of land reform[…]". The section does not explicitly refer to the mode of acquisition, however the inference can be drawn that it is not limited to expropriation by virtue of s 12(1)(b) where it states "(b) acquisition or disposal by a department, for any reason other than that mentioned in paragraph (a)[…]". It appears as if the Act is not prescriptive in terms of the mode of acquisition or disposal, however this aspect will be explored in greater detail during the principal study.

21 In the event that the property is expropriated, the parties could be the expropriating authority and the expropriated owner who attempt to reach agreement on the amount of compensation. The relevant parties could also be the Minister of Rural Development and Land Reform and the

dispute, thereby preventing unnecessary litigation. Since just and equitable compensation must either be agreed upon by the affected parties or decided upon by a court,[22] the ability of valuations conducted under this legislative regime to inform parties negotiating just and equitable compensation will depend on the congruence between the prescribed formula for valuations and interpretation of section 25(3) of the *Constitution* by the Judiciary.[23]

1.2 Research question

This study seeks to determine the extent to which a valuation of immovable property conducted according to methodology prescribed by the *Property Valuation Act* and *Regulations* will arrive at a value which reflects the just and equitable compensation payable should the immovable property be expropriated for land reform purposes.

1.3 Aim of the Study

The primary aim of the study is to assess the potential of arriving at a valuation which accords with a just and equitable amount of compensation using the valuation methodology prescribed by the *Property Valuation Act* and associated *Regulations*. In order to address the research question, it is necessary to determine the compensation that is payable for expropriation under the *Constitution*, the role of a valuation in determining compensation and finally the extent to which the prescribed valuation methodology can arrive at a value which reflects just and equitable compensation should the property be expropriated.

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land owner where the land is acquired by means other than expropriation, for instance pursuant to an agreement under s 42D of the *Restitution Act*.

22 Section 25(2)(b) of the *Constitution*.

23 This statement rests upon the assumption that an affected land owner would obtain his or her own valuation during negotiations on a purchase price during purchase and sale negotiations or negotiations on the compensation during expropriation proceedings, and that the parties may fail to reach an agreement in the event of differing valuations based on different interpretations of the legal framework, ultimately resulting in litigation to have the quantum of compensation decided.

1.3.1 Expropriation under the Constitution

The starting point of the study is to outline the theoretical point of departure for the payment of compensation upon expropriation. The legal framework is then discussed which enables the state to expropriate land for land reform purposes, focusing on the compensation which is prescribed for such expropriation.

1.3.2 The role of a valuation conducted by the Valuer-General on the determination of just and equitable compensation where immoveable property is expropriated for land reform purposes

With the policy decision to move away from a willing-buyer, willing-seller model for land acquisition in favour of paying just and equitable compensation,[24] the role of valuations conducted by the *Valuer-General* is key. While the state can expropriate property in the absence of an agreement on the compensation,[25] agreement on the amount is encouraged to avoid prolonged and costly litigation.[26] Valuations can be an essential tool used by the state during negotiations with the land owner to minimize the risk of litigation.

It is therefore necessary to establish the role which a valuation of property identified for land reform will have on the offer and determination of compensation. To determine this role, the study analyses legislation that regulates the valuation of property identified for land reform, case law and the views of academia on the topic. The study also analyses the role that a valuation of property by statutory valuation bodies play in determining the compensation for compulsory acquisition in Australia. The compulsory acquisition laws of several states and self-governing territories in Australia[27] explicitly provide for a valuation to be conducted by the Valuer-General of that state or self-governing territory. The effect of the value determination by

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24 Gen Not 369 in GG 34607 of 19 September 2011.

25 *Haffejee NO and Others v eThekwini Municipality and Others* 2011 (6) SA 134 (CC).

26 See s 25(2) of the *Constitution* wherein it is stated that compensation must "[…]either been agreed to by those affected or decided or approved by a court."

27 See s 51(xxxi) of the *Commonwealth of Australia Constitution Act* 1900 (hereinafter referred to as the *Constitution of Australia*); *Lands Acquisition Act* 15 of 1989; *Native Title Act* 110 of 1993; Allen 2000 *Sydney L. Rev* 351-380; Weis 2017 *Fed. L. Rev* 223-256; Winnett 2010 *U.N.S.W.L.J.* 776-807.

these statutory valuation bodies has on the determination of just compensation[28] may assist in the interpretation of the legal position in South Africa. Likewise, a comparison is also conducted with Eastern European countries that required land valuations to assist in their respective land reform programmes.

1.3.3 Comparative analysis between the prescribed valuation methodology and just and equitable compensation

The ability of the valuation to assist negotiations and avoid litigation is largely dependent its ability to accurately reflect a value that can be equated to the amount of compensation that a court would deem just and equitable should the property be expropriated. This is determined by the congruence between prescribed methodology and the approach likely to be followed by the judiciary should it be called upon to adjudicate on the calculation of compensation.

The study therefore analyses the extent to which the formula prescribed by the *Property Valuation Act* and *Regulations* to determine the value of property identified for land reform align with the determination of just and equitable compensation. More specifically, the study analyses the extent to which the judiciary's approach to determining compensation for expropriation is reflected in the prescribed valuation methodology in relation to factors listed in section 25 of the *Constitution*, unlisted factors and the balancing of interests between the public and the affected parties.

Case law is used to determine the approach adopted by South African courts in relation to factors listed in section 25 of the *Constitution*, unlisted factors and the balancing of rights. In the event that the courts have not had the opportunity to rule on the application any aspect which may be relevant to the determination of

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[28] See s 51(xxxi) of the *Commonwealth of Australia Constitution Act* 1900 (hereinafter referred to as the *Constitution of Australia*); *Lands Acquisition Act* 15 of 1989; *Native Title Act* 110 of 1993; Allen 2000 *Sydney L. Rev* 351-380; Weis 2017 *Fed. L. Rev* 223-256; Winnett 2010 *U.N.S.W.L.J.* 776-807.

just and equitable compensation[29] or where uncertainty still persists,[30] views expressed in published in literature is considered. In addition, the judicial application of article 14.3 of the *German Basic Law*[31] is used as persuasive authority to guide the interpretation of section 25 of the *Constitution*. The judicial interpretation of the *German Basic Law*[32] was chosen as persuasive authority as the measure of compensation payable for expropriation in article 14.3 of the *German Basic Law* is comparable to that provided for by section 25(3) of the *Constitution*.

1.4 Contribution to existing body of knowledge

A great deal has been written about the expropriation provisions in the *Constitution* by way of comparisons with formulations in foreign jurisdictions, the calculation of compensation as well as its application to land reform. Du Plessis,[33] Kleyn,[34] Eisenberg[35] and Van der Walt[36] have written extensively on the calculation of compensation under section 25 of the *Constitution* both with reference to comparable provisions in foreign jurisdictions as well as the legal theory underpinning the rationale for compensation. The interplay between the obligation to pay compensation and the realisation of the land reform ideals ingrained in section 25 of the *Constitution* has also been extensively explored by Du Plessis,[37] Ntsebeza[38] and Van der Walt.[39] Research has also been published analysing

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29 Both Sachs 2017 https://www.iol.co.za/news/politics/no-need-to-change-land-clauses-8290617; and Moseneke 2014 "Reflections on South African Constitutional Democracy – Transition and Transformation"; have reflected on the judiciary's limited opportunity to adjudicate on the calculation of just and equitable compensation for land expropriated in the context of land reform.

30 Aside from where the courts have been called on to adjudicate compensation for land expropriated under the land reform programme, relevant cases are also considered where the courts decide upon just and equitable compensation pursuant to an agreement under s 42D of the *Restitution Act* or where the owner is entitled to just and equitable compensation under the *Land Reform (Labour Tenants) Act* 3 of 1996 (hereafter referred to as the *Labour Tenants Act*).

31 *German Basic Law* of 1949; Kleyn 1996 *SAPL* 402-445; 1993 *SAJHR* 412-421.

32 Kleyn 1996 *SAPL* 402-445; 1993 *SAJHR* 412-421.

33 Du Plessis 2014 *PELJ* 807; Du Plessis 2013 *Stell LR* 359-376; Du Plessis *Compensation for Expropriation under the Constitution* 2009.

34 Kleyn 1996 *SAPL* 402-445.

35 Eisenberg 1993 *SAJHR* 412-421.

36 Van der Walt *Constitutional Property Law* 503-520; Van der Walt 2005 *SALJ* 765-778.

37 Du Plessis 2014 *PELJ* 807-810.

38 Ntsebeza *Land redistribution in South Africa: the property clause revisited* 107-131.

39 Van der Walt 2006 *SALJ* 23-40; Van der Walt 2008 *STELL LR* 325-346.

valuation methodologies accepted by the courts when adjudicating upon compensation for expropriation in the pre-constitutional era and its suitability for the calculation of compensation in terms of formulation contained in section 25(3) of the *Constitution.*[40] However, limited research appears to have been published on the role of a valuation conducted by a statutory institution on the calculation of compensation where immoveable property is expropriated for land reform.[41] There has likewise been limited reference in published literature[42] which focuses on the valuation methodology and formula prescribed by the *Property Valuation Act* and *Regulations*.

There is still a need to determine the role of a valuation conducted by a statutory valuation body such as the *Valuer-General* in the determination of compensation. The study seeks to build on the existing knowledge in this regard. It also seeks to determine the ability of a valuation conducted according to the prescripts of the *Property Valuation Act* and associated *Regulations*[43] to accurately estimate the compensation that would be afforded should the property be expropriated.

1.5 Points of departure, assumptions and hypothesis

1.5.1 Point of departure

The *Constitution* places an obligation on the state to take reasonable legislative and other measures to give effect to the rights in section 25(5) to (7) of the *Constitution.* Expropriation can play a central role in a state-driven process of land reform.[44] For the purposes of the research question the study proceeds from the point of departure that the state has the prerogative to take legislative steps in an effort to

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40 Du Plessis 2015 *PELJ* 1726-1759.

41 See Du Plessis 2015 *PELJ* 1726; Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" 191-221.

42 See Du Plessis 2015 *PELJ* 1726; Van Wyk 2017 *TSAR* 31,32.

43 As indicated in footnote 20 above, the *Property Valuation Act* prescribes a valuation methodology reflecting the formula used to calculate compensation in terms of the *Constitution* but the application is not limited to valuations conducted in anticipation of expropriation and can precede other forms of acquisition for the purposes of land reform.

44 Cousins 2016 *PLAAS* 16; Cousins and Scoons 2009 *PLAAS* 11; Groenewald 2003 *St. Mary's Law Review on Minority issues* 200.

give content to the principle of just and equitable compensation.[45] Provided that it is not in conflict with the *Constitution* as the supreme law of the land, as legislation or regulation in conflict with it is invalid.[46]

1.5.2 Assumptions

This study is premised on the assumption that an owner whose land is expropriated for the purposes of reform is entitled to just and equitable compensation. Although this is a legal requirement under section 25(2) of the *Constitution*, it is included as an assumption as there is a Parliamentary process underway at the time of writing to review section 25 of the *Constitution*, and to make recommendations on whether it should be amended to make provision for expropriation without compensation.[47] Should an amendment take place, it may not be fatal to the study as the amended content will be taken into consideration *vis-à-vis* the efforts by the state to codify the meaning of section 25.

In the event of the state invoking its powers of expropriation to obtain land for reform purposes, it is also assumed that the expropriated owner and the expropriating authority may fail to reach agreement on the amount of compensation the event that the valuation obtained by the state differs markedly from a valuation obtained by the land owner.[48] In this regard it is assumed that the majority of land owners facing expropriation will not act out of benevolence or compulsion, but will rather strive to obtain an amount of compensation which correlates closely with the valuation obtained by the owner. In this event the courts would be called upon to determine the compensation.

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45 Section 25(2) of the *Constitution* states that "Property may be expropriated only in terms of a law of general application […]".

46 Section 2 of the *Constitution*.

47 Parliament of the Republic of South Africa 2018 7-13.

48 Section 9(1) of the *Expropriation Act* 63 of 1975 (hereafter referred to as the *Expropriation Act*) makes provision for an expropriated owner to submit a written notice outlining the amount of compensation claimed as well as the particulars regarding how this amount was arrived at. This provision presumably makes provision for the owner to obtain his own valuation. The draft *Expropriation Bill* is more explicit in that it specifically requires the owner in clause 14(1)(c) to include a copy of the landowner's valuation when the owner furnishes particulars of his claim for compensation.

1.5.3 Hypothesis

Compensation deemed just and equitable by the judiciary for land expropriated for land reform purposes will differ from the valuation of such land where a valuer applies the formulation contained in the *Property Valuation Act* and associated *Regulations*. This difference may not affect the constitutional validity of the *Property Valuation Act* or associated *Regulations*.

1.6 Description of the research methods used

The aim of this study was restricted to a comparative analysis between the judicial interpretation of just and equitable compensation for expropriation and the formulation devised to value land identified for acquisition as part of the land reform programme in terms of the *Property Valuation Act* and *Regulations.* The research is based on a literature study to ascertain the full extent of the legal framework influencing the calculation of compensation upon expropriation as well valuations conducted by the *Valuer-General* where land is to be acquired for land reform. This entailed research on primary legislation, secondary legislation, case law and a theoretical point of departure relating to just and equitable compensation for expropriation.

In order to determine the role of a valuation conducted by the *Valuer-General* in the context of compensation awarded for immoveable property expropriated for land reform purposes, an analysis of domestic legislation was supplemented by a limited comparative legal study. Various Australian states and self-governing territories were chosen as suitable comparisons as administrative valuation bodies[49] have been established through statute with their role defined to various degrees in the compulsory acquisition legislation of that state or self-governing territory.[50] These can serve as persuasive authority when interpreting the role of the *Valuer-General* under the *Property Valuation Act* but caution must be observed as the compensation awarded for compulsory acquisition in Australia[51] differs from that required by

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49 See the discussion in Chapter three under points 3.5.3.1 below.
50 See the discussion in Chapter three under points 3.5.3.2 to 3.5.3.5 below.
51 This difference is assessed in detail in Chapter three under point 3.5.3.1 below.

section 25 of the *Constitution*. A comparison is also made with various Eastern European countries that have created statutory valuation bodies to value land as part of their respective land reform programmes.[52] Its probative value is also assessed in light of the purpose for which they were established, which differs somewhat from the *Valuer-General.*[53]

The comparative legal method is also used to compare the judicial interpretation of just and equitable compensation for expropriation in terms of section 25 of the *Constitution* with the formula prescribed for valuing property identified for land reform under the *Property Valuation Act* and *Regulations.* Specific focus is given to the application of the factors listed in section 25(3)(a) to (e) of the *Constitution vis-à-vis* the value ascribed to them in the valuation formulation contained in the *Property Valuation Act* and *Regulations.* An analysis is also conducted regarding the extent to which the prescribed valuation formulation can accommodate any unlisted factors which may affect compensation under section 25 of the *Constitution*.

An analysis of case law is used to determine the judicial approach to determining just and equitable compensation under section 25(3) of the *Constitution*. Where the courts have not had the opportunity to rule on the application any aspect which may be relevant to the determination of just and equitable compensation[54] or where uncertainty still persists,[55] views expressed in published in literature is considered as well as the approach followed by German courts in determining compensation for expropriation.[56]

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52 See the discussion in Chapter three under point 3.6 below.

53 See the discussion in Chapter three under point 3.6 below.

54 Both Sachs 2017 https://www.iol.co.za/news/politics/no-need-to-change-land-clauses-8290617; and Moseneke 2014 "Reflections on South African Constitutional Democracy – Transition and Transformation"; have reflected on the judiciary's limited opportunity to adjudicate on the calculation of just and equitable compensation for land expropriated in the context of land reform.

55 Aside from where the courts have been called on to adjudicate compensation for land expropriated under the land reform programme, relevant cases are also considered where the courts decide upon just and equitable compensation pursuant to an agreement under s 42D of the *Restitution Act* or where the owner is entitled to just and equitable compensation under the *Land Reform (Labour Tenants) Act* 3 of 1996 (hereafter referred to as the *Labour Tenants Act*).

56 The motivation for choosing German case law as persuasive authority is provided under point 1.3.3 above.

It is not the aim of this study to conduct a full-blown comparative study between compensation for expropriation between German and South African law and comparisons are only used as persuasive authority to guide our interpretation of certain factors that may affect the calculation of compensation under section 25(3) of the *Constitution* where uncertainty exists.

1.7 Relevance for the Research Unit

The study complements the Research Unit's aim of addressing developmental challenges in South Africa through law, justice and sustainability. More specifically, it can fall within the projects Human Vulnerability or Justice in Practice as it builds on the existing body of knowledge regarding the interpretation of constitutional provisions dealing with land reform and property rights by assessing the congruence between the prescribed valuation methodology and the judicial interpretation of section 25 of the *Constitution*.

The meaning and content of just and equitable compensation is highly topical as political parties, policy makers and civil society organisations are actively debating the merits of amending the *Constitution* to allow for the expropriation of land without compensation.[57] The modalities of acquiring land for reform and more specifically the costs thereof, are central to this debate. The study can therefore assist policy makers by indicating the accuracy of prescribed valuation methodologies used to determine just and equitable compensation as this can influence the amount of compensation offered to land owners when negotiating compensation and litigation to determine the just and equitable amount. Both factors affect the affordability of acquiring land for reform using the current constitutional provisions for expropriation which is central to the ongoing debate on amending the *Constitution*.

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[57] Parliament 2018 https://www.parliament.gov.za/news/national-assembly-debates-motion-land-expropriation.

1.8 Format of the dissertation

The dissertation is divided into five chapters. The first chapter sketches the background to the study, the problem statement, research question, assumptions, points of departure, hypothesis, research methodology and outlines the relevance of the study.

Chapter two provides a theoretical point of departure for why compensation is paid when property is expropriated and then proceeds to outline the measure of compensation payable when property is expropriated in South African law. This entails a brief analysis of the legislation which provides for the authority to expropriate land for reform purposes, the measure of compensation provided for as well as the approach which our courts have followed in the calculation of compensation under applicable legislation.

Chapter three delves into the legal relationship between a valuation undertaken by the state with the view to making an offer of compensation and the determination of such compensation. To this end, the provisions of the *Property Valuation Act* are interrogated and guidance is sought from the established role which a statutory valuation body plays in Australia when determining compensation for expropriation under Australian legislation.

Chapter four contains an in-depth comparison between the formula contained in the *Regulations* and the approach adopted by South African courts to calculating compensation for expropriation. Where insufficient precedent exists in South Africa, German precedent will be explored as a possible indication of the approach which our courts may follow in applying any listed or unlisted factor when presented with the opportunity to do so.

Finally, Chapter five concludes with a discussion of the insights obtained in the preceding chapters with a view to testing the hypothesis and answering the research question.

Chapter 2 The measure of compensation payable upon expropriation of land for reform

2.1 Introduction

Before proceeding to the role of valuations and a comparative study of the *Property Valuation Act* and *Regulations*, it is first necessary to establish the finer details of the compensation currently payable when land is expropriated for reform. This entails an overview of the approach adopted by South African courts to calculate compensation and a detailed analysis of the legislation providing powers to expropriate land for reform purposes, as well as the measure of compensation provided for in those Acts. This does not include an analysis of the various valuation methodologies endorsed by the courts, as this is dealt with in the following chapter when assessing the linkage between a valuation and compensation. Before discussing the *quantum* of compensation payable, it is useful to explore the theoretical point of departure for why compensation is paid to the expropriated owner.

2.2 Theoretical point of departure for the payment of compensation

This is a complex exercise in legal philosophy since there is no universally accepted view of private property rights across sovereign states[58] and a cluttered doctrine surrounding justice in expropriation law[59]

The disparity between views is particularly stark in Commonwealth[60] and European nations[61] where there is an implied duty for states to pay compensation for a

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58 Jacobson *et al* 1963 *Iowa L. Rev.* 878.

59 Stern 2017 *Can. J.* 419.

60 Van der Walt *Constitutional Property Law* 505 cites the case of *Attorney-General v De Keyser's Royal Hotel, Ltd* [1920] AC 508 (HL) as authority for the position being accepted in commonwealth jurisdictions.

61 Van der Walt argues in *Constitutional Property Law* 505 that compensation has become an implied requirement in the *European Convention on Human Rights and Fundamental Freedoms*, 1950; even though compensation is not explicitly referred to in any of its provisions. As authority, Van der Walt relies on the case of *James v United Kingdom* [1986] 8 EHRR 123 where it was held that article one implicitly requires compensation to be paid in takings, unless exceptional circumstances are present.

taking.[62] This can be contrasted with some developing nations who often question the need to pay compensation where expropriation is used to rectify historical inequities brought about by colonialism.[63]

The context of a country's property rights regime is important to consider when assessing the rationale for paying compensation. In the United States, the *Fifth Amendment to the Constitution of the United States*[64] prevents the state from taking private property for a public purpose without paying compensation.[65] As is the case with the South African *Constitution*, the *Fifth Amendment* can be regarded as a negative property guarantee. It places a limitation on the state's right to interfere with the rights of an individual in that due process must be followed and compensation must be paid where the interference amounts to an expropriation.[66] In this sense it is intended to protect the individual against "the perils of a powerful and potentially tyrannical state".[67]

The payment of compensation for certain takings under the *Fifth Amendment* was traditionally based on the notion that it would be unfair[68] to expect an individual to carry the costs for an endeavour that benefits the public at large. This notion was endorsed by the United States Supreme Court in the case of *Armstrong v United States*[69] where it was held that the *fifth Amendment*

> […] [W]as designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.[70]

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62 Van der Walt *Constitutional Property Law* 505 cites the case of *Attorney-General v De Keyser's Royal Hotel, Ltd* [1920] AC 508 (HL) as authority for the position being accepted in Commonwealth jurisdictions. Wesley 1972 *Vand. L.* 941, 942 also argues that the implied duty to compensate arises in western jurisdictions from the concept of restitution in integrum, implying that the state has a duty to place the individual in the same position he or she was in prior to causing damage through expropriation.

63 Wesley 1972 *Vand. L.* 941, 942; Muller 1981 *Colum. J. Transnat'l L* 35.

64 U.S. CONST. amend. V. (hereafter referred to as the *Fifth Amendment*).

65 *Fifth Amendment* as cited in; Jones 1995 *Hofstra L. Rev.* 3.

66 Du Plessis *Compensation for Expropriation under the Constitution* 2009 168.

67 Jones 1995 *Hofstra L. Rev.* 5.

68 Stern 2017 *Can. J.* 413.

69 346 U.S. 40.

70 See *Armstrong v United States,* 346 U.S. 40 at p49.

The state's powers of Eminent Domain must in the first instance be exercised for a public purpose[71] and as such the expropriated owner theoretically also benefits from the public purpose for which the property is taken. Be that as it may, the requirement to compensate prevents the affected individual from suffering greater loss from the taking than the benefit which they receive as a member of the public.[72]

While there are similarities in the *Constitution* which would support the same justification, Van der Walt[73] argues that the principle has been misapplied by the judiciary. The *Constitution* requires expropriation to take place for a public purpose or in the public interest.[74] In the case of *Du Toit v Minister of Transport,*[75] the Constitutional Court, on appeal accepted the High Court's[76] rationale for reducing the amount of compensation awarded for the removal of gravel from a private land owner's property because the gravel was to be used for the construction of a national road.[77] The court held that a deviation from the market value of the gravel reflected a better balance between the public interest and the interest of the owner as the construction of the national road is in the public interest and would therefore also benefit the expropriated owner.

Van der Walt further argues that the public interest is a prerequisite to a lawful expropriation, and not a factor that should influence the calculation of compensation. Should the public interest motivation affect the amount of compensation for "business-as-usual"[78] expropriations such as road construction, it

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71 Du Plessis *Compensation for Expropriation under the Constitution* 2009 177 notes that the courts in the United States interpret the public use requirement contained in the *Fifth Amendment* liberally, in that the exercise of the state's power of eminent domain must merely be rationally related to a public purpose. In this regard Du Plessis cites the case of *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) 241; RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" 159.

72 Jones 1995 *Hofstra L.* 12.

73 Van der Walt 2005 *SALJ* 765.

74 Section 25(2) of the *Constitution*.

75 2006 (1) SA 297 (CC) (hereafter referred to as the *Du Toit case*).

76 *Du Toit v Minister of Transport* 2003 (1) SA 586 (C).

77 *Du Toit* case at para 51.

78 Van der Walt 2005 *SALJ* 773 distinguishes between expropriation for land reform and expropriation for what he terms 'business-as-usual' functions such as road maintenance. In the latter scenario, he argues that the public interest requirement should not influence the amount of compensation since the burden for public projects should be spread equally across the tax base. However, Van der Walt does recognise that an exception should apply where the property

would undermine the economic principle of spreading the burden for public projects.[79] Although not specifically referred to, Van der Walt's critique on the *Du Toit case*[80] seems to indicate that the rationale for paying compensation relied on by the United States' Supreme Court in the *Armstrong case*[81] does not enjoy universal support by South African Courts.

In addition to protecting the individual from carrying an undue burden, Jones[82] argues that the purpose of compensation is also to serve as an investment guarantee to encourage economic activity. The promise of compensation is meant to offset the risk of loss in the event that property is taken for a public purpose, thereby promoting economic development.[83] According to Jones,[84] the *Fifth Amendment* was written against the backdrop of economic depression and as such the compensation requirement was intended to encourage risk-averse property owners to invest by "providing security for the fruits of economic endeavours".[85]

Jones likens this to a form of public sector insurance against loss caused by state action but qualifies the statement in that compensation under the *Fifth Amendment* does not provide the same level of indemnity as private insurance would since it does not cover all ancillary losses nor the costs of litigation to establish the compensation.[86] It is unclear whether this motivation influenced the drafters of the *Constitution* at the time when it was drafted.

The justification for paying compensation in the event of state interference with property rights is often reliant on the state's rationale for protecting the property rights of individuals as well as what that state regards as a compensable

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is expropriated for land reform purposes. His argument does not rest on the public interest requirement in s 25(2) of the *Constitution*, but on the explicit inclusion of the purpose of the expropriation as a listed factor in s 25(3) of the *Constitution*.

79 Van der Walt 2005 *SALJ* 773, 774.
80 Van der Walt 2005 *SALJ* 765.
81 *Armstrong v United States*, 346 U.S. 40.
82 Jones 1995 *Hofstra L.* 7 – 10.
83 Stern 2017 *Can. J.* 421.
84 Jones 1995 *Hofstra L.* 7 – 10.
85 Jones 1995 *Hofstra L.* 8.
86 Jones 1995 *Hofstra L.* 6.

interference.[87] Again, with reference to the American jurisprudence, Michelman[88] explores the rationale for paying compensation by analysing different theories underpinning the legal recognition of property, including the Desert and "Personality Theories",[89] "Social Functionary Theories"[90] and the "Utilitarian Theories"[91] of property. Utilitarian theory, on which Michelman bases his rationale, measures the results of decisions based on their outcomes to society as a whole.[92] If the protection of an individual's property interests results in a positive outcome to society, it must be regarded as an interest worthy of protection.

With reference to the writings of Bentham,[93] Michelman assesses the desirability of an outcome with reference to its effect on individual productivity. It is argued that improved productivity by individuals will benefit society as a whole and that productivity will only be achieved within a regulatory environment where law permits the individual to reap the benefits of his own labour and skill. This increased productivity is what Michelman refers to as "efficiency gains".[94] The protection of individual property rights is therefore legitimised by the positive outcome it holds for society as a collective through increased individual productivity,[95] and that the promise of legal recognition to exclusive possession provides social stability.[96] Michelman,[97] referring to Hume,[98] notes that this argument does not require a direct causal connection between property rights and social stability, but rather a recognition of the consequences which might ensue

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87 See Du Plessis *Compensation for Expropriation under the Constitution* 2009 for a discussion of the comparative laws of Germany, the United States and Australia.

88 Michelman 1967 *Harv. L. Rev.* 1165.

89 This theory is based on the argument that an individual should be permitted to receive the benefits of the products which he has produced with his own labour; Michelman 1967 *Harv. L. Rev.* 1203 – 1205.

90 This theory assumes that the consumption of resources for production is a desirable and that individual allocation of resources are therefore required to ensure the optimal use and consumption of that resource Michelman 1967 *Harv. L. Rev.* 1206 – 1208.

91 Michelman 1967 *Harv. L. Rev.* 1208 – 1213.

92 Du Plessis 2014 *Stell LR* 363.

93 Bentham *Theory of Legislation* Chap 7 – 10; as cited in Michelman 1967 *Harv. L. Rev.* 1211.

94 Michelman 1967 *Harv. L. Rev.* 1214.

95 Du Plessis 2014 *Stell LR* 363.

96 Michelman 1967 *Harv. L. Rev.* 1210.

97 Michelman 1967 *Harv. L. Rev.* 1211.

98 Hume *Writings on Economics* 78 – 80; as cited in Michelman 1967 *Harv. L. Rev.* 1209.

> Hume does not say that the property institutions of the present day rest on each person's continuing, conscious perception that, absent stabilized private possession, society would disintegrate. What he does say is that men's habits of mind have been shaped in accordance with that perception and all its ramifications, so that events which are inconsistent with, or which threaten, stabilized private possession are the cause of a kind of instinctive unease which demands rectification.

In the same way as the failure to recognise individual property rights could act as a disincentive for productivity, Michelman explains that regulatory interference of a certain degree[99] could have a similar demoralisation cost unless it is off-set by compensation. The latter is what Michelman terms the "settlement cost"[100] and includes the time and effort required to settle on compensation. In other words, compensation is paid to prevent individuals from becoming discouraged at the prospect that they may not benefit from the time and labour invested if their property can be taken away without compensation, resulting in a reduction in productivity which prejudices society. The payment of compensation is therefore justified if the pain of individual contributions to the fiscus from which compensation is paid is less than the pleasure achieved by knowing that compensation will be forthcoming in the event of state interference.[101]

Building on the Utilitarian theory of property rights, Michelman argues that the equation explained above is insufficient to account for the complexities of various competing needs and aspirations in society, and should therefore also make provisions for normative considerations of 'fairness' to be considered.[102]

Du Plessis,[103] with reference to Michelman, likewise argues that a strict utilitarian approach may be unsuitable in the South African context as there are more variables

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99 Du Plessis 2014 *Stell LR* 360 notes that the use of Michelman's theory must be approached with caution due to the differences between American and South African jurisprudence regarding the compensability of state interference with property rights. Unlike the *Constitution* which makes a clear distinction between a deprivation of property and an expropriation, the degree of regulatory interference by the state is a key consideration in American jurisprudence as to when regulatory interference justifies compensation. Michelman's theory must be understood within this context. See Du Plessis *Compensation for Expropriation under the Constitution* 2009 for a detailed analysis in this regard.

100 Michelman 1967 *Harv. L. Rev.* 1214.

101 Du Plessis 2014 *Stell LR* 363.

102 Michelman 1967 *Harv. L. Rev.* 1218 - 1224.

103 2014 *Stell LR* 359.

to the equation in a highly unequal society. Du Plessis further argues that increased productivity is not necessarily the highest priority outcome for all members of society and that this consideration must consequently be balanced with the need to rectify the unequal distribution of wealth and land in South Africa. This becomes particularly relevant where the duty to compensate potentially conflicts with the effective and speedy delivery of social justice through land reform. In this regard, Du Plessis[104] states the following

> With regards to the utilitarian rationale for expropriation, in South Africa expropriation cannot always be (merely) the maximisation of society's wealth, but it must sometimes fulfil a restorative function. While wealth creation seems to be the objective of the current property owners, restitution and redistribution of land are the hope of the landless and a constitutional directive.

As Du Plessis notes, South African courts have been somewhat inconsistent when it comes to balancing these often competing interests with the protection of private property rights on occasion prioritised over aim of acquiring land for reform at affordable rates, while the opposite was true for the redistribution of mineral rights.[105] As an alternative to an outright prioritisation of one objective over the other, Du Plessis[106] explores the possibility of applying a variation of Michelman's theory to influence the amount of compensation that could be paid when land is expropriated for reform. Du Plessis also argues that a deviation from market value could be justified to prevent the settlement costs associated with compensating landowners from becoming disproportionally high in relation to the demoralisation costs,[107] especially where the continued unfulfillment of land reform expectations presents demoralisation costs in its own right. This way of thinking accords with the views of Van der Walt[108] who agrees that a deviation from market value would be

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104 Du Plessis 2014 *Stell LR* 366.

105 Du Plessis 2014 *Stell LR* 360 – 362 argues that the Land Claims Court favoured the strict protection of individual property rights over affordable land reform in the case of *Mhlanganisweni Community v Minister of Rural Development and Land Reform* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012) whereas the Constitutional Court reversed the emphasis in *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC).

106 2014 *Stell LR* 359.

107 Du Plessis 2014 *Stell LR* 372.

108 Van der Walt 2005 *SALJ* 765.

justified where expropriation is undertaken for the purpose of land reform, but not where expropriation is undertaken for non-redistributive public purposes.

Aside from motivating individuals, the other side of the efficiency argument[109] suggests that the compensation requirement is designed to place a fiscal restriction on the state, thereby mitigating against its unfettered application.[110] Proponents of this theory argue that the requirement of compensation attaches a cost to the state when it exercises its powers of expropriation, and as a result the state will only exercise its powers when it is the most cost-effective manner to obtain the property in question, thus reducing the likelihood that the state will interfere with private property arbitrarily[111] or where there are more cost effective ways of achieving the public purpose for which the property is required. The intended effect is to reduce state interference with private property rights as well as to promote fiscal discipline within the state.[112]

It is unclear whether this argument would find traction within the South African land reform context as there are already fiscal and non-fiscal restrictions placed on the state to mitigate against the unfettered use of their powers of expropriation. From a non-fiscal point of view, Van der Walt notes that the public purpose and public interest requirements may restrict the state to use its powers of expropriation only where the property could not be obtained through less intrusive means.[113] The question is therefore not if expropriation is the most affordable means of obtaining

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109 Jones 1995 Hofstra L. Rev. 10; Du Plessis *Compensation for Expropriation under the Constitution* 2009 217 – 227.

110 Jones 1995 *Hofstra L. Rev.* 10; Knetsch and Borcherding 1979 *U. Toronto L. J.* 242-244; Stern 2017 *Can. J.* 418.

111 Du Plessis *Compensation for Expropriation under the Constitution* 2009 224 – 227.

112 Jones 1995 *Hofstra L. Rev.* 10.

113 See Van der Walt *Constitutional Property Law* 499-503 for a discussion on whether the public purpose requirement places an obligation on the expropriating authority to attempt to acquire the property through agreement prior to invoking its powers of expropriation. While the legal position is not yet settled, Van der Walt draws comparison to German and Irish law where expropriation may only take place as a last resort and finds limited support for this position in domestic case law; See also a motivation by Hoops 2016 *SALJ* 788-819 for legal reform in South Africa to prevent the state from using powers of expropriation to acquire property and to subsequently transfer it to third parties. S 2(1) of the *Expropriation Bill* also proposes to limit the expropriating authority's powers of expropriation to instances whereby the property could not be obtained through purchase and sale on reasonable terms.

the property if compensation must be obtained, but whether or not there are means available that would impact less on the property rights of the individual.

It seems unlikely that the requirement to compensate owners can be intended to act as a disincentive for the state to invoke its powers of expropriation where there are no less intrusive means available as this could lead to non-fulfilment of the public purpose or interest, which would undermine the rationale for providing the state with powers of expropriation in the first place. One could also argue that affordability is less relevant in the context of socio-economic rights under the *Constitution,* including the right to equitable access to land,[114] as they are internally qualified to the extent that their realisation is subject to the state's available resources in any event.[115]

An additional theory underpinning the payment of compensation is based on the desire to uphold the rule of law.[116] Stern, [117] with reference to Rawls,[118] Finnis[119] and Fuller,[120] explains that the rule of law requires generally accepted and clear standards to prevent ad hoc decision making. Within the context of expropriation, it is theorised[121] that clear standards for compensation are required to prevent ad hoc decision making by courts or governments when faced with the need to provide justice to affected property owners. This argument, however, speaks more to the notion of a universal standard of compensation as opposed to the underlying rationale for paying compensation.

Subject to several variations, the rationale for the payment of compensation upon expropriation, generally seem to be based on considerations of justice, efficiency and a need to uphold the rule of law. These theories are important as they sketch

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114 Section 25(5) of the *Constitution* qualifies the right to equitable access to land by the inclusion of the words "[…]within its available resources[…]".

115 Currie and De Waal *The Bill of Rights Handbook* 574-585; Brand "Introduction to socio-economic rights in the South African Constitution" 3-4.

116 Stern 2017 *Can. J.* 421.

117 Stern 2017 *Can. J.* 421 - 425.

118 Rawls *A Theory of Justice* 235-243 as cited in Stern 2017 *Can. J.* 422.

119 Finnis *Natural Law and Natural Rights* 270-271 as cited in Stern 2017 *Can. J.* 421.

120 Fuller *The Morality of Law* 39-43; as cited in Stern 2017 *Can. J.* 421.

121 Stern 2017 *Can. J.* 421 - 425.

the context within which the *Constitution*, as it currently reads,[122] provides for compensation upon expropriation. The focus is now shifted to the standard of compensation provided for in South African law.

2.3 Legislative framework regulating the calculation of compensation for land reform expropriations

The calculation of compensation in South African law is regulated by a combination of primary legislation and the prescripts of the *Constitution* itself. In the pre-constitutional era, compensation was primarily determined by the *Expropriation Act*[123] which placed the emphasis on market value or actual financial loss accompanied by an amount of *solatium* to compensate for non-patrimonial loss.[124] This determination of compensation differs from the just and equitable threshold for compensation as prescribed by section 25(3) of the *Constitution*.[125]

At the time of writing, a draft *Expropriation Bill*[126] is under consideration which will repeal the *Expropriation Act* to provide for an administratively fair procedure to be followed by the expropriating authority and to align the detailed procedures for calculating compensation with section 25(3) of the *Constitution*. However, until such time as the *Expropriation Bill* is enacted or the current *Expropriation Act* is declared invalid, the relevant provisions of the *Expropriation Act* continue to apply to the extent that it is not in conflict with the *Constitution*.[127] As such, the procedure and base methodology for determining compensation remains that which is contained within the *Expropriation Act* and *the Property Valuation Act,* however the former

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122 At the time of writing there is a parliamentary process underway to review the content of s 25 of the *Constitution* as well as the need for amendments to allow for expropriation without compensation.

123 63 of 1975.

124 Section 12 of the *Expropriation Act* as discussed in detail below.

125 Van Wyk 2017 *TSAR* 21.

126 Gen Not 1409 in GG 42127 of 21 December 2018 (hereafter referred to as the *Expropriation Bill*).

127 Section 2 of the *Constitution*; the *Du Toit* case at para 31.

must be read in line with the relevant constitutional principles to ensure that the compensation calculated[128] is just and equitable.[129]

2.3.1 The calculation of compensation under the Expropriation Act

Prior to the enactment of the *Constitution*,[130] the principle legislation regulating expropriation in South Africa is the *Expropriation Act*.[131] It provides authority for the Minister of Public of Works[132] to initiate an expropriation for a public purpose,[133] permits the Minister to undertake expropriation on behalf of specified juristic persons[134] or local authorities[135] and provides for a uniform methodology for

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128 The role of the *Valuer-General* under the *Property Valuation Act* in the calculation of just and equitable compensation is discussed in greater detail in Chapter three below.

129 Van der Walt *Constitutional Property Law* 503; *Du Toit case* at para 31.

130 *Du Toit case* at para 26; The effect of the introduction of the *Constitution* is dealt with under point 2.3.2 below.

131 63 of 1975.

132 Section 2 (1) of the *Expropriation Act* provides the authority for the Minister of Public Works to expropriate property or take it temporarily in the public interest, subject to compensation.

133 Section 1 of the *Expropriation Act* defines 'Public Purpose' as
"'Public purpose' includes any purposes connected with the administration of the provisions of any law by an organ of state."
It can be argued that the Expropriation Act therefore provides the Minister of Public Works with a narrow scope of authority when compared to s 25(2) of the *Constitution* which makes provision for expropriation for a public purpose as well as in the public interest.

134 Section 3 of the *Expropriation Act* permits the Minister to expropriate property on behalf of specified juristic persons or bodies but only so far as it relates to immoveable property. The entities listed in s 3(2) are:
"(a) a university as defined in the Universities Act, 1955 (Act 62 of 1955);
(b) a university college as defined in section 1 of the Extension of University Education Act, 1959 (Act 45 of 1959);
(c) a technikon mentioned in section 1 of the Technikons (National Education) Act, 1967 (Act 40 of 1967), or section 1 of the Technikons Act, 1967 (Act 40 of 1967);
(d) a governing body as defined in section 1 of the Educational Services Act, 1967 (Act 41 of 1967);
(e) the Atomic Energy Board mentioned in section 11 of the Atomic Energy Act, 1967 (Act 90 of 1967);
(f) a college as defined in section 1 of the Indians Advanced Technical Education Act, 1968 (Act 12 of 1968);
(g) the Council mentioned in section 1 of the National Monuments Act, 1969 (Act 28 of 1969); and
(h) any juristic person, other than a juristic person mentioned in paragraph (a), (b), (c), (e), (f), or (g), established by or under any law for the promotion of any matter of public importance."
It is worth noting that none of these juristic persons are laden with a statutory obligation in relation to land reform so it could be deemed ultra vires if the Minister of Public Works initiates an expropriation on behalf of any of these entities for the purposes of land reform as it would fall outside of their statutory scope.

135 Section 5 of the *Expropriation Act* makes provision for the Minster of Public Works to expropriate property required by a local authority.

calculating compensation[136] when expropriation is empowered through another piece of legislation.

Traditionally the common law measure of compensation payable upon expropriation was intended to be "the equivalent in value [be given] to take the place of the property lost".[137]

The accurate measure of compensation was therefore an amount that represented the equivalent value of the expropriated property. This value must be determined objectively and disregard any special, subjective value which the expropriated owner attached to the property.[138] Section 12 of the *Expropriation Act* sets out the manner in which compensation must be determined in greater detail, but the underlying intention is the same, as was confirmed by the Supreme Court of Appeal in the case of *Karanga Holdings (Pty) Ltd v Minister of Water Affairs*[139] where it confirmed *Estate Marks v Pretoria City Council*,[140] stating that the "Act aims, principally, to provide the equivalent in value of the property lost".[141]

Section 12 of the *Expropriation Act* determines compensation "equivalent in value"[142] as market value[143] plus financial loss[144] where tangible[145] property or a registered right in Minerals is expropriated under the *Expropriation Act*. Only in the event where there is no market for the property in question can one calculate compensation on the basis of its replacement value.[146] Actual financial loss is also

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136 Section 26(1) of the *Expropriation Act*.
137 *Estate Marks v Pretoria City Council* 1969 (3) SA 277 (A) at 300.
138 Southwood *The compulsory acquisition of rights: by expropriation, way of necessity, prescription, labour tenancy and restitution* 80, 81.
139 1998 (4) SA 330 (SCA).
140 1969 (3) SA 227 (A) at pp 242, 243.
141 *Estate Marks v Pretoria City Council* 1969 (3) SA 277 (A) at 342 para H.
142 *Estate Marks v Pretoria City Council* 1969 (3) SA 277 (A) at 342 para H.
143 Section 12 (1)(a)(i) of the *Expropriation Act*.
144 Section 12 (1)(a)(ii) of the *Expropriation Act*.
145 *Du Toit case* at para 28.
146 Section 12(1) of the *Expropriation Act* further states
"Provided that where the property expropriated is of such a nature that there is no open market therefor, compensation therefor may be determined – (aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or (bb) in any other suitable manner".

the basis for calculating compensation for an expropriated right other than a registered mineral right.[147] The sum of the property or right's market value, or replacement value where no market exists, plus financial loss is supplemented by an additional amount for *solatium* calculated on the basis of a fixed formula contained in the Act.[148] Finally, once the amount of compensation has been settled, interest may be payable if there was a lapse of time between the date on which the state took possession and the compensation was finally settled.[149] Each of these factors is analysed in detail below.

2.3.1.1 Market value

Section 12(1)(a)(i) of the *Expropriation Act* prescribes that the compensation must be based in the first instance on "[…]the amount which the property would have realised if sold on the date of notice in the open market by a willing seller to a willing buyer".[150] This is commonly referred to as market value, and it is based on the premise that the amount of money which a willing buyer would agree to pay to a willing seller on an open market represents the value of the property lost.

The calculation of market value is based on a hypothetical transaction and does not require a pre-existing offer nor that the property be offered for sale at an organised market[151] but it does require the property to be marketable. In the Supreme Court of Appeal's words, one must look at whether the property is likely to attract any buyers if offered for sale. This was expressed by Howie JA in *Karanga Holdings (Pty) Ltd v The Minister of Water Affairs*[152] as follows

> In the contest of contractual damages the terms 'market' or 'market value' do not connote an organised market like a stock exchange or municipal produce markets; if a commodity, offered for sale, is likely to attract potential purchasers who would be prepared to buy if the price were agreed, that commodity is marketable in a commercial sense and capable of having a market value *Katzenellenbogen Ltd v Mullin* 1977 (4) SA 855 (A) at 878E-879B. No consideration of principle seems to me to render the position any different where one is dealing with the value of an

147 Section 12(1)(b) of the *Expropriation Act*.
148 Section 12(2) of the *Expropriation Act*.
149 Section 12(3) of the *Expropriation Act*.
150 Section 12(1)(a)(i) of the *Expropriation Act*.
151 *Karanga Holdings (Pty) Ltd v The Minister of Water Affairs* 1998 (4) SA 330 (SCA) para 8.
152 1998 (94) SA 330 (SCA)

> expropriated asset, even one, I would venture to add, for which there would only have been a single potential buyer.[153]

When applying this measure, the courts rely on several assumptions about the nature of the hypothetical transaction to ensure that the value is not skewed by atypical or exceptional circumstances. When looking at the price that may be agreed upon in an open market situation, it must be assumed that both parties negotiate from an informed position and are aware of any characteristics of the property which may influence the purchase price. In this regard, the court in *Minister of Water Affairs v Mostert and Others*[154] held that

> […] the measure of value of land, without improvements, is the fair market value thereof and the value must therefore be determined by reference to the price which a willing seller might reasonably be expect to obtain from a willing purchaser, where both parties negotiate on equal terms and both realise the existing advantages and potentialities of the land.[155]

An informed buyer would also be cognisant of any restrictions imposed on the property as well as the potential inherent in the property if used for another purpose.[156] However if an expropriated owner claims that the market value of a property should be increased due to the inherent potential of a property if put to a different use, he must prove on a balance of probabilities that transacting parties would have taken such a future, beneficial use into consideration when arriving at a price. In this regard the court in *Thanam NO v Minister of Lands*[157] stated the following

> But it seems to me that if a plaintiff in a case such as this relies upon the potentialities of a property as a reason for claiming that a greater price would have been obtained for the property by reason thereof, he must at least establish upon a balance of probabilities that the property has potential uses to which it is

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153 *Karanga Holdings (Pty) Ltd v The Minister of Water Affairs* 1998 (4) SA 330 (SCA) at 336 paras G-H.

154 1966 (4) SA 690 (A) at 722 paras C-D.

155 The case was not decided based on s 12(1)(a) of the *Expropriation Act* but on s 60(3)(a)(i) of the *Water Act* 54 of 1956. The case is never-the-less relevant for the interpretation of market value under s 12(1)(a) of the *Expropriation Act*.

156 *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D) at 88C–E; Minister of Water Affairs v Mostert 1966 (4) SA 705 paras D – E. Todd v Administrator, Transvaal 1972 (2) SA 874 (A).

157 *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D).

> reasonably capable of being put in the future that a willing buyer and a willing seller would take such potential uses into account in fixing the price.[158]

This approach was endorsed and further developed in the case of *Port Edward Town Board v Kay*[159] where the court applied a three-step approach to establish whether the highest and best use of the property should be considered in arriving at the market value upon expropriation. Where it is alleged that the property's potential, if used for different purposes, should be included, he must firstly prove that there is a reasonable possibility that the property could have a higher value based on its potential for a different use. Then it must be proven on a balance of probabilities that a willing buyer would take this into account when agreeing on a hypothetical purchase price. Finally, it must be proved what additional value would be ascribed to the property in this instance.[160]

In addition to the parties being informed, a court must disregard any influence it may have on the hypothetical purchase price in the event that the seller was under a compulsion to sell.[161] In this regard, the court in *Bonnet v Department of Agricultural and Land Tenure*[162] quoted Lord Romer in *Sri Raja v Revenue Officer* where it is stated that

> The compensation must be determined, therefore, by reference to the price which a willing vendor might reasonably expect to obtain from a willing purchaser. The disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy alike must be disregarded. Neither must be considered as acting under compulsion. This is implied in the common saying that the value of the land is not to be estimated at its value to the purchaser. This does not mean, however, that the fact that some particular purchaser might desire the land more than others is to be disregarded. The wish of a particular purchaser, though not his compulsion, may always be taken into consideration for what it is worth.[163]

The courts have also confirmed that the market value had to be determined as if there were multiple potential purchasers, even if there would only be one *de facto*

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158 *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D) at 88 paras E–F.
159 1996 (3) SA 664 (A).
160 *Port Edward Town Board v Kay* 1996 (3) SA 664 (A).
161 *Sri Raja v Revenue Officer* [1939] 2 ALL ER 317 at 321 paras B-C as referenced by Southwood *The compulsory acquisition of rights: by expropriation, way of necessity, prescription, labour tenancy and restitution* 80, 81.
162 1974 (3) SA 737 (T) 749 paras D-E.
163 *Sri Raja v Revenue Officer* [1939] 2 ALL ER 317, 321 para B-C as quoted in *Bonnet v The Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) at 749 paras D-E.

potential purchaser for the property in question.[164] In deciding the price that a property would fetch on an open market, one must work from the premise that there may be several potential purchasers, even in the event that the expropriating authority would de facto be the only purchaser due to special circumstances surrounding the property, such as an impending change in land use facilitated by municipal zoning.[165] In line with the above, if the court is compelled to consider the possibility of multiple purchasers, it must also reckon with the purchase price that purchasers would be likely to offer in case they do not intend to use the property for the specific purpose which it may be rezoned for.[166]

A hypothetical transaction for the purposes of obtaining market value must furthermore be based on "usual terms and conditions".[167] The full extent of what distinguishes a usual condition from an unusual one has not been considered exhaustively. One instance in which the courts have provided clarity relates to the structure of payments that one would typically associate with a transaction of a particular nature. In the case of *Bonnet v Department of Agricultural and Land Tenure,*[168] the court confirmed that the market value had to be determined according to payments made in instalments and not according to a single cash payment, as the latter was not the usual form of such transactions. In this regard the court stated

> Under the relevant Act, I must determine the amount which the property would realise in the "open market", that is, its market value, and the question of cash as against instalment payment does not seem to me to be a proper consideration. In the open market transactions on the instalment basis are customary and that is the normal basis to accept.[169]

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164 *Bonnet v Department of Agricultural and Land Tenure* 1974 (3) SA 737 (T) at 749 para F; *Karanga Holdings (Pty) Ltd v The Minister of Water Affairs* 1998 (4) SA 330 (SCA) at 336 paras G-H.

165 *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) at 882 para A.

166 *Minister of Agriculture v Randeree's Estate and Others* 1979 (1) SA 145 (A).

167 *Bonnet v The Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) at 747 para H.

168 1974 (3) SA 737 (T).

169 1974 (3) SA 737 (T) at 747, 748.

Similarly, the courts have also cast doubt as to whether the price paid for property sold by auction reflects the "best test of value"[170] where the seller is compelled to sell due to circumstances, but the usual method of sale is by "private treaty".[171]

To arrive at the market value of a property, the courts have given recognition to a variety of valuation methods which are discussed in more detail below.

2.3.1.2 Actual financial loss

In addition to the market value of the right or property, section 12(1)(a)(ii)[172] also entitles the expropriated owner to "[a]n amount to make good any actual financial loss caused by the expropriation or the taking of the right".[173]

Under section 12(1)(a)(ii), actual financial loss is awarded in addition to the market value of the property where the *dominium*[174] passes to the state through the expropriation of tangible property or a registered right to minerals, and actual financial loss is incurred in addition to the market value of the property.

Actual financial loss is also the measure of compensation awarded where the right to take property temporarily is evoked,[175] or where a registered right in property is expropriated.[176] In this regard, section 12(1)(b) if the *Expropriation Act* provides "[…]in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right".[177]

Section 12(1)(b) does not make a distinction in the text between registered and unregistered rights, however it was confirmed by the court in the case of *Natal Estates Ltd v Community Development Board and Others,*[178] that section 12(1)(b)

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170 *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) at 883 paras E-F.
171 *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A) at 883 paras E-F.
172 Of the *Expropriation Act*.
173 Section 12(1)(a)(ii) of the *Expropriation Act*.
174 *Wallis and Another v Johannesburg City Council and Another* 1981 (3) SA 905 (W).
175 *Wallis and Another v Johannesburg City Council and Another* 1981 (3) SA 905 (W).
176 Section 12(1)(a)(ii) of the *Expropriation Act*; *Natal Estates Ltd v Community Development Board and Others* 1985 (3) SA 378 (D) at 381 paras D-E.
177 Section 12(1)(b) of the *Expropriation Act*.
178 1985 (3) SA 378 (D).

only applies to registered rights. In it reasoning, the court relied on section 13 of the *Expropriation Act* which creates a special dispensation for lessees where their contractual rights are terminated as a result of an expropriation. Section 13 states that that compensation for these rights must be paid "[…]as if his right thereunder was a registered right"[179]. Should section 12(1)(b) make provision for compensation when unregistered rights are expropriated, tit would have rendered section 13 redundant.[180] Actual financial loss can be claimed in addition to market value where *dominium*[181] of the property has been taken by the state and is the primary measure of compensation for a temporary taking,[182] the expropriation of a registered right as well as an unregistered contractual right of a lessee.[183]

For actual financial loss to be compensable under the *Expropriation Act,* the loss must have been "caused by the expropriation".[184] In the case of *Davies and Another v Pietermaritzburg City Council,*[185] the Appellate Division, as it was then known, confirmed the approach adopted in *Pienaar v Minister van Landbou*[186] and held that mere factual causation is not sufficient to claim compensation for financial loss in the form of lost profits where the expropriation is merely a *cause sine qua non* of the loss of profit.[187] The court held that a "direct causal connection"[188] is required between the expropriation and the financial loss for it to be compensable.

No direct causal connection exists where positive steps are still required to be taken by the expropriated owner to obtain statutory approvals before his profits would materialise, even where the expropriated owner would likely obtain the required

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179 Section 13(1) of the *Expropriation Act*.
180 *Natal Estates Ltd v Community Development Board and Others* 1985 (3) SA 378 (D) at 380.
181 *Wallis and Another v Johannesburg City Council and Another* 1981 (3) SA 905 (W).
182 *Natal Estates Ltd v Community Development Board and Others* 1985 (3) SA 378 (D).
183 Section 13(1) of the *Expropriation Act*; *Natal Estates Ltd v Community Development Board and Others* 1985 (3) SA 378 (D).
184 Section 12(1)(a) and (b) of the *Expropriation Act*.
185 1989 (3) SA 765 (A) at 771 paras A-F.
186 1972 (1) SA 14 (A) at 25 paras E-G as cited in *Davies and Another v Pietermaritzburg City Council* 1989 (3) SA 765 (A) at 771 para E.
187 *Davies and Another v Pietermaritzburg City Council* 1989 (3) SA 765 (A) at 771, 772; *Benede Sand Boerdery (Edms) Bpk v Virginia Munisipalitiet* 1992 (4) SA 176 (A).
188 *Davies and Another v Pietermaritzburg City Council* 1989 (3) SA 765 (A) at 771 para E.

approval if applied for.[189] The courts have however held that expenses incurred in anticipation of a future development, including professional fees associated for the development of a property, can be claimed as financial loss.[190] However, where costs were incurred to establish the infrastructure necessary to exploit a mineral right, an additional amount for the expenses incurred to erect such infrastructure cannot be claimed as financial loss if the value of the infrastructure has been factored into the market value.[191] Similarly, where the market value of materials excavated from an expropriated property can be determined, this value must be factored into the market value of the property expropriated and cannot be claimed as additional financial loss, but in fact constitutes the market value of the property taken.[192]

2.3.1.3 Replacement value

If the property is not likely to attract any potential purposes, there is no market value and compensation should be determined according to the replacement value or any other suitable method.[193]

2.3.1.4 Solatium

In addition to the amounts calculated under section 12(1), the *Expropriation Act* also makes provision for an additional amount to be awarded on a sliding scale

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189 In *Davies and Another v Pietermaritzburg City Council* 1989 (3) SA 765 (A) the court dismissed an appeal based on the appellant's assertion that they suffered financial loss in the form of lost profits. The court did not make an award for the profits which the developers claimed they would have realised for the sale of individual units since the developers were still required to obtain the necessary statutory approvals for the development at the time of expropriation: Similarly, the court in *Pienaar v Minister of Landbou* 1972 (1) SA 14 (A) held that the expropriated owner was not entitled to an amount for actual financial loss based on his assertion that the land in question was to be developed as irrigated land, pending the construction of a dam that was to be used to irrigate the expropriated property as well as another property belonging to the expropriated owner. In this case the expropriated owner had not built the dam in question at the time of the expropriation, and as such additional steps were required of him to realise the profits at the time of the expropriation, and as such there was no sufficient causation between the expropriation and the alleged loss of profits.

190 *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) at 682, 683.

191 *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T).

192 *Bodasing v South African Roads Board* 1994 (4) SA 867 (D).

193 Section 12(1)(aa) and (bb) of the *Expropriation Act*.

proportionate to the total compensation.[194] This amount must be calculated with reference to the amount calculated under section 12(1) but it does not constitute a sperate payment. It is rather part of the total compensation offered or decided by a court.[195] The courts have referred to this portion of the compensation as *treurgeld*[196] or *solatium,*[197] and it is intended to compensate the former owner or rights holder for inconvenience caused by the expropriation.[198] This payment is a form of solace[199] paid for non-patrimonial loss and does not seek to compensate actual financial loss.[200]

2.3.1.5 Interest

In the event that the expropriating authority takes possession before the full compensation is paid, the expropriated owner is entitled to receive the payment of interest[201] at a prescribed rate.[202] In the latter case the interest payable will be calculated excluding any amount awarded as *solatium* and will be based only on the market value and financial loss caused by the expropriation.[203]

2.3.2 Influence of section 25 of the Constitution

Unlike section 12 of the *Expropriation Act,* section 25 of the *Constitution* does not place the emphasis solely on market value but rather prescribes just and equitable compensation, reflecting an equitable balance between the public interest and the

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194 Section 12(2) of the *Expropriation Act* provides for an additional amount of 10% if the amount calculated under 12(1) does not exceed R100 000, 5% if the amount in between R100 000 and R500 000, 3% for an amount between R500 000 and R1 000 000 and 1% if the amount exceeds R1 000 000.

195 *Dormehl v Gemeenskapsontwikkelingsraad* 1979 (1) SA 900 (T) at 911 para F; *Redelinghuys v Stadraad van Pretoria* 1990 (1) SA 555 (T) at 559 paras A-I.

196 *Redelinghuys v Stadraad van Pretoria* 1990 (1) SA 555 (T) at 559 para A; a direct translation would read 'mourning money', however it could be interpreted as compensation for a *sui generis* form of non-patrimonial loss.

197 *Du Toit case* at para 6.

198 Du Plessis *Compensation for Expropriation under the Constitution* 61.

199 Van Wyk 2017 *TSAR* 23.

200 Du Plessis *Compensation for Expropriation under the Constitution* 61.

201 Section 12(3) of the *Expropriation Act*.

202 Section 12(3)(a) of the *Expropriation Act* states that the interest rate is the "standard interest rate" determined in terms of s 26(1) of the *Exchequer Act* 66 of 1975.

203 Section 12(3)(a) of the *Expropriation Act* only refers to "the amount of compensation payable in accordance with subsection (1)".

interest of those affected.[204] While market value can be a relevant factor taken into consideration, it is not the only factor nor does it enjoy any greater eminence than any other relevant factor.[205] It is therefore clear that a manifest difference exists between the measure of compensation provided for in section 12 of *Expropriation Act* and that prescribed by section 25(3) of the *Constitution.* This difference, however, does not necessarily render the *Expropriation Act* constitutionally invalid.

In the *Du Toit case,* [206] the Constitutional Court was called upon to decide the amount of compensation which a property owner was entitled to where the South African Roads Board (as it was then known) exercised its powers to expropriate gravel from his property in terms of section 8(1)(c) of the *National Roads Act*.[207] Section 8(2) of the *Roads Act* provides for the procedure and measure of compensation to be determined by the *Expropriation Act.*[208] However, since the formula for the calculation of compensation differs between the *Expropriation Act* and the *Constitution,* the court was called upon to provide clarity on how compensation is to be calculated in the constitutional era.

The court clearly indicated that the *Expropriation Act* was no longer the primary source of authority for expropriation since the state's authority now vested directly in the provisions of the *Constitution*. In this regard the court stated the following:

> Although the Act has for nearly two decades been applied in the expropriation of property and has been regarded as the major source of expropriation law in South Africa, it is important to recognise and appreciate that since the inception of the Constitution, all applicable laws must comply with the Constitution and be applied in conformity with its fundamental values. It is therefore now the Constitution, and not the Act, which provides the principles and values and sets the standards to be applied whenever property, which in turn is now also constitutionally protected, is expropriated.[209]

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204 Section 25(3) of the *Constitution*.

205 In the *Du Toit case* it was held at para 37 that "[…] Section 25(3) indeed does not give market value a central role."

206 2006 (1) SA 297 (CC).

207 54 of 1971 (hereafter referred to as the *Roads Act*).

208 Section 41(5) of the *Roads Act* determined that
"[T]he provisions of section 7 to 24 of the Expropriation Act, 1975, will apply with regard to any expropriation in accordance with subsection (1) or (3), reading in the changes necessary in the context […]"

209 *Du Toit case* at para 26.

The new standard referred to by the court is that of just and equitable compensation, reflecting an equitable balance between the public interests and the interests of those affected by the expropriation.[210] This standard is peremptory, and any compensation agreed to or decided on by a court must adhere to this standard.[211] However, this does not automatically invalidate the measure of compensation prescribed by the *Expropriation Act*[212] as "[s]ection 12 of the Act does not preclude the award of just and equitable compensation".[213]

Instead, the court decided that the provisions of the *Expropriation Act* must still be applied, provided that the amount is just and equitable as contemplated in section 25(3) of the *Constitution*. In this regard, the court stated the following:

> Under these circumstances, the more practical approach which will ensure that the peremptory standards of compensation envisaged in section 25(3) of the Constitution are met, is therefore to consider what compensation is payable under the Act, which is still valid and then to consider if that amount is just and equitable under section 25(3) of the Constitution.[214]

The Court also endorsed the approach formulated by the Land Claims Court in *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affiars;*[215] namely to start at market value and then apply other relevant factors as required by section 25(3) of the *Constitution* to arrive at an amount that is just and equitable.[216] In relation to section 12 of the *Expropriation Act,* the court also held *obiter* that actual financial loss could be the starting point, depending on the

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210 Section 25(3) of the *Constitution*.

211 *Du Toit case* at para 28 the court stated
"However, the amount of compensation agreed to or decided upon must adhere to the standards of justice and equity. It must also reflect an equitable balance between the interests of the public and of those affected by the expropriation. These standards, provided for in section 25(3) of the Constitution, are peremptory and every amount of compensation agreed to or decided upon by a court of law must comply with them."

212 In the *Du Toit case* the court held at para 34 that an inconsistence does not automatically render it invalid, the court stated
"[t]he construction of the relevant provisions of the Act and section 25(3) of the Constitution is different but does not appear to give rise to inconsistency.".

213 *Du Toit* at para 32.

214 *Du Toit* at para 35.

215 [2000] 2 All SA 26 (LCC).

216 *Du Toit* at para 37.

circumstances of the case,[217] presumably where a right is expropriated, other than a right in minerals.[218]

Section 12 of the *Expropriation Act* provides for replacement value as well as "any other suitable manner"[219] to be used where no market exists for property which has been expropriated. If actual loss is condoned as a starting point to calculate just and equitable compensation, it seems plausible that replacement value or any other manner for calculating compensation under section 12 of the *Expropriation Act* could also be used as a starting point if the expropriated property is "of such a nature that there is no open market therefor".[220]

The *Expropriation Act*, read with in conformity with the *Constitution*, is a law of general application. This must furthermore be read with the provisions in legislation which empowers the expropriation of property for land reform purposes. These statutes, as well as the compensation they provide for, is discussed in detail below.

2.3.3 Primary legislation containing powers of expropriation for the purposes of land reform

2.3.3.1 Provision of Land and Assistance Act[221]

The first piece of primary legislation enacted to give effect to the state-led land reform programme provides for the Minister of Land Affairs, as the Ministry was then known,[222] to acquire land[223] in the name of the state,[224] dispose of it and make

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217 *Du Toit* at para 37.
218 Section 12(2)(b) of the *Expropriation Act*.
219 Section 12(1)(aa) and (bb) of the *Expropriation Act*.
220 Section 12(1) of the *Expropriation Act*.
221 126 of 1993 (hereafter referred to as the *Provision of Land and Assistance Act*)
222 These powers are vested in the Minister of Rural Development and Land Reform.
223 Section 10(1) of the Act provides the requisite legal authority for the Minister to acquire land from monies appropriated by Parliament for the purposes of the Act as well as make grants or subsidies available to persons who qualify as beneficiaries. This Act is regarded as empowering the state to give effect to the right to equitable access to land contained in s 25(5) of the *Constitution*, however the Act is not explicit in terms of who the beneficiaries are. S 10(2) simply provides that a grant or subsidy granted in terms of s 10(1)(b) may be provided to
"(a) persons who have no land or who have limited access to land, and who wish to gain access to land or to additional land;
(b) persons who wish to secure or upgrade the conditions of tenure under which they live or wish to develop the land with the consent of the owner;

it available for settlement purposes.[225] Section 12 makes provision for the Minister to acquire land through expropriation by granting equivalent powers to that which the Minister of Public Works enjoys under the *Expropriation Act*. It states

> Without derogating from the powers that a Minister may exercise under the Expropriation Act (Act No. 63 of 1975), the Minister may for the purposes of this Act, exercise equivalent powers to the powers that such other Minister may exercise under the Expropriation Act, 1975. [226]

Regarding the calculation of compensation, section 12(3) goes on to state:

> In the event of expropriation, compensation shall be paid as prescribed by the Constitution, with due regard to the provisions of section 12 (3), (4) and (5) of the Expropriation Act, 1975.[227]

At the time of promulgation, the Constitution in force was the *Interim Constitution*.[228] Section 28(3) of the *Interim Constitution* also made provision for expropriation subject to just and equitable compensation, albeit that the formulation differed somewhat from that of section 25 of the Final *Constitution*.[229] The term 'Constitution'

(c) persons who have been dispossessed of land or of a right to land but who do not have a right to restitution in terms of the Restitution of Land Rights Act,"

As far as land acquired by the state is concerned, s 10(1)(a) simply states

"10. (1) The Minister may, from money appropriated by Parliament for this purpose-

(a) Acquire land <u>for the purposes of this Act</u>;" (underlining own emphasis)

The purposes of the Act are not expressly provided for in a section within the Act but the long title does provide some guidance in that it states

"To provide for the designation of certain land; to regulate the subdivision and of such land and the <u>settlement of persons thereon</u>; to provide for the rendering of financial assistance for the acquisition of land and to <u>secure tenure right</u>s; and to provide for matters connected therewith." (underlining own emphasis).

From the long title one can deduce that the purpose of the Act, and consequently to purpose of land acquired by the Minister under the Act, is to provide for secure tenure and settlement of designated persons. This accords with the commonly held view that although there is no overarching framework legislation for land redistribution, the Act provides the legal basis for the state to acquire land for the land redistribution programme; Rugege 2004 *Int'l J. Legal Info.* 297;

224 Section 2(1)(b) of the *Provision of Land and Assistance Act* provides the authority for the state to acquire land under the Act, read with s 9 which details that it must be registered in the name of the state under the *Deeds Registries Act* 47 of 1937.

225 Section 8 of the *Provision of Land and Assistance Act* allows for the "[s]ettlement of persons on designated land". Settlement of identified persons is a primary objective of the Act, in line with the land reform objectives contained in s 25(5) to (7) of the *Constitution*.

226 Section 12(1) *Provision of Land and Assistance Act.*

227 Section 12(3) *Provision of Land and Assistance Act*.

228 *Constitution* of the Republic of South Africa 200 of 1993 (hereafter referred to as the *Interim Constitution*).

229 Section 28(3) of the *Interim Constitution* made provision for the payment of compensation that is

is not specifically defined in the Act so it is logical to assume that reference to compensation calculated in terms of the 'Constitution' became a reference to section 25 of the *Constitution* once it repealed and replaced the *Interim Constitution*.

It is worth mentioning that Section 12(3) of the *Provision of Land and Assistance Act* predates the Constitution Court's decision in the *Du Toit case.*[230] The Legislature likely foresaw a conflict between the *Constitution's* new standard of compensation and the *Expropriation Act's* emphasis on market value and *solatium* in section 12(1) and (2). As such the *Provision of Land and Assistance Act* explicitly excludes the application of section 12(1) and (2) of the *Expropriation Act* and instead mandates a direct application of section 25(3) the *Constitution*. It does not however prevent the application section 12(3), (4) & (5) of the *Expropriation Act,* which makes provision for the payment of interest in certain instances.

2.3.3.2 Extension of Security of Tenure Act[231]

ESTA was enacted to give effect to section 25(6)[232] of the *Constitution* by providing security of tenure to occupiers residing on private land. If land needs to be acquired to secure the tenure rights of an occupier, section 26 of the ESTA provides for the Minister of Land Affairs, as the Ministry was then known, to expropriate land.

The legislature chose to follow a similar formulation to that contained in the *Provision of Land and Assistance Act*. Section 26(1) provides the Minister of Land Affairs with "equivalent"[233] powers to those afforded to the Minister of Public Works under the *Expropriation Act*. Regarding compensation the ESTA also excludes the application of section 12(1) and (2) of the *Expropriation Act* but provides for the

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"[…]just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

The formulation for the calculation of compensation differed from the final wording of s 25(3) of the *Constitution* in that it did not expressly list the purpose of the expropriation as listed in s 25(3)(e) of the *Constitution*.

230 2006 (1) SA 297 (CC).

231 62 of 1997 (hereafter referred to as *ESTA*).

232 Van der Walt *Constitutional Property Law* 21.

233 Section 26(1) of the *ESTA*.

direct application of the *Constitution*, plus interest under section 12(3), (4) and (5) of the *Expropriation Act*.[234]

2.3.3.3 Restitution of Land Rights Act[235]

The *Restitution Act* also makes provision for the Minister to acquire land by, expropriation amongst other means.[236] Albeit in this instance the purpose of the expropriation and the intended beneficiaries is more clearly defined. Section 42E(1)(a) defines a narrow scope of application as it only relates to land or a right in land in respect of which a claim has been submitted for the restitution of a right in land[237] or for financial compensation. In this instance the scope of the expropriation is limited to instances where the Minister seeks to give effect to a valid claim in terms of the *Restitution Act.* This narrow scope is somewhat tempered by Section 42E(1)(b) which provides that land or a right in land may also be expropriated where no claim has been lodged over the property but where there is never-the-less a correlation between the claim and the land in question and where its acquisition will further the purposes of the claim or the Act.[238]

As far as the calculation of compensation is concerned, section 42E(3) and (4) pre-empt an inconsistency between section 25(3) of the *Constitution* and section 12 of the *Expropriation Act* in that it includes reference to both the *Constitution* as well

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234 See s 26(3) of the *ESTA*.

235 22 of 1994.

236 Section 24E(1) of the *Restitution Act* states
"(1) The Minister may purchase, acquire in any other manner or, consistent with the provisions of section 3 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), expropriate land or a right in land"

237 The criteria for a valid claim in terms of the *Restitution Act* is contained in s 2 of the Act.

238 Section 42E(1)(b) states:
"(1) The Minister may purchase, acquire in any other manner or, consistent with the provisions of section 3 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), expropriate land or a right in land-
[…]
(b) In respect of which no such claim has been lodged but the acquisition of which is directly related to or affected by such claim, and which will promote the achievement of the purpose contemplated in paragraph (a);"

as the *Expropriation Act* with the instruction that the *Expropriation Act* applies "with the necessary changes"[239] read in to ensure compliance with the *Constitution*.

Section 42E(2) & (3) of the *Restitution Act* states the following:

> The Expropriation Act, 1975 (Act No. 63 of 1975), shall, with the necessary changes, apply to an expropriation under this Act, and any reference to the Minister of Public Works in that Act must be construed as a reference to the Minister for the purpose of such expropriation.
>
> [3] Where the Minister expropriates land, a portion of land or a right in land under this Act, the amount of compensation and the time and manner of payment shall be determined either by agreement or by the court in accordance with section 25(3) of the Constitution.[240]

Section 42E(3) and (4) is not as explicit in detailing which subsections of section 12 of the *Expropriation Act* still apply, but does however state that the amount of compensation, time and manner of payment must be determined "in accordance with section 25(3) of the Constitution".[241] As is the case in the *Provision of Land and Assistance Act,* the *Restitution Act* also predated the Constitutional Court's seminal judgement on the matter.[242] However, it did not attempt to deal with a perceived conflict by excluding provisions of the *Expropriation Act,* but simply stated that it must be applied in accordance with the *Constitution.* In this regard the *Restitution Act* seemed to pre-empt the outcome of the Constitutional Court's decision in the *Du Toit case*[243] almost verbatim.

2.3.3.4 Land Reform (Labour Tenants) Act[244]

The *Labour Tenants Act* is somewhat unique as it does not explicitly provide powers of expropriation to a functionary of the executive. Instead, the Act contains a process whereby an owner and the Director-General of the Department of Land Affairs, as it was then known, can resolve a claim by a labour tenant by agreement. Failure to do so allows them to attempt arbitration and finally seek relief from the

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239 Section 42E(2) and (3) of the *Restitution Act*.
240 Section 42E(2) and (3) of the *Restitution Act.*
241 Section 42E(2) and (3) of the *Restitution Act.*
242 The *Du Toit case*.
243 2006 (1) SA 297 (CC).
244 3 of 1996.

Land Claims Court.[245] Section 22(2) in turn proves for the court to "order that land or a right in land, held by an owner of affected land, be transferred to the applicant".[246]

Although this is not explicitly referred to as an expropriation, the Land Claims Court has previously confirmed that the process provided for in the *Labour Tenants Act* is a form of a judicial expropriation.[247] Section 23 furthermore makes provision for the "[o]wner's right to compensation".[248] Contrary to the land reform legislation discussed above, section 23 does not refer in any way to the *Expropriation Act* but instead mandates the direct application of the *Constitution* and specifically refers to just and equitable as the threshold. It reads

> The owner of affected land or any other person whose rights are affected shall be entitled to just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land or a right in land. [249]

2.4 Conclusion

The *Provision of Land and Assistance Act, ESTA, Restitution* and *Labour Tenants Acts* all provide for expropriation to take place subject to compensation, however the formulation of that compensation differs slightly in each instance. The formulation contained in the *Restitution Act* stipulates that compensation is to be determined in terms of the *Expropriation Act* but "in accordance with section 25(3) the Constitution". [250] This formulation closely mirrors the Constitutional Court's decision in the *Du Toit case*[251] in that section 12 of the *Expropriation Act* can still be applied to determine compensation, provided that the compensation is just and equitable within the meaning of section 25(3) of the *Constitution*.

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245 See ss 16 – 22 of the *Labour Tenants Act*.
246 Section 22(2) of the *Labour Tenants Act*.
247 *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 11 at para 21; *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 68 at para 22; *Msiza v Director-General for the Department of Rural Development and Land Reform and Others* (LCC133/2012) [2016] ZALCC 12 at para 6 – 31 (hereafter referred to as the *Msiza case*).
248 Section 23 of the *Labour Tenants Act*.
249 Section 23(1) of the *Labour Tenants Act*.
250 Section 42E(2) & (3) of the *Restitution Act.*
251 2006 (1) SA 297 (CC).

ESTA and the *Provision of Land and Assistance Act* excludes the application of section 12 of the *Expropriation Act* but permits the payment of interest under section 12(3) to (5) as well as other procedural aspects of the *Expropriation Act* to apply. On face value, these provisions appear to preclude the application of section 12(1) of the *Expropriation Act*, which places the emphasis on market value in favour of a direct application of section 25(3). The *Labour Tenants Act* excludes the application of the *Expropriation Act* in its entirety in favour of a direct application of the *Constitution.* Despite these differences, one can make the argument that the methodology adopted by the Constitutional Court in the *Du Toit case,*[252] largely nullifies the differences between these statutes.

Where section 12(1) is applied, as in the *Restitution Act,* the court clearly held that any amount awarded must be just and equitable as a peremptory requirement.[253] In other words, an amount awarded under section 12(1) of the *Expropriation Act,* and hence an amount awarded under the *Restitution Act,* will be adjusted from market value if necessary, to reflect an amount that is just and equitable. Where legislation requires a direct application of section 25(3) of the *Constitution,* the settled methodology in terms of the *Du Toit case* is to start at the property's market value in any event, and then to apply any other factor that is relevant in accordance with section 25(3) to arrive at a value that is just and equitable.[254] There may thus still be a difference between these statutes in relation to the procedures that must be followed when invoking the powers to expropriate land under the different Acts, but the measure of compensation is likely to be substantially similar.

The same could also conceivably apply regarding the payment of interest on compensation (expressly included in *ESTA* and the *Provision of Land and Assistance Act* but not expressly provided for in the *Labour Tenants Act*). The mere fact that the *Labour Tenants Act* does not make express provision for interest does not preclude a court from awarding it as section 25(3) of the *Constitution* provides for

252 2006 (1) SA 297 (CC).
253 *Du Toit* at para 35.
254 *Du Toit* at para 37.

an "open-ended list of relevant circumstances to be taken into account".[255] In other words, interest could conceivably be applied under the *Labour Tenants Act* if it is a relevant consideration under the circumstances, and conversely will only apply under the other legislation (which makes reference to the relevant sections of the *Expropriation Act*) if it is necessary to arrive an amount that is just and equitable.

[255] *Du Toit* at para 28.

Chapter 3 The role of a valuation conducted by the *Valuer-General* in the determination of just and equitable compensation for immoveable property expropriated for land reform purposes

3.1 Introduction

The role of a professional valuer in determining the value of a property *vis-à-vis* the role of the judge as the final arbitrator of compensation is one which poses several conceptual difficulties. In the absence of an agreement, compensation for expropriated property must be determined or approved by a court of law.[256] However, challenges arise when the law itself requires a determination to be made, the nature of which falls within the specialised realm of professional valuers.

The approach adopted by our courts can best be described as a pragmatic one, whereby the courts rely on expert evidence provided by professional valuers but still retain their judicial prerogative to assess the credibility of the evidence put before them.[257] There is recognition that judicial officers would not ordinarily have the requisite skills and experience to make a determination of this nature in their own right, yet they retain the final say not only on the amount of compensation to be awarded,[258] but also on the accuracy and suitability of the valuation presented in courts by expert witness.[259] It appears as if the irony of this arrangement, whereby the presiding judge is required to act as the "Super Valuator",[260] is not lost on the courts.

Whist our existing body of case law on expropriation centres on the valuations obtained by expropriated owners claiming compensation, a new dynamic entered in

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256 Section 25(2)(b) of the *Constitution*.
257 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253, 254.
258 A discussion on the conceptual difference between compensation and value is included in the discussion below.
259 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253, 254.
260 *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 955, 956.

the debate in 2014 with the promulgation of the *Property Valuation Act.* The Act created a statutory institution known as the *Valuer-General*,[261] tasked with valuing property identified for acquisition by the state as part of the land reform programme.[262] This chapter focuses on the possible influence which a valuation undertaken by the *Valuer-General* may have on an award of compensation where land is expropriated for the purpose of reform. To answer this question, the study analyses the precedents set by the courts and the provisions of the *Property Valuation Act* itself as well as attempts to ascertain the intention of the legislature which could be indicative of the *Value-General's* intended role.

A comparison is also drawn with the laws of various Australian states and self-governing territories where the role of statutory valuation bodies in determining the compensation payable for compulsory acquisition is contained in legislation. Primary legislation and case law from Australia are analysed to determine whether any analogies exist that could be indicative for the interpretation of the *Property Valuation Act*. Likewise, consideration is also given to selected examples from Central and Eastern Europe where statutory bodies conducted valuations in connection with land reform programmes undertaken in that region.

3.2 The role of the judiciary as the "Super Valuator"[263] when determining compensation for expropriation

In terms of section 9 of the *Expropriation Act*, an expropriated owner must indicate within sixty days whether or not he accepts the offer of compensation made by the State.[264] Should the expropriated owner not accept the offer, he must deliver a notice to the Minister outlining the amount claimed as compensation, including the

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261 Section 4 of the *Property Valuation Act*.

262 Under the objects of Act, s 2(c) of the *Property Valuation Act* lists the purpose of the Act to "provide for the valuation of property that has been identified for purposes of land reform;".

263 *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 955, 956.

264 As outlined in the previous chapter, the *Expropriation Act* still regulates the procedure to be followed when land is expropriated under any of the empowering provisions contained in the *Restitution Act, ESTA, Provision of Land and Assistance Act* and the *Labour Tenants Act*.

particulars as to how this amount is calculated with reference to the requirements in section 12 of the *Expropriation Act.*

As outlined in the previous chapter, the calculation of compensation is a complex and highly specialised procedure and one would imagine that this falls outside of the skills base of most owners to conduct themselves. Hence, an owner may enlist the services of a professional valuer to calculate the value of his land and furnish the particulars required by the Act. Although it is not expressly mentioned in the legislation, an owner may enlist the services of a professional valuer to assist with this task. In the event that the expropriating authority and the owner fail to reach an agreement, the amount of compensation must be determined either by an arbitrator if both parties agree, or by the high court.[265] The draft *Expropriation Bill* provides for a process that is substantially similar, with the only notable difference being that the Bill expressly provides for a valuer to enter onto the property to conduct a valuation on the request of the expropriating authority[266] and requires the owner submitting a counter claim for compensation to furnish the authority with a copy of a valuation report as part of the particulars of the claim.[267]

Should the dispute proceed to a court of law, the litigants will need to place evidence before the court to support their claim to just and equitable compensation under the circumstances.[268] As is the case with any evidence, the litigating parties are entitled to test the evidence led by the other party and it is up to the presiding officer to exercise his discretion as to the credibility and weight of evidence. However, the courts seem to be keenly aware that the expert evidence of a professional valuer needs to be treated somewhat differently as the nature of the testimony is unique. The courts have recognised that the nature of a valuation is

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265 Section 14 of the *Expropriation Act*.

266 Section 5(2)(b) of the *Expropriation Bill*; s 13 of the *Property Valuation Act* makes provision for a valuer authorised by the *Valuer-General* to exercise substantially similar powers when conducting a valuation under that Act.

267 Section 14(1)(c) states that the written statement delivered by the expropriated owner to the expropriating authority must include:
"furnishing full particulars as to how the amount contemplated in paragraph (b) is made up, including a copy of valuation, other professional report or other document that forms the basis of the compensation claimed, if any;".

268 *Msiza case* at para 5.

not precise and relies on the expertise of the witness, expertise which a judge does not usually preside over himself.[269] In this regard, the court in *Estate Marks v Pretoria City Council* stated the following

> In terms of secs. 7 (1) and 8 (1) of the Act, the function of the Court a *quo* was to determine the amount of compensation to be paid, as distinct from deciding an issue solely dependent on the relative credibility of conflicting testimony. Moreover, uncontradicted evidence is not necessarily acceptable evidence (*Sigournay v Gillbanks,* 1960 (2) SA 552 (AD) at p. 558 *in fine*), and the basic issue for decision is essentially a matter which is in the realm of estimate (cf. *South African Railways v New Silverton Estates Ltd.,* 1946 AD 830 at p. 838). At the same time, such estimate is, from the very nature of the enquiry, largely dependent upon the estimate of experts. The valuation of property – I am disposed to think, particularly of urban property such as that in issue in the present case where so many different facets enter into the enquiry – is not a sphere in which a Judge ordinarily has any specialised knowledge. Postulating that accepted expert testimony contains no demonstrable errors or inherent improbabilities, it is, accordingly, very desirable that a judge – whose function under Act 56 of 1956 it is to fix the compensation in the light of all the evidence put before him – who declines to accept the conclusions of expert witnesses whose evidence he has, in other respects, accepted should in his judgement indicate clearly the reasons which motivate him in doing so.[270]

It therefore seems as if a judge is required to exercise a greater degree of circumspection when assessing the accuracy of an expert valuation, however this does not render it infallible. The court must simply be satisfied that the valuation is correct in that it does not contain any "demonstrable errors or inherent improbabilities".[271]

Interestingly, the court in *Estate Marks v Pretoria City Council* recognised that the aim of the evidence is to determine compensation for expropriation, and is therefore a *sui generis* form of evidence. Nevertheless, it still chose to deal with the valuation under the general rules of evidence, namely as "a logical deduction from factual data".[272] The nett result is that the evidence is either rejected or accepted. In this regard the court stated:

> Nevertheless, it is, I think, important to bear in mind that, as in the case of the Water Court referred to in *Jackson's case, Supra* at p. 419G – H, reflects the correct

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269 1969 (3) SA 227 (A)
270 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 252, 253.
271 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253.
272 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253.

> approach to be adopted by this Court in the present case. That is to say, adapting the words of FAGAN, J.A., in *Jackson's* case at that page, the valuation of the Court a *quo,*
>
> 'though it relates to matters that may in many respects be so uncertain and so difficult to determine that no one can be dogmatic about them, nevertheless purports to be a finding of fact, a logical deduction from factual *data*; also that an appeal to this Court is a full appeal. If therefore this Court, while giving proper weight to the factors indicated above nevertheless finds the Court a *quo's* valuation to be incorrect, it is its duty to set that valuation aside'.
>
> Before this Court will set aside the award, it must of course be satisfied that the valuation of the Court a *quo* in incorrect…[273]

Stated differently, the court will either reject a valuation if it is incorrect and refuse to award compensation on that basis or accept the accuracy of a valuation and award compensation based on that valuation. In this regard, one can argue that the courts tacitly accepted that the correct measure of compensation to be awarded is akin to its valuation, provided that the valuation is accepted.

This deduction is supported by the remark made *obiter* by King AJ, in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council*[274] where it is stated

> Notwithstanding, the law enjoins me to transport myself into a world of fiction and to don the mantle of a super valuator, overriding, if necessary, the views expressed by men experienced in the valuation of property and whose views are relied upon almost daily by willing purchasers and sellers. I must at one and the same time be the willing seller and the willing buyer, both well-informed, and I must arrive at a price in a market that did not exist at the time of expropriation. It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuators make the task of the super valuator seemingly 'curiouser and curiouser'.[275]

While the judge clearly highlighted the fiction involved in the arrangement, it appears as if the court's role had been that of a "super valuator" and not to determine an amount of compensation separate from the accepted valuation of the property. There have, however, been notable attempts to deviate from this pattern.

In the *Msiza case*, the Land Claims Court was faced with a claim for compensation under the *Labour Tenants Act.* The State agreed to pay the owner the market value

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273 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253.
274 1979 (1) SA 949 (W).
275 At 955, 956.

of the portion being claimed,[276] however, there was a dispute between the valuers employed by the state and the owner as to whether or not the "developmental potential"[277] of the property should be considered when assessing the market value. By relying on the *Pointe Gourde* principle, the judge rejected the argument that the valuation should take the developmental potential of the land into account. The following was stated in this regard

> My view is that the market value of the land can only be determined by reference to its agricultural value, which is its current use. I reject the invitation to take into account the developmental potential of the land.
>
> In coming to the above conclusion, I draw strength from the *Pointe Gourde* principle. As noted, this principle states that in determining the market value of the land to be acquired by the state through an expropriation scheme, the deciding authority must exclude any increase or decrease in the land value which would occur as a result of the expropriation. But I take into consideration the operating logic of the principle. Applying the approach advanced by the landowner could distort the real value of the land and produce outcomes which are dissonant to the purposes behind compensation. Compensation, in terms of section 25, must first and foremost serve the public interest. The monies to be paid to expropriated persons emanate from the public purse and they are constitutionally designed to serve a discreet legal purpose, not to compensate each and every possible potential loss of commercial opportunity. That approach could also create perverse incentives for landowners to artificially raise the potential value of their land, if they know that by the simple device of generating interest in the land, its market value could be significantly altered. I conclude, based on these reasons, that the correct market value of the property is R1,8m.[278]

While the detailed rationale for the court's approach to market value is analysed in more detail in the chapter which follows, it is suffice for the purposes of this study to note that the judge followed the precedent set by the court before him by entering the fray as the "super valuator" to determine which valuation was correct.

Be that as it may, the fact that the inquiry did not stop there distinguishes this case from previous cases. Once the judge corrected the valuation, the court did not *ipso facto* equate this valuation with just and equitable compensation. This despite the fact that the state offered to pay the market value. Instead, the court proceeded to

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276 *Msiza case* at para 78.
277 *Msiza case* at para 44.5.
278 *Msiza* at paras 46, 47 (underlined for own emphasis).

draw a clear distinction between the corrected market value and the amount due as compensation. In this regard, the judge held

> The government indicated that it was willing to settle the claim at the market value, provided that such value is claimed according to the present use of the land – the agricultural use – as opposed to the potential development of the property – or township development use.
>
> Despite the willingness of the state to pay the market value of the property, I am not satisfied that the market value of the land, as agricultural, is just and equitable and reflects an equitable balance between the public interest and the interests of those affected by the expropriation. I have concluded that the amount must be adjusted downwards.
>
> […]
>
> The national fiscus should [not] be saddled with extravagant claims of financial compensation, when the clear object of taking the land is to address a pressing public interest concern such as land reform.
>
> […]
>
> Accordingly, I decline to approve the proposal of the landowners as not being just and equitable. Similarly, the offer by the state to pay a market value is not approved.
>
> It is determined that the correct amount which would be just and equitable is R1, 500 000 (one million five hundred thousand rand).[279]

The significance of this decision cannot be underestimated in assisting us to understand the relationship between a valuation and the amount awarded as compensation. As was the case in the previous decisions discussed above,[280] the court did intervene as the 'super valuator' to correct the valuation placed as evidence before it, however it did not accept this valuation as binding on its discretion to determine just and equitable compensation. The judge repeatedly referred to the 'value' of the property[281] with reference to the valuation techniques and in so doing, the judge implicitly made a distinction between the value of the land and the amount of compensation which would be just and equitable under the circumstances.

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279 *Msiza* at pp78-82.

280 *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W); *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A).

281 See the portions underlined for emphasis in the quote above.

This decision was however, overturned on appeal,[282] and the market valuation accepted by the court a quo was awarded as compensation. The Supreme Court of Appeal did not express itself about the issue of whether or not a valuation is binding. Instead it chose to accept the valuation submitted by the state as the correct amount to be awarded as compensation because the valuer took the same set of factors relied on by the court to deviate from the valuation into account in its valuation. In this regard, the Supreme Court of Appeal once again reaffirmed the approach previously followed by South African courts in the pre-constitutional era, namely to correct the valuation where needed and then to accept the valuation as the correct measure of compensation without drawing a distinction between the two concepts. The court's reasoning was stated as follows

> The report of the expert called on behalf of the State is significant. In reaching his valuation of R1,8 million he considered the physical features attaching to the land as also its present and historical use by the Msiza family. He stated as follows 'taking cognisance of the historic and current use, and the judgement on the subject property in terms of Chapter III of the Land Reform (Labour Tenants) Act, we considered agricultural use is the highest and best use for the subject property and will be valued accordingly.' Simply put, the valuation of R1.8 million too account of the Msiza claim in the valuation of the property.[283]

3.3 Introduction of the Valuer-General

From the discussion above, it seems that the courts have not been abundantly clear as to whether there is a difference between the value of a property and the compensation to which the owner of that property is entitled upon expropriation. The reason for this is partly because the courts are yet to fully clarify the extent to which it can deviate from an accurate valuation to determine compensation, or whether a valuation should be adopted *mero moto* as the compensation after it has been interrogated by the courts as the 'super valuator'. The following discussion follows on this question by interrogating the role and functions of the *Valuer-General.* More specifically, it seeks to answer whether the intervention by the legislature by enacting the *Property Valuation Act* serves to clarify the position.

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[282] *Uys N.O and Another v Msiza and Others* 2018 (3) SA 440 (SCA) (hereafter referred to as the *Msiza Appeal*).

[283] *Msiza Appeal* at para 15.

In 2014, the legislature enacted the *Property Valuation Act,* establishing a statutory body known as the Office of the Valuer General[284] tasked with undertaking valuations of land identified for acquisition as part of the land reform programme or as and when valuations are requested for other purposes by national or provincial government departments.[285]

The purpose of the *Valuer-General* appears to be multifaceted. At its simplest, it provides the state with in-house valuation capacity to buck the trend seen in previous expropriation cases where the state relies on independent valuers contracted to value properties earmarked for expropriation.[286] A closer examination of the policy documents underpinning the creation of the *Valuer-General,* as well as arguments made by the Minister of Rural Development and Land Reform in the Land Claims Court,[287] reveals the intention for an additional, more active role in shaping the amount of compensation paid for expropriation.

The concept of a "Land Valuer-General"[288] was originally proposed in the *Green Paper*. The problem statement identifies several challenges associated with the appointment of independent valuers by the state, a practice which was prevalent at the time. These challenges were listed as

> (a) South Africa lacks a nationwide comprehensive, reliable and collated hub of property values;
>
> (b) absence of legislative framework to determine when 'market value' is one of the variables in determining values as opposed to being the only criterion;
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> (c) probity of some of the valuation is questionable;

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284 Hereafter referred to as the *Valuer-General*.

285 Section 2 of the *Property Valuation Act*.

286 In all the cases cited in Chapter two, the court refers to expert witnesses by name and outlines their specialist knowledge and experience irrespective of whether they are called by the state or by the expropriated owner. This seems to indicate that the expert witnesses called to testify by either the state or the expropriated owner are independent valuers contracted by one of the parties. None of the cases referenced in Chapter two cited statutory bodies called as expert witnesses to corroborate a valuation used by the court to determine compensation.

287 See *Moloto Community v Minister of Rural Development and Land Reform and Others* (LCC 204/2010) (hereafter referred to as the *Moloto case*) and *Emakhasaneni Community v The Minister of Rural Development and Land Reform and Others* (LCC 03/2009) (hereafter referred to as the *Emakhasaneni case*).

288 Point 6.6 of the *Green Paper*.

(d) conflict of interest and malpractices;

(e) improper or hurried valuations in order to meet deadlines or compliance planning; and

(f) an ahistorical or mechanical approach to valuation.[289]

The challenges listed under (c), (d) and (e) imply that valuations conducted by independent valuers contracted to the state did not adhere to the expected standards of quality, impartiality and due diligence respectively. These challenges could have motivated the state to create its own valuation capacity. The challenges listed under (a), (b) and (f) however seem to extend beyond mere implementation and hints at the state's discomfort with the methodology used by valuers when the purpose of the valuation is to determine compensation for the expropriation of land for the purposes of reform. One can deduct, perhaps, that the state did not view the valuations conducted by independent valuers at an arm's length from the state as a sufficient base of information to make an informed offer of compensation to the landowner where land is to be expropriated for the purposes of reform.

Conversely, the intention behind the creation of the office of the *Valuer-General* was likely twofold, namely to address the implementation challenges by creating in-house valuation capacity for the state but also to force the valuer undertaking a valuation during expropriation proceedings for land reform to interpret and apply section 25 of the *Constitution* when conducting the valuation. The latter intention is articulated more clearly under point 6.6.2 of the *Green Paper* where it is stated that the *Valuer-General* will be responsible for, *inter alia* "(b) determining financial compensation in cases of land expropriation, under the Expropriation Act or any other policy and legislation, in compliance with the constitution".[290]

It seems quite clear from the above that the intention, at least during the stage of policy formulation, was for the *Valuer-General* to determine the compensation to be paid when land is expropriated for reform. This wording differs slightly, but perhaps importantly, from the wording finally included in the *Property Valuation Act* which

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289 Point 6.6.1 of the *Green Paper*.
290 Point 6.6.1 of the *Green Paper*.

refers to determining the value of the property intended for acquisition under the land reform project. In this regard section 12(1)(a) of the *Property Valuation Act* states

> Whenever a property has been identified for-
>
> (a) purposes of land reform that property must be valued by the Office of the Valuer-General for purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines [...][291]

'value' is in turn defined as follows

> **'value'**, for the purposes of section 12(1)(a), means the value of property identified for purposes of land reform, which must reflect an equitable balance between the public interest and the interests of those affected by the acquisition, having regard to all the relevant circumstances, including the –
>
> (a) current use of the property;
>
> (b) history of the acquisition and use of the property;
>
> (c) market value of the property;
>
> (d) extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
>
> (e) purpose of the acquisition; and
>
> **'Valuer-General'** means the individual appointed as Valuer-General in terms of section 8 or acting as such.[292]

When reading these two provisions together, the *Property Valuation Act* clearly places an obligation on the *Valuer-General* to conduct a valuation of property that is identified to be acquired for land reform purposes but based on a formulation which mirrors the calculation of compensation under section 25 of the *Constitution*.

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[291] Section 12(1)(a) of the *Property Valuation Act*.
[292] Section 1 of the *Property Valuation Act*.

3.4 Acquisition versus expropriation

The difference between 'acquisition' and 'expropriation', as well as 'value' versus 'compensation' merits closer consideration. The dictionary definition of acquisition is reads "the buying or obtaining of assets or objects".[293]

It is a generic term that can encompass several methods of obtaining property, including purchase and sale as well as expropriation. The various legislation discussed in Chapter two which gives effect to land reform provides for the state to acquire property as part of its obligation to give effect to the rights to equitable access to land, restitution and in certain instances tenure security.[294] The legislation in question provides for powers of expropriation but does not limit the methods of acquisition to expropriation.[295] As Du Plessis[296] notes, there may be several modes of acquisition in addition to purchase and sale or to expropriation.

The fact that the *Green Paper* only refers to expropriation could be indicative of the stated intention to move away from the "willing-buyer, willing-seller"[297] method of acquiring property for land reform towards using expropriation. In other words, the original vision for the *Valuer-General* could have been limited to instances of expropriation because the policy direction at the time was to focus on expropriation only, and to move away from purchasing property for land reform. The fact that the *Property Valuation Act* finally makes refence to the more generic term of 'acquisition' could mean that the legislature does not wish to limit the possible role which the *Valuer-General* could play and rather leaves the door open to instances where land is acquired by means other than expropriation.

This distinction was recently considered by the Land Claims Court in the *Emakhasaneni case.* Prior to the hearing, the parties reached a settlement

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293 Oxford Living Dictionaries (online) 2018 https://en.oxforddictionaries.com/definition/acquisition.

294 Du Plessis 2014 *PELJ* 808-809, 819.

295 Du Plessis 2014 *PELJ* 808-809, 819.

296 Du Plessis 2014 *PELJ* 819 notes that "on the continuum between confiscation and contract there are various other options.".

297 Clause 5(a) of the *Green Paper* lists the willing-buyer willing-seller model as a "Current Challenge" and weakness of the land reform programme; Du Plessis 2014 *PELJ* 798.

agreement in terms of section 42D of the *Restitution Act* whereby the Minister would acquire the properties subject to compensation as agreed upon by the parties. Should the parties fail to agree on the price, the settlement agreement provided for the court to determine the amount, which would constitute just and equitable compensation as per section 42D of the *Restitution Act*.[298]

When called upon to do so, the Land Claims Court saw no difference between the determination of compensation for expropriation or an acquisition under a section 42D settlement agreement. In this regard the court stated:

> Section 22(1)(b) of the Restitution Act empowers the Court to determine compensation for the expropriation or acquisition of land. I cannot imagine that compensation for "acquisition" would have to be determined on a different basis than compensation for "expropriation".[299]

It should perhaps be borne in mind that the term acquisition referred to above was interpreted within the context of the powers granted to the Land Claims Court by the *Restitution Act*[300] as well as the Rules of the Land Claims Court.[301] The acquisition was therefore of a *sui generis* nature where the Land Claims Court is called upon to determine just and equitable compensation for property acquired under the *Restitution Act.* The same may not be applicable in instances where the Minister is negotiating a purchase price and the court is not tasked with determining just and equitable compensation under the *Restitution Act*. It can be argued that the court tacitly acknowledged this distinction where it is stated

> The Act may very well set out the procedure whereby the amount for which the Minister may purchase property for land reform purposes but that does not exclude this Court's jurisdiction to determine the just and equitable compensation. Particularly, where the parties have referred the matter to it for such determination.[302]

The difference between the terms 'acquisition' and 'expropriation' may thus be negligible where the court is called upon to determine just and equitable

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298 *Emakhasaneni case* at paras 2 to 6.
299 *Emakhasaneni case* at para 36.
300 *Emakhasaneni case* at para 36; See also the *Moloto case* at para 18.
301 See reference to Rule 31 of the Land Claims Court in *Emakhasaneni* at para 17.
302 *Emakhasaneni case* at para 34.

compensation under the *Restitution Act*. This does not conclusively answer whether the *Valuer-General's* valuations are binding on the state when negotiating a purchase price or compensation in the process of expropriation.

3.4.1 Value versus compensation

The salient question is whether or not the intention of the legislature is for the *Valuer-General* to act as an arbitrator in relation to compensation,[303] or whether the intention is for *Valuer-General* to determine the 'value' of the property distinct from the amount of compensation which the expropriated owner is entitled to. The *Green Paper* provides for the *Valuer-General* to determine financial compensation "under the Expropriation Act or any other policy and legislation, in compliance with the Constitution".[304]

The role of the *Valuer-General* in determining compensation vis-à-vis the role of the court[305] was also a pivotal point of contention during public consultations held by the legislature prior to the Act's promulgation.[306] Several stakeholders, in their submissions, highlighted the need to safeguard against limiting an affected person's access to court, to which the Department of Rural Development and Land Reform responded that the role of the *Valuer-General* was not intended to limit access to courts.

This could perhaps provide a clue as to why the final wording of the *Property Valuation Act* does not refer to the determination of compensation, but rather to

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303 Mostert 2017 *PELJ* 760; 770.

304 Point 6.6.2 (b) of the *Green Paper*.

305 In this regard Mostert 2014 *PELJ* 760 stated the following at 770
"The Green Paper's purpose is to indicate possible directions of policy change, to solicit comments from developing policy that would eventually translate in changes to existing law. It is too early to predict specific issues of constitutionality that could be raised by a policy change not yet developed, nor implemented".
Subsequent to this statement the *Property Valuation Act* was promulgated, but the argument is made in this paper that the Act does not provide any greater degree of clarity relating to the role of courts vis-à-vis the *Valuer-General*.

306 Parliamentary Monitoring group 2014 https://pmg.org.za/committee-meeting/16975/.

"determin[e] the value of the property having regard to the prescribed criteria procedures and guidelines".[307]

Aside from the findings of a valuation being captured in a valuation report,[308] the *Property Valuation Act* is furthermore silent on exactly what the legal effect of a valuation is or whether the valuation report is binding on any parties.[309]

Pienaar[310] notes that the interaction between the *Valuer-General,* professional bodies and the courts was still unknown at the time when the *Green Paper* was written as the wording gave rise to multiple interpretations.[311] One interpretation was that the *Valuer-General* merely acts in an advisory capacity.

However, an alternative interpretation was recently argued on behalf of the Minister of Rural Development and Land Reform in both *Moloto*[312] as well as the *Emakhasaneni case*.[313] In both instances, the state averred that section 12 of the *Property Valuation Act* places an obligation on the *Valuer-General* to determine the compensation for properties acquired under the *Restitution Act* to the exclusion of the Land Claims Court. It was furthermore argued that the owner's only recourse was to review the valuation conducted by the *Valuer-General* if they are unsatisfied with the quantum of compensation.[314] As highlighted by the court in passing judgement, such an interpretation could place the *Property Valuation Act* in conflict with section 25(2)(b) of the *Constitution*, which prescribes that compensation must be either "agreed to by those affected or decided or approved by a court".[315]

The court held in both instances that section 12 of the *Property Valuation Act* does not oust the jurisdiction of the court to determine just and equitable compensation.

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307 Section 12(1)(a) of the *Property Valuation Act*.
308 Section 15 of the *Property Valuation Act*.
309 Mostert 2017 *PELJ* 760, in relation to the *Green Paper* stated that "[i]t is too early to predict specific issues of constitutionality that could be raised by a policy change not yet developed, nor implemented".
310 Pienaar 2014 *PELJ* 656.
311 Mostert 2017 *PELJ* 760; 770.
312 At paras 7 to 9.
313 At paras 10 to 14.
314 See *Emakhasaneni* at paras 10 to 14; and the *Moloto case* at paras 7 to 9.
315 Section 25(2)(b) of the *Constitution*.

In *Moloto*, the court could not find any provision which expressly supported the state's contention and hence relied on the presumption that the legislature did not intend to limit the court's jurisdiction.[316] In this regard, the court stated the following

> The mere fact that the Valuer General is empowered by the aforesaid section of the PVA Act to determine the compensation, does not, *per se*, oust the jurisdiction of this Court to do so. Had that been the intention of the Legislature, it would have done so in specific terms or by implication.[317]

Although the court did not read the intention to oust the court's jurisdiction as the final arbitrator, it accepted that section 12 of the *Property Valuation Act* does allow the *Valuer-General* to determine compensation. This was done even though the Act never makes use of the word compensation but only refers to determining the value. Perhaps it is wise not to read too much into the use of terminology as the court did not find it necessary to "examine the PVA Act and its impact on the Court's jurisdiction"[318] since the state failed to advance substantive arguments on the point.

In contrast, the court's judgement in the *Emakhasaneni case* centred precisely on this matter. In considering the parties' arguments, the court pointed to the right of each individual to approach the courts where a constitutional right is threatened.[319] On this basis, the court rejected the state's interpretation and held that the *Valuer-General's* duty to determine the value of the property did not equate to it determining just and equitable compensation to the exclusion of the courts. To this effect, the court stated the following

> The wording of section 12(1)(a) of the PV Act merely states that the OVG must value the land "for the purposes of determining the value of the property having regard to the prescribed criteria procedures and guidelines;" It does not say that the OVG makes the decision as to the compensation to be paid or that the Minister is bound by that decision. [320]

316 *Moloto case* at para 26.
317 *Moloto case* at para 26.
318 *Moloto case* at para 28.
319 *Emakhasaneni case* at para 22.
320 *Emakhasaneni case* at para 22.

This latest judgement from the Land Claims Court is the clearest indication that a determination of 'value' by the *Valuer-General* does not equate to a determination 'compensation'. This distinction was further cemented by the court where it stated

> I do not find anything in the PV Act which prevents the Minister from paying "compensation" that exceeds the "value" determined by the OVG, nor to agree to the determination of "compensation" by the Court, well-knowing that the Court's determination could be higher that the "value" determined by the OVG. [321]

Through a process of elimination, it does however appear as if the intention of the legislature was not for the valuation by the *Valuer-General* to oust the jurisdiction of the courts in determining just and equitable compensation upon expropriation.

3.5 Comparative analysis with foreign jurisdictions

3.5.1 Introduction

As outlined above, recent judgements of the Land Claims Court[322] provide considerable clarity where the court is approached to determine just and equitable compensation pursuant to a settlement agreement under the *Restitution Act.* However, at the time of writing, there was still some uncertainty surrounding the exact scope and function of the *Valuer-General* where the Minister initiates expropriation procedures under any empowering provision contained in land reform legislation. In this regard, a comparison with foreign jurisdictions where statutory bodies have been assigned a role in valuing property compulsorily acquired could assist in guiding our interpretation of the *Property Valuation Act* and the role of the *Valuer-General.* Special emphasis is placed on the commonwealth of Australia as several states have enacted legislation creating statutory valuation entities and specialist courts with defined roles in relation to compulsory acquisition.

3.5.2 Introduction to the Australian law of compulsory acquisition

In drawing comparisons with the Australian laws of compulsory acquisition, it is important to qualify comparisons by noting a fundamental difference between

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321 *Emakhasaneni case* at para 35.

322 See the discussion on the *Emakhasaneni* and *Moloto* cases above.

section 25 of the *Constitution* and the corresponding provision in the *Constitution of Australia*.

Section 51 (xxxi) of the *Constitution of Australia* reads as follows

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good governance of the Commonwealth with respect to:
>
> […]
>
> (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws;[323]

Whereas the fundamental purpose of section 25 of the South African *Constitution* is to strike a balance between the rights of the affected parties and that of the public interest,[324] section 51 (xxxi) of the *Constitution of Australia's* primary function is to balance the rights and powers of the commonwealth versus those of the individual states and territories[325] as it sets out the terms on which the Commonwealth and states can compulsorily acquire property.[326] The duty to protect individual rights in the Australian context rests primarily with the legislatures of each state or self-governing territory,[327] and section 51(xxxi) provides the authority to each state to enact legislation which provides for the compulsory acquisition of property from individuals provided that such legislation can only permit the acquisition on just terms.[328] Where legislation provides for powers of compulsory acquisition without detailing the compensation that is to be paid, the courts have developed a presumption in law in favour of just compensation.[329]

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323 Section 51 (xxxi) of the *Constitution of Australia*.
324 *Du Toit case* at para 8.
325 The commonwealth of Australia is a federal structure with six states and two self-governing territories; See ss 106, 120 and 122 of the *Constitution of Australia*; Du Plessis *Compensation for Expropriation under the Constitution* 2009 at 187.
326 Allen 2000 *Sydney L. Rev.* 368.
327 Allen 2000 *Sydney L. Rev.* 368.
328 Van der Walt *Constitutional Property Clauses* 39-74.
329 *Attorney-General v De Keyser's Royal Hotel* [1920] AC (HL) 508 at 542; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 as referenced in Jacobs *Law of Compulsory Land Acquisition* 306, 307.

Although section 51(xxxi) does not lend itself to direct application to a set of facts through a proportionality test,[330] it is still regarded as "a very great constitutional safeguard"[331] since any legislation enacted by the commonwealth or a state legislature which makes provision for the acquisition of property on terms falling short of the 'just terms' threshold may be struck down as unconstitutional.[332] The measure of compensation as well as the manner in which it is calculated are therefore determined by the prescripts of the legislation enacted by the commonwealth as well as each state. As such the exact formulation differs from state to state,[333] provided they can all be reconciled with the concept of just compensation.

A crucial difference is therefore that the South African *Constitution* explicitly prescribes the measure of compensation as well as the manner in which it must be fixed, namely per agreement, failing which it must be approved or decided upon by a court.[334] Section 51(xxxi) of the *Constitution of Australia* leaves such decisions to the discretion of the legislature, including each state's legislature.[335] However, in the

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330 Allen 2000 *Sydney L. Rev.* 362 – 369.

331 *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 403; as referenced in Weis 2017 *Fed. L. Rev.* 224. Du Plessis *Compensation for Expropriation under the Constitution* 188, relying on the judgement in *Clunies-Ross v The Commonwealth of Australia and Others* (1984) 155 CLR 193, notes that the court has elevated the 'just terms' provision in section 51(xxxi) to a constitutional guarantee akin to an individual right to just compensation; Weis 2017 *Fed. L. Rev.* 223 agrees with this interpretation but argues that the courts have erred in this approach as there are fundamental differences between section 51(xxxi) of the *Constitution of Australia* and explicit constitutional property guarantees such as the *Fifth Amendment*. Weiss's argument is based on the notion that section 51(xxxi) is too vague in relation to its scope of protection to be regarded as a property guarantee nor does it explicitly state that it must be the measure of compensation that must be just.

332 Jacobs *Law of Compulsory Land Acquisition* 11; *Jenkins v Commonwealth* (1947) 74 CLR 400 at 404. This difference is explained in Jacobs *Law of Compulsory Land Acquisition* 299 with reference to Report number 14 of the *Australian Law Reform Commission, Lands Acquisition and Compensation* as follows:
"[T]hat validity depends upon the justness of the terms provided by the statute itself. The court does not ask whether the terms upon which a particular acquisition has been effected are in fact just[…]"

333 Jacobs *Law of Compulsory Land Acquisition* 309-314.

334 Section 25(2)(b) of the *Constitution*.

335 Where the constitution of a state does not expressly make provision for compensation to be paid upon compulsory acquisition, there is a presumption in favour of compensation. *Commonwealth v New South Wales* (1915) 20 CLR 54; *Commonwealth v New South Wales Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1 at 149; *Pye v Renshaw* (1951) 84 CLR 58; and *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399; all as referenced in Jacobs *Law of Compulsory Acquisition* 40.

event that the measure of compensation or the manner in which it is fixed does not amount to just terms, it will be struck down.[336]

When investigating the manner in which compensation is determined under Australian law with reference to the role of statutory valuation bodies, one must per implication look at the prescripts of the commonwealth and each state's compulsory acquisition legislation and the role played by that state's statutory valuation body. The influence which a valuation by a statutory valuation body under any Australian state's legislation can inform just terms for a compulsory acquisition by that state may provide persuasive authority to guide the interpretation of the *Property Valuation Act* and the role of the *Valuer-General* in the South African constitutional dispensation.

3.5.3 Institutional framework

3.5.3.1 Introduction

As per the explanation above, section 51(xxxi) of the *Constitution of Australia* provides for both the commonwealth government and each state to pass legislation providing for compulsory acquisition. Commonwealth legislation can only make provision for compulsory acquisition on just terms, with the legislation of individual states and self-governing territories generally following suit.[337] Although legislation of the Commonwealth, states and self-governing territories provide for similar processes to be followed, there are nuanced differences in the role which statutory valuation bodies play in determining the offer of compensation made to an expropriated owner as well as the influence which their valuations exert on the adjudication of compensation where disputes arise.

Despite the fundamental differences between the South African and Australian constitutions, it is assumed that the legislation of the Commonwealth and the

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336 Jacobs *Law of Compulsory Land Acquisition* 11; *Jenkins v Commonwealth* (1947) 74 CLR 400 at 404.

337 *Attorney-General v De Keyser's Royal Hotel* [1920] AC (HL) 508 at 542; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 as referenced in *Jacobs Law of Compulsory Land Acquisition* 306-307.

Australian states provide for procedures which adhere to the standard of just terms, as failure to do so would render them invalid. The role ascribed to statutory valuation bodies can therefore be used as persuasive authority[338] to guide the interpretation of the *Valuer-General's* role in determining compensation under the *Property Valuation Act* within the context of section 25 of the *Constitution*.

3.5.3.2 Pre-acquisition process and the role of statutory valuation bodies in the offer of compensation

As is the case under the South African *Expropriation Act*,[339] the acquiring authority under the various Australian legislation must notify the owner or affected right holder of its decision to acquire the property through compulsion. A notice to this effect is either delivered to affected parties or published in an official notice.[340] It is at this point that affected parties become entitled to compensation.

In most Australian compulsory acquisition legislation, the onus is on the owner or the holder of a mortgage bond to submit a claim for compensation to the expropriating authority.[341] In South Australia, Western Australia and Queensland,

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338 As per section 39(1)(c) of the *Constitution*, a court 'may' consider foreign law when interpreting the Bill of rights.

339 See s7 of the *Expropriation Act*.

340 The procedures differ slightly between legislation with s23 of the (hereafter referred to as the *Lands Acquisition Act*) requiring a pre-acquisition declaration followed by an acquisition notice under section 44; A similar process is followed in New South Wales through the Notice of intention to acquire land by compulsion and the notice of acquisition under s11 and s19 of the *Land Acquisition (Just Terms Compensation)* Act 22 of 1991 (hereafter referred to as the *NSW Act*); s10 and s16 of the *Land Acquisition Act of South Australia*; s6 and s19 of the *Land Acquisition and Compensation Act* 121 of 1986 (hereafter referred to as the *Victorian Act*); This is known as a 'notice to treat' under s11 of the *Land Acquisition Act of Tasmania* 102 of 2001 (hereafter referred to as the *Land Acquisition Act of Tasmania)* followed by a notice of acquisition in s18; In Queensland, a notice of intention to acquire is followed by a notice of resumption under section 7 and 12 of the *Acquisition of Land Act* 48 of 1967 (hereafter referred to as the *Queensland legislation*); Under section 170 and 177 of the *Lands Administration Act* 30 of 1997 (hereafter referred to as the *Western Australia Land Administration Act*) the government of Western Australia first serves a notice of intention to acquire followed by a Taking order; Section 42A of the *Lands Acquisition Act* 53 of 1979 (hereafter referred to as the *Northern Territory Legislation*) prescribes a notification of the proposal to acquire followed by a notice of acquisition under s46; Finally, ss 20 and 25 of the *Lands Acquisition Act* 42 of 1994 (hereafter referred to as the *ACT Act*) provide for the publication of a pre-acquisition notice and a notice requiring acquisition.

341 Section 67(1) of the *Lands Acquisition Act*; s36 of the *Land Acquisition Act of Tasmania*; s39 of the *NSW Act*; s19 of the *Queensland legislation*; Division 2 of Part 10 of the *Western Australia Land Administration Act*; Section 56 of the *ACT Act*.

separate reference may be made to claims where native title[342] or non-native title,[343] respectively, are extinguished. The *Northern Territory legislation* places the obligation on the expropriating authority to make an offer of financial compensation or alternative land where native title is extinguished but requires any other person with an interest in the land, to submit a claim.[344]

This process is followed either by the Minister accepting the claim or rejecting it and making a counter offer.[345] Should the land owner not be willing to accept the counter-offer, a variety of processes can ensue under different legislation, namely a second round of offers[346] and counter offers[347] and payment of the offer to the court until the amount can be decided upon in the case of South Australia.[348] In each offer, the owner or the acquiring authority, as the case may be, is obligated to provide an explanation as to how the amount was arrived at.[349] Such an explanation could conceivably be informed by a valuation but the Commonwealth, South Australian, Western Australian, Northern Territory and Tasmanian legislation does not explicitly refer to a statutory valuation body nor outline their role in the legislation.

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342 Section 13(5a) of the *Land Acquisition Act of South Australia* applies where native title as recognised under the *Native Title Act* 100 of 1993 is extinguished. Should there be a dispute about the existence of native to the to the land, the court is not empowered to decide upon the matter *meru moto* as the native title party has to make an application to the relevant authority for a native title claim and concomitant certificate; Section 23(4) of the *Land Acquisition Act of South Australia*; This can be compared with the *Northern Territory Legislation* where s50(1D)(d) does permit the Civil and Administrative Tribunal (created in terms of the *Northern Territory Civil and Administrative Tribunal Act* 28 of 2014) to inquire into the existence of native title where compulsory acquisition and the resolution of compensation is decided upon. Likewise, s4 and 4A of the *Queensland legislation* distinguishes between non-native title and native title under the *Native Title (Queensland) Act* 85 of 1993. Division 1, Subdivision 2 of Part 9 of the *Western Australia Land Administration Act* deal comprehensively with claims for the extinguishment of native title.

343 Section 15(5) of the *Land Acquisition Act of South Australia*.

344 Section 50 of the *Northern Territory Legislation*.

345 Section 70(1) of the *Lands Acquisition Act*; s39 of the *Land Acquisition Act of Tasmania*; Division 3 of Part 10 of the *Western Australia Land Administration Act*; ss 68 to 72 of the *Northern Territory Legislation*; s 59 of the *ACT Act*.

346 Section 75 of the *Lands Acquisition Act*.

347 Section 76 of the *Lands Acquisition Act*.

348 Section 23A of the *Land Acquisition Act of South Australia*.

349 Section 74(2); s75(b)(ii) and s75(1)(b) of the *Lands Acquisition Act*; s36(2)(c) of the *Land Acquisition Act of Tasmania*; ss 68 and 70 of the *Northern Territory Legislation*.

As with the aforementioned, the *Queensland legislation* does not ascribe any role to the *Valuer-General of Queensland*[350] as far as an offer of compensation is concerned. However, in the event that the property is no longer required by the acquiring authority within 7 years of the taking, the first offer to purchase must be made to the expropriated owner at an amount determined by the *Valuer-General of Queensland*.[351] It is interesting to note that the *Valuer-General of Queensland* does not have a statutory role in relation to determining an offer of compensation under compulsory acquisition, but can determine the offer when the land is disposed of in terms of an ordinary purchase and sale agreement. It is unclear whether one can draw the inference that the *Queensland Legislation* makes a distinction between 'compensation' for compulsory acquisition and the 'value' of the property where transfer takes place by means of a normal purchase and sale agreement. This is complicated by the fact that the measure of compensation prescribed by the *Queensland Legislation* is the value of the land plus consequential loss. In this regard the Act states

> Assessment of compensation
>
> (1) In assessing the compensation to be paid, regard shall in every case be had not only to the value of the land taken but also-
>
> (a) to the damage, if any, caused by any of the following-
>
> (i) the severing of land taken from other land of the claimant;
>
> (ii) the exercise of any statutory powers by the constructing authority otherwise injuriously affecting the claimant's other land mentioned in subparagraph (i)…
>
> (2) Compensation shall be assessed according to the value of the estate or interest of the claimant in the land taken on the date when it was taken. [352]

It is interesting to note that no role is prescribed for the *Valuer-General of Queensland* despite the measure of compensation prescribed being that of the property's value, with no reference made to normative factors such as justice, fairness or reasonableness.

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350 Established under the *Land Valuation Act* 39 of 2010.
351 Section 41 of the *Queensland Legislation*.
352 Section 20(1) and (2) of the *Queensland Legislation*.

The *Western Australia Land Administration Act* does not explicitly refer to a valuation by a statutory institution but it does require the claim for compensation to be scrutinised. In this regard section 217(1) requires "[…] the claim to be examined, and a report made as to the value of the interest as to which no dispute exists and as to the damage sustained by the claimant by reason of the taking".[353]

The terms 'examined' and 'report' are not defined in the Act, however when read with the *Valuation of Land Act*,[354] it becomes apparent that the report outlining the value of the interest acquired could well be compiled by the *Valuer-General of Western Australia*.[355] The *Valuation of Land Act* never makes direct reference to a report within the context of compulsory acquisition nor to the *Western Australia Land Administration Act*. However, section 39(1)(b) does permit the *Valuer-General of Western Australia* to conduct valuations of land for any authority which has functions relating to the acquisition of land. In this regard, the Act states

> Valuer-General may make valuations for Crown etc.
>
> (1) The Valuer-General may make valuations of land for, and provide valuation advice for-
>
> […]
>
> (b) any person, body or authority performing any public function which, under any written law-
>
> (i) has among his, her or its functions the power to acquire or dispose of land;[356]

Compulsory acquisition under the *Western Australia Land Administration Act* should satisfy these requirements as it is an authority performing a public function under law, which has the powers to acquire land through compulsion. It is therefore entirely possible that the acquiring authority can call upon the *Valuer-General of Western Australia* to compile a report on the value of the expropriated right, and that this report must be used to 'examine' the offer of compensation. In this context the *Valuer-General of Western Australia* merely offers a service to assist the state

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353 Section 217(1) of the *Western Australia Land Administration Act*.
354 74 of 1978.
355 Created by the *Valuation of Land Act* 74 of 1978.
356 Section 39(1)(a) of the *Valuation of Land Act* 74 of 1978.

in making an offer and does not replace the role of the state nor fix the amount it must offer as compensation.

The *NSW Act* follows largely the same pre[357] and post-acquisition process,[358] however, a salient difference is that the claim for compensation can either be submitted to the acquiring authority or directly to the *Valuer-General of New South Wales*.[359] Irrespective to whom the claim is submitted, the *NSW Act* seems to place the obligation on the shoulders of this institution to compile a valuation report (or have one commissioned)[360] and determine the amount that should be offered to the expropriated owner as compensation. In this regard, section 41 of the *NSW Act* reads as follows

> Valuer-General's determination of amount of compensation
>
> (1) The authority of the State must, within 7 days after it compulsorily acquires land, provide the Valuer-General with a list of the issues that the authority believes are relevant to the determination of the amount of compensation by the Valuer-General.
>
> (2) The Valuer-General may determine the amount of compensation to be offered to a former owner of land for a compulsory acquisition of the land:
>
> (a) before or after the acquisition takes effect; and
>
> (b) even though the former owner has not made a claim for the compensation.
>
> (3) The Valuer-General is to provide a copy of the determination of the amount of compensation (together with any report on the value of the land prepared by or for the Valuer-General) to:
>
> (a) the authority of the State concerned; and
>
> (b) the former owner to whom the compensation is payable.[361]

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357 See ss 42 to 53 of the *NSW Act*.

358 See ss 11 to 18 of the *NSW Act*.

359 The Valuer-General of New South Wales (hereafter the *Valuer-General of NSW*) is a statutory institution created by the *Valuation of Land Act* 2 of 1916; In the even that a claim is submitted to the expropriating authority, it must send a copy to the *Valuer-General of NSW* under s 39 (5)(a); A copy of the pre-acquisition notice must also be sent to the *Valuer-General of NSW* under s 18.

360 Section 41(3) of the *NSW Act*.

361 Section 41 of the *NSW Act.*

The clause refers to a "determination"[362] of the amount of compensation, as does clause 47.[363] On the face of it this wording would appear to provide the *Valuer-General of NSW* with binding powers to set the offer, however case law seems to indicate otherwise. In *Dan Wei Zheng v Roads and Maritime Services,*[364] The New South Wales Land and Environmental Court referred to the offer made by the acquiring authority on the advice of the *Valuer-General of NSW*, it was referred to as "[t]he compensation determined by RMS on Valuer General['s] advice was in the sum of […]". It therefore does not seem as if the *NSW Act* prescribes a peremptory role for the *Valuer-General of New South Wales* to determining the offer of compensation for compulsory acquisition. It rather acts in an advisory capacity only. It is still the acquiring authority which determines the offer made to the expropriated owner, not the *Valuer-General of New South Wales*.

It is further worth noting that the acquiring authority's offer can differ from the advice of the *Valuer-General of NSW.* In *Dan Wei Zheng v Roads and Maritime Services*[365] the applicant disputing the offer was the expropriated owner, but the breakdown of the acquiring authority's offer never-the-less differed from the valuation conducted by the *Valuer-General of NSW.*[366] Differences included key aspects such as the market value[367] and loss as a result of disturbance,[368] both of which are amounts that could be quantified by a statutory valuation body such as the *Valuer-General of NSW*. This reaffirms the notion that the *Valuer-General of*

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362 Section 41 of the *NSW Act*.

363 This relationship between the *Valuer-General of NSW* and the expropriating authority is made even more explicit in s 47 of the *NSW Act* where it is stated
"The Valuer-General is to determine the amount of compensation to be offered to a person under this Part."
As well as s 42(1) where it is stated
"An authority of the State which has compulsorily acquired land under this Act must, within 45 days after publication of the acquisition notice, give the former owners of the land written notice of the compulsory acquisition, their entitlement to compensation and the amount of compensation offered (as determined by the Valuer-General)."(underlining for own emphasis).

364 [2017] NSWLEC 77 at para 7.

365 [2017] NSWLEC 77 at para 7.

366 *Dan Wei Zheng v Roads and Maritime Services* [2017] NSWLEC 77 at para 10.

367 As required by s 55(a) of the *NSW Act*.

368 As required by s 59(a) to (e) of the *NSW Act*.

NSW renders a service to the acquiring authority as required by statute, but that its determination is not binding on the authority.

Similarly, the legislation of Victoria[369] clearly indicates that it is the expropriating authority that determines the amount of compensation offered[370] but it must have "regard"[371] for a valuation of the land carried out by the *Valuer-General of Victoria*.[372] This function can also be performed by an independent valuer who holds the required qualifications or experience as required by the *Victorian Valuation of Land Act.* In this regard, section 31 (3) and (5) state

> The offer must set out the amount that the Authority, on the information available to it, has *assessed as a fair and reasonable estimate of the amount of compensation* [own emphasis] payable to the claimant under this Act on the assumption that the claimant held the interest in respect of which the offer is made.
>
> […]
>
> In making the offer the Authority must have regard to a valuation of the land carried out by the Valuer-General or a person who holds the qualifications or experience specified under section 13DA(2) of the Valuation of Land Act 1960.[373]

A copy of this valuation must accompany the offer.[374]

While it is not exactly clear what is meant by having "regard"[375] to a valuation, it does seem as if the Government of Victoria has a degree of discretion in applying factors not contained in the valuation. The semantics of section 31(3) may be significant as the expropriating authority in Victoria can "assess […] what it believes is a fair and reasonable estimate"[376] based on all the information available to it. By virtue of section 31(5) this information must include a valuation conducted by the *Valuer-General of Victoria* but the Act does not seem to limit the information which can be considered by the authority to merely the valuation. This indicates that the

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369 In terms of the Victoria Act.
370 Section 31(3) of the *Victoria Act*.
371 Section 31(5) of the *Victoria Act*.
372 Created by the *Valuation of Land Act* 6653 of 1960 (hereafter referred to as the *Victorian Valuation of Land Act* and the *Valuer-General of Victoria)*.
373 Section 31(3) & (5) of the *Victoria Act*.
374 Section 31(4) (a) of the *Victoria Act*.
375 Section 31(5) of the *Victoria Act*.
376 Section 31(3) & (5) of the *Victoria Act*.

acquiring authority can apply its discretion and offer an amount which it deems fair and reasonable considering all the information available to it. Such an amount could differ from the amount at which the property was valued by the *Valuer-General of Victoria*. To put it bluntly, the expropriating authority does not need to simply rubber-stamp the valuation conducted by the *Valuer-General of Victoria*, but can apply its mind to other factors and offer an amount that is fair and reasonable.

Likewise, the law in Tasmania[377] is less explicit and does not state that the *Valuer-General of Tasmania* must determine the offer. However, its approval is required before the acquiring authority can accept or reject a claim for compensation submitted by an expropriated owner or make a counteroffer.

Although the exact role of the Valuer-Generals differs in the legislation of each state or territory, it seems clear that these institutions are relied upon to a great extent by acquiring authorities when formulating an amount to offer as compensation. In drawing comparisons between Australian states and the role which the *Valuer-General* plays in South African law, it must be borne in mind that the factors used to determine compensation in Australia are largely aimed at determining market value, plus an amount to compensate for loss and disturbance incurred as a result of the compulsory acquisition.

3.5.3.3 Determination of compensation

The Commonwealth's powers to compulsory acquire land are restricted by the *Constitution of Australia* to acquisition on just terms.[378] This is a peremptory requirement[379] and as a result the compensation offered under compulsory acquisition legislation must meet this requirement. In this regard, the *Lands Acquisition Act* obligates the Commonwealth government to compensate an affected

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377 Section 40(8) of the *Land Acquisition Act of Tasmania*.

378 Section 51(xxxi) of the *Constitution of Australia*.

379 In *King v Minister for Planning and Housing* [1993] 1 VR 159; (1991) LGRA 288 it was held that a provision which provides for a an additional 20% to be awarded as solatium would not be constitutional as a blanket approach is not in line with the just terms requirement. *Ironhill Pty Ltd v Transgrid Ironhill Management Pty Ltd v Transgrid* [2004] NSWLEC 700 at para 29, 30; Jacobs *Law of Compulsory Land Acquisition* 160.

party an "amount […] [that], having regard to all relevant matters, will justly compensate the person for the acquisition.".[380]

The Act goes on to specify that all relevant matters should be considered in assessing the compensation, including the market value, any additional financial benefit derived by the owner from the property, an amount for disturbance and solatium,[381] reasonable reimbursement for legal and professional fees[382] and in the event that the acquired right is severed from other property interests the value of any loss incurred by the reduction in value of that remaining right in property.[383] In other words, just compensation has been interpreted by the legislature as market value plus an amount to compensate for loss and disturbance incurred as a result of the compulsory acquisition.

Although the states and self-governing territories are not bound by the just terms requirement,[384] their compulsory acquisition legislation mostly provides for market-related compensation. The *NSW Act* makes provision for compensation to be based on comparable sales plus compensation for solatium, disturbance, severance and costs incurred.[385] A special provision also guarantees that compensation may not be less than market value.[386] The same aspects are taken into consideration in Victoria[387] although no express market value guarantee is included nor does the legislation prohibit unlisted factors from being considered.[388] South Australian[389] legislation states that the affected owner must be 'adequately' compensated while an expropriated owner in the Australian Capital Territory must receive an amount which "justly"[390] compensates him. No express provision is made for compensation

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380 Section 55(1) of the *Lands Acquisition Act*.
381 Section 55(2)(c) of the *Lands Acquisition Act*; Director, Land Operations and Public Works, Special Claims and Land Policy Branch 2011.
382 Section 55(2)(e) of the *Lands Acquisition Act*; Director, Land Operations and Public Works, Special Claims and Land Policy Branch 2011.
383 Section 55(2) of the *Lands Acquisition Act*.
384 Jacobs *Law of Compulsory Land Acquisition* 298.
385 Section 55 of the *NSW Act*.
386 Section 3(1)(a) of the *NSW Act*.
387 Section 41 of the *Victorian Act*.
388 *Roads Corporation v Love* (2010) 179 LGERA 113; [2010] VSC 537 at para 153.
389 Section 25(1)(a) of the *Land Acquisition Act of South Australia*.
390 Section 45 of the *ACT Act*.

on just terms in Queensland, Western Australia, Tasmania and the Northern Territory,[391] however, the courts have developed a presumption in favour of just compensation.[392]

Despite differences in legislation, the prominence of statutory valuation bodies in determining offers of compensation in Australia could be attributed to the general trend of market-related compensation. The Valuer-Generals of the various states and territories have a wider function than their South African counterpart as they are primarily responsible for compiling valuation roles against which property taxes can be levied by local governments. As in South Africa, property rates are determined as a function of a property's market value. Where offers of compensation for compulsory acquisition are also based largely on market value, it seems convenient to use the same statutory valuation authority. The role of statutory valuation bodies in Australia does seem more complicated where compulsory acquisition legislation provides for compensation in kind to be paid in lieu of financial compensation.

3.5.3.4 Role of a statutory valuation body *vis-à-vis* compensation in-kind

In Tasmania, Western Australia and Queensland, the expropriated owner can also obtain suitable, alternative land in lieu of market-value compensation.[393] In Queensland,[394] all that is required is for the acquiring authority and the claimant to agree but in Tasmania, the consent of the *Valuer-General of Tasmania*[395] is also required. This is the only example where the claimant needs to obtain the consent of the *Valuer-General of Tasmania* before submitting a claim. In essence, the *Valuer-General of Tasmania* determines the value of the expropriated property and the

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391 Jacobs *Law of Compulsory Land Acquisition* 290.

392 *Attorney-General v De Keyser's Royal Hotel* [1920] AC (HL) 508 at 542; *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate* [1965] AC 75 as referenced in Jacobs *Law of Compulsory Land Acquisition* 306, 307.

393 Section 27(1)(d) of the *Land Acquisition Act of Tasmania*; s 21 of the *Queensland Legislation*; s 212 of the *Western Australia Lands Administration Act* 30 of 1997.

394 In the absence of an agreement, the Land Court in Queensland may determine the suitability of the alternative land as compensation; s 21(2) of the *Queensland Legislation*.

395 Established by the *Valuation of Land Act* 102 of 2001 (hereafter referred to as the *Valuer-General of Tasmania*).

value of comparable alternative land to ensure that the settlement constitutes just compensation. Once the *Valuer-General of Tasmania* is satisfied, the agreement binds the expropriating authority. It does still not amount to a determination by the *Valuer-General of Tasmania* in the absence of agreement.

The *Land Acquisition Act of South Australia* makes express reference for the payment of non-monetary compensation.[396] Although it is not an exhaustive list, the examples provided in the Act include "a transfer of land, the provision of goods or services, or the carrying out of work for the re-instatement or improvement of land remaining in the claimant's ownership after the acquisition".[397]

Such in-kind compensation need not be a full set-off, as compensation can seemingly include a combination of cash and in-kind compensation.[398]

In the event of non-monetary compensation, the scope for a determination by a statutory valuation institution such as a Valuer-General would logically be absent. The *Land Acquisition Act of South Australia* does however only refer to non-monetary compensation in the context of negotiations between the expropriating authority and the expropriated owner or native title party, whichever the case may be. This indicates that compensation in-kind is only intended where the parties reach an agreement to this effect. It should therefore not detract from any possible role which a statutory valuation body or Valuer-General can play in determining compensation where there is a dispute.

Section 27(1)(d) of the *Land Acquisition Act of Tasmania* likewise refers to "the betterment of other land belonging to the claimant"[399] as a result of the public purpose for which the compulsory acquisition takes place, to be considered when determining the compensation payable.[400] In the event that the value of the

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396 Section 34(4) of the of the *Land Acquisition Act of South Australia*.
397 Section 34(4) of the of the *Land Acquisition Act of South Australia*.
398 Section 34(6) of the of the *Land Acquisition Act of South Australia* states that the authority's obligation to pay compensation is proportionally reduced by the value of the non-monetary compensation, which indicates that a combination of both is possible.
399 Section 27(1)(d) of the *Land Acquisition Act of Tasmania*.
400 Section 27(1) of the *Land Acquisition Act of Tasmania*.

betterment exceeds the entitlement to compensation, the compensation is fully set-off and the owner cannot incur an obligation to compensate the state for the betterment.[401]

Unlike the non-monetary compensation under the *Land Acquisition Act of South Australia*, where the parties actively agree to the form of the in-kind compensation, the *Acquisition Act of Tasmania* simply makes provision for compensation to be off-set against any financial benefit that the affected owner may passively receive as a result of the scheme under which the compulsory acquisition was pursued. This could be seen as a form of compensation in-kind, however, this is not a separate agreement but a factor to be considered when determining compensation per agreement or under any of the dispute resolution mechanisms provided for in that Act. It would therefore not *ipso facto* exclude the role of a valuer.

3.5.3.5 Discussion on the difference between value and compensation in the Australian law of compulsory acquisition

While there are various permutations between the state's legislation as to what should and should not be considered in offers of compensation, it remains unclear whether Australian law recognises a distinction between the concepts of 'value' and 'compensation'.

The New South Wales Supreme Court stated *obiter* that the purpose[402] of section 54 to 56 of the *NSW Act* is to

> create a complete and exclusive basis for determinations [of compensation] and in so far as matters considered by Isaacs J [in Spencer v Commonwealth (1907) 5 CLR 418 at 422] to be appropriate in determining the value of land are either in conflict with or additional to the criteria set out under the Act they are, in my view, irrelevant.[403]

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401 Section 27(3) of the *Land Acquisition Act of Tasmania*.

402 Jacobs *Law of Compulsory Land Acquisition* 292.

403 This passage was quoted by Jacobs *Law of Compulsory Land Acquisition* 292 and cited as follows: *Council of the City of Gosford v Cunningham*, Valuer-General (NSW) (Unreported, NSW Sup Ct, 26 March 1996) at 31, 32.

From this excerpt, it seems clear that the judiciary deems all considerations other than those which would assist the court in determining the value of the land irrelevant. This is amplified by the fact that the *NSW Act* limits the considerations to "the following matters only",[404] which includes market value plus an amount to set off loss due to severance and disturbance. The *NSW Act* has therefore been interpreted to exclude any considerations which do not relate directly to the value of the land. In NSW, the concept of compensation therefore directly equates to value. A similar construction is entirely feasible for the legislation of most states and territories in Australia as the measure of compensation is likewise aimed at market value. Under these circumstances, it is logical that a statutory valuation entity should play a prominent role in determining the offer of compensation as the compensation due to the owner and the value of the land is one and the same.

One notable exception can be found in the legislation of *Victoria.* The *Victorian Act* requires the authority to offer an amount which is "fair and reasonable",[405] based on all of "the information available".[406] In the case of *Roads Corporation v Love,*[407] the Supreme Court of Victoria contrasted the *Victoria Act* and the *NSW Act.* It held that the concept of compensation provided for a wider and more inclusive formulation than that of the *NSW Act.* In this regard the court stated

> The inclusion of the word "only" in s 55 in the NSW legislation requires that "the amount of compensation" must be assessed under that statute *only* by reference to the listed matters which follow. The equivalent provision in Victoria, however, provides a broader notion of "compensation" by providing for an inclusive, regime as follows:
>
> […]
>
> In adopting this construction of s 43(1)(a) of the LAC, I bear in mind the duty of the Court to give effect to the purpose of the legislation by applying the ordinary and natural meaning of its words as the primary guide to the understanding of that purpose, and I also bear in mind that s 56(1)(a) of the NSW legislation considered by the High Court in *Walker Corporation,* is materially different to the Victorian in the manner I have described. I also bear in mind that the concept of

404 Section 55 of the *NSW Act*.
405 Section 31(3) of the *Victoria Act*.
406 Section 31(3) of the *Victoria Act*.
407 [2010] VSC 537.

"compensation" in the Victorian Act, provides greater scope than its NSW counterpart.[408]

The court draws a clear comparison with the *NSW Act* and refers to the "concept of compensation",[409] as opposed to the value of land under the *NSW Act*. This "inclusive, regime"[410] also seems closer to the formulation of just and equitable compensation under the South African *Constitution*.[411]

Where the *Victorian Act* requires the authority to offer an amount which is fair and reasonable, based on all of the information available to it,[412] section 25 of the *Constitution* makes provision for just and equitable compensation "having regard to all relevant circumstances".[413] The *Victoria Act* explicitly states that the acquiring authority must have regard to the valuation conducted by the *Valuer-General of Victoria*,[414] whilst section 25 includes the market value as one of the factors that may be considered.[415] Just as Du Plessis argues[416] that the South African *Constitution* makes a distinction between the concepts of value and compensation, one can argue that the same elements are present in the *Victoria Act.*

It is therefore of special significance that the *Victoria Act* can still ascribe a role to a valuation conducted by the *Valuer-General of Victoria*. This point can be explored in more detail as it could serve as an example to further guide our interpretation of the *Valuer-General's* role under *Property Valuation Act vis-à-vis* the determination of compensation in South Africa.

The *Constitution* and the *Expropriation Act* refers to market value as a consideration but is silent on whom the market value is determined by. In contrast, the *Victoria*

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408 *Roads Corporation v Love* [2010] VSC 537 at paras 154 – 156.
409 *Roads Corporation v Love* [2010] VSC 537 at para 154.
410 *Roads Corporation v Love* [2010] VSC 537 at para 154.
411 There are of course several differences between these provisions, most notably that the former is only used to inform the offer of compensation while the latter is the peremptory standard for compensation in South Africa, but the similarities are compelling.
412 Section 31(3) of the *Victoria Act*.
413 Section 25(3) of the *Constitution*.
414 Section 31(5) of the *Victoria Act*.
415 Section 25(3)(c) of the *Constitution*.
416 Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" 191-221.

Act explicitly refers to the State's Valuer-General. These differences, however, are negated to some extent considering the role which the *Property Valuation Act* prescribes for the *Valuer-General,* the centrality of market value in the application of section 25 of the *Constitution* as well as the calculation of compensation under the *Victoria Act*.

The measure of compensation as prescribed[417] in the *Victoria Act* is largely based on market value, plus any special value of the property to the claimant, consequential loss as a result of severance, disturbance[418] and expenses incurred by soliciting professional advice in relation to the compulsory acquisition. While market value is not supposed to enjoy an eminent status above any other considerations,[419] it is to some extent comparable as the methodology adopted in the *Du Toit case* does seem to place undue emphasis on market value in the calculation of just and equitable compensation,[420] although substantial criticism has been levelled against this approach.[421]

As far as the role of a statutory valuation body is concerned, unlike the *Victoria Act,* section 25 of the *Constitution* does not make any explicit reference to the *Valuer-General*. Section 25, however, is contained within the Bill of Rights and not ordinary legislation. A more appropriate comparison would be between section 31 of the *Victoria Act* and primary legislation in South Africa. Section 12(1) of the *Property Valuation Act* makes provision for the *Valuer-General* to determine the value of land identified for land reform, however, acquisition may not be limited to expropriation.

We now have clarity following the *Moloto* and *Emakhasaneni cases* that the mode of acquisition will have little bearing on the quantum where the court is required to

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417 Section 41 of the *Victoria Act*.

418 'Disturbance' as prescribed by s41(1)(d) of the *Victoria Act* is comparable to *solatium* under the *Expropriation Act*.

419 In *Du Toit* at para 37.

420 *Ex Parte Former Highland Residents; In Re; Ash v Department of Land Affairs* [2000] 2 All SA 26 (LCC); Du Plessis "How the Determination of Compensation Is Influenced by the Distinction between the Concepts of 'Value' and 'Compensation'" 196, 197; Van Wyk 2017 *TSAR* 21.

421 See Du Plessis "How the Determination of Compensation Is Influenced by the Distinction between the Concepts of 'Value' and 'Compensation'" 196, 197; Van der Walt 2005 *SALJ* 765; Van Wyk 2017 *TSAR* 26.

calculate compensation under the *Restitution Act.* It is still unclear exactly what the role of the *Valuer-General* would be where the state negotiates to purchase land for reform or initiates expropriation proceedings under the *Expropriation Act*. It may well be that a link is implied. There certainly seems to be support for this intention in the wording of the *Green Paper*[422] and the arguments made by the state in *Moloto* and *Emakhasaneni.* However, there is no cross reference made in the *Expropriation Act.* Although the context could differentiate this situation from the facts of the *Emakhasaneni case*, the court did note that the *Property Valuation Act* would not prevent the Minister from making an offer which exceeds the valuation.[423] The interpretation could well apply when the state negotiates or initiates expropriation proceedings and negotiations to take place outside of the court proceedings. Although the offers may not be binding, it is unlikely that it could be disregarded completely. To do so would render the obligation in the *Property Valuation Act* to value land identified for land reform superfluous, which could in turn offend the presumption against superfluous legal provisions. The answer likely lies somewhere in between these extremes and, in this regard,, the *Victoria Act* could be useful to aid our interpretation.

3.5.4 Determination of compensation in the absence of an agreement

Where no agreement can be reached on the amount of compensation, the Commonwealth as well as the various states' legislation makes provision for a wide variety of mechanisms to either settle disputes or adjudicate on the amount of compensation before recourse is sought to the formal court processes. Despite the variance that exists between the legislation of the Commonwealth and the various states, the procedures contained all broadly fall within the ambient of just terms as prescribed by section 51(xxxi) of the *Constitution of Australia* and should therefore be considered in so far as it could provide guidance on the interpretation of the *Valuer-General's* possible role under the *Property Valuation Act* where no agreement can be reached on compensation for expropriation. It is worth investigating each

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422 See point 6.6.2 of the *Green Paper* as discussed in Chapter three.
423 Emakhasaneni case at para 35.

mechanism, and more specifically the role of a statutory valuation body in the adjudicative process, to determine whether there is international precedence for a statutory valuation body to play any role in the adjudication of compensation upon expropriation.

Under the Commonwealth *Lands Acquisition Act,* an expropriated owner is afforded three choices when he rejects the offer of compensation made by the acquiring authority, namely to review the Minister's offer by the Administrative Appeals Tribunal,[424] to have the compensation determined by Federal Court,[425] by arbitration or an expert.[426] It is significant to note that an owner is allowed to choose between the various options catered for in the Act to determine compensation, but once a decision has been made, he is bound to the outcome and cannot have recourse to any of the other avenues if he is unsatisfied by the outcome.[427]

3.5.4.1 Review by administrative tribunals

One of the options offered by the *Lands Acquisition Act* is to review the offer made by the Minister under section 81.[428] Unlike South Africa where there is a constitutional right to review all government conduct amounting to administrative action,[429] the basis of administrative review in Australia is founded on the "common law principles of 'natural justice'",[430] a type of procedural fairness guarantee either

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424 Section 81 of the *Lands Acquisition Act*.

425 Section 82 of the *Lands Acquisition Act*.

426 Section 80 of the *Lands Acquisition Act*.

427 Section 83 of the *Lands Acquisition Act* states
"(1) A person who has, under Division 4, accepted an offer of compensation is not entitled, in respect of the acquisition to which the offer relates;
(a) to accept another offer of compensation;
(b) to enter into an agreement under section 80;
(c) to make an application under section 81; or
(d) to institute proceedings under section 82.".

428 Of the *Lands Acquisition Act*.

429 Section 33(3)(a) of the *Constitution* states that
"(3) National legislation must be enacted to give effect to these rights, and must-
(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal";
This was further given effect to by the provisions of the *Promotion of Administrative Justice Act* 3 of 2000.

430 Asimow and Lubbers 2010 *Windsor Y B Access Just* 263.

developed by the courts or provided for by statute.[431] The administrative bodies of various states and territories in Australia are therefore largely creatures of statute, with the scope, composition and powers of each determined by its empowering provisions.

Under the Commonwealth *Lands Acquisition Act*, an affected party entitled to compensation can elect to have the authority's offer of compensation reviewed by the Administrative Appeals Tribunal.[432] The tribunal is empowered to confirm the offer made by the Minister to substitute it with its own amount[433] which will then be final and binding on the parties.[434] It is not a specialist tribunal for compulsory acquisitions, but rather a generalist body[435] created by the *Administrative Appeals Tribunal Act*[436] that can review any matter to the extent that there is an empowering provision in statute permitting it to do so.[437] Taking this into consideration, it can be argued that the Administrative Appeals Tribunal's role in determining compensation is more akin to that of a specialist court than administrative review when compared to the South African context. In Australia, the Administrative Appeals Tribunal can "examin[e] whether a decision is substantively correct, after consideration of all relevant issues of law, fact, policy and discretion".[438]

This stands in stark contrast to administrative review in the South African law where the rounds of review are restricted to an inquiry into whether the action was lawful, reasonable or procedurally fair.[439] The powers of the Administrative Appeals Tribunal in deciding upon the merits when determining compensation is more akin to those of the Land Claims Court in South Africa and indeed the Tribunal operates similar to a court in that parties are entitled to a "formal adversarial proceeding"[440] where

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431 Asimow and Lubbers 2010 *Windsor Y B Access Just* 263.
432 Section 71 of the *Lands Acquisition Act*.
433 Section 81(4) of the *Lands Acquisition Act*.
434 Section 82(5) of the *Lands Acquisition Act*.
435 Asimow and Lubbers 2010 *Windsor Y B Access Just* 263-267.
436 91 of 1975 (hereafter referred to as the *Administrative Appeals Tribunal Act*).
437 Section 25(1) of the *Administrative Appeals Tribunal Act* read with s 81 of the *Lands Acquisition Act*.
438 Creyke and McMillan *Control of Government Action: Text, Cases and Commentary* 144-179 as referenced in Asimow and Lubbers 2010 *Windsor Y B Access Just* 263.
439 See the *Promotion of Administrative Justice Act* 3 of 2000.
440 Asimow and Lubbers 2010 *Windsor Y B Access Just* 266.

evidence is led and assessed. This avenue should therefore simply be seen as a cost-effective approach to determine compensation by an administrative tribunal as opposed to resorting to a court of law in the first instance. A party can still appeal a decision of the Administrative Appeals Tribunal to a federal court but only where a question of law arises.[441]

The *ACT Act* makes provision for a very similar process in that the claimant can apply for the final offer of the acquiring authority to be reviewed[442] by the Administrative Appeals Tribunal of the Australian Capital Territory.[443] No role seems to be envisioned for a statutory valuation body as the *ACT Act* simply allows the Tribunal to confirm or vary the offer made by the acquiring authority as the final amount of compensation. In this regard section 67(4) states

> On the application, the Tribunal may exercise all the powers and discretions conferred by this Act on the Executive in making the final offer of compensation and shall make a decision –
>
> (a) affirming the final offer of compensation made by the Executive; or
>
> (b) varying the final offer of compensation made by the Executive.[444]

As with the commonwealth legislation, the claimant is deemed to waive all other dispute resolution options, including a settlement agreement with the state, if the matter is referred to the Tribunal.[445]

In Western Australia, where the state and the expropriated owner fail to reach agreement through the process of claims, offers, counter claims and counter offers,[446] either party can apply for the matter to be heard by the State Administrative Tribunal.[447] The Tribunal has a wide range of powers and can act as

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441 Section 44(1) of the *Administrative Appeals Tribunal Act*; Asimow and Lubbers 2010 *Windsor Y B Access Just* 266.

442 Section 67 of the *ACT Act*.

443 Created in terms of the *Administrative Appeals Tribunal Act* 51 of 1989; this was later repealed and replaced by the Civil and Administrative Tribunal which exercises the same powers under the *Civil and Administrative Tribunal Act* 35 of 2008.

444 Of the *ACT Act*.

445 Section 68 of the *ACT Act*.

446 See ss 217 to 220 of the *Western Australia Land Administration Act*.

447 Created by the *State Administrative Tribunal Act* 45 of 2004.

a mediator,[448] review administrative decisions[449] as well as make binding decisions where allowed by statute.[450] Decisions of the Tribunal can be appealed to the Supreme Court of Western Australia.[451] Where either party requests the amount of compensation to be determined by the Tribunal, a unique provision in the *Western Australia Land Administration Act*[452] allows each party to appoint an 'assessor' to the bench to assist the presiding member. In this regard, the Act states

> Constitution of SAT for compensation claims
>
> (1) Except as otherwise stated in this section, when the State Administrative Tribunal is dealing with a claim for compensation under this Part, it is to be constituted by-
>
> (a) a judicial member or a senior member who is a qualified person; and
>
> (b) the person appointed as an assessor by the claimant; and
>
> (c) the person appointed as an assessor by the acquiring authority.[453]

The Act does not define the term 'assessor', nor does it outline the skills or experience required. However, there is nothing in the Act which prevents this person being a valuer. The *State Administrative Tribunal Act* furthermore allows the Tribunal to appoint "a legal practitioner, or any other person with relevant knowledge or experience"[454] to assist the Tribunal. In the case of compulsory acquisition, such a person could be a valuer or a person with specialised knowledge akin to the 'expert' under section 80 of the Commonwealth *Lands Acquisition Act.*

In a similar manner, the Administrative Appeals Tribunal and the State Administrative Tribunal, the *Northern Territory Legislation* makes provision for the compensation to be determined by the Northern Territory Civil and Administrative Tribunal.[455] Once again, either party may refer the matter to the Tribunal in the

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448 Section 54 of the *State Administrative Tribunal Act* 45 of 2004.
449 Part 3 subdivision 3 of the *State Administrative Tribunal Act* 45 of 2004.
450 See Division 4 of the *State Administrative Tribunal Act* 45 of 2004.
451 Section 105 of the *State Administrative Tribunal Act* 45 of 2004.
452 At s 226.
453 Section 226 of the *Western Australia Land Administration Act*.
454 Section 64 of the *State Administrative Tribunal Act* 45 of 2004.
455 Section 81 of the *Northern Territory legislation*.

event that they do not agree with the claim or the offer[456] and the Tribunal has the discretion to decide on the amount of compensation by ordering an "instrument of determination".[457]

No reference is made to a valuation, nor is explicit reference made to a statutory valuation body. The Tribunal is simply required to make a determination in accordance with the Schedule to the Act which states that the award must be an "amount that fairly compensates the claimant for the loss he has suffered".[458] Once again, assessors may be appointed to assist the tribunal. However, unlike Western Australia where the parties nominate the assessors,[459] it is the president of the Tribunal who nominates the assessors "only if the President is satisfied the person holds suitable qualifications, or has suitable knowledge or experience for the proceeding".[460] The Act does not elaborate any further, but such an assessor could well be a valuer, although no reference is made to a statutory valuation body.

Similar institutions exist in both Victoria[461] and South Australia.[462] When reviewing a valuation by the *Valuer-General of Victoria*, the Supreme Court of Victoria was very clear in the case of *ISPT Pty Ltd v Melbourne City Council & Another*[463] that the Victorian Civil and Administrative Tribunal sits, in that instance, as an expert tribunal

> The functions of the Land Valuation List of VCAT are allocated to the Tribunal by a variety of enabling Acts of Parliament. In general, it might be said that these functions are related to the specialist function of the valuation of land. For this reason the personnel of the list comprises a small number of lawyers who have a knowledge of the principles of administrative review processes and experience in land valuation matters together with members who are property qualified as valuers of land and each of whom has considerable experience in land valuation. […] For the above reasons we consider it is clear that in exercising its functions of review under the *Land Valuation Act 1960* the Tribunal, when constituted by both legally qualified persons and qualified valuers or by qualified valuers alone, is an expert tribunal.[464]

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456 Section 71 of the *Northern Territory legislation*.
457 Section 82 of the *Northern Territory legislation*.
458 Schedule 1 clause 1 of the *Northern Territory legislation*.
459 Section 226 of the *Western Australia Land Administration Act*.
460 Section 73 of the *Northern Territory Civil and Administrative Tribunal Act* 28 of 2014.
461 Created by the *Victorian Civil and Administrative Tribunal Act* 53 of 1998.
462 Created by the *South Australian Civil and Administrative Tribunal Act* 59 of 2013.
463 [2008] VSCA 180; 20 VR 447.
464 at para 16.

On this basis, the court condoned the Tribunal using its own skills and knowledge to decide on the correct valuation opposed to merely accepting or rejecting the evidence placed before it.[465] The tribunal is only able to do so when it is properly constituted with the right expertise. The judge also went on to state that this would not be proper in the event that a tribunal only consists of a legal expert sitting alone.[466] As a result of its specialised composition, a specialist administrative tribunal charged with the determination of compensation can even go so far as to conduct a valuation *meru moto* if it determines that the valuations placed before it do not meet the standard of compensation as prescribed by any compulsory acquisition legislation. This is in stark contrast with the courts which can only assess the evidence placed before it as it is not an expert body with specialised skills in valuation. In this regard the court in *ISPT Pty Ltd v Melbourne City Council & Another* stated

> It may be that an expert tribunal is in a different position; and the tribunal's role in conducting a review is subtly different to a body such as the Supreme Court. I would think that the tribunal may suggest an approach not taken by any valuer called to give evidence and, subject to hearing the parties and affording them natural justice, then adopt that approach.[467]

3.5.4.2 Determination of compensation by arbitration

Under the Commonwealth legislation, the determination of compensation by arbitration is to some extent comparable to the Administrative Appeals Tribunal in that the amount of compensation is determined by an administrative body, which does not necessarily have specialist knowledge of valuation practices or the calculation of compensation for compulsory acquisition. The arbitrator acts as an adjudicator and his determination is binding on the parties.[468] The only notable difference is that compensation can only be determined by arbitration where both

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465 In this regard the court in *ISPT Pty Ltd v Melbourne City Council & Another* [2008] VSCA 180; 20 VR 447 stated at para 21 "Of course it is accepted that a specialist tribunal should not be prevented from using its acquired technical expertise in the resolution of a dispute before it."

466 *ISPT Pty Ltd v Melbourne City Council & Another* [2008] VSCA 180; 20 VR 447 stated at para 19.

467 *ISPT Pty Ltd v Melbourne City Council & Another* [2008] VSCA 180; 20 VR 447 at para 24.

468 Section 80(2) of the *Lands Acquisition Act*.

parties agree to this process.[469] Tasmania likewise makes provision for the parties to agree that the compensation be determined by arbitration.[470] The arbitration award is binding on the parties and may only be set aside by a court if it can be shown that a party to the proceedings lacked sufficient capacity or if there was some procedural irregularity in the arbitration process.[471]

The Commonwealth legislation also allows compensation to be determined by an "expert".[472] This term is not defined in the Act, so it is difficult to know exactly what expertise are referred to and whether this would include a statutory valuation office. The official guideline document released by the Commonwealth Government[473] provides some guidance in this regard where it states

> An 'expert' is someone expert in the determining the value of the particular kind of land in question- for example, if your poultry farm is to be acquired, you could choose an expert in valuation of poultry farms to deal with the matter. No time limit has been imposed on the approach to an arbiter or an expert. [474]

This passage is quite telling as it clearly indicates that a valuer may be regarded as an expert, especially where he or she has specialist knowledge of a specific kind of property. As is the case with an arbiter, the determination of an expert is final and binding on the parties.[475] In this instance then, a valuer is legally empowered to fix the amount of compensation to which an expropriated owner is entitled.

A similar provision in the Tasmanian Law provides for the parties to agree that a compensation dispute may be determined by a "Special Arbitrator".[476] A Special Arbitrator[477] is appointed solely for the purpose of settling disputes relating to

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469 Section 80(1) of the *Lands Acquisition Act*.
470 Section 42(1)(b) of the *Land Acquisition Act of Tasmania*.
471 Section 34 of the *Commercial Arbitration Act* 13 of 2011.
472 Section 80 of the *Lands Acquisition Act*.
473 Director, Land Operations and Public Works, Special Claims and Land Policy Branch 2011.
474 Director, Land Operations and Public Works, Special Claims and Land Policy Branch 2011.
475 Section 80(2) of the *Lands Acquisition Act*.
476 Section 42(1)(c) of the *Land Acquisition Act of Tasmania*.
477 This should not be confused with s 42(1)(c) of the *Land Acquisition Act of Tasmania*, which makes provision for compensation to be decided by a non-specialist under the procedures set out for arbitration of a generalist nature under the *Commercial Arbitration Act* 13 of 2011 of Tasmania.

compulsory acquisition in Tasmania[478] and is appointed by virtue of his experience in the assessment of compensation for compulsory acquisition. In this regard, the *Land Acquisition Act of Tasmania* states

> A person appointed under subsection (1) is to be a person who, in the opinion of the Governor, has sufficient experience in the assessment of compensation in relation to the acquisition of land to act as an arbitrator.[479]

Although called by a different name, the role of the Specialist Arbitrator in Tasmania seems akin to that of the 'expert' under Commonwealth legislation.

It therefore seems as though Australian legislation may make provision for the determination of compensation by some sort of specialist valuer. There are however two important caveats to note when drawing comparisons with the possible role of the *Valuer-General* in South Africa. Firstly, specialist valuers are judged on his 'expert' knowledge[480] in determining the value of a specific type of property or "sufficient experience"[481] in determining compensation for compulsory acquisition. One could argue that his role is qualified by his personal knowledge or experience in a specific field, and not by virtue of statutory powers (it appears as though a private valuer can be regarded as an expert). Secondly, both parties must consent to arrangement. It is therefore not statute that bestows this special role upon the valuer, but rather the fact that both parties place their faith in his or her expert abilities.

3.5.4.3 Determined of compensation by court process

Unlike the South African *Constitution*,[482] section 51(xxxi) of the *Constitution of Australia* merely refers to "just terms"[483] and does not expressly provide for compensation to be determined by the courts where no agreement can be reached with affected parties. Be that as it may, none of the Australian legislation discussed

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478 The role of the Special Arbitrator is not governed by the *Commercial Arbitration Act* 13 of 2011 of Tasmania, but rather by s 6(1) of the *Land Acquisition Act of Tasmania*.
479 Section 6 (2) of the *Land Acquisition Act of Tasmania*.
480 Director, Land Operations and Public Works, Special Claims and Land Policy Branch 2011.
481 Section 6(2) of the *Land Acquisition Act of Tasmania*.
482 Section 25(3) of the *Constitution*.
483 Section 51(xxxi) of the *Constitution of Australia*.

above exclude the judicial adjudication of compensation, provided that the Commonwealth *Lands Acquisition Act* prevents an expropriated owner from seeking relief from the court if he voluntarily agrees to arbitration or refers the offer to review by the Administrative Appeals Tribunal.[484]

Where compensation must be determined by the judiciary, specialist courts have been given this task by the various legislation, namely the Environment, Resources and Development Court,[485] the Land Court in Queensland,[486] Land and Valuation Court in South Australia[487] and the Land and Environmental Court[488] in New South Wales.[489]

In the remaining jurisdictions, the task falls on the Federal Courts of Australia[490] and the Northern Territory,[491] as well as the Supreme Courts of Tasmania,[492] Victoria,[493] Western Australia[494] and the Australian Capital Territory[495] respectively.

Although three states make use of specialist courts to determine compensation, their roles are akin to the federal and supreme courts in the other jurisdictions in

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484 See s83 of the *Lands Acquisition Act*.

485 Created under the *Environment, Resources and Development Court Act* 63 of 1993 (hereafter referred to as the *ERD Court*).

486 Section 24 of the *Queensland Legislation*.

487 Section 6 of the *Land Acquisition Act of South Australia*.

488 See division 5 of the *NSW Act*.

489 It may be of interest to take note that the *NSW Act* only makes provision for a person who has claimed compensation to lodge an objection with the Land and Environment Court, and not the expropriating authority. In other words, it does not appear as if the *NSW Act* empowers the Land and Environment Court to settle a dispute if the acquiring State's government is not satisfied in paying the amount determined by the *Valuer-General of NSW.* Nor does the wording of ss 41 or 42 seem to offer the State any discretion to offer an amount of compensation other than the amount determined by the *Valuer-General of NSW*. The relevant sections state that the Valuer-General determines the amount of compensation offered to the affected parties. The unambiguous nature of the wording seems to indicate that it is a peremptory requirement for the amount offered as compensation to be determined by the *Valuer-General of NSW*, although no case law could be found to certify this deduction. It could therefore be argued that the valuation of the *Valuer-General of NSW* is binding on the State, but not on the person entitled to the compensation.

490 Section 6 of the *Lands Acquisition Act*.

491 Section 45A of the *Northern Territory legislation*.

492 Section 3 of the *Land Acquisition Act of Tasmania*.

493 Section 3 of the *Victoria Act*.

494 Section 223 of the *Western Australia Land Administration Act*.

495 Section 97 of the *ACT Act*.

that it hears evidence placed before it, scrutinises the evidence and makes adjustments where warranted.[496]

A noteworthy exception is contained in the *Land Acquisition Act of South Australia* which requires the *Environment, Resources and Development Court* to mediate between the parties with the view to reach agreement on compensation[497] before resorting to a determination which it deems fit,[498] including an order to acquire alternative land[499] or buildings,[500] or the discharge of a debt.[501]

In stark contrast to the specialist administrative bodies, Federal, Supreme or specialist courts hearing compensation cases may use their own knowledge or skills to conduct a valuation or to determine the value independently from the evidence placed before it by specialist valuers. In *Brewarrana Pty Ltd v Commissioner of Highways;*[502] the judicial head of the Land and Valuation Division of the Supreme Court of South Australia, sitting without valuers as assessors, noted that a judge must seek to be informed as best as he can be by the expert testimony but should not use his own knowledge of valuation practice to make a ruling nor "bring a third set of opinions into the arena".[503] In this regard, it was stated

> In the Land and Valuation Court I seek to be informed and, as best I can, to evaluate; I do not sit to use such acquired knowledge of valuation principles as I have acquired in order to confirm or to condemn. I must act on the evidence, and if any of it is, in any way, defective, incomplete or irreconcilable then I must make such use as I can of what other evidentiary material is available to correct, complete or reconcile.[504]

This does not, however, prevent the court from making adjustments to either valuation placed before it.[505] In *Dan Wei Zheng v Roads and Maritime Services*[506] the

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496 *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298 at para 146.
497 Section 23(3) of the of the *Land Acquisition Act of South Australia*.
498 Section 26(e) of the *Land Acquisition Act of South Australia*.
499 Section 26(b) of the *Land Acquisition Act of South Australia*.
500 Section 26(c) of the *Land Acquisition Act of South Australia*.
501 Section 26(a) of the *Land Acquisition Act of South Australia*.
502 (1973) SASR at 541.
503 *Brewarrana Pty Ltd v Commissioner of Highways* (1973) SASR at 544, 545.
504 *Brewarrana Pty Ltd v Commissioner of Highways* (1973) SASR at 541.
505 *Arcus Shopfitters Pty Ltd v Western Australian Planning Commission* [2004] WASC 85 at para 52.
506 [2017] NSWLEC 77.

court applied the same level of scrutiny to the values provided by the acquiring authority, the *Valuer-General of Victoria* and the expert valuer commissioned by the Applicant. In quoting section 24(2) of the *Land and Environmental Court Act*,[507] the court clearly stated[508] that it is the role of the court to give effect to the provisions of the *Victoria Act* which determines the way in which compensation must be calculated. Per implication, this means that the *Valuer-General of Victoria* does not have a special role in this regard. Section 24 states

> The Court shall, for purposes of determining any such claim, give effect to any relevant provisions of any Acts that prescribe a basis for, or matter to be considered in, the assessment of compensation.[509]

In the event that the courts, or specialist courts for that matter, are required to determine compensation under compulsory acquisition legislation, it is telling that the courts do not treat compensation as separate from value but instead assumes the role of the "Judicial Valuer".[510] In *Sydney Water Corporation v Caruso,* the New South Wales Land and Environment Court clearly stated the following in relation to its role in determining compensation under the *NSW Act*

> Her Honour was required, as the judicial valuer, to have regard to that issue either pursuant to s 55(f) or, according to the appellant, s 56(1)(a) of the Just Terms Act.[511]

The court further went on to state that its role was to hear the evidence placed before it by expert valuers, to scrutinise the method proposed (as is the case with any expert evidence placed before a court) and to apply any adjustments to the method proposed as may be warranted after the evidence has been scrutinised.

> In the normal course, in a case such as the present (and indeed in the present case), the valuers called by the respective parties would take and analyse comparable sales to determine a rate per square metre to apply to the acquired land. Each would express an opinion as to whether the rate derived from the comparable sales should be adjusted up or down to take account of, for instance,

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507 204 of 1979.

508 *Dan Wei Zheng v Roads and Maritime Services* [2017] NSWLEC 77 at para 15.

509 Section 24(2) of the *Land and Environmental Court Act* 204 of 1979.

510 See *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298 at paras 3, 35, 37 and 146; *Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156; *Dan Wei Zheng v Roads and Maritime Services* [2017] NSWLEC 77 at para 16.

511 (2009) 170 LGERA 298 at para 35.

> the potential highest and best use of that land and its other characteristics to the extent to which they differed from the sales evidence. In determining a rate to be adopted, the judicial valuer was required to resolve the doubts or conflicts raised in the expert evidence as to the rate to be derived from the analysis of the sales and the adjustments, if any, to be applied to that rate, in favour of the dispossessed owner.[512]

The role of the Australian courts as the "Judicial Valuer"[513] could be compared to the South African courts' role as the "super valuator".[514] In this regard, it seems as though both jurisdictions equate value with compensation and empowers their courts to step into the shoes of the valuer to correct the valuation instead of arriving at an amount of compensation (be it just and equitable or on just terms) distinct from the value of the property.

3.6 Administrative tribunals and compensation in Eastern European land restitution programmes

3.6.1 Introduction

With the dissolution of the USSR, many of the new states created in Central and Eastern Europe adopted various policy measures labelled as "anti-communist"[515] reforms to transition towards a free market economy[516] and provide redress for dispossessions that took place under the previous regime.[517] These policy measures included the restitution of land unlawfully expropriated[518] by the previous regime to the former owners,[519] the imposition of land taxes[520] as well as the privatisation of

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512 *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298 at para 146.

513 See *Sydney Water Corporation v Caruso* (2009) 170 LGERA 298 at paras 3, 35, 37 and 146; *Yates Property Corporation Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156; *Dan Wei Zheng v Roads and Maritime Services* [2017] NSWLEC 77 at para 16.

514 *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956.

515 Appel 2005 *East European Politics and Societies* 379.

516 Hartvigsen 2013 *Land Use Policy* 330.

517 Appel 2005 *East European Politics and Societies* 380.

518 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 41.

519 Restitution programmes were instituted in Estonia, Latvia, Lithuania, the Czech Republic, Slovakia, Germany, Albania, Romania, Bulgaria, Slovenia, Croatia Serbia, Montenegro and Macedonia; Appel 2005 *East European Politics and Societies* 379; Hartvigsen 2013 *Land Use Policy* 332; Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 41.

520 Malme and Tiits "The Land Tax in Estonia" 30-32.

state owned land[521] or collectivised farms.[522] Where physical restoration of the land in question was not feasible, alternative measures were used such as financial compensation in the form of cash,[523] compensation vouchers redeemable against the state to acquire alternative state land or shares in state-owned land or collectivised farms.[524]

These land reform programmes can be distinguished from the South African experience in that the principle challenge is not how to value land identified for expropriation by the state but rather to place a value on land which was not previously a tradable commodity or how to place value on land rights lost for the purposes of paying compensation. A monetary value is required to determine the amount of compensation due in restitution cases where the land cannot be restored,[525] to determine the price at which state land should be sold for privatisation[526] as well as to serve as a baseline against which land taxes can be levied.[527] These land reform programmes are relevant for the purposes of this comparative study because it necessitated the creation of institutions and methodologies to determine the value of land where no recent land values had previously existed.

The purpose of valuations conducted under the various land reform initiatives in Central and Eastern Europe is undoubtedly different from the purpose of a valuation conducted by the *Valuer-General.* However, It can still serve as a useful comparison to determine the extent to which administrative institutions are used globally, in an

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521 According to Hartvigsen 2013 *Land Use Policy* 334, state land was sold for privatisation in Estonia, Latvia, Lithuania, Slovakia, Hungary, Bulgaria, Poland, Germany, Croatia, Serbia, Montenegro and Kosovo.

522 According to Hartvigsen 2013 *Land Use Policy* 334; Davies 1997 *Europe-Asia Studies* 1409-1432, collective farms were subdivided in Latvia, Lithuania, the Czech Republic, Slovakia, Germany, Moldova, the Ukraine, Russia and Azerbaijan.

523 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 41.

524 Compensation vouchers was the principal form of compensation used in Hungary; Hartvigsen 2013 *Land Use Policy* 334.

525 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 41.

526 Hartvigsen 2013 *Land Use Policy* 334; Davies 1997 *Europe-Asia Studies* 1409-1432.

527 Malme and Tiits "The Land Tax in Estonia" 27-38.

advisory or adjudicative role, determine the value of land, and particularly within the context of land reform initiatives. Some pertinent examples are discussed below.

3.6.2 Determination of compensation for land reform in Estonia

The Baltic state of Estonia instituted land restitution programmes in the 1990s after obtaining independence from the former USSR.[528] These programmes are primarily aimed at restoration of the land, however, there are various examples where the legislation provides for exceptions.[529] In Estonia, claimants who were "unlawfully expropriated"[530] are entitled to claim restoration of financial compensation. The Act specifically states that claims are to be decided upon by local government. In this regard, section 12 (5) states that "[r]eturn of property shall be decided and organised by rural municipality governments or city governments unless otherwise provided by law".[531]

Local governments are reportedly also responsible for the calculation of compensation where the land is not restored and finical compensation is paid.[532] Tomson[533] notes that the valuation method applied in restitution cases in Eastern Europe[534] is that of mass valuations whereby the value of a property is estimated using the average value of similar properties in the area as opposed to appraising the individual property. This valuation procedure is typically used for taxation purposes,[535] including in South Africa.[536] However, Estonia differs from South Africa

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528 Foster 1996 *Transnat'l L.* 621-173.

529 Foster 1996 *Transnat'l L.* 643 notes that the three Baltic states all impose restrictions on the right to restoration by excluding certain categories of properties from restoration in favour of compensation; s 2 of the *Republic of Estonia Principles of Ownership Reform Act*, 1991 (hereafter referred to as the *Estonian Law*) states that a claimant is entitled to land restoration or financial compensation but s 12 (3) and (5) exclude land which has since been acquired by *bona fide* purchasers or land in the possession of the state.

530 Section 7 of the *Estonian Law*.

531 Section 12 (5) of the *Estonian Law*.

532 Foster 1996 *Transnat'l L.* 637.

533 Tomson 2009 Nordic Journal of Surveying and Real Estate Research 40-58.

534 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 41 notes that mass valuation has been used in assessing the value of property illegally expropriated under USSR rule for the purpose of financial compensation in Hungary, Albania, Estonia, Latvia and Lithuania.

535 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 42.

536 Municipal property taxes under the *Local Government: Municipal Property Rates Act* 6 of 2004 is levied based on municipal valuation rolls.

in that it is also used to determine the value of a property which is the subject of a restitution claim under the *Estonian Law*. It is noted by Tomson that this method is less accurate than individual valuations but can lower the costs associated with valuations.[537] Special provisions were also included to estimate the current value of property which could not be restored or has since been destroyed, based on assumptions of its value in 1940,[538] before Estonia was incorporated into the USSR.

It is interesting to note that local government, as part of the executive and not the judiciary, determines the amount of compensation payable. When considering whether or not this provides a precedent for an administrative organ of state to determine compensation, one should note that the context in which this takes place is very important, as this compensation does not necessarily relate to compensation upon expropriation, but rather compensation for unlawful acts of dispossession perpetrated by a previous government.

Where disputes arise as to whether the property was in fact unlawfully expropriated, the matter must be settled by a judicial inquiry.[539] Land that was obtained by new owners in a bona fide manner is exempted from restoration, thus the only remedy for the original disposed owners is an award of compensation.[540] It therefore seems as though issues of valuation and compensation do not arise in cases of physical restoration but only where compensation is paid in the place of physical restoration. In this regard, Tomson stated

> As a rule there is no need for valuation in the context of physical restitution but it is necessary in case of compensation in cash (or some other money derivative) or property of equivalent value to that which was expropriated.[541]

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537 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 40-58.

538 Malme and Tiits "The Land Tax in Estonia" 28 notes that claimants under the Estonian land restitution programme were entitled to 40 times the 1940 value of land that could not be restored and 10 times the 1940 value of buildings that were subsequently destroyed.

539 Section 19 (1) of the *Estonian Law.*

540 Section 12 (3) of the *Estonian Law.*

541 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 41, 42.

3.6.3 Foreign Claims Settlement Commission

In 1954, the United States Government set up the FCSC to receive and assess claims for compensation by American citizens who suffered loss as a result of their properties being seized in Eastern Europe.[542] In determining compensation, the FCSC made use of the appraisals and valuations conducted in mass for taxation purposes,[543] similar to the Albanian example cited above. Importantly, the FCSC has the authority to conclusively decide upon the legitimacy of a claim as well as the compensation to which a claimant is entitled.[544] The stated tax value of the properties which formed the basis for the claims were therefore accepted by the FCSC as the correct amount of compensation.[545] The FCSC is thus a clear example of an administrative body which inquires into the value of property and summarily award compensation equal to the accepted value.

The role of the FCSC is unlikely to serve as persuasive evidence for interpreting the role of the *Valuer-General* under the Property Valuation Act as there is a crucial factor distinguishing the FCSC from all the examples mentioned above. The FCSC was created as an ad hoc mechanism to compensate American citizens for losses occurred as a result of their property being expropriated by a foreign state in a foreign jurisdiction. It would not qualify as a taking under the Fifth Amendment as the loss did not come about as a result of the United States exercising its powers of eminent domain.

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542 Neff 1992 *Dick. J. Int'l L.* 359-364.

543 *Fredrick Snare Corporation et al.* FCSC Decision No. CU-3602, reprinted in 2 FCSC Index-Digest 1 (1963-1977) as referenced in Neff 1992 *Dick. J. Int'l L.* 362; it was held that this is an appropriate method of determining the value of the property lost.

544 Neff 1992 *Dick. J. Int'l L.* 360.

545 *Fredrick Snare Corporation et al.* FCSC Decision No. CU-3602, reprinted in 2 FCSC Index-Digest 1 (1963-1977) as referenced in Neff 1992 *Dick. J. Int'l L.* 362; it was held that this is an appropriate method of determining the value of the property lost.

3.6.4 Limitations on administrative valuation bodies to adjudicate on land value disputes imposed by the European Convention for the Protection of Human Rights and Fundamental Freedoms[546]

It is questionable whether any administrative body in Eastern Europe would be able to definitively adjudicate on land values under their respective land reform programmes. Many Eastern European constitutions do not include an express "due process"[547] guarantee that would *ipso facto* bar an administrative body such as a state valuer to definitively determine land values under the various land reform projects where a dispute is raised. However, these states adopted the *Convention*[548] which requires disputes on civil rights to be heard by an independent tribunal.[549]

In the case of *Vasilescu v Romania,*[550] the European Court of Human Rights held that Romania had violated the *Convention* by disallowing the country's judiciary from entertaining an action by the owner to recover assets seized in a police investigation. The Romanian law in question barred the courts from hearing the case without the state's consent, which was held to violate the owner's rights under the *Convention* to have alleged rights violations heard by an impartial tribunal.[551]

This decision did not specifically deal with a dispute regard land values under a land reform programme. However, it seems unlikely that administrative entities in states that are members of the *Convention* would be permitted to determine the value of compensation afforded to expropriated owners to the exclusion of an impartial oversight body such as a court or tribunal in light of this decision. Member states to the *Convention* that undertook land reform programmes would thus not be permitted to determine compensation by administrative valuation bodies to the exclusion of a court of impartial tribunal. The comparison therefore supports the

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546 (1950) (hereafter referred to as the *Convention)*.
547 Ellis 1994 *Yale J. Int'l L.* 200.
548 (1950) (hereafter referred to as the *Convention)*.
549 Articles 6 (1) and 8 as referenced by Djajic 2000 *Syracuse J. Int'l L. & Com.* 366.
550 [1998] ECHR 42, 27053/95.
551 Djajic 2000 *Syracuse J. Int'l L. & Com.* 366.

notion that a valuation by the *Valuer-General* cannot be a final and binding determination of compensation.

3.7 Conclusion

Innovative valuation methodologies and administrative bodies with adjudicative powers were used in Central and Eastern Europe's various land reform initiatives. In Estonia, local municipalities were charged with assessing the compensation provided to restitution claimants whose land rights could not be restored. Likewise, the United States' Congress provided the FCSC with wide-ranging powers to assess damage and to make awards where the property of US citizens was confiscated. Mass valuations by administrative bodies were also used elsewhere in Eastern and Central Europe to determine the value of property rights lost as a result of confiscation.

These examples will likely have limited persuasive value in guiding South African courts' interpretation of the role played by the *Valuer-General* to inform offers to purchase or compensate as the context differs markedly. The valuations conducted by administrative authorities in Central and Eastern Europe are aimed at informing offers of compensation within the context of the state providing compensation to claimants where the land cannot be restored, to inform prices at which state land can be sold for privatisation or for levying a land tax. The decision in *Vasilescu v Romania*[552] furthermore mitigates against the possibility that an administrative valuation body could ever determine land values to the exclusion of the courts should a dispute arise. Owing to the region's unique history of state-led dispossession and collective ownership by the state, the acquisition of property from private individuals does not seem to feature prominently in the region's land reform programmes.

In stark contrast, South Africa's restitution and redistribution programmes both empower the state to acquire land from private individuals by expropriation. As outlined above, the *Constitution* contains the peremptory requirement that

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552 [1998] ECHR 42, 27053/95.

compensation must either be agreed upon by the expropriating authority and those affected, or approved or decided upon by a Court.[553] Where there is ambiguity as far as it relates to the *Valuer-General* "determining"[554] the value of land identified for expropriation under land reform legislation, the Land Claims Court[555] has preferred an interpretation that does not exclude its jurisdiction, in line with section 25(3) of the *Constitution*.

Should land be acquired through expropriation in Eastern Europe, there are indications that the same institutions would likewise not have the final say in determining the value of compensation. Ellis[556] notes that many of the Constitutions developed by Eastern European countries included clauses that prevent the state from expropriating property outside the prescripts of law and subject to compensation.

In Australia, the interplay between administrative valuation bodies and the determination of compensation is slightly more nuanced. Section 51xxxi of the *Constitution of Australia* requires just terms for compulsory acquisition, a requirement which has been embodied in legislation as both providing for the payment of compensation as well as procedural safeguards. While the Valuer-Generals of several Australian states and territories do play a significant role in influencing the offer of compensation made to expropriated owners, their valuations do not seem to be binding on the acquiring authority in making the offer. If the affected party entitled to receive compensation does not accept the offer (greatly influenced by the valuation), there does not seem to be any precedent in Australian legislation whereby the valuation conducted by a Valuer-General is final and binding on an affected party.

The Valuer-Generals never act as the adjudicator in Australia, however, there is a wide range of other, specialist administrative bodies which can act in such a capacity, ranging from administrative tribunals, to 'experts' and specialist

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553 Section 25(3) of the *Constitution*.
554 Section 12(1)(a) of the *Property Valuation Act.*
555 See the discussion on the *Moloto* and *Emakhasaneni cases* above.
556 Ellis 1994 *Yale J. Int'l L.* 197-201.

arbitrators. Significantly, an expropriated owner would still have recourse to appeal a decision from a specialised, administrative adjudication body to the federal court or to a range of specialist courts. A notable exception to this rule is found in the Commonwealth *Lands Acquisition Act*[557] that requires that the expropriated owner must first consent to adjudication by a specialist administrative body before his recourse to other formal courts are deemed to be waived.

Another clear indication that the Valuer-Generals of various states and territories do not play an adjudicative role in Australian law is the mere fact that it is often the Valuer-General who is cited, alongside the acquiring authority, as a party to litigation where compensation is determined by a formal court of law.

A comparative analysis of Australian legislation supports the view that the *Valuer-General* only acts in an advisory role to the expropriating authority and should not replace its discretion to formulate an offer of compensation. Likewise, comparisons with foreign jurisdictions offer little credence to the argument that it was the intention of the legislature to empower the *Valuer-General* to determine the amount of compensation that an owner is entitled to upon expropriation to the exclusion of an agreement or to exclude the jurisdiction of the courts. The Land Claims Court recently confirmed this view within the context of the *Restitution Act* where the court is called upon to decide on compensation.[558] The court in *Emakhasaneni* held *obiter* that the *Property Valuation Act* could prescribe a different process where the Minister enters into negotiations to purchase property.[559] Likewise, there was also no definitive decision where parties negotiated compensation during expropriation proceedings. Judging from foreign experiences, a court would likely apply the same rationale if the question arose.

The position in South Africa is obscured somewhat by inconsistent use of terminology. The Supreme Court of Appeal has continued to equate compensation with the value of the land[560] whereas the Land Claims Court has attempted to draw

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557 See s83 of the *Lands Acquisition Act*.
558 See the discussion on the *Moloto* and *Emakhasaneni cases* above.
559 The *Emakhasaneni case* at para 34.
560 See the discussion on the *Mzisa Appeal above.*

a distinction between the value of land and the amount awarded to the expropriated owner as compensation,[561] although it too, on occasion, had used the terms interchangeably.[562]

[561] The distinction between value and compensation was highlighted in the discussion on the *Mzisa case* above as well as the *Emakhasaneni case* at para 34.

[562] The Court in the *Moloto case* also referred to the *Valuer-General* determining compensation at para 26 whereas the same court drew a distinction between the Minister's role in making an offer of compensation and the *Valuer-General* determining value in the *Emakhasaneni case* at para 34.

Chapter 4 Comparative analysis between the judicial interpretation of section 25(3) of the *Constitution* and the valuation formula prescribed under the *Property Valuation Act*

4.1 Introduction

The valuations conducted by the *Valuer-General* may not be binding on the Minister when formulating an offer of compensation during expropriation proceedings nor does it oust the jurisdiction of the court to determine just and equitable compensation where no agreement can be reached.[563] However, there is still uncertainty regarding the valuation's role when the expropriating authority negotiates a purchase price for land acquired under the land reform process or where the Minister initiates expropriation proceedings and negotiates the *quantum* of compensation with the expropriated owner. A comparative study indicates that valuations do in fact play a leading role, if not a definitive one, in foreign jurisdictions.[564]

If a valuation conducted by the *Valuer-General* under the prescribed valuation formula can accurately determine the value of the property being expropriated by applying the criteria contained in section 25 of the *Constitution* to determine compensation, it would allow the expropriating authority to make an offer that resembles just and equitable compensation. A valuation of this kind enables the expropriating authority and the expropriated owner to reach agreement and reduce the likelihood of a dispute, thereby preventing unnecessary litigation.

This outcome is contingent upon the ability of the *Valuer-General*, using the prescribed valuation formulation, to arrive at a value which resembles just and equitable compensation. This Chapter compares the detailed valuation formula prescribed by the *Valuer-General* with the approach adopted by the judiciary when determining just and equitable compensation to determine whether the *Valuer-*

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563 See the discussion on the *Moloto* and *Emakhasaneni cases* in Chapter three para 3.4.1 above.
564 See the discussion in Chapter three under point 3.5.

General's valuations are capable of accurately informing an offer of just and equitable compensation.

4.2 Definition of 'value' under the Property Valuation Act

As alluded to in the previous chapter, the *Property Valuation Act* ascribes a different value to property dependent on the purpose for which it is to be valued. Where the *Valuer-General* is requested by a Government Department to determine the value of property for any purpose other than acquisition for land reform purposes, the *Valuer-General* is required to determine the market value of the property.[565] Where the property is earmarked for acquisition[566] for land reform[567] purposes, the value is defined in a way which closely mirrors the formula set down by section 25(3) of the *Constitution* for the calculation of compensation upon expropriation. It reads

> **"value"**, for the purposes of section 12(1)(a), means the value of the property identified for purposes of land reform, which must reflect an equitable balance between the public interest and the interest of those affected by the acquisition, having regard to all the relevant circumstances, including the-
>
> (a) current use of the property;
>
> (b) history of the acquisition and the use of the property;
>
> (c) market value of the property;
>
> (d) extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

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565 Section 12(1)(b) of the *Property Valuation Act*.

566 Section 12(1)(b) only applies if and when a Government Department requests the *Valuer-General* to assist it in valuing the property, however the wording of s 12(1)(a) does not require the Minister or Department of Rural Development and Land Reform, the Commission on the Restitution of Land Rights or any other body responsible for any of the land reform programmes to make a request for a valuation in the context of expropriation. It merely states that the *Valuer-General* must (own emphasis) value the property if it has been identified for acquisition for land reform purposes. Neither the *Property Valuation Act,* the *Expropriation Act*, the *Labour Tenants Act*, the *Restitution Act*, *ESTA* nor the *Provision of Land and Assistance Act* spells out the procedure that the acquiring authority must follow to commission the *Valuer-General* in the process of acquiring land.

567 Land Reform is defined in s 1 of the *Property Valuation Act* as
"'land reform' means land redistribution, land restitution, land development and tenure reform"
It seems as if this definition intends to cover all programmes which aim to give effect to ss25 (5), (6) and (7) of the Constitution as well as "land development", which is not referenced in the *Constitution* but which is referred to in the *Green Paper* as the support services provided to beneficiaries.

(e) purpose of the acquisition; [and][568]

This definition captures the contents of section 25(3) of the *Constitution* nearly verbatim and hence does not provide any greater guidance on how these factors must be applied.[569] However, section 12(1)(a) of the *Property Valuation Act* also states that it must be valued "having regard to the prescribed criteria, procedures and guidelines".[570] In this regard, the recently promulgated *Regulations* deserve special consideration as the criteria referred to in the Act is expressed as a formula which the *Valuer-General* or authorised valuers must use when valuing land identified for land reform. Based on the discussion in the previous chapter, it appears as though the Act places an obligation on the *Valuer-General* to interpret section 25(3) of the *Constitution* not to fix the amount of compensation upon expropriation, but to inform a valuation which the expropriating authority can use to make an offer of compensation. The *Regulations* prescribe how these factors are to be interpreted.

4.3 Formula for ascertaining 'value' prescribed by the Regulations

4.3.1 Introduction

Regulation 6(b) sets out a detailed formula for the calculation of value where land is acquired with[571] or without[572] moveable property, standing crops or timber. The basic formula for determining the value of the land reads as follows

> The authorised valuer shall determine the value of the subject property for the purposes of section 12 (1)(a) of the Act as follows:
>
> (b) Where the immovable property is to be acquired without moveable property, annual crops or growing timber on the subject property that have not yet been harvested as at the date of valuation-
>
> (i) adding the current use value and market value of the subject property as at the date of valuation, and as established in terms of regulation 5, and dividing the resulting figure by two;

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568 Section 1 of the *Property Valuation Act*.
569 Du Plessis 2014 *PELJ* 798.
570 Section 12(1)(a) of the *Property Valuation Act*.
571 Reg 6(a) in Gen Not 1322 in GG 42064 of 30 November 2018.
572 Reg 6(b) in Gen Not 1322 in GG 42064 of 30 November 2018.

(ii) subtracting from the resulting figure the value, as at the date of valuation, of acquisition benefits and the value of direct state investment and subsidy in the acquisition and beneficial capital improvement of the subject property; and

(iii) provided that the value of movable property, annual crops or growing timber on the subject property that have not yet been harvested as at the date of valuation, and established in terms of Regulation 5, must be subtracted from current use value before the division referred to in sub-regulation (i) is performed;[573]

If the movable property, crops or timber are acquired with the property, its value must simply be added to the market value before the division takes place. In this regard Regulation 6(a)(iii) reads as follows

[P]rovided that the value of moveable property, annual crops or growing timber on the subject property that have not yet been harvested as at the date of valuation, and as established in terms of Regulation 5, must be added to market value before the division referred to in sub-regulation (1) is performed.[574]

The basic formula for determining the value of the land can be summarised as follows:

([market value + 'current use value']/2) – ('acquisition benefits' + state investment & subsidy)

The difference between Regulation 6(a) and (b) appears to be that the value of movables and unharvested crops must either be; added to the market value of the property before being divided if they are to be valued together with the land; or subtracted from the current use value before being divided if the land is to be valued in isolation.

While market value[575] and state subsidies[576] mirror the listed factors in section 25 of the *Constitution*, the formula introduces new concepts such as the 'current use value' and 'acquisition benefits' that are not found in the Act's definition of 'value' nor in the *Constitution* but are nevertheless defined in the *Regulations*.[577] The

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573 Reg 6(b) in Gen Not 1322 in GG 42064 of 30 November 2018.
574 Reg 6(a)(iii) in Gen Not 1322 in GG 42064 of 30 November 2018.
575 Section 25(3)(c) of the *Constitution*.
576 Section 25(3)(d) of the *Constitution*.
577 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

introduction of these concepts could be compared to the listed factors requiring the consideration of "current use"[578] and the "history of the acquisition and use of the property"[579] listed in section 25(3) of the *Constitution*. While the instruction from the acquiring authority to the *Valuer-General* must state the purpose of the acquisition,[580] it does not seem to factor directly into the formula.

The degree to which these concepts mirror the factors listed under section 25 of the *Constitution* and their application by the judiciary, can determine the accuracy with which a valuation undertaken in terms of the *Regulations* can inform an expropriating authority of the offer of compensation it should make. This is explored in more detail below.

4.3.2 Current use value equated with current use as a listed factor in section 25(3) of the Constitution

The *Regulations* define the current use value as follows

> **"Current use value"** means the net present value, as at the date of valuation, of cash inflows and outflows, or other benefits and costs that the subject property generates for the specific owner in perpetuity or, in the case of a lease, to lease expiry, under lawful use, and without regard to its highest and best use, or the monetary amount that might be realised upon its sale;[581]

The net present value is in turn defined as

> **"net present value"** means the difference between the present value of cash inflows, or other benefits, and the present value of cash outflows, or other costs;[582]

The current use value is therefore taken as the net profit generated by activities on the property at the time of valuation excluding the highest and best value of the land, which is in turn defined as follows

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578 Section 25(3)(a) of the *Constitution*.
579 Section 25(3)(b) of the *Constitution*.
580 Regulation 4(1)(c) Gen Not 1322 in GG 42064 of 30 November 2018.
581 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.
582 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

> **"highest and best use"** means the reasonably probable and lawful use of property, that is physically possible, financially feasible, and that results in the highest value;[583]

The *Constitution* does include the current use of the property as a listed factor,[584] however equating current use to the net profit generated by the land in question does deviate somewhat from the way in which this factor has been applied by our courts. Even if this deviation is permissible,[585] the current formulation does contain a few areas of ambiguity that could hamper its effective implementation.

4.3.2.1 Discussion on the timeframe for the calculation of net income

The definition of 'current use value' refers to the 'net present value' at the time of valuation. Net present value in turn is defined[586] as the difference between the income and expenditure generated by activities on the property, otherwise known as the profit or loss. However, when reading the definitions of current use value and net present value together, it does not indicate over what timeframe the income or loss should be calculated. The only aspect related to timeframes is found in the definition of current use value where it is stated that the net present value must be calculated "as at the date of valuation".[587]

In the absence of case law or further guidance from the legislator, there is little indication of how literal a court would interpret the phrase "at the time of valuation".[588] It is also not clear what the assessment period for the net present value is. Possibilities include that it could relate to the duration of the current owner's ownership of the property or alternatively, the income during the present financial year or production season in the case of properties used for agricultural purposes.

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583 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.
584 Section 25(3)(a) of the *Constitution*.
585 As was held in the *Du Toit case*, a formulation for compensation which differs from the formulation in s 25 of the *Constitution* is not *ipso facto* unconstitutional provided the outcome reflects an amount that meets the peremptory requirement of the compensation being just and equitable.
586 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.
587 Definition of "current use value" reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.
588 Definition of "current use value" in reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

4.3.2.2 Discussion on fixed versus variable income

Depending on the current use of the property, the income generated using that property (if at all) can be fixed or variable. Where the property is leased, it could produce a monthly rental return for the owner which is relatively fixed and easy to estimate, based on rental agreements.[589] However, where agricultural properties actively used for agricultural production are valued, the income could vary from month to month, depending on the commodity and even from season to season, depending on a variety of factors such as weather conditions and price volatility. In the latter instance, clarity is also not forthcoming as to whether an average yearly or seasonal income is taken over a number of years or seasons to account for the variability, or whether the phrase "as at the date of valuation"[590] obligates the valuer to only consider the year or season when the valuation takes place.

Clarity regarding the assessment period is critical as it can have a noticeable effect on the total amount that is calculated as the value under the proposed formulation. For example, the price listed on the Johannesburg Stock Exchange for a tonne of white maize varied from R4025,09 as an average in the 2016/17 marketing year to an average of R1902,98 in the 2017/18 marketing year.[591] This variability in price will naturally have a significant effect on the nett income where an agricultural property is used for the purposes of producing maize. This is merely an example but income variability is inherent in several land uses, which makes the timing of the valuation as well as the period of assessment one of the most influential factors in determining the value where the current use value is applied as prescribed by the *Regulations.*

4.3.2.3 Discussion on the return on capital investments

Another factor related to the assessment period which remains somewhat ambiguous, is the matter of how the value of capital investments will be considered

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589 Raubenheimer *Waardasiereg* 43.

590 Definition of "current use value" in reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

591 South African Grain Information Services 2019 http://www.sagis.org.za/historical%20prices%20local.html.

where they are not yielding a net income yet. A property owner may well invest in the capital improvement of a property with the resulting expectation that these improvements will yield a greater income in the future. Where agricultural properties are concerned, significant expenditure may be incurred to plant new vines or orchards which will only yield an income after the plants have matured. Similarly, renovations may be undertaken on property that is rented out for residential purposes with the view to obtain higher rental income in the future due to the improved quality. In both scenarios, the period of assessment used to calculate the current use value is critical.

Capital investment of this nature entails "cash outflows, or other costs"[592] with the expected increase in "cash inflows, or other benefits"[593] as per the definition of net present value only coming to fruition in the future, possibly after the date of the valuation. The net present value, as defined at the date of valuation, will reflect a negative number. This could have a distorting effect on the current use value if the assessment period includes the costs of the capital investment but does not include the expected returns that may only be realised after the date of valuation.

To counter any potential distortion as outlined above, the *Regulations* require an authorised valuer to take expenditure towards capital investments that has not yet materialised into account. In this regard, regulation 5(3) was inserted[594] and reads as follows

> In establishing the current use value, the authorised shall take into account the following:
>
> (a) The impact of capital expenditure incurred on the subject property before the date of valuation, but whose effects are yet to fully materialise as at the date of valuation, by reason imputing the relevant cash flows, or benefits and costs;[595]

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592 Definition of "net present value" contained in reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

593 Definition of "net present value" contained in reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

594 No analogous provision was contained in Gen Not 365 in GG 40793 of 21 April 2017 when the regulations were published in draft form for public comment. This provision was likely inserted as a result of public comments received.

595 Reg 5(3)(a) in Gen Not 1322 in GG 42064 of 30 November 2018.

The provision places an obligation on the valuer to consider the impact on the current use value but leaves the methodology open and does not prescribe exactly how the valuer must go about this in "imputing the relevant cash flows, or benefits and costs".[596] The Income Capitalisation Method[597] of valuation is prescribed in the *Valuation Handbook*[598] to take long-term capital investments into account for the valuation of state land. The purpose of this method, as per the *Valuation Handbook,* is to determine the "productive value"[599] of state land. Although not defined in the *Regulations*, the capitalisation rate is understood to be the expected annual return on investment received from a property.[600]

The *Valuation Handbook* prescribes a capitalisation rate of 5% for unused state land and 10% on land leased out by the state for agricultural purposes.[601] In contrast, the Regulations place the onus on the owner, the agent of the owner, tenant or occupier to inform the authorised valuer of the "internal rate of return and/or yield",[602] which one can equate to the capitalisation rate. It therefore seems as though the valuer is not bound to use a prescribed capitalisation rate, as is the case for state land valued according to the *Valuation Handbook*, but must rather go on the information provided to him by the owner, agent or tenant.

Interestingly, the *Valuation Handbook* only refers to capitalisation rates and productive value as an alternative to determine the value of the property where the comparative sales method, as the preferred method,[603] is not suitable. In other words, the application of a capitalisation rate is only used when the productive value of land is more suitable to determine than the market value.[604] In contrast, the formula contained in the *Regulations* makes use of a capitalisation rate not as an alternative to market value, but to calculate the current use value which is then

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596 Reg 5(3)(a) in Gen Not 1322 in GG 42064 of 30 November 2018.
597 Du Plessis 2015 *PELJ* 1740; Raubenheimer *Waardasiereg* 42-44.
598 Valuation Handbook at 4.
599 Valuation Handbook at 2.
600 Du Plessis 2015 *PELJ* 1740; Raubenheimer *Waardasiereg* 43.
601 Valuation Handbook at 4, 19.
602 Reg 2(e) in Gen Not 1322 in GG 42064 of 30 November 2018.
603 Valuation Handbook at 1 9.
604 Valuation Handbook at 4.

added to the market value and divided by two as per the formula provided for in the *Regulations*.

Although the *Regulations* are clear in that capital expenses incurred prior to the valuation must be factored in when determining the current use value, it seems to give valuers relative discretion in deciding exactly how this is taken into account. Where state land is concerned, the *Valuation Handbook* prescribes a pre-determined capitalisation rate[605] to calculate the 'productive value' of the property. Where the *Valuer-General* values land identified for land reform purposes, it is the owner, agent or tenant who must provide the capitalisation rate.

Greater guidance is given in the *Regulations* where the capital expenditure relates specifically to trees planted for timber or expenses incurred to mine minerals on the land. In this regard regulation 5(3)(b) and (c) state the following

> (b) In the case of timber on the subject property, the full optimal rotation period for the tree species concerned; and
>
> (c) In the case of mining property, imputed cashflows arising from mineral stockpiles and residual stockpiles on the subject property.[606]

Once again, there is no explicit instruction as to how the value of the investments must be calculated, but as far as timber is concerned, sub regulation (b) seems to at least indicate the timeframe over which the costs and returns should be calculated, namely the optimal rotation period for that species. The reference to "mineral stockpiles and residual stockpiles"[607] of minerals in sub regulation (c) deserves closer scrutiny.

The value of minerals does not accrue to the landowner unless the landowner is also the holder of a mining right under the *Minerals and Petroleum Resources Act*.[608]

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605 The *Valuation Handbook* at 4 requires the valuer to calculate the value based on a capitalisation rate of both 5% and 10% for comparative purposes.

606 Reg 5(3)(b) & (c) in Gen Not 1322 in GG 42064 of 30 November 2018.

607 Reg 5(3)(c) in Gen Not 1322 in GG 42064 of 30 November 2018.

608 28 of 2002 (hereafter referred to as the *MPRDA*); s 3(1) of the *MPRDA* clearly states that the mineral resources of South Africa are the common heritage of all South Africans with the state acting as its custodian. It was furthermore confirmed by the Constitutional Court in the case of *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) at para 71 that the

As such, cashflows arising from the mineral stockpiles and residual stockpiles on the property should not be used to calculate the current use value of property. The *MPRDA* provides for the holder of a prospecting or mining right to consult with the owner of the property to gain access so the minerals can be extracted.[609] In the event that the landowner refuses access, the holder of the prospecting or mining right must inform the land owner[610] that he is breaching the provision of the *MPRDA* which allows the holder access to the property,[611] followed by a process to ensure access for the holder upon compensation being paid to the land owner.[612] The land owner is therefore only entitled to compensation for a partial loss of the surface rights, or for rental income if the owner and the holder of the right under the *MPRDA* could come to some sort of lease agreement. He is not however, entitled to the actual value of the minerals extracted as this does not belong to the land owner nor accrue to the value of the property. It therefore makes little sense to consider the value of the stockpiles on the land when assessing the current use value of the property. An approach which could be more aligned to the *MPRDA* would be to factor in the value of the income derived from the loss of surface rights if mining takes place on the property.[613]

4.3.2.4 Specific challenges with the valuation of movables, standing crops or timber

Regulation 6(a) and (b) prescribe the way in which to deal with standing crops during a valuation. If the standing crops are to be acquired with the property, the value of the crops must be added to the market value of the property.[614] The timing of the assessment is extremely important as a standing crop may have little or no

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promulgation of the *MPRDA* resulted in the mineral rights under the land ceasing to be the property of the landowner.

609 See s10 of the *MPRDA*.

610 Section 54(2)(b) of the *MPRDA*.

611 Section 5(3)(a) of the *MPRDA* allows the holder of the right to enter onto the property with the necessary equipment and employees to exercise his mining or prospecting rights.

612 Section 54 of the *MPRDA*.

613 Although the legislation in question was not the *MPRDA* but the Roads Act, the court in the *Du Toit case* likewise held that the owner of the property was entitled to be compensated for the value of the surface rights put to use as agricultural land at the time of the expropriation and not for the value of the gravel extracted by the respondent.

614 Reg 6(b)(iii) in Gen Not 1322 in GG 42064 of 30 November 2018.

value if calculated before it is ready to be harvested. Assuming that it is the intention of the regulator to predict the value of the crops at the time when it is ready to be harvested, the estimated value of the matured crop can be added to the market value of the property. However, it will still skew the calculation of the current use value if the expenditure incurred to purchase the seeds and plant the crops is taken into account into the net present value as a cash outflow but the fruit of that expenditure is not counted as a cash inflow because the predicted value of the crops forms part of the market value. In other words, the net present value of the property will reflect a negative figure as costs have been incurred to plant a crop which cannot be balanced with the predicted value of the cash inflow from selling the matured crop as this amount is added to the market value of the property as per regulation 6(b)(iii). While this may increase the market value, an amount of zero Rand will be added before being divided by two as per the formula.

Likewise, where the standing crop is not to be acquired with the property, regulation 6(a)(iii) states that the value of the crop must be subtracted from the current use value. Once again, the timing of the assessment is extremely important as a standing crop may have little or no value if calculated before it is ready to be harvested. If the intention is indeed to estimate the value of the matured crop, it is not clear why this estimated value must be subtracted from the current use value. If expenses are incurred (cash outflow) to purchase and plant the seeds, the net present value will be negative. If the expected value of the crop is to be further subtracted from this, the net present value will plunge even further into the negative. Perhaps a formulation where the expected value of the matured crop is added to the net present value would more accurately reflect the difference between cash inflows and outflows of activities undertaken on the property in a given time period.

4.3.2.5 Application to property used for residential purposes

Aside from the challenges outlined above, the very idea of equating current use with the income produced by the property indicates a bias towards income producing, rural property. Land reform is not limited to income producing rural property. In

fact, according to Cousins, Hall and Dubb,[615] an estimated 87% of restitution claims that have been settled by 2014 were urban claims over predominantly residential properties. Likewise, where land is to be acquired through expropriation under section 26 of the *ESTA*, the purpose will be to secure tenure rights for occupiers in line with the object of the Act.[616] Finally, while there is ambiguity regarding the object of land redistribution and its intended beneficiaries,[617] there is no legislation preventing the state from redistributing land for residential purposes nor legal obligation on a beneficiary to use the land to generate an income.

Section 12(1)(a) of the *Property Valuation Act* applies to properties identified for acquisition through the "land reform"[618] programme which, as defined, explicitly includes restitution, redistribution and tenure reform.[619] It is therefore feasible that residential property is acquired for land reform, in which case the *Valuer-General* will be called upon to value the property using the prescribed formula. In this scenario the current use value would equate to zero, and the total value would amount to half of market value minus acquisition benefits and the value of state subsidies. The crucial question which remains unanswered is whether the residential use of rural or urban property justifies a lesser award than would have been the case if the same property was used to generate an income.

4.3.2.6 The application of current use by the judiciary

The jurisprudence developed to date points to a very close link between the current use of the property and market value. However, differing views as to if and how the factors can be applied separately have been proposed by various authors.[620] In the

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615 Cousins *et al* 2014 *PLAAS* 34.

616 Section 26 of the *ESTA* makes provision for the Minister to expropriate land. Although the purpose of these powers is not explicitly stated, the long title makes refers to the need to "provide for measures with state assistance to facilitate long-term security of tenure"; The Minister's powers of expropriation could be exercised in line with this object.

617 Parliament High Level Panel on the assessment of key legislation and the acceleration of fundamental change 211.

618 Section 12(1)(a) of the *Property Valuation Act*.

619 Section 1 of the *Property Valuation Act* defines land reform as: **"'Land Reform'** means land redistribution, land restitution, land development and tenure reform;".

620 See Van Wyk 2017 *TSAR* 28; Southwood *The compulsory acquisition of rights: by expropriation, way of necessity, prescription, labour tenancy and restitution* 79.

pre-constitutional era, the focus was primarily placed on determining the market value of the property as this was the accepted threshold for compensation at the time. The current use of the property featured prominently in determining when and under which circumstances the market value should consider alternative, future uses of the property where the current use was not the highest and best use.[621]

In *Thanam NO v Minister of Lands*,[622] the court held that an applicant must prove, on a balance of probabilities, that the property is capable of a higher value, alternative use when claiming a market value exceeding the value as currently used. This was developed into a three-step approach by the court in *Port Edward Town Board v Kay*[623] starting with the need to prove a reasonable possibility that a higher use exists, that a buyer would have taken this into account and finally what the effect on the market price would have been.

With the introduction of the *Constitution*, the focus was no longer solely on determining market value but shifted to applying current use as a factor in arriving at just and equitable compensation. Despite this shift in focus, the courts still maintain a strong link between current use as a factor and the way in which market value is adjusted to arrive at just and equitable compensation. This can be seen from the dictum of Dodson J, in the *Khumalo case*[624] wherein it was stated

> With regard to constitutional factor (a), the current use of the property by labour tenants has been referred to in the determination of market value.[625]

The new interpretation brought on by the *Constitution* was set out in detail by the Land Claims Court in the *Msiza case* where the purpose was stated to prevent an expropriated owner benefitting from "speculative forces"[626] when claiming compensation from the state for expropriation.

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621 See *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D) at 88 paras C–E; *Minister of Water Affairs v Mostert 1966* (4) SA 705 paras D, E. *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A); *Port Edward Town Board v Kay* 1996 (3) SA 664 (A).

622 1970 (4) SA 85 (D) at 88 paras E, F.

623 1996 (3) SA 664 (A).

624 *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 11 at para 94.

625 *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 11 at para 94.

626 *Mzisa case* at para 52.

In the *Msiza case,* the court applied section 25(3) of the *Constitution* in a judicial expropriation[627] under the *Labour Tenants Act*. The validity of the labour tenant's claim was not in question and the Department agreed to buy the land parcel at its market value. However, there was a dispute between the Department of Rural Development and Land Reform and the landowner as to what the correct market value of the portion that the state would acquire for the labour tenants was. Two valuations were conducted and counsel for the expropriated owner argued that the land should be valued according to its developmental potential as it was earmarked for township development, although permission for rezoning and subdivision was not yet obtained, it argued that the land parcel's market value was R4.36 million. The Department argued that developmental potential should not be considered, and that the market value of the land under its current, agricultural use was R1.8 million.

In weighing up the contrasting expert evidence, the court rejected the developmental potential from being considered. In its reasoning, it emphasised that the *Constitution* specifically included current use as a listed factor to prevent an owner from benefiting from speculation, as this would be contrary to the just and equitable compensation requirement. The court's statement reads as follows:

> It is not without significance that the Constitution expressly refers to the current use of the property. Current use is to be distinguished not only from historical use of the property, but also from the future use of the property. The intention is to arrive at an equitable determination of the compensation, free from the pervading influences of speculative forces which can distort the value of the property.[628]

From the above, one can clearly deduce that the 'current use' element in section 25(3)(a) of the *Constitution* is intended to prevent any future use or speculation thereof from playing a role in calculating compensation. Interestingly, the court in *Msiza* referred to current use as a factor which prevents speculative forces from distorting the "equitable determination of compensation",[629] and not market value per say. This remark by the court could be interpreted as opening the door towards an interpretation that distinguishes between the application of the current use value

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627 *Mzisa case* at paras 9 to 25; *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 11 at para 21.

628 *Msiza case* at para 52.

629 *Msiza case* at para 52.

to market value and to compensation independently, however, the application of the two-stage approach[630] to determining compensation mandated the judge to first determine market value and then to apply other factors that are relevant, which effectively resulted in the current use factor being applied to determine the market value of the property.[631]

The link between market value and current use was again reinforced on appeal.[632] The appellant's argument that the developmental potential of the land should be taken into account was dismissed by the court as the potential of future developments was too remote to be considered.[633] However, the court explicitly stated that this affected the market value of the land

> The Pointe Gourde principle does not apply to the present case as the Trust bought the land knowing of the Msiza claim and the presence of the Msiza family on the land. On this basis the market value of the land is therefore R1,8 million, and not R4,36 million, which would have been the market value of the land with its developmental potential.[634]

It could perhaps be argued that the two-staged approach accepted in *Du Toit* cements the link between market value and the application of current use in so far as it relates to the possibility of the land being put to an alternative use with a higher value. This is by virtue of the simple fact that the two-stage approach starts with market value and then applies other factors if and where relevant.[635] As was the case in the *Msiza appeal*, the current use factor was applied to adjust the market value by excluding the developmental potential.

To some extent, the explicit exclusion of highest and best use in the *Regulations* mirrors the court's exclusion of future or speculative use. A minor misalignment,

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630 As accepted by the Constitutional Court in *Du Toit* and applied in *Msiza*.

631 The Supreme Court of Appeal in the *Msiza Appeal* seemed to hint at this though process where it stated "[t]he LCC was hesitant to apply the two-stage approach but did so and accepted the market value of R1,8 million.".

632 *Msiza Appeal*.

633 The court in the *Msiza Appeal,* in applying the approach adopted in *Port Edward Town Board v Kay* 1996 (3) SA 664 (A), reasoned that a potential buyer would not factor the developmental potential into a hypothetical purchase price due to the knowledge of the labour tenant's claim and the effect it could have in negating the potential of the land being rezoned for non-agricultural purposes.

634 *Msiza Appeal* at para 21.

635 *Du Toit* at para 38.

whether intended or not, is that the definition of current use value in the *Regulations*[636] excludes highest or best use from being considered, irrespective of whether the current use is the highest or best use. The definition of current use value simply reads that the value must be determined "without regard to its highest and best use, or the monetary amount that might be realised upon its sale".[637]

There is no qualification to the effect that the highest or best use must be disregarded where the current use is not the highest and best use, although this could be interpreted as implicit within the definition in order to align it with the judicial interpretation of current use in section 25(3) of the *Constitution*.

There is no example where a court has equated the current use factor in section 25(3) of the *Constitution* with the income derived from the property, nor is there any precedent indicating that the current use factor justifies a higher value for income producing, rural land vis-à-vis urban or rural residential properties. However, the mere fact that there is no precedent does not per implication mean that the precedent excludes such a possibility.

4.3.2.7 Current use applied distinct from market value

As outlined in the section above, South African courts have created the precedent that the current use factor must be applied to determine the correct market value where alternative, higher-value uses are contended.[638] The mere fact that our courts have only applied current use to determine the market value exclusive of developmental potential, does not mean that there are no other circumstances under which the current use factor can be applied differently.[639]

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636 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

637 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

638 See the discussion above in relation to *Port Edward Town Board v Kay* 1996 (3) SA 664 (A); *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D); *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 11; *Msiza* and the *Mszia Appeal*.

639 In the *Du Toit case* it was held at *para* 35 that a formulation which differs from section 25(3) of the *Constitution* could still be valid provided that the amount arrived at meets the peremptory standard of just and equitable. While that judgement may have applied to section 12 of the *Expropriation Act,* the same rationale should apply in that legislation which does not mirror the manner in which current use has been applied to date, will not be unconstitutional *ipso facto* provided that the amount arrived at still meets the peremptory standard of just and equitable.

One example is noted by Du Plessis[640] with reference to the case of *President of the RSA v Modderklip Boerdery (Pty) Ltd.*[641] Where the state has failed to adequately protect a property owner from the unlawful occupation of his property and the market value is reduced as a result of the unlawful occupation, the current use factor could justify an upward adjustment from market value to arrive at compensation that is just and equitable. A second example is found in *Khumalo and Others v Potgieter and Others*[642] where the de facto use of the land by labour tenants and the legal protection afforded to them against eviction justified an increase in compensation as the owner derived no benefit from their labour.

Van Wyk,[643] with reference to the works of other authors,[644] notes that the current use requirement could be used to justify the expropriation of a scare natural resource if the owner is not using or exploiting the resource. This concept has been referred to as a "use-it or lose-it"[645] principle but has not to date been established in South African law.[646]

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640 Du Plessis 2015 *PELJ* 1734-1735.

641 2005 5 SA 3 (CC).

642 (LCC34/99) [1999] ZALCC 68 (17 December 1999) at para 94.

643 Van Wyk 2017 *TSAR* 28; This argument was also accepted by Dugard "Unpacking Section 25: Is South Africa's Property Clause an Obstacle or Engine for Socio-Economic Transformation?" 9.

644 Van Wyk 2017 *TSAR* 28 references Budlender *The constitutional protection of property rights* 59; Van der Walt *Constitutional Property Law* 512-520; Currie and De Waal *The Bill of Rights Handbook* 552-553.

645 Badenhorst and Olivier 2012 *THRHR* 337; *Agri South Africa v Minister of Minerals and Energy and Another* 2012 (1) SA 171 (GNP) at para 70.

646 It was argued that the transitional provisions in the *MPRDA* introduced a system of use-it or lose-it in relation to so-called unused, old order mineral rights that existed prior to the enactment of the *MPRDA* in the cases of *Agri South Africa v Minister of Minerals and Energy and Another* 2012 (1) SA 171 (GNP); *Minister of Minerals and Energy v Agri SA* 2012 (5) SA 1 (SCA); *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC). This argument was rejected in the High Court at para 70 where Du Plessis J stated
"From what I have said, it is apparent that the MPRDA with Schedule II introduced a principle of 'You have lost it. Now apply within a year and if you qualify, you may use it'. In that sense the MPRDA is, purely as an anti-sterilisation and anti-hording instrument, rather blunt, I need not consider what the position would have been if the MPRDA had indeed introduced the use it or lose it principle"
The Constitutional Court, per Mogoeng CJ, finally held that no expropriation took place as the provisions of the *MPRDA* constituted a mere deprivation but not an expropriation; Marais 2015 *PEJL* 2992-3006;
While the High Court in *Agri South Africa v Minister of Minerals and Energy and Another* 2012 (1) SA 171 (GNP) at para 70 referred to the *MPRDA* as an "anti-sterilization and anti-hoarding instrument", it was not considered what influence the hoarding or sterilization of a scare resource could have on the calculation of compensation and more specifically how the current

It can be argued that the formulation of current use value and its role in the determination of value under the *Regulations* seeks to introduce a concept similar to use-it or lose-it in the sense that an owner would be punished with a lower valuation if he does not use the property to generate an economic return. There have been attempts to introduce a similar concept into the South African law, but these attempts have not proceeded to the point of promulgation. The draft *Preservation and Development of Agricultural Land Framework Bill*[647] sought to promote the use of high potential agricultural land for agricultural production by prescribing a reduced rate of compensation if the property was not used for agricultural production.[648] However, at the time of writing, the Bill has not yet been promulgated and a revised version has been published[649] which did not contain provisions seeking to affect compensation for expropriation based on the use of the property. Likewise, the 2013 *National Water Policy Review*[650] recommended amendments to the *National Water Act*[651] to cater for a use-it or lose-it approach, whereby any unused portion of an authorised water user's allocation would be "reallocated to the public trust"[652] without compensation. No legislative amendments have been made to affect this policy but Van Wyk's argument[653] could find relevance should it be enacted.

The purpose for which valuations are conducted under the *Regulations* should limit the extent to which Van Wyk's argument[654] finds application. The formula prescribed in the *Regulations* relates to land that is valued for land reform purposes[655] as defined in the Act.[656] Neither the *ESTA, Restitution Act, Labour Tenants Act* nor the

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use factor would be applied in the event that the use was against the public interest, as compensation was not awarded since the Constitutional Court held in *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) that no expropriation took place.

647 Gen Not 210 in GG 38545 of 13 March 2015.

648 Item 54(3)(c) in Gen Not 210 in GG 38545 of 13 March 2015.

649 Gen Not 984 in GG 40247 of 2 September 2016.

650 Gen Not 888 in GG 36798 of 30 August 2013.

651 36 of 1998.

652 Item 2.1 in Gen Not 888 in GG 36798 of 30 August 2013.

653 Van Wyk 2017 *TSAR* 28.

654 Van Wyk 2017 *TSAR* 28.

655 Reg 5 in Gen Not 1322 in GG 42064 of 30 November 2018.

656 Section 1 of the *Property Valuation Act* defines land reform as:
"'Land Reform' means land redistribution, land restitution, land development and tenure reform;".

Provision of Land and Assistance Act is aimed at ensuring the productive use of scare natural resources. It may be that the concept of "land development"[657] could be aimed at ensuring productive use, but this is not mirrored as an objective in the legislation which provides for powers of expropriation. Emphasis on productive use in the valuation would therefore be misaligned with the purpose of the land reform legislation containing empowering provisions for expropriation.

Van der Walt[658] furthermore contends that it would not be in the public interest should the current use factor be used to punish landowners for the way in which they chose to use their property.

4.3.2.8 The application of current use as a factor in comparable constitutional provisions setting out the determination of compensation upon expropriation

In the *Deichordnung case*[659] the German Federal Constitutional Court had to decide on the validity of legislation which made provision for a legislative expropriation to transfer dikes and property adjacent to dikes from private owners to public ownership as part of a programme to improve protection from flooding. The legislation also made provision for compensation to be paid to the owners. In testing the compensation provided for in the legislation against the standards of article 14.3 of the German Basic Law,[660] the court held that the developmental potential of land for alternative uses could not be considered where the municipal laws did not permit the land to be used for that alternative use.[661] In this regard the German law seems stricter than the 3-pronged test formulated for developmental potential in the South African law[662] and considerably stricter than the provisions of the *Regulations.*

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657 See the definition of "Land Reform" in s 1 of the *Property Valuation Act.*
658 Van der Walt *Constitutional Property Law* p512-513; also cited by du Plessis 2015 *PELJ* 1734.
659 BVerfGE 24, 367 (*Deichordnung case*).
660 of 1949.
661 *BVerfGE* 24, 367 at para 188.
662 *Port Edward Town Board v Kay* 1996 (3) SA 664 (A).

Likewise, the inherent potential of the soil could not be taken into consideration if the current use was simply to harvest the grass which stabilises the dikes.[663]

Some support can also be found in the German Law for the Land Claims Court's contention that the law should not reward speculation.[664] According to Kleyn,[665] the application of article 14.3 of the German Basic Law[666] considers the reason for which the market value of a property may have increased over time and looks critically at whether this was due to the owners' "own labours"[667] or whether it was due to neutral factors such as the scarcity of land. This is reflected in section 154(2) of the Federal Building Code[668] wherein it is outlined that the financial compensation to which an owner is entitled may be discounted to the extent that the increase in the value of the property is merely due to a resonation and not as a result of his own investment. This accords with Kleyn's view that, where the increase in value was due to "state contributions or neutral factors",[669] a downward adjustment from market value could be justified. To some extent, these factors echo the Land Claims Court's reasoning in that no substantial investment was made into the property and that the object of compensation was not to reward speculation.[670] The persuasive authority supporting the LCC's decision is however somewhat limited as the decision was over-turned on appeal with the court stating that "There was therefore no justification for stigmatising the Trust's claim as 'extravagant'".[671] It does not appear as though the Supreme Court of Appeal looked to foreign law as persuasive authority.

The application of the current use as a factor under section 25(3)(a) of the *Constitution* appears to be quite settled, but it does not reflect the weight attached to this factor by the *Regulations* nor equate current use to current use value.

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663 *BVerfGE* 24, 367 at para 190.
664 *Mzisa case* at para 52.
665 Kleyn 1996 *SAPR/PL* 443, 444.
666 Of 1950.
667 Kleyn 1996 *SAPR/PL* 443.
668 Federal Building Code (Baugesetzbuch, BauGB), 1997; Gromitsaris 2011 *Ius Publicum* p50.
669 Kleyn 1996 *SAPR/PL* 443.
670 *Msiza case* at para 80.
671 *Msiza appeal* at para 26.

4.3.3 Market value

4.3.3.1 Introduction

Of all the factors listed in section 25(3) of the *Constitution*, market value is perhaps the most contentious.[672] It is also the factor which has received the most detailed interpretation and analysis by our courts as it formed the basis of compensation in the pre-constitutional era and is still given prominence in the *Expropriation Act*.[673] The regulations likewise contain detailed guidance as to what can and cannot be taken into consideration by a valuer in the calculation of market value,[674] but leave considerable discretion as to which valuation method should be used. These factors are discussed in detail below to ascertain the differences and similarities between the *Regulations* and the existing precedents established by the South African courts.

4.3.3.2 Consideration of the property's potential, highest and best use

Regulation 5(5) obligates the valuer to determine the market value by accounting for its realisable potential and assuming its highest and best use. It reads as follows

> Market Value
>
> (5) The authorised valuer shall establish the market value of the subject property as at the valuation date, taking into account any realisable potential and assuming its highest and best use. [675]

Since there is no definition provided for 'realisable potential', it is not clear whether this relates to a use other than the current use of the property nor how it differs from the concept of 'highest and best use' as defined. Presumably, both concepts relate to a higher value if the property is used for a purpose other than the current use. Irrespective of what the true differences are between these concepts, the

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672 See Du Plessis 2015 *PELJ* 1726; Pienaar 2014 *PELJ* 640; Van der Walt 2005 *SALJ* 765; Van Wyk 2017 *TSAR* 21 for an outline of the overemphasis placed on market value to date in the calculation of compensation upon expropriation.

673 See s 12(2) of the *Expropriation Act*.

674 Reg 5 in Gen Not 1322 in GG 42064 of 30 November 2018.

675 Reg 5(5) in Gen Not 1322 in GG 42064 of 30 November 2018.

application of this provision deviates somewhat from the way in which the corresponding factor has been applied by the courts.

As outlined in the previous section, the courts stated that an applicant must prove, on a balance of probabilities, that the property is capable of an alternative use with a higher value.[676] This was then developed into a three-staged approach to more accurately determine when this can influence the market value.[677] The developmental potential of a property will not be considered where the purchaser has knowledge of impediments preventing the development[678] as the intention of just and equitable compensation is to arrive at an amount "free from the pervading influences of speculative forces which can distort the value of the property".[679]

By "assuming"[680] the highest and best use and taking the realisable potential into account, it appears as though the *Regulations* place an obligation on the valuer to consider any alternative use for the property which could result in a higher value irrespective of its speculative effect,[681] the purchaser's knowledge of any impediments to using the property for other purposes,[682] whether additional steps are required to realise the potential which have not been taken, the likelihood of this potential being realised[683] or whether the buyer would have taken that alternative use into consideration in a hypothetical purchase price.[684] The definition of 'highest and best use' could be said to contradict the existing precedent as it refers to the "reasonably probable and lawful use of property".[685] As indicated above, the determining factor as to whether an alternative use can be considered is not whether it is reasonably probable, but rather that it must be proved on a balance of

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676 *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D).
677 *Port Edward Town Board v Kay* 1996 (3) SA 664 (A).
678 *Msiza Appeal* at para 20.
679 *Msiza* at para 52.
680 Reg 5(5) in Gen Not 1322 in GG 42064 of 30 November 2018.
681 This contradicts the *dictum* in the *Msiza Appeal* at para 20.
682 This contradicts the *dictum* in *Msiza* at para 52.
683 This contradicts the *dictum* in *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D) whereby the party alleging that the property is capable of an alternative use with a higher value, must prove same on a balance of probabilities.
684 According to the 3 requirements set out in *Port Edward Town Board v Kay* 1996 (3) SA 664 (A), it must be shown that a hypothetical purchaser would have taken this into account in his offer.
685 Definition of "highest and best use" contained in reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

probabilities that this alternative use is possible,[686] that a buyer would take this into consideration when agreeing to a purchase price and it must be proven what this value would be.[687] It must furthermore be shown that the purchaser knows of impediments[688] and the alternative use must not reward speculation.[689]

4.3.3.3 Factors excluded in the assessment of market value

Regulation 5(6) also prohibits the valuer from taking several factors into consideration, namely

> (a) The fact that the property is the subject of an acquisition or expropriation;
>
> (b) The special suitability or usefulness of the property for which it is required by the acquiring authority, if it is unlikely that the property would have been purchased for that purpose in the open market;
>
> (c) Any enhancement in the market value of the property, if such enhancement is a consequence of the use of the property in a manner which is unlawful;
>
> (d) Any diminution in the market value of the property, if such diminution is a consequence of being encumbered by a mining right, permit or permission, and where such encumbrance took place subsequent to assumption of ownership by the owner of the subject property;
>
> (e) Anything done with the object of obtaining compensation; and
>
> (f) The value of any moveable property, annual crops or growing timber on the subject property, and belonging to the owner, that have not yet been harvested as at the date of valuation, provided that the authorised valuer must determine their value separately if so requested by the instructing authority.[690]

As explained by the Court in the *Msiza Appeal*,[691] the exclusion in sub Regulation (a) has its roots in the *Pointe Gourde Principle*[692] inherited from English Law and subsequently codified in section 12(5)(f) of the *Expropriation Act*. The exclusion in

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686 *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D).
687 *Port Edward Town Board v Kay* 1996 (3) SA 664 (A).
688 *Msiza Appeal* at para 20.
689 *Msiza* at para 52.
690 Reg 5(6) in Gen Not 1322 in GG 42064 of 30 November 2018.
691 At para 18-21.
692 *Pointe Gourde Quarrying and Transport Co Ltd v Sub-Intendent of Crown Lands* [1947] AC 565 (P.C) as referenced in the *Msiza Appeal* at para 18; *City of Cape Town v Helderberg Park Development* (Pty) Ltd 2007 (1) SA 1 (SCA) at para 28.

sub regulation (a) is therefore *prima facie* aligned with the approach followed by our judiciary.[693]

The exclusions contained in regulations (b) and (c) likewise mirror the corresponding provisions in the *Expropriation Act*.[694] Sub regulation (e) does not appear to be based directly on any provisions contained in the *Expropriation Act*, however, it could be supported by both section 12(5)(d)[695] as well as the *Pointe Gourde Principle*. Section 12(5)(d) prohibits compensation to be paid for improvements made to the property after the notice of the intention to expropriate has been delivered unless it was initiated before the notice was delivered, or if it was required to maintain the property.[696] Sub regulation (e) brings in an element of intent as it relates to enhancements made "with the object of obtaining Compensation".[697] This requirement of intention is not present in section 12(5)(d) of the *Expropriation Act* but perhaps it is assumed that any enhancements made after the impending expropriation has become known must be done with the intention of obtaining compensation, unless there was a pre-existing obligation or unless it was done to maintain the property. While not directly comparable, there does appear to be some congruence between these sections.

Furthermore, the *Pointe Gourde Principle* requires the valuer to virtually disregard the impending expropriation.[698] It therefore follows that the valuation should

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693 *Msiza Appeal*; *City of Cape Town v Helderberg Park Development* (Pty) Ltd 2007 (1) SA 1 (SCA); *Port Edward Town Board v Kay* 1996 (3) SA 664 (A).

694 Reg 5(b) in Gen Not 1322 in GG 42064 of 30 November 2018 closely resembles s5(b) of the *Expropriation Act*. It reads as follows
"(b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased."
Reg 5(c) in Gen Not 1322 in GG 42064 of 30 November 2018 likewise closely resembles s5(c) of the *Expropriation Act*, which reads as follows
"if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account."

695 Of the *Expropriation Act*.

696 Section 12(5)(d) of the *Expropriation Act.*

697 Reg 5(e) in Gen Not 1322 in GG 42064 of 30 November 2018.

698 In *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) at p42, the court explained the underlying rationale behind s 12(5)(f) of the *Expropriation Act* by quoting the following passage with approval from *Myers v Milton Keyenes Development Corporation* [1974] 2 ALL ER 1096 (CA):

disregard anything done by the owner to attract additional compensation as a result of the impending expropriation.

Finally, sub regulations (d) and (f) do not find corresponding precedent in the *Expropriation Act* or in case law. However, this could be because moveable property, timber, standing crops or mining rights, permits or permissions are valued separately in the formulation.[699]

4.3.3.4 Limitations on the use of state transactions

Regulation 5(7) furthermore regulates the conditions under which state acquisitions can be used as comparable transactions to assess market value. It states

> (7) In establishing the market value of the subject property, the authorised valuer may take into account prices paid by the state as evidence for market value, only if-
>
> (a) the authorised valuer has taken reasonable steps to find transactions where the state is not a party to, and finds that these are not available;
>
> (b) having regard to the facts and the circumstances of the transaction, and the broader property market, the authorised valuer is of the opinion that the price paid by the state is reasonable and fair, and would represent what a non-state buyer would pay for the subject property, could one be found; and
>
> (c) the authorised valuer has disaggregated the total price paid by the state into process paid for moveable and immovable property, as appropriate.
>
> (8) The authorised valuer must include in the valuation report his or her use of prices paid by the state as evidence for market value as a departure.[700]

The *Regulations* therefore clearly lay out three requirements that must be satisfied before a valuer can use prices paid by the state in its valuation, namely that; reasonable steps were taken to find transactions where the state is not a party; the valuer must be satisfied that the prices paid by the state are fair and the valuer must indicate the prices paid for moveable and immoveable property.

"It is apparent, therefore, that the valuation has to be done in an imaginary state of affairs in which there is no scheme".

699 See Reg 6(a), (b) and 5(3)(c) in Gen Not 1322 in GG 42064 of 30 November 2018.

700 Reg 5(7) & (8) in Gen Not 1322 in GG 42064 of 30 November 2018.

These requirements mirror the approach adopted by the judiciary. The court in *Minister of Water Affairs v Mostert*[701] followed a similar approach in cautioning against the use of state transactions unless it can be shown that it followed "objective and impersonal bargaining".[702] The Appellate Division, as it was then known, likewise recognised in *Estate Marks v Pretoria City Council*[703] that there might be instances in which comparable transactions are not available, in which case one has little choice but to make use of prices paid by the state.[704] It was furthermore accepted in the case of *Van Zyl v Stadsraad van Ermelo*[705] that compensation paid for expropriation could be used in assessing the market value of a property, provided that these amounts be approached with caution as the buyer was not a willing buyer by virtue of the expropriation.[706] This approach was quoted with approval by Gildenhuys J in *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs.*[707] The precedent therefore seems to align closely with

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701 1966 (4) SA 690 (A).

702 *Minister of Water Affairs v Mostert* 1966 (4) SA 690 (A) at 723.

703 1969 (3) SA 227 (A).

704 The court stated in *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 254
"The difficulty, of course, often is to find transactions which are truly comparable. As INNES, J.A., remarked in *Pietermaritzburg Corporation v South African Breweries Ltd.,* 1911 AD 501 at p. 516:
'It may not be always possible to fix the market value by reference to concrete examples. There may be cases where, owing to the nature of property, or to the absence of transactions suitable for comparison, the valuator's difficulties are much increased. His duty then would be to take into consideration every circumstance likely to influence the mind of a purchaser,…There being no concrete illustration ready to hand of the operation of all these considerations upon the mind of an actual buyer, he would have to employ his skill and experience in deciding what a purchaser, if one were to appear, would be likely to give. And in that way, he would to the best of his ability be fixing the exchange value of the property.'
Ordinarily speaking, an expropriation prince hardly fits the concept, prescribed by the Act, of a sale "in the open market by a willing seller to a willing buyer". As *Cripps, op. cit.* para. 4 – 193, remarks:
'The sales must also be sales on a free market, and sales by agreement to an acquiring authority having compulsory powers are not reliable evidence of value in the open market since they would not, generally, satisfy the assumption of a willing seller derived from the statutory requirement of market value […] Nevertheless, contemporaneous expropriation prices for property in the vicinity may be relevant and afford some guidance.'"

705 1979 (3) SA 549 (A) at p568.

706 The judge stated at p568:
"In die reël moet die vergelykbaarheid van pryse wat as gevolg van onteiening van vergelykbare eiendomme betaal is met 'n mate van omsigtigheid benader word omdat by sodanige gevalle twyfel mag ontstaan of die 'koper' 'n 'vrywillige' koper was".

707 [2000] 2 ALL SA 26 (LCC) at p34.

the requirement in the *Regulations* that the valuer must motivate why state transactions were relied upon.[708]

The second requirement, namely that the valuer must be satisfied that the prices paid by the state are fair,[709] also resonates with the court's existing approach. In *Union Government v Jackson and Others,*[710] it was stated that prices paid by the Government should not be assumed to be a "proper test of fair market value"[711] unless corroborating evidence can be provided indicating that the prices paid by the Government equated to those properties' fair market value. This judgement effectively requires the valuer to show that the prices paid by Government are fair.

Finally, the requirement to separate movables and immovables,[712] as well as the requirement to highlight the use of state transactions in the valuation report,[713] are unique to the task required of the valuer by the *Regulations.* They do not, however, contradict existing precedent by the courts. The result is that regulation 5(7) overall seem to accurately reflect the approach adopted by the courts in using state transactions for assessing market value.

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708 Reg 5(7)(a) in Gen Not 1322 in GG 42064 of 30 November 2018.

709 Reg 5(7)(b) in Gen Not 1322 in GG 42064 of 30 November 2018.

710 1956 (2) SA 398 (A).

711 In *Union Government v Jackson and Others* 1956 (2) SA 398 (A) it was stated at p425:
"I have conceded that the prices paid by the Government for the other farms have some relevancy to the valuation of the properties in issue; but it is a far cry from that proposition to one which makes those prices the complete test for such valuation, at any rate without much fuller data for a comparison that the record gives us. While I have no criticism to offer on the reasons mentioned by ROPER J, in support of his assumption that the prices paid for the other farms probably represented a reasonable value, the fact remains that they were paid in transactions of a very special type, not the ordinary voluntary sales between parties who have a free choice whether or not they will consider the bargain at all. To equate them therefore with the prices obtainable at such sales which are the proper test of fair market value- is an assumption which in the absence of evidence that they do correspond, is not necessarily correct".

712 Reg 5(7)(c) in Gen Not 1322 in GG 42064 of 30 November 2018.

713 Reg 5(8) in Gen Not 1322 in GG 42064 of 30 November 2018.

4.3.3.5 Valuation methodology

4.3.3.5.1 Introduction

Aside from the provisions of regulation 5(5) to (7) discussed above, the *Regulations* do not specify what methodology a valuer must use when determining market value. The only requirement is that the valuer should include the approach he chose to use and his reasoning for doing so in the valuation report.[714] Within the context of the pre-constitutional measure for compensation, our courts have recognised several methods for determining the market value of immoveable property,[715] namely the comparable sales[716] method, the income capitalisation approach,[717] the residual value method[718] and the cost approach.[719] The comparable sales method has been accepted as the preferred approach,[720] although the other methods may be used where this method is not practical.[721] A valuer following the prescripts of the *Regulations* should logically follow the same approach as there is nothing to the contrary stated in the *Regulations*, save that a number of provisions would only be

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714 Reg 7 (r) in Gen Not 1322 in GG 42064 of 30 November 2018 states that:
"A valuation report contemplated in section 15 of the Act must in addition to the matters set out in that section, contain the following information:
[…]
(f) a statement of the valuation approach and reasoning;".

715 *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956; *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) at 676.

716 *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) at 676; This method has also been referred to as the "comparable transactions" approach in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956; or the market data approach by Du Plessis 2015 *PELJ* 1737.

717 Du Plessis 2015 *PELJ* 1737; This method was also been referred to as the "capitalisation of existing net returns" method in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956.

718 *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) at 956.

719 Du Plessis 2015 *PELJ* 1741, 1742; *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) at para 50, 51.

720 The court in *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) stated at 253, 254
"It is, I think, well established that comparable transactions afford the most satisfactory guide in determining market value".

721 This approach has also been incorporated into the *Valuation Handbook* 12 wherein it states that the comparable sales method is the preferred method to be used by valuers commissioned by the state, but that the capitalisation income and cost methods can also be used in the instances where the comparable sales method is not practical as indicated by the jurisprudence of the Land Claims Court.

applicable to certain valuation methodologies. These are discussed in more detail below.

4.3.3.5.2 Comparable sales method

The comparable sales method is not defined in legislation but it has been developed by the courts when expert valuers have chosen to use this method when testifying as to the market value of properties.[722] The methodology is not defined in the *Regulations*, however, the *Valuation Handbook* describes it as follows

> […]valuers must make their assessment of MV by looking at the prices paid for land in recent open market transactions in the vicinity of the land being valued, disregarding transactions that are not sufficiently comparable, and taking into account any adjustments that need to made in order to render the figures obtained from the comparable transactions more meaningful. [723]

As stated above, both the courts[724] and the *Valuation Handbook*[725] lists this method as the preferred one and presumably that would be no different under the *Regulations* as there is no provision indicating a contrary view. The inclusion of regulation 5(7) and (8),[726] which regulates the use of state acquisitions as comparable transactions, reinforces this view as these considerations would only be applicable if the comparable sales method is used. There is, furthermore, jurisprudence indicating that alternate methods can be used where the comparable sales method is not practical.

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722 See *Bonnet v Department of Agricultural and Land Tenure* 1974 (3) SA 737 (T*); Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253, 254; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W); *Karanga Holdings (Pty) Ltd v Minister of Water Affairs* 1998 (4) SA 330 (SCA); *Minister of Water Affairs v Mostert and Others* 1966 (4) SA 690 (A) at 722 paras C, D; *Minister van Waterwese v Von During* 1971 (1) SA 858 (A); The *Mzisa case*; *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C); *Port Edward Town Board v Kay* 1996 (3) SA 664 (A); *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D); *Todd v Administrator, Transvaal* 1972 (2) SA 874 (A).

723 *Valuation Handbook* at 12.

724 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 253, 254; *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) at 676.

725 At 12.

726 In Gen Not 1322 in GG 42064 of 30 November 2018.

4.3.3.5.3 Income capitalisation method

The *Valuation Handbook* permits valuers to use alternative methods for valuing land where the comparative sales method is not suitable,[727] including the income capitalisation method[728] whereby the value of property is determined based on the annual income generated by the property for the owner. Du Plessis[729] notes that this method is mostly used to determine the value of properties acquired for investment as the core consideration in determining the estimated value of the property is the return which it would render to a potential investor.

Regulation 2(e)(iv) permits the valuer to request the owner, agent, tenant or occupier of the property to deliver details regarding the "internal rate or return and/or yield"[730] of the property where this is "reasonably required for the valuation of the subject property".[731] The *Regulations* therefore seem to permit this method to be applied but in keeping with the approach adopted by our courts,[732] the comparable sales method will likely be preferred where comparable transactions are available.[733]

4.3.3.5.4 Other valuation methods

Evidence has been led in court using alternative valuation methodologies including the cost approach[734] and the residual land value method.[735] These methods are however only applied as alternatives where the comparable sales method cannot be

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727 *Valuation Handbook* at 4.

728 Also referred to as the Income Approach by Raubenheimer *Waardasiereg* 43.

729 Du Plessis 2015 *PELJ* 1740-1741.

730 Reg 2(e)(iv) in Gen Not 1322 in GG 42064 of 30 November 2018.

731 Reg 2(e) in Gen Not 1322 in GG 42064 of 30 November 2018.

732 *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T); *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A); Du Plessis 2015 *PELJ* 1740, 1741.

733 In *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) at 754 the court expressed a preference for the comparable sales method where it stated that it is in the "[…]relatively fortunate position of not only having reasonably comparable transactions in the neighbourhood, but also the offer made by Greyling early in 1968. I will not be guided in any way by the D.C.F. calculations".

734 *Ex Parte Former Highland Residents: In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) as referenced by Du Plessis 2015 *PELJ* 1741, 1742; Raubenheimer *Waardasiereg* 44-45.

735 *Opera House (Grand Parade) Restaurant Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) at 676; Raubenheimer *Waardasiereg* 45-46.

applied.[736] Once again, there is no indication in the *Regulations* that these and other methods cannot be used, however, should the determination of compensation proceed to litigation, the weight of evidence suggests that the valuer may need to provide motivation should the comparable sales method not be used as the courts have expressed their preference for that method in the past.[737]

4.3.4 Acquisition benefits v the history of the acquisition and use of the property

After the sum of the market value and current use value has been divided by two, the formula contained in *Regulations* requires the valuer to deduct any 'acquisition benefits' from the value.[738] Acquisition benefits are defined as

> **"Acquisition benefits"** means any benefits that accrued to the owner of, and the subject property, because of the manner of acquisition, including that they did not acquire the property at market value and from a willing owner, and where such acquisition and benefit was due to, aided by, or a consequence of past discriminatory laws and practices, or unlawful conduct.[739]

There are two elements of this definition that merit finer consideration when comparing the approach adopted by our courts to section 25(3)(b).[740] Firstly, there is a duel requirement that the property must not have been acquired at market value from a willing owner and the benefit must have been acquired as a result of past discriminatory laws and practices or unlawful conduct. The benefit must furthermore accrue to the owner and the subject property.

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736 In *Ex Parte Former Highland Residents: In Re: Ash v Department of Land Affairs* 2000 2 All SA 26 (LCC) at 30, the cost approach was used as figures for sales were only available in another neighbourhood which the court deemed not to be directly comparable; The court in *Opera House (Grand Parade) Restaurant Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) at 677 likewise held that the residual land value method "is not the safest or most appropriate method" as the comparable sales approach is preferred.

737 *Opera House (Grand Parade) Restaurant Ltd v Cape Town Municipality* 1989 (2) SA 670 (C); *Pietermaritzburg Corporation v SA Breweries Ltd* 1911 AD 501 at 506; *Minister of Water Affairs v Mostert and Others* 1966 (4) SA 690 (A); *Estate Marks v Pretoria City Council* 1963 (3) SA 227 (A).

738 Reg 6(a)(ii) in Gen Not 1322 in GG 42064 of 30 November 2018.

739 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

740 Section 25(3)(b) lists the "history of the acquisition and use of the property" as a factor that can be considered to arrive at just and equitable compensation.

The purpose of section 25(3)(b) was unpacked by the Land Claims Court in the *Mzisa case*. The court stated the following in this regard

> The requirement to consider the history of the acquisition and the use of the property is a very specific enquiry based on the facts of each case. The rationale for this requirement is clear, given South Africa's history of land dispossession and racial discrimination. In particular, this factor is most relevant in cases where land was expropriated by the state and sold below market value during apartheid or made available to white farmers below market rates. In such an instance, it would indeed be unfair to pay full market value in compensation as this would enable the owner to benefit twice from apartheid.[741]

Section 25(3)(b) is therefore only deemed applicable where the benefit received was as a result of racially discriminatory laws or practices. Where the property was acquired in a way other than a market-related transaction, but never-the-less not as a result of racial discrimination, it should not be used to discount the amount of compensation payable to the owner. This is supported by the dictum of Gildenhuys J in *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others*[742] where it was stated that "one should not distinguish between 'rich' landowners and others in the determination of compensation".[743]

It was again confirmed in *Msiza* that it is not a relevant consideration where the property has not been acquired through an arm's length transaction as long as there is no relation to racially discriminatory laws or practices.[744] The dual requirement apparent in the definition of acquisition benefits therefore seem to mirror the approach followed the courts.

Interestingly, the courts have also made downward[745] adjustments to the value of the property based on the historical use of the property as required by section

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741 *Msiza case* at para 53.

742 (LCC 156/2009) [2012] ZALCC 7 (19 April 2012).

743 *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012) at para 61.

744 The court stated in *Msiza* at para 60
"The evidence given by the landowners was that their acquisition of the land in 1999 cannot be considered as a market related transaction since the person who sold the land to them had some sort of affinity for them, based on personal relations. I do not see how this influences the basic facts of the case.".

745 In the case of *Khumalo and Others v Potgieter and Others* (LCC34/99) [1999] ZALCC 68917 December 2010) the court at para 94, 95 rationalised a reduction in the value of the compensation from market value as the reduction of the value of the property as a result of the

25(3)(b), but the definition of acquisition benefits[746] only makes reference to benefits in the history of the acquisition and not the history of its use by that owner.

It is not entirely clear what is intended where the definitions state that the benefit must accrue to "the owner of and the subject property".[747] Perhaps it simply alludes to the requirement that it is the expropriated owner who must have been the beneficiary of some acquisition benefit and not a predecessor in title.

While the *Regulations* only seem to consider any benefits arising from the way in which the property was acquired, the corresponding constitutional provision also enables the courts to consider the historical use of the property.[748] According to Kleyn,[749] the balancing of public and private interests required by Article 14.3 of the German Basic Law[750] considers own contributions and own labour to determine whether compensation at market value would be justified or not. There the increase in the value of property can be attributed to the owner's own labours, for example if investments were made or buildings erected, there would be little reason to deviate from market value. However, where the increase in the value of land over time is not due to the efforts of the owner, for example if it is due to state projects or the scarcity of land, a fair balance between the public and private interests could be less than the current market value.[751]

Since Article 14.3 does not list individual factors as done in the South African *Constitution*, it is unclear whether this persuasive authority could be used to

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impending expropriation had already been realised at the time when the property was purchased; Van Wyk 2017 *TSAR* 25; In the *Msiza case* at para 54 to 63, the court also made a downward adjustment based on "equity considerations" as the appreciation in the value of the property from the time at which the expropriated owner bought the land and the time of the expropriation did not come about as a result of a change in land use or investment into the property by the owner. To award the full amount of the appreciation would amount to rewarding speculation which it held was unfair towards the public interest.

746 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

747 Reg 1 in Gen Not 1322 in GG 42064 of 30 November 2018.

748 Section 25(3)(b) of the *Constitution* lists the "history of the acquisition and use of the property" (own emphasis) as a factor which could be relevant in the determination of compensation.

749 Kleyn 1996 *SAPR/PL* 443-444; Erasmus *The Interaction between Property Rights and Land Reform in the New Constitutional Order in South Africa* 184.

750 of 1949.

751 Kleyn 1996 *SAPR/PL* 443-444.

influence the application of section 25(3)(c), section 25(3)(e) or whether it should be separately considered under the application of the historical use of the property as listed in section 25(3)(b) of the *Constitution*. Irrespective, it could serve as persuasive authority for South African courts in developing the approach to just and equitable compensation[752] as it applies under the German law in finding a fair balance between the public and private interests.[753]

4.3.5 Direct state subsidies in the acquisition and beneficial capital improvement of the property

Regulation 6 also requires the value of "direct state investment and subsidy in the acquisition and beneficial capital improvement of the subject property"[754] to be subtracted as part of the formula. This requirement mirrors the wording contained in section 25(3)(d) of the *Constitution* near verbatim. According to Van der Walt,[755] the intention of this provision is to prevent the state from compensating an owner at full market value where the land was originally acquired with assistance from the state or where capital improvements, which resulted in an increase to the value of the land,[756] were undertaken with state assistance. There are however two important qualifications, namely that only direct subsidies should be factored in[757] and that it must be the current owner who received the benefit.[758]

These qualifications seem to be reflected in Regulation 5(9) where it is stated that the value of "direct state investment and subsidy [must be calculated] accruing to

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752 As required under section 39(1)(c) of the *Constitution*.

753 Kleyn 1996 *SAPR/PL* 443-444.

754 Regulation 6(a)(ii) and 6(b)(ii) in Gen Not 1322 in GG 42064 of 30 November 2018.

755 *Constitutional Property Law* 513.

756 Gildenhuys *Onteieningsreg* 177 stresses the importance that the improvements must be beneficial. In the event that the state paid subsidies to make improvements, but these improvements did not contribute to an increase in the market value as at the date of expropriation, then the state would not be placed in the situation of paying twice because the market value did not increase as a result of the improvement.

757 Van der Walt *Constitutional Property Law* 514; and Gildenhuys *Onteieningsreg* 176 agree that indirect subsidies such as tax benefits, marketing subsidies and drought relief awarded to the owners of agricultural holdings will likely not be considered as a factor to discount the amount of compensation awarded as it would be too difficult to calculate the value of indirect benefits.

758 Gildenhuys *Onteieningsreg* 176 notes that this factor will only be applicable where it is the expropriated owner, and not a predecessor in title that received subsidies from the state in the acquisition and beneficial capital improvement of the property.

the owner of the subject property".[759] The way in which it is calculated however deviates somewhat from the approach followed by our courts. Regulation 5(10) and (11) instructs the valuer in the first instance to calculate the value based on the replacement cost as at the time of valuation and only where this is not possible can the historical value be used. In this regard the *Regulations* state:

> Where the direct state investment and subsidy in the acquisition and beneficial capital improvement of the subject property can, without ambiguity, be attributed to specific improvements existing on the subject property, the value contemplated in sub-regulation (9) must be established on the basis of the replacement cost of those improvements, less the total accumulated depreciation as the at the valuation date; and
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> Where the attribution contemplated in sub-regulation (10) cannot be made, the authorised valuer shall determine the historical cost of state investments and subsidies, and escalate the said cost to the date of valuation using an appropriate cost or price index.[760]

In the case of *Farjas (Pty) Ltd v Minister of Agriculture and Land Affairs*[761] the Supreme Court of Appeal held that the consumer price index was the most appropriate means to calculate the modern-day value of money within the context of calculating compensation. *In casu* the dispute related to an award of just and equitable compensation where the land cannot be restored under the *Restitution Act*. More specifically, the courts had to determine the correct method to determine the modern-day value of the compensation which a claimant was entitled to at the time of dispossession, taking into consideration "changes over time in the value of money".[762] Taking into account the need for a balance between the individual entitled to compensation and the public purpose, it was held that the most appropriate method was the Consumer Price Index and not the rate of return calculated under the ABSA House Price Index.

The reasoning was confirmed by the Constitutional Court in *Florence v Government of the Republic of South Africa*[763] where the majority judgement confirmed that the

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759 Reg 5(9) in Gen Not 1322 in GG 42064 of 30 November 2018.
760 Reg 5(10) & (11) in Gen Not 1322 in GG 42064 of 30 November 2018.
761 2013 (3) SA 263 (SCA).
762 Section 33(eC) of the *Restitution Act.*
763 2014 (6) SA 456 (CC).

Consumer Price Index was the most appropriate measure to calculate the value of money over time. In this regard, the court stated:

> The CPI essentially generates the inflation-adjusted value. It ensures that the 'consumption power' of money is not eroded over time. Perhaps a clearer explanation of the CPI is 'an index that adjusts the value of money for consumption purposes over time and compensates for diminishing value of money'. It is thus fair to say that the CPI seeks to measure the value of money over time in order to avoid its diminishing value with the passage of time.[764]

Although the cases in question dealt with the calculation of compensation under the *Restitution Act*, the *Restitution Act* requires the claimant to receive just and equitable compensation in the event that the land cannot be restored.[765] Where this requires the court to calculate the present-day value of historical amount, it has held that the correct approach is to apply the consumer price index. In other words, the way in which the value of historical subsidies should be determined should be to establish the value of the subsidies at the time and to apply the consumer price index to reach its present-day value. That value and not the current replacement costs, should be deducted in the valuation.

The draft *Expropriation Bill* also seeks to guide the interpretation of this provision further in clause 12(3)(e) where it states that it may be just and equitable to award nil compensation where the value of direct state subsidies in the acquisition and beneficial capital improvement of the property exceeds the market value of the land.[766] At the time of writing, this provision is still contained in draft legislation and

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764 At para 141.

765 In *Florence v Government of the Republic of South Africa* 2014 (6) SA 456 (CC) the court noted at *para* 46 that it was the intention of the Act to award similar compensation to those claimants whose land can be restored versus those who receive equitable redress. The court stated "[g]iven these purposes, what should we make of Ms Florence's argument that because the Restitution Act permits both restoration and equitable redress, the latter should generally be equivalent to the former? In *Mphela* this court held that 'the starting point is that the whole of the land should be restored, save where restoration is not possible due to the compelling public interest considerations'. This recognises the primacy of restoration. Equitable redress, including in the form of financial compensation, is generally 'second prize'. In *Goedgelegen* the court noted that 'the Restitution Act is an enactment intended to express the values of the Constitution and to remedy the failure to respect such values in the past, in particular, the values of dignity and equal worth'. In keeping with the ideal and constitutional value of equality, it seems that all claimants are entitled to at least roughly equivalent compensation - whether or not restoration of the land is possible.".
In this regard equitable redress should be equivalent to just and equitable compensation.

766 Clause 12(3)(e) of the *Expropriation Bill.*

can therefore still be amended before final promulgation. The formula contained in Regulation 6[767] does not appear to conflict with this proposal as direct subsidies must be subtracted from the difference between market value and production value. Where the value of the subsidies exceeds market value, it is possible that the formula will arrive at an amount equal to nil.

4.3.6 Purpose of the expropriation

Section 25(3)(e) of the *Constitution* lists "the purpose of the expropriation"[768] as a factor which could be relevant to the calculation of compensation. The definition of value contained in the *Property Valuation Act* mirrors section 25(3)(e) of the *Constitution* with its inclusion of "the purpose of the acquisition",[769] yet no value is ascribed to the purpose of the acquisition in the *Regulations* nor does it feature in the formula contained in Regulation 6.[770] The *Regulations* prescribe that the purpose of the acquisition be included in the instruction to the *Valuer-General*[771] and that the *Valuer-General* must record same in the valuation certificate.[772] Interestingly, the information provided to the *Valuer-General* in the instruction must expressly stipulate that the purpose which the property is required for is a public one or in the public interest.[773] The public purpose or interest must likewise be captured in the valuation certificate.[774]

The way in which the purpose of the valuation is captured in the *Regulations* hints at a confusion between the public nature of the purpose (or interest) as a

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767 Reg 6 in Gen Not 1322 in GG 42064 of 30 November 2018.
768 Section 25(3)(d) of the *Constitution.*
769 Section 1 of the *Property Valuation Act*.
770 Reg 6 in Gen Not 1322 in GG 42064 of 30 November 2018.
771 Reg 4(1)(c) in Gen Not 1322 in GG 42064 of 30 November 2018.
772 Reg 7(q) in Gen Not 1322 in GG 42064 of 30 November 2018.
773 Reg 4(1)(c) in Gen Not 1322 in GG 42064 of 30 November 2018 states
"4. (1) An instructing authority requiring a valuation of the subject property which has been identified for land reform must request the Valuer-General, in writing, to conduct such valuation and must include the following information-
[…]
(c) the purpose for which the subject property is required, and a statement that this purpose is either in the public interest or for a public purpose, as the case may be;".
774 Reg 5(13) in Gen Not 1322 in GG 42064 of 30 November 2018.

prerequisite to a lawful expropriation[775] and the influence which the purpose could have on the calculation of compensation.

Although it has been argued that the courts have confused these concepts in the past,[776] authors generally accept that there is a distinct difference between the public purpose or interest requirement as a prerequisite for all lawful expropriations and the presence of a unique purpose which could be deemed relevant to adjust the amount of compensation under section 23(3)(e) of the *Constitution.*[777] Exactly which purposes would justify an influence on the amount of compensation is highly contested.

Van der Walt[778] argues that the purpose of the expropriation could be a more relevant factor when compared to expropriation for other, "business as usual"[779] purposes such as infrastructure. It is argued that the inclusion of section 25(8) of the *Constitution* could support the notion that little or no compensation could be payable where land is expropriated for land reform purposes as no provision of section 25, including the right to compensation, can preclude the state from giving

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775 Section 25(2)(a) states that property may only be expropriated in terms of a law of general application for a public purpose or in the public interest. An expropriation whose purpose does not meet this peremptory standard will be unlawful and hence the question of compensation will not arise; Van der Walt *Constitutional Property Law* 458-461, 515; Gildenhuys *Onteieningsreg* 94-109; Marais and Maree 2016 *PELJ* 5-14; Slade 2016 *PELJ* 3-5, 15, 19.

776 Van der Walt *Constitutional Property Law* 514-516; Van der Walt 2006 *SALJ* 23-40; argues that the Supreme Court of Appeal in *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA) erred in its reliance on the public interest to hold that the owner of the property should not be compensated for the market value of gravel taken by the state. The court held that it would not be in the public interest to pay the owner the full market value of the gravel as the purpose was to build a public road, and instead held that the owner should only be compensated for the temporary use of the property. Van der Walt *Constitutional Property Law* 515 argues that it would defeat the object of including the purpose of the expropriation under section 25(3) if the public purpose/interest requirement could simultaneously serve as a requirement for a lawful expropriation as well as a reason to discount the amount of compensation awarded. In this regard he states
"Or does it imply that the same significant deduction must apply to all expropriations for a public purpose, in other words, all lawful expropriations? The last question identifies the problem with this decision: the public interest justifies expropriation in the first place but should not also justify a reduction of the compensation amount, unless there is a special reason such as land reform involved.".

777 See Du Plessis 2013 *Stell LR* 372; Gildenhuys *Onteieningsreg* 177-179; Van der Walt *Constitutional Property Law* 514-516; Van der Walt 2006 *SALJ* 23-40; Van Wyk 2017 *TSAR* 29, 30.

778 Van der Walt *Constitutional Property Law* 514-516.

779 Van der Walt *Constitutional Property Law* 515.

effect to land reform. Van der Walt does however note that this would go against the bulk of international experience whereby expropriation without compensation is deemed unfair.[780]

Du Plessis[781] relies on the Utilitarian approach to compensation advocated by Michelman[782] to argue that a deviation from market value could be justified in cases where market-related compensation is unaffordable and the payment of sub-market rates could result in the greatest benefit to the majority of South Africans whose interests in land reforms and social justice outweighs the owner's interest in receiving market-related compensation.

On the other hand, Gildenhuys[783] argues that it may be unfair to impose a greater burden on the shoulders of an individual owner whose property is expropriated for land reform *vis-à-vis* an owner whose property is required for any other public purpose or interest. However, Gildenhuys does note that it could be just to award a lesser amount if the purpose of the expropriation is to achieve land reform, provided that the reduction "is not arbitrary and would not impose an unfair or disproportionate burden on the expropriatee".[784]

Our judiciary has likewise struggled to apply the purpose of the expropriation in the calculation of compensation. After determining the correct market value of the property, the Land Claims Court in the *Msiza case*, in line with the approach adopted in *Du Toit,* considered the purpose of the Expropriation. In line with the views of the authors referenced above, the court held that the purpose of section 25 (e) was primarily aimed at expropriation for land reform purposes and read with section 25 (8) of the *Constitution*,[785] justified the payment of compensation below market value.[786] In deviating from the accepted market value of the property, the court

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780 Van der Walt *Constitutional Property Law* 518.
781 Du Plessis 2013 *Stell LR* 371-372.
782 Michelman 1967 *Harv. L. Rev.* 1165.
783 Gildenhuys *Onteieningsreg* 178-179.
784 Gildenhuys "Full Compensation, Fair Compensation or No Compensation in Expropriations for Land Reform" 150.
785 Section 25(8) states that no provision of section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform.
786 *Msiza* at para 66.

gave seven reasons[787] to justify a downward adjustment, one of which related to the purpose of the expropriation under the *Labour Tenants Act*. In this regard the court stated

> Sixth the object of the compensation is land reform – which is expressly mentioned in the Constitution under the rubric of public interest. The national fiscus should [not] be saddled with extravagant claims of financial compensation, when the clear object of taking the land is to address a pressing public interest concern such as land reform;[788]

The court went on to reduce the amount of compensation from R1 800 000, representing the agreed upon market value by R300 000 to arrive at an amount of R1 500 000 which it deemed just and equitable.[789]

The judgement was however overturned on appeal with the Supreme Court of Appeal holding that the reduction of R300 000 was "arbitrarily decided […] [and with] no rational foundation".[790] Central to the Supreme Court of Appeal's decision was the fact that the state was willing to pay the market value and hence it could not be shown that an award of market value would be unfair towards the fiscus in that it could not afford to pay such an amount.[791] While the Supreme Court of appeal did not comment on or disagree with the Land Claims Court's view of the purpose of section 25(3)(e), namely that it was intended to address the public interest objective of land reform,[792] it did not agree with its application as it deemed it "arbitrary".[793]

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787 Aside from the purpose of the expropriation, the court ion *Msiza* at para 80 cited the "disproportionate chasm" between the purchase price paid for the land and the current market value, the fact that no significant investments have been made to the land by the owners, the land use did not change, the owners knew of the labour tenant's claim when purchasing the property, it was known to the owners when buying the land that the claim was valid and the labour tenants have lived on the property since 1936. These reasons have been dealt with under various headings above.

788 *Msiza* at para 80.6.

789 *Msiza* at para 81, 82.

790 *Msiza Appeal* at para 27.

791 *Msiza Appeal* at para 26.

792 *Msiza* at para 80.6.

793 *Msiza Appeal* at para 27.

The outcome of the *Msiza Appeal* is perhaps best captured by Gildenhuys[794] where he states that land reform, as the purpose of the expropriation, could influence the amount of compensation awarded, provided that it is not arbitrary. Unfortunately, this does not provide greater clarity as to how the purpose of the expropriation could meaningfully be applied in a non-arbitrary fashion.

Although the correct way in which this factor must be applied to compensation is far from settled, international precedent indicates that it can be applied to influence the amount of compensation. This does not, however, factor in the formula for the valuation of property contained in the *Regulations.*[795] This exclusion indicate instances where it could factor in the calculation of compensation creates a possible discrepancy between the valuation and the eventual compensation that may be agreed upon or awarded. Van Wyk notes that it would have assisted our understanding of section 25(3)(e) of the *Constitution*, had the court in *Msiza* outlined the calculation used to factor in the purpose to the calculation of compensation and what the role of the *Property Valuation Act* is in quantifying this factor.[796] It seems as though the *Regulations* do little to improve our understanding in this regard.

The draft *Expropriation Bill* also seeks to influence the existing jurisprudence on this factor by stating that the it may be just and equitable to award nil compensation where land is expropriated in the public interest,[797] including where land is expropriated under the *Labour Tenants Act*.[798] It is worth noting that this section only relates to land[799] and not to property within the wider constitutional concept. The relevant clause also uses the term "may"[800] as opposed to 'must', which indicates that nil compensation is not prescribed but rather clarifies that it is possible

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794 Gildenhuys "Full Compensation, Fair Compensation or No Compensation in Expropriations for Land Reform" 150.
795 Reg 6 in Gen Not 1322 in GG 42064 of 30 November 2018.
796 Van Wyk 2017 *TSAR* 29.
797 Clause 12(3) of the *Expropriation Bill*; The *Labour Tenants Act* was listed as an example however it does not appear to be a closed list, instead it is listed as an example where the expropriation would be in the public interest.
798 Clause 12(3)(a) of the *Expropriation Bill*.
799 Clause 12(3) of the *Expropriation Bill.*
800 Clause 12(3) of the *Expropriation Bill.*

under the right circumstances to award nil compensation for expropriated land where the purpose falls within the public interest. Although the clause does not appear to be prescriptive, it seeks to influence the interpretation of section 25 of the *Constitution* in that the public interest requirement should not only be a prerequisite for a lawful expropriation but should also influence the calculation of compensation.

To determine whether land reform as the purpose of the expropriation could justify nil compensation as recommended in *Expropriation Bill*, guidance could be drawn from the German law as persuasive authority.[801] The public's interest features prominently in German expropriation law as proportionality is required between the public benefit and the interests of those adversely affected to both establish the public good requirement as a prerequisite to a lawful expropriation[802] as well as to determine the constitutionality of compensation provided for in legislation.[803] The former is premised on the notion that expropriation must be for the public good, which is determined by a proportionality between the public benefits and the effects it has on private interests.[804] This can more readily be compared with the proportionality test[805] applied in the South African law to determine whether a deprivation will be permissible under section 25(1) of the *Constitution* and the German Federal Constitutional Court has determined that the payment of compensation must not be considered when determining the proportionality at this stage of the inquiry.[806] The latter is more applicable for this inquiry as any statute

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801 As outlined in the first chapter, there are considerable similarities between German and South African constitutional property law in that they both require compensation for expropriation to reflect and equitable balance between the interest of the public and those affected by the expropriation; Kleyn 1996 *SAPL* 402-445;

802 Hoops *The Legitimate Justification of Expropriation* 51, 52, 125-132.

803 Du Plessis *Compensation for Expropriation under the Constitution* 160-167.

804 Hoops *The Legitimate Justification of Expropriation* 51, 52, 125-132

805 *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another*; *First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 at paras 57-70, 91.

806 BVerfGE 3139,08 [2013] (*Garzweiler opencast lignite mine case*); as referenced in Hoops *The Legitimate Justification of Expropriation* 133.

prescribing expropriation must cater for compensation which reflects a balance between the interests of the public and the interest of those effected.[807]

Within the context of land reform, amendments to the German Civil Code[808] was passed following the reunification of East and West Germany which permitted those in possession of land that was previously the subject of agrarian reform policies requiring adherence to strict restrictions,[809] to become the full owners of those properties. The situation arose where a number of possessors claimed that they should be entitled to receive ownership despite the fact that they did not adhere to the required conditions previously in place and hence should not have been possessors under the previous dispensation, but were listed as the possessors due to the errors in the land register of the previous regime.[810] The amendments did not permit these possessors to obtain ownership.

The BVerfGE upheld the constitutionality of these provisions despite the fact that it did not provide for compensation to be paid to these possessors[811] as the courts regarded this provision as merely determining the contents and limit of ownership opposed to constituting an expropriation.[812] The ECHR was then called on to adjudicate whether these decisions by the BVerfGE violated Article 1 of the Protocol to the *Convention*.[813] This article requires state interference with the peaceful enjoyment of property to be provided by law, in the public interest and to reflect a

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807 Du Plessis *Compensation for Expropriation under the Constitution* 160-167.

808 Subsection (11) to (16) of BGB s233. This was referred to as the "Modrow Law" Deutsch 2005 *German L.J* 1373.

809 According to Deutsch 2005 *German L.J* 1368, 1369, subjects in possession of agricultural land were obligated to use it for agricultural purposes, failing which it would revert to the state. Their heirs would also be subject to the same requirements.

810 Deutsch 2005 *German L.J* 1367-1369; *Jahn and Others v Germany* ECHR (46720/99, 72203/01 & 72552/01) [2004] 3-12.

811 *BVerfGE* 1637/99 [2000]; *BVerfGE* 2062/99 [2000].

812 Deutsch 2005 *German L.J* 1370.

813 Article 1 of Protocol 1 to the ECHR states
"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
[…]
The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.".

fair balance between the means and the interest.[814] The proportionality test contained a presumption in favour of compensation as a measure which excludes compensation would ordinarily be considered disproportionate in the absence of exceptional circumstances.[815] Based on the facts of the case, the ECHR held that such "exceptional circumstances"[816] were present as the law was passed during a transitional period in Germany's history, the short period in which Germany had to enact the amendments following reunification and finally the social justice purpose of the legislation.[817] Regarding the latter point, the ECHR stated the following

> Thirdly, the reasons for the second Property Rights Amendment Act. In that connection, the FGR parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice so that the acquisition of full ownership by the heirs of land acquired under the land reform did not depend on the action or non-action of the GDR authorities at the time.[818]

In essence, the ECHR held that the social justice purpose of the land reform legislation in Germany constituted exceptional circumstances which justified no compensation being paid. This precedent holds special reference for the interpretation of section 25(3)(e) of the *Constitution* and section 12(3) of the *Expropriation Bill* if enacted in its current form as our courts may consider the judgement of the BVerfGE and must consider the judgement of the ECHR.[819] It should however be noted that due to the differences between the German and South African law, the ECHR and BVerfGE were not in the position to determine compensation but were limited to determining the validity of legislation which provided for no compensation. In South Africa the courts can directly apply the

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814 *Jahn and Others v Germany* ECHR (46720/99, 72203/01 & 72552/01) [2004] at para 78.

815 In this regard the ECHR stated the following in *Jahn and Others v Germany* ECHR (46720/99, 72203/01 & 72552/01) [2004] at para 94
"Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it imposes a disproportionate burden on the applicants. In this connection, the Court has already found that the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 of Protocol No. 1 only in exceptional circumstances […]"

816 *Jahn and Others v Germany* ECHR (46720/99, 72203/01 & 72552/01) [2004] at para 94.

817 *Jahn and Others v Germany* ECHR (46720/99, 72203/01 & 72552/01) [2004] at para 116.

818 *Jahn and Others v Germany* ECHR (46720/99, 72203/01 & 72552/01) [2004] at para 116.

819 Section 39(1)(b) & (c) states that the courts must consider international law and may consider foreign law when interpreting the Bill of Rights.

standard in section25(3) to determine compensation.[820] As such, it is not limited to deciding between the extremes of full or no compensation and the answer, as Du Plessis suggests,[821] may lie in simply awarding compensation which deviates from market value.

In summary, the *Regulations* require a statement from the acquiring authority that the acquisition is in the public interest or for a public purpose.[822] Although this is a prerequisite for a lawful expropriation, it is unclear as to how this relates to the role of the *Valuer-General* as it does not have powers to expropriate. It merely conducts a valuation that can inform an offer of compensation should the acquiring authority choose to expropriate. Ironically, the formula prescribed by the Regulations to determine the value of the property does not appear to cater for the purpose of the expropriation to be considered. Although there is no conclusive precedent from the courts indicating how this factor should be applied, it is clear that it could influence the amount of compensation provided that it is relevant and not applied in an arbitrary fashion.[823] The provisions of the draft *Expropriation Bill* may well impact upon this as it seeks to guide the courts by stating that it may be just and equitable to award nil compensation where the expropriation is done for the public interest. This is supported by persuasive foreign and international precedent where the purpose is based on social justice considerations such as land reform. Where the purpose is indeed a relevant factor, a valuation conducted under the *Regulations* will therefore not likely reflect the weighting which a court could give to this factor when assessing compensation.

4.3.7 Unlisted factors and additional considerations

Section 25(3) of the *Constitution* requires all relevant factors to be taken into consideration to determine compensation that is just and equitable, taking into account all relevant factors with the central aim of arriving at an amount that strikes

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820 See the *Du Toit* case in this regard.
821 Du Plessis 2013 *STELL LR* 372.
822 Reg 4(1)(c) in Gen Not 1322 in GG 42064 of 30 November 2018.
823 *Msiza Appeal* at para 27; Gildenhuys "Full Compensation, Fair Compensation or No Compensation in Expropriations for Land Reform" 150.

a just and equitable balance between the public interest and those of affected parties.[824] The factors listed in subsection (a) to (e) is not a closed list[825] and must be applied as and when they are relevant[826] with the weighting appropriate in the context of the specific set of facts[827] and the spirit of the *Constitution*.[828]

A formula which limits its considerations to the factors listed in section 25(3) of the *Constitution* and applies a predetermined weighting to certain factors[829] is in danger of not accurately informing an offer of compensation in the absence of other considerations being applied by the expropriating authority.

There are a multitude of additional factors that could find application in the calculation of compensation which are not catered for in the determination of value under the *Regulations*. For example, the *Expropriation Act* permits the payment of *Solatium* at a prescribed rate.[830] Since the Act continues to be applied in conformity with the *Constitution*,[831] *Solatium* can be a relevant factor if it does not offend the peremptory standard of compensation required by the *Constitution*. The Land Claims Court also previously held that the extent to which the expropriation affects the rights of the owner[832] can influence the need to pay compensation and the court in the *Du Toit case* held *obiter* that actual financial loss could even be a starting point where market value is not appropriate.[833]

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824 Du Plessis *Compensation for Expropriation under the Constitution* 99.

825 The court in *Du Toit* at para 28 noted that "section 25(3) provides an open-ended list of relevant circumstances to be taken into account".

826 See *Du Toit* at para 33.

827 Du Plessis *Compensation for Expropriation under the Constitution* 108.

828 Van der Walt *Constitutional Property Law* 272 as referenced by Du Plessis *Compensation for Expropriation under the Constitution* 100.

829 See the discussion on current use value v current use above.

830 Section 12 (2) of the *Expropriation Act.*

831 *Du Toit* at para 32-34.

832 In *Nhlabathi and Others v Fick* (LCC42/02) [2003] ZALCC 9 (8 April 2003) the court held at *para* 34 that the occupier's right to bury relatives under s6(2)(dA) of *ESTA* without affording compensation to the owner of the land constituted a reasonable and justifiable limitation on the right to receive compensation as it "did not constitute a major intrusion into the property rights of the land owner". The extent of the intrusion could therefore be a factor in deciding upon compensation.

833 *Du Toit* at para 37.

Gildenhuys[834] notes that the special suitability of the property for the purpose of which the owner required it as well as the value to the owner are factors considered in foreign jurisdictions that could likewise be applicable in South Africa under the right circumstances. Special categories of properties such as churches and schools could also prompt other factors to be considered.[835]

Although not legislated yet, the draft *Expropriation Bill* seeks to place the emphasis on the purpose for which it is held as relevant factors. The Bill states that it may be just and equitable to award nil compensation where land has been abandoned[836] or where it is held solely for speculative purposes.[837] It is unclear at this stage whether these factors will be considered under the current use factor,[838] the history of the acquisition and use of the property[839] or simply a *sui generis* factor to guide the courts in striking a just and equitable balance. In either event, these factors do not appear to be incorporated into the definition of current use value and the formula provided for in the *Regulations* seems to exclude additional factors from being considered.

By means of persuasive authority, the German Federal Court has previously ruled on the constitutionality of a provision in German law which requires approval when agricultural or forestry land is purchased as an investment.[840] The court ruled that a blanket prohibition violated the German Basic Law,[841] but noted that the social function associated with the recognition of property rights under article 14(2) of the German Basic Law[842] is particularly acute when dealing with land, as the general interests of the public carry a far greater weight in the use of land versus any other form of property.[843] It should be noted that this case did not deal with the calculation of compensation upon expropriation but rather with the proportionality of the means

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834 Gildenhuys *Onteieningsreg* at 179-182.
835 Gildenhuys *Onteieningsreg* at 182-196.
836 Clause 12(3)(d) of the *Expropriation Bill.*
837 Clause 12(3)(b) of the *Expropriation Bill.*
838 Section 25(3)(a) of the *Constitution.*
839 Section 25(3)(b) of the *Constitution.*
840 *BVerfGE* 21, 73.
841 *BVerfGE* 21, 73 at *para* 35.
842 *BVerfGE* 21, 73 at *para* 24.
843 *BVerfGE* 21, 73 at *para* 23.

versus the end goal where the legislature defines the content of the law.[844] The notion that the public interest argument carries more weight in the purchase of land for investment purposes *vis-à-vis* other forms of property could well serve as persuasive authority when compensation is calculated for land purchased solely for speculative purposes.

The draft *Expropriation Bill* also caters for the possibility of nil compensation where land is expropriated from a state-owned corporation or entity.[845] This consideration does not seem to fit within any of the factors listed in section 25 of the *Constitution* as it relates to the identity of the owner. The Land Claims Court previously rejected the notion of discriminating against certain owners in the calculation of compensation where it held that the law should not distinguish between rich landowners and others[846] in the calculation of compensation for expropriation. It is not clear whether this non-discrimination argument will hold water when distinguishing between private land owners and state-owned entities. Perhaps this argument may not even be relevant if it is held that the property was acquired wholly through state assistance, in which case section 25(3) (d) of the *Constitution* could influence the compensation. When determining the value of the property under the *Regulations,* the subtraction of direct state investment and subsidies[847] may result in the value being adjudged as nil in any event.

4.3.8 Inherent challenges with a fixed formula for value versus the calculation of compensation under section 25 of the Constitution

According to Gildenhuys,[848] section 25(3) of the *Constitution* was designed to be a flexible mechanism that can be applied differently according to the context. As such, it does not lend itself to the application of a rigid formula.

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844 Du Plessis *Compensation for Expropriation under the Constitution* 150-156; Hoops *The Legitimate Justification of Expropriation* 146-152; Van der Walt *Constitutional Property Clauses* 132-145.

845 Clause 12(3)(c) of the *Expropriation Bill.*

846 *Mhlanganisweni Community v Minister of Rural Development and Land Reform and Others* (LCC 156/2009) [2012] ZALCC 7 (19 April 2012) at para 61.

847 Reg 6(a)(ii) and 6(b)(ii) in Gen Not 1322 in GG 42064 of 30 November 2018.

848 *Onteieningsreg* at 167.

Persuasive authority for Gildenhuys' contention can be found in the jurisprudence of the German Constitutional Court. With reference to article 14.3 of the German Basic Law,[849] which also requires an equitable balance between the public and private interests to determine compensation,[850] the court in the *Deichordnung case* held that a fixed formula for compensation was not compatible with the flexible nature required by article 14.3 of the German Basic Law.[851] In that specific case, legislation made provision for a fixed rate of compensation per square meter for all owners whose land was expropriated under the dyke improvement scheme. The court held that "[t]he requirement of Article 14.3 of the Basic Law prohibits a flat-rate compensation (per square meter rate)".[852] Instead, legislation was required to set down an abstract standard of compensation that is capable of being applied to a specific set of circumstances.[853] No rigid compensation standard exists and dependent on the context, the compensation can dip below market value.[854]

In South Africa, the prescriptive nature of the formula for the calculation of value provided for in the *Regulations* do not mirror the flexible nature of just and equitable compensation under the *Constitution*.

4.4 Conclusion

Based on the sections above, the calculation of value using the formula prescribed by the *Regulations* may fail to accurately reflect the calculation of compensation under section 25 of the *Constitution.* The listed elements of market value, direct state subsidies and to an extent the acquisition benefits in the *Regulations* largely reflect the judiciary's application of the corresponding factors in the *Constitution*. However, the concept of current use value and its predetermined weighting does not reflect the way in which the current use factor has been applied in determining compensation. The purpose of the expropriation as a factor influencing

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849 Of 1950.
850 Du Plessis *Compensation for Expropriation under the Constitution* 147-150; Kleyn 1996 *SAPR/PL* 442; Van der Walt *Constitutional property clauses* 150, 151.
851 *BVerfGE* 24, 367 at *paras* 50, 83.
852 *BVerfGE* 24, 367 at *para* 50.
853 *BVerfGE* 24, 367 at *para* 78.
854 *BVerfGE* 24, 367 at *para* 183.

compensation appears to be absent from the *Regulations*. Although this is a listed factor which our courts have grappled to come to grips with, several authors have formulated views on how this can be applied and persuasive authority from the application of foreign law as well as international law instruments akin to the South African *Constitution* indicate that it can and should be considered. The very nature of a rigid formula which does not appear to cater for unlisted factors or a context-specific assessment of relevant factors differs markedly from the valuation formula from the design of section 25(3) of the *Constitution*.

This does not necessarily mean that a valuation conducted according to the formula in the *Regulations* is incapable of reflecting an amount akin to just and equitable compensation. The Court in *Du Toit* held that a mere difference between section 12 of the *Expropriation Act* and section 25 of the *Constitution* does not render the former unconstitutional, provided the final amount meets the peremptory requirement of just and equitable compensation.[855] If the same reasoning is applied to these *Regulations*, one can argue it will likewise come down to a case-by-case analysis to determine whether the value arrived at using that formula reflects a fair estimate of just and equitable compensation.

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[855] In this regard the Majority in the *Du Toit case* stated the following at *para* 34:
"If, after having regard to all relevant factors, the compensation awarded is just and equitable and it reflects an equitable balance between the public and private interests, the constitutional standards as envisioned in section 25(3) would have been met. The construction of the relevant provisions of the Act and section 25(3) of the Constitution is different but does not appear to give rise to inconsistency. If on closer scrutiny it does, we have not been called upon to make that determination. I will therefore proceed on the assumption that there is no inconsistency."

Chapter 5 Conclusion and recommendations

5.1 Introduction

When embarking on this research study the primary purpose was to determine the extent to which the provisions of the *Property Valuation Act* and *Regulations* can influence the final determination of compensation for expropriation. The study commenced with a brief discussion on why compensation is paid for property expropriated in pursuit of a public interest objective such as land reform, as well as an outlining of the measure of compensation that is currently payable to set the foundation for the discussions that formed the core of the research question, namely the impact of the prescribed valuation methodologies on the calculation of compensation.

To answer the research question and test the results against the hypothesis, it was first necessary to critically analyse the role which a valuation plays in the determination of compensation both within the historical context of the South African case law as well as with reference to foreign jurisdictions that can serve as persuasive authority. Finally, the formulation contained in the valuation *Regulations* was compared with the approach adopted by the judiciary in the calculation of just and equitable compensation. Where certain factors listed in section 25(3) of the *Constitution* have not been comprehensively ruled on by the courts, the opinions of prominent authors, foreign and regional case law were considered.

5.2 The measure of compensation payable when land is expropriated for reform

In the pre-constitutional era, the measure of compensation was determined solely by the *Expropriation Act*, the provisions of which are still in force at the time of writing. The object of compensation at the time of promulgation was to provide the owner with an amount equivalent to his loss,[856] which resulted in the *Expropriation*

[856] *Estate Marks v Pretoria City Council* 1969 (3) SA 277 (A) at 300; *Karanga Holdings (Pty) Ltd v Minister of Water Affairs* 1998 (4) SA 330 (SCA).

Act prescribing market value[857] plus actual financial loss[858] and an amount for *solatium*[859] based on a fixed rate proportional to the total compensation.[860] Despite the apparent differences between the Act and section 25(3) of the *Constitution,* which introduced just and equitable compensation as the peremptory standard,[861] the *Expropriation Act* continues to be applied with the necessary changes to ensure compliance with the constitutional standard of just and equitable compensation.[862] Courts chose to adopt[863] and affirm[864] a two-stage approach starting with the market value of the property and applying any other relevant factors to arrive at an amount which is just and equitable.

Four pieces of primary legislation contain empowering provisions that allow the Minister of Rural Development and Land Reform to expropriate land for the purposes of reform.[865] The *Restitution Act* provides for compensation to be determined according to the *Expropriation Act* provided it is in accordance with section 25(3) of the *Constitution.*[866] *ESTA* and the *Provision of Land and Assistance Act* requires compensation to be calculated according to section 25(3) of the *Constitution* but still provides for interest to be paid and other processes to run according to the *Expropriation Act.*[867] The *Labour Tenants Act* excludes the application of the *Expropriation Act* in favour of a direct application of the *Constitution*.[868] Despite these differences in the text of the empowering provisions, the Constitutional Court's

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857 Section 12 (1)(a)(i) of the *Expropriation Act*.
858 Section 12 (1)(a)(ii) of the *Expropriation Act*.
859 This terminology was used in *Du Toit* at para 6; it has also been referred to as "treurgeld" in *Redelinghuys v Stadraad van Pretoria* 1990 (1) SA 555 (T) at 559A.
860 Section 12(2) of the *Expropriation Act*.
861 *Du Toit* at para 28.
862 *Du Toit* at para 35; the court noted that the constitutionality of the *Expropriation Act* was not directly challenged and as such it was not necessary to rule on its constitutionality. Instead, its provisions continue to apply to the extent that the compensation reflects an amount which meets the constitutional standard of just and equitable compensation.
863 *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC).
864 *Du Toit* at para 37.
865 See the discussion on s 12 of the *Provision of Land and Assistance Act* in para 2.3.3.1, s 26 of *ESTA* in para 2.3.3.2, s 42E of the *Restitution Act* in para 2.3.3.3 and ss 23 and 24 of the *Labour Tenants Act* in para 2.3.3.4 above.
866 Section 42E(2) & (3) of the *Restitution Act*.
867 See the discussion on *ESTA* and the *Provision of Land and Assistance Act* in paras 2.3.3.2 and 2.3.3.1 above.
868 See the discussion on the *Labour Tenants Act* in para 2.3.3.4 above.

decision in *Du Toit* effectively means that the two-step approach must be applied whenever land is expropriated for reform purposes.[869]

5.3 The role of a valuation conducted by the Valuer-General in the determination of compensation when land is expropriated for reform

In the pre-constitutional era when market value was the accepted measure of compensation, the courts tended to treat value and compensation as one and the same, with the court assuming the role as the "super-valuator".[870] Evidence would be led by professional valuers detailing the manner in which they arrived at the estimated value of the property and this evidence. Save to the extent that it does not contain "demonstrable errors or inherent improbabilities",[871] it was desirable that the judge accepted such evidence[872] and equated this estimation with the compensation payable to the expropriated owner.

Du Plessis argues that the shift away from market-based compensation towards the constitutional standard of just and equitable compensation warrants a distinction between the concepts of value and compensation.[873] The Land Claims Court took a step in the *Msiza case* towards a precedent for determining compensation distinct from the value of the property where the court deviated from the accepted value to award discounted compensation based on the purpose of the expropriation.[874] This decision was overturned on appeal as the Land Claims Court failed to provide adequate reasons for deviating from the value of the property.[875] However, when faced with a different set of facts, the Land Claims Court subsequently recognised the distinction again in the *Emakhasaneni case.* This inconsistency seems to be quite

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869 See the discussion in para 2.3.3.5 above.

870 Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council 1979 (1) SA 949 (W) at p956.

871 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 252, 253.

872 *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) at 252, 253.

873 Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" 205.

874 See the discussion on the *Msiza case* in Chapter 3 above; Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" 199; Van Wyk 2017 *TSAR* 27-28.

875 See the discussion on the *Mzisa appeal* in Chapter three above.

pronounced between the jurisprudence of the Land Claims Court on the one hand and the Supreme Court of Appeal on the other as it continued to equate compensation with value.[876]

To some extent, this legal-conceptual confusion has been exacerbated by the creation of the Office of the *Valuer-General*.[877] The *Green Paper* reflects a policy decision to move away from the willing-buyer, willing-seller mode of acquisition for land reform[878] purposes towards acquisition based on expropriation. The Office of the *Valuer-General* was to be created to determine "financial compensation in cases of land expropriation".[879] However, when the *Property Valuation Act* was finally promulgated, no reference was made to determining compensation. Instead, reference was made to determining the "value"[880] of land identified for land reform but the definition mirrors Section 25(3) of the *Constitution* near verbatim. This created a great deal of uncertainty as to the role of the *Valuer-General* in determining compensation for expropriation.[881] When reading the *Property Valuation Act* with the provisions of the draft *Expropriation Bill*, authors such as Van Wyk[882] argued that the *Valuer-General's* role merely related to the investigation phase preceding an expropriation and not the final determination of compensation.

The *Constitution* explicitly states that compensation must be "agreed to by those affected or decided or approved by a court".[883] The Minister of Rural Development and Land Reform recently argued in favour of an interpretation whereby the "value"[884] is seen as synonymous to compensation with the effect that it supersedes the discretion of both the Minister in making an offer as well as the court as the

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876 The court in the *Msiza appeal* held that all the factors relied on by the LCC was already considered in the determination of market value; Du Plessis "How the determination of compensation is influenced by the disjunction between the concepts of 'value' and 'compensation'" 200.

877 Du Plessis 2014 *PELJ* 806, 819.

878 *Green Paper* at para 5.

879 *Green Paper* at para 6.6.2.

880 Section 1 of the *Property Valuation Act*.

881 Du Plessis 2014 *PELJ* 819;

882 Van Wyk 2017 *TSAR* 31-35.

883 Section 25(2)(b) of the *Constitution*.

884 As defined in s 1 of the *Property Valuation Act*; see also s12(1)(a) of the *Property Valuation Act* where it is stated that the value must be determined by the value general where land is acquired for reform.

final arbiter.[885] The Land Claims Court rejected this interpretation in so far as the court is asked to determine compensation under the *Restitution Act*, but left the door open to the possibility of differing interpretations where the state negotiates the purchase price or an agreement for compensation.

5.4 Lessons from foreign jurisdictions

Van Wyk's interpretation[886] is supported by persuasive authority from foreign jurisdictions, most notably those of Australia. All Australian states and self-governing territories created a Valuer-General by statute.[887] These entities typically have a variety of functions related to valuations for tax purposes and several states explicitly provide for these entities to inform the acquiring authority when making an offer of compensation for compulsory acquisition.

The compulsory acquisition legislation of the Commonwealth, South Australia, Tasmania and the Northern Territory does not make reference to the Valuer-Generals nor a valuation report.[888] In Western Australia, the role is implied as the authority is required to commission a report to determine the value,[889] although this role is not explicitly reserved for the *Valuer-General of Western Australia*. In Queensland, the *Valuer-General of Queensland* does not feature until such time as the authority wishes to dispose of property acquired through compulsion, at which time the *Valuer-General of Queensland* is required to determine the asking price.[890] The *NSW Act* explicitly requires the *Valuer-General of NSW* to compile a valuation report to inform the acquiring authority when it makes its offer of compensation,[891] and claims can even be submitted directly to the *Valuer-General of NSW*.[892] The *Victoria Act* is perhaps the most nuanced as it requires the acquiring authority to consider the valuation report prepared by the *Valuer-General of Victoria*, but never-

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885 See the discussion on the *Moloto* and *Emakhasaneni cases* in chapter three above.
886 Van Wyk 2017 *TSAR* 31-35.
887 See the detailed discussion on these entities in Chapter 3 above.
888 See the discussion in chapter three, paras 3.5.3.1 to 3.5.3.5 above.
889 Section 217(1) of the *Western Australia Land Administration Act*.
890 Section 41 of the *Queensland Legislation*.
891 Section 41 of the *NSW Act*.
892 See the discussion of s 41 of the *NSW Act* in chapter three, para 3.5.3.2 above.

the-less places the responsibility on the acquiring authority to make an offer which it deems a "fair and reasonable estimate of the amount of compensation"[893]

The various compulsory acquisition statutes of the commonwealth, states and self-governing territories furthermore provide for specialist bodies to play a role in intermediate steps between the offer of compensation and the final determination of the compensation, including a review of the offer by a variety of administrative tribunals,[894] arbitration[895] and specialist arbitration[896] as well as determination by an expert.[897] These processes are however usually subject to agreement by both parties and do not preclude[898] an affected party from approaching the formal courts for a binding adjudication. Certain states have even created specialist courts for the determination of compensation[899] upon compulsory acquisition with the power to make binding determinations and, in select cases, preside over mediation.[900]

Despite the multitude of alternative options available, no Australian legislation seems to permit a statutory valuation body to make a binding determination of compensation as the court remains the final adjudicator where disputes arise. This could be used as persuasive authority to support Van Wyk's[901] view that the *Valuer-General's* role is limited to the investigation phase when property is expropriated. This persuasive authority could still play a significant role if the courts are finally called upon to decide if the *Valuer-General's* valuations are binding on the Minister when negotiating compensation or a purchase price.

Section 25 (3) seeks to promote agreement between the expropriating authority and affected parties. A provision which binds the expropriating authority's hands

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893 Section 31(3) & (5) of the *Victoria Act*.
894 See the discussion on review by administrative tribunals in chapter three, para 3.5.4.1
895 Section 80(2) of the *Lands Acquisition Act*.
896 Section 42(1)(c) of the *Land Acquisition Act of Tasmania*.
897 Section 80 of the *Lands Acquisition Act*.
898 The notable exception is contained in s 83 of the *Lands Acquisition Act* which prohibits an affected party from approaching multiple fora where he or she has agreed to the determination of compensation by alternative means to the formal court process.
899 See the discussion in Chapter three, para 3.5.4.3 for a discussion of the specialist courts created in Queensland, New South Wales and South Australia.
900 Section 23(3) of the of the *Land Acquisition Act of South Australia*.
901 Van Wyk 2017 *TSAR* 31-35.

could compromise its ability to reach an agreement with the affected parties. Such an interpretation would run contrary to the spirit, purport and object of section 25 (3), so it is unlikely that a court would prefer such an interpretation as it is obligated to promote the spirit, purport and object of the Bill of Rights when interpreting statues.[902] While the provisions of the *Property Valuation Act* could conceivably be interpreted in a narrow fashion to bind an authority acquiring land,[903] they could use foreign law as persuasive authority and apply the principle of "reading down"[904] to prefer an interpretation aimed at achieving the spirit and object of that provision in the Bill of Rights.[905]

There are examples from Central and Eastern Europe's various land reform efforts[906] where administrative bodies conducted valuations and set compensation.[907] These examples are clearly distinguishable because compensation is not calculated within the context of expropriation. Instead, the purpose was to provide financial compensation where land could not be restored,[908] as an *ad hoc* compensation arrangement by the United States Government to compensate American investors whose investments were nationalised,[909] to determine a value at which state-owned land should be disposed of as part of a privatisation programme[910] or for the purposes of levying a tax[911] on the value of the land where there was no private ownership and hence no land market under soviet rule. The fundamental difference in the purpose for calculating compensation means that the Central and Eastern European examples are likely of little probative value as persuasive authority to guide the interpretation of the *Valuer-General's* role in relation to section 25 of the *Constitution*.

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902 Section 39(2) of the *Constitution*; Currie & de Waal *The Bill of Rights Handbook* 64, 65.
903 As the court in the *Emakhasaneni cases* noted *oiter* at para 34.
904 Currie & de Waal *The Bill of Rights Handbook* 65.
905 See *Govender v Minister of Safety and Security* 2001 (4) SA 273 (SCA) as referenced in Currie & de Waal *The Bill of Rights Handbook* 65.
906 Hartvigsen 2013 *Land Use Policy* 332-337.
907 See for example the discussion on s12(5) of the *Estonian Law* in Chapter three, para 3.6.2 above and the discussion on the *FCSC* in Chapter three, para 3.6.3 above.
908 Tomson 2009 *Nordic Journal of Surveying and Real Estate Research* 41.
909 See the discussion on the *FCSC* in Chapter three, para 3.6.3 above.
910 Hartvigsen 2013 *Land Use Policy* 334.
911 Malme and Tiits "The Land Tax in Estonia" 30-32.

5.5 The ability of a valuation conducted according to the prescribed valuation formula to inform an offer of just and equitable compensation

The determination of the property's value by the *Valuer-General* does not bind the expropriating authority to offer same as compensation nor does it oust the jurisdiction of the court to determine just and equitable compensation when expropriation occurs.[912] However, the formula contained in the *Regulations* to determine "value"[913] may not be an accurate reflection of the way in which just and equitable compensation would be determined, and hence may have limited value when used to inform offers of compensation by the expropriating authority.

The concept of just and equitable compensation requires a balancing of rights.[914] The extent to which a rigid formula with a predetermined weighting does not accord with author's[915] views on the nature of just and equitable compensation. This is further supported by comparative studies with German law that can serve as persuasive authority.[916] As far as the listed factors are concerned, the calculation of market value, acquisition benefits and the deduction of direct state subsidies in the *Regulations* largely reflects the way in which the corresponding factors have been applied by the courts.

The concept of 'current use value' does not find precedent in the way in which the courts have applied current use as a listed factor. There are also several operational difficulties posed by this concept and its predetermined weighting, especially where property acquired for land reform is not used for commercial purposes to generate an income. The way in which current use has been applied as a factor by the courts in limiting the consideration of developmental potential is not accurately captured

912 See the *Emakhasaneni case* at para 36, 37.
913 Section 1 of the *Property Valuation Act*.
914 Gildenhuys *Onteieningsreg* 169-170.
915 Gildenhuys *Onteieningsreg* 167.
916 *BVerfGE* 24, 367 at *paras* 50, 83.

in the calculation of market value[917] nor does it accord with author's[918] views as to how this factor could be applied in the future. The total exclusion of the purpose of the expropriation is likewise problematic. Even though the courts have grappled to come to grips with the way in which to apply this factor, comparative studies with foreign jurisdictions indicate that it can play a significant role in the determination of compensation.[919]

5.6 Assessment of hypothesis

There is a fundamental difference between just and equitable compensation as a context-specific,[920] flexible mechanism and the fixed formula provided for by the *Regulations.* This results in a high possibility that the determination of value under the *Property Valuation Act* will not correspond with the measure of compensation in all instances where expropriation takes place for land reform purposes. However, this may not render the *Property Valuation Act* and associated *Regulations* unconstitutional.

The purpose of a valuation conducted by the *Valuer-General* appears to be limited to the investigation phase of expropriation proceedings, does not oust the jurisdiction of the court and should hence not offend the notion that compensation must be agreed upon, decided or approved by a court of law.[921] Even where the expropriating authority does offer the value determined by the *Valuer-General* as compensation, the precedent set by the *Du Toit* judgement implies that it would not *ipso facto* be unconstitutional, provided the amount meets the peremptory standard of just and equitable compensation.[922]

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917 See the discussion on market value in Chapter three para 3.4.4 above.

918 See Budlender *The constitutional protection of property rights* 59; Currie and De Waal *The Bill of Rights Handbook* 552, 553; Du Plessis 2015 *PELJ* 1734, 1735; Gildenhuys *Onteieningsreg* 172; Van der Walt *Constitutional Property Law* 512-520; Van Wyk 2017 *TSAR* 28.

919 See the discussion on the purpose of the expropriation in Chapter three, para 4.3.6 above.

920 Du Plessis *Compensation for Expropriation under the Constitution* 78.

921 Section 25(2)(b) of the *Constitution.*

922 *Du Toit* at para 34.

5.7 Recommendations

5.7.1 Introduction

Despite the State's argument that the *Valuer-General* supersedes the discretion of the Minister and the courts to determine just and equitable compensation, the courts chose to interpret it in a way consistent with the *Constitution*. Be that as it may, uncertainly persists regarding its role in determining value and the expropriating authority's role in formulating offers of compensation.[923] There is likewise uncertainty, perpetuated by inconsistency in the approach followed by the different courts, as to the distinction between value and compensation.[924] Confusion regarding these concepts from both the sides of the property owners, valuers and expropriating authorities could make it very difficult to reach an agreement on compensation where property is expropriated. The proliferation of litigation due to conceptual uncertainties would surely hamper the use of expropriation to accelerate land reform in South Africa. Such an outcome would effectively nullify the value of the *Valuer-General* as a statutory institution. It is submitted that this undesirable situation can be avoided by amending selected provisions of the *Expropriation Bill* and the *Regulations*.

5.7.2 Expropriation Bill to distinguish between the role of the valuer in determining value and the expropriating authority in determining an offer of compensation

Although the role of the *Valuer-General* in expropriation proceedings will likely be interpreted as limited to the investigative phase,[925] there may be an opportunity to avoid a complex interpretive exercise. At the time of writing, the *Expropriation Bill* has not been finally promulgated, which creates a golden opportunity to provide clarity by outlining its exact role and function within the context of the Bill.

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923 Du Plessis "How the Determination of Compensation Is Influenced by the Distinction between the Concepts of 'Value' and 'Compensation'" 194, 195.

924 Du Plessis "How the Determination of Compensation Is Influenced by the Distinction between the Concepts of 'Value' and 'Compensation'" 191-222.

925 Van Wyk 2017 *TSAR* 30-32, 35.

As per the discussion in Chapter three, the *Victorian Act* requires the authority to offer an amount which is "fair and reasonable [based on all] the information available" [926] to it, including the valuation conducted by the *Valuer-General of Victoria*.[927] Section 25 of the *Constitution* likewise makes provision for "just and equitable compensation […] having regard to all relevant circumstances",[928] including the value of the property.[929] These similarities are compelling.

Section 25 of the *Constitution* naturally is not explicit as to who should determine the market value but there is an opportunity to clarify this approach within the context of land reform. This can be achieved by inserting a provision into the *Expropriation Bill* to clarify the role of the *Valuer-General,* drawing inspiration from section 31 of the *Victoria Act*. Such a provision should inform the expropriating authority of the property's 'value', while placing an obligation on the expropriating authority to apply its discretion and consider additional factors not contained in the valuation, but which could nevertheless be relevant in the circumstances to arrive at an offer of 'compensation' that it deems just and equitable.

The insertion of such a provision would ensure that expropriating authorities, and indeed the *Valuer-General* itself, clearly understand their respective functions in the process of expropriation. Such a provision could ensure that the *Property Valuation Act* is not interpreted in a way which offends section 25(3) of the *Constitution* by giving effect to the distinction between 'value' and 'compensation' as argued by Du Plessis.[930]

5.7.3 Creation of a compensation policy to compliment amended regulations

By drawing a clear separation between value and compensation, the *Regulations* should be amended to more accurately reflect the accepted judicial approach applied to the factors used to determine the value of the property. In this regard,

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926 Section 31(3) of the *Victoria Act*.
927 Section 31(5) of the *Victoria Act*.
928 Section 25(3) of the *Constitution*.
929 Section 25(3)(c) of the *Constitution*.
930 Du Plessis "How the Determination of Compensation Is Influenced by the Distinction between the Concepts of 'Value' and 'Compensation'" 191-222.

the concept of current use value should be reconsidered, as well as the weighting ascribed to it by the fixed formula contained in the *Regulations*.[931] The *Regulations* could also be amended to more accurately reflect the court's approach to applying current use as a factor and the circumstances under which developmental potential can be factored into the value of the property.

If a provision akin to section 31 of the *Victorian Act* is inserted into the *Expropriation Bill*, it would be up to the expropriating authority to apply those normative factors which the court in *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs*[932] identified as difficult to quantify. Such an approach would allow the expropriating authority to determine the relevant and the suitable weighting attached to the purpose of the expropriation and any factors not listed in section 25(3) of the *Constitution,* but which may nevertheless be relevant considerations in the circumstances.

Such an amendment could be accompanied by a compensation policy developed for the use of expropriating authorities. While the formula provided for in the *Regulations* may be too rigid to take context-specific factors into account, there is still the need for consistency in the application of discretion by expropriating authorities. Such a policy would ideally set out the criteria which an expropriating authority must apply in addition to the valuation of the property when formulating offers of compensation.

Such criteria could even be enacted in the form of regulations to guide the authority when exercising its powers of expropriation as set out in the empowering provisions contained in land reform legislation.[933] To some extent, this is already being attempted with the introduction of clause 12(3) into the *Expropriation Bill* as it sets out circumstances under which it may be just and equitable to award nil compensation. Most notably, it states that nil compensation may be just and

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931 See Reg 6(a)(ii) and 6(b)(ii) in Gen Not 1322 in GG 42064 of 30 November 2018.

932 [2000] 2 All SA 26 (LCC) at para 34.

933 See the discussion on s 12 of the *Provision of Land and Assistance Act* in para 2.3.3.1, s 26 of *ESTA* in para 2.3.3.2, s 42E of the *Restitution Act* in para 2.3.3.3 and ss 23 and 24 of the *Labour Tenants Act* in para 2.3.3.4 above.

equitable where land is expropriated under the *Labour Tenants Act*.[934] While it is not clear why the *Labour Tenants Act* was listed *vis-à-vis* the various other land reform statutes, it appears to be an attempt to influence the way in which the expropriating authority applies its discretion to the purpose of the expropriation.

In a way, this development reflects the rationale applied in German law whereby the legislature plays a far greater role in determining the measure of compensation payable, provided that it conforms to the overarching standard provided for in the German Basic Law.[935] The *Expropriation Bill*, once enacted, will be a law of general application applicable to all expropriations conducted under empowering provisions.[936] As such, it could be more suitable to provide this sort of guidance in regulations enacted under individual statutes containing empowering provisions for expropriation. More detailed guidance can be provided on the application of factors that could be relevant for the purposes of that specific piece of legislation.

Such a system should provide enough flexibility to apply different weighting to factors such as the purpose of the expropriation appropriate for each empowering provision. Clause 12(3) of the *Expropriation Bill* only relates to instances where it may be just and equitable to provide nil compensation. However, as Du Plessis notes,[937] the calculation of compensation under the *Constitution* does not need to force a choice between full and no compensation based on the purpose of the expropriation. Instead, it can be applied to award an amount which is less than market value. The extent of the deviation justifiable would be context-specific and could therefore be better captured in a land reform-specific compensation policy or regulations to the various land reform legislation.

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934 See s 12(3)(a) of the *Expropriation Bill*.

935 The concept of the *Junktim-Klausel* implies that a taking will only be considered an expropriation where legislation provides for compensation to be paid and that the statute would determine the amount of compensation provided that the Federal Constitutional Court of Germany would strike the clause down if it does not meet the standard set by article 14.3 of the German Basic Law of 1954, but the court would not apply article 14.3 directly to determine the compensation payable; Du Plessis *Compensation for expropriation under the Constitution* 181-184.

936 See clause 2(4) of the *Expropriation Bill.*

937 Du Plessis 2013 *STELL LR* 372.

5.7.4 A possible role for alternative dispute resolution mechanisms

Another feature of Australian law which could serve as a good example for South Africa, is the plurality of options for which it caters in relation to settling disputes on compensation for expropriation. While the formal courts typically remain the final adjudicator,[938] various laws make provision for specialist bodies as an option that can be pursued either as an alternative or as a precursor to litigation. The process prescribed by the *Expropriation Bill* is aimed at reaching consensus through the process of claims,[939] offers[940] and counterclaims[941] for compensation, failing which the parties can request mediation.[942] In the event that agreement cannot be reached, even after resorting to mediation, the state is obligated to approach the courts for a ruling.[943] No provision is made for a specialist body akin to arbitration, specialist arbitration or determination by an expert as in Australian law,[944] to bridge the gap between agreement and formal court procedures.

The South African *Constitution* may allow for an interim step subject to approval by a court. As it currently reads, the *Expropriation Bill* seems to cater for compensation to be determined by agreement or by a court of law. However, the possibility of a specialist body adjudicating on compensation subject to ratification by the courts is not provided for and is perhaps an option which could be considered to alleviate the financial burden of litigation. A specialist body could operate in an inquisitorial manner and waive certain evidentiary requirements, thereby making the process quicker and less costly to the litigants. A hallmark of the Australian law which could perhaps be included in the *Expropriation Bill,* is that adjudication by a specialist body should be subject to the consent of both parties. To cater for the requirement in

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938 See the discussion in Chapter three under points 3.5.4.1, 3.5.4.2 and 3.5.4.3 above; the only notable exception where the jurisdiction of the court can be excluded is contained in section 83 of the *Lands Acquisition Act* whereby a claimant waives his right to approach alternative forums where he has consented to an alternative form of adjudication provided for in that legislation.

939 See ss7(2)(h)(ii), 7(4)(a) and 16 of the *Expropriation Bill*.

940 See s7(6)(b) of the *Expropriation Bill*.

941 See s16 of the *Expropriation Bill*.

942 See s21(1) of the *Expropriation Bill.*

943 See s21(2) of the *Expropriation Bill.*

944 See the discussion in chapter 3, para 3.5.4.2 above.

section 25(2)(b) of the *Constitution*, a decision by this specialist body could be subject to confirmation by the Land Claims Court.

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