Improving land reform through CSR:

A legal framework analysis

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Summary

Key concepts: Corporate Social Responsibility (CSR); land reform; restitution; redistribution; legal framework; framework legislation; CSR framework Act; private sector; agricultural sector

In reaction to the unequal land ownership brought about by decades of apartheid, the first democratically elected government embarked on an extensive land reform programme – a programme consisting of the three constitutionally protected pillars: restitution, redistribution and tenure reform. The aim of this programme is not only to provide for restitution to persons who lost their land as a result of racially based measures, but also provide previously disadvantaged South Africans with access to land in order to address the unequal land ownership. This research focuses on the restitution and redistribution pillars of the land reform programme.

The progress made in terms of both these sub-programmes has been disappointing. With reference to redistribution the government has set the target to by 2014 redistribute 30% of white owned commercial agricultural land to black persons. To date, less than 10% of this target has been achieved and all indications are that the overwhelming majority of land which has been redistributed is not being used productively or have fallen into a state of total neglect. The state of the redistributed land can be attributed to a variety of causes, with the main cause being the government’s inability to provide proper post-settlement support to land reform beneficiaries.

Against this background it is clear that alternative options have to be identified in order to improve the result of land reform. This research identifies corporate social responsibility (CSR) as one alternative and asks the question: How can land reform be improved through a legal framework for CSR?

Through their CSR companies in the private sector, amongst other, accept responsibility for their impact on as well as upliftment of the society in which they
function. Companies in the agricultural sector is strategically positioned to, through their CSR contribute to the success of land reform.

Since CSR is not currently supported by a focussed CSR legal framework it is recommended in this study that CSR should be regulated through a framework Act. The purpose of this framework Act is to position CSR within the wider legal framework and to compel businesses operating in South Africa to get involved in CSR initiatives through compulsory CSR contributions. The proposed framework Act consists of sections which amongst other include a preamble that not only confirms the government’s commitment to CSR but also highlights the role that the private sector plays in improving social conditions. The proposed Act also makes provision for the creation of a Committee for Corporate Social Responsibility that would be held responsible for the implementation of the proposed Act. The framework Act further identifies various CSR themes where businesses can become involved in. One of the identified themes which are of national importance is land reform. Included in the proposed Act is a requirement that businesses should, based on their annual turnover spend a percentage of their taxable income on CSR programmes. Failure to make the required contribution is a contravention of the Act which is punishable in terms of the Act. Finally the proposed Act requires businesses to annually report to the Committee for CSR on the nature of their CSR contributions together with the business’ CSR policy and strategy.
Opsomming

Titel: Die bevordering van grondhervorming deur KSV: 'n Regsraamwerk ontleiding

Sleutelkonsepte: Korporatiewe Sosiale Verantwoordelikheid (KSV); grondhervorming; restitusie; herverdeling; regsraamwerk; raamwerk wetgewing; KSV Raamwerk Wet; privaatsektor; landbousektor

In reaksie op die ongelyke grondbesit wat teweeggebring is deur dekades van apartheid, het die eerste demokraties verskose regering met 'n omvangryke grondhervormingsprogram begin – 'n program bestaande uit drie grondwetlikbeskermde pilare – restitusie, herverdeling en grondbesit hervorming. Die oogmerk van hierdie program is nie net om voorsiening te maak vir restitusie aan persone wie hulle grond as gevolg van rasgebasseerde maatreëls verloor het nie, maar ook om voorheen benadeelde Suid-Afrikaners toegang tot grond te gee ten einde die ongelyke grondbesit aan te spreek. Hierdie navorsing fokus op die restitusie- en herverdelingspilare van die grondhervormingsprogram.

Die vordering gemaak in terme van beide hierdie sub-programme is teleurstellend. Met verwysing na herverdeling het die regering die mikpunt gestel om teen 2014 30% van landbou grond wat in die besit van wit kommersiële boere is aan swart persone oor te dra. Tot op hede is minder as 10% van hiedie teiken bereik en alle aanduiding is dat die oorgrote meerderheid van die grond wat wel herverdeel is, nie produktief aangewend word nie of in totale verval is. Hierdie verval kan toegeskryf word aan verskeie oorsake, waarvan die vernaamste die Regering se gebrek aan die beskikbaarstelling van behoorlike na-vestigingsondersteuning aan die begunstigdes van die grondhervormingsprogram is.

Teen bogenoemde agtergrond is dit duidelik dat alternatiewe opsies geïdentificeer moet word ten einde die uitslag van grondhervorming te verbeter. Hierdie navorsing identificeer korporatiewe sosiale verantwoordelikheid (KSV) as
een alternatief en vra die vraag: Hoe kan grondhervorming verbeter word deur ’n regsraamwerk vir KSV?

Deur KSV aanvaar maatskappye in die privaatsektor onder andere verantwoordlikheid vir hulle impak op, asook opheffing van die samelewings waarin hulle funksioneer. Maatskappye in die landbousektor is strategies geposisioneer om deur KSV by te dra tot die sukses van grondhervormingsprojekte.

Aangesien KSV tans nie deur ’n gefokusde regsraamwerk ondersteun word nie, word in hierdie studie voorgestel dat KSV deur middel van ’n raamwerkswet gereguleer moet word. Die doel van hierdie raamwerkswet is om KSV binne die breë wetgewende raamwerk te plaas en om besighede wat binne Suid-Afrika werk saam te verplig om betrokke te raak by KSV inisiatiewe deur middel van verpligte KSV bydraes. Die voorgestelde raamwerkswet bestaan uit artikels wat ondermeer ’n voorrede insluit waarin die regering se verbintenis tot KSV bevestig word en waarin die rol wat die privaatsektor speel in die verbetering van sosiale omstandighede uitgelig word. Die voorgestelde wet maak ook voorsiening vir die daarstelling van ’n Komitee vir Korporatiewe Sosiale Verantwoordelikheid wat verantwoordelik gehou sal word vir die implementering van die voorgestelde wet. Verder identifiseer die raamwerkswet verskeie KSV temas waarby besighede betrokke kan raak. Een van die geïdentifiseerde temas wat van nasionale belang is, is grondhervorming. Ingesluit in die voorgestelde wet is ’n vereiste dat besighede, op grond van hulle jaarlikse omset, ’n persentasie van hulle belasbare inkomste aan KSV programme moet spandeer. Versuim om die vereiste bydrae te maak kom neer op ’n oortreding van die voorgestelde wet wat strafbaar is in terme van die wet. Ten slotte vereis die voorgestelde wet ook dat besighede op ’n jaarlikse basis aan die Komitee vir KSV verslag moet doen oor die aard van hulle KSV bydraes tesame met die besigheid se KSV beleid en strategie.
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<td>Agricultural Black Economic Empowerment</td>
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<tr>
<td>AHRLJ</td>
<td>African Human Rights Law Journal</td>
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<td>ANC</td>
<td>African National Congress</td>
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<tr>
<td>BEE</td>
<td>Black Economic Empowerment</td>
</tr>
<tr>
<td>CDE</td>
<td>Centre for Development and Enterprise</td>
</tr>
<tr>
<td>CSI</td>
<td>Corporate Social Investment</td>
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<td>CSR</td>
<td>Corporate Social Responsibility</td>
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<tr>
<td>CSIR</td>
<td>Council for Scientific and Industrial Research</td>
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<td>DA</td>
<td>Democratic Alliance</td>
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<td>DLA</td>
<td>Department of Land Affairs</td>
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<td>DoA</td>
<td>Department of Agriculture</td>
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<td>DRDLR</td>
<td>Department of Rural Development and Land Reform</td>
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<td>EC</td>
<td>European Commission</td>
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<td>ESR Review</td>
<td>Economic and Social Rights in South Africa</td>
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<td>FAO</td>
<td>Food and Agricultural Organization of the United Nations</td>
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<tr>
<td>GG</td>
<td>Government Gazette</td>
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<td>Gen Not</td>
<td>General Notice</td>
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<td>GN</td>
<td>Government Notice</td>
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<td>GRI</td>
<td>Global Reporting Initiative</td>
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<td>ILO</td>
<td>International Labour Organisation</td>
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<td>ISO</td>
<td>International Organisation for Standardisation</td>
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<td>Acronym</td>
<td>Full Name</td>
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<tr>
<td>MTSF</td>
<td>Medium Term Strategic Framework</td>
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<tr>
<td>NEDLAC</td>
<td>National Economic Development and Labour Council</td>
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<tr>
<td>NEPAD</td>
<td>New Partnership for Africa’s Development</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Cooperation and Development</td>
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<tr>
<td>PER</td>
<td>Potchefstroomse ElektronieseRegsblad <em>(Potchefstroom Electronic Law Journal)</em></td>
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<tr>
<td>PLAAS</td>
<td>Institute for Poverty, Land and Agrarian Studies</td>
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<tr>
<td>RADP</td>
<td>Recapitalisation and Development Programme</td>
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<tr>
<td>RDP</td>
<td>Reconstruction and Development Programme</td>
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<tr>
<td>SAHRC</td>
<td>South African Human Rights Commission</td>
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<tr>
<td>SAIRR</td>
<td>South African Institute of Race Relations</td>
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<tr>
<td>SAJHR</td>
<td>South African Journal on Human Rights</td>
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<tr>
<td>SALJ</td>
<td>South African Law Journal</td>
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<tr>
<td>SA Merc LJ</td>
<td>South African Mercantile Law Journal</td>
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<tr>
<td>SETA</td>
<td>Sector Education Training Authority</td>
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<td>Stell LR</td>
<td>Stellenbosch Law Review</td>
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<tr>
<td>THRHR</td>
<td>Tydskrif vir Hedendaagse Romeins-Hollandse Reg <em>(Journal of Contemporary Roman-Dutch Law)</em></td>
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<tr>
<td>UNGC</td>
<td>United Nations Global Compact</td>
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<tr>
<td>WBCSD</td>
<td>World Business Council for Sustainable Development</td>
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<td>WTO</td>
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Chapter 1: Introduction

1.1 Context of the research

Post-apartheid South Africa faces a variety of challenges that emanated from the injustices caused by apartheid. One of the earliest challenges faced by the first democratically elected government was how to address the unequal distribution of land in the country. The South African Government has shown commitment to eradicating the inequalities and injustices of the past and has initiated a comprehensive land reform programme – a programme which has to date not been concluded – with a strong constitutional basis. The research in this thesis takes place within the context of land reform, especially land reform related to the restitution or redistribution of white-owned commercially productive agricultural land.

1.1.1 Land reform in South Africa

One of the most important legislative measures taken by the Government was the enactment of the Restitution of Land Rights Act, which was specifically aimed at providing redress (through a restitution programme) to black South Africans who were dispossessed of their land and rights in land under the apartheid dispensation. The Restitution Act, which laid the foundation for the land restitution programme, received constitutional endorsement through section 25(7) of the Constitution, which states that:

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

Similarly, section 25(5) of the Constitution introduced the second pillar of land reform, which is commonly referred to as the land redistribution programme. In terms of this section the state is under the constitutional duty to take:

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2 Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution). S 25 of the Constitution is generally referred to as the “property clause”.

1
reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

As a result of these constitutional obligations, Government embarked on an ambitious land reform programme which was aimed at redistributing 30% of white-owned commercial agricultural land by 2014 to black South Africans and settling all claims for redistribution (almost 80 000) by 2005. To date, more than six years after the initial target, all land claims have still not been settled and less than 10% of the redistribution target has been achieved. However, the slow pace of these two land reform programmes is not the only challenge faced by the programmes. It is generally accepted that more than 90% of agricultural land transferred in terms of these two programmes is not being used productively. This situation not only contributes to the increasing levels of poverty and unemployment of these land reform beneficiaries, but also threatens food security. A factor that further compounds the crisis is the recent calls by some politicians inciting landless South Africans to illegally occupy land belonging to white farmers, creating a potentially explosive situation. It is evident that the challenges faced by the land reform programmes are in urgent need of attention and that the problem (as a research area) is entirely current.

In order to substantially reduce the pressure placed on Government with specific reference to the challenges faced by the land reform programme, it is submitted that the effective facilitation of Corporate Social Responsibility (hereinafter referred to as CSR) would not only contribute towards the success of the land reform programme, but would also have a positive impact on the country’s economic stability and food security.

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3 See par 2.4.
4 See par 2.4.
5 The situation of land reform has deteriorated to such an extent that calls have gone out to have a Codesa-type conference to discuss the need for a new way of thinking on land reform (Codesa refers to the Convention for a democratic South Africa – a convention that was used to negotiate the democratic transformation in 1991 and 1992). These calls have been made in response to the Minister of Rural Development and Land Reform’s remark that land could no longer be allocated in its current fashion and that greater emphasis should be placed on allocating land to black commercial farmers (Duvenhage 2011 http://www.fin24.com/Economy/New-thinking-necessary-on-land-reform-20111120-2).
1.1.2 Improving land reform through CSR

The aim of CSR includes the improvement of the quality of life of stakeholders by going beyond normal business activities. CSR is primarily concerned with the contribution that the business sector makes towards the general upliftment of the local community, for example, and society at large. It is submitted that the private sector has an important role to play as an agent of development in addressing social issues through its CSR agenda. In this regard it should be pointed out that the contributions that the private sector makes towards upliftment should not necessarily be in the form of monetary contributions. Contributions such as the transfer of skills to disadvantaged persons or communities are manifestations of CSR and will accordingly be viewed as contributions that go beyond regular business activities.

Frederick\(^6\) identified six fundamental principles of CSR. These principles are:

1. Power begets responsibility.\(^7\)
2. A voluntary assumption of responsibility is preferable to government intervention and regulation.\(^8\)
3. Voluntary social responsibility requires business leaders to acknowledge and accept legitimate claims, rights, and needs of other groups in society.\(^9\)
4. CSR requires a respect for law and for the rules of that game that govern marketplace relations.\(^10\)
5. An attitude of “enlightened self-interest” leads socially responsible business firms to take a long-run view of profits.\(^11\)

---

\(^6\) Frederick "Theories of corporate social performance" 144 – 145.
\(^7\) This precept is based on the notion that a business has social power and as a result of this social power a business needs to assume social responsibilities in order to sustain its future. This notion of social power will be discussed in par 3.1.
\(^8\) It is important to note that this principle refers to the fact that a voluntary approach is preferable to government intervention. It should be agreed that CSR is in principle voluntary (this aspect will become more evident in the discussion of the definitional construct of CSR). However, if businesses do not assume this voluntary responsibility (as envisaged by the third principle), the question could rightly be asked if some form of government intervention is not required (chapter 4 will be devoted to a discussion of the role of the government in CSR, while chapter 5 will scrutinise various instruments that could potentially form part of a national legal framework for CSR).
\(^9\) This principle supports the stakeholder approach in terms of which a business needs to realize that it has stakeholders other than just shareholders and that the business should manage its relationships with all of its stakeholders. The stakeholder approach will be discussed in more detail in par 3.4.2.2.
\(^10\) The rules of the game are provided by an efficient legal framework that supports and facilitates CSR. See chapters 5 and 6 for a discussion of the legal framework and proposals in this regard.
\(^11\) The idea of “enlightened self-interest” opposes mere "self-interest”. The main focus of "self-interest" is profit maximisation, where CSR is regarded as an unnecessary expense, in line with the shareholder...
Greater economic, social, and political stability — and therefore a lower level of social criticism directed toward the private enterprise system — will result if all businesses adopt a socially responsible posture.\textsuperscript{12}

These principles aptly describe the basic precepts of CSR and form the basis for most of the discussion in this research.

Although a voluntary assumption of CSR is preferable to governmental intervention and regulation, the Government has an important role to play in the facilitation of CSR in order to ensure that the business sector does indeed fulfil its social responsibilities.

1.1.3 The role of Government in facilitating CSR

Although Frederick’s second principle of CSR notes that a voluntary assumption of responsibility is preferable to governmental intervention and regulation, it is generally accepted that CSR is becoming an increasingly important part of most governments’ agendas for sustainable development and attaining the goal of poverty alleviation, whilst governmental regulation is still seen as one of the most important drivers of CSR.\textsuperscript{13} CSR has been described as a concept whereby businesses decide to voluntarily contribute to the upliftment of society.\textsuperscript{14} It was initially designed as a voluntary social control mechanism where business would fulfil its duties in the “absence of, or without a need for, over-restrictive government intervention”.\textsuperscript{15} Should CSR as a whole then be a voluntary process, it might be argued that the state has no role to play within the facilitation thereof. Advocates of legislative intervention highlight the failures of the present voluntary systems as one of the main reasons for the need of the state to play a

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\textsuperscript{12} The final precept sketches the outcome to be achieved if the private sector adopts its social responsibilities. If the agricultural sector were to become actively involved in the land reform programme and make contributions to the programme through its CSR initiatives, the results would be greater economic, social and political stability.

\textsuperscript{13} Hamann and Acutt 2003 (20) Development Southern Africa 258. Hamann, Khagram and Rohan (2008 (34) Journal of Southern African Studies 35) argue that “the state has a crucial role to play in defining and enforcing a social role for big business, in contrast to a reliance on voluntary approaches to CSR”. See par 3.6 for a discussion of the drivers of CSR.


\textsuperscript{15} Wood 2008 (18) Business Ethics Quarterly 160.
more prominent role in the facilitation of CSR.\textsuperscript{16} This research will, as a point of departure, accept that the state has a role to play in the facilitation of CSR. Should CSR be totally voluntary, the business sector might not realise the important contributions that it could make towards the success of the land reform programme, poverty alleviation and sustainable development.

It should be noted that CSR should not be seen as replacing regulation or legislation concerning social rights, although it has undeniable links with and cuts across various branches of the law, including commercial law, human rights law and international law. According to Ward\textsuperscript{17} it is “unarguable that law shapes CSR”. Furthermore, it should not be seen as shifting the state’s responsibility in respect of facilitating CSR to the private sector and thus “privatising” the state’s responsibilities. In order to ensure an effective framework for CSR, a regulatory foundation that promotes growth, employment and good governance is required whereby all participants have certainty about their rights and responsibilities. Regulation should be consistent, effective, transparent, fair and understandable. An effective enabling legislative framework for CSR will not only provide the “rules of the game” but will also provide a level playing field on the basis of which socially responsible practices can not only be developed but also measured.

As indicated, in terms of section 7 of the Constitution the state is under a constitutional obligation to respect, protect, promote and fulfil the rights enshrined in the Constitution. Since CSR includes issues related to human rights, it can be argued that the state is under an obligation to facilitate it.\textsuperscript{18} However, in post-apartheid South Africa the state has possibly neglected its constitutional duty in the sense that very little has been done to legislate the responsibilities that the private sector has towards its many stakeholders. It is also fair to state that the majority of South African businesses have not done enough to alleviate the need of the masses. It would seem as if businesses are expecting that the state will take full responsibility for the social welfare of its citizens

\textsuperscript{16} See par 4.2.2.
\textsuperscript{17} Ward\textit{ Legal issues} 1.
\textsuperscript{18} It should be noted that although issues such as the provision of health care, education or access to housing or water are all examples of areas in which businesses can make a contribution through their CSR initiatives, this research does not focus on the fulfilment of these (socio-economic) rights. Any reference to these areas is merely used to indicate possible areas in which businesses could make a contribution through their CSR practices.
through legislation and implementing state welfare systems. On the other hand, the state might feel inclined to increase the number of its regulatory initiatives in a situation where self-regulation by industries is insufficient and does not contribute towards the solution of the nation’s numerous social problems.

1.1.4 The role of the private sector in CSR

The distinction between the roles of business and the state is becoming increasingly more blurred, and it appears as though the responsibility for development is shifting away from Government to the private sector. It is important to recognise that the state alone is currently not in a position where it would be able to address all of the challenges arising from the land reform programme, without the assistance of the private sector. As a result, it is submitted that the private sector (especially the agricultural sector) has an important role to play in contributing to the success of the land reform programme and the improvement of the quality of life of land reform beneficiaries through the acceptance of its social responsibilities.

An interrelationship exists between business and society in which context business and society need each other. This research is based on the assumption that a successful business sector is reliant on society to provide labour and to purchase the commodities produced or provided by the sector. At the same time, society requires successful businesses. This need was aptly formulated by Porter and Kramer\(^\text{19}\) when they noted:

> No social program can rival the business sector when it comes to creating the jobs, wealth, and innovation that improve standards of living and social conditions over time.

This statement emphasises the important contribution that businesses make toward addressing a variety of social challenges such as poverty and unemployment. Through their CSR practices and initiatives businesses play an undeniably important role in contributing to the well-being of society.

Based on the interdependence between businesses and society, this responsibility requires that, within the context of this research, businesses have a positive involvement with land reform beneficiaries that would lead to sustainable land reform

projects and ultimately benefit the emerging South African economy. The role of business is becoming increasingly important in the development of human skills since such development is beneficial not only to society at large but to the business as well. As businesses draw on societal resources, they need to “plough back” into society in order to promote the greater well-being of society at large. By developing the skills of their stakeholders (including the communities in which each business operates), businesses make a direct investment in human capital. Consequently it can be stated that CSR has evolved from the interrelationship between the private sector and the societies in which the private sector operates.

According to a recent report by the World Bank20

> [t]he contemporary corporate social responsibility (CSR) agenda is founded in a recognition that businesses are part of society, and they have the potential to make a positive contribution to societal goals and aspirations. (emphasis added)

The report continues by stating that:

> [t]here is increasing evidence that developing country governments are beginning to view CSR practices as a subject with relevance for public policy – as a means to enhance sustainable development strategies and a component of their national competitiveness strategies to compete for foreign investment and position their exports globally, as well as to improve poverty-focused delivery of public policy goals.21 (emphasis added)

Private sector CSR initiatives are aimed at filling the gaps caused by an inability by the state to comprehensively address social problems. These initiatives represent an important alternative source of resources which can be utilised in development.22 Despite the potential of CSR, it should be kept in mind that CSR should not be regarded as a means through which all of society’s problems can be solved, nor should the private sector be expected to carry the costs of addressing societal problems. The

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20 Fox, Ward and Howard *Public sector roles* 3.
21 Fox, Ward and Howard *Public sector roles* 4.
22 It should be noted that by October 2011 the social welfare grants made available by the Government supported an estimated 15.2 million South Africans, a figure which translates into 10.9% of the national budget (SAPA 2011 [http://www.fin24.com/Budget/Mini-Budget-2011/Social-grants-now-support-152m-20111025](http://www.fin24.com/Budget/Mini-Budget-2011/Social-grants-now-support-152m-20111025)). In reaction to this figure, President Zuma noted that these grants were not sustainable and that plans had to be developed to reduce the general dependency on government assistance. According to the President, South Africa cannot afford to be a welfare state, and government and business need to work together to improve the situation (Phakati 2011 [http://www.businessday.co.za/Articles/Content.aspx?id=159568](http://www.businessday.co.za/Articles/Content.aspx?id=159568)).
private sector is, however, able to address a number of social problems through its social agendas.

The focus of this research is particularly on the contribution of the agricultural sector to the success of the land reform programme through its CSR practices and initiatives. It is essential to briefly position the sector within the national economy. Primary agricultural activities contribute an estimated 2.5 – 3% to the gross domestic product (GDP) and are responsible for employing between 7 and 8% of the national workforce.\(^{23}\) However, it is estimated that the agro-industrial sector, which is linked to various other sectors of the economy, contributes 12% to the GDP, an estimate that illustrates the importance of the sector. In 2009 the agricultural sector was responsible for 6.5% of all South African exports, with 46% of agricultural production being exported.\(^{24}\) These exports included wine, citrus, maize and grapes. South Africa is the largest producer of maize in the Southern African Development Community, with an average of 9.7 million tons being produced annually by an estimated 8 000 commercial maize producers mainly in the North West Province, Mpumalanga, and the Free State.\(^{25}\) South Africa is also the world’s 12\(^{th}\) largest producer of sunflower seeds and the leading exporter of protea cut flowers.\(^{26}\) Whereas only 22% of the total arable land can be classified as high-potential arable land, nearly 80% of the agricultural land is suitable for livestock


\(^{26}\) South Africa also has a thriving forestry sector with the country having developed one of the biggest planted forests on the planet. It is estimated that approximately 1.3 million hectares of South Africa’s land surface are covered by plantations. The sector employs almost 170 000 employees and contributes in excess of R16 billion to the national economy on an annual basis (Government 2010 [http://www.info.gov.za/aboutsa/agriculture.htm]).
farming. Livestock farming contributes almost half of the total agricultural output, making the livestock sector the largest national agricultural sector.

From the above statements it is abundantly clear that the South African agricultural sector has a vital role to play in the South African economy. The future existence of this sector might be threatened by a land reform programme that continues to perform below expectations. This research will argue that the regulation of CSR will make an important contribution towards releasing the potential of agricultural land reform projects. This research will attempt to indicate that, if properly co-ordinated, the private sector, through its acceptance of its social responsibility, has an extremely important function to fulfil in land reform, through skills development for example.

This thesis does not purport to provide an encompassing discussion of all of the pieces of legislation which could potentially be linked to CSR or which could possibly have CSR content. The legislation discussed in this thesis addresses issues which are internationally recognised as CSR priority issues. However, given South Africa’s unique history, specific attention will be given to legislation aimed at addressing the injustices of the past, which enables historically disadvantaged South African to gain access to the mainstream economy through empowerment.

1.2 General and specific research questions

Given this situation, the general question to be researched in this thesis can be formulated as follows:

How can land reform be improved through a CSR legal framework?

The following specific research questions have been formulated in order to answer the general research question comprehensively:

1. How is land reform currently being addressed in South Africa?


28 It is estimated that the dairy industry employs 38 000 workers, with an additional 40 000 workers being employed by related industries (Anon 2010 http://www.southafrica.co.za/about-south-africa/environment/agriculture-forestry-and-land/).
2. How is CSR framed within the national context?

3. How can CSR contribute to the land reform programme?

4. What are the roles and responsibilities of Government in creating an enabling environment for CSR?

5. Which legal requirements and guidelines found nationally and internationally could form part of a national legal framework for CSR?

6. What should be included in a proposed CSR framework Act aimed at institutionalising CSR?

### 1.3 Primary and secondary research objectives

The primary objective of this research is to determine to what extent land reform can be improved by a CSR legal framework. In reaching the primary objective, the following secondary research objectives can be identified:

1. to determine how land reform is currently being addressed in South Africa;

2. to establish how CSR is framed within the national context;

3. to conclude how CSR can contribute to the land reform programme;

4. to determine the roles and responsibilities of Government in creating an enabling environment for CSR;

5. to identify and scrutinise legal requirements and relevant guidelines found nationally and internationally that could form part of a national legal framework for CSR; and

6. to combine relevant national legislation and national and international guidelines into a framework Act that would institutionalise CSR.

### 1.4 Central guiding arguments

The study is based on the following central guiding arguments:
• Society’s needs are exceeding the capability of Government to fulfil them.

• Businesses have an obligation towards meeting the needs of a wide variety of stakeholders.

• Land reform in South Africa is problematic and could potentially threaten food security.

• The agricultural sector has a strategic interest in land reform and is ideally situated to contribute to land reform.

• The manner in which the agricultural sector could contribute to land reform is through their socially responsible practices and initiatives.

• Government should create an enabling environment for CSR.

• Although CSR is an established field of research, the definition and implications of CSR are still not clear and no clear guidelines exist for the private sector in general and the agricultural sector in particular.

1.5 Relevance of the thesis

From the discussions to follow in chapter 2 it will become evident that land reform in South Africa is problematic and in urgent need of attention. To date, no formal or meticulous attempts have been made to link CSR with land reform, nor has any attempt been made to discuss a possible enabling environment for CSR within the national context. Within the context of land reform and the constitutional obligation included in section 25(5) of the Constitution, obliging the state to take reasonable legislative and other measures to enable South Africans to gain access to land, this research posits that CSR and the accompanying enabling environment created by Government could be regarded as falling within the ambit of the section.

CSR initiatives (especially those of agricultural companies) could impact significantly on the land reform programme and, given the absence of an official CSR enabling framework, the necessity for establishing such a framework is self-evident. Linking land
reform and CSR is of national importance. A successful land reform programme will be beneficial to Government and will free up scarce resources which could be used to address other social needs. A successful land reform programme will be beneficial to the agricultural sector as a result of the increased productivity on agricultural land reform projects. Finally those who stand to benefit the most from successful land reform projects are the beneficiaries of these projects. Productive farming projects will have an impact on unemployment and poverty alleviation and will contribute to the economy.

1.6 Research method

This research entails an analytical literature study of recent and relevant literature that is applied in a critical and integrated manner and presented as a well-integrated literature review. Due to its multidisciplinary nature an analytical literature study was undertaken of literature extending beyond legal literature. The literature studied in this research includes relevant case law, legislation, text books, and scientific contributions published nationally and internationally.

1.7 Chapter divisions

In order to address the formulated primary research objective in a coherent and logical manner, the content of this thesis is organised into seven chapters of which chapters 2 to 6 will specifically address the secondary research objectives in response to the stated primary research objective.

Chapter 1 substantiates the theme of the research, places the theme in the South African context, and demonstrates why it is necessary to investigate the problem concerned and find an answer to the research objective posed. The chapter further identifies the need for creative development in a situation which might, if left unaddressed, threaten the stability of the country.

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29 An examination of the bibliography will indicate that sources from a variety of subject fields were considered. These fields include business management, business communications and business ethics.
Chapter 2 examines the way in which land reform in South Africa is currently being addressed. The chapter provides the situational context for the thesis and discusses the right to access to land as per section 25(5) of the Constitution as a socio-economic right. It further provides an overview of the Land Acts which regulated the occupation of, access to and rights in land through spatial segregation based on race. The land reform programme was established to address these injustices. This chapter provides an overview of the land restitution and land redistribution programmes in order to establish the current state of the land reform programme. Finally the chapter addresses the proposed new direction for land reform.

Chapter 3 discusses how CSR is framed in the national context and examines CSR as a possible solution to the challenges experienced by the land reform programme. The chapter scrutinises numerous definitions (national and international) of CSR in order to establish if a universally accepted definition of CSR is possible. The chapter further discusses the common approaches to CSR. The benefits and limitations of being socially responsible are discussed in order to conclude how CSR can contribute to the land reform programme. Finally the chapter identifies some drivers of CSR, and identifies governments in general as important drivers.

Based on the identification of governments as drivers of CSR, chapter 4 reflects on the various roles and responsibilities that governments have when creating an enabling environment for CSR. The chapter also discusses some measures which could establish an enabling environment and finally addresses the question: What can the South African Government do to promote CSR?

Chapter 5 indentifies and scrutinises the legal requirements and relevant guidelines found nationally and internationally that could form part of a national legal framework for CSR. The chapter analyses the current enabling environment for CSR created through national legislation with CSR content, with specific focus on the black economic empowerment framework. The local enabling environment is further strengthened through voluntary national guidelines and instruments addressing CSR or CSR-related
issues. Finally some of the most prominent international instruments dealing with CSR are reviewed.

Chapter 6 combines elements identified in the discussions of the instruments in chapter 5 into a framework Act that would institutionalise CSR. The chapter identifies commonalities and priority issues and propose a framework Act for CSR.

The seventh and final chapter summarises the conclusions that be drawn from this research, in order to determine to what extent land reform can be addressed by a CSR legal framework.
Chapter 2: Land reform – the situational context

2.1 Introduction

The South African agricultural landscape was (and to a large extent still is) characterised by uneven land ownership, extreme rural poverty and the unproductive use and management of resources. These characteristics are directly linked to the strategic objectives of rural development, food security and land reform as identified in the Government’s 2009 – 2014 Medium Term Strategic Framework (MTSF), which is inter alia aimed at ensuring a more equitable distribution of the benefits of economic growth and halving poverty and unemployment by 2014.\(^1\) Government’s MTSF has identified 12 outcomes as a key focus until 2014, of which outcome 7 requires the Department of Rural Development and Land Reform (DRDLR) to build vibrant, equitable and sustainable rural communities. In order to achieve this outcome the DRDLR has identified eight strategic goals which address issues such as increased access to and productive use of land (agrarian reform) and improved food production.\(^2\) The goal of increasing access to land and the productive use of land by 2014 is directly linked to the land reform programme and further addresses the issue of uneven land distribution through restitution and redistribution.

The distorted distribution of land is evident from the fact that by 1994 an estimated 87% of agricultural land was owned by the white minority, while 13% was owned by black persons.\(^3\) This skewed distribution of land was the direct result of the way in which the pre-1994 governments regulated the occupation of, access to and rights in land through spatial segregation based on race.\(^4\) Given its history of forced removals and racial

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\(^1\) The Presidency Medium Term Strategic Framework 2.
\(^2\) DRDLR Strategic Plan 2011 – 2014 22.
\(^3\) It should be noted that although these figures are widely used to describe the uneven distribution of land under the apartheid regime, the figures are questionable. The 13% of black-owned land refers in all likelihood to land owned by the South African Development Trust and does not include land privately owned in the former homelands of Transkei, Bophuthatswana, Venda or Ciskei, which under the new dispensation were again incorporated into South Africa, or to land owned by companies and close corporations with a majority of black shareholders or members. See par 2.3.2 for a reference to the South African Development Trust.
\(^4\) De Villiers Land reform: Issues and challenges 45.
segregation, Bromley described South Africa’s land reform programme as *sui generis*, where the cry is not only for land redistribution but also for land restitution.

In order to address this unequal distribution of land, the first democratically elected South African Government initiated a land reform programme consisting of three constitutionally endorsed pillars. The first pillar focuses on land restitution in terms of which a person or community who was dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices would be entitled to restitution of the property or to equitable redress. Land redistribution forms the second pillar of the programme. The objective of this programme is to redistribute 30% of white-owned agricultural land to historically disadvantaged South Africans by 2014. The final pillar makes provision for tenure reform in terms of which persons whose tenure of land is legally insecure are entitled to legally secure tenure. Through these three pillars and their constitutional foundation, the land reform programme has become a constitutional imperative.

The pace of land reform in general has unfortunately been disappointingly slow. It took almost 13 years after the cut-off date for submitting land claims in terms of the restitution programme to settle 96% of the claims. It is further evident that the target of redistributing 30% of white-owned agricultural land by 2014 will not be met and it is becoming increasingly important to speed up land and agrarian reform in order to

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6 Ss 25(5) – 25(9) of the Constitution lay the constitutional foundation for land reform and as a result, land reform must be conducted within the confines of the Constitution. See par 2.2 for a discussion of access to land as a socio-economic right.
7 This pillar received constitutional backing through s 25(7) of the Constitution.
8 S 25(5) of the Constitution requires the state to take reasonable legislative and other measures, within its available resources, to foster conditions which would enable citizens to *gain access to land* on an equitable basis. 30% of agricultural land amounts to an estimated 24.7 million hectares of land. Confusion existed regarding the meaning of the phrase “agricultural land”, since the original land reform documents referred only to “agricultural land”. However, it would appear that “agricultural land” in the context of the current land reform programme refers to “white-owned commercial agricultural farmland” (Bosman *Land reform: a contextual analysis* 7 and CDE *Land Reform in South Africa* 33). Redistributive land reform is defined as “the net transfer of wealth and power from the landed to the landless and land-poor classes” (Borras 2006 (6) *Journal of Agrarian Change* 73).
9 S 25(6) of the Constitution. This research will primarily focus on the restitution and redistribution pillars, since these two pillars are closely related. Due to the limited focus of this research, tenure reform as a land reform programme will not be discussed. Borras (2006 (6) *Journal of Agrarian Change* 77) is of the opinion that tenure reform cannot be described as redistributive land reform.
prevent a Zimbabwe-style land grab.\textsuperscript{10} The continued unequal distribution of land and the slow progress of the land reform programme as a whole have led to political figures such as the controversial president of the ANC Youth League, Julius Malema, inciting black South Africans to occupy and take land from white owners without giving payment,\textsuperscript{11} with Malema reported as have said “if they don’t want to give the land over to us, we must take it without their permission”.\textsuperscript{12} The undeniable truth is that land reform is an emotional, sensitive and potentially explosive topic.

Calls like these not only elicit strong emotional reaction from current land owners but also have a negative impact on investor confidence, which could adversely affect economic stability. However, it is not difficult to understand why the landless are becoming impatient. In the 17 years since the inception of the land reform programme only an estimated 6.7 million\textsuperscript{13} hectares of land have been transferred and of these it is estimated that 90\% of the land which was acquired by the state and provided to emerging farmers has become unproductive.\textsuperscript{14} As a result of these failures, it was reported that for the 2011/12 restitution budget, an amount of R900 million would have

\textsuperscript{11} Nhlabathi 2011 http://www.sowetanlive.co.za/news/2011/05/06/malema-calls-for-massive-land-grab. A slightly less radical approach was proposed by the Minister of Agriculture, Forestry and Fisheries when she proposed that white farmers transfer 40\% of their farming operations to black farmers – an approach which was obviously strongly opposed by the agricultural unions such as the Transvaal Agricultural Union (TAU SA) (Van der Walt 2010 http://www.volksblad.com/Suid-Afrika/Nuus/Landbou-organisasie-kap-Joemat-Pettersson-20100512). In this context, land reform has been described as an issue “that lends itself to political exploitation, whether by interest groups seeking to draw attention to their specific causes by linking them to the much wider interest in ‘the land’, or by political opportunists seeking to draw attention away from other matters” (CDE Land Reform in South Africa 5).
\textsuperscript{12} SAPA 2011 http://www.news24.com/SouthAfrica/Politics/malema-to-face-criminal-charges-20111020#. Based on this statement, AfriForum (a civil rights movement) laid a criminal charge of incitement to sedition against the ANCYL president.
\textsuperscript{13} This figure represents the total hectares of land transferred collectively in terms of all three of the pillars of the land reform programme (SAPA 2012 http://www.fin24.com/Economy//Nkwinti-spells-out-land-reform-target-20120301-2). It is estimated that less than 4 million hectares have been transferred in terms of the redistribution programme (Olivier et al (eds) Restitution operational strategy 5).
\textsuperscript{14} It was reported that more than half of the farms bought by Government in terms of the Land Redistribution for Agricultural Development Programme had failed or fallen into decline (SAPA 2010 http://www.news24.com/SouthAfrica/News/Use-land-or-lose-it-Nkwinti-20100302).
to be diverted to recapitalising the failing projects – an amount which had been allocated to settle restitution claims.\textsuperscript{15}

The challenges in the current land reform model were acknowledged by the Minister of Rural Development and Land Reform when he said:

I have to acknowledge that the land reform programmes implemented to date have not been sustainable and have not provided the anticipated benefits to the recipients of the programme. To date approximately 6 million hectares of land have been transferred through restitution and redistribution and much of this land is not productive and has not created any economic benefit for many of the new owners. There has been an over emphasis on hectares at the expense of development and food security. This has contributed to declining productivity on farms; decrease in employment in the agricultural sector; and, deepening poverty in the countryside.\textsuperscript{16}

To further exacerbate the problem it was reported in 2011 that of the almost 6 million hectares bought by Government to be redistributed through the land reform programme an estimated 2 million hectares (or 30\%) have been sold back to the previous white owners\textsuperscript{17} largely as a result of a lack of support (financial, training, production) from Government (lack of Government intervention and flawed agricultural policies).

To demonstrate the challenges of the land reform programme, it was reported in 2010 that the Government needed approximately R72 billion to transfer 19 million hectares of land to achieve the 30\% target by 2014.\textsuperscript{18} This massive financial burden is linked to what is referred to as the problem of ”big policy and the shrinking state” – the big policy being the land reform policy. The land reform policy “bears little relation to the institutions, budgets and political environment in or through which it is to be realised,”\textsuperscript{19}

\textsuperscript{18} Nkwinti 2010b http://www.ruraldevelopment.gov.za/ DLA-Internet//content/document_library/Ministry/Ministry_Minister_Speeches/Speech2.pdf. According to Du Plessis, Pienaar and Olivier (2009 (24) SA Public Law 591) it was estimated that approximately R71 billion was needed to ensure that 15\% of agricultural land is transferred by 2014.
and the shrinking state is confronted with insufficient institutional and financial resources.

However, it is crucial that any acceleration of the pace of land reform should result in a dramatic improvement in the sustainability of the farming enterprises concerned.\textsuperscript{20} The land reform programme involves more than the mere restoration and redistribution of land. The people gaining access to the land are expected to manage legal entities and manage vital resources sustainably, while the programme has not focussed on supporting individual household livelihood activities on the land. The programme has resulted in the establishment of numerous unsustainable, poorly managed projects.

Land reform has undeniably fallen far short of both public expectations and official targets and has done little to bring about the equal distribution of land.\textsuperscript{21} Recipients of land under the land reform programme have not reaped the full benefits from the initiative and have not received the anticipated socio-economic benefits, mainly as a result of Institutional weakness in overall land management, policy and legislation.\textsuperscript{22}

This chapter will not attempt to provide an appraisal of arguments in favour of or against the need for land reform. Land reform is a reality and is constitutionally entrenched and, given the country’s history of forced removals and discrimination, land reform is not only a necessity but the morally right thing to do. In the context of this research, this chapter will set the scene on which the remainder of the chapters will be based, where the focus is on the contribution which companies in the agricultural sector can make, through their CSR initiatives, towards the success of the land reform programme.

\textsuperscript{20} Department of Agriculture \textit{The Land and Agrarian Reform Project (LARP) Concept Document} 6.
\textsuperscript{21} According to Hall (2004 (100) \textit{Review of African Political Economy} 213) the restitution programme has not led to the expected redistribution of land with many of the beneficiaries opting for financial compensation as opposed to land. Restitution beneficiaries have various options available if their claims are successful. See par 2.4.1.2 for a reference to these options.
\textsuperscript{22} President Zuma, quoted in Reuters 2010 \url{http://www.news24.com/SouthAfrica/News/Land-reform-not-helping-blacks-20100527}. The Minister of Rural Development and Land Reform supported the President’s remarks and noted that “as a result of inadequate post settlement support such as training and development; access to finance and markets, etc, a large number of those who have received land through the land reform programme have not been able to derive optimal benefit out of the process” (Nkwinti 2010a \url{http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_library/documents/Speeches_and_Media_Statements/Minister/RESTITUTION_SPEECH.pdf}).
This chapter will focus primarily on the redistribution and the restitution programmes of the land reform programme. The broad aim of this chapter is to determine how land reform is currently being addressed in South Africa. In order to achieve this, the chapter will briefly discuss the right to access to land as a socio-economic right and set the historical context which gave rise to the need for redressing inequalities in land ownership. It will also discuss the early policies which introduced the notion of land reform. Following this discussion, an overview of the restitution and redistribution programmes will be given. The progress made in terms of these programmes will be examined and the challenges faced by these programmes will be explored. Finally the discussion will focus on Government-initiated measures (through legislation and other policies) designed to address the current state of these two programmes.

2.2 Access to land as a socio-economic right\textsuperscript{23}

2.2.1 Introduction

In the previous paragraph reference was made to the fact that land reform is constitutionally entrenched in sections 25(5) to 25(9) of the Constitution and that land reform is accordingly viewed as a constitutional imperative. These sections place the Government under a constitutional obligation to ensure that citizens have the right of access to land on an equitable basis (section 25(5)); to secure the rights of tenure of those persons or communities whose tenure of land is insecure (section 25(6)); and to establish a programme through which land restitution can be realised (section 25(7)).\textsuperscript{24}

\textsuperscript{23} This section does not represent an attempt to engage in an in-depth analysis of socio-economic rights in general. The aim of this section is merely to demonstrate that access to land, and within the context of this research access to land in terms of the restitution and redistribution programmes, is regarded as a socio-economic right from which certain entitlements and duties arise. This section will not entertain the debate about the extent to which socio-economic rights should receive constitutional endorsement and protection. The simple fact is that these rights are included in the Constitution and consequently enjoy constitutional standing.

\textsuperscript{24} These sections attempt to transform the dispensation with reference to land which existed under apartheid rule to a dispensation which aims to address the injustices brought about by apartheid and promote the values underlying the Constitution. The aim is accordingly to transform society by addressing historical wrongs, a purpose that is confirmed by the preamble to the Constitution. Attempts to transform can be described as “transformative constitutionalism” which has been defined as: “an enterprise of inducing large-scale social change through nonviolent political processes grounded in law” (Klare 1998 (14) SAJHR 150). Transformative constitutionalism strives to improve the quality of life and attain social justice for all. In the national context socio-economic rights such as the right of access to land contribute to the social transformation of South African
These sections are crucial to enable marginalised people to improve their quality of life and socio-economic well-being by providing them with rights addressing land issues. The sections further create an express mandate to take affirmative steps to give effect to the right through legislation and programmes aimed at attaining a more equitable distribution of land by expanding access to land to those who were previously barred from such access.25

The right to have access to land on an equitable basis prescribed in section 25(5) can be described as establishing the constitutional basis for land reform in general, since all three pillars of the land reform programme (restitution, redistribution and tenure reform) are ultimately aimed at providing access to land. As a result, this section is in need of further discussion.

Although the right of access to land is not identified as a socio-economic right in the International Covenant of Economic, Social and Cultural Rights of 1966,26 there seems to be some consensus amongst commentators on the Constitution that access to land is indeed a justiciable socio-economic right. Currie and De Waal27 describe socio-economic rights as “a constitutional agreement that the state must strive to achieve certain developmental goals”.28 With reference to land, the Government should strive to achieve granting the population access to land on an equitable basis. The importance of the right to access to land is emphasised by the fact that access to land is required for the realisation of other socio-economic rights such as the right to access to adequate housing and the right to food, and the right to access to land is therefore also embedded in these other rights.

society. For a discussion of transformative constitutionalism, see Botha 2002 Journal of South African Law 612 – 627; Pieterse 2005 (20) SA Public Law 155 – 166; Roux 2009 (2) Stell LR 258 – 285; and Van der Walt 2006 Journal of South African Law 1 – 31. Ss 25(5) – 25(7) should be read in conjunction with s 25(8) which provides that no provision included in s 25 may impede the state from taking legislative and other measures to inter alia achieve land reform aimed at redressing the results of past racial discrimination, subject to the limitations in s 36(1).

25 Van der Walt Constitutional Property Law 3rd ed 186 noted that ss 25(5) – 25(9) cannot be classified as straightforward claims-rights providing individuals with a right to land.
26 This UN instrument has been signed by Government, but not ratified.
28 Brand (in Brand and Heyns (eds) Socio-economic rights in South Africa 3).
The recognition of the right to access to land as a socio-economic right implies that the Government is under a constitutional duty to create conditions that foster access to land. Failure to comply with this duty could expose the Government to legal action. As such, socio-economic rights are justiciable and the Government can be held accountable for a failure to comply with its constitutional duties. In terms of section 172(1)(a) of the Constitution, courts are required, in instances of the Government’s failing to comply with its constitutional duty, to declare a law or conduct which is inconsistent with the Constitution invalid to the extent of its inconsistency. Enforcement of the legal entitlements created by the socio-economic rights is possible, with the Constitution creating remedies in instances where the rights are infringed upon. As a result, the judiciary is tasked with interpreting socio-economic rights and giving content to the rights. The following sections will have a closer look at the right of access to land as a socio-economic right.

2.2.2 Access to land in terms of section 25(5) of the Constitution

2.2.2.1 Introduction

Access to land, as a qualified socio-economic right, is constitutionally entrenched and the state is under a constitutional obligation to

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29 As confirmed by the Constitutional Court in Ex Parte Chairperson of the Constitutional Assembly: In re certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC) at paras 76 – 78 and Government of the Republic of South Africa v Grootboom 2001 1 SA 46 (CC) at paras 20 and 94. Addressing the issue of the justiciability of socio-economic rights, the Constitutional Court reaffirmed in Minister of Health v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC) at par 25 that: “The question in the present case ... is not whether socio-economic rights are justiciable. Clearly they are”. (emphasis added) Also see Brand and Heyns (eds) Socio-economic rights in South Africa 17.

30 From this section it is evident that a challenge can be lodged against the constitutionality of a law as was the case in Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 6 SA 505 (CC) where provisions of the Social Assistance Act 59 of 1992 were challenged as inconsistent with a constitutionally protected socio-economic right, (s 27(1)(c)) of the Constitution, which states that everyone has the right to social assistance. Secondly, a challenge can also be lodged against conduct which is inconsistent with a constitutional right, as was the position in the Treatment Action Campaign case, where a national policy was challenged on the grounds that the conduct was inconsistent with the right to have access to healthcare services (s 27(1)(a) of the Constitution).

31 Brand and Heyns (eds) Socio-economic rights in South Africa 2.

32 The right to access to land is categorised by some authors as a “qualified socio-economic right” which imposes a positive duty on the state to take reasonable steps, within its available resources, to enable citizens to gain equitable access to land. Other “access” rights which are categorised as
take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.\textsuperscript{33}

This section guarantees citizens\textsuperscript{34} the right to equal access to land and creates an entitlement which is legally enforceable against the state. The state is obliged to utilise available resources to construct favourable circumstances to fulfil the right, although the qualified socio-economic rights include the right to have access to adequate housing (s 26(1)); the right to have access to healthcare services (s 27(1)(a)); and the right to have access to sufficient food and water (27(1)(b)). For a discussion of the right to access to water, see for example Van der Walt \textit{The concept “beneficial use” in South African water law reform} 98. See Brand and Heyns (eds) \textit{Socio-economic rights in South Africa} 3 for a discussion of the classification of socio-economic rights. It should be noted that Liebenberg (in Woolman, Bishop and Brickhill (eds) \textit{Constitutional Law of South Africa} 2\textsuperscript{nd} edition 33-5 and Liebenberg \textit{Socio-economic rights} 80) does not, in her categorisation of socio-economic rights, identify the right to access to land as a qualified socio-economic right. In fact from the discussions by the author it would appear as though the author does not view access to land as a socio-economic right at all. This is supported by the fact that the author also does not discuss access to land under the heading “Other unqualified socio-economic rights” in Woolman, Bishop and Brickhill (eds) \textit{Constitutional Law of South Africa} 2\textsuperscript{nd} edition 33-52 – 33-53. For the purposes of this research it will be accepted that the right to access to land is a socio-economic right, as confirmed by Currie and De Waal \textit{The Bill of Rights Handbook} 5\textsuperscript{th} edition 563.

\textsuperscript{33} It should be noted that the wording of this socio-economic right differs substantially from the wording of other socio-economic rights. With regards to the rights to access to housing (s 26(1)) and access to healthcare services, sufficient food and water, and social security (s 27(1)), the state is under a constitutional duty to “take reasonable legislative and other measures, within its available resources, \textit{to achieve the progressive realisation}” of these rights (ss 26(2) and 27(2)). S 25(5) contains no requirement related to the progressive realisation of the right of access to land. Instead it requires the state to “foster conditions which enable citizens to gain access to land on an equitable basis”. As a result, the state is not responsible for achieving the progressive realisation of the right to access to land as is the case with other socio-economic rights. This differentiates access to land from other socio-economic rights and supports the notion that a core minimum right with reference to access to land is not possible. For a discussion of the concept of “progressive realisation” in the context of ss 26 and 27, see Liebenberg in Woolman, Bishop and Brickhill (eds) \textit{Constitutional Law of South Africa} 2\textsuperscript{nd} edition 33-41 – 33-44.

\textsuperscript{34} The reference to “citizens” distinguishes the right to access to land from the majority of the rights included in the Bill of Rights. The rights to access to adequate housing (s 26(1)); access to healthcare services, sufficient food and water, and social security (s 27(1)); and education (s 29) – the so called “core socio-economic rights”, confers the rights created in the sections upon “everyone” as opposed to “citizens”. The reference to “everyone” has been adjudicated in the \textit{Khoza} case to include people with permanent residency but who are not citizens in respect of the right to receive benefits of the social security system. From the wording of s 25(5) it is clear that the intention is to limit the availability of the right to “citizens” as opposed to those who are not. It is argued that the exclusion of non-citizens from the enjoyment of this right would not constitute unfair discrimination in terms of s 9 of the \textit{Constitution}. It is interesting to note that, with reference to black economic empowerment, which is not a socio-economic right, but rather a programme aimed at \textit{inter alia} realising socio-economic rights, reference is also made to “citizens” as opposed to “everyone”. The proposed amendments to the \textit{BEE Act} refers to black people as Africans, Coloureds, and Indians “who are citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation – (a) before 27 April 1994; or (b) on or after 27 April 1994 and who have been entitled to acquire citizenship by naturalisation prior to that date but were precluded from doing so by Apartheid policies” (Draft Broad-Based Black Economic Empowerment Amendment Act, 2011 (Gen Not 893 in GG 34845 of 9 December 2011). When called upon to give meaning to the term “citizen” the formulation included in the \textit{Draft Amendment Act} could be used as a useful indicator.

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state has a margin of discretion regarding its preference of the means through which it attempts to fulfil the right. Section 25(5) thus places a positive obligation on the state to fulfil its duty to take reasonable legislative and other measures towards the realisation of the right to access to land. 35 This entitlement is aimed at providing citizens with access to land in the furtherance of social justice. However, it should be stressed from the onset that section 25(5) does not provide a right to land. Instead it provides a right of access to land. 36 The right of access to land does not confer the right on individuals to claim actual land from the state. It merely requires the state to provide access to land. 37

For the purpose of this research the notion of access to land is limited to access in terms of the land reform programme, and more specifically access to land primarily in terms of the redistribution programme and to some extent the restitution programme. Access to land in this context refers to the process through which rights and opportunities to acquire and own or occupy and use land on a permanent or temporary basis are gained. 38 Within the context of this research land use refers to the use of land primarily for productive agricultural purposes.

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35 Liebenberg (in Chaskalson et al (eds) Constitutional Law of South Africa 3rd revision service 41-34) describes this obligation as an obligation of conduct. According to Liebenberg (in Chaskalson et al (eds) Constitutional Law of South Africa 3rd revision service 41-25) “[a]n obligation of conduct requires the state to adopt measures reasonably calculated to realize the enjoyment of a particular right”. S 25(5) is also supported by s 25(8) that empowers the state to take legislative and other measures to achieve land reform.

36 The same position is true for other access rights such as access to sufficient water (see Van der Walt The concept “beneficial use” in South African water law reform 100).

37 Eisenberg (in Chaskalson et al (eds) Constitutional Law of South Africa 3rd revision service 40-7) remarked that the reference to “access to land” limits the state’s obligation to the extent that the state is not under an obligation to “actually provide individuals with land”. According to Liebenberg (in Chaskalson et al (eds) Constitutional Law of South Africa 3rd revision service 41-26) “access to” has been included in the socio-economic rights in order to stress the fact that the state is not obliged to “deliver the rights directly and without charge to anyone”.

38 Cotula, Toulmin and Quan 2006 http://www.icard.org/icard_doc_down/Issue_Paper1.pdf. In the national context access to land also involves a process through which land is restored to those who were dispossessed of their land through apartheid and forms of tenure reform aimed at securing tenure rights. Lahiff and Rugege (2002 (6) Law, democracy and development 285) are of the opinion that access does not necessarily imply ownership and that it could also refer to the availability of land in joint ownership, through lease agreements or other secure rights. Pienaar and Brickhill (in Woolman, Bishop and Brickhill (eds) Constitutional Law of South Africa 2nd 48-13) support the argument that the reference to “access to land” is not restricted to measures facilitating ownership, but also encompasses other rights to land. Unlike the right to access to adequate housing (s 26(1)); to sufficient food and water (s 27(1)(b); and appropriate social assistance (s 27(1)(b)), s 25(5) does not have any qualitative dimension regarding the state’s performance. Liebenberg (in Chaskalson et al (eds) Constitutional Law of South Africa 3rd revision service 41-39)
Although land reform in general is not regulated by a particular overarching piece of legislation, access to land is facilitated through various legislative and other measures created through the land reform framework. Since 1994, Government has developed various such measures. Legislative measures include the *Restitution Act*, enabling those dispossessed of their property after 19 June 1913 as a result of discriminatory laws or practices to claim restitution, or the *Land Reform: Provision of Land and Assistance Act*, empowering the state to purchase land for redistribution purposes. During the existence of the redistribution programme the Government has also taken various *other measures* to enable access to land. These measures include making grants available to potential beneficiaries who would utilise the grants to purchase land. Various grants have in the past been made available to enable beneficiaries to gain access to land on an equitable basis. These grants include the Settlement/Land Acquisition Grant (SLAG) and grants made available through the Proactive Land Acquisition Strategy (PLAS); the Comprehensive Agricultural Support Programme (CASP); or the Land and Agrarian Reform Project (LARP). These measures provide different routes to gain access to land on an equitable basis.

Lahiff and Rugege are of the opinion that the reference to access to land “on an equitable basis” is a precursor to the redistribution programme which is aimed at establishing a more equal distribution of land against the backdrop of the uneven distribution of land brought about by apartheid.

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39 For a discussion of the restitution programme and the *Restitution Act*, see par 2.4.1.
40 For a discussion of this Act as an instrument in the redistribution programme, see par 2.4.2.2.7.

Although the Act assists the Government in fulfilling its obligation to provide access to land, it does not provide a mechanism through which Government can be held accountable for a failure to provide access.

41 See par 2.4.2.2.1.
42 See par 2.4.2.2.3.
43 See par 2.4.2.2.4.
44 See par 2.4.2.2.5.
45 Lahiff and Rugege 2002 (6) *Law, democracy and development* 286.
46 Pienaar and Brickhill (in Woolman, Bishop and Brickhill (eds) *Constitutional Law of South Africa* 2nd 48-13) support this position and remark that the reference to “on an equitable basis” implies that “redistribution programmes are especially aimed at redressing the imbalances in land ownership”. According to Eisenberg (in Chaskalson* et al* (eds) *Constitutional Law of South Africa* 3rd revision
2.2.2.2 Duty to respect, protect, promote and fulfil

The state’s duty to see to the realisation of the rights entrenched in the Bill of Rights, such as the right of access to land, should be read in conjunction with section 7(2) of the Constitution, obliging the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. According to Brand\textsuperscript{47} this section “indicates the scope and nature of the entitlements that socio-economic rights can create”. As a result it is necessary to briefly refer to each of these duties.

2.2.2.2.1 Duty to respect

The first duty in terms of section 7(2) requires the state to respect the rights in the Bill of Rights. This duty can be described as a negative obligation requiring the state to refrain from interfering with the enjoyment of the right. The state must desist from limiting or taking away people’s existing access to the enjoyment of the right without proper cause.\textsuperscript{48} According to Brand\textsuperscript{49} the state should not only refrain from interfering with the existing exercise of socio-economic rights, but should also in instances of interference mitigate the impact of such interference.\textsuperscript{50} Measures which amount to the denial or obstruction of, in the case of qualified socio-economic rights, access to a particular right would be seen as a breach of the state’s duty to respect socio-economic rights.\textsuperscript{51} Where as a result of a change in national policy, for example, persons are denied access to the enjoyment of a socio-economic right, the state would be held accountable for obstructing such access. With reference to redistribution, the shift of the focus in the LRAD programme from being “pro-poor” to emerging farmers can possibly amount to a failure by the State to respect the right of access to land.\textsuperscript{52}

\begin{flushright}
\textsuperscript{47} Brand and Heyns (eds) Socio-economic rights in South Africa 9.
\textsuperscript{48} SAHRC The right to land viii and 1.
\textsuperscript{49} Brand and Heyns (eds) Socio-economic rights in South Africa 30.
\textsuperscript{50} The measures that will be discussed in par 2.3 are good examples of how the apartheid government interfered with the existing exercise of the right to access to land.
\textsuperscript{51} Liebenberg in Chaskalson et al (eds) Constitutional Law of South Africa 3\textsuperscript{rd} revision service 41-29 and Brand and Heyns (eds) Socio-economic rights in South Africa 9. Liebenberg (in Chaskalson et al (eds) Constitutional Law of South Africa 3\textsuperscript{rd} revision service 41-28 – 41-30) also identifies deprivation of access and unfair discrimination as possible violations of the duty to respect.
\textsuperscript{52} See par 2.4.2.2.2 for a discussion of the LRAD programme and the shift in policy.
\end{flushright}
2.2.2.2 Duty to protect

The duty to *protect* is a positive duty obliging the state with reference to access to land, for example, to protect the existing enjoyment of the right through legislative and other measures aimed at providing access to land and to prevent the infringement of the right. In this regard, the judiciary has an important role to fulfil in ensuring that the existing enjoyment of a right is protected. In the context of land reform and with reference to the state’s proposed limitation on the amount of land which foreign nationals may own, the question may be asked if this measure can be regarded as an attempt by the State to protect access to land by its citizens.

2.2.2.3 Duty to promote

According to Brand, the duty to *promote* is not clearly distinguishable from the duty to *fulfil*. The duty to promote the rights in the Bill of Rights addresses to a large extent the communication strategies employed by the state to raise awareness of the right and create an atmosphere conducive to the realisation of the right.

2.2.2.4 Duty to fulfil

The final duty in terms of section 7(2) is to *fulfil* the rights in the Bill of Rights. This duty is a positive duty requiring the state to act in accordance with the obligation created in section 25(5), for example, to take affirmative steps to realise the right. In giving effect to its duty to fulfil the right to access to land, legislative steps (such as those referred to in paragraph 2.2.2.1) have been taken, and as a result statutory entitlements have been created.

The duty to fulfil is breached when the state does not take appropriate steps to fully realise the enjoyment of a socio-economic right. In this regard, courts will be called

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53 SAHRC *The right to land* viii. For a general discussion of the duty to protect socio-economic rights, see Liebenberg in Chaskalson et al (eds) *Constitutional Law of South Africa* 3rd revision service 41-31 – 41-32. Liebenberg (in Woolman, Bishop and Brickhill (eds) *Constitutional Law of South Africa* 2nd edition 33-6) notes that the duty to promote could be viewed as a dimension of the duty to fulfil these rights.

54 Brand and Heyns (eds) *Socio-economic rights in South Africa* 10.

upon to determine whether or not state policy and practice adequately realise the enjoyment of the right in question. Generally an inquiry into whether or not the state has complied with the duties imposed by the Constitution in respect of socio-economic rights is based on determining if the state has failed to formulate or implement reasonable legislative and other measures to give effect to a socio-economic right. In order to evaluate the adequacy of a policy or practice related to qualified socio-economic rights, the Constitutional Court has developed the “reasonableness” standard based on the internal limitation clause provided for in these rights. The following paragraph will discuss the reasonableness review as formulated through Constitutional Court judgements.

2.2.2.3 The reasonableness review

The reasonableness review is the central standard applied by the courts to determine the extent to which state policy or practice fulfils the obligations created by the socio-economic rights included in the Bill of Rights. The standard for review emanates from the duty of the state to take reasonable legislative and other measures, within its available resources, to achieve the realisation of a socio-economic right. Are the specific measures able to give effect to the realisation of the right? In order to answer this question the state must justify its policy choice, with the justification measured against the standard of reasonableness, which must be determined on a case-by-case basis. According to Brand

[The Court’s standard requires that the state must devise and implement measures to realise socio-economic rights – it cannot do nothing ... the state must have measures in place to realise these rights and must implement them.

The standard of reasonableness to be applied in instances where it is alleged that the state has not complied with its constitutional duties with regard to socio-economic rights has evolved from judgements delivered by the Constitutional Court illustrating that the

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57 Brand and Heyns (eds) Socio-economic rights in South Africa 46.
standard is a “shifting standard of scrutiny”. 58 These judgements include Soobramoney v Minister of Health (KwaZulu-Natal), 59 Government of the Republic of South Africa v Grootboom, 60 Minister of Health v Treatment Action Campaign (No 2), 61 and Khosa v Minister of Social Development; Mahlaule v Minister of Social Development. 62

2.2.2.3.1 The Soobramoney case

This case was the first of a number of Constitutional Court cases addressing the interpretation of socio-economic rights and specifically the qualified right of access to healthcare services. 63 The Court was asked to adjudicate whether or not the denial of Soobramoney’s access to dialysis treatment was justifiable. The Court concluded that the denial of access was justifiable and not unreasonable and that the relevant guidelines determining access to the provision of dialysis were applied rationally and in good faith. 64 The Court also considered the limited resources available to the state to provide access to dialysis treatment to those in need of the treatment.

According to Liebenberg 65 this judgement

> established the basic paradigm of reasonableness review for evaluating compliance with the positive duties imposed by the socio-economic rights in ss 26 and 27.

Despite the fact that the Court “established the basic paradigm of reasonableness review”, Liebenberg 66 describes this reasonableness review as “a thin standard or rationality scrutiny for socio-economic rights claims”. The judgment can, however, be credited with the first application of a standard of reasonableness in the context of

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58 Brand and Heyns (eds) Socio-economic rights in South Africa 44.
61 2002 5 SA 721 (CC) (hereinafter referred to as the TAC case).
62 2004 6 SA 505 (CC) (hereinafter referred to as the Khoza case).
63 At par 15.
64 Soobramoney case paras 24 – 29.
65 Liebenberg Socio-Economic Rights 146.
66 Liebenberg Socio-Economic Rights 152.
socio-economic rights, although the Court did not give content to the reasonableness review.

2.2.2.3.2 The Grootboom case

Whereas the Court in the Soobramoney case did not commit itself to a standard reasonableness review, the Court in the Grootboom case identified some criteria to determine the reasonableness of Government action. In this case the reasonableness of the state’s national housing programme that is linked to the right to have access to adequate housing (in section 27(1)) came under review. In its evaluation of the Government’s housing programme the Court concluded that the programme was neither reasonable nor comprehensive and consequently the Government fell short of its constitutional duty.67

In its formulation of the reasonableness review, the Court stated:

A Court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.68

Based on this formulation and in order to adjudicate on the reasonableness of Government action the following questions need to be answered: Were any measures in place to realise the right, and have these measures been implemented? Are the measures reasonably capable of achieving the realisation of the right? What progress has resulted from the implementation of the measures and can a lack of progress be explained? Thus, an assessment of reasonableness requires an inquiry into the design, adoption and implementation of measures to realise socio-economic rights. Reasonableness is therefore adjudicated against the following criteria:

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67 At par 64.
68 At par 41.
a) Comprehensiveness

Are the measures comprehensive and co-ordinated and are they sufficiently focussed? Are the responsibilities to implement the measures designated to specific government spheres? If these questions were to be asked in the context of the land reform programme, the programme might be found wanting. The lack of post-settlement support provided to land reform beneficiaries (especially beneficiaries of the redistribution programme) might indicate that the measures are not comprehensive enough and that they are not sufficiently focussed. Another difficulty faced by the entire land reform programme is the lack of co-operation between the national Department of Agriculture, Forestry and Fisheries and the Department of Rural Development and Land Reform, especially with regard to post-settlement support, where it is uncertain which department should accept responsibility for providing support to land reform beneficiaries once they have been settled on redistributed land.

b) Resources

Are sufficient financial and human resources made available to implement the comprehensive and co-ordinated measures? A programme must be reasonably resourced in order to meet the standards of the review. In the 2012/13 budget less than 1% of the national budget was allocated to the land reform programme, a fact which raises serious questions about the Government’s overall commitment to meeting the targets set for the various programmes. Added to the difficulties arising from the allocation of this very limited budget is the problem of the lack of appropriate human resources. One of the biggest challenges facing the DRDLR is the unavailability of personnel to implement the programmes. The large numbers of vacancies within the Department impedes the implementation of the programme to the detriment of those citizens who have the right of access to land.

c) Implementation

Are the measures reasonably implemented and are they reasonably capable of achieving the purpose of the granting of the right? Can progress be shown? In the Grootboom judgement the Court confirmed that Government measures to realise a right
must be capable of achieving the purpose of such measures. The Court\textsuperscript{69} stated that the “programme must be capable of facilitating the realisation of the right”. Government’s national strategy aimed at fulfilling the right of access to land suffers from problems of implementation, with neither of the land reform targets having been reached on its original due date.

The importance of the criterion of the measures having been reasonably implemented was stressed by the Court in the \textit{Grootboom} case, where the Court noted that:

These policies and programmes must be reasonable both in their conception and their implementation. The formulation of programmes is only the first stage in meeting the state’s obligations ... An otherwise reasonable programme that is not reasonably implemented will not constitute compliance with the state’s obligation.\textsuperscript{70}

Thus, despite the fact that the Government has taken various legislative and other measures to grant access to land, the pace and extent of the implementation of the land reform programme need to be evaluated in order to determine the programme’s reasonableness.

In conclusion, in conducting the reasonableness review the Court will examine whether or not a particular programme is capable of facilitating access to the right as well as whether or not the programme is reasonably formulated and implemented and capable of achieving the purpose of the right.\textsuperscript{71} Government must act \textit{bona fide} and rationally in the implementation a particular programme.\textsuperscript{72}

2.2.2.3.3 The TAC case

This judgement dealt with an evaluation of the state’s measures to prevent the mother-to-child transmission of HIV. It was held that the state’s measures to prevent the mother-to-child transmission of HIV were in breach of the rights created in sections 27(1) and 27(2) of the \textit{Constitution}. The Court applied the reasonableness review as formulated in the \textit{Grootboom} case and added another criterion to the review. In terms

\textsuperscript{69} \textit{Grootboom} case at par 41.
\textsuperscript{70} \textit{Grootboom} case at par 42.
\textsuperscript{71} For critique on the reasonableness review see Bilchitz 2003 (19) \textit{SAJHR} 1 – 26 and Liebenberg in Woolman, Bishop and Brickhill (eds) \textit{Constitutional Law of South Africa} 2\textsuperscript{nd} edition 33-40 – 33-41.
\textsuperscript{72} O’Regan 1999 (1) \textit{ESR Review} 2.
of this criterion it must be established if the measures taken by Government are transparent and if they have been made known to all affected by them. The Court stated:

for a public programme such as this to meet the constitutional requirement of reasonableness, its contents must be made known appropriately. 73

Roodt74 identified the restitution programme as “a good example of a rights-based programme undermined by a lack of adequate communication strategy”. This contention is based on the arguments that restitution claimants did not understand the restitution process and were not properly advised on the completion of claims forms.

2.2.2.4 Internal limitation

One of the criteria used to determine the reasonableness of a programme aimed at facilitating access to a socio-economic right is that appropriate human and financial resources must be available to realise the right.75 However,

[f]ailure on the part of the State to fulfil a socio-economic right due to a lack of adequate resources is not, in itself, a violation of that right.76

The internal limitation in the qualified socio-economic rights provides justification for budgetary allocations resulting in the inadequate realisation of a right, and consequently serves as a qualification of the right.77

The qualified socio-economic rights included in the Bill of Rights make reference to the realisation of these rights by the state, but subject the realisation to the extent of the “available resources”.78 The state is under a constitutional duty to make resources

73 At par 123.
75 Grootboom case at par 39.
76 Lahiff and Rugege 2002 (6) Law, democracy and development 288.
77 Pieterse (2003 (120) SALJ 41 – 48) remarks that in instances where a positive duty rests on the state in terms of s 7(2) of the Constitution with regards to qualified socio-economic rights, the Courts will use the internal limitation in the specific right to determine whether or not a limitation of the right is justified, and not the general limitation clause in s 36(1).
78 Mollendorf (1998 (14) SAJHR 330) observes: “‘Available resources’ is, however, ambiguous as it has both narrow and broad senses. It may mean those resources that a ministry or department has been allotted and has budgeted for the protection of the right. Alternatively, it may mean any resources that the State can marshal to protect the right. These are the two extreme senses of the terms. To be sure, between the narrowest interpretations and the broadest lie other senses”. For an evaluation
available to realise the qualified socio-economic rights, but if sufficient resources are not available the state can raise that fact as a defence against claims for failure to deliver on its constitutional obligation. This internal limitation is related to budgetary issues and addresses budgetary constraints. The state does not have unlimited resources at its disposal and as a result it has to determine national priorities and allocate budgets accordingly. Although the state should give effect to the realisation of socio-economic rights, the state is not obliged to go beyond its available resources.

With reference to the availability of resources and the reasonableness review, the Court in *Grootboom* stated that:

> The third defining obligation to take the requisite measures is that the obligation does not require the State to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. (emphasis added)

Pertaining to the land reform programme, the questions of if and under what conditions limited resources constitute a valid basis for limiting access to land in terms of the land reform programmes have as of yet not come before the courts. However, Lahiff and Rugege point out that repeated failures by the Government in the past to spend the budget allocated for land reform suggests that if the reasonableness of the land reform programme is challenged, the Government might not be able to suggest that it is hampered by a lack of resources. Although it is a national reality that the need for access to land greatly exceeds the resources made available for land reform, it is unacceptable that the resources that have been allocated have not been utilised to such an extent that the right to access to land is realised. It is also reasonable to argue that if more funds are allocated to provide access to land the realisation of other socio-economic rights such as education, healthcare or housing might diminish as limited

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80 *Grootboom* case at par 94.
81 At par 46.
82 Lahiff and Rugege 2002 (6) *Law, democracy and development* 289.
resources will merely be redirected from one cause to another, as the State borrows from Peter to pay Paul.

An issue related to the internal limitation clause included in the qualified socio-economic rights is the notion of a minimum core obligation. In terms of the minimum core obligation it is argued that in spite of limited resources, the state is required to ensure that it provides at least the minimum core needed to realise a specific right. An example of the minimum core could be the provision of a specified minimum amount of water per day. The issue of a minimum core was raised in the *Grootboom* case, where it was argued that the state had to provide housing immediately and on demand. However, the Court rejected the notion of a "minimum core obligation" and noted that there is no unqualified duty on the state to provide access to housing immediately and on demand. This position was again confirmed by the Constitutional Court in the *TAC* case, where the Court noted that it was "impossible to give everyone access even to a 'core' service immediately".

Finally it should be noted that where an infringement of a qualified socio-economic right is alleged, the courts will not make use of section 36(1) in order to determine whether or not the infringement is justifiable. With regard to the positive duties (to protect, promote and fulfil) in relation to qualified socio-economic rights (such as the right of access to land) courts will use the internal limitation clause and not section 36(1).

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83 The issues of access to sufficient water in terms of s 27(1) of the Constitution and the establishment of a minimum water supply were addressed by the Constitutional Court in *Mazibuko and Others v City of Johannesburg* 2010 3 BCLR 239 (CC). The Court ruled against the notion of a minimum core and held that the measures in place were reasonable in the circumstances.


85 At par 95. See Liebenberg *Socio-Economic Rights* 163 – 172 for a discussion of the minimum core approach.

86 At par 35.

2.2.3 Conclusion

A land reform programme must be balanced, comprehensive and supported by a coherent policy framework situated in a national strategy. It must facilitate access to land in order to promote agricultural development and provide protection to vulnerable groups. In the context of land reform, access to land provides a platform for socio-economic empowerment and enables the beneficiaries of the programme to become involved in agricultural development and in so doing to lift themselves out of poverty. Advancing equitable access to land is also vital to achieve social justice, political and economical stability and rural development, especially in South Africa with its extremely uneven distribution of land ownership. In order to facilitate equitable access to land, land reform programmes should be reasonable, with the programme being able to achieve its proposed targets. The programme should be implemented effectively and the appropriateness of the mechanisms used to advance access should be assessed regularly.

Despite the discretion afforded to the state with regard to the nature of the measures taken to enable equitable access to land, the discretion is not unlimited. The measures taken by the state should be adequate and appropriate to achieve the realisation of the right. By simply transferring land in terms of the land reform programme, the DRDLR has not fulfilled its obligations. Conditions should be created that would lead to the effective utilisation of the transferred land, which measures would improve the livelihoods of the recipients and promote development.

As a whole, the land reform programme has failed to have a notable impact on ownership patterns, with most of the potential agricultural land still owned by either the state or white persons. This raises questions about the reasonableness and effectiveness of the current land reform measures in the light of section 25(5), which in turn questions the Government’s commitment to the success of the programme.

Government should take note of the judgement in President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd,\textsuperscript{88} which indirectly warned the

\textsuperscript{88} 2005 5 SA 3 (CC).
Government that a failure to provide access to land through an effective land reform programme could result in the Government’s having to purchase land from current landowners on whose land illegal squatting is taking place as a result of the slow pace of land reform. An ineffective land reform programme could result in landless people taking the law into their own hands and illegally occupying privately owned land, in which case the Government might be forced to purchase the land.

With the slow progress of land reform and with budgetary constraints in mind, it is important to realise that the state can also rely on private institutions to deliver socio-economic rights. Liebenberg\(^89\) supports this notion and states that “[t]he state should be entitled to rely on private mechanisms of delivery in appropriate circumstances”. This research is based on the general point of departure that through their CSR measures the private sector (especially agricultural companies – due to their strategic positioning with reference to agricultural land reform) has an important role to play in delivering socio-economic benefit in general, and an especially important role to play in the success of the land reform programme. Through the establishment of a strong CSR framework, which could be regarded as “other measures” in terms of section 25(5), Government could be seen as complying with the duties set out in section 7(2) with regard to the realisation of the right of access to land.

However, before the issue of CSR can be raised it is necessary to briefly discuss the legislation that gave rise to the need for land reform and then to discuss the restitution and redistribution programmes respectively. These discussions will ultimately provide an answer to the first specific research question.

Each of these programmes will be discussed with reference to the progress made by the programme in the realisation of the right of access to land, with a factual description of the measures instituted by Government. The key challenges for the realisation of the right of access to land will also be described briefly.

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\(^{89}\) In Chaskalson \textit{et al} (eds) \textit{Constitutional Law of South Africa} 3\textsuperscript{rd} revision service 41-35.
2.3 The historical context of land reform and early policies

This section in no way attempts to provide an extensive historical background to the discriminatory laws and practices related to land which gave rise to the need for land reform. 90 A very brief overview will be provided of the main legislative framework for the territorially segregationist policies and the initial policies formulated by the post-1994 Government to address the issue of land reform. 91 The then National Party Government’s strategy of territorial segregation, population resettlement and political exclusion was founded on a history of conquest and dispossession enforced through oppressive land laws. 92 According to Van der Walt 93 South African land law has also been employed to entrench the political ideology of racial segregation by means of spatial separation of race groups, thereby creating a controversial body of statutory law which may be called apartheid law.

The effect of this racially based segregation legislation was to make black people “perpetual tenants” 94 with very limited rights. The first of these racially based segregation laws was the Natives Land Act of 1913.

90 For a more complete overview of the historical situation which gave rise to the need for the current land reform programmes, see Badenhorst, Pienaar and Mostert Silberberg and Schoeman 586 – 590; Murray and Williams 1994 (61) Review of African Political Economy 315 – 318; Mapadimeng 2003 (52) Transformation 21 – 30; Robinson 1997 (23) Brooklyn Journal of International Law 468 – 481; Mostert 2002 (119) SALJ 401 – 402. Although the aim of this paragraph is to give a brief overview of the historical context of land reform, it has been noted that “[t]he popular debate on land reform in South Africa is influenced far more by beliefs about this country’s history than by plans for its future well-being” (CDE Land Reform in South Africa 5).

91 For a discussion of pre-apartheid land ownership, see Feinberg 1995 (40) Historia 48 – 63.

92 Murray and Williams 1994 (61) Review of African Political Economy 316 and Badenhorst, Pienaar and Mostert Silberberg and Schoeman 586. The strategy of territorial segregation was aptly described by Sachs J in Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC) at paras 9 -10 as “a cluster of statutes ... gave a legal/administrative imprimatur to the usurpation and forced removal of black people from land and compelled them to live in racially designated locations. For all black people, dispossession was nine-tenths of the law. Residential segregation was the cornerstone of the apartheid policy. This policy was aimed at creating separate ‘countries’ for Africans within South Africa. Africans were precluded from owning and occupying land outside the areas reserved for them by these statutes ... Differentiation on the basis of race was, accordingly, not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing, side-by-side, with cramped pockets of impoverished and insecure black ones. The principles of ownership of Roman-Dutch law then gave legitimation in an apparently neutral and impartial way to the consequences of manifestly racist and partial laws and policies”.

93 Van der Walt 1990 (23) De Jure 2.

2.3.1 The Native Land Act 27 of 1913

The Natives Land Act was the Act responsible for laying the foundation for apartheid and territorial segregation and, for the first time, formalised limitations on black land ownership. The Act introduced ethnic differentiation based on the mistaken belief that differentiation between dissimilar races was fundamentally desirable. According to section 1(1) of the Act

Except with the approval of the Governor-General --

(a) a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a person other than a native, of any such land or of any right thereto, interest therein, or servitude thereover; and

(b) a person other than a native shall not enter into any agreement or transaction for the purchase, hire, or other acquisition from a native of any such land or of any right thereto, interest therein, or servitude thereover

From the wording of these sections, it is clear that the aim of the Act was to bring about territorial segregation based on race, where natives were prohibited from occupying or acquiring land. According to Davenport the Act “laid down an absolute barrier in law between black and non-black landholding”. The aim of the Act was further strengthened by section 1(2) of the Act which provided:

From and after the commencement of this Act, no person other than a native shall purchase, hire or in any other manner whatever acquire any land in a scheduled native area or enter into any agreement or transaction for the purchase, hire or other acquisition, direct or indirect, of any such land or of any right thereto or interest therein or servitude thereover, except with the approval of the Governor-General.

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98 The date of commencement of this Act was 19 June 1913, which became the cut-off date for instituting land claims in terms of the restitution programme. See par 2.4.1.1. Despite the provisions of this Act, Feinberg and Horn (2009 (50) Journal of African History 41 – 60) show that the Act failed to stop black persons from purchasing land. The authors note that evidence suggests that land ownership increased in certain areas after 1913, questioning the effectiveness of the Act.
Any agreement concluded in contravention of this prohibition was *ab initio* null and void\(^{99}\) and any contravention of the Act was punishable by the imposition of a fine or imprisonment with or without hard labour, not exceeding six months.\(^{100}\) The Act further made provision for the establishment of a commission tasked with the identification of areas within which black people\(^{101}\) would not be permitted to acquire or hire land\(^{102}\) or interest in land,\(^{103}\) as well as areas where persons other than black people would be prohibited from acquiring or hiring land or interest in land.\(^{104}\) Through the Act, scheduled areas were designated and in terms of the Act, an estimated 8% of South African land was reserved for black South Africans.\(^{105}\)

The Act effectively prohibited sharecropping contracts\(^{106}\) between white landowners and black farmers, resulting in many black farmers losing a substantial portion of their income, which in turn resulted in further economic hardship for them. As a law based on racial segregation, it is clear why this piece of legislation was singled out in the redistribution programme as the effective starting point for apartheid. This Act represented the first step in effecting racially based segregation, a system which was furthered through the *Native Trust and Land Act* of 1936.

### 2.3.2 The *Native Trust and Land Act* 18 of 1936

The *Native Trust and Land Act* made provision for the establishment of the South African Native Trust, a state agency to administer trust land, and “to be administered for

\(^{99}\) S 1(4) of the *Natives Land Act*.

\(^{100}\) S 5(1) of the *Natives Land Act*.

\(^{101}\) The Act refers to “natives” as opposed to “black people” and defines the term native as “any person, male or female, who is a member or an aboriginal race or tribe of Africa” (s 10 of the Act).

\(^{102}\) According to s 10 of the Act, a person shall be deemed to hire land if “in consideration of his being permitted to occupy that land or any portion thereof (a) he pays or promises to pay to any person a rent in money; or (b) he renders or promises to render to any person a share of the produce of that land, or any valuable consideration of any kind whatever other than his own labour or services or the labour or services of his family”.

\(^{103}\) S 2(1)(a) of the *Natives Land Act*. For a discussion of the *Natives Trust and Land Bill*, see SAIRR *The Native Bills described and analysed* 1 – 35.

\(^{104}\) S 2(1)(a) of the *Natives Land Act*.


\(^{106}\) Davenport 1985 *Acta Juridica* 61. Contracts of this type were agreements between the white landowner and farm workers in terms of which the farm workers were allowed to use a portion of the farmer’s land for their own production and in return the farm workers would provide a certain amount of labour. Davenport (1987 (4) *Development Southern Africa* 396) notes that the *Land Act* had a crippling effect on black agriculture.
the settlement, support, benefit, and material welfare of the natives of the Union”. 107

The Act abolished individual land ownership by black people with trust tenure through the creation of the South African Development Trust, which was a government body responsible for purchasing land in “released areas” for black settlement. 108

In terms of section 2(1) of the Act, certain areas of land (including land identified in the Natives Land Act) were transferred to the Native Trust, to be administered by the Trust. Vested in the Trust was land reserved for the occupation of natives and land within the scheduled native areas as identified in the Natives Land Act. 109 The South African Native Trust Fund 110 was created and the funds utilised to acquire and develop land of the Trust, to advance the interest of natives in scheduled native areas, and to generally assist and develop the “material, moral and social well-being of natives” residing on Trust land. 111 The Act further empowered the Trust to acquire land for native settlement but limited the amount of land which could be acquired in this regard to approximately 13% of the total land. The land which could be acquired by the Trust was further limited to land within the scheduled native areas or within released areas. 112 The Act created “reserves” for black people and increased the 8% of land reserved by the Natives Land Act to 13%, confining 80% of the population to this area. 113 In order to achieve the objectives of the Act, section 13 empowered the trustees of the Trust to expropriate land owned by natives outside a scheduled area for reasons of public health or for any other reason which would promote public welfare or be in the public interest. Compensation paid upon expropriation was determined by the fair market value of the land without any improvements, plus the value of the necessary or useful improvements; plus the value

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107 S 4(1) of the Natives Trust and Land Act.
110 A fund created in terms of s 8 of the Natives Trust and Land Act.
111 S 9(1) of the Natives Trust and Land Act.
112 S 10(2) of the Natives Trust and Land Act. Natives were entitled in terms of ss 11(1) and 18(2) of the Act to purchase, lease or otherwise acquire land in scheduled areas (see Van der Merwe 1989 (4) Journal of South African Law 679).
113 Robinson 1997 (23) Brooklyn Journal of International Law 475.
of luxurious improvements (limited to the actual cost of such improvements) plus a sum compensating for inconvenience.\textsuperscript{114}

From the above it is clear that the \textit{Native Trust and Land Act} was an important instrument used by the then Government to facilitate its policy of racial segregation. The Act stripped black South Africans of their right to own land or even to live outside demarcated areas without proper authorisation. It is clear that this Act furthered the objective of racial segregation, which eventually necessitated the need for land reform.

\subsection*{2.3.3 The \textit{Group Areas Act 41 of 1950}\textsuperscript{115}}

The \textit{Group Areas Act} of 1950, described as the “second wave” of evictions,\textsuperscript{116} was used by the then National Party government to forcibly remove black, coloured and Indian people from designated “white areas”.\textsuperscript{117} According to Schoombee\textsuperscript{118}

\begin{quote}
\textit{[g]roup areas legislation functions essentially through the control of ownership of immovable property, and of the occupation and “use” of land and premises, on the basis of race.}
\end{quote}

The aim of the Act was to provide for the establishment of group areas and for the control of the acquisition of immoveable property and the occupation of land and premises.\textsuperscript{119} The Act established three groups of people – a white group, a native group and a coloured group.\textsuperscript{120} Based on the creation of these groups, the Act made provision for the establishment of group areas designated for the exclusive use and ownership of members of a particular group.\textsuperscript{121} Disqualified persons – persons who were not of the same group as the group area – were not permitted to occupy any land

\begin{thebibliography}{99}
\bibitem{114} S 13(4) of the \textit{Natives Trust and Land Act}.
\bibitem{115} Hereinafter referred to as the \textit{Group Areas Act} of 1950.
\bibitem{116} Bosman \textit{Land reform: a contextual analysis} 3.
\bibitem{117} For a more detailed discussion of the Act, see Hiemstra \textit{The Group Areas Act}; Henochsberg \textit{An explanation of the Group Areas Act, 1950}; and Kirkwood \textit{The Group Areas Act – an analysis}.
\bibitem{118} Schoombee 1985 \textit{Act Juridica} 77.
\bibitem{119} The Act also contained measures to ensure proper municipal administration in certain areas (s 7); restrictions on certain agreements relating to immovable property in controlled areas (s 8); restrictions on the occupation of land in controlled areas (s 10); and measures regarding the disposition of property held in contravention of the Act (s 20).
\bibitem{120} S 2(1) of the \textit{Group Areas Act} of 1950. A member of the coloured group is defined as a person who is not a member of the white or native groups.
\bibitem{121} S 3(1) of the \textit{Group Areas Act} of 1950.
\end{thebibliography}
or premises in a group area except under the authority of a permit,\textsuperscript{122} nor were they permitted to own immoveable property in an area from which they were disqualified.\textsuperscript{123}

\textbf{2.3.4 The Group Areas Act 36 of 1966}\textsuperscript{124}

The final of the four Land Acts to be discussed in this section is the \textit{Group Areas Act} of 1966, which complemented the \textit{Group Areas Act} of 1950.\textsuperscript{125} The aim of the Act was to consolidate the law related to the establishment of group areas and to regulate the control of the acquisition of immoveable property and the occupation of land and premises.\textsuperscript{126} The Act shows numerous similarities with the \textit{Group Areas Act} of 1950 and also established three groups for the purposes of the Act: white, Bantu\textsuperscript{127} and coloured groups. Section 13 of the Act prohibits the acquisition of immovable property in a controlled area, while section 20 placed restrictions on the occupation of land in a controlled area.\textsuperscript{128} These sections reflect sections 4 and 5 of the \textit{Group Areas Act} of 1950. The Act also stated that

\begin{quote}
no person who is a member of any group shall occupy and no person shall allow any such person to occupy any land or premises in a specified area which was not lawfully occupied ... except under the authority of a permit.\textsuperscript{129}
\end{quote}

However, the Act did provide for exceptions where it would not be unlawful for a person to occupy land or premises if the person is a \textit{bona fide} servant or employee of the state; or is a \textit{bona fide} visitor for a total of not more than ninety days in any calendar year of

\begin{footnotes}
\item[122] S 4(1) of the \textit{Group Areas Act} of 1950.
\item[123] S 5(1) of the \textit{Group Areas Act} of 1950. Any agreement allowing persons from outside a designated group to occupy or own property in an area not designated to them would be \textit{ab initio} null and void (S18 of the Act).
\item[124] Hereinafter referred to as the \textit{Group Areas Act} of 1966.
\item[125] For an outline of the Act, see Schoombee 1985 \textit{Acta Juridica} 77 – 84.
\item[127] The Act moved away from the use of the word “native” and used the term “Bantu” to refer to “any person who in fact is or who is generally accepted as a member of an aboriginal race or tribe in Africa” (s12(1)(b)(i) of the \textit{Group Areas Act} of 1966).
\item[128] The Act formed the basis of separate development, especially in residential areas (Van der Walt 1990 (23) \textit{De Jure} 26).
\item[129] S 17(1) of the \textit{Group Areas Act} of 1966.
\end{footnotes}
any person lawfully residing on the land or premises; or is a *bona fide* scholar attending a school controlled or aided by the state.\(^{*130}\)

In furtherance of its policy of racial segregation, section 23 of the Act empowered the State President to proclaim though the *Gazette* an area for the exclusive occupation by or ownership of members of a specified group. In conjunction with section 23, sections 26 and 27 prohibited the occupation or acquisition of property by disqualified persons in group areas. Regarding the enforcement of the Act, the then South African Police were given extensive powers. As an example of these powers, section 43(1)(a) empowered the Police when investigating a suspected offence in terms of the Act to enter without a warrant any premises and make any examination as might be necessary.

It was estimated that between 1960 and 1983 approximately 3.5 million people were forcibly removed as a result of the Acts discussed in the previous four paragraphs.\(^{131}\)

From the discussion of these Land Acts, it is evident that the effects of these Acts are morally and practically unacceptable and that the Acts had to be repealed in order to achieve a more equal distribution of land ownership.

### 2.3.5 The Abolition of Racially Based Land Measures Act 108 of 1991

After the disbanding of the ANC and the release of Nelson Mandela, the National Party Government of FW de Klerk had to affect measures to end the centuries of apartheid – a system supported by the Land Acts discussed in the preceding paragraphs. The *Abolition of Racially Based Land Measures Act* was promulgated in order to bring an end to the Land Acts, and came into operation on 30 June 1991.\(^{132}\) According to the long title of the Act, it was promulgated to

> repeal or amend certain laws so as to abolish certain restrictions based on race or membership of a specific population group on the acquisition and utilization of rights to land; to provide for the rationalization or phasing out of certain racially based

\(^{130}\) S 17(2) of the *Group Areas Act* of 1966.

\(^{131}\) Platzky and Walker *The surplus people* 9 – 12; Robinson 1997 (23) *Brooklyn Journal of International Law* 477 and DLA White Paper par 2.5.

\(^{132}\) For a discussion of the Act including the identification of certain problems which the Act faced, see Olivier, Du Plessis and Pienaar 1991 (6) *SA Public Law* 115 – 125 and Du Plessis, Olivier and Pienaar 1991 (6) *SA Public Law* 264 – 266.
institutions and statutory and regulatory systems repealed the majority of discriminatory land laws ...

In order to achieve this aim, section 1 of the Act repealed the *Natives Land Act* and related laws, while section 11 repealed the *Natives Trust and Land Act*. Section 12 of the Act contained transitional measures regarding the phasing out of the South African Development Trust. Since the Trust owned the majority of “native” land, transitional measures had to be put in place in order to facilitate the transfer of the land out of the Trust to other State departments or institutions established to take transfer of the land.

Section 48 of the Act dealt with the repeal of the *Group Areas Act* of 1966. In terms of this section, the *Group Areas Act* of 1966 and all amendments thereto were abolished with immediate effect enabling all South Africans, regardless of race, to occupy and own land in any part of the country without fear of prosecution. For the first time in almost 80 years non-white South Africans were no longer precluded from owning land. This signalled an end to an unfortunate chapter in South Africa’s history.

### 2.3.6 The Reconstruction and Development Programme (RDP)

The first democratically elected Government inherited a country ravaged by extreme levels of poverty, a worsening unemployment problem and unacceptable inequalities in levels of income. In 1994 the Reconstruction and Development Programme (RDP) introduced an integrated socio-economic policy framework aimed at eradicating the legacies of the past through the redress of inequalities, and at building a vibrant and democratic South Africa. The reasons for introducing the RDP included the fact that South Africa was identified as a country with one of the highest income distribution

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134 The RDP was the first policy articulation of the new national government. Turok (1995 (19) *International Journal of Urban and Regional Research* 305) described the RDP as the centrepiece of the government’s efforts to promote socio-economic reform and restructuring. He further described the RDP as “a bold umbrella-plan that aims to bring about all-round socio-economic improvement; to focus the efforts of different levels and departments of government on this task; and to make the process thoroughly participatory by mobilizing the resources of civil society to support it” (Turok 1995 (19) *International Journal of Urban and Regional Research* 305).
inequalities and consequently an extremely high incidence of poverty.\textsuperscript{135} The RDP recognised that poverty was the single greatest burden on the country and that poverty affected millions of people, especially those living in rural areas.\textsuperscript{136} In order to address poverty and extreme deprivation, the programme identified various aspects that needed to be addressed. These included the provision of land and housing as well as access to safe water and sanitation.\textsuperscript{137}

The programme recognised that the basic needs of people had to be met and that human resource development should take place. In order to eradicate poverty and ensure that the basic needs of the poorest of poor were met, the programme identified a strategy resting on four pillars, which were:

- creating opportunities for all South Africans to develop to their full potential;
- boosting production and household income through job creation, productivity and efficiency, improving conditions of employment, and creating opportunities for all to sustain themselves through productive activity;
- improving living conditions through better access to basic physical and social services, health care, and education and training for urban and rural communities, and
- establishing a social security system and other safety nets to protect the poor, the disabled, the elderly and other vulnerable groups.\textsuperscript{138}

The programme acknowledged that land represented the most basic need for the rural population, a need that resulted from the discriminatory practices of the past regime. In order to effectively address the issues of inequality, poverty and landlessness caused

\textsuperscript{135} \textit{White Paper on Reconstruction and Development} in Gen Not 1954 in GG 16085 of 23 November 1994 (hereinafter referred to as the \textit{RDP White Paper}).

\textsuperscript{136} The problem statement to the RDP indicated that it was estimated in 1994 that at least 17 million people were living below the Minimum Living Level and of these that at least 11 million were in rural areas (ANC \textit{A basic guide to the Reconstruction and Development Programme} par 2.2.1).

\textsuperscript{137} The elimination of illiteracy and an improvement in the quality of education was also identified. It is interesting to note that the \textit{RDP White Paper} and the ANC’s \textit{Basic guide to the Reconstruction and Development Programme} differ substantially from each other. As an example, the \textit{RDP White Paper} focussed less on land reform and referred to land reform pilot projects only, while the \textit{Basic guide to the Reconstruction and Development Programme} placed substantial emphasis on land reform.

\textsuperscript{138} ANC \textit{A basic guide to the Reconstruction and Development Programme} par 2.2.4. The government’s commitment to addressing these pillars is evident from the legislation that has been enacted since the introduction of the programme. These include the \textit{Employment Equity Act}, the \textit{Skills Development Act}, and the \textit{Redistribution of Land Act}. These legislative measures are aimed at creating opportunities for all South Africans to develop to their full potential and at providing them with access to land in order to sustain themselves through productive activity.
by the “injustices of forced removals and the historical denial of access to land”\textsuperscript{139} the programme identified the need for the establishment of a comprehensive national land reform programme.\textsuperscript{140} The RDP envisaged

a dramatic land reform programme to transfer land from the inefficient, debt-ridden, ecologically-damaging and white-dominated large farm sector to all those who wish to produce incomes through farming in a more sustainable agricultural system.\textsuperscript{141}

The land reform programme is aimed at encouraging the use of land for agricultural purposes and providing productive land in order to raise incomes and productivity. The reform programme is based on the redistribution of land to those who need it but cannot afford it and on restitution for those who were deprived of their land due to the system of apartheid.\textsuperscript{142} In the light of these inequalities, the RDP identified the main elements of land reform: land redistribution, restitution, and tenure reform.\textsuperscript{143} The aim of the land redistribution programme was to strengthen the property rights of communities already occupying the land and to provide access to land for those previously deprived of the right to be the owners of land. Within the context of redistribution, the RDP set the ambitious target of transferring 30% of all white-owned agricultural land to black South Africans by 2001.\textsuperscript{144} The aim of land restitution was to restore land to South Africans dispossessed by discriminatory legislation and practices since 1913.\textsuperscript{145} In order to

\textsuperscript{139} ANC A basic guide to the Reconstruction and Development Programme par 2.4.2. For a discussion of the initial approach of the ANC to land reform, see Levin and Weiner “The politics of land reform in South Africa after apartheid: Perspectives, problems, prospects” 107 – 110.

\textsuperscript{140} Boyle 2001 (11) Indiana International & Comparative Law Review 677. For a discussion of the land reform programme in the context of the RDP, see Deininger and May Can there be growth with equity 7 – 10.

\textsuperscript{141} ANC A basic guide to the Reconstruction and Development Programme par 4.3.8.

\textsuperscript{142} ANC A basic guide to the Reconstruction and Development Programme par 2.4.5. Van Rooyen, Nggangweni and Njobe (1994 (33) Agrekon 257) note that the RDP struck a nerve in South African society with its emphasis on land restitution and redistribution.

\textsuperscript{143} Aliber and Mokoena “The land question in contemporary South Africa” 330.

\textsuperscript{144} ANC A basic guide to the Reconstruction and Development Programme par 2.4.14. As early as 1994 Van Rooyen, Nggangweni and Njobe (1994 (33) Agrekon 260) questioned how realistic the 30% transfer was, given the scarcity of resources to support the programme. The authors also noted that within the context of the agricultural sector, the objectives and targets of the RDP would have to be balanced with other national economic needs such as the importance of productive land use for agriculture and food production and in this regard they stressed the importance of the provision of support services and policies to support productive and sustainable land use (Van Rooyen, Nggangweni and Njobe (1994 (33) Agrekon 257).

\textsuperscript{145} It should be noted that restitution was originally conceived as a limited programme which focussed on redress rather than the wider concept of agrarian restructuring (Hall 2004 (38) Canadian Journal of African Studies 656).
achieve these aims the Government needed to provide substantial funding and to create an infrastructure that supported land development. As a result of the discriminatory practices of the past, the majority of South Africans had been dispossessed of their land and in instances forcibly removed and relocated. The RDP recognised this and indicated that the need existed to restore land to the dispossessed through implementing a system of land restitution.

A key element in the fight against poverty is the development of human resources. The central objective of the entire RDP was to provide opportunities for people to develop themselves in order not only to improve the quality of their own lives but also to contribute to the upliftment of their communities. The programme acknowledged the fact that although the ultimate responsibility for ensuring human resource development lay with Government, civil society (by implication, the private sector) should be encouraged to actively take part in the provision of learning opportunities.

The Reconstruction and Development Programme represented a very important first step in post-apartheid South Africa en route to initiating change and addressing the injustices of the past. The programme identified the eradication of poverty as its most important challenge. In order to eradicate poverty the basic needs of those disadvantaged through apartheid needed to be addressed. These needs were to be addressed inter alia through programmes of land reform and land redistribution as well as the development of human resources. In order to further address the issue of land

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146 Substantial funding is required both to purchase land to redistribute, or to restore land where the owners were dispossessed, and to provide financial compensation in cases where it is not possible to restore land to its original owners.

147 ANC A basic guide to the Reconstruction and Development Programme par 2.4.13. The issue of land restitution was confirmed in section 25(7) of the Constitution in terms of which “a person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or equitable redress”.

148 The programme also identified the need to address Adult Basic Education (ABE), which was aimed at providing adults with literacy and numeric skills. Other issues covered by the programme included the environment, nutrition and healthcare, building the economy and democratising the state and society. This study will, however, be limited to matters dealing with land and skills development. Although it will be evident from the discussions to follow that the RDP (with reference to land reform) and other land reform policies have not been as successful as initially envisaged, the RDP has been successful in other areas, where millions of black South Africans have gained access to clean running water, housing and electricity (Harsch 2001 (January) Africa Recovery 14).
reform, the *White Paper on Land Policy, 1997*\(^{149}\) was released with the specific vision of establishing a land policy which is “just, builds on reconciliation and stability, contributes to economic growth and bolsters household welfare”.\(^{150}\) The following paragraphs will provide a brief discussion of this policy instrument.

### 2.3.7 The White Paper on Land Policy, 1997

The *White Paper* was responsible for establishing the overall land reform policy and it addressed *inter alia* the injustices caused by racially-based land disposessions, unequal land ownership, and the need for the sustainable use of land.\(^{151}\) In this regard the *White Paper*\(^ {152}\) acknowledged:

> Forced removals in support of racial segregation have caused enormous suffering and hardship in South Africa and no settlement of land issues can be reached without addressing such historical injustices.

Based on this reality, the aim of the *White Paper* was to provide an overall platform for land reform consisting of three principal components: restitution, redistribution and tenure reform – the same three pillars as identified in the RDP.\(^ {153}\) Government committed itself to a land reform programme where, with specific reference to redistribution, it would not intervene in the land market. Rather than getting directly involved in the purchase of land for redistribution, the Government undertook to adhere to the principle of “willing buyer, willing seller”, where Government would provide resources to finance market-led redistribution transactions without Government’s becoming the owner of the land.\(^ {154}\) However, in the recent past Government has

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\(^{149}\) DLA *White Paper on Land Policy, 1997*. Hereinafter referred to as the *White Paper*. It should be noted that this important policy instrument was not published in the *Government Gazette*, which is the normal route which policy instruments follow once a Green Paper has been released. In this regard a Green Paper was not released, and accordingly the *White Paper on Land Policy, 1997* cannot be described as a true White Paper that went through normal administrative processes.

\(^{150}\) DLA *White Paper* par 2.1.

\(^{151}\) DLA *White Paper* par 2.1. The *White Paper* noted that an effective land policy should also deal with the need to reduce poverty and enhance economic growth. See Mbao 2002 (27) *Journal for Juridical Science* 94.


\(^{153}\) See Mostert, Plenaar and Van Wyk “Land” 117.

\(^{154}\) This approach to land reform has been described as market-led or market-assisted agrarian reform (Lahiff 2007 (28) *Third World Quarterly* 1577). For a discussion of the origins of market-led agrarian reform and recent debates, see Lahiff, Borras and Kay 2007 (28) *Third World Quarterly* 1420 – 1423.
identified the “willing buyer, willing seller” system as one of the principal obstacles against redistribution and is considering abolishing the principle and moving towards a more aggressive approach of expropriation.\textsuperscript{155} The \textit{White Paper}\textsuperscript{156} recognised the reality that it had limited fiscal resources to finance the land reform programme, and that the land reform budget is competing with other budgetary priorities such as housing, health care and education.\textsuperscript{157}

As stated above, the \textit{White Paper} confirmed the three pillars of the land reform programme. With reference to redistribution, the \textit{White Paper}\textsuperscript{158} stated that

the purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses, in order to improve their income and quality of life.

From a sustainability perspective, the \textit{White Paper}\textsuperscript{159} clearly stated, with reference to redistribution projects:

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

\textsuperscript{155} From the discussion of the \textit{Green Paper on Land Reform} in par 2.4.1 the proposed move away from the “willing buyer, willing seller” principle will become evident. It should be noted that although the Government identifies the principle as one of the major stumbling blocks in the current land policy, it has not provided the details of any research conducted to support its position. It has been argued that redistributive land reform has two minimum requirements namely “compensation to landlords at below ‘market’ price and payment by peasants and workers at below actual acquisition cost” (Borras 2006 (6) \textit{Journal of Agrarian Change} 75). These requirements would provide support for the Government’s proposed move away from the “willing buyer, willing seller” principle. Borras (2006 (6) \textit{Journal of Agrarian Change} 74 – 75) is of the opinion that instances where current owners of land are paid 100% of the market value while buyers shoulder 100% of the acquisition cost cannot be described as true redistributive land reform. However, if the South African position is examined it would become evident that land reform beneficiaries are seldom responsible for 100% of the acquisition cost. In terms of an elaborate grant system, beneficiaries are supported through government funding to purchase land. See par 2.4.2.2 for a discussion of the government measures to foster the conditions in which prospective beneficiaries may gain access to land.

\textsuperscript{156} DLA \textit{White Paper} par 3.2.

\textsuperscript{157} Given the limited resources allocated to the land reform programme it is not surprising that the pace of progress of the land reform programme has been very slow. With an annual budget of less than 1% of the national budget it is clear that the identification of land reform as a priority is not support by the budgetary evidence.

\textsuperscript{158} DLA \textit{White Paper} par 4.3. The redistribution programme will be discussed in more detail in par 2.3.1.

\textsuperscript{159} DLA \textit{White Paper} par 4.7.1. See Pienaar 2011 (14) \textit{PER} 34 and Carey Miller and Pope \textit{Land Title in South Africa} 400.
Viability and sustainability are central to any successful land reform programme. Unfortunately, the issue of the economic and social viability of the intended land use has been largely neglected in both the redistribution and restitution pillars with the majority of agricultural land reform programmes being unproductive.

The goal of the restitution programme, on the other hand, is described as

to restore land and provide other restitututionary remedies to people dispossessed by racially discriminatory legislation and price, in such a way as to provide support to the vital process of reconciliation, reconstruction and development.\(^\text{160}\)

The White Paper reaffirms the fact that the policy and procedure for land claims are based on the provisions of section 25(4) of the Constitution and the Restitution of Land Rights Act\(^\text{161}\) and details four of its elements: qualification criteria,\(^\text{162}\) forms of restitution,\(^\text{163}\) compensation,\(^\text{164}\) and urban claims.\(^\text{165}\)

Although land reform aims to contribute to economic development, both by providing beneficiaries with the opportunity to engage in productive land use and by increasing employment opportunities through encouraging greater investment, it will become evident from the discussions in paragraphs 2.4.1.4 and 2.4.2.4 that the majority of agricultural land reform projects are not using land productively and that the envisaged growth in employment has not materialised.\(^\text{166}\) In the most instances the major cause for the unproductive use of land is a lack of financial and institutional support from Government to land reform beneficiaries. This is despite the White Paper’s\(^\text{167}\)

\(^{160}\) DLA White Paper par 4.13. The White Paper reaffirms the criteria for the lodgement of a restitution claim and identifies some of the legislation which will be recognised as racially discriminatory laws for the purposes of the restitution process (DLA White Paper par 4.14.2). The restitution programme will be discussed in more detail in par 2.3.2.

\(^{161}\) 22 of 1994. For further reference to this Act, see par 2.4.1.

\(^{162}\) DLA White Paper par 4.14.2. Dispossession of right in land after 19 June 1913 in terms of, or furthering the objective of, a discriminatory law or practice without receiving equitable and just compensation.

\(^{163}\) DLA White Paper par 4.14.4. Forms of restitution include: restoration of the dispossessed land; provision of alternative land; payment of compensation; or a combination of land and compensation.

\(^{164}\) DLA White Paper par 4.14.5. The White Paper addresses the payment of compensation to claimants and compensation to land owners.


\(^{166}\) This is despite the fact that the White Paper identifies redistributive land reform and the provision of support services as central to the Government’s employment strategy and to reducing the mounting cost of the welfare budget (DLA White Paper par 2.5.2).

\(^{167}\) DLA White Paper par 6.7.
acknowledgement that without a programme of state support and targeted intervention, 
land reform will not be possible and that

[I]t is important to note that the land reform programme is to a large extent dependent on 
the ability of potential beneficiaries to be able to access the programme easily, and to 
have a clear understanding of what assistance they can get from government.

This passage underlines the critical importance of post-settlement support for the 
success and sustainability of the land reform programme. Unfortunately it appears as 
though the importance of post-settlement support has in the past been sacrificed for the 
numbers game, in which the focus was on the number of restitution claims settled or the 
number of hectares transferred in terms of the redistribution programme rather than on 
ensuring that the transfers resulted in sustainable livelihoods for the beneficiaries.

The following paragraphs will briefly discuss the restitution and redistribution 
programmes and provide an overview of the progress of each of these programmes.

2.4 The Land Reform Programme

Since the dawn of the new democratic dispensation South Africa has gone through 
profound transformation. One of the areas earmarked for transformation was the 
prevailing land situation and the need to transform the South African landscape. This 
was acknowledged by the White Paper on Reconstruction and Development, 168 which 
noted the fact that:

No political democracy can survive and flourish if the majority of its people remain in 
poverty, without land, and without their basic needs being met and without tangible 
prospects for a better life.

The need to establish a framework for land reform was initially acknowledged in 
sections 121 to 123 of the 1993 Constitution 169 although these sections dealt 
predominantly with the restitution of land rights and the establishment of the

See par 2.3.6 for a discussion of the RDP.
169 Constitution of the Republic of South Africa 200 of 1993 (hereinafter referred to as the 1993 
Constitution).
Commission on Restitution of Land Rights. The Government’s land reform programme received constitutional endorsement in section 25 (the property clause) of the 1996 Constitution. Section 25(5) enjoined the state to take reasonable legislative and other measures to foster conditions that would enable citizens to gain access to land on an equitable basis. The application of this section is limited, however, by the resources at the state’s disposal. The property clause reaffirmed the three pillars of the Government’s land reform programme as identified in the RDP and the White Paper.

This section will start with a brief explanation of the land restitution programme and will then continue to describe the progress made to date. Finally the section will analyse the success of the redistribution programme in order to arrive at possible lessons to be learned for the future and the possible need for a paradigm shift.

2.4.1 Land restitution

2.4.1.1 Introduction

Land restitution forms an integral part of the overall land reform programme and is aimed at redressing the injustices of the past. Hall remarked that restitution addresses the loss of land rights that resulted from homeland consolidation, forced removals from “black spots”, the Group Areas Act, and related laws that designated land on a racial

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170 For a discussion of the constitutional basis for land reform in terms of sections 121 to 123 of the 1993 Constitution, see Badenhorst, Pienaar and Mostert Silberberg and Schoeman 592 – 593; Carey Miller and Pope Land Title in South Africa 320 – 323 and Ntsebeza and Hall (eds) The Land Question 114 – 117.


172 See par 2.2.2 for a discussion of the right of access to land in terms of s 25(5) of the Constitution.

173 See paragraph 2.2.6 and 2.2.7.

174 For a more concise discussion of restitution, see Carey Miller and Pope Land Title in South Africa 313 – 397.

basis as well as the losses suffered by former labour tenants, beneficial occupiers of
land, and residents affected by betterment planning in the former homelands.

Within the context of the agricultural sector, Hall\textsuperscript{176} further observed that

[r]estitution of land rights in South Africa balances the imperative to restore land to the
dispossessed with concerns to minimise disruption to agricultural production and
political stability.

Decades of racial discrimination and segregation and practices depriving the majority of
South Africans of access to land necessitated the restitution framework and legislation.
As a result of the past racially discriminatory laws and practices,\textsuperscript{177} South Africa
inherited an extremely unequal distribution of land that needed to be addressed. If this
unequal distribution of land is not addressed the prevailing injustice may result in
violence or a situation similar to that prevailing in Zimbabwe, where white land owners
were forcibly removed from their farms and their farms “redistributed” to Mugabe
loyalists.

As stated in the introduction to this section, the issue of land restitution was addressed
in the 1993 \textit{Constitution} and confirmed in the property clause through section 25(7) of
the \textit{Constitution}, thus providing restitution with a clear constitutional base.\textsuperscript{178} Section
25(7) of the \textit{Constitution} provides that:

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

Section 1 of the \textit{Restitution Act} defines equitable redress as:

any equitable redress, other than the restoration of a right in land, arising from the
dispossession of a right in land after 19 June 1913 as a result of past racially
discriminatory laws or practices, including—

(a) the granting of an appropriate right in alternative state-owned land;

(b) the payment of compensation

\textsuperscript{176} Ntsebeza and Hall (eds) \textit{The Land Question} 92.
\textsuperscript{177} Such as the legislation discussed in paragraph 2.3.
\textsuperscript{178} This legal base was further strengthened by the enactment of the \textit{Restitution of Land Rights Act} 22 of
1994 (hereinafter referred to as the \textit{Restitution Act}), which remains one of the main pillars of land
reform. Van der Walt (\textit{Constitutional Property Law} 288) notes that sections 25(4) to 25(9) of the
\textit{Constitution} legitimise land reform.
From this section it is clear that restitution can be achieved through the restoration of the claimed land or through other equitable redress consisting of monetary compensation or the provision of suitable land.

It should, however, be kept in mind that the mere transfer of land will not necessarily bring about a reduction in the rates of poverty amongst those receiving the land.

2.4.1.2 The programme

The programme envisaged by section 25(7) of the Constitution was given legal force through the enactment of the Restitution Act, the first transformatory law promulgated by the newly established ANC government. The aim of the Act is to provide for the restitution of land rights to those persons or communities who were deprived of their rights by past racially discriminatory laws or practices that were in existence after 19 June 1913. The restitution programme was directly aimed at providing redress (compensation) to people who had been removed from their land or dispossessed of it.

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180 S 1 of the Restitution Act defines a right in land as “any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question”. For a discussion of the restitution of rights in land, see Mostert, Plenaar and Van Wyk "Land" 151 – 152.
181 The 1913 cut-off date was a compromise reached by the negotiators of the 1993 Constitution (Rugege 2004 (32) International Journal of Legal Information 289) and reflected the date on which the Black Land Act commenced. For criticism of the cut-off date see Carey Miller and Pope Land Title in South Africa 319 – 320. The White Paper notes that historical claims pre-dating the cut-off date would be dealt with under the other land reform programmes such as redistribution (DLA White Paper par 4.14.3). In May 2011 it was reported that the government was considering reopening the land claims process to compensate black persons who failed to meet the deadline for the submission of land claims as well as considering claims of disposessions that took place before 1913 (Reuters 2011 http://www.news24.com/SouthAfrica/Politics/SA-to-reopen-land-claims-process-20110510; Du Toit 2011 http://www.beeld.com/Suid-Afrika/Nuus/Staat-wil-grondeise-heropen-20110511 and Radebe 2011 http://www.businessday.co.za/Articles/Content.aspx?id=142335). Agri SA strongly criticized this possibility noting that extending the cut-off claim date to before 1913 would imply that traditional tribes such as the Khoisan would then theoretically be able to reclaim the entire land, since they were the original inhabitants of the country (Van der Walt 2011 http://www.beeld.com/Suid-Afrika/Nuus/Agri-SA-se-pyne-kom-met-eise-voor-1913-20110512). However it appears as if the government has accepted that reopening the land claims process was not a viable option and the Green Paper on Land Reform, 2011 (see par 2.5.1) makes no reference to the possibility. The Act is also responsible for the creation of the Commission on the Restitution of Land Rights as well as the Land Claims Court.
as a part of the policy of spatial segregation.\textsuperscript{182} This programme has been described as a “rights-based” programme due to the fact that qualifying claimants have the right to either restoration of or compensation for land of which they have been dispossessed.\textsuperscript{183} However, the mere fact that a dispossession took place as a result of discriminatory laws or practices is not sufficient grounds for redress in terms of the Act.

In order to lay a restitution claim,\textsuperscript{184} claimants had to meet certain qualifying requirements as determined by section 2(1)(a) of the\textit{ Restitution Act}.\textsuperscript{185} In terms of this section a person or community\textsuperscript{186} is entitled to restitution of a right in land\textsuperscript{187} if that person was dispossessed after 19 June 1913. The dispossession had to be as a result of past racially discriminatory laws or practices\textsuperscript{188} and the dispossession\textsuperscript{189} had to be

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\textsuperscript{182} De Villiers \textit{Land reform: Issues and challenges} 51 and Badenhorst, Pienaar and Mostert \textit{Silberberg and Schoeman} 629.  \\
\textsuperscript{183} Hall 2004 (38) \textit{Canadian Journal of African Studies} 656.  \\
\textsuperscript{184} It should be noted that claims had to lodged against the state and not against the private owners of the land as confirmed in \textit{Department of Land Affairs, Popela Community v Goedgelegen Tropical Fruits (Pty) Ltd} 2007 6 SA 199 (CC) at par 63 (Pienaar 2011 (14) \textit{PER} 36 and Carey Miller and Pope \textit{Land Title in South Africa} 315 – 317). For a discussion of this case, see Du Plessis, Pienaar and Olivier 2007 (22) \textit{SA Public Law} 551 – 556. It should further be noted that no general claim for restitution exists and only those claims which meet the requirements as set out in the \textit{Constitution} and \textit{Restitution Act} will be considered (Carey Miller and Pope \textit{Land Title in South Africa} 307).  \\
\textsuperscript{185} For a discussion of the procedural steps to lodge a claim in terms of the \textit{Restitution Act}, see Mbao 2002 (27) \textit{Journal for Juridical Science} 97 – 99; Mostert 2002 (119) \textit{SALJ} 412 – 418; Pienaar 2009 (12) \textit{PER} 19; Carey Miller and Pope \textit{Land Title in South Africa} 340 – 351 and Van der Walt and Pienaar \textit{Introduction} 324.  \\
\textsuperscript{186} S 2(1)(a) of the \textit{Restitution Act} read with s 25(7) of the \textit{Constitution}. Mostert (2002 (119) \textit{SALJ} 406) notes that the term “person” probably includes natural as well as juristic persons. With reference to \textit{Randal v Minister of Land Affairs; Knott v Minister of Land Affairs} 2006 3 SA 216 (LCC) Mostert (“Constitutional Protection of Property and Land Reform” 414 – 415) notes that white persons who were dispossessed in terms of racially discriminatory laws or practices may also claim restitution if they meet the criteria. However, the inclusion of white people in the restitution process has been questioned by Hopkins (2006 (21) \textit{SA Public Law} 175 – 184), although he concludes that he is in agreement with the decisions of the Land Claims Court.  \\
\textsuperscript{187} In terms of s 1 of the \textit{Restitution Act}, a right in land denotes any right in land, whether registered or unregistered, including the interest of a labour tenant and a sharecropper. See Carey Miller and Pope \textit{Land Title in South Africa} 323 – 326 and 330 – 331 and Van der Walt \textit{Constitutional Property Law} 292 – 293.  \\
\textsuperscript{188} The question of whether or not a dispossession has occurred as a result of past racially discriminatory laws or practices has been addressed by the Land Claims Court in various instances. See in this regard \textit{Minister of Land Affairs v Slamdien} 1994 4 BCLR 413 (LCC), where the Land Claims Court formulated three questions in order to determine if the specific dispossession resulted in racially based segregation. The three questions that had to be answered were: Was the relevant legislation a discriminatory law, was the discrimination linked to the exercise of land rights, and was the dispossession as a result of a discriminatory law or practice linked to the exercise of land rights. (For a discussion of the case, see Du Plessis, Olivier and Pienaar 1999 (14) \textit{SA Public Law} 245 – 246 and Mostert, Pienaar and Van Wyk “Land” 152 – 153). However, the Constitutional Court, in \textit{Alexkor Ltd v Richtersveld Community} 2004 5 SA 460 (CC) found that the \textit{Slamdien} test was too narrow and 
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without adequate compensation within the specified period. Finally the dispossession must have had the purpose of furthering the object of racially discriminatory laws or practices.

If a restitution claim met these requirements, the claimants had a number of options for restitution. These options included: restoring the title to the original land, providing alternative land or receiving financial compensation (or a combination of the last two). The alternative land which could be provided to beneficiaries included the possibility of the restoration of state land. However, state land would be provided only if the restoration were feasible, just and equitable.

confirmed that the focus of the investigation should be on the impact or effect of the laws rather than “establishing whether the aim was to provide for spatial racial segregation” (Pienaar 2005 De Jure 204). For a case note on the a quo decision, see Mostert 2002 (1) Journal of South African Law 160 – 167 and for a discussion of the appeal court’s decision, see Du Plessis, Olivier and Pienaar 2003 (18) SA Public Law 496 – 498. For a discussion of the Constitutional Court’s decision see Barry 2004 (20) SAJHR 355 – 382 and Mostert, Pienaar and Van Wyk "Land" 153. Physical dispossession of the land does not have to be proved – the mere dispossession of a right will suffice (Van der Walt Constitutional Property Law 291).

In order to determine if the dispossession took place as a result of past discriminatory legislation or practices it must be established if the action relied upon is recognised as a discriminatory practice and if the practice caused the dispossession (De Villiers Land reform: Issues and challenges 52). It should be noted that the Restitution Act does not provide a definition of “dispossession” and Mostert (2002 (119) SALJ 406) observes that a physical dispossession is not required. For case law addressing the issue of dispossession within the context of restitution, see Chief Nchabeleng v Chief Phasa 1998 3 SA 578 (LCC) and Dulabh & another v Department of Land Affairs 1997 4 SA 1108 (LCC).

For a discussion of the qualifying elements required in order to institute a restitution claim in terms of the Act, see Badenhorst, Pienaar and Mostert Silberberg and Schoeman 630 – 637, where the authors discuss which persons or categories of persons would be eligible to institute a claim; what is understood by the terms “dispossession”; a “right in land” and “discriminatory law or practice”. Also see Mostert, Pienaar and Van Wyk "Land" 150 – 163. See Mbao 2002 (27) Journal for Juridical Science 102; Mostert 2002 (119) SALJ 411 and Van der Walt Constitutional Property Law 297 for a discussion of the payment of compensation requirement.

In terms of s 33(cA) of the Restitution Act, the feasibility of restoration is a factor which is considered when granting or refusing the restoration of land. The requirement was confirmed in Macleantown Residents Association Re: Certain Erven and Commonage in Macleantown 1996 4 SA 1272 (LCC) 1282. The factor was again addressed in In re Kranspoort Community 2000 2 SA 124 (LCC) and more recently in Baphiring Community v Uys and others 2010 3 SA 130 (LCC) (hereinafter referred to as the Baphiring-case), where the court held that paying R70 million for the land of which the Baphiring Community was disposessed was not a feasible option. For case notes on these two decisions see Van Wyk 2010 (25) SA Public Law 590 – 601; Du Plessis, Olivier and Pienaar 2000 (15) SA Public Law 234 – 235 and Pienaar 2011 (14) PER 40. In order to determine whether or not restoration is feasible, factors such as the cost of acquisition of the land; the disruption of the lives and economic activities of the present land owners; the ability of the claimant community to use the land; and the public interest – including available state resources – (Baphiring case par 17 and Pienaar 2011 (14) PER 42) must be taken into account.
Section 2(2) of the Restitution Act prohibits restitution if a person or community has received equitable and just compensation or consideration. If the Land Claims Commissioner is satisfied that the claim has been lodged in the prescribed manner, that the claimants have not been equitably compensated and that the claim is not frivolous or vexatious, the claim will be published in the Government Gazette in order to inform outsiders of the existence of the claim. Once the claim has been gazetted the owner of the land is not allowed to sell, lease or develop the land without notifying the commissioner, nor may any improvements be removed without the written authority of commissioner.

2.4.1.3 The progress

In terms of the Restitution Act a total of 79 696 claims was lodged and of these claims an estimated 74 000 were settled by mid-2008. It took almost 16 years to finalise 95% of the approved land claims, signalling the disappointingly slow progress of the programme. It should be noted that the initial deadline for the completion of the restitution process was set for December 2005. When it became evident that this

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192 S 11(1) of the Restitution Act. Unfortunately the fact that many commercial farms are tied up in claims negatively affects production and investment since the current land owners are unlikely to make major investments in land where the ownership is disputed. For a discussion of the claims process in terms of the Act, see De Villiers Land reform: Issues and challenges 53 – 58.

193 S 11(7) of the Restitution Act.

194 Lahiff Status Report 2008 13. These claims include rural (11.8%) as well as urban (88.2%) claims. According to s 2 of the Restitution Act the cut-off date for the lodging of claims was 31 December 1998. Also see De Villiers Land Reform – A Commentary 4-5 and De Villiers Land reform: Issues and challenges 64 – 73 for a critical analysis of the progress with restitution. It was reported in February 2012 that 3 346 claims still had to be settled (Van der Walt 2012 http://www.volksblad.com/Suid-Afrika/Nuus/Grondhervorming-se-uitdaginge-lyk-so-20120215#). However in March 2012 Minister Nkweniti indicated that 8 770 claims were still outstanding (SAPA 2012 http://www.fin24.com/Economy/Nkwinti-spells-out-land-reform-target-20120301-2).

195 The remaining 5% of claims relate to complex land claims mainly impacting on rural land (Pienaar 2011 (14) PER 32). The difficulties with settling the remaining rural land claims include: high land costs, and protracted negotiations and disputes between claimants and traditional authorities (Du Plessis, Pienaar and Olivier 2007 (22) SA Public Law 549). To further emphasise the extremely slow pace of the restitution programme, Du Plessis, Olivier and Pienaar (1999 (14) SA Public Law 529) noted as early as 1999 that “concerns have been raised that the restitution process is moving too slowly” and by 2005 the authors noted that in the preceding 10 years only 2.9% of land had been distributed (Du Plessis, Olivier and Pienaar 2005 (20) SA Public Law 435). For a discussion of the performance of all three land reform pillars in the first 10 years of the new democracy, see Hall Land and agrarian reform in South Africa 4 – 11. The Nkunzi land claim is an example of how drawn out the land claims process can be. It was reported (SAPA 2011 http://www.news24.com/SouthAfrica/News/13-year-wait-for-R528m-land-claim-20110210) that the community had to wait 13 years for their claim to be settled.
deadline would not be met President Mbeki granted an extension until March 2008. The Land Claims Commission had, however, requested that the deadline for completion of the process be postponed until the end of 2011. The extension was approved but the process was not completed by the target date.\textsuperscript{196} The reason for the request for the further extension is the fact that the outstanding claims represent the more complex claims and claims that are difficult to settle.\textsuperscript{197} It was reported that at the end of the first quarter of 2010 approximately 96% of 79 696 land claims had been settled, benefitting an estimated 1.5 million beneficiaries.\textsuperscript{198}

The difficulty with settling the claims lies in the fact that land prices have increased dramatically, that there are disputes between community claimants, that certain claims have been referred to the Land Claims Court for adjudication, and that landowners dispute the validity of the claims.\textsuperscript{199} The seemingly slow pace at which the restitution process is being completed is attributed to the fact that the Commission had to perform the dual function of investigating and settling claims as well as providing post-settlement support to those claimants that had already received land in terms of the programme.

By June 2008 the South African Government had spent more than R16bn on the settlement of land claims, and it estimated that another R18bn was required to settle the outstanding claims.\textsuperscript{200} According to reports, most of the claims had been settled by means of monetary compensation rather than the restoration of the land.\textsuperscript{201} In 2007 it was reported that officials involved in the settlement of claims had discouraged

\textsuperscript{196} At the end of November 2011 it was reported that the target for finalising restitution had been further extended to 2020 with the outstanding claims being settled at an expected rate of 600 per year (Duvehage 2011 http://www.fin24.com/Economy/land-reform-Govt-change-tack-20111128#).

\textsuperscript{197} The outstanding rural claims involve "traditional community governance structures, forestry land and mining land", which are difficult to settle (Olivier et al (eds) Restitution operational strategy 5).

\textsuperscript{198} DRDLR Strategic Plan 2010 – 2013 12.

\textsuperscript{199} Lahiff Status Report 2008 17. The claims also involve large tracts of land as well as large claimant groups. Other challenges include boundary disputes between communities and disputes between communities and the offices bearers of communal property institutions (DRDLR Annual Report 2011 34).

\textsuperscript{200} Dardagan (2008 http://www.iol.co.za/news/politics/land-reform-to-be-more-hands-on-1.421880) reports that the Land Claims Commission has indicated that a further R30bn is needed to develop existing resettled farms.

\textsuperscript{201} It is estimated that 69.7% of the settled claims have made use of the compensation route while only 26.4% of the claims were settled through the restoration of land (Lahiff Status Report 2008 14). Also see Lahiff Status Report 2008 2.
claimants from requesting financial compensation and suggested that they rather insist on the restoration of their land.\textsuperscript{202} This stance might be a further reason for the delay in the settlement of claims, since the process associated with the restoration of land is much more challenging than that involved in merely paying financial compensation. According to the Land Claims Commission over 2.3 million hectares have been returned to an estimated 290 000 households, benefiting approximately 1.4 million individuals.\textsuperscript{203}

Although it would seem that definitive progress has been made within the programme, the question that arises from the progress is what happens to the land once it is resettled? Only once it can be shown that the restitution process contributes towards the overall economic stability of the country and improvement of the quality of life of the beneficiaries can it be said that the programme is successful. In this regard the Centre for Development and Enterprise\textsuperscript{204} states that

\textit{it is a historical fact that, across the globe, most state-dominated land reforms have had a very poor outcome for almost everyone concerned.}

The following section will highlight some of the problems with the existing restitution programme.

2.4.1.4 The challenges

This section will provide a brief description of the challenges arising from the restitution process – challenges that could possibly threaten not only food security but also overall economic stability.

2.4.1.4.1 The claims process

The first stumbling block in the restitution process as provided for in the \textit{Restitution Act} is that once a claim has been lodged against a piece of land, such land is effectively taken out of the market since prospective buyers are reluctant to purchase land over

\begin{footnotesize}
\begin{enumerate}
\item Anon 2007 \texttt{http://www.legalbrief.co.za/article.php?story=20070910080349938.}
\item DRDLR \textit{Strategic Plan 2009 – 2012} 16.
\item CDE \textit{Land Reform in South Africa} 7.
\end{enumerate}
\end{footnotesize}
which a claim is registered. A further problem is that upon validation of the claim the current landowners in many instances make no further investments in the land and production in many instances either ceases or continues at a diminished level. According to AgriSA the uncertainty created by the settlement process represents “the single biggest constraint to investment.” On the other side of the coin it has been reported that the then Minister of Agriculture and Land Affairs proceeded to insert a condition into the title deeds of land restored to certain communities. In terms of this condition the Minister reserves the right to effectively veto any decision by a community to sell or encumber the land. The land can accordingly not be sold or encumbered without the Minister’s approval. This raises serious questions about the enjoyment of property rights under the process.

2.4.1.4.2 Performance of land reform projects

The performance of land reform projects has generally been disappointing for various reasons including inadequate post settlement support and a lack of skills, as well as a lack of access to capital and an overall general lack of planning. The result of these factors is that the reform projects are largely unproductive and in some instances have fallen into a state of complete decay. According to the Centre for Development and Enterprise it is now accepted that at least 50% of all the land reform projects have

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205 According to the Centre for Development and Enterprise “Once a restitution claim has been lodged or gazetted, the land cannot be sold or transferred in any way – including redistribution to emerging black farmers assisted by LRAD grants” (CDE Land Reform in South Africa 14).

206 For a summation of the problems encountered with the lodgement, screening and settling of land claims, problems which in the majority of instances are a result of poor governance, see Plenaar 2009 (12) PER 20 – 22.


209 In this regard, land reform projects refer to claims that have been settled in favour of communities – in other words land has been restored to the community and not to individuals within the community.

210 It is interesting to note that the Commission on the Restitution of Land Rights is contesting the notion that restitution projects are failing on the basis that in most instances the Commission has not started with the implementation of the business plans. This raises some serious questions: How is it possible that 14 years after the restitution programme has been introduced business plans have still not been implemented? See De Villiers Land reform: Issues and challenges 72 for a discussion of these issues.

211 CDE Land Reform in South Africa 45.
failed to make any noteworthy contribution to the overall upliftment of the beneficiaries.²¹²

The failure of the restitution programme became evident in a study by Kirsten and Machete of land reform projects in the North-West Province.²¹³ According to their research only 42% of the North-West projects are producing effectively and marketing their produce.²¹⁴ However, in the Baphiring-case an even bleaker picture was painted of the situation in the specific province. It was conceded by Christopher Antrobus, an expert witness for the claimant community specialising in project evaluation and feasibility studies that

in the past, restitution in the form of agricultural land had generally been unsuccessful, due to inadequate financial support and inadequate knowledge of skills in commercial farming.²¹⁵

Khama, the official responsible for resettlement in the office of the Regional Land Claims Commissioner, testified that he was responsible for 330 projects related to restitution and resettlement in the North-West Province and of these 330 projects he could not identify a single project that had been successful.²¹⁶ According to Khama,²¹⁷ the difficulties faced by restitution projects

range from a lack of human resource experts who can manage the resettlement projects, to a lack of strategic partners. The biggest impediment appears to be a lack of funding. Another stumbling block is the lack of skills to continue commercial farming on the land.

This acknowledgement is a concise summation of the major challenges facing resettlement projects, with the lack of pre- and post-settlement support (as a result of budgetary constraints and institutional bureaucracy) as the most notable challenges.

²¹² De Villiers (Land Reform – A Commentary 11) refers to research conducted by the University of Pretoria that found that 44% of the restitution projects show a decline in agricultural output.
²¹⁵ Baphiring-case par 22.
²¹⁶ Baphiring-case par 25. See Pienaar 2011 (14) PER 42.
²¹⁷ Baphiring-case par 25.
This lack of support and the consequent failure of the redistribution projects pose a threat to food security with less produce being available to feed the nation. In this regard, Hall\textsuperscript{218} aptly notes that

\begin{quote}
[The failure of post-transfer support to materialise, even where this is specified in project plans, presents an overwhelming obstacle to production and marketing]
\end{quote}

In addition to the fact that an unproductive restitution project poses an enormous threat to food security and economic stability, the mismanagement of the programme also poses an environmental threat in the large scale erosion caused by overgrazed land with the accompanying negative impact on the prospects for ecologically sustainable development.\textsuperscript{219}

2.4.1.4.3 State liability

A further challenge to the restitution process is that the Department of Rural Development and Land Reform cannot provide an estimation of the future liability of the state for land restitution claims that have not been approved.\textsuperscript{220} From a budgetary point of view this represents one of the biggest challenges facing the programme. It is impossible for the fiscus to allocate funding to the Department if it is not possible to estimate how much funding is required to settle the claims which have been submitted but not yet approved.

From the above it is evident that the Government faces numerous challenges in the restitution programme, with the biggest possibly being the lack of resources (institutional and financial) to provide post-settlement support to restitution beneficiaries. It appears as though Government on its own does not have the capacity to solve the challenges of the restitution programme. In this regard a possible solution lies in collaboration between Government and the private sector. Especially with regard to agricultural restitution projects, the private sector (and specifically the agricultural sector) has an important supportive role to play as a strategic partner.

\textsuperscript{218} Hall \textit{The impact of land restitution and land reform on livelihoods} 16.
\textsuperscript{219} Attfield, Hattingh and Matshabaphala 2004 (25) \textit{Third World Quarterly} 412.
\textsuperscript{220} Ensor 2011 \url{http://www.businessday.co.za/Articles/Content.aspx?id=152477}.
However, the challenges faced by the restitution programme are not unique to the specific programme. From the discussions in the following paragraphs it will become evident that the redistribution programme faces similar challenges and that the progress made in terms of the national target of transferring 30% of white-owned commercial agricultural land has been equally unsatisfactory.

### 2.4.2 Land redistribution

#### 2.4.2.1 Introduction

Section 25(5) of the Constitution imposes a positive duty on the state to improve accessibility to land.\(^{221}\) Rugege\(^{222}\) notes that this provision “creates a socio-economic right for those in need of land to call on the state to act and make land accessible”.\(^{223}\) The constitutional obligation with regard to redistribution requires the state to foster conditions which enable citizens to *gain access to land on an equitable basis*. However, this obligation is not absolute and the state is required to take reasonable legislative and other measures to foster these conditions only *within its available resources*. Consequently section 25(5) has its own internal limitation clause providing the scope within which the constitutional obligation regarding redistribution is to be exercised. The fulfilment of the constitutional obligation is subject to the availability of limited resources, where access to land has to compete with other socio-economic rights such as housing, healthcare and education. Decisions regarding the allocation of funding to the various socio-economic rights lie with the national government and the courts will not intervene in budgetary decisions unless a clear need exists to protect a particular constitutionally entrenched right.\(^{224}\) The question of redistribution is thus essentially one of how much resources are available and what the state can afford.

The primary purpose of redistribution is to enable the landless to gain access to land for residential and productive purposes in order to improve their livelihoods, while the

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\(^{221}\) See par 2.2.2. For a general discussion of redistribution see Mostert, Plenaar and Van Wyk "Land" 120 – 130.


\(^{223}\) See in this regard the remark by Yacoob J in the *Grootboom* case at par 19 where the Constitutional Court interpreted access to land as a socio-economic right. See par 2.2.2 for a discussion of access to land as a limited socio-economic right.

\(^{224}\) See the discussion in par 2.2.2.
primary focus of the programme has been the drive to redistribute land through market forces based on the “willing buyer, willing seller” approach.225 Carey Miller and Pope state in this regard:226

Redistribution is not a legal mechanism as such but rather a programme involving the promotion and provision of state aid and assistance – financial and in terms of the process of implementation – directed to the acquisition of land by persons prejudiced by the unfair system of the old regime.

Lahiff227 remarks:

In the context of extreme inequality in landholding, particularly in a country with a relatively high rural population, the redistribution of land assets must be seen as a central element of a land reform programme and a key indicator of success.

Although one of the main focuses of the redistribution programme is to redistribute agricultural land to emerging farmers, it has been reported that the pace of redistribution of agricultural land has been slow and that after the beneficiaries have received the redistributed farms little or no production takes place.228

While the overall target for redistribution has been set at transferring 30% of white-owned commercial agricultural land, the programme itself is a discretionary programme229 based on the provision of grants230 aimed inter alia at assisting emerging black farmers to obtain access to agricultural land. The provision of grants is in line with the constitutional duty to foster conditions, within its available resources, which enable

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225 Hall 2004 (100) Review of African Political Economy 215 and Badenhorst, Pienaar and Mostert Silberberg and Schoeman 593.
226 Carey Miller and Pope Land Title in South Africa 398.
228 Du Plessis, Pienaar and Olivier 2009 (24) SA Public Law 588.
229 Carey Miller and Pope Land Title in South Africa 399 describe the redistribution programme as “essentially a facilitation programme” which facilitates access to land through a discretionary grant system.
230 According to Claxton (2003 (8) Michigan Journal of Race and Law 546) the South African redistribution programme follows a market-based model similar to those in Kenya and Zimbabwe, which are based on grants and loans provided to qualifying beneficiaries to purchase land on the open market. Deininger and Binswanger (1999 (14) The World Bank Research Observer 267) remark that the South African approach to redistribution, where financial assistance is provided to acquire land, is similar to demand-driven social investment funds. The authors continue by identifying a number of advantages of this approach, including the fact that due to the existence of an upper limit to the grants, beneficiaries are encouraged to “seek run-down, unproductive farms”, a practice that would stimulate the land market (Deininger and Binswanger 1999 (14) The World Bank Research Observer 267).
citizens to gain access to land on an equitable basis. The following paragraphs will provide a very succinct outline of the various programmes and grants made available to potential land reform beneficiaries since the inception of the programme.

2.4.2.2 Government measures to foster conditions to gain access to land

2.4.2.2.1 Settlement/Land Acquisition Grants (SLAG)

The Settlement/Land Acquisition Grant (SLAG) was the original mechanism used to encourage redistribution and was based on providing a cash grant (R16 000) to qualifying poor black South Africans to extend their property ownership and facilitate their access to land.231 In order to qualify for the grant, the applicant must be lawfully resident in South Africa, legally competent to contract, and have a gross monthly household income of less than R1 500.232 The grant could be used mainly to acquire land for residential purposes and small business development, and although the grant could be used to acquire equity in a land-based enterprise, applicants who needed land for agricultural purposes were directed to the Land Redistribution for Agricultural Development grant.

2.4.2.2.2 Land Redistribution for Agricultural Development (LRAD)233

The LRAD programme has been described as the flagship redistribution programme234 aimed at facilitating the transfer of agricultural land to qualifying beneficiaries who have

232 DLA Grants and services policy (Version 7) 10. This grant is clearly aimed at the historically disadvantaged and the poor. See Terblanche Die landelike swart vrou se reg op grondbeheer 59.
233 For a discussion of the LRAD programme, see Pienaar 2004 (25) Obiter 286 – 288; Mapadimeng 2003 (52) Transformation 20 – 41; Ntsebeza and Hall (eds) The Land Question 90 – 91 and 180 – 181 and Hall Land and agrarian reform in South Africa 28 – 32. For case studies of land reform projects that made use of the LRAD grants, see Hall The impact of land restitution and land reform on livelihoods 6 – 7. Whereas LRAD funding focuses primarily on funding for commercial agricultural purposes, applicants who needed support for both settlement and agricultural production could apply for the Settlement and Production Land Acquisition Grant (SPLAG), which is available mainly to rural dwellers or farm workers/dwellers who wish to acquire land and improve their livelihoods and settlement conditions. The grant is currently set at R111 152 per household with no own contribution, but the award of the grant will be subject to the availability of funds (DLA date unknown http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_library/documents/Publications /Programmes/Land and Tenure Reform/Redistribution/SETTLEMENT-PRODUCTION-LAND-ACQUISITION-GRANT-POLICY-FRAMEWORK.pdf par 4 – 5.
234 De Villiers Land reform: Issues and challenges 50 and Hall 2004 (100) Review of African Political Economy 217. Badenhorst, Pienaar and Mostert (Silberberg and Schoeman 594) describe the
the resources and experience to become commercial farmers. The focus of the programme is on persons who requires land for agricultural purposes and who are able to make an own contribution in order to receive the grant. Since the grant is based on a sliding scale of matching grants, it has been criticised for benefitting the “haves”, with the focus apparently being shifted from the poor and marginalised to emerging farmers.

An applicant will qualify for the grant only if the applicant is a black South African citizen who is older than 18 years and in a position to make the stipulated own contribution of at least R5 000 for the minimum subsidy of R20 000 and is willing to participate in a training programme. The amounts made available in terms of this programme are determined on a sliding scale. The more a beneficiary can contribute from his own funds, the larger the allowance provided by the state would be, thus benefitting those who already have funds available.

Since a single grant would in most instances not be sufficient to enable an applicant to acquire agricultural land, potential beneficiaries have applied in groups to increase the grant amount. These actions have created the problem referred to as the “rent-a-crowd” phenomenon, where “entrepreneurial” beneficiaries are putting large groups of people together to increase the grant amount without the beneficiaries having any

Redistribution programme as “essentially a facilitative programme which provides, amongst others, for financial assistance in the form of grants and subsidies”.

235 De Villiers Land reform: Issues and challenges 50.
236 DLA Grants and services policy (Version 7) 2.
237 Rugege 2004 (32) International journal of legal information 303; Du Plessis, Olivier and Pienaar 2000 (15) SA Public Law 233; Ntsebeza and Hall (eds) The Land Question 104; Lahiff et al Land Redistribution and poverty reduction in South Africa 69 and Lahiff Land Reform in South Africa: A status report 2008 34. It could be argued that the shift from being “pro-poor” to promoting equitable access to land for emerging black farmers is a dereliction of the constitutional duty to provide access to land on an equitable basis as envisaged by s 25(5) of the Constitution, since the poorest of the population are excluded from benefitting from the LRAD programme (see Brand and Heyns (eds) Socio-economic rights in South Africa 188).

238 The own contribution could also be in terms of labour although, in order to claim the full R5 000 in labour as an own contribution, the applicant must submit a business plan proving evidence of how the applicant intends to devote own labour towards the project (DLA Grants and services policy (Version 7) 5 – 6). See Terblanche Die landelike swart vrou se reg op grondbeheer 63.

239 DLA Grants and services policy (Version 7) 5.
240 Bosman Land reform: A contextual analysis 5.
relationship with each other.\textsuperscript{241} This situation has been attributed \textit{inter alia} to the restrictions placed on the subdivision of agricultural land.\textsuperscript{242}

2.4.2.2.3 The Proactive Land Acquisition Strategy (PLAS)

In terms of the state-driven (as opposed to the beneficiary demand driven)\textsuperscript{243} Proactive Land Acquisition Programme (PLAS) the state is actively becoming involved in the land market as the “willing buyer”, where the state purchases land directly from private owners rather than providing beneficiaries with grants which enable them to purchase the land themselves.\textsuperscript{244} In terms of this strategy, the state acquires land through expropriation,\textsuperscript{245} or through auctions\textsuperscript{246} or through market transactions,\textsuperscript{247} without being obliged to immediately attach beneficiaries to such land. This approach enables the state to either transfer the land in ownership to beneficiaries or to lease the land to beneficiaries on a trial base with an option to purchase the land and transfer ownership

\textsuperscript{241} Ntsebeza and Hall (eds) \textit{The Land Question} 179.

\textsuperscript{242} Although the \textit{Subdivision of Agricultural Land Act} 70 of 1970 was theoretically repealed by the \textit{Subdivision of Agricultural Land Act Repeal Act} 64 of 1998 which was published in the \textit{Government Gazette} on 28 September 1998, no date has been given for the enactment of the \textit{Repeal Act}. The consequence of this situation is that the original Act remains in force.

\textsuperscript{243} The state will purchase land either at a project level where “the need or demand may or may not be quantified in terms of identified beneficiaries” or programmatically where the “land needs of potential beneficiaries are to be identified in a specific area and matched with suitable and available land in the area” (DLA \textit{Proactive Land Acquisition Strategy} 12).

\textsuperscript{244} Lahiff \textit{Land Reform in South Africa: A status report 2008} 8 and Greenberg \textit{Status report, 2010} 5. The strategy targets black people (Africans, Coloureds and Indians) who possess the required farming skills and who wish to become involved in farming. Although the Act empowers the relevant Minister to acquire land for land reform purposes, it is not clear why the Government is considering acquiring more land when it still does not have a concise figure of how much land it owns. Government is acquiring privately owned agricultural land without knowing how much state-owned land is available for redistribution. According to the Minister of the DRDRLR, it is envisaged that the process of establishing a register of state land will be completed by 2014. Only then will Government have indication of the amount of its state land (Nkwinti 2011 \texttt{http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_library/documents/Speeches_and_Media_Statements/Minister//2011BudgetandPOLICY_SPEECH.pdf}). The Minister indicated that the Department will embark on a comprehensive audit of state land comprising of 1 155 492 State Land Parcels. However, it is unlikely that the Department has the ability to audit approximately 400 000 parcels per year. It is estimated that between 19\% and 30\% of land in South Africa is owned by government or state-owned-enterprises (Vecchiato 2011 \texttt{http://mg.co.za/article/2011-09-12-no-land-reform-before-audit-says-da}). The CSE estimates that the State owns more than 25 million hectares of land in South Africa (CDE \textit{Land Reform in South Africa 2008} 21). However it should be noted that included in this figure is military land and national parks such as the Kruger National Park.

\textsuperscript{245} DLA \textit{Proactive Land Acquisition Strategy} 13. Expropriation will be considered in instances where the land market is not releasing enough land for redistribution.

\textsuperscript{246} DLA \textit{Proactive Land Acquisition Strategy} 13 – 14.

\textsuperscript{247} DLA \textit{Proactive Land Acquisition Strategy} 14. Negotiated transfers between the state and private land owners represent one of the methods of acquisition.
after a specified period. Until such time as the appropriate beneficiaries have been selected for acquired land, the Department must make sure that the land is “farmable”. From the time when the land is acquired until the time when the beneficiaries have taken occupation of the land, it must be ensured that holding arrangements are in place, in terms of which someone is entrusted with taking care of the property. This could be done by appointing a caretaker, a lessee or a management company. According to the Strategy document a caretaker agreement can be described as “essentially an interim holding arrangement” whereby someone takes care of the land without having an option to purchase and for a period of 12 months at a time. The alternative to caretaker arrangements is to make use of management companies which manage the agricultural property in terms of a service level agreement.

According to the Strategy document the main advantages of the state-driven acquisition programme include an acceleration of the redistribution process and improved beneficiary identification and selection in relation to redistributed land. This proactive strategy is strongly based on the provisions of section 11 of the Provision of Land and Assistance Act, which empowers the relevant Minister to acquire land for redistribution purposes and keep it until such time as the land is “farmable” and appropriate beneficiaries have been identified.

Lahiff criticises this approach. According to the author

This implies that prospective beneficiaries may not be directly involved in the purchase decision or in the immediate post-purchase planning for the land, opening up the possibility of a more top-down (“statist”) approach to both project implementation and beneficiary selection.

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248 Lease agreements with an option to purchase must be linked to at least one production cycle in order to provide the beneficiaries with an opportunity to prove themselves as potential farmers. However, the strategy clearly endorses the “use it or lose it” approach and states that beneficiaries who “have not broken even during the lease period will be removed from the farming operation and new beneficiaries will be installed” (DLA Proactive Land Acquisition Strategy 18).

249 DLA Proactive Land Acquisition Strategy 16.
250 DLA Proactive Land Acquisition Strategy 17.
251 DLA Proactive Land Acquisition Strategy 4.
252 126 of 1993.
253 See par 2.4.2.2.7 for a discussion of the PLA Act.
Hall\textsuperscript{256} echoes this concern and observes that the Proactive Land Acquisition Strategy together with the \textit{Provision of Land and Assistance Act}

gives far-reaching discretionary powers to DLA officials to purchase land directly, rather than by disbursing grants to enable beneficiaries to purchase land; officials may determine which land should be acquired by the state, whether it should be transferred or leased, and if so, to whom and on what terms.

These concerns raise the question: How can Government consider acquiring more land (which until it is transferred in ownership to beneficiaries remains state land) while it does not have any exact figures regarding how much state land is currently available for redistribution? Why is white-owned commercial agricultural land being targeted while other suitable land is available for redistribution? With reference to the availability of state land Louw\textsuperscript{257} notes:

By far the bigger and best prospect for land redistribution is from government. Government is the primary owner of land in historically black areas ("homeland", "townships", "squatter settlements"): land that can be immediately redistributed to existing occupiers at virtually no cost. ... redistribution from government, at virtually zero cost, could result in millions of black land owners with billions of rands of capital released into the hands of existing occupiers and unleashed into the economy where it can be traded, mortgaged, let and developed.

2.4.2.2.4 The Comprehensive Agricultural Support Programme (CASP)

CASP is focused on providing post-settlement agricultural support to targeted beneficiaries of the land reform programme in order to improve farming efficiency and reduce poverty and inequalities in land occupancy.\textsuperscript{258} Unfortunately the programme was not synchronised with the LRAD programme, which focuses on land reform, which has resulted in institutional ineffectiveness where the Departments of Agriculture and Land Reform have not collaborated on the provision of grants.\textsuperscript{259} CASP has been replaced by the Land Agrarian Reform Project, which has integrated the CASP and the LRAD programme.

\textsuperscript{256} Hall (ed) \textit{Another Countryside}? 81.
\textsuperscript{257} Louw 2010 http://www.freemarketfoundation.com/ShowArticle.asp?ArticleType=Issue&ArticleId=2598.
\textsuperscript{259} Greenberg \textit{Status report, 2010} 11.
2.4.2.2.5 The Land and Agrarian Reform Project (LARP)

The LARP emerged in 2007 as priority 7 of the Presidential Apex Priorities with the main objectives of redistributing 5 million hectares of white-owned agricultural land to 10 000 emerging farmers and providing agricultural support services to these targeted beneficiaries. The project is based on envisaged integrated service delivery between the Department of Agriculture and the Department of Land Affairs and aims to “reverse a fragmented approach and pro-actively intervene to accelerate land reform”. According to the DoA the project will fast-track land and agrarian reform through the use of focus areas and aligned comprehensive agricultural support packages which address social and economic needs. It is envisaged that new agricultural land reform projects will be “coherently planned and supported for a five-year incubation period with the objective of achieving sustainability over this period”. However, the success of this ambitious programme has not been forthcoming and no indication has been given of how the programme has increased the pace of land reform.

2.4.2.2.6 The Comprehensive Rural Development Programme (CRDP)

The Comprehensive Rural Development Programme (CRDP) was released in 2009 with the following specific objectives: sustainability; beneficiation; poverty eradication; economic growth; employment creation; and the overall vibrancy of land restitution projects.

The CRDP provides an integrated programme for rural development, land reform and agrarian change and is detailed in the Comprehensive Rural Development Programme Framework. The CRDP is “the latest manifestation of rural development” and

261 DoA Land and Agrarian Reform Project 16.
262 DoA Land and Agrarian Reform Project 18 – 19.
263 DoA Land and Agrarian Reform Project 21.
264 The CRDP has been described as a “three-pronged strategy focused on enabling rural people to take control of their destiny, with the support from government, and thereby deal effectively with rural poverty through the optimal use and management of natural resources. This will be achieved through a coordinated and integrated broad-based agrarian transformation as well as the strategic investment in economic and social infrastructure that will benefit the entire rural communities” (Gen Not 117 of 2011 in GG 34063 of 3 March 2011).
consists of three integrated pillars: infrastructure (rural development); land reform and production support (agrarian transformation); and integrated land reform and agricultural support. Agrarian transformation is aimed at increasing production and sustainable resource use and strengthening rural livelihoods, while rural development focuses on improving and developing economic and social infrastructure.\textsuperscript{266} The objectives of the land reform pillar of the CRDP are to increase the pace of land redistribution and to increase the pace of settling outstanding land claims. With reference to redistribution, the programme identifies 5 categories of beneficiaries:

- “landless households” seeking small pieces of land for subsistence production;
- “commercially ready subsistence producers” wanting to expand and farm part-time;
- “expanding commercial smallholders” already producing commercially but wanting to expand;
- “well-established black commercial farmers” already producing and having the potential to become large-scale farmers; and
- “financially capable aspirant black commercial farmers”, namely business people wanting to diversify into agriculture \textsuperscript{267}

The aim of establishing these categories is to target those beneficiaries with proven interest and skills in farming and to give priority to those beneficiaries when making funding available. However, the framework document provides no indication of how priority will be given to beneficiaries and how funding will be provided based on the categories.\textsuperscript{268}

2.4.2.2.7 \textit{Land Reform: Provision of Land and Assistance Act} 126 of 1993

An essential piece of legislation in the redistribution programme is the \textit{Land Reform: Provision of Land and Assistance Act}.\textsuperscript{269} The importance of the \textit{PLA Act} within the land

\textsuperscript{266} Ministry of Rural Development and Land Reform \textit{CRDP Framework} 15 – 16.
\textsuperscript{268} For a further discussion of the CRDP, see Olivier \textit{et al} (eds) \textit{Restitution operational strategy} 79 – 81.
\textsuperscript{269} Hereinafter referred to as the \textit{PLA Act}. See Mostert, Pienaar and Van Wyk "Land" 120 – 122 for a discussion of the Act.
reform context is evident from the aims of the Act identified in section 1(A). According to this section, the objectives of the Act are to:

(a) give effect to the land and related reform obligations of the State in terms of section 25 of the Constitution of the Republic of South Africa, 1996;
(b) effect, promote, facilitate or support the maintenance, planning, sustainable use, development and improvement of property contemplated in this Act;
(c) contribute to poverty alleviation; and
(d) promote economic growth and empowerment of historically disadvantaged persons

From the above quote it is clear that the Act is an important vehicle in the land reform policy framework used to provide land and assistance in the land reform programme. According to Carey Miller and Pope\textsuperscript{270} the Act “provides for straightforward means of redistributing otherwise available land as a matter of executive discretion”. The Act identifies three categories of land for the purposes of settlement: State land (land controlled by the Minister and made available by the Minister for purposes of settlement);\textsuperscript{271} land purchased or acquired by the minister for purposes of settlement; and private land which has been made available by the owner thereof for purposes of settlement.\textsuperscript{272}

Section 10 of the Act has been specifically amended to provide the Minister of Rural Development and Land Reform with powers regarding the provision of property for land reform purposes. Section 10 makes provision for financial assistance for the acquisition, development and improvement of land for land reform purposes.\textsuperscript{273} In terms of section 10 of the Act, the Minister is empowered to acquire property in order to achieve the objectives as stated in section 1(A) of the Act. The section further makes provision for grants or subsidies which can be used for the purchase of land for

\textsuperscript{270} Carey Miller and Pope \textit{Land Title in South Africa} 405.
\textsuperscript{271} According to Louw (from the Free-market Foundation) “the second form of land that can be redistributed, is superfluous land owned by the government in one of its many forms. No one has any idea how much superfluous government land there is or even what proportion of land belongs to the government” (Louw 2010 \url{http://www.freemarketfoundation.com/ShowArticle.asp?ArticleType=Issue&ArticleId=2598}).
\textsuperscript{272} S 2(1) of the \textit{PLA Act}. It should be noted that in terms of s 2(4) of the Act, laws governing the subdivision of agricultural land shall not apply to any of the three categories of land, unless the Minister directs otherwise. For a discussion of the 2008 amendments to the Act, see Du Plessis, Pienaar and Olivier 2008 (23) \textit{SA Public Law} 124 – 125.
\textsuperscript{273} Badenhorst, Pienaar and Mostert \textit{Silberberg and Schoeman} 604; Carey Miller and Pope \textit{Land Title in South Africa} 409 and Pienaar 2004 (25) \textit{Obiter} 274.
residential purposes or for agricultural production.\textsuperscript{274} In conjunction with section 10, section 11 empowers the Minister to dispose\textsuperscript{275} of land acquired in terms of the Act. This section thus enables the Minister to lease or transfer land to beneficiaries of the redistribution programme on conditions he deems appropriate.

In short the contribution of the \textit{PLA Act} to land reform is that the Act enables the Minister of Rural Development and Land Reform to redistribute state land to land reform beneficiaries, or to purchase land for the purpose of land reform.\textsuperscript{276} Although this Act was enacted before the \textit{Constitution}, the Act clearly falls within the ambit of the measures envisaged in section 25(5) which enjoins the state to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

2.4.2.2.8 The “Use it or lose it” approach

In terms of this approach land redistributed to beneficiaries of the redistribution programme will be forfeit if the land is not farmed productively. Beneficiaries have to “use” the land or they will “lose” it. The Minister of Rural Development and Land Reform is quoted as saying: “Those who got land through redistribution, if they don’t use that land, we will take it”,\textsuperscript{277} and

our view is that [we should] give them a chance, establish a clear system of managing these farms, provide necessary support and those who do not want to work the land, take them out.\textsuperscript{278}

The aim of this approach is to ensure that agricultural output does not decline further as a result of the unproductive and unsustainable use of land.

\textsuperscript{274} S10(b) of the \textit{PLA Act}.
\textsuperscript{275} In this context, “dispose” includes “sell, exchange, donate, lease, award or otherwise dispose” (s 11).
\textsuperscript{276} While the focus of the \textit{PLA Act} is predominantly on redistribution as a form of land reform, s 42C of the \textit{Restitution of Land Rights Act} was enacted to make provision for similar financial aid in restitution cases. S 42C empowers the Minister to grant an advance or subsidy for the development or management of, or to facilitate the settlement of persons on land to any claimant to whom restoration or the award of a right in land has been ordered or any person resettled on such land.
\textsuperscript{277} Minister Nkwinti as quoted in Boyle 2010 \url{http://www.timeslive.co.za/local/article334448.ece/Massive-farm-failure-in-SA}.
\textsuperscript{278} SAPA 2010 \url{http://www.news24.com/SouthAfrica/News/Use-land-or-lose-it-Nkwinti-20100302}. 

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The principle can be applied in respect of redistributed land only and not land transferred in terms of the restitution programme. Full ownership of land restored in terms of the restitution programme is vested in the restitution beneficiaries and an application of the “use it or lose it” principle in these instances would amount to expropriation. The same holds true for redistributed land where the transfer of the land in ownership was not subject to a condition that the land would be forfeited if not used productively. This approach raises a number of questions such as: When is land being used productively? If the beneficiaries produce enough for their own consumption will this suffice, or is the land being used productively only once the produce is sold commercially? To date no official definition has been provided for the term “used productively” and it is unclear how land can be taken back without any clear indication of what is expected from beneficiaries. A further issue relates to the support which beneficiaries receive once the land has been made available to them. Without proper support (financial, training etc) these projects are doomed to fail.

It was reported that in 2008 Government took back 77 farms in Limpopo due to unproductive land use, signalling that Government has had enough of beneficiaries who simply want land but do not want to work the land.\(^\text{279}\) In 2009 the case of Veronica Moos, a beneficiary of the redistribution programme, made headlines when the then Minister of Land Affairs, Lulu Xingwana, announced with big fanfare that the farm that was allocated to Moos under the PLAS would be repossessed in terms of the “use it or lose it” policy.\(^\text{280}\) It was alleged that in the two years preceding the action by the Minister no agricultural activity took place, despite the fact that the farm was farmable when bought by the state and that Moos had received a R200 000 infrastructural grant and paid only R2 000 per annum in rent.\(^\text{281}\) In response to these allegations, Moos claimed that she was unaware of the fact that the Minister was empowered to evict her

\(^{279}\) Du Plessis, Pienaar and Olivier 2009 (24) SA Public Law 152. It should be noted that the repossessed land did not belong to those from whom it was taken away. The land was state-owned, enabling the Government to remove the occupants.


\(^{281}\) The land was purchased by the state for R1.7 million.
since she had never received a copy of the relevant policy despite several requests in this regard.\textsuperscript{282} Moos also noted that although she initially received R200 000 in subsidies, she received no further support from the government departments.\textsuperscript{283} The matter was settled in the High Court where it was ordered that the Department of Land Affairs acted unlawfully and that the farm had to be returned to Moos with the actions of the Minister described as “high-handed” and “sinister”.\textsuperscript{284}

Moos prevailed in this instance because she could provide evidence that the post-settlement support which she received from Government was insufficient and did not enable her to use the land productively. This case reiterates the failure of the support programmes discussed in the previous paragraphs and stresses the need for an alternative approach to land reform.

\textit{2.4.2.3 The progress}

It was estimated that by March 2012, 6.7 million hectares of white-owned agricultural land had been redistributed.\textsuperscript{285} In order to meet the 2014 target of transferring 30\% of white-owned agricultural land an estimated 19 million hectares have therefore to be transferred by 2014 at a rate of more than 3 million hectares per annum.\textsuperscript{286} To illustrate the impossibility of the task at hand: an average of 371 000 hectares had been transferred per annum during the period 1994 – 2008. This situation prompted the Minister of Rural Development and Land Reform to state that: “We cannot talk any more

\begin{itemize}
\item Ms Moos also had to wait for more than two years to get a copy of her lease agreement.
\item Du Plessis, Pienaar and Olivier 2009 (24) \textit{SA Public Law} 160. To further contribute to her hardship, Ms Moos’ property was broken into twice and the electrical cables were stolen. As a result of this she feared for her safety and decided not to live on the property. Although Ms Moos was granted a subsidy of R200 000 she did not, due to institutional bureaucracy, receive the whole amount at once. She received instalments over an extended period, making it impossible to make any major infrastructural improvements at once.
\item SAPA 2012 \url{http://www.fin24.com/Economy/Nkwinti-spells-out-land-reform-target-20120301-2}. Included in this figure is land redistributed through the restitution and tenure programmes. From the data released by the DRDLR it is unclear whether this figure is actually limited to white-owned agricultural land or if state-owned land that has been transferred is also included.
\item DRDLR \textit{Strategic Plan} 2009 – 2012 17. It should be noted that this amount includes land transferred in terms of the restitution and tenure reform programmes.
\end{itemize}
about acquiring 30% of land (by 2014). It’s just not practically possible.”\textsuperscript{287} At the end of November 2011 it was reported that Government has not transferred any land in full ownership to beneficiaries of the redistribution programme since 1 April 2010.\textsuperscript{288} Land acquired through the PLAS has been retained by the state and is made available to emerging farmers only through lease agreements. However, the DA (the official opposition party) claims that in terms of the new approach, emerging farmers are placed on state-owned land without having ownership or any form of lease agreement, causing tenure uncertainty amongst these emerging farmers.\textsuperscript{289}

2.4.2.4 The challenges

2.4.2.4.1 Fiscal restraint

With the total annual amount of money made available to land reform at less than 1% of GDP, it is clear that the authorities responsible for land reform are faced with an enormous fiscal restraint. The fiscal restraint is increased even further by the cost of land and rising prices. The fiscal restraint is passed on to the beneficiaries of the redistribution programme and manifests itself in the lack of support which these beneficiaries receive from Government. In order for redistribution to be successful substantial investments are needed in infrastructure and other post-settlement support,\textsuperscript{290} but the bureaucratic process limits private sector involvement.\textsuperscript{291} Although the private sector would in all likelihood not contribute funds towards the acquisition of land for land reform purposes, the sector can make valuable contributions in other areas, which would ease the fiscal restraint. One such area would be the provision of


\textsuperscript{288} Joubert 2011 http://www.beeld.co./Suid-Afrika/Nuus/Swartes-kry-nie-meer-grond-20111128#.

\textsuperscript{289} Joubert 2011 http://www.beeld.co./Suid-Afrika/Nuus/Swartes-kry-nie-meer-grond-20111128#.

\textsuperscript{290} Van der Brink, Thomas andBinswanger (in Ntsebeza and Hall (eds) The Land Question 181) remark that international experience had shown that in a typical land reform project, the cost of acquisition of the land accounts for only 30 – 40% of the total cost. The rest of the costs are made up by the costs of housing, inputs, tools, farm development and training. Although enormous amounts of money are required if the State is to reach its redistribution targets, Greenberg observed that in some financial years the DRDLR failed to spend its budget for land reform, further contributing to the slow pace of reform and suggesting a “lack of capacity rather than lack of resources” (Greenberg Status report, 2010 5).

\textsuperscript{291} Deininger and Binswanger 1999 (14) The World Bank Research Observer 268.
assistance (such as skills development and training) to land reform beneficiaries through the sector’s CSR programmes.

2.4.2.4.2 Beneficiary challenges

Within the context of the agricultural sector, emerging farmers are experiencing problems with production due to conflict amongst beneficiaries (where for example not all of the beneficiaries are willing to contribute to a project although they want to share in the profits), inadequate development support and a lack of expertise.\textsuperscript{292} Added to these challenges, Zimmerman\textsuperscript{293} argues that in general the rural poor will be less inclined to

move the distances demanded by redistribution, have less labor available for farming, are less able to afford the program’s up-front costs, have fewer farming-specific skills, and have less capacity to cope with agricultural risk. Therefore, the poor are likely to be rationed out of participation in the program, and the land redistribution will have little effect on rural poverty ...

Two of the most crucial challenges relate to land use and post-settlement support.\textsuperscript{294} Manenzhe and Lahiff state:\textsuperscript{295}

Complementary support services for land reform are not being adequately planned or implemented, and no clear role has been allocated to municipalities.

2.4.2.4.3 Post-settlement support

The need exists to support land reform beneficiaries beyond the transfer stage.\textsuperscript{296} Failure to provide this support will (as evidence suggests) limit the productivity of agricultural land reform projects. Institutional development and support is a critical element for sustainable land reform projects. The problem of post-settlement support is directly linked to the fragmentation of the support grants framework. In the discussions

\textsuperscript{292} Du Plessis, Pienaar and Olivier 2009 (24) SA Public Law 151.
\textsuperscript{293} Zimmerman 2000 (28) World Development 1439 – 1460.
\textsuperscript{294} Ntsebeza and Hall (eds) The Land Question 100 and Manenzhe and Lahiff Restitution and Post-settlement Support 25. In a case study of four redistribution projects in the Limpopo province by Lahiff et al (Land Redistribution and poverty reduction in South Africa 66) the researchers conclude that poor project design and the lack of support services were the most dominant challenges facing the projects.
\textsuperscript{295} Manenzhe and Lahiff Restitution and Post-settlement Support 25.
\textsuperscript{296} According to Jacobs (Support for agricultural development 7) the lack of post-settlement support is indicative of a general failure to conceptualise land reform beyond the transfer stage.
of the Government measures to enable access to land in the previous paragraphs it has become evident that a plethora of programmes exist, causing not only confusion amongst officials from the state departments but also amongst beneficiaries who need support in terms of these programmes. The aim of the CRDP is to streamline this situation and it is hoped that the integration of programmes through the CRDP will remove the uncertainty caused by the existence of so many various programmes.

As was the case with the fiscal restraint, the private sector could potentially play a significant role in the provision of post-settlement support to beneficiaries through their CSR programmes.

2.4.2.4.4 Subdivision of agricultural land

Hall\textsuperscript{297} identifies the subdivision of agricultural land as a major impediment to the success of land reform. However, land redistributed for the purposes of land reform is not subject to limitations on the subdivision of land if the land was acquired by the Minister in terms of the \textit{PLA Act}. Section 10(2) of the \textit{PLA Act} stipulates in no uncertain terms:

\begin{quote}
The laws governing land use, the subdivision or consolidation of land, or the establishment of townships, shall not apply to land contemplated in this Act unless the Minister directs otherwise in writing.
\end{quote}

Since this section is applicable only to land acquired through the \textit{PLA Act}, it is possible that the subdivision impediment is applicable to private transactions, where for example a number of grant beneficiaries pool their grants in order to acquire land. In such an instance it would in the majority of cases not be possible to transfer a small piece of land to each individual beneficiary, necessitating that the beneficiaries purchase the land in legal entities, an act which would give rise to its own problems.

2.4.2.4.5 Sustainability

One of the biggest challenges facing both the restitution and the redistribution programmes is the issue of sustainable land reform projects and the sustainability of these projects. As is the case in most developing countries, land plays a central role in

\textsuperscript{297} Hall (ed) \textit{Another Countryside?} 38.
generating livelihoods for the poor.\textsuperscript{298} The issue of sustainability is probably one of the most neglected when it comes to land reform within the South African context, although it should be regarded as one of the absolute requirements for successful land reform.\textsuperscript{299} The (un)sustainability of many projects established in terms of the land reform programme has been identified as one of the principal shortfalls of the land reform programme. At the outset of the land reform programme, the \textit{White Paper on South African Land Policy, 1997} noted that land reform should result in the sustainable, productive use of natural resources. The \textit{White Paper}\textsuperscript{300} envisages

\begin{quote}
a land policy and reform programme that contributes to reconciliation, stability, growth and development in an equitable and sustainable way.
\end{quote}

The principles on which the land reform programme is based include economic viability and environmental sustainability. This implies that land reform projects must be planned in a manner conducive to economic viability and environmental sustainability.\textsuperscript{301} Resources should be managed in a sustainable manner and environmental impacts should be kept to a minimum in order to create conditions in which new owners of land are enabled to make use of productive resources and contribute to a national process of changing relations of political and economic power in the countryside. Resource management planning is unfortunately a missing dimension in the current land reform programme and is often not addressed in business plans drafted for land reform projects. A project that is not sustainable does not reflect the spirit of the land reform programme. Sustainability in this context refers to financial (economic) viability, environmental integrity and social (equitable) sustainability.\textsuperscript{302}

\begin{itemize}
  \item \textsuperscript{298} Deininger and Binswanger 1999 (14) \textit{The World Bank Research Observer} 247.
  \item \textsuperscript{299} In this regard Mostert, Pienaar and Van Wyk noted that “the general absence of development-related provisions in land reform is rather disconcerting. With the exception of the Land Reform: Provision for Land and Assistance Act, the bulk of these measures hardly have any reference to the promotion of sustainable development – although land reform and sustainable development ought to go hand-in-hand” (Mostert, Pienaar and Van Wyk "Land" 164).
  \item \textsuperscript{300} DLA \textit{White Paper} par 2.1. For a reference to the \textit{White Paper}, see par 2.3.7.
  \item \textsuperscript{301} Regarding redistribution projects, the \textit{White Paper} (par 2.5.2 and par 4.7.1) proposed that an assessment of the viability and sustainability of projects would be used as a means by which to prioritise the projects. Attention should \textit{inter alia} be given to the economic and social viability of intended land use.
  \item \textsuperscript{302} CSIR \textit{CPI Review} par 3.4.1.
\end{itemize}
Regardless of which legal entity is chosen when land is transferred in terms of the land reform programme, that entity will be faced with costs associated with the functioning of the entity.\textsuperscript{303} Unless the entity is financially sustainable it will not be able to meet the costs of the project. The \textit{CPI Review}\textsuperscript{304} noted that many of the institutions which formed part of the study were only just solvent or functionally insolvent. Another factor that impacts on the financial sustainability of these projects negatively is the lack of access to financial support from financial institutions. Due to the negative perception of land reform projects their usual low levels of productivity, financial institutions regard these projects as high-risk clients and are not willing to provide financial support. Financial sustainability is unlikely without external support either from Government or from other financial institutions or private partners. A further contributory factor is the fact that many projects have little or no production, which means that the members are in all likelihood not receiving any tangible benefits from the project and as a result are becoming disillusioned with the project.\textsuperscript{305} As a result, the majority of land reform projects have very low risk thresholds, which renders the projects (and the beneficiaries) vulnerable not only to economic setbacks but also to environmental hazards.\textsuperscript{306}

In land reform projects where the land is to be used for agricultural purposes, environmental sustainability is one of the most important requirements to be met in order to ensure long-term success.\textsuperscript{307} Without environmental sustainability the agricultural production potential of the land will decrease over time, which would adversely affect not only the national food supply but also have negative social impacts.

\begin{footnotes}
\item[303] In this regards costs includes municipal rates and taxes, maintenance costs, management costs such as management salaries, auditor’s expenses, and all costs associated with farming if the entity operates as a land-based agricultural enterprise.
\item[304] CSIR \textit{CPI Review} par 3.4.6.
\item[306] Sustainable Development Consortium (SIS) Strategy 14.
\item[307] The \textit{Draft second edition consolidated environmental implementation and management plan} (Gen Not 117 of 2011 in GG 34063 of 3 March 2011) briefly discusses the environmental impact of land reform. The document notes that “land reform may impact on the environment as it may result in a change in the type and intensity of agricultural production or any production system. In most cases, land reform beneficiaries do not have adequate resources and/or skills such that land use selection is poorly done. Under such circumstances, the carrying capacity of land is often neglected thereby leading to land degradation” (Gen Not 117 of 2011 in GG 34063 of 3 March 2011).
\end{footnotes}
on the communities themselves. The land reform programme has been characterised by a lack of support to enable land reform beneficiaries to identify and understand their environmental rights and responsibilities as new land owners. The White Paper stated:

There is a severe risk of increased environmental degradation if preventive and improved resource measures do not accompany the land reform programme and land development in general.

One of the challenges facing the land reform programme is how to integrate environmental sustainability and land reform into a framework that affords social, economic and environmental benefits.

In projects where, for example, the community members have cattle grazing on the communal land, the prospect of overgrazing and resultant soil erosion poses a threat to sustainability. A further example of the negative environmental impacts of land reform is evident from the land reform project at Boskuil in the North West Province. At this particular programme it was reported that over-abstraction of water for mining has destroyed a wetland, while the expansion of the township led to water contamination and other health problems. The effective use of land in accordance with a land-use plan would contribute to the sustainable use of the land. The CSIR CPI Review found that despite the fact that some of the communal property institutions (CPIs) had business plans, most of the CPIs either did not have copies of the plans or that the plans were not being implemented. According to the report only 33% of individual respondents thought that the land was currently being used appropriately.

Wynberg and Sowman have created an environmental sustainability assessment tool to be used in land reform projects. The tool is based on six steps used to assess the

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308 DLA White Paper par 10.
309 Wynberg and Sowman 2007 (50) Journal of Environmental Planning and Management 785.
310 Wynberg and Sowman 2007 (50) Journal of Environmental Planning and Management 789.
311 CSIR CPI Review par 3.4.10.
312 CSIR CPI Review par 3.4.10.
314 In March 2011 the DRDLR also released guidelines for the integration of environmental planning into land reform and land development together with environmental sustainability assessment guidelines.
environmental sustainability of land projects that have been identified, but where the land has not yet been transferred, although the potential beneficiaries have been identified.\textsuperscript{315} In terms of the tool, a general description of the environmental aspects of the planned project is to be given. Included in this description is the description of the climate and rainfall of the area, the soil type and its productivity, the availability of water resources, and the history of development and planning in the region.\textsuperscript{316} Once a general description has been given it is necessary to establish the current use of the area, for example crop production, grazing or livestock production, settlement, or mining. In most instances the use of the land is dependent on the availability of natural resources such as water. The availability of these resources should be established as well as the extent to which the land reform beneficiaries or the state have dealt with the management of these resources. Finally it should be established what activities are planned for upon the transfer of the land. These details would enable planners to prepare an integrated environmental assessment for the project and draft a natural resource management plan. A natural resource management plan should pay attention \textit{inter alia} to water rights, water quality and the availability of the resource. This would enable the beneficiaries to be better prepared for the risk of drought and other hazards.

Social sustainability requires communities to operate in an effective, cohesive group.\textsuperscript{317} This will be possible only where there is equality of membership, fairness and democracy and a common group identity, and where a democratically elected body manages an entity in an inclusive decision-making process, based on democratic processes that are transparent and which hold the management accountable for its actions.\textsuperscript{318} In order to have a socially sustainable community it is important that the community members share a common vision about the purpose and objectives of the

\textsuperscript{315} For a complete discussion of the six step approach used by this tool, see Wynberg and Sowman 2005 www.eeu.uct.ac.za/thematic-areas/integrated-environmental-planning-management-and-assessment/environmental-dimensions-of-land-reform.


\textsuperscript{317} CSIR CPI Review par 3.4.8.

\textsuperscript{318} For a comprehensive discussion of the principles associated with social sustainability within CPIs, see CSIR CPI Review par 3.2.
project. A common occurrence in redistribution projects especially is the fact that the beneficiaries do not reside on the redistributed land and need to commute between their residences and the project. Beneficiaries are unwilling to settle on the farms due to their fear of isolation and of being removed from their social and cultural environments.\textsuperscript{319} The rent-a-crowd phenomenon, where individuals, often with no previous ties, pool the available government grants to acquire land and form a “community”, is similar to an “arranged marriage”, where

people whose social ties have been detrimentally affected by dispossession are drawn together again as \textit{de facto} co-owners under the rubric of a community claim.\textsuperscript{320}

The social risk of these “arranged marriages” is often not considered when people are encouraged to form a “community” in order to gain access to land, and becomes evident from the high level of conflict which is found in many projects.

In reaction to the issue of sustainable agricultural resource use, the South African Government drafted a \textit{Sustainable Utilisation of Agricultural Resources Bill}\textsuperscript{321} in 2003, the aim of which is to provide for and promote the sustainable utilisation of natural agricultural resources. The \textit{Draft Bill} defines sustainable utilisation as the utilisation of agricultural resources for the production of food and other produce to enhance food security in an environmentally sound way, without compromising the ability of future generations to meet their own needs. In terms of section 7 of the \textit{Draft Bill}, no agricultural land may be sold or leased for a period of longer than 10 years unless the relevant state department has declared in writing that the natural agricultural resources concerned will continue to be utilised in a sustainable manner. Although this section might contribute towards ensuring that future agricultural activities are conducted in a sustainable manner, this \textit{Draft Bill} is still only a draft and has not been presented to parliament for approval.

Based on the challenges discussed, it is evident that the private sector, and especially the agricultural sector, has to get involved in redistribution projects. The agricultural

\textsuperscript{319} CSIR \textit{CPI Review} par 3.2.
\textsuperscript{320} Sustainable Development Consortium \textit{SIS Strategy} 19.
\textsuperscript{321} DAFF 2003 \url{http://www.daff.gov.za/docs/Bills/sustainable.htm}.
sector can make a substantial contribution to the success of redistribution through its CSR initiatives. The knowledge, skills and other resources locked up in the sector have to be unlocked for the benefit of the redistribution programme. Agricultural companies are strategically ideally positioned to contribute to redistribution. It is posited that the future success of the redistribution programme will be dependent on the contribution of agricultural businesses in the private sector.

2.4.2.5 Conclusion

In spite of the Government measures to foster conditions to gain access to land as discussed in paragraph 2.4.2.2, the pace of land reform remains slow. In reaction to the slow progress made by the redistribution programme as well as the general failure of redistribution projects, it is imperative that the pace of land reform should be accelerated and that the sustainability of redistributed farmland should be dramatically improved. However it is crucial that a balance should be struck between the amount of farmland redistributed and the amount of support which is available to these projects. Less land, while the State ensures that the land which is transferred is used to its full capacity.

The slow pace of redistribution, coupled with the ineffectiveness of the Government measures to bring about conditions which make it possible for potential beneficiaries to gain access to land, has necessitated the adoption of a new approach. The following paragraphs will discuss the proposed changes in the land policy as announced by Government in 2011.

2.5 The proposed new direction

In 2011 the Government announced its proposed new direction for land reform. This new approach is based in the *Green Paper on Land Reform, 2011*[^322] and the Recapitalisation and Development Programme (RADP) which emerged from the *Green Paper*. The following paragraphs will briefly reflect on these two instruments.

[^322]: Department of Rural Development and Land Reform *Green Paper on Land Reform, 2011* (DRDLR Pretoria 2011) and Gazetted in Gen Not 639 in GG 34607 of 16 September 2011. Hereinafter referred to as the *Green Paper*. The *Green Paper* was initially due to be released in early 2010.
2.5.1 The Green Paper on Land Reform, 2011

The long-awaited Green Paper on Land Reform was released on 31 August 2011 by the Department of Rural Development and Land Reform. It sets out Government’s approach to addressing the difficulties experienced by its national land reform programme. The Green Paper acknowledges that land is “a fundamental element in the resolution of the race, gender and class contradictions” and that the state needs to continue its investment in the transformation of land control and ownership. Based on this recognition, the Green Paper’s vision for land reform includes a system where all South Africans have reasonable access to land with secure, clearly defined property rights, combined with effective land use planning and regulatory systems that promote optimal land use and sustainable production. Within the context of this research, the Green Paper identified equitable allocation and use of land and sustained production for food security as the principles which must underlie land reform. The proposed policy targets food security and is focussed on minimising land reform which does not lead to sustainable livelihoods, employment and relative income equality. These provisions are crucial not only for the success of the land reform programme, but also for long-term sustained economic growth.

Recognising the challenges and weaknesses of the current land reform programme discussed in paragraphs 2.4.1.4 and 2.4.2.4, the Green Paper confirms that the need to address the fragmented beneficiary support system; the 30% redistribution target by 2014; declining agricultural contribution to the GDP and a problematic restitution model.

323 The Green Paper did not, as was widely speculated, contain any proposals regarding the amendment of s 25 of the Constitution with regards to the proposed declaration of agricultural land as a national asset. In 2010 it was speculated that the proposed Green Paper would contain proposals on the declaration of agricultural land as a national asset (Hartley 2010 http://www.businessday.co.za/articles/Content.aspx?id=104501 and Hofstatter 2010 http://www.businessday.co.za/articles/Content.aspx?id=103667). This speculation resulted from officials of the DRDLR raising questions about farmers who according to them hold unused agricultural land while the land could be used for land reform purposes (Lund http://www.fin24.com/Economy/Farmers-have-nothing-to-fear-20100317 and Du Toit 2010 http://www.beeld.com/Suid-Afrika/Nuus/Wildplase-in-staat-se-visier-20100317).

324 DRDLR Green Paper 1.
325 DRDLR Green Paper 4.
327 Anon 2011 6 The Contemporary Gazette 19.
are the rationale behind the drafting of the Green Paper. The proposed changes to the land reform programme are aimed at improving past and current land reform perspectives without significantly disrupting agricultural production and food security; and avoiding or minimising land redistribution and restitution which do not generate sustainable livelihoods, employment and incomes. The proposed changes to the land reform strategy include a recapitalisation and development programme; a single land tenure system consisting of four tiers; the creation of a Land Management Commission; and the appointment of a Land Valuer-General responsible for the

328 DRDLR Green Paper 5. Unfortunately the Green Paper still lays the majority of the blame for the current crisis in the land reform programme at the doorstep of the country’s colonial and apartheid past, without acknowledging the government’s role in these failures. Evidence of governance failures is found for example in the fact that the DRDLR received a qualified audit from the Auditor-General, which arose partly from the fact that the Department has since the introduction of the land reform programme failed to conduct an audit of state-owned land, and that the Department had outstanding claims against it to the value of R566 million. Had the programme been well-managed and appropriately resourced, the position might have been different (Peyper 2010 http://afrikaans.news24.com/Suid-Afrika/Nuus/Bedrog-en-pligsversuim-striem-grondsake-20100929-3. According to the DA (2011 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page?oid=255688&sn=Detail&pid=71616) the Green Paper “focuses almost entirely on the faults of our history, as well as attempting to argue that the current economic environment and property ownership systems are also to blame for the state’s failure to implement an effective programme of land reform”. According to Naidoo (2011 http://www.fm.co.za/Article.aspx?id=149406) “[U]nderpinning much of the failure of the land-reform policy has been a distinct lack of political leadership and weak government capacity to be an effective player in the land market”.

329 DRDLR Green Paper 5.

330 The four tiers of the proposed tenure system include leasehold for state and public land; freehold (with limitations) for privately owned land (it is speculated that the reference to “with limitations” is an indication that the possibility exists that government in future might consider a ceiling on the amount of land an individual might own (Hartley 2010 http://www.businessday.co.za/articles/Content.aspx?id=104501 and Du Toit 2010 http://www.boerevyheid.co.za/forums/showthread.php?22021-Staat-wil-s%EA-hoeveel-grond-boere-mag-besit-en-bewerk) - Agri SA opposes this recommendation and notes that in the national context bigger land owners make the biggest contribution to food security and exports (SAPA 2011 http://www.news24.com/SouthAfrica/Politics/State-wont-manage-land-reform-Agri-SA-20110901); freehold (subject to obligations and conditions) for land owned by foreigners; and communally owned land (DRDLR Green Paper 6). According to PLAAS (2011 http://us2.campaign-archive1.com/?u=1ef2bf75c99750631a09a7141&id=0d793df2c0) “The four tier tenure system proposed by the Green paper will not solve any of the tenure systems faced by poor and marginalised South Africans”. The issue of land owned by foreigners received much attention and was widely debated before the release of the Green Paper and although the Green Paper makes provision for the curtailment of foreign land ownership it provides no justification for such proposals. It was reported that the Green Paper would make provision for precarious tenure for foreigners where land owned by them would revert back to the state if they do not meet certain obligations (Radebe 2011 http://www.businessday.co.za/articles/Content.aspx?id=146974).

331 The functions of the Land Management Commission (LMC) include the issuing of advisory options and guidelines on land management; managing the regulatory environment in such a way as to ensure that land is managed in a manner that would protect its quality, and auditing to ensure the integrity of the inventory of state and public land (DRDLR Green Paper 6).
provision of fair and consistent land values and the determination of financial compensation in expropriation cases.332

For the purposes of this research, the most important proposed change to the land reform strategy is the Recapitalisation and Development Programme, which is aimed at ensuring that all farms redistributed in terms of the land reform programme are 100% productive. This will be achieved through a partnership approach where existing commercial farmers are involved on a risk-sharing basis. This programme, as an instrument to improve the current land reform programme, will be discussed in more detail in paragraph 2.5.2.

Despite the proposed changes the Green Paper is not without its faults, and it is likely that once the period of commenting on the draft has ended the final version could

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332 The creation of the office of the Land Valuer-General (LVG) is a direct result of the perceived failure of the willing buyer/willing seller approach to land reform, where land reform is the result of market forces and where the state purchases land for land reform on the open market at market value. The Green Paper identified the current land acquisition strategy based on willing buyer/willing seller as one of the reasons for the current slow pace of land reform (DRDLR Green Paper 7) – this position has been reiterated by President Zuma on numerous occasions (Marrian 2011 http://www.citizen.co.za/citizen/content/en/citizen/local-news?oid=205346&sn=Detail&pid=334&Land-reform-must-be-in-line-with-constitution–Zuma). In its response to the Green Paper, the Democratic Alliance (South Africa’s largest opposition party) describes the creation of the LMC and the LVG as just another layer of bureaucracy which, due to the encroachment of its powers on those of the judiciary, might not pass constitutional muster (DA 2011 http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page/71654?oid=25568&sn=Detail&pid=71616); SA Commercial Prop News http://www.sacommercialpropnews.co.za/business-specialties/property-empowerment-transformation-charter/3485-unconstitutional-proposals-in-green-paper-on-land-reform-must-be-removed.html and Anon 2011 (6) The Contemporary Gazette 18 – 19. The LVGs mandate to determine financial compensation in expropriation cases should also be strongly questioned, since this is a constitutional competency allocated to the judiciary. In reaction to comments that aspects of the Green Paper might be unconstitutional, the Minister of Rural Development and Land Reform is reported to have said that “[s]o if the honourable members are suggesting that there are aspects of the green paper which border on unconstitutional we will ask cabinet to change the Constitution if we need to...” (Nkwinti as quoted in Vecchiatto 2011 http://www.news24.com/SouthAfrica/Politics/DA-minister-at-odds-over-land-reform-20110920). In reaction to these remarks, the Afrikanerbond described the Minister’s comments as “a serious threat to democracy” (Mohamed 2011 http://www.citizen/content/en/citizen/local-news?oid=226741&sn=Detail&pid=334&Afrikanerbond-hits-out-at-ANC), while the Transvaal Agricultural Union noted that food shortages would be the first consequence if the Constitution is amended for the sake of land reform (SAPA 2011 http://www.news24.com/SouthAfrica/politics/TAU-SA-worries-over-constitution-claims-20110921). For a general discussion of the willing buyer, willing seller approach, see Bosman Land reform: A contextual analysis 9 – 14; Lahiff 2007 (28) Third World Quarterly 1577 – 1597 and Ntsebeza and Hall (eds) The Land Question 98 – 100.
contain other recommendations. The current draft lacks substance and vision and fails to address the most urgent challenges related to the slow pace of redistribution and the excessively high percentage of unproductive land reform farms. According to PLAAS the Green Paper “provides almost no guidance on any of the crucial questions facing land and agrarian reform” while being “insubstantial and vague”.

Although the proposals make provision for the establishment of a Land Valuer-General to determine a market value for land earmarked for land reform, the draft fails to address the fundamental issue of available resources. As long as the state does not have enough resources to fund the purchase of approximately 20 million hectares of agricultural land the pace of the land reform programme will remain slow.

Furthermore, Government is not assuming enough responsibility for the failures of the land reform programme. Mazibuko critically comments:

> The government cannot begin to address the issue of land reform without acknowledging where the current implementation challenges in its own department lie. Instead, it focuses almost entirely on the faults of our history, as well as attempting to argue that the current economic environment and property ownership systems are to blame for the state’s failure to implement an effective programme of land reform.

The Green Paper fails to address the primary failure of the land reform programme – unproductive farming enterprises. Although the redistribution of more agricultural land will be met with approval on a political level, the real challenge lies on an economical level where, given the history of land reform projects, the redistribution of more land could threaten food security and the national economy. What is required is an agricultural land reform programme that creates economic conditions which facilitate

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333 The discussion contained in this section is based on the Green Paper on Land Reform as of 12 September 2011.
335 PLAAS 2011 http://us2.campaign-archive1.com/?u=1ef2bf75c99750631a09a7141&id=0d793df2c0.
336 In its comment on the Green Paper, PLAAS used words and phrases such as “a huge disappointment” and “bafflingly slight” while describing the Ministry as “unable to provide the leadership” required in order to address the urgent state of affairs in land reform (PLAAS 2011 http://us2.campaign-archive1.com/?u=1ef2bf75c99750631a09a7141&id=0d793df2c0).
337 With reference to the LVG the Green Paper is silent on issues such as the qualifications of valuers and whether or not it is a requirement that the valuers be registered with the relevant professional body.
sustained growth, attract investment, increase productivity, create more employment opportunities and promote food security.

One of the proposed instruments in the Green Paper aimed at addressing the issue of unproductive agricultural land reform projects is the Recapitalisation and Development Programme (RADP). The following paragraphs will identify the objectives of the RADP; discuss the programme’s scope of application and provide an overview of recommendations to be implemented in order to reach the stated objectives.

2.5.2 The Recapitalisation and Development Programme (RADP)

2.5.2.1 The objectives of the RADP

The RADP (supported by a Recapitalisation and Development Fund and strategic partnerships) is a direct consequence of the failure of an excessively high number of agricultural land reform projects. It was acknowledged by the Minister of Rural Development and Land Reform that up to 90% of all land reform projects are unproductive and not functional, resulting in South Africa’s becoming a net importer of food with food security under threat and the state losing revenue. The RADP targets these unproductive land reform projects (which were productive, going concerns when originally purchased by the state) and represents an attempt by Government to resuscitate these projects. One of the causes of the failure of these projects is a lack of support services for those who benefitted from the land reform programme (emerging farmers) and it is this cause that the RADP attempts to address.

Based on the knowledge that South Africa is becoming a net importer of food and that the majority of land reform projects are failing or have already failed, the RADP

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339 In November 2009 it was reported that 49% of land reform projects have failed to establish successful farming operations on the redistributed land (Cook 2009 http://www.fin24.com/Economy/Land-reform-new-thinking-needed-20091123).

340 Nkwinti 2010b http://www.ruraldevelopment.gov.za/ DLA-Internet//content/document_library/Ministry /Ministry_Minister_Speeches/Speech2.pdf. According to the DRDLR most of the approximately 6 million hectares of agricultural land which has been redistributed in terms of the land reform programme lies unproductive (DRDLR Recapitalisation and Development Programme 3). It is estimated that up to 4 000 agricultural land reform projects are in financial distress and in urgent need of assistance (Ukhabi Re-thinking rural transformation in South Africa 10).

identifies five objectives aimed at addressing the situation. These objectives are: to increase production; to guarantee food security; to graduate small farmers into commercial farmers; to create employment opportunities within the agricultural sector; and to establish rural development rangers. The first four objectives are directly linked to the issue of unproductive agricultural land reform projects and are clearly aimed at re-establishing South Africa as a net exporter of food through a vibrant and performing agricultural land reform programme. The objective of establishing rural development rangers is less clear. No indication is given of what is envisaged by this decision. It is unclear whether the rural development rangers are individuals who are appointed by the DRDLR or are the mentors provided for in the policy framework.

2.5.2.2 The scope of application

The RADP will be accessible primarily to emerging black farmers needing and deserving support for the farming operations on land which has already been acquired for land reform projects, as well as future land transactions designated to land reform. The programme is further specifically available to farms acquired by black farmers outside the land reform programme, who are experiencing financial difficulties. Although the policy framework for the programme states that stringent conditions will have to be met in order to receive support, no indication of such conditions, other than the submission of a credible business plan, is provided. It should be noted that farms will not automatically qualify for support. Farms will be selected on a case-by-case basis in conjunction with other state departments such as Agriculture.

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342 DRDRL Recapitalisation and Development Programme 3 – 4.
343 Future land beneficiaries will also qualify for support when they meet the conditions for support. From its scope of application it is evident that this programme is focussed on those farmers or communities who have benefitted from the land reform programme (received land from the state) but who have not received adequate support to sustain production.
344 DRDRL Recapitalisation and Development Programme 3 and 4. In this regard, the programme is aimed at providing support to emerging farmers who purchased farms with the assistance of lending institutions (such as the Land Bank) without any state support.
345 The fact that stringent conditions will have to be met represents an attempt to deter beneficiaries of the land reform programme from becoming dependent on support and the creation of a culture of entitlement and dependency.
346 DRDRL Recapitalisation and Development Programme 4.
2.5.2.3 Recommendations

The RADP consists of two elements: Recapitalisation and Development. According to the policy document the recapitalisation element is entirely resource-driven and will focus on land reform and other strategic farming enterprises that have received little or no agricultural support but will grow if further investments are provided.347

On the other hand, the development element’s primary focus is on the expansion and progress of farming enterprises, which is to be achieved through mentoring and collaboration with strategic partners.348

However, resources are required if recapitalisation is to take place or to ensure the growth and development of farming enterprises. The lack of financial support to land reform beneficiaries was identified as one of the major reasons for the crisis in which the land reform programme finds itself. In order to address this issue a Recapitalisation and Development Fund has been created by the DRDLR.

2.5.2.3.1 The Recapitalisation and Development Fund (RDF)

In order to achieve the goal of ensuring that all land reform farms are 100% productive and sustainable, an amount of R1.3 billion has been made available until the end of 2014.349 The RDF is funded through the DRDLR’s annual budget and consists of 25% of the Department’s annual land reform budget.350 The fund replaces existing land

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347 DRDLR Recapitalisation and Development Programme 5. It is interesting to note that although the Green Paper is not yet policy, the RADP is already included in the DRDLR’s strategic plan for 2011 – 2014. According to the strategic plan it is expected that by 2014 the programme would have recapitalised and developed 1 807 farms (DRDLR Strategic Plan 2011 – 2014 41).

348 According to the Green Paper development refers to “shared growth and prosperity, relative income equality, full employment and cultural progress”, while underdevelopment refers to “poverty, relative income inequality, unemployment and cultural backwardness” (DLDLR Green Paper 4 – 5). In terms of the DRDLR’s Strategic Plan 2011- 2014 it is estimated that 1 807 farms will be recapitalised and developed by 2014 (DRDLR Strategic Plan 2011 – 2014 41). It is not clear how the Department reached this figure and whether or not these farms have been pre-selected. Given the Department’s performance in the past, it remains to be seen if this target will indeed be achieved. It is noteworthy that the move towards joint ventures with strategic partners and co-management agreements has, before the release of the Green Paper, been identified as an option which has proven to be successful in the redistribution programme (Hall 2004 (38) Canadian Journal of African Studies 666).


350 For the 2010/2011 budget period this amounted to R900 million.
reform grants such as the 25% PLAS Operational Budget; the 25% Household Development Grant; the 25% Restitution Development Grant and the Restitution Settlement Grant.\textsuperscript{351} Funding will be made available in accordance with an approved business plan and will be available for a maximum of five years. For the first five years of a funded project the DRDLR will act in an oversight capacity, overseeing the management of the projects. It is likely that the funding will decrease over the five-year period since it is expected that at the end of each financial year the project will have to be more productive than in the previous year, thus needing less support. It is unclear how the Department will actually monitor and assess the progress of a project and what measures it will take if the project does not perform according to its business plan. Neither the RADP nor the \textit{Green Paper} makes reference for example to the “use-it-or-lose-it” principle, where land reform beneficiaries will forfeit the land if the project is found to be unproductive or not producing as agreed upon. It remains to be seen what measures, if any, the Government will put in place to ensure that government funding is not simply channelled into a bottomless pit without resulting in any improvement in levels of rural unemployment, economic growth and relative income equality.

Simply throwing money at the problem is not the solution to the land reform crisis, nor does the DRDLR have the capacity to solve the problem on its own.\textsuperscript{352} However, it appears as if the DRDLR has taken cognisance of these facts and is placing more emphasis on the role of mentors and strategic partners in addressing the land reform challenges.

2.5.2.3.2 Mentorship

In connection with mentorship the Department noted that

\textquote[353]{m}entorship will become a central element of the programme given the skills gap of land reform beneficiaries\textsuperscript{353}.

\textsuperscript{351} DRDLR \textit{Recapitalisation and Development Programme} 5 – 6. Apart from receiving funding from National Government, funding may further be sourced from strategic partners who for strategic or social reasons want to get involved with land reform.

\textsuperscript{352} The effect of the RADP is that Government is in effect paying twice for the land it had previously acquired.

\textsuperscript{353} DRDLR \textit{Recapitalisation and Development Programme} 6.
Through the establishment of the mentorship programme the DRDLR is attempting to engage on a formal basis the skills and knowledge of experienced farmers. According to the policy, the mentorship programme is aimed at equipping qualifying land reform beneficiaries with farming related skills in order to transform the farming projects from unproductive, unsustainable farms into farming units which make significant contributions to the agricultural sector.\textsuperscript{354}

The expenses related to the appointment of mentors will be covered through the RDF, although this funding will be available for an agreed period of time only. Farming enterprises are expected to cover these costs once they have become productive and are generating a profit. The DRDLR has recently published advertisements for persons from the agricultural sector to act as mentors on land reform farms. Prospective mentors should provide proof of having extensive farming experience and should have experience in skills transfer and providing training.\textsuperscript{355} Mentors should assist land reform beneficiaries with farm assessments, the preparation of business plans and the implementation of strategies to transform the farms into productive units.

The mentorship approach is closely linked to the strategic partnership approach and mentors are encouraged to enter into co-management or share-equity agreements where the mentor as the strategic partner assumes some of the risk of the farming operations.

2.5.2.3.3 Strategic partners

Strategic partnerships are central to the RADP and organised agriculture has to embrace this intervention.\textsuperscript{356} The strategic partnership approach is a central theme of

\textsuperscript{354} Kane-Berman has an interesting opinion on the Department’s move to include the private sector in the land reform programme. According to him “at first sight, bringing in the private sector seems enlightened. Probe a little deeper and a neat trick is being performed. Responsibility for an extended series of land reform projects is being transferred from the state to white farmers, who are being trussed up in more and more red tape. They are thus being set up as scapegoats for future failures, which will then be the pretext for an even more aggressive programme of expropriation of land” (Kane-Berman 2010 http://www.businessday.co.za/articles/Content.aspx?id=124768).


\textsuperscript{356} The strategic partnership approach in the land reform programme is not a new approach. As early as 1996 the then Department of Land Affairs’ Land Reform Policy Committee released a document entitled Private sector initiatives in land reform in which it was noted that “[t]he government supports
this research, where companies in the agricultural sector become involved in agricultural land reform projects through their CSR initiatives.\textsuperscript{357} However, in the discussion in chapter 4 of the role of Government in establishing an enabling CSR environment it will become clear that the strategic partnership approach is also central to an enabling CSR policy framework.\textsuperscript{358}

According to the policy\textsuperscript{359} the most important element of the strategic partnership approach is that the partner shares in the risk.\textsuperscript{360} The policy identifies three major types of partnerships: co-management, share-equity and contract farming. Co-management is described as

an arrangement where two or more social actors negotiate, define and guarantee amongst themselves, a fair sharing of the management functions, entitlements and responsibilities for a given territory or set of natural resources.\textsuperscript{361}

The policy identifies co-management agreements between land reform beneficiaries and neighbouring farmers as an example of how co-management can transform unproductive agricultural projects.\textsuperscript{362} In this context, the co-management arrangement will be formalised through an agreement between the land reform beneficiaries and the neighbouring farmers, in terms of which each of the parties’ rights and duties are explained. Government plays an important facilitation role and provides funding and other support services to strengthen the collaboration.
Share-equity schemes are based on a partnership between land reform beneficiaries and private sector partners, where the land reform beneficiaries buy shares in a farming enterprise with Government funding. The idea behind these schemes is that land reform beneficiaries acquire a stake in a farming enterprise in which they are already involved. Although these schemes have in the past been proven as one of the few approaches to land reform that has actually seen benefits being passed down to the beneficiaries, these schemes will not feature further in this research since the research is primarily focused on the contribution of companies in the agricultural sector to land reform, where the companies do not necessarily wish to become co-owners of land reform projects.

The final manifestation of strategic partnerships in terms of the policy is known as contract farming. Contract farming, as the name indicates, is based on a binding contract between a farmer and another commercial partner (such as a supermarket) in terms of which the farmer provides a specified quantity of produce to the purchaser, who then sells the product on the market. The advantage of this type of agreement is that the farmer has a market for his products while the purchaser has a guaranteed supply of products. An agricultural company focusing on the maize market, for example, will be able to conclude contracts with agricultural land reform beneficiaries in terms of which the company agrees to purchase the maize from the emerging farmers (land reform beneficiaries) at a pre-determined price. The agreement on the price at the conclusion of the contract creates certainty amongst the contracting parties and guarantees that the emerging farmers have a market for their produce. In contracts such as these the risk is more evenly spread between the contracting partners. The producer has the risk that he will be unable to deliver the agreed quantity of produce, while the purchaser has the market risk and the risk that it would be unable to pay the contract price or that the market will be overstocked with a lower demand on the product. However, contract farming could also include the provision for example of physical inputs such as seed or fertiliser or the provision of technical training and

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363 Although the Government placed a moratorium on farm equity schemes in June 2009, it was reported at the end of 2010 that the government would lift the moratorium in January 2011 (SAPA 2010 http://www.businesday.co.za/articles/Content.aspx?id=126736).
accounting services by the strategic partner. In this type of agreement the emerging farmers are paid for their labour and the use of their land. Where physical inputs are provided it speaks for itself that the contract price for the produce will be lower, since most of the risk lies with the strategic partner.

2.6 Conclusion

The success of the overall land reform programme will be evaluated against the extent to which the programme has improved food security, created a more equal distribution of income, increased the well-being of beneficiaries through improved access to clean drinking water and sanitation and improved housing, and given rise to a more sustainable use of natural resources.\textsuperscript{364} A failed land reform programme threatens economic stability and food security and has far-reaching political implications. Given the possibility of the realisation of such consequences, this chapter has been aimed at answering the first specific research question, which inquires as to how land reform is currently being addressed in South Africa. In order to address this question the nature of access to land as a constitutionally entrenched right had to be examined and the progress and challenges of the restitution and redistribution programmes had to be discussed.

From the discussion of the lack of progress made in the restitution and redistribution programmes, it has become clear that the overall land reform programme has failed by a large margin to meet its delivery targets and failed to make a significant contribution to the socio-economic position of the land reform beneficiaries. This failure has highlighted the wide gap between the goals of the programme and the resources available to meet those goals. In attempting to meet the delivery targets of the land reform programme, a balance needs to be struck between the number of hectares transferred and the ability of the beneficiaries to produce on a sustainable level. The overemphasis on the number of hectares transferred as opposed to the development of sustainable land reform projects which contribute to food security is creating a

\textsuperscript{364} Kleinbooi in Hall (ed) Another Countryside? 7.
potentially volatile situation which could see the landless act on calls to seize land without permission and without paying compensation.

In the context of agricultural land, the transfer of land in the land reform programme has not been strongly linked to agricultural production and very little sustainable agricultural production is taking place on farmland restored through the programme. This situation is mainly due to an insufficient support system, a lack which could in future, if not properly addressed, become an even bigger threat to the agricultural economy.

Together with the insufficient support system, the current selection of beneficiaries for redistributed land is threatening food security, with land being redistributed to people who have no interest in farming. Productive agricultural land must be released only to suitably experienced land reform beneficiaries, and greater consideration should be given to beneficiary and land selection. Walker correctly notes:

Redistributing land to the poor and the marginalised cannot, in itself, guarantee them significantly enhanced incomes, livelihoods or even a stronger sense of social well-being, nor (though this remains untested) can it guarantee social stability to the broader society.

It has become evident in the preceding paragraphs that the mere restitution or redistribution of land to land reform beneficiaries does not contribute towards the improvement of their quality of life, nor does it contribute towards eradicating poverty, nor does it translate into improved agricultural productivity. The failures of the land reform programme especially with regard to the restitution and redistribution of rural land are a clear indication that a paradigm shift is required to ensure that future land reform projects are approached in such a manner that they make a sustainable contribution towards agricultural development.

Instead of claimants merely receiving land, Government should do proper feasibility studies to determine if the restitution or redistribution of the land would be to the benefit not only of the beneficiaries but also to the overall economic benefit of the country. The

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366 In Ntsebeza and Hall (eds) The Land Question 134.
mere redistribution of land is no guarantee that the land will be optimally utilised in the fight against poverty.

It is imperative that more pragmatic solutions are found for land reform in order to ensure its future success. According to Olivier,\(^{367}\) addressing the new approach of the DRDLR,

\[
\text{[a] strong focus is placed on the identification of suitable strategic partners and the conclusion of agreements that will ensure the successful operation of the enterprise on the restored land, and the effective transfer of skills to land reform beneficiaries.}
\]

The private sector (especially the agricultural sector) is strategically well positioned to make a significant contribution towards the success of agricultural land reform. The private sector, in partnership with Government, has the capacity (resources and skills) to make meaningful contributions to land reform and agriculture.\(^{368}\) The CDE fittingly noted.\(^{369}\)

Some leading companies pioneered voluntary land reform long before it became official government policy, and today the private sector’s role in land issues is bigger than ever. Despite this, there seems to be relatively little government and public awareness of the considerable corporate and private sector contribution to land reform. The main contributions of the private sector fall into five categories – finance, transfers through the land market, BEE and equity deals, post settlement support, corporate social investment. (emphasis added)\(^{370}\)

Despite the reference to corporate social investment as opposed to corporate social responsibility, this statement supports the main theme of this research and acknowledges the fact that through its CSR initiatives the private sector can contribute to land reform.

\(^{367}\) Olivier et al (eds) Restitution operational strategy 5.

\(^{368}\) For a discussion of current private sector initiatives in various sectors related to land reform, see Kleinbooi in Hall (ed) Another Countryside? 193 – 205 and CDE Land reform in South Africa, 2008 34 – 44.

\(^{369}\) CDE Land reform in South Africa, 2008 30.

\(^{370}\) From this research it will become evident that issues like black economic empowerment or post-settlement support are viewed as manifestations of the private sector’s CSR initiatives. For a discussion of the BEE elements that could be classified as being manifestations of CSR, see par 5.2.2.5.
The CDE\textsuperscript{371} in their report on land reform in South Africa made various recommendations on how to reconfigure land reform. One of the recommendations related to the role of the private sector and its potential contribution to land reform. In this regard it was remarked:

It is clear that effective implementation will require enhanced capacity in both government and the private sector in strategic policy design ... Successful delivery will only take place on the basis of an effective public–private partnership in which the roles of both public and private sector actors and market forces should be clearly defined, and mutually agreed.\textsuperscript{372} (emphasis added)

In order to ensure that future redistribution projects result in economically sustainable units it is proposed that Government should engage both the beneficiaries as well as the private sector in the process. The contribution of the private sector through its CSR initiatives has largely been ignored in the land reform process and the involvement of this sector as a strategic partner is currently not a requirement in terms of the programme. Due to its access to skills and the availability of financial resources within this sector is it almost unthinkable that this sector should be excluded from the programme. The question arising from this is how to engage the private sector in the overall land reform programme. It is proposed that the private sector should be involved in the process and that agreements should be reached between Government, a private sector partner and the beneficiaries of agricultural land. In terms of this agreement every partner will take on certain specified responsibilities and the responsibilities will effectively be shared between the contracting parties, creating Mutual Obligation Agreements.

The private sector has the potential to make a major difference to the success of land reform if the sector strategically repositions land reform. This research argues that the contribution of the private sector is embodied in the sector’s Corporate Social Responsibility initiatives and that due to their strategic position in the sector agricultural companies have the ability to contribute to land reform. The next chapter will reflect on CSR and will \textit{inter alia} address the definitional construct of CSR and evaluate the business case for and the drivers of CSR.

\textsuperscript{371} CDE \textit{Land Reform in South Africa} 21 – 23.
\textsuperscript{372} CDE \textit{Land Reform in South Africa} 22.
Chapter 3: Framing Corporate Social Responsibility

3.1 Introduction

Corporate social responsibility stems from corporate power. Businesses wield significant economic, political and social power and with this power come social responsibility.\(^1\) Through their economic power, businesses have the ability to drive or destroy an economy. Through their political power and the use of corporate lobbying, businesses have the ability to shape public policy. Through their social power businesses have the ability to address social problems such as unemployment, poverty and a failing land reform programme.\(^2\) However, responsibility also breeds power – the more socially responsible a business is the more credibility it would receive in its operating communities and the stronger its licence to operate would be. A stronger licence to operate provides a business with more power. In this sense power and responsibility are symbiotic terms – the one follows the other.\(^3\) Social responsibility needs to reflect the amount of social power that a business has. According to Davis and Blomstrom\(^4\) the iron law of social responsibility is that “those who do not take responsibility for their power ultimately shall lose it” and “in a free society, discretionary abuse of societal responsibilities leads, eventually, to mandated solutions”.\(^5\) If a business does not act on its social responsibility it will lose its power to other businesses that make use of their social power in a responsible manner.

In the current business dialogue, the iron law relates to the licence to operate\(^6\) and a business’ legitimacy to operate as viewed by society. Businesses that act in a socially

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\(^1\) Davis 1960 *California Management Review* 71.

\(^2\) In this regard social power refers to the influence that business holds over society.

\(^3\) Boeger, Murray and Villiers (eds) *Perspectives on Corporate Social Responsibility* 103. For a discussion on power and responsibility see Schaap 2000 (20) *Politics* 129 – 135 and Allouche (ed) *Corporate Social Responsibility* 20.

\(^4\) Davis and Blomstrom *Business and its Environment* 171. Also see Lawrence and Weber *Business and Society* 49 and Davis 1973 (16) *Academy of Management Journal* 312 – 322. The iron law of social responsibility has also been described as the rational argument for CSR (Werther and Chandler *Strategic Corporate Social Responsibility* 2\(^{\text{nd}}\) edition 17).

\(^5\) The possibility of a “mandated solution” will be discussed in more detail in chapter 6.

\(^6\) The license to operate is regarded as one of the drivers of CSR. For a discussion of the concept “licence to operate”, see par 3.6.6.
irresponsible manner stand to lose their legitimacy and consequently their licence to operate.

With this in mind, the meteoric rise in the prominence of Corporate Social Responsibility (CSR) in the last few decades necessitates a closer examination of the important developmental contribution that this phenomenon can make especially with regard to the South African position and more specifically, the contribution to a successful land reform programme. Local business are increasingly beginning to view themselves as social enterprises with the ability to have a social impact on the communities in which they operate – the ability to address contemporary social issues. Businesses are also becoming aware of the fact that by harnessing their social power they could gain a strategic advantage over their competitors, which ultimately reflects positively on the bottom line.\(^7\)

Globally the issue of CSR is embedded within the dialogue of business, civil society and government. Within the business dialogue CSR has “acquired distinctive organizational status”\(^8\) and has become part of the overall management process, while civil society is increasing its pressure on businesses to raise their levels of involvement in CSR. A substantial increase has been noticed in the number of businesses that annually report on various aspects of their responsibilities towards their stakeholders.\(^9\) The increase in disclosure has been encouraged by a growth in the number of CSR standards, codes of conduct and government initiatives.\(^10\) Combined with the increasing pressure on businesses to raise their levels of CSR involvement is the growing awareness in governments in general of the importance of tapping into businesses’ social responsibilities. In the local context, this is evidenced by legislative interventions requiring businesses to make socio-economic development contributions in order to empower those disadvantaged by the apartheid regime. The most notable contribution

\(^7\) The benefits or advantages of CSR will be discussed in more detail in par 3.6.
\(^8\) Crane et al (eds) Corporate Social Responsibility 4.
\(^9\) Crowther and Capaldi Corporate Social Responsibility 19. The European Commission reported that the number of European businesses reporting in line with the requirements of the Global Reporting Initiative increased from 270 in 2006 to more than 850 in 2011 (EC Corporate Social Responsibility (COM(2011) 681 5)).
\(^10\) Included in these standards, codes of conduct and government initiatives are the GRI, AA1000, the United Nations Global Compact and the ISO 26000 standard.
in this regard is the *Broad-based Black Economic Empowerment Act*\(^{11}\) together with its *Codes of Good Practice on Black Economic Empowerment*.\(^{12}\)

An increase in the scope of social problems such as increasing crime levels, rising poverty and unemployment, environmental degradation and the ever increasing AIDS pandemic is requiring the private sector to re-examine its responsibility not only to society in general but also specifically to its stakeholders.\(^{13}\) Inequality such as income inequality persists and few effective steps have been taken to redress the persistent inequalities. From the current persistent high levels of poverty and unemployment it appears as if the Government does not have the capabilities or resources (or at least has very limited capabilities and resources) to ameliorate the extent of these social problems. Consequently the role of the private sector is increasingly being seen as a possible means through which these social problems can be addressed.

An example of how the business sector can contribute towards the amelioration of social problems is to be found in the sector’s social responsibility to its various constituents such as its shareholders, employees and local communities.\(^{14}\) The private sector should conduct its business in a socially responsible manner that contributes to sustainable development. Through the acceptance of its social responsibility and the accompanying social initiatives, the private sector has an unmistakable role to play in addressing the social problems facing the country. Examples of CSR initiatives as manifestations of businesses’ social responsibility include the adoption of progressive human resource management practices and projects aimed at community upliftment.\(^{15}\)

\(^{11}\) 53 of 2004 (hereinafter referred to as the *BEE Act*). The issue of Black Economic Empowerment (BEE) will be dealt with comprehensively in par 5.2.2.

\(^{12}\) GN 2036 in GG 28351 of 20 December 2005 (hereinafter referred to as the *Codes of Good Practice*). The *BEE Act*, the *Codes of Good Practice* and the various Sector Charters form the BEE framework.

\(^{13}\) Due to the important position that stakeholders take up in the CSR dialogue, par 3.4.2.2 will elaborate on the stakeholder approach as one of the main CSR approaches.

\(^{14}\) This research focuses exclusively on the contribution of the private *business* sector, especially the agricultural sector. It is recognised that other organisations such as non-profit organisations also have a social responsibility but for the purposes of this research the focus will be on business within the agricultural sector.

\(^{15}\) McWilliams, Siegel and Wright 2006 (43) *Journal of Management Studies* 1.
The core of CSR lies in acknowledging the fact that a business has an impact on the societies within which it features and that, resulting from this impact, the business has a social responsibility to the affected societies.

This chapter addresses the second and third specific research questions and attempts to illustrate how CSR is framed within the national context and how socially responsible practices can contribute to the land reform programme. In order to answer these questions the chapter will establish how CSR is framed within the national context and indicate how CSR can contribute to the land reform programme. In order to address these secondary objectives, the concept of CSR will be defined and the historical development of CSR will be traced. Following this, a discussion will be provided of the theoretical underpinnings of CSR. The business case for CSR will be addressed and the benefits and limitations of CSR will be discussed. Finally the major drivers of CSR will be described.

In order to address the first issue regarding CSR as a definitional construct, this chapter will provide an examination of a variety of international and national definitions that attempt to define CSR. Following this, an examination of the most prominent definitions of CSR will be performed in order to arrive at a working definition of CSR for the purposes of this research. The second section of the chapter will probe some of the most notable approaches to or theories on CSR including the work of Milton Friedman, Edward Freeman and Archie Carroll, all of whom approach social responsibility from different perspectives. Once the different approaches to CSR have been discussed, the following sections address two main questions: Why does businesses pay any attention to CSR and does CSR provide any strategic benefit to businesses? This section will focus on what has commonly been labelled “the business case for CSR” and will examine the advantages that CSR as a strategic management tool has for a business. Realising, however, that CSR is not without its failings and limitations, the section will continue to examine some of the major points of criticism levelled against CSR.

After settling the issue of whether or not CSR provides any strategic benefit to a business, the focus will shift toward CSR drivers, examining the reasons motivating a business to act with social responsibility. The discussion will highlight the fact that the
majority of a business’ stakeholders have the ability to encourage a business to be socially responsible. The discussion will, however, note that some of the drivers of CSR are not as potent in a developing country due to the fact that consumers and civil society are for the most part not as well organised as they are in developed nations. In the final instance, the discussion focuses on the Government as a driver of CSR and the important role that Government has to play in facilitating CSR. This discussion provides the foundation for Chapter 5, where the current legislative framework pertaining to CSR is discussed.

Businesses have the ability through their CSR initiatives to transform and develop society and address social issues arising in many instances from the inability of Government to attend to the most basic human needs.16

Although many international CSR definitions refer to the fact that CSR “goes beyond the law” or that “CSR begins where the law ends” the need exists for a strong legislative framework where businesses are encouraged through incentives or the threat of prosecution to engage in CSR initiatives. The role that the Government has to play in establishing an enabling CSR environment will be addressed in chapter 4, while chapter 5 will determine which legal requirements and guidelines found nationally and internationally could form part of a national legal framework for CSR.

In the following sections each of the identified issues will be discussed in more detail in order to attempt to address the issues in a meaningful way.

16 Porter and Kramer (2006 (84) Harvard Business Review 84) correctly note that no business can solve all of society’s social problems and as a result of this, a business must select issues that intersect with its core business. The authors argue that: “The essential test that should guide CSR is not whether a cause is worthy, but whether it presents an opportunity to create shared value – that is, a meaningful benefit for society that is also valuable for the business” (emphasis added) (Porter and Kramer 2006 (84) Harvard Business Review 84). The authors further distinguish between generic social issues which may be important to society but do not affect the company’s operations nor contribute to the company’s competitiveness and value chain social impacts which represent those social issues which could be significantly affected by the company’s operations (Porter and Kramer 2006 (84) Harvard Business Review 85). Companies should attempt as far as possible to address those social issues which fall within the company’s field of expertise. As an example: it would be more beneficial for an agricultural company to assist emerging farmers who received land in terms of the land reform programme than to make a contribution to a local home for the aged.
3.2 CSR definitional construct: “Terminology in Turmoil”

3.2.1 Introduction

One of the biggest challenges faced when conducting research on the topic of CSR is to provide a definition of this contested notion. Despite the abundance of definitions, it is generally accepted that there is no consensus on a single universally accepted definition of CSR. This uncertainty is exacerbated by the fact that it is argued that CSR is a context-dependent concept that may mean different things to different people. The uncertainty was aptly described by Votaw almost 40 years ago when he wrote:

[C]orporate social responsibility means something, but not always the same thing to everybody. To some it conveys the idea of legal responsibility or liability; to others, it means socially responsible behavior in the ethical sense; to still others, the meaning transmitted it that of “responsible for” in a causal mode; many simply equate it with a

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17 The term “CSR” consist of the words “corporate”; “social” and “responsibility”. In the context of this research “corporate” refers specifically to legal entities involved in the agricultural sector and more specifically agricultural businesses such as Suidwes (Pty) Ltd or Senwes (Ltd). The contributions of commercial farmers are in no way less important, but the research is limited to the contribution which the major agricultural companies can make toward the success of the land reform programme. “Social” refers to the fact that society is the ultimate beneficiary of corporate responsibility, while “responsibility” refers to the acceptance of the consequences and impacts of corporate action on society. For a discussion of these individual terms, see Horrigan Corporate Social Responsibility 38 – 39.

18 WBCSD CSR: Meeting changing expectations 3; WBCSD CSR – The WBCSD’s journey 2; Horrigan Corporate Social Responsibility 34; Okoye 2009 (89) Journal of Business Ethics 614 and Carroll 1979 (4) Academy of Management Review 497. To illustrate the lack of consensus regarding a definition of CSR, it must be noted that a period of 30 years has gone by between the remarks of Carroll and Okoye. Van Marrewijk (2003 (44) Journal of Business Ethics 96) notes that there has been a proliferation of terms and that the diversity and overlap in terminology, definitions and conceptual models poses obstacles to academic debate and research. More than 35 years ago, Sethi (1975 (17) California Management Review 58) remarked: “the phrase corporate social responsibility has been used in so many different contexts that it has lost all meaning”, while Banerjee (2001 (1) Journal of Corporate Citizenship 42) notes that CSR is “too broad in its scope to be relevant to organizations”. In an attempt to provide an inclusive definition of CSR, Blowfield and Frynas (2005 (81) International Affairs 503) propose that CSR be used as an umbrella term which recognizes “(a) that companies have a responsibility for their impact on society and the natural environment, sometimes beyond legal compliance and the liability of individuals; (b) that companies have a responsibility for the behaviour of others with whom they do business (e.g. within supply chains; and (c) that business needs to manage its relationship with wider society, whether for reasons of commercial viability or to add to society”.


charitable contribution; some take it to mean socially conscious; many of those who embrace it most fervently see it as a mere synonym for legitimacy in the context of belonging or being proper or valid; few see a sort of fiduciary duty imposing higher standards of behavior on businessmen than on citizens at large.

Votaw is echoed by Kitchin\(^\text{21}\) when he notes:

CSR is a confusing thing. One moment is seems to mean the engagement of non-governmental organisations (NGOs), the next it is all about charitable donations, and five minutes later it seems to mean the ethical treatment of employees. One minute the NGOs are calling the shots, the next the accountants are in the act selling “reputation assurance”.

Not only does an abundance of definitions for CSR exists, but various terms which have more or less the same definition are used interchangeably. According to Trialogue,\(^\text{22}\) a leading CSR consultancy business in South Africa:

... [a] plethora of terminologies are bandied around and used interchangeably – often incorrectly ... Such terms as: corporate citizenship; corporate social responsibility (CSR); sustainability; triple-bottom-line; corporate social investment (CSI); corporate governance; transformation; a companies' social and environmental obligations and so on, are frequently referred to without a clear understanding of the choice of term or the distinction between them.

A few more terms such as corporate social performance (CSP); corporate social responsiveness; corporate social and environmental responsibility (CSER); corporate community investment (CCI) and community engagement can be added to these to complete the set.\(^\text{23}\)

\(^{21}\) Kitchin 2003 (10) *Journal of Brand Management* 312.

\(^{22}\) Rockey (ed) *The CSI Handbook* 8th edition 6. Also see Waddock 2004 (109) *Business and Society* 5; Horrigan *Corporate Social Responsibility* 36 and Blowfield and Frynas 2005 (81) *International Affairs* 501. Although the main focus of Blowfield and Frynas’ article is on the evolution of corporate citizenship, it still provides a useful portrayal of the terminology used in business language in order to depict the fact that a business feels responsible for its constituencies.

\(^{23}\) The confusing use of terminology is further evident from the interchangeable use of the phrases “social responsibility” and “sustainable development”. It is noted in *Guidance on social responsibility* that “Social responsibility is closely linked to sustainable development. Because sustainable development is about the economic, social and environmental goals common to all people, it can be used as a way of summing up the broader expectations of society that need to be taken into account by organizations seeking to act responsibly. Therefore, an overarching objective of an organization’s social responsibility should be to contribute to sustainable development” (*SABS Guidance on social responsibility* 9). This position is supported by the WBCSD, which views CSR as an integral component of sustainable development, with corporate financial responsibility and corporate environmental responsibility being the other components (*WBCSD CSR: Meeting changing expectations* 3).
This section does not attempt to provide clarity on the various (possibly conflicting) definitions to be found in the field of CSR scholarship, nor will it attempt to clarify the (possible) distinction between the terms mentioned above. It will further not entertain the debate regarding the question of whether or not CSR is a mere manifestation of corporate citizenship. Where the matter of CSR and corporate citizenship is addressed this will be done as a result of the terminology being used interchangeably in definitions.

This section will attempt to provide an exposé of various definitions of CSR and where applicable refer to similarities or differences between the discussed definitions. In defining CSR the section will in the first instance focus on selected international definitions and continue to examine local definitions.

### 3.2.2 International definitions

#### 3.2.2.1 International institutions

##### 3.2.2.1.1 The World Bank

The World Bank, a leading international financial institution which provides financial and technical support to developing countries for capital programmes, defines CSR as:

> The commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life, in ways that are both good for business and good for development.

This definition encompasses a number of extremely important concepts when working with CSR. In the first instance the definition recognises that businesses have a social responsibility to contribute to sustainable economic development, thus acknowledging the fact that the primary focus of businesses should be to contribute to the economy

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24 World Bank 2003 [http://info.worldbank.org/etools/docs/library/57434/publicpolicy_econference.pdf](http://info.worldbank.org/etools/docs/library/57434/publicpolicy_econference.pdf). Dahlsrud (2008 (15) *Corporate Social Responsibility and Environmental Management* 4) identified five dimensions of CSR and used these dimensions to analyse a number of CSR definitions. These are: a) the environmental dimension, which refers to the natural environment; b) the social dimension, referring to the relationship between business and society; c) the economic dimension, referring to financial aspects of CSR; d) the stakeholder dimension, which refers to stakeholders and the stakeholder approach (to be discussed in par 3.4.2.1 and 3.4.2.2) and e) the voluntariness dimension, referring to actions not prescribed by law and in most instances based on ethical considerations. It appears that the World Bank’s definition does not explicitly include the environmental dimension, nor is any reference made to voluntariness.
and economic growth without negatively impacting on future generations. The second and equally important responsibility of businesses is to ensure, in conjunction with a variety of stakeholders and through its economic responsibility, that the quality of life of those affected by the business’ activities is substantially improved. Although this definition has a very distinctive developmental approach, the definition still accepts that CSR initiatives should also be beneficial to the business.

The World Bank’s definition can be used as a good point of departure for companies in the agricultural sector which wish to contribute to land reform through their CSR initiatives. Companies in the agricultural sector have a social responsibility to contribute to sustainable economic development, especially within the sector. In this regard, contributions to the land reform programme in collaboration with Government and land reform beneficiaries could lead to land reform projects that contribute to sustainable economic development.

### 3.2.2.1.2 The World Business Council for Sustainable Development (WBCSD)

The WBCSD is a global association of companies dealing exclusively with the issue of business and sustainable development and provides a base from which companies can explore sustainable development. The Council is viewed as a “catalyst for change towards sustainable development” that recognises the important contribution that CSR can make in affecting social change. Resulting from this recognition, the WBCSD defines CSR as

> the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large.

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26 WBCSD CSR: Meeting changing expectations.

27 WBCSD CSR: Meeting changing expectations 3. In 2000 the WBCSD defined CSR as “the commitment of business to contribute to sustainable economic development, working with employees, their families, the local community and society at large to improve their quality of life” (WBCSD Corporate social responsibility: Making good business sense 9). It is noteworthy that the definition provided in 2000 does not refer to the commitment of business as being a “continuing” one, nor does it refer to the fact that businesses are required to “behave ethically”. Following on Dahlsrud’s classification of dimensions (see fn 24), the definition provided by the WBCSD in 2000 does not include the voluntariness dimension, possibly indicating a move away from the notion that CSR is always based on voluntary actions.
This definition illustrates the fact that CSR has a social dimension through the acceptance that business stands in a relationship with local communities and society at large. The WBCSD’s definition of CSR acknowledges the fact that CSR has the potential to become an important driver for social progress as a result of the fact that the business sector forms part of society. The interdependency that exists between the business sector and society implies that businesses have an important role to play in improving the quality of life of the stakeholders involved in the businesses.\(^{28}\)

The WBCSD views CSR, together with corporate financial responsibility and corporate environmental responsibility, as the pillars for a business’ overall responsibility.\(^{29}\) The Council also supports the idea that a sound CSR strategy will be beneficial to business if the strategy is based on sound business principles. This definition again stresses the notion that CSR initiatives have the ability to make meaningful contributions to the development and transformation of society.

The WBCSD’s definition displays certain similarities with the definition of the World Bank. Both of these definitions regard CSR as the commitment of business aimed at contributing to economic development with the “beneficiaries” of these actions being the workforce (employees); their families; local communities; and society at large. This business commitment should lead to an improvement of the quality of life of the “beneficiaries”.

3.2.2.1.3 The International Organisation for Standardisation (ISO)

The ISO, the world’s largest developer and publisher of international standards,\(^{30}\) defines social responsibility in its Guidance on Social Responsibility\(^{31}\) as the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with

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\(^{28}\) Kotler and Lee Corporate Social Responsibility 3.

\(^{29}\) WBCSD CSR: Meeting changing expectations 3. From this source it appears as if the Council equates corporate responsibility (with its three pillars) with sustainable development.

\(^{30}\) ISO Date Unknown http://www.iso.org/iso/about.htm.

\(^{31}\) ISO Guidance on Social Responsibility 3. The relevant content of the proposed ISO 26000 will be discussed in detail in par 5.3.2.
international norms of behaviour; and is integrated throughout the organization and practised in its relationships.\textsuperscript{32}

Included in this definition are concepts such as organisation, impacts, environment, ethical behaviour, sustainable development, stakeholders, and international norms of behaviour. For the purposes of the ISO’s definition, "organisation" refers to

... an entity or group of people and facilities with an arrangement of responsibilities, authorities and relationships and identifiable objectives.\textsuperscript{33}

Based on the inclusion of these concepts, this definition represents one of the most comprehensive currently available. It acknowledges the fact that an organisation’s activities could change society, the economy or the environment in both a positive or negative manner and that an organisation should consider these possible impacts. In the context of this acknowledgement businesses have a social responsibility to contribute to the wellbeing of their stakeholders. The definition supports the notion that social responsibility is found within compliance with applicable legislation and international standards. Note that this definition does not refer to CSR as actions that “voluntarily go beyond the law”, as is the case with some of the definitions to be discussed in this section.\textsuperscript{34}

In line with the definitions of CSR provided by the World Bank and the WBCSD, the ISO’s definition is based on the notion of sustainable development, where the behaviour of an organisation contributes to sustainable development.\textsuperscript{35} Whereas the World Bank

\textsuperscript{32} Activities in this regard also refer to products, services and processes. Although this is one of the most complete definitions of CSR, if the definition is measured against Dahlsrud’s dimensions (see fn 24) it is evident that the dimension of voluntariness is absent. However, this is not necessarily a shortcoming and it is argued that a definition of CSR should make reference to the fact that CSR activities should in the first instance be in compliance with applicable law and consistent with international norms of behaviour.

\textsuperscript{33} ISO Guidance on Social Responsibility 3. Excluded from this definition are governments acting in their sovereign role as legislators or judicial authorities. The definition of the ISO is a clear indication that the ISO accepts that entities other than businesses such as non-profit organisations also have a social responsibility towards their employees, their families and society at large.

\textsuperscript{34} See in this regard the definitions of the European Commission authors Jones and McWilliams and Siegel discussed in the remainder of this section.

\textsuperscript{35} Guidance on Social Responsibility notes that: “Sustainable development is about integrating the goals of a high quality of life, health and prosperity with social justice and maintaining the earth’s capacity to support life in all its diversity. These social, economic and environmental goals are interdependent and mutually reinforcing. Sustainable development can be treated as a way of expressing the broader expectations of society as a whole” (ISO Guidance on Social Responsibility 4). For a
and the WBCSD’s definitions refer to employees (the workforce), their families, local communities, and society at large, the definition of the ISO provides an umbrella term to describe these groups as “stakeholders”. The definition further supports the more inclusive (as opposed to the more limited shareholder-centred approach) stakeholder approach to CSR and recognises that the expectations of stakeholders should be considered in business decisions and activities and that CSR should not simply be bolted onto the existing business management, but should be integrated into management policies and decisions.

Importantly, the definition also refers to behaviour which is consistent with international norms of behaviour, which are defined as:

\[E\]xpectations of socially responsible organizational behaviour derived from customary international law, generally accepted principles of international law, or intergovernmental agreements that are universally or nearly universally recognized.

This definition is especially pertinent for the discussion in chapter 5 of international instruments that address CSR and that could be considered relevant even for businesses operating within the agricultural sector in South Africa – these instruments include instruments of the Global Reporting Initiative and the United Nations Global Compact.

3.2.2.1.4 The European Commission

The European Commission, the executive body of the European Union, defined CSR in 2001 as:

\[\text{discussion of CSR and sustainability, see Porter 2008 (25) Systems Research and Behavioral Science 398 – 400.}\]

36 A stakeholder is defined as an “individual or group that has an interest in any decision or activity of an organization” (ISO Guidance on Social Responsibility).

37 For a discussion of the shareholder-supremacy approach, see par 3.4.2.1.

38 For a discussion of the stakeholder approach, see par 3.4.2.2.

39 Grayson and Hodges Corporate Social Opportunity 10.

40 ISO Guidance on Social Responsibility 3.

41 For a discussion of the GRI, see par 5.4.2.

42 For a discussion of the UNGC, see par 5.4.3.

A concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.\textsuperscript{44}

In terms of this definition CSR is essentially a notion whereby businesses decide on a voluntary basis to contribute to a better society and a cleaner environment.\textsuperscript{45}

The Commission supports the idea that CSR concerns businesses going beyond (over and above) the minimum legal and other requirements determined by society at large in order to address societal needs, and that it is fundamentally a voluntary business initiative.\textsuperscript{46} In terms of this definition CSR should form part of and be integrated into the normal business strategy and become part of a business’ day-to-day operations.

However, the global economic crisis and the resulting social consequences have damaged the relationship of trust between business and its stakeholders to such an extent that the Commission deemed it necessary in 2011 to reconsider its definition of CSR and provide a new agenda for action. In terms of the updated definition, CSR is simply defined as “the responsibility of enterprises for their impacts on society”,\textsuperscript{47} a responsibility based on respect for the law, integrated into business operations and aimed at maximising shared value for stakeholders whilst limiting the negative impacts of the business’ activities.\textsuperscript{48} The new definition no longer contains any reference to the notion that CSR starts where the law ends – no reference is made to “going beyond the minimum legal requirements”. In fact it is recognised that public authorities should, through a mixture of voluntary policy measures and complementary regulation, play a supporting role.

The EC’s definition pales in comparison with the elaborate definition provided by the ISO, and the usefulness of this definition is questionable. Although it might be argued

\textsuperscript{44} This definition encompasses all of the dimensions identified by Dahlsrud (2008 (15) Corporate Social Responsibility and Environmental Management 4). It refers to the environmental, social, economic, stakeholder and voluntariness dimensions.


\textsuperscript{46} The Commission is of the view that the voluntary approach is preferable to a comprehensive legal framework and regards any additional obligations and administrative requirements as counter-productive (EC COM(2006) 136 2), although it agrees that CSR practices are not a substitute for public policy.

\textsuperscript{47} EC COM(2011) 681 6.

\textsuperscript{48} EC COM(2011) 681 6.
that the new definition has all of the critical elements, it does not provide an indication of
to whom the responsibility is owed nor does it make any reference to the centrality of
sustainable development.

It appears that the definition of the ISO is most comprehensive of the four described
above. The following paragraphs will examine the definitions provided by leading
international networks.

3.2.2.2 International networks

3.2.2.2.1 Business for Social Responsibility (BSR)

BSR, a CSR network of more than 250 companies aimed at developing sustainable
business strategies and solutions and one of America’s largest organisations devoted to
CSR, defines CSR as:

        business decision-making linked to ethical values, compliance with legal requirements,
        and respect for people, communities, and the environment around the world.\textsuperscript{49}

BSR regards social responsibility as a guiding principle that should be included in every
aspect of a business. In terms of the definition provided, a business will be regarded as
being socially responsible if it is operated in a manner that is consistent with the ethical,
legal, commercial and public expectations that society has of the private sector. The
reference to legal compliance is an indication that in terms of this definition CSR begins
with legal compliance. This definition provides support for the notion that CSR does not
begin where the law ends but where the law begins.

3.2.2.2.2 The International Business Leaders Forum (IBLF)

The International Business Leaders Forum, Britain’s largest group promoting CSR,
defines CSR as:

\textsuperscript{49} As quoted by Aaronson 2003 (108) \textit{Business and Society Review} 310; Thomas and Nowak \textit{Corporate
social responsibility: a definition} 17 and Dahlsrud 2008 (15) \textit{Corporate Social Responsibility and
Environmental Management} 8. This definition does not refer to the economic and voluntary
dimensions of Dahlsrud’s dimensions (see fn 24).
open and transparent business practices that are based on ethical values and respect for employees, communities, and the environment. It is designed to deliver sustainable value to society at large, as well as to shareholders.\footnote{As quoted in Dahlsrud 2008 (15) \textit{Corporate Social Responsibility and Environmental Management} 7 and Aaronson 2003 (108) \textit{Business and Society Review} 310.}

Included in this definition are all of the dimensions identified by Dahlsrud\footnote{Dahlsrud 2008 (15) \textit{Corporate Social Responsibility and Environmental Management} 4.} except for the dimension of voluntariness. Respect for the environment draws on the environmental dimension, while the reference to business practices has to do with the economic dimension. The reference to ethical values draws on the voluntary nature of CSR. Since the definition refers to the creation of sustainable value to \textit{society at large} as well as to \textit{shareholders}, various stakeholders are included, bringing the definition within the social and stakeholder dimensions respectively. This definition also includes many of the elements identified in the ISO’s definition, although it does not make any reference to legal responsibilities.

\textbf{3.2.2.2.3 The Social Response Network}

The Social Response Network,\footnote{Social Response Network 2010 \texttt{http://socialresponsetoork.org/services.html} and quoted by Aaronson 2003 (108) \textit{Business and Society Review} 310 and Kotler and Lee \textit{Corporate Social Responsibility} 3.} a network established to create alliances between businesses and non-profit organisations to establish CSR programmes, defines socially responsible business practices as the situation where:

\begin{quote}
    a corporation adopts and conducts discretionary business practices and investments that support social causes to improve community well-being and protect the environment.
\end{quote}

This definition has been transformed into a definition of CSR where CSR is then defined as:

\begin{quote}
    a commitment to improve community well-being through discretionary business practices and contributions of corporate resources.\footnote{Kotler and Lee \textit{Corporate Social Responsibility} 3 and Carroll and Shabana 2010 \textit{International Journal of Management Reviews} 90.}
\end{quote}

The central aspect of this definition is the reference to discretionary business practices and contributions. “Discretionary” in this regard refers to practices or contributions
which are not mandated or required by law.\textsuperscript{54} It refers to voluntary decisions and a voluntary commitment whereby a business chooses to improve community well-being. This voluntary commitment should be evidenced throughout the business’ decisions and activities. Although this definition advocates the voluntary approach it should be noted that this approach is not universally accepted as is evident from the fact that many of the definitions in this section refer to the role of the law and consequently to regulation in defining CSR.

3.2.2.3 \textit{International scholars}

The topic of CSR has been under discussion for approximately six decades and during this period various scholars have attempted to provide an acceptable definition of what is today commonly referred to as corporate social responsibility.\textsuperscript{55} These authors come from a variety of disciplines, including law, philosophy, economics and sociology, to name but a few. The fact that the subject has received attention from such a variety of fields of scholarship is indicative of the fact that CSR is at its core a multidisciplinary field of scholarship which can be studied from multiple approaches. The following paragraphs will examine a few of the definitions provided by the leading authors on the subject. They will be discussed chronologically in order to determine whether or not any progress has been made toward an acceptable definition.

3.2.2.3.1 Bowen

In 1953 Bowen (who is referred to as the “Father of Corporate Social Responsibility”)\textsuperscript{56} wrote \textit{Social responsibilities of the businessman}, a work which laid the foundation for the study of corporate social responsibility as an academic field of scholarship. In this seminal work he formulates two rather inconspicuous questions: “What responsibilities to society may businessmen reasonably be expected to assume?”\textsuperscript{57} and “To what

\textsuperscript{54} Put differently “CSR represents the firm’s strategic intent with regard to social and environmental initiatives, where such actions exceed what is required by law or regulation” (emphasis added) (Porter 2008 (25) \textit{Systems Research and Behavioral Science} 398).

\textsuperscript{55} For an excellent exposition of the evolution of the definition of CSR, see Carroll 1999 (38) \textit{Business & Society} 268 – 295 and Crane et al (eds) \textit{Corporate Social Responsibility} 19 – 46.

\textsuperscript{56} Carroll 1999 (38) \textit{Business & Society} 270 and Windsor 2001 (9) \textit{International Journal of Organisational Analysis} 230.

\textsuperscript{57} Bowen \textit{Social responsibilities} xi.
extent do the interests of business in the long run merge with the interests of society?"  

Although Bowen does not define CSR, he notes that the responsibility of business refers to:

> the obligations of businessmen to pursue those policies, to make those decisions, or to follow those lines of action which are desirable in terms of the objectives and values of our society.  

This statement supports the notion that businesses have to consider various dimensions when conducting business, which are not limited to the economic dimension. Bowen’s early view acknowledges the fact that businesses operate in society and as a result businesses need also become aware of the social consequences of their business operations.

### 3.2.2.3.2 Davis

In 1960 Keith Davis wrote that CSR is a “nebulous idea” and defined the social responsibility of business as:

> businessmen’s decisions and actions taken for reasons at least partially beyond the firm’s direct economic or technical interest.

This definition was further expanded when he asserted that a business’ social responsibility arises from concern for the ethical consequences of one’s acts as they might affect the interest of others.

In Davis’ view, a business’ social responsibility stems from the fact that a business is regarded as an economic unit with impacts on the community, and as a result of these impacts the business is under an obligation to have regard for the communities affected by its actions – the business affects society beyond the gates of the business.

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58 Bowen *Social responsibilities* 5.  
60 Davis 1960 *California Management Review* 70.  
61 Davis 1960 *California Management Review* 70.  
62 Davis 1967 (10) *Business Horizons* 47.  
63 In 1967 Davis noted that a business is responsible to a variety of stakeholders (or claimant groups), rather than being responsible only to shareholders. Although he is not regarded as the “father of the
terms of this view a socially responsible business will accept that its actions have an influence on the whole social system and act accordingly. The author recognises that a business’ social responsibility is inextricably linked to the business’ social power and as a result of its social power a business needs to accept responsibility for the manner in which it influences its communities.\(^{64}\)

Davis continued working on the subject of CSR, conceded that “the concept of social responsibility is not an easily defined one”, and eventually defined CSR as a business’ consideration of, and response to, issues beyond the narrow economic, technical and legal requirements of the firm.\(^{65}\)

According to this definition CSR begins where the law ends (“beyond ... legal requirements”). Davis supports the notion that the mere fact that a business acts within the boundaries of the law does not imply that the business is being socially responsible – compliance is expected. Social responsibility is an acceptance of social obligations beyond legal requirements.\(^{66}\)

3.2.2.3.3 Frederick

William Frederick, one of the foremost authors on the subject of CSR, has been conducting research on the topic for almost half a century. As early as in 1960 he wrote that social responsibility implies that:

> businessmen should oversee the operation of an economic system that fulfils the expectations of the public.\(^{67}\)

It further implies that businesses should evince:

> a public posture toward society’s economic and human resources and a willingness to see that those resources are utilized for broad social ends and not simply for the narrowly circumscribed interests of private persons and firms.\(^{68}\)


\(^{65}\) Davis 1973 (16) *Academy of Management Review* 312.


\(^{67}\) Frederick 1960 (2) *California Management Review* 60.
Frederick has noted an evolution in the construction of the successive definitions and
distinguished between CSR₁, CSR₂ and CSR₃ where CSR₁ refers to the traditional
definitions provided for CSR up to 1970, where the focus was on businesses’
obligations to work for social betterment.⁶⁹ CSR₁ posits that the rights demanded by
companies are accompanied by responsibilities such as the responsibility to behave
responsibly.⁷⁰ Companies should be held responsible for their actions and decisions to
the extent that these affect society. This approach is aptly described by Waddock,⁷¹
where the author remarked that under the CSR₁ framework:

companies could and should be held responsible for their actions and decisions as they
affected society and ought to live up to a higher set of standards than simple
adherence to the law for the good of all, and they ought to contribute to the well-being
of society.

CSR₂ represented a new strain of thought regarding the role of business in society and
the phrase “corporate social responsiveness” came into use more frequently.
Regarding the change in the phrase, Frederick⁷² remarks:

Soon it became evident that the promulgators of the “responsiveness” notion did intend
it to be a genuine replacement for the idea of “responsibility” and that it was not simply
one of those fashionable changes in phraseology that occasionally takes the scholarly
community by storm.

In the evolution of the definition CSR₂ refers to “the capacity of a corporation to respond
to social pressures”.⁷³ This definition requires a company to consider its stakeholders

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⁶⁸ Frederick 1960 (2) California Management Review 60. As was the case with Keith Davis (see par
3.2.2.3.2), Frederick also noted that social responsibility is linked with social power.
⁶⁹ Frederick 1994 (33) Business & Society 154. For a brief discussion of the evolution from CSR₁ to
CSR₃, see Moir 2001 (1) Corporate Governance 18.
⁷⁰ The six fundamental precepts of CSR₁ are: power begets responsibility; a voluntary assumption of
responsibility is preferable to government intervention and regulation; voluntary social responsibility
requires business leaders to acknowledge and accept the legitimate claims, rights, and needs of
other groups in society; CSR requires a respect for law and the rules of the game that govern
marketplace relations; an attitude of “enlightened self-interest” leads socially responsible business
firms to take a long-run view of profits; and greater economic, social, and political stability will result if
all businesses adopt a socially responsible posture (Frederick "Theories of Corporate Social
Performance" 144 – 145).
⁷¹ In Scherer and Palazzo (eds) Global Corporate Citizenship 56. For a discussion of CSR₁, see Waddock
2004 (109) Business and Society Review 14 – 16.
⁷² Frederick 1994 (33) Business & Society 154.
and to act in a proactive rather than reactive manner, and reflects a move from a philosophical approach to a managerial approach.\footnote{74}

CSR$_2$ evolved into CSR$_3$, which is described as “corporate social rectitude”.\footnote{75} CSR$_3$ is an acknowledgement that management strategies and practices have inherent ethical dimensions and that business ethics occupies a central role in the CSR debate.\footnote{76} In the context of ethical behaviour, Frederick\footnote{77} notes that rectitude or ethics involves “a pervasive sense of rightness, respect, and humanity” where ethics are “at the centre of a company’s concerns, its policies, and its major decisions”.\footnote{78}

3.2.2.3.4 Eilbirt and Parket

Henry Eilbirt and Robert Parket argue that the best way to understand CSR is to equate it with “good neighbourliness”. According to these authors, CSR involves acting in a manner that causes the least amount of harm to the neighbourhood. On the other hand CSR can also be expressed as “the voluntary assumption of the obligation to help solve neighbourhood problems”.\footnote{79} Moving away from equating CSR with “good neighbourliness”, the authors define CSR as

\begin{quote}
the commitment of a business or Business, in general, to an active role in the solution of broad social problems.\footnote{80}
\end{quote}

This definition acknowledges the notion that a business has the ability through its CSR initiatives to solve many of the social problems with which governments are currently confronted.

\footnotesize
\begin{itemize}
  \item \footnote{73} Frederick 1994 (33) \textit{Business \& Society} 154. For a discussion of the definition of CSR$_2$, the implications of the approach and its shortcomings, see Frederick 1994 (33) \textit{Business \& Society} 154 – 162.
  \item \footnote{74} Scherer and Palazzo (eds) \textit{Global Corporate Citizenship} 56 – 57; Waddock 2004 (109) \textit{Business and Society Review} 16 – 17 and Moir 2001 (1) \textit{Corporate Governance} 18.
  \item \footnote{75} Frederick "Theories of Corporate Social Performance" 147.
  \item \footnote{76} Scherer and Palazzo (eds) \textit{Global Corporate Citizenship} 57 and Waddock 2004 (109) \textit{Business and Society Review} 19 – 20.
  \item \footnote{77} Frederick "Theories of Corporate Social Performance" 157.
  \item \footnote{78} Frederick "Theories of Corporate Social Performance" 157.
  \item \footnote{79} Eilbirt and Parket 1973 (16) \textit{Business Horizons} 7.
  \item \footnote{80} Eilbirt and Parket 1973 (16) \textit{Business Horizons} 7. The authors identify racial discrimination, pollution, transportation and urban decay as examples of social problems which could be solved through business intervention. See Carroll 1999 (38) \textit{Business \& Society} 278, for a brief discussion of the contribution of Eilbirt and Parket.
\end{itemize}
3.2.2.3.5 Carroll

In 1979 Archie Carroll added his voice to the CSR chorus – a voice that still echoes through much CSR literature. Carroll initially attempted to define CSR in terms of the various responsibilities that a business has. He identified four basic obligations that a business has toward society – those obligations or responsibilities which are not mutually exclusive are economic, legal, ethical and discretionary responsibilities, which in total represent a business' social responsibilities. Based on the identification of these four responsibilities, Carroll stated that the social responsibility of business encompasses the economic, legal, ethical and discretionary expectations that society has of organizations at any given point in time.

This definition, based on the four areas of social responsibility, was further elaborated on in 1983 when Carroll noted that:

CSR involves the conduct of a business so that it is economically profitable, law abiding, ethical and socially supportive. To be socially supportive then means that profitability and obedience to the law are foremost conditions to discussing the firm’s ethics and the extent to which it supports the society in which it exists with contributions of money, time and talent. Thus, CSR is composed of four parts: economic, legal, ethical and voluntary or philanthropic.

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81 For a summation of Carroll’s definitions of CSR, see Carroll 1999 (38) Business & Society 282 – 284, and 286 – 290.

82 Carroll 1979 (4) Academy of Management Review 499. Carroll remarked that the economic responsibility of a business represents the fundamental social responsibility of a business – a business has the responsibility to make profit (this is similar to Friedman’s view of profit maximisation (for a discussion of the Friedman approach see paragraph 3.4.2.1) (Carroll 1979 (4) Academy of Management Review 500). This economic responsibility results from the fact that society has “sanctioned” business by allowing it to operate as part of the fulfilment of the social contract that exists between business and society (see par 3.4.2.4 for a reference to the social contract theory). Society expects businesses to conduct their business within the boundaries of the law – this according to Carroll (1979 (4) Academy of Management Review 500) represents the legal responsibilities of business. In terms of this approach ethical responsibilities refer to those expectations that society has of business that exceed legal responsibilities. In the final instance, the discretionary responsibilities of business are those voluntary initiatives that can best be described as philanthropic giving – or what some refer to as “pat-a-poor-person” (Thomas and Nowak Corporate social responsibility: a definition 15).

83 Carroll 1979 (4) Academy of Management Review 500. These domains will be discussed in more detail in par 3.4.2.2.1.

84 Carroll as quoted in Carroll 1999 (38) Business & Society 286. Note that in terms of this definition the discretionary responsibilities have been reframed as voluntary or philanthropic responsibilities. The four areas of responsibility were later depicted as pyramidal in structure, with the economic responsibility forming the basis of the pyramid and philanthropic responsibilities forming the top of
Extrapolating from this four-domain definition, Schwartz and Carroll proposed an alternative approach to defining social responsibility where the four-domain approach was replaced with a three-domain approach consisting of economic, legal and ethical domains.85

3.2.2.3.6 Jones

Thomas Jones86 defines CSR as

the notion that corporations have an obligation to constituent groups in society other than stockholders and beyond that prescribed by law or union contract.

This definition supports the notion that CSR initiatives have to be voluntarily adopted. According to this definition, if initiatives result from the coercive forces of law, such initiatives would not be of a voluntary nature and would consequently not be regarded as being true CSR initiatives. The definition further recognizes the fact that businesses have a responsibility that stretches beyond responsibility towards owners or shareholders to include other stakeholders.

3.2.2.3.7 McWilliams and Siegel

Abigail McWilliams and Donald Siegel define CSR as

actions that appear to further some social good, beyond the interests of the firm and that which is required by law.87

These authors support the notion that CSR represents those actions that further the social good beyond legal requirements. In following this definition, a business that enforces prescribed occupational safety standards will not be regarded as being socially responsible since the business is merely complying with the law. If a business provides

85 Schwartz and Carroll 2003 (13) Business Ethics Quarterly 503 – 530. (For a discussion of the Schwartz and Carroll model, see paragraph 3.4.2.3.2).
87 McWilliams and Siegel 2001 (26) Academy of Management Review 117. Also see Siegel and Vitaliano (2007 (16) Journal of Economics and Management Strategy 773) who remark that CSR occurs when companies “engage in activity that appears to advance a social agenda beyond that which is required by law”.
extensive fist-aid training to its employees beyond that which is required by law, the business will be regarded as being socially responsible.

3.2.2.3.8 Lantos

Geoffrey Lantos\textsuperscript{88} regards a business as an economic enterprise and inherently a social institution. The social nature of a business is evident from the variety of social consequences that stems from business operations. Lantos\textsuperscript{89} accordingly defines CSR as:

The obligation stemming from the implicit “social contract” between business and society for firms to be responsive to society’s long-run needs and wants, optimizing the positive effects and minimizing the negative effects of its actions on society.

This definition supports the notion that an implicit social contract exists between business and society, similar to the social contract that exists between society and government. A business' societal obligations are founded in this contract in terms of which a business has to accept that in return for being granted a licence to operate by society, it has to become responsive to societal needs and assume responsibility for the social consequences of its business operations.\textsuperscript{90}

3.2.3 African Perspectives

3.2.3.1 The African Union

Unlike the European Union’s Commission,\textsuperscript{91} the AU has not formulated or endorsed a definition of CSR. It would appear that the subject of CSR has not received much attention from the AU. The issue of CSR was addressed at the first EU-Africa Business

\textsuperscript{88} Lantos 2001 (18) Journal of Consumer Marketing 600.

\textsuperscript{89} Lantos 2001 (18) Journal of Consumer Marketing 600.

\textsuperscript{90} Lantos (2001 (18) Journal of Consumer Marketing 608 - 621) proposed a framework in which he initially identified two different types of CSR – altruistic CSR and strategic CSR (he later added ethical CSR as a third type of CSR (Lantos (19) 2003 Journal of Consumer Marketing 205 – 230; also refer to Lantos 2003 (19) Strategic Direction 31 – 35)). In terms of altruistic CSR the motive for the initiative is not an economic one. The business does not expect to receive any benefit from the initiative. A strategic CSR initiative is motivated by the expectation that the initiative would be to the benefit not only of the intended beneficiary but also of the business. (For a discussion of strategic CSR see paragraph 3.5).

\textsuperscript{91} See par 3.2.2.1.4 for a discussion of the EC’s definition.
Forum where it was proposed that the EU and Africa should work together to create an African business network to promote CSR.\textsuperscript{92}

### 3.2.3.2 *The New Partnership for Africa’s Development (NEPAD)*

The NEPAD, a programme of the African Union, was established to address the most pressing issues on the African content, which include escalating poverty and under-development. Poverty alleviation and sustainable growth and development were identified as some of the partnership's objectives.\textsuperscript{93} CSR can be viewed as one of the possible solutions to some of Africa’s biggest challenges. Unfortunately NEPAD has to date not provided a definition of CSR, but in its *Business Declaration on Corporate Social Responsibility*\textsuperscript{94} the signatories of the *Declaration* recognised the fact that businesses have a profound impact on their constituencies and as a result have an obligation to act in a socially responsible manner. The *Declaration* stresses the fact that CSR initiatives are indispensable in the drive to empower historically disadvantaged persons. Signatories of the *Declaration* further agree that the maintenance of positive stakeholder relationships is a key component of CSR and that businesses are faced with the challenge of balancing financial performance with stakeholder interests.\textsuperscript{95}

### 3.2.3.3 *The African Institute of Corporate Citizenship (AICC)*

The AICC\textsuperscript{96} provides a wide definition of CSR as:

The extent to which companies consider and manage their social, environmental and economic impacts and contributions to society as well as the extent to which they do this through stakeholder engagement and reporting on performance.\textsuperscript{97}

This definition notes the fact that businesses do not operate in a vacuum and that their decisions and activities have social, environmental and economic impacts on society, which impacts have to be properly managed through a process of stakeholder engagement.

\textsuperscript{92} European Commission 2007 \url{http://www.africa-union.org}.
\textsuperscript{93} NEPAD 2010 \url{http://www.nepad.org/about} and Mullerat and Brennan *Corporate Social Responsibility* 530.
\textsuperscript{94} NEPAD 2007 \url{http://www.ahi.co.za/current/NEPADBusinessDeclaration.pdf}.
\textsuperscript{95} NEPAD 2007 \url{http://www.ahi.co.za/current/NEPADBusinessDeclaration.pdf}.
\textsuperscript{96} AICC *Corporate social responsibility in South Africa* 3.
\textsuperscript{97} This definition includes all of the dimensions identified by Dahlsrud (see fn 24) except the voluntariness dimension.
engagement. The reference to stakeholder engagement as opposed to shareholder engagement is a reflection of the acceptance that businesses should consider and to some extent include stakeholders other than shareholders in the formulation of policies, for example. The definition also supports the prominent role of reporting on CSR performance. Businesses need to demonstrate to their stakeholders that they are acting socially responsible.

3.2.4 South African perspectives

3.2.4.1 Introduction

Whereas the international scene is rich with literature on the subject of CSR, it would appear that surprisingly few institutions or researchers have ventured into the CSR realm in the national context. Even fewer have attempted to provide a definition for CSR.

Given South Africa’s unique history and its numerous socio-economic challenges, it is not strange that any attempt to define CSR in the South African context is influenced by this history. The current national landscape places a strong emphasis on Corporate Social Investment as opposed to Corporate Social Responsibility. According to Fig South African business generally eschews the notion of “corporate social responsibility”, despite the wide use of the term among practitioners and in the literature. Instead, it favours concepts of “corporate social investment” and “corporate citizenship”: concepts that ask no questions about legacy, memory, history, justice or moral and ethical responsibilities.

The reference to investment rather than responsibility is indicative of the fact that the South African private sector expects a return on their CSR initiatives and, if properly managed, that the costs associated with the initiatives will be recovered over time.

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98 For a discussion of stakeholder engagement in the national context, see par 5.3.4.6.2. For a discussion of the stakeholder approach, see 3.4.2.2.
99 The issue of reporting and the importance thereof, with specific reference to integrated reporting, will be discussed in chapter 5.
100 This position is in line with Horrigan’s remark that “definitions of CSR can also be jurisdiction-orientated” (Horrigan Corporate Social Responsibility 37).
101 Hamman 2003 (20) Development Southern Africa 238; Fig 2005 (81) International Affairs 599 and AICC Corporate social responsibility in South Africa 4.
102 Fig 2005 (81) International Affairs 601.
through the positive CSR spin-offs. The expected return includes enhanced reputation, an improved bottom line or greater brand recognition. The term CSI is preferred to the notion of responsibility. It might be argued that responsibility is inextricably linked to the notion that the private sector is being held accountable for historical injustices. CSI denotes a more neutral meaning as opposed to CSR and represents an attempt to negate the concept of accountability for historical injustices. By referring to social investment as opposed to social responsibilities, the private sector is attempting to move away from the stigma attached to business as a result of the apartheid regime. According to Fig

“[r]esponsibility” would imply taking action to acknowledge, recognize and offer redress for apartheid-era violations of human rights.

Sections of the private sector reject the notion that the business sector should accept responsibility for historical injustices, and accordingly regard CSR as an acceptance of the obligation to redress these injustices. Any attempt to define CSR within the South African context should reflect the historical realities that were associated with the apartheid era.

For the purposes of this research the internationally accepted term “corporate social responsibility” will be used to refer to business’ responsibility towards its stakeholders, while “corporate social investment” will be viewed as the manifestation of CSR through CSR initiatives.

The following sections will reflect on the limited variety of national definitions provided for CSR.

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103 See par 3.6 for a discussion of the benefits of CSR.
104 Fig (ed) Staking their claims 8. It is undeniable that in many instances big business has been implicated in and supportive of the legacy of apartheid and consequently these businesses are to some extent being held “responsible” (AICC Corporate social responsibility in South Africa 11).
105 Fig 2005 (81) International Affairs 601.
106 This issue will not be addressed in this section.
3.2.4.2  The King II Report on Corporate Governance

The King Report on Corporate Governance for South Africa 2002\textsuperscript{107} identifies social responsibility as one of the seven characteristics of good governance.\textsuperscript{108} Although the Report does not define CSR, it is noted that a socially responsible business will be aware of and responsive to social issues. The Report\textsuperscript{109} further notes

A good corporate citizen is increasingly seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues.

Based on the acceptance that a business should be responsible with regard to environmental and human rights issues, in terms of King II CSR can be defined as:

the organisation's demonstrable commitment to ethical standards and its appreciation of the social, environmental and economic impact of its activities on the communities in which it operates.\textsuperscript{110}

This definition supports the notion that a business' activities have an impact on more than just the shareholders – a good corporate citizen will accept that its actions impact on various stakeholders. In this regard, the definition reflects international definitions such as those of the World Bank, WBCSD and the ISO.\textsuperscript{111} This definition further advocates a move from the single bottom line (focussing exclusively on profits) to the “triple bottom line” (referring to the social, environmental and economic impacts of businesses) in order for businesses to remain sustainable.

3.2.4.3  The King Report on Governance for South Africa – 2009

The third King Report on Governance\textsuperscript{112} does not explicitly define CSR although it does provide a glossary of terms which are relevant in the area of corporate governance. Since the preceding King Report\textsuperscript{113} identified CSR as one of the characteristics of good

\textsuperscript{107} IoD King Report on Corporate Governance for South Africa 2002 (hereinafter referred to as King II).
\textsuperscript{108} IoD King Report 12 and SAGA Implications for corporate social investment 3. Other characteristics include transparency, independence, accountability and fairness.
\textsuperscript{109} IoD King Report 12.
\textsuperscript{110} SAGA Implications for corporate social investment 3.
\textsuperscript{111} See paragraphs 3.2.2.1.1 to 3.2.2.1.3 for a discussion of these definitions. Although some of these definitions do not explicitly refer to stakeholders, they do refer to employees, their families and local communities, all of which are considered to be stakeholders.
\textsuperscript{112} IoD King Report on Governance for South Africa – 2009.
\textsuperscript{113} See par 3.2.4.2
corporate governance, it was not unexpected that the third report also referred to CSR. The third report notes that CSR is an essential and critical component of the broader concept of corporate citizenship, thus linking CSR not only to corporate governance but also to corporate citizenship.\footnote{IoD King Report on Governance for South Africa – 2009 232.} However, it is noteworthy that the third report does not use the same definition as provided in the second report; instead it endorses the ISO’s definition as provided in the \textit{Guidance on Social Responsibility}.\footnote{For a discussion of the ISO’s definition, see par 3.2.2.1.3.}

Given the confusion between the use of the terms CSR and CSI, the third report distinguishes between these two concepts. The third report notes that CSI\footnote{Also referred to as responsible investment (IoD King Report on Governance for South Africa – 2009 233).} is a manifestation of CSR and that:

\begin{quote}
[i]n the narrow sense it refers to donations and other kinds of financial assistance (made for an altruistic purpose), and in the broader sense, includes other kinds of contributions beyond just financial assistance.\footnote{IoD King Report on Governance for South Africa – 2009 233.}
\end{quote}

It should be noted that this definition identifies altruistic donations (which are donations that are purely philanthropic and not strategically linked to the business’ core business) as social investments in the narrow sense which might be viewed as contrary to the investment approach, where a return is expected on investments. Purely philanthropic donations are normally gratuitous disposals with no returns required or expected.

\subsection*{3.2.4.4 The South African Grantmakers’ Association (SAGA)}

In its briefing paper, the South African Grantmakers’ Association (SAGA) discusses the implications of \textit{King II} for CSI. The Association distinguishes between CSR and CSI, but indicates that the terms are used interchangeably. According to SAGA\footnote{SAGA Implications for corporate social investment 5.} CSR implies:

\begin{quote}
corporate concern regarding the legal, ethical, environmental and social management practices applied in an organisation’s operations and activities – in effect, conduct as a good corporate citizen,
\end{quote}

\footnotesize
\begin{flushright}
115 For a discussion of the ISO’s definition, see par 3.2.2.1.3.  
116 Also referred to as responsible investment (IoD King Report on Governance for South Africa – 2009 233).  
118 SAGA Implications for corporate social investment 5.
\end{flushright}
The core of this definition is the acceptance that a business has a range of responsibilities, including a legal and social responsibility, towards its stakeholders. CSI on the other hand

relates to direct or indirect financial investment in socially responsible initiatives and activities. ... A crucial element of corporate social investment is the understanding that corporate assets are involved and that management should seek to provide – and shareowners are entitled to expect – a return on such investment.\(^\text{119}\)

In terms of this definition, financial investment refers to the direct contribution of funds to a CSR initiative, while indirect investment refers for example to the provision of services at no cost. Since reference is made to “investment”, company shareholders are entitled to expect some form of return on the investment – return which does not necessarily have to be in immediate monetary form. It could for example relate to reputational increase.

3.2.4.5 Trialogue

According to Trialogue,\(^\text{120}\) the term CSR refers to “a value system which a company adopts in order to be responsible to broader society”,\(^\text{121}\) while CSI refers to

a company’s contributions (cash and non-cash) to people, organisations or communities that are external to the company.\(^\text{122}\)

This definition was expanded in 2009. The expanded definition notes that CSI refers to:

[a] company’s financial and non-cash contributions – beyond its commercial operations – to disadvantaged communities and individuals for the purpose of social upliftment and welfare.\(^\text{123}\)

\(^{119}\) SAGA Implications for corporate social investment 5 – 6. Direct financial investment occurs when financial resources (money) are directed toward socially responsible initiatives and activities, while indirect investments are in kind contributions such as infrastructural use, free services etc. The return expected does not necessarily make a direct impact on the financial bottom line. The return could be an increased reputation or other forms of value creation.


\(^{121}\) This source equates CSR with corporate citizenship and regards CSI as a "small but influential, element of corporate citizenship or corporate social responsibility" (Rockey (ed) The CSI Handbook 8th edition 6).

\(^{122}\) Rockey (ed) The CSI Handbook 8th edition 6. These company contributions should be predominately focused on disadvantaged individuals and on local communities from which employees are drawn. Commercial sponsorships are to be excluded from these contributions unless these contributions have a distinct developmental purpose.
In terms of this definition CSI represents the actual business contributions aimed at the upliftment and development of communities affected by the business’ operations. The definition not only identifies the targeted recipients of the social investments – disadvantaged communities and individuals - but also defines the purpose of these investments – social upliftment and welfare.

### 3.2.5 Legislative definitions

It would seem that the reluctance to the use of the term corporate social responsibility has not been limited to the private sector. The legislator, in the Notice of the draft 2nd phase of the codes of good practice on broad-based black economic empowerment,\(^\text{124}\) also steers clear of referring to corporate social responsibility; instead the Draft Notice provides a definition of corporate social investment. In terms of this Draft Notice CSI is defined as:

> an enterprise’s contributions to society and community that are extraneous to its regular business activities.\(^\text{125}\)

This definition implies that contributions made as part of normal business practices are not regarded as CSR contributions. In order to be recognised, contributions must be extraneous to regular business activities and must go beyond normal business activities. It would thus appear as if this definition excludes contributions made by employers in terms of labour legislation, for example.

According to the Draft Notice\(^\text{126}\) CSI initiatives include but are not limited to development programmes, health programmes, education, training, environmental programmes and programmes that support arts and culture.

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\(^\text{123}\) De Wet (ed) *The CSI Handbook* 12th edition 4. De Wet further remarks that “CSI refers to a company’s total non-commercial contribution to society, which is not part of employee benefits or commercial sponsorships. This includes all SED initiatives, as well defined by the BEE Codes of Good Practice, and most of what constitutes an LED programme, as set out in Social and Labour Plan framework” (De Wet (ed) *The CSI Handbook* 12th edition 5). “SED contributions” refers to socio-economic development contributions in terms of the BEE framework, while “LED contributions” refers to local economic development in terms of the Social and Labour Plans required for mines by the Department of Mineral Resources. For a discussion of SED contributions, see par 5.2.2.5.5.

\(^\text{124}\) Gen Not 2036 in GG 28351 of 20 December 2005. The BEElegislation and related regulations and Codes of Practice will be discussed in more detail in par 5.2.2.

\(^\text{125}\) Par 1.5 of Code 700 of GN 2036 in GG 28351 of 20 December 2005.
The final *Codes of good practice on black economic empowerment*\(^\text{127}\) goes even further than the *Draft Notice* and makes no reference to CSI or CSR. The *Codes* prefer to refer to social investment initiatives as socio-economic development (SED) contributions, which is a collective term for approved SED initiatives.\(^\text{128}\) Approved SED contributions are defined as

monetary or non-monetary contributions carried out for the benefit of any projects approved for this purpose by an organ of state or sectors.\(^\text{129}\)

The *Code*\(^\text{130}\) continues further to define SED contributions as

monetary or non-monetary contributions actually initiated and implemented in favour of beneficiaries ... with the specific objective of facilitating sustainable access to the economy for those beneficiaries.\(^\text{131}\)

In the context of this research, SED contributions as defined in the BEE framework are not only considered to be corporate social investments, but they also fall within the wider ambit of corporate social responsibility.\(^\text{132}\)

The uncertainty regarding CSI or SED is further perpetuated by the sector charters drafted in terms of section 12 of the *Broad-based Black Economic Empowerment Act*.\(^\text{133}\) The *Financial Sector Charter on Black Economic Empowerment*,\(^\text{134}\) which was gazetted

\(^{127}\) GN 112 in GG 29617 of 9 February 2007.

\(^{128}\) The author speculates that the move by the legislator away from terms such as CSR or CSI could be an attempt by the legislator to introduce constitutional language to the CSR environment. The reference to socio-economic development is in line with the language used in the Bill of Rights in the *Constitution*. Included in the Bill of Rights are various rights which are described as socio-economic rights. However, it should be noted that the author does not argue that CSR is a socio-economic right, but merely that some socio-economic rights might be realised through CSR. For a discussion of the right to access to land as a socio-economic right, see par 2.2.

\(^{129}\) Schedule 1 of GN 112 in GG 29617 of 9 February 2007 (Schedule 1 of the Notice contains a list of definitions used in the *Code*). “Approved SED contributions” refers to projects focusing on environmental issues or projects targeting infrastructure development, enterprise creation or reconstruction in underdeveloped areas or areas identified by the national integrated sustainable rural development or urban renewal programmes (GN 112 in GG 29617 of 9 February 2007). For a discussion of SED contributions, see par 5.2.2.5.5.

\(^{130}\) Par 3.2 of Statement 700 of GN 112 in GG 29617 of 9 February 2007.

\(^{131}\) The socio-economic development contributions and socio-economic development programmes will be discussed in more detail in par 5.2.2.5.5.

\(^{132}\) This position is also supported by Trialogue (De Wet (ed) *The CSI Handbook* 12\(^{th}\) edition 6).

\(^{133}\) 53 of 2003.

on the same day as the *Codes of good practice on black economic empowerment*, reverts back to CSI as opposed to SED. This sector charter defines CSI as

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projects aimed primarily at black groups, communities and individuals that have a strong developmental approach and contribute towards transformation.135 (emphasis added)
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In line with the focus of BEE on empowering black persons,136 this definition singles out historically disadvantaged South Africans as its primary beneficiaries. The requirement that CSR projects must have a nuanced developmental approach and contribute towards transformation is unique and illustrates how the country’s historical background has given rise to a country-specific definition where the focus is on development and transformation. The definition provides support for the argument that CSR initiatives should be aimed at development and that these initiatives should make an actual difference in the lives of its beneficiaries without creating a culture of dependency.

The *AgriBEE Sector Charter on Black Economic Empowerment*137 further exacerbates the existing confusion regarding the construction of a definition. It seems as if this Charter uses CSI and SED interchangeably. As an example, the Charter states that exempted micro enterprises are encouraged to

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contribute to transformation in agriculture, particularly in the areas of skills development and corporate social investment138 (emphasis added)
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In the same vein, farming enterprises undertake to make agricultural land available to farm workers through their CSI initiatives139 and under the heading of rural development, poverty alleviation and corporate social investment, farming enterprises undertake to contribute to CSI initiatives in respect of rural community members, workers and their families.140 The only reference to SED is in the section containing the definition of the terms used in the Charter. It is noteworthy that although a definition is

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135 Par 13 of GN 110 in GG 29610 of 9 February 2007. The paragraph continues to provide a list of possible CSI initiatives. The contents of this list exhibits many similarities with the Draft Code (GN 2036 in GG 28351 of 20 December 2005) and makes no reference to SED, SED contributions or SED programmes.
136 For a discussion of this term, see par 5.2.2.1.
137 GN 314 in GG 30886 of 20 March 2008. For a discussion of AgriBEE, see par 5.2.3.
139 Par 5.1.2.8 of GN 314 in GG 30886 of 20 March 2008.
140 Par 5.7.1 of GN 314 in GG 30886 of 20 March 2008.
provided for SED, the term is not used in the Charter. The AgriBEE scorecard\textsuperscript{141} follows the same pattern as the Charter and refers only to CSI, although neither the Charter nor the scorecard defines what is understood by this term.

The definitions provided in this section are further evidence that CSR, even within the South African context, is a contested concept with not only various definitions but also with various confusing terms used to denote essentially the same idea.\textsuperscript{142}

Since the main focus of this research is on the contribution that the \textit{agricultural sector} can make towards the success of the land reform programme through their CSR programmes and initiatives, it is imperative that it should be established how the major role-players in the sector define CSR. The following section will focus on corporate definitions provided for CSR by three of the leading agricultural companies in the North-West province in order to determine whether these companies follow the international or national trend in defining CSR.

3.2.6 \textbf{Corporate definitions}

3.2.6.1 \textit{Suidwes Group of Companies}

Suidwes is one of the leading agricultural companies in South Africa, servicing a surface area of approximately 13.5 million hectares in the North-West Province, the Free State and the Northern Cape with 60 outlets across the area.\textsuperscript{143} The Group of Companies includes Suidwes Grain (a company that markets grain products), Wesmark (providing a variety of farming inputs), Wesmeg (addressing mechanisation requirements), Suidwes Fin (addressing insurance and risk management requirements), and Terratek (providing

\textsuperscript{141} This scorecard will be discussed in more detail in par 5.2.2.4 and par 5.2.2.5.

\textsuperscript{142} Whereas the South African Government appears to be uncertain how to define or refer to businesses' social responsibility, the UK Government has a much more nuanced approach to CSR. The UK Government noted that “Corporate Social Responsibility recognises that the private sector’s wider commercial interests require it to manage its impact on society and the environment in the widest sense. This requires it to establish an appropriate dialogue or partnership with relevant stakeholders, be they employees, customers, investors, suppliers or communities. CSR goes beyond legal obligations, involving voluntary, private sector-led engagement which reflects the priorities and characteristics of each business, as well as sectoral and local factors” (UK Government 2001 http://ec.europa/employment_social/soc-dial/csr/pdf/013-GOVNAT_United-Kingdom_UK_011221_en.pdf).

advice on agronomy, soil science and animal science). The core business of the Group “addresses the primary needs and interests of agricultural producers”.  

Although no official definition of CSR could be found on the Suidwes’ website, the 2011 Annual Report does report on the issue of sustainability. One of the aspects reported on under the heading of sustainability is social responsibility. From the Report it seems as if the company views CSI as a financial investment in socially responsible initiatives. According to the 2011 Annual Report Suidwes predominantly provides support to selected social organisations in the agricultural sector and invests in community activities in areas where the company operates. The company is also involved in mentorship programmes for emerging farmers. In terms of this support, the Annual Report recognises that the ability to provide the support should be directly linked to the company’s financial performance, thus endorsing the notion of strategic CSR. The objective of the company’s CSR initiatives is to provide support in activities associated with agriculture and in fields where the company has the required skills and expertise to provide meaningful support. The company’s CSR initiatives are focused on training, HIV/Aids, entrepreneurship and social development.

Although no definition of CSR could be found on the company’s website, it can be deduced from the 2011 Annual Report that the company also engages with various stakeholders, including employees and their families. This is confirmed by the following statement from the 2011 Annual Report:

"The employee well-being programme forms part of Suidwes’ social responsibility programmes since not only employees, but also family members are entitled to make use of this service free of charge. We believe that healthy families result in healthy employees which in turn mean increased productivity."

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145 http://www.suidwes.co.za.
146 This approach is in line with SAGA’s distinction between CSR and CSI, as discussed in par 3.5.
This statement is based on the business case for CSR, in which it is accepted that it “pays to do good”.\textsuperscript{151} The return which the company receives on its investment is situated in the fact that the rate of absenteeism should decrease if its workforce is healthy. An example of a further investment would be that employees who are mothers would be absent from work less frequently if their children were healthy and they did not have to stay at home to attend to their sick children.

The company further attempts to instil a socially responsible ethos in its employees. In this regard Suidwes promotes employee participation in social projects. Employees may elect to make financial contributions (which could be deducted from their payroll remuneration) to a social fund managed by a committee that evaluates worthy causes and channels funds and monitors the utilisation of the funds.\textsuperscript{152}

In conclusion it appears that, although no official definition of CSR is provided on the company’s website or in any of its annual reports, the company has a good understanding of what CSR entails. The company uses discretionary funding (monetary and non-monetary) and is involved in initiatives with a developmental objective aimed at furthering social welfare.\textsuperscript{153} An example of an initiative with a developmental objective is the mentorship programme in terms of which support is provided to emerging farmers – some of whom have received land in terms of the land reform programme.

\textbf{3.2.6.2 Senwes Limited}

Senwes is another leading agricultural business in South Africa (with its business activities predominantly in the North-West province, Free State, Gauteng and Northern Cape) and focuses on the provision of inputs for agricultural production together with providing market access for grain produce. Although the Senwes website\textsuperscript{154} contains a link to a corporate social responsibility page, no definition of CSR is provided. From the

\begin{footnotesize}
\begin{enumerate}
  \item See par 3.5.
  \item For example, this approach is in line with Barnett's approach (2007 (32) \textit{Academy of Management Review} 795) to CSR. He views CSR as “discretionary business activity aimed at furthering social welfare”.
  \item http://www.senwes.co.za.
\end{enumerate}
\end{footnotesize}
company’s *Integrated Operational and Financial Report*\(^{155}\) it is clear, however, that the company has a grasp of what CSR entails. This is also evidenced by the reference in the company’s vision to aspects such as sustainability management, enhancing ethical behaviour, and managing stakeholder relations. Stakeholder relations are one of the strategic focus areas identified by the company and the company strives towards having “effective structures and processes for stakeholder engagement, which facilitate communication, interaction and conflict resolution.”\(^{156}\) The company has identified the following stakeholders: shareholders and investors, customers, suppliers, employees, Government and communities.

The company’s social responsibility activities have three distinct focus areas: human resources, community involvement, and safety, health and environment.\(^{157}\) Regarding human resources, the company is aware that their employees constitute one of the cornerstones of the business and as such the company invests in its employees through staff training and skills development programmes aimed at empowering employees to acquire skills that would be beneficial to the employee as well as the business.\(^{158}\) The company accepts that it has a responsibility towards local communities and as a consequence the company makes financial and other contributions to organisations and communities where it has business operations. Finally, with regard to safety, health and environment, the company recognises that its employees have the right to a workplace which is safe and not detrimental to their health, and therefore regards safety and health as integral elements of risk management.

From the company’s *Integrated Report* it appears as if the company distinguishes between CSR and CSI. The report contains a section on CSI stating that the company’s involvement and investment in the community are growing. The report identifies five distinct areas on which its CSI initiatives focus. These areas are

\(^{155}\) Senwes 2011 [http://www.senwes.co.za/Files/main_Corporate/Annual_reports/2011/Integrated_sustainable_operations.pdf](http://www.senwes.co.za/Files/main_Corporate/Annual_reports/2011/Integrated_sustainable_operations.pdf) (hereinafter referred to as the *integrated report*). It should be noted that since Senwes is a listed company it is required to draft an integrated report on an annual basis. This is in line with the recommendations of the *King Report on governance for South Africa – 2009* (see par 5.3.4.6.4 for a discussion of the requirement regarding integrated reporting).


education, entrepreneurship and job creation, sports, arts and culture, and health and welfare. As an example of the company’s initiatives regarding entrepreneurship and job creation, the report\textsuperscript{159} notes that the company

assists farmers with technical support and training to ensure that arable land in our area of operation is productive and that emerging farmers can run profitable farming enterprises through pursuing best farming practices.

From the above it is clear that although the company does not provide an official definition of its interpretation of what CSR entails, the company’s actions reflect an understanding of CSR. In line with the definitions provided in this section, the company accepts responsibility for its actions relative to its stakeholders and contributes to initiatives with a transformational goal.

3.2.6.3 \textit{NWK Limited}

NWK Ltd, a leading provider of agricultural and related services and inputs primarily in the North West Province, fulfils an essential role in South Africa’s agricultural industry.\textsuperscript{160} Like the previous two agricultural companies, NWK provides no definition of CSR on its website. In fact, whereas the Afrikaans website contains a “sosiale verantwoordelikheid”\textsuperscript{161} link, the English website does not have any link to social responsibility. The company’s annual report does, however, contain a reference to CSR, although it is still not defined. The issue of CSR is dealt with under the general heading “socio-economic development”, which could indicate that the company regards its CSR initiatives as being part of the socio-economic development contributions required in terms of BEE.\textsuperscript{162} Although the annual report refers to the fact that an NWK model for CSR has been approved, no such model is available on its website. Despite

\begin{flushleft}
\textsuperscript{159} Senwes \ 2011 \ \texttt{http://www.senwes.co.za/Files/main_Corporate/Annual_reports/2011/Integrated_sustainable_operations.pdf}.
\textsuperscript{160} NWK Date Unknown \texttt{http://www.nwk.co.za/eng/index.asp}. \ The company provides a variety of services including agricultural services, grain marketing and storage, financial services and a trade department that offers consumer goods.
\textsuperscript{161} Available at \texttt{http://www.nwk.co.za/afr/Bertokke/sosiaal.htm}. \ The Afrikaans page is not of much use either. The “sosiale verantwoordelikheid” page provides only pamphlets containing detail of some of the charitable donations which the company has made, none of which are explicitly linked to the company’s core business.
\textsuperscript{162} NWK \ 2011 \ \texttt{http://www.nwk.co.za/eng/jaarverslag/NWKJaarVerslag2011.pdf}. \ For a discussion of the SED element on the BEE scorecard, see par 5.2.2.5.5.
\end{flushleft}
the fact that the model is not available to the public, the annual report does provide some clues regarding the content of the model. In this regard the report states:

The model for NWK’s sustainable CSR policy is based on the relationship between three important aspects, namely:

- NWK’s framework for consistent and sustainable involvement;
- NWK’s sensible community-orientated spending; and
- NWK’s commitment to cooperation with local communities to uplift them and improve their sustainability.

From this statement it is evident that the company’s CSR initiatives have a very distinct community focus. The reference to “consistent and sustainable involvement” is a reflection of the company’s stated commitment to making a difference in the lives of the beneficiaries of its CSR initiatives on a continuous basis. It would appear that the company does not view its CSR activities as once-off or *ad hoc*.

In spite of the nuanced community approach, the company does not indicate how the relationship with the community could be beneficial to the company itself. The annual report does not provide any indication that the company engages in CSR initiatives on a strategic basis, for example, and it appears as though many of the company’s initiatives amount to corporate philanthropy as opposed to strategic investments.

### 3.2.7 Conclusion

Any attempt to define CSR should in the first instance recognise that the definition can differ from society to society and can be influenced by factors such as culture and belief. This variability contributes to the inability to formulate a single universally accepted definition.\(^{163}\) The South African position serves as an excellent example. In the discussion of the national definitions of CSR it became evident that local businesses are not totally comfortable with the use of the term CSR owing to their negative perception of the notion of “responsibility”. It became clear that local businesses preferred the term corporate social *investment*, although a good case can be made out for the opinion that CSR and CSI do not have the same meaning and that one is a consequence of the

\(^{163}\) Blowfield and Frynas (2005 (81) *International Affairs* 502) note: “This vagueness restricts CSR’s usefulness both as an analytical tool and as a guide for decision-makers”.

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other.\textsuperscript{164} It also became clear that the legislator is not comfortable with the use of the term CSR, and has preferred terms such as CSI or SED. This is partially as a result of South Africa’s history and is reflected in references to “contributions toward transformation”\textsuperscript{165} or “transformation in agriculture”,\textsuperscript{166} which are uniquely South African. However, regardless of a particular history or culture, it is impossible, even within the context of a particular country, to define CSR to such an extent that it would be applicable in each instance. As a result CSR should rather be used as an umbrella term to indicate that businesses have a responsibility towards the societies within which they operate and that this responsibility needs to be managed.

From the more than 25 definitions discussed in this paragraph it has become evident that no two definitions are the same in all respects, although similarities can be identified. The aim of the discussions was not to provide a new (or yet another) definition for CSR but rather to identify possible elements of a common definition.

Firstly, it appears that there is some consensus on the fact that CSR requires, in the first instance, compliance with the law, but also calls for business to voluntarily go beyond the requirements of the law (see the definitions of the ISO,\textsuperscript{167} Frederick,\textsuperscript{168} Carroll,\textsuperscript{169} Jones\textsuperscript{170} and McWilliams and Siegel\textsuperscript{171}). However, Wood\textsuperscript{172} notes, with reference to the notion that in exercising social responsibility a business is expected voluntarily go beyond the requirements of the law, that:

“voluntary” fulfilment of responsibility is in an important sense a contradiction in terms – duties require enforcement mechanisms – and the CSR concept has unfortunately come to be associated in practice with voluntaristic philanthropy and community relations.

\textsuperscript{164} See par 3.2.4.4.
\textsuperscript{165} According to the Financial Services Charter. See par 3.2.5.
\textsuperscript{166} According to the AgriBEE Charter. See par 3.2.5.
\textsuperscript{167} See par 3.2.2.1.3.
\textsuperscript{168} See par 3.2.2.3.3.
\textsuperscript{169} See par 3.2.2.3.5.
\textsuperscript{170} See par 3.2.2.3.6.
\textsuperscript{171} See par 3.2.2.3.7.
\textsuperscript{172} Wood 2008 (18) \textit{Business Ethics Quarterly} 162.
Secondly, the majority of definitions identify the recipients (beneficiaries or stakeholders as opposed to shareholders) of CSR initiatives. The range of recipients includes employees, their families, local communities or communities in which the businesses operate, and society at large. In line with the argument that definitions could vary from country to country, it has become evident in the discussion of the legislative definitions\(^\text{173}\) in the South African context that local definitions specifically identify black South Africans as the targeted recipients of CSR initiatives.\(^\text{174}\) Thus, in the local context it is likely that historically disadvantaged South Africans will be the identified recipients.

The third common element is the thought that CSR activities and practices should be beneficial to both the business and society (or the targeted recipients) and that these activities should deliver sustainable value to society. CSR is at its most strategic when it is economically profitable and when it contributes to sustainable economic development.

In the fourth instance, a common CSR definition should refer to the fact that CSR activities are those activities which are extraneous to its regular business activities\(^\text{175}\) – businesses should be seen as “doing something more” and responding to specific needs. These extraneous activities should have clearly identified and specific objectives. Such objectives vary from the broadly stated objective of activities which are “good for development”\(^\text{176}\) or which “further some social good”\(^\text{177}\) in general to more specific objectives such as the facilitation of sustainable access to the economy of identified beneficiaries, as is the case with SED contributions in terms of the BEE framework. An acceptable definition of CSR should reflect the fact that CSR goes beyond philanthropic contributions to communities.

\(^{173}\) See par 3.5.
\(^{174}\) See par 5.2.2.1 for a definition of ‘black’ persons.
\(^{175}\) See par 3.5.
\(^{176}\) See par 3.2.2.1.1.
\(^{177}\) See par 3.2.2.3.7. Other general objectives of CSR include improving the quality of life of stakeholders (see par 3.2.2.1.1 and par 3.2.2.1.2); improving community well-being (see par 3.2.2.2.1) or contributing to the well-being of society (see par 3.2.2.3.3); solving broad social problems (see par 3.2.2.3.4); and a response to society’s long-run needs and wants (see par 3.2.2.3.8). More focussed objectives include a focus for example on specific health issues (see par 3.2.2.1.3); or activities with a strong developmental approach which contribute to the specific objective of transformation (see par 3.5) or, as is the case with SED contributions in terms of AgriBEE, initiatives which focus directly on skills development (see par 3.5).
Finally, an attempt to define CSR should make reference to the fact that CSR is not something that is bolted onto existing business practices, but is rather an approach integrated throughout all levels of the business and practised in all its relationships with its stakeholders. This approach reinforces the need for stakeholder engagement, where stakeholders are included in business decisions and practices which might have an impact on them.

3.3 The historical development in South Africa

The historical development of CSR is by no means unique. As is the case with the development of almost every field of scholarship, the rise to prominence of CSR has been characterised by severe criticism, difficulty in conceptualising the main tenets and core principles, and a perceived inability to provide conclusive research that supports the basic idea that CSR is good for business. Crane et al aptly note that:

Anyone looking for a field marked by clarity, consensus, and cohesiveness is likely to be disappointed.

This statement illustrates the need for continuing research in a field that is in a continuous state of development. The development of CSR is found in the relationship between business and society, where business attempts to establish its legitimacy in the public eye and society attempts to regulate the growth of corporate power.

Within the South African context, the CSR movement is still in its infancy and is a relatively recent phenomenon which has not necessarily been met with enthusiasm throughout the business sector. This situation is noted by Fig:

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178 See par 3.2.2.1.3 and par 3.2.2.1.4.
179 See par 3.4.2.2 for a discussion of the stakeholder approach. Stakeholders in this context could specifically include local communities.
180 Crane et al (eds) Corporate Social Responsibility 6 support the contention that CSR is best described as a field of scholarship as opposed to being a concept, construct or theory.
183 Jenkins 2005 (81) International Affairs 526.
184 Fig 2005 (81) International Affairs 615.
Many black entrepreneurs see CSR as being for “white” firms to atone for past sins, and therefore their own contribution to CSR spending remains minimal.

This is also one of the reasons why some businesses prefer the term CSI as opposed to CSR.

Within the national context and with reference to apartheid Hamann\textsuperscript{185} remarks:

The history of apartheid, and until 1994, the absence of committed state support for social development has required that companies embrace broader developmental objectives by means of social investment initiatives.

Whereas within the national context the legacy of apartheid and the consequent remedial action taken by Government and the private sector can currently be viewed as a driving force behind some CSR initiatives, internationally the CSR movement had many of its beginnings in attempts to influence international companies operating in the pre-1994 South Africa. During the apartheid years South African businesses were the targets of international consumer boycotts calling on international companies operating in South Africa to withdraw their businesses from South Africa, or as was the case with American companies, to accept initiatives such as the Sullivan Principles, which prescribed how responsible business was to be conducted in South Africa.\textsuperscript{186} The private sector contributed to and supported apartheid through its innovations to side-step sanctions, through the payment of taxes, and through its acceptance of Government contracts.

In the 1970s the international community pressurised multinational organisations with affiliates in South Africa to disinvest from the country and through their actions to condemn the policies of the apartheid regime. This pressure resulted in a voluntary code of conduct that became known as the Sullivan Principles. Signatories of the 1977 Sullivan Principles undertook to afford all of their South African employees, regardless of race, the same rights as their US counterparts. According to Leipziger\textsuperscript{187} one of the most important contributions of these Principles was that from a legal point of view businesses were encouraged to defy an unjust regime (apartheid) and accept social

\textsuperscript{185} Hamann 2003 (20) Development Southern Africa 249.
\textsuperscript{186} AICC Corporate social responsibility in South Africa 14.
\textsuperscript{187} Leipziger The Corporate Responsibility Code Book 68.
responsibility for all their employees, regardless of the country in which they were employed.\textsuperscript{188} These Principles became the blueprint for businesses that wanted to “do the right thing” in their business in South Africa and in so doing retain their credibility in the eyes of their US stakeholders.\textsuperscript{189}

According to Fig\textsuperscript{190} the black business community is divided on the subject of CSR. On the one hand emerging entrepreneurs are seen as having a responsibility to accumulate capital and to expand the role of black South Africans in the economy. These entrepreneurs are of the opinion that CSR represents an avenue which white business should use to repent for the injustices of the past and to provide redress to those affected by apartheid. On the other hand it is argued that these entrepreneurs have a responsibility towards the communities from which they originate as well as the communities affected by their business.

The development of CSR in the local context is divided into the period before and after the abolition of apartheid. The pre-1994 era was characterised by erratic philanthropic initiatives which did not relate to the core business of the company and which ultimately made little or no possible impact on existing social problems. The post-1994 era is characterised by attempts by both the Government and the private sector to address the injustices of the past – Government through various pieces of transformative legislation, and the private sector through its CSR initiatives.\textsuperscript{191}

3.4 The theoretical underpinnings of CSR

3.4.1 Introduction

When formulating a definition for CSR, such a definition will strongly be influenced by the theoretical approach of the person providing the definition. Since CSR as a field of scholarship is constantly developing, it is not uncommon that various approaches are

\textsuperscript{188} The Sullivan Principles were succeeded by the Global Sullivan Principles launched in 1999 aimed at encouraging businesses to support economic, social and political justice in their place of business, regardless of where that might be. For more on the Global Sullivan Principles see www.globalsullivannprinciples.org.

\textsuperscript{189} Post 2002 (12) Business Ethics Quarterly 268.

\textsuperscript{190} Fig (ed) Staking their claims 7.

\textsuperscript{191} For a more encompassing discussion of the evolution of CSR in South Africa, see Fig (ed) Staking their claims 14 – 30.
used to provide a theoretical foundation for business’ social responsibility. The development of CSR has been characterised by a proliferation of approaches, some more controversial than others. These approaches range from the Friedman approach, which denies the fact that a business has any social responsibility other than maximising profits,\(^\text{192}\) to the Freeman approach, that advocates that a business not only has a responsibility to its shareholders but also to other stakeholders like employees and communities affected by the company’s core business.\(^\text{193}\)

As noted by Garriga and Melé\(^\text{194}\) the majority of CSR theories focus on any of the following main aspects: achieving the objectives that lead to long-term profits, using business power responsibility, the integration of social demands in management, and contributing to society through ethically based actions. The authors identify four categories into which CSR theories can be classified. These are instrumental theories, political theories, integrative theories and ethical theories.\(^\text{195}\)

The instrumental theories regard a business as a strategic instrument for wealth creation and view CSR as an unnecessary expense that diminishes profits. Within this category the authors identify three main groups of theories depending on the economic objective proposed.\(^\text{196}\) The first group focuses on maximising shareholder value and uses share price as a measurement. An example of this theory would be the shareholder approach advocated by Milton Friedman.\(^\text{197}\) The second group of theories

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\(^{192}\) For a discussion of the Friedman approach, see par 3.4.2.1.

\(^{193}\) For a discussion of the Freeman approach, see par 3.4.2.2.

\(^{194}\) Garriga and Melé 2004 (53) *Journal of Business Ethics* 65. According to Klonoski (1991 (34) *Business Horizons* 16) despite the fact that various theories have been advanced on the nature and extent of CSR it would appear as if a single foundational question separates them, the question being: “Does business have a social nature or not?” Klonoski argues that the answer to this question has an impact on the character of one’s theory of CSR.

\(^{195}\) Garriga and Melé 2004 (53) *Journal of Business Ethics* 51 – 52. Secchi (2007 (9) *International Journal of Management Reviews* 347 – 373) does not agree with the categories proposed by Garriga and Melé and proposes three different categories for CSR theories. These categories are: the utilitarian, managerial and relational theories. Utilitarian theories include theories on social costs, while the managerial theories which consider CSR from inside the firm focus on theories regarding corporate social performance and social accountability. The relational theories include the stakeholder approach and the social contract theory. Since the classification of Garriga and Melé and that of Secchi exhibit certain similarities, the classification of Garriga and Melé will be used in this research.

\(^{196}\) Garriga and Melé 2004 (34) *Journal of Business Ethics* 53.

\(^{197}\) See par 3.4.2.1 for Friedman’s approach.
is focused on the strategic goal of achieving competitive advantages. The third group of theories is cause-related marketing theories, where the goal is to increase the bottom line through brand building. These theories argue that the bottom line will increase as a result of the association of a social responsibility dimension with the business.

Political theories emphasise the social power of a business and specifically a business' responsibility in the political arena associated with its power. As a result of its power a business accepts its social duties and has social responsibilities. Corporate citizenship is one of the major theories that can be distinguished amongst the political theories.

The third group of theories, the integrative theories, argues that business depends on society for its future existence (and social licence to operate) and that business should integrate social demands in its business strategy. Examples of integrative theories include stakeholder management, where stakeholders (other than just the shareholders) are integrated into managerial decision-making in line with the approach by Freeman. Corporate social performance is another example of an integrative theory that has found application in Schwartz and Carroll's three-domain approach.

Finally, the ethical theories are theories based on the belief that the relationship between business and society is founded on ethical values. This group of theories focuses on the ethical requirements in the relationship between business and society. They are value-based and ethics is their central theme. The authors include stakeholder management in this category, and argue that stakeholder management is ethically based as a result of the fiduciary relationship between managers and stakeholders. The value-based concept of sustainable development with its social

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201 See par 3.4.2.4 for a brief discussion of corporate citizenship.
202 See par 3.4.2.2 for a discussion of the stakeholder approach advocated by Freeman.
dimension is another theory in this category, and is increasingly becoming a field of scholarship in its own right.  

The following sections will discuss some of the major approaches in each of the preceding four categories in order to establish how CSR is viewed from an international perspective.

3.4.2 CSR approaches

3.4.2.1 The shareholder approach\(^{206}\) - the Friedman School

Garriga and Melé\(^{207}\) classify the shareholder approach as among the instrumental theories, where a business is viewed as an instrument to create wealth\(^{208}\) and CSR is regarded as an unnecessary expense.\(^{209}\) This is regarded as the classical view of CSR.\(^{210}\)

The notion that a company – a legal entity and artificial person – could have a social conscience and resulting social responsibility came under fierce criticism from Milton Friedman as early as 1970. It is widely accepted that Friedman is the protagonist in the story of CSR. In his seminal article *The Social Responsibility of Business is to Increase its Profits*\(^{211}\) Friedman argued that the exclusive responsibility that a business manager


\(^{206}\) This approach is also referred to as the Shareholder Value Theory or Fiduciary Capitalism (see Crane et al (eds) *Corporate Social Responsibility* 55 – 62) or the ownership theory as opposed to the stakeholder theory (Lawrence and Weber *Business and Society* 6). For a discussion of Friedman’s approach on the business of Business, see Horrigan *Corporate Social Responsibility* 91 – 93.

\(^{207}\) Garriga and Melé 2004 (34) *Journal of Business Ethics* 52.


\(^{209}\) Klonoski (1991 (34) *Business Horizons* 9) classifies the shareholder approach as a fundamentalist theory based on the fact that this approach concludes that businesses have no or very limited social responsibilities.


\(^{211}\) Friedman 1970 [www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html](http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html). This article represents a reaction to the views of proponents of CSR such as Davis (1960 *California Management Review* 70 – 76), where Davis argues that the social responsibility of a business is vested in the social power that a business has. According to Davis (1960 *California Management Review* 71) “social responsibilities of businessmen need to be commensurate with their social power”.

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(and thus the business) has is the responsibility towards his employers and ultimately the shareholders. This responsibility is normally to make as much money as possible and to generate profits, within the boundaries set by law and ethical custom. The pursuit of profit maximisation for the shareholder forms the focal point of this approach. In this sense the company is regarded as an “economic agent” the primary objective of which is to maximise profits. By maximising profits the manager would ensure that the economic value of the business is increased to the benefit of its shareholders. The sole function of a business should be an economic one, where profit maximisation is the criterion used to measure success.

In Friedman’s view, if a manager for example goes beyond the legal requirements on reducing pollution in order to contribute to the social aim of improving the environment, he will do so at the expense of profits and will be spending his shareholders’ profits. Friedman further argues that if, in order to contribute to the social aim of improving the environment, a manager has to increase the price of his product, he is spending his customers’ money. Engaging in social activities should be tolerated only if it is required by law or if such activities would add value to a shareholder’s investment in the business. According to Friedman if a business manager is directing corporate resources towards a social aim, the manager is effectively imposing taxes on the shareholders and is consequently also acting as a public servant.

In terms of the Friedman approach, those who support CSR are “preaching pure and unadulterated socialism”, and CSR “involves the acceptance of the socialist view that political mechanisms, not market mechanisms, are the appropriate way to determine the allocation of scarce resources to alternative uses”. He further states that

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212 In this construct the manager acts as an agent of the shareholders, who are regarded as being the principal in the principal-agent relationship.
213 Van Marrewijk 2003 (44) Journal of Business Ethics 96. In terms of this approach businesses should pursue only economic self-interest – any attempt to engage in CSR is morally wrong (Freeman and Liedtka 1991 (July-August) Business Horizons 93).
215 This approach is referred to as the doctrine of profit maximisation.
216 In this approach government is viewed as the only legitimate institution that should address social issues.
Few trends could so thoroughly undermine the very foundation of our free society as the acceptance by officials of a social responsibility other than to make as much money for their stakeholders as possible.218 (emphasis added).

The Friedman approach to CSR is aptly summarised as follows:

There is one and only one social responsibility of business – to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud.219

This approach accordingly rejects discretionary CSR expenditure and regards the creation of economic wealth as the most important contribution that the private sector can make towards general welfare.220 The approach supports the notion that wealth creation should be the supreme goal of business and that this goal is best achieved through conducting a business for self-interest – business should confine itself to its commercial role.221 In this line of reasoning it is argued that wealth creation further supports the government chest through the levying of taxes. More wealth should lead to more taxes collected, which would be utilised by government to address social problems.

In keeping with the Friedman approach it can be argued that taking on social responsibilities distorts the market and interferes with the economic activities of firms, while enabling governments to escape the obligation to fulfil their responsibilities towards their people. Governments are likely to neglect their responsibilities if the responsibilities are taken over by the private sector.

Spending money on CSR initiatives is a misappropriation of valuable corporate resources that should either be directly invested back into the business or paid out to the shareholders. The mere fact that business provides employment and pays taxes is enough to prove that the private sector is accepting responsibility.

218 Friedman as quoted in Carroll 1999 (38) Business and Society 277.
220 Windsor 2006 (43) Journal of Management Studies 103. In the discussions of the various definitions of CSR in par 3.2 it became evident that one of the core characteristics to be taken into account in defining CSR is the fact that CSR contributions should be seen as discretionary as opposed to mandated or required by law. This is in stark contrast to Friedman's approach.
221 Crane et al (eds) Corporate Social Responsibility 60 and Cannon Responsibility 36.
It would, however, seem as if the private sector has to some extent refuted Friedman’s contention through the number of business-sponsored CSR initiatives. Critiques of the shareholder approach argue that the creation of wealth cannot represent the whole of public good. Whilst wealth is created it would still be possible to exploit workers and natural resources, which would not be serving the public good. Melé\textsuperscript{222} remarked:

There is increasing evidence that economic success in the long run cannot be achieved unless management takes into account not only shareholder interests, but also those of employees, customers, suppliers and local communities, and other groups with a stake in the companies’ activities (stakeholders). A successful business firm needs much more than self-interest and concern for profits.

Upon closer analysis of Friedman’s approach it appears that without realising it Friedman himself advocates a social responsibility for businesses. Friedman\textsuperscript{223} posits that businesses should make as much profit as possible 

while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.

This statement identifies the notions of profit maximisation, legal compliance and ethical custom, which are remarkably like three of the tiers of Carroll’s\textsuperscript{224} pyramid of social responsibilities, namely economic responsibility, legal responsibility and ethical responsibility.\textsuperscript{225} The only tier that is absent from Friedman’s statement is what has become known as altruistic CSR, which deals with philanthropic responsibilities which entail the voluntary “giving back to stakeholders, regardless of whether or not such spending influences the business’ profitability”.\textsuperscript{226}

\textsuperscript{222} Crane \textit{et al} (eds) \textit{Corporate Social Responsibility} 61.
\textsuperscript{223} Friedman 1970 \texttt{www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html}.
\textsuperscript{224} Carroll 1991 (34) \textit{Business Horizons} 39 – 48.
\textsuperscript{225} For a discussion of Carroll’s pyramid of social responsibilities see par 3.4.2.2.1.
\textsuperscript{226} Lantos 2003 (19) \textit{Strategic Direction} 31 – 35 and Lantos 2002 (19) \textit{Journal of Consumer Marketing} 205 – 230. Lantos further supports Friedman in arguing that altruistic CSR should be viewed as a form of socialism that amounts to an unethical expense. This notion of altruistic CSR stands in contrast to what Lantos refers to as “strategic CSR”, which consists of philanthropic activities that are not only beneficial to stakeholders other than shareholders but also to the business itself and consequently the shareholders (Lantos 2001 (18) \textit{Journal of Consumer Marketing} 600). In Lantos’ view, strategic CSR is commendable because it ultimately creates a win-win situation for both the business and its stakeholders. The issue of strategic CSR will be discussed in more detail in the section dealing with the business case for CSR in par 3.5.
3.4.2.2 The stakeholder approach

3.4.2.2.1 Introduction

Edward Freeman is credited with the formulation of the stakeholder approach. In this approach the private sector is under an obligation to act in a socially responsible manner towards a variety of constituents, including shareholders, the workforce, customers, suppliers and the communities affected by a business’ core business. This approach acknowledges the fact that persons other than just shareholders have an interest in the success of the business and that a business is not only accountable to its shareholders but also has to balance the interests of stakeholders that can affect the company’s core business.

The stakeholder approach focuses on those who provide input in decision-making as well as on those who benefit from those decisions. In the stakeholder approach it is argued that CSR activities can be beneficial to both the business and to stakeholders.

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227 This approach is also referred to as the constituency theory (Klonoski 1991 Business Horizons 13). Quazi and O’Brien (2000 (25) Journal of Business Ethics 36) regard the stakeholder approach as the modern view to CSR as opposed to the classical view of the shareholder approach. The importance of the stakeholder theory is evident from the massive quantity of literature produced on this subject. Leading international journals have commissioned dedicated editions on stakeholder theory. These include the Academy of Management Review Volume 24, 1999 and the Business Ethics Quarterly Volume 12, 2002. According to a recent literature review conducted by Laplume, Sonpar and Litz (2008 (34) Journal of Management 1152 – 1189) approximately 180 articles have been published on this subject in the eight leading journals on management.

228 The central word in this approach is stakeholder as opposed to stockholder or shareholder, where stake implies an interest in or claim on a business enterprise by those with a stake in the business' activities (Lawrence and Weber Business and Society 7).

229 For a discussion on what constitutes a community, see Dunham, Freeman and Liedtka 2001 http://papers.ssrn.com/abstract=284973. The authors identify four alternative definitions of community – community of place (where the physical proximity of the members defines the community); community of interest (where people are linked as a result of their interests, like hobbyists or those involved in advocacy); community as a virtual advocacy group (this group exists through technological advances enabling electronic communication among members) and community of practice (denoting professional work groups united by shared interests etc). For a discussion of stakeholder perspectives on social responsibility, see Crowther and Capaldi (eds) Corporate Social Responsibility 47 – 63.

230 Phillips, Freeman and Wicks 2003 (13) Business Ethics Quarterly 487 and Scherer and Palazzo (eds) Global Corporate Citizenship 100 – 105. According to the authors the stakeholder approach is not concerned only with who gets how much of the pie, but also with who gets a say in how the pie is baked (Phillips, Freeman and Wicks 2003 (13) Business Ethics Quarterly 487).
that do not necessarily have a financial interest in the business. According to Crowther and Aras\textsuperscript{231} the stakeholder theory is

based on the assertion that maximising wealth for shareholders fails to maximise wealth for society and all its members.

The stakeholder approach can be regarded as the cornerstone for the business case for CSR, where businesses are increasingly becoming aware of the fact that in order to be sustainable businesses they have to engage with their stakeholders.\textsuperscript{232} This approach stresses the importance of a business' relationship with a variety of stakeholders other than just the shareholders.\textsuperscript{233} The crux of the stakeholder approach is that the relationships that exist between the business and a range of stakeholders must be mutually satisfactory in order to ensure successful business performance over the long term.\textsuperscript{234}

Most of a business’ stakeholders are connected to the business via contracts. Employees and suppliers, for example, are linked through explicit contracts such as service contracts and suppliers’ contracts. With other constituencies such as customers a more implicit contract exists, and it can even be argued that a social contract exists between a business and the society in which it functions.\textsuperscript{235}

The stakeholder approach is characterised by two distinct theories, the instrumental stakeholder theory and the normative stakeholder theory. The instrumental theory

\textsuperscript{231} Crowther and Aras Corporate Social Responsibility 30.
\textsuperscript{232} The business case for CSR will be discussed in more detail in par 3.5. According to the European Commission (EC COM(2001) 5) the business case for CSR becomes apparent “where corporate social responsibility is a process by which companies manage their relationships with a variety of stakeholders who can have a real influence on their licence to operate”.
\textsuperscript{234} Donaldson 2003 (12) Business Ethics Quarterly 108. The European Commission supports this notion and argues that the involvement of stakeholders will enhance the effectiveness of a business’ CSR initiatives (EC COM(2006) 136 7).
\textsuperscript{235} The issue of social contracts will be discussed in more detail in par 3.4.2.4.
focuses on the extent to which corporate financial performance can be improved by using stakeholders as an instrument or a means to reach a goal. The normative theory, by contrast, stresses the inherent value of stakeholders, regarding them as an end and not merely as a means.

The concept of stakeholders is central to this approach and it is necessary to establish how this concept is defined. The following section will examine a number of definitions.

3.4.2.2.2 The stakeholder concept

Freeman, who first foregrounded the stakeholder approach, defines stakeholders as

any group or individual who can affect or is affected by the achievement of the organization’s objectives.

From this definition it is evident that stakeholder groups can be divided into two categories – primary stakeholders and secondary stakeholders. Primary

footnotes:

237 Garcia-Castro and Ariño 2008 http://www.iese.edu/en/files/6_40625.pdf and Jones and Wicks 1999 (24) Academy of Management 208 – 210. Donaldson (1999 (24) Academy of Management Review 237) defines instrumental theory as “any theory asserting that…if managers view the interests of stakeholders as having intrinsic worth and pursue the interests of multiple stakeholders, then the corporations they manage will achieve higher traditional performance measures”. He further defines normative stakeholder theory as “any theory asserting some form of the claim that managers ought to view the interests of stakeholders as having intrinsic worth and should pursue the interests of multiple stakeholders” (Donaldson 1999 (24) Academy of Management Review 237).
238 For a summation of definitions provided for stakeholders from 1963 to 1995, see Mitchell, Agle and Wood 1997 (22) Academy of Management Review 858.
239 Freeman A Stakeholder Approach 48. This definition possibly provides the broadest approach to defining a stakeholder and although it is often cited, according to Mithcell, Agle and Wood (1997 (22) Academy of Management Review 862) it is not universally accepted among researchers and academics. The broad approach is based on the stakeholders’ power to influence the business, regardless of whether the stakeholder has a legitimate claim to the stake. In terms of the broad approach, groups such as terrorists and competitors and even the environment (Phillips and Reichart 1998 (23) Journal of Business Ethics 185 – 198) are regarded as stakeholders. This broad approach necessitates an acceptable and justifiable sorting criterion in order to narrow the range of stakeholders. The criteria used to classify stakeholders will be discussed in paragraph 3.4.2.2.4. The power of the stakeholder is one of the criteria.
240 Mitchell, Agle and Wood (1997 (22) Academy of Management Review 853 – 854) support this classification. Lawrence and Weber distinguish between market and nonmarket stakeholders, where market shareholders refer to “those that engage in economic transactions with the company as it carries out its primary purpose of providing society with goods and services” and nonmarket stakeholders refer to “people or groups who – although they do not engage in direct economic exchange with the firm – are nonetheless affected by or can affect its actions”. (Lawrence and Weber Business and Society 8 – 9). Market stakeholders can also be primary stakeholders while nonmarket stakeholders are also referred to as secondary stakeholders. Werther and Chandler (Strategic Corporate Social Responsibility 2nd edition 34 – 35) distinguish between organisational
stakeholders are those who are indispensable to the future existence of the business. The business’ continued existence is reliant upon the business having good relationships with this group. It usually includes shareholders or investors, employees, customers and suppliers – those who form part of the business’ supply chain. This group also includes Government, which is responsible for providing infrastructure and legislation for the business to operate in. 241 Secondary stakeholder groups are those groups which are not crucial to the survival of the business but who influence it or are influenced by it. An example of this group is the media, which have the ability to affect a business through their reporting. 242

In Mitchell, Agle and Wood’s 243 view stakeholders can be

- owners and non-owners of the firm; as owners of capital or owners of less tangible assets; as actors or those acted upon; as those existing in a voluntary or involuntary relationship with the firm; as rights-holders, contractors, or moral claimants; as resource providers to or dependents of the firm; as risk-takers or influencers; and as legal principals to whom agent-managers bear a fiduciary duty.

In terms of this broad definition of stakeholders virtually anyone can be regarded as being a stakeholder, and as a result the need exists to identify those stakeholders that can realistically be viewed as stakeholders. The issue of stakeholder identification and classification will be addressed in the following sections.

Donaldson and Preston 244 define stakeholders as

- persons or groups with legitimate interests in procedural and/or substantive aspects of corporate activity.

According to these authors stakeholders are identified by their interests in the business regardless of whether the business has any functional interest in them. 245

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Bruono and Nichols\textsuperscript{246} support the notion that businesses are “servants of the larger society” and they define stakeholders in a narrow and broad sense. They state:\textsuperscript{247}

In a narrow sense, stakeholders are those identifiable groups or individuals on which an organization depends for its survival, sometimes referred to as primary stakeholders – stockholders, employees, customers, suppliers and key government agencies. On a broader level, however, a stakeholder is any identifiable group or individual who can affect or is affected by organizational performance in terms of its products, policies and work processes. In this sense, public interest groups, protest groups, local communities, government agencies, trade associations, competitors, unions, and the press are organizational stakeholders.

Following on the definition of Bruono and Nichols, the local community in an area in which mining is conducted will not be regarded as being a primary stakeholder since the mine in the strict sense does not depend on the community for its existence. The local community would, however, be regarded as a stakeholder on the broader level since it could be affected by the operations and decisions of the mine. Should the mine for instance close down, such a measure would have a negative impact on the community as a result of the removal of economic activities from the community.

An interrelationship exists between a business and its stakeholders, where the actions of the business impact on the stakeholders and where the stakeholders’ actions have an impact on the business.\textsuperscript{248} This view accepts that stakeholders with legitimate interests in the business interact with the business in order to obtain some form of benefit.\textsuperscript{249}

Post, Preston and Sachs\textsuperscript{250} define stakeholders, in relation to the business, as:

\begin{quote}
[i]ndividuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities, and who are therefore its potential beneficiaries and/or risk bearers.
\end{quote}

In terms of the definitions provided it is evident that in order to be regarded as a stakeholder, the stakeholder should hold a stake in the business, whether directly or

\begin{itemize}
\item \textsuperscript{245} Donaldson and Preston 1995 (20) Academy of Management Review 67.
\item \textsuperscript{246} Bruono and Lawrence “Stockholder and stakeholder interpretations of business’ social role” 202 – 208.
\item \textsuperscript{247} Bruono and Lawrence “Stockholder and stakeholder interpretations of business’ social role” 202 – 208.
\item \textsuperscript{248} This position is supported by the ISO, which notes that “stakeholders are organizations or individuals that have one or more interests in any decision or activity of an organization” (ISO Guidance on social responsibility 17).
\item \textsuperscript{249} Donaldson and Preston 1995 (20) Academy of Management Review 68.
\item \textsuperscript{250} Post, Preston and Sachs 2002 (45) California Management Review 8.
\end{itemize}
indirectly. The following section will establish how a stake is defined within the stakeholder approach.

3.4.2.2.3 Defining stakeholder claims/stakes

The stakeholder theory is based on the notion that groups or persons have a stake in the business, as implied by the use of the term stakeholder.251 This stake can be a share or like interest reflecting some form or property rights or ownership252 or merely the interest that a group has in the operations and decisions of the business. According to Garcia-Castro and Ariño253 the notion of a stake is connected to risk – stakeholders are those groups that share in the risk of the business, either voluntarily or involuntarily, and whose stake will be influenced by the business’ action.254 Clarkson255 views stakeholders as voluntary or involuntary risk-bearers, where voluntary stakeholders bear risk as a result of their investment in the business and involuntary stakeholders are exposed to risk due to the business’ activities. In the absence of risk there is nothing “at stake”, no stakeholder to speak of, and nothing to be lost.256 Shareholders as stakeholders risk the loss of their investment; employees as stakeholders risk losing their jobs; creditors risk default on payment; and suppliers risk a loss of turnover in the case of business closure.257 All of these constituencies stand to suffer a direct financial

251 The ISO uses the term "interest" as opposed to stake. Interest in this context refers to “the actual or potential basis of a claim, that is, to demand something that is owed or to demand respect for a right. Such a claim need not involve financial demands or legal rights. Sometimes it can simply be the right to be heard” (ISO Guidance on social responsibility 17).
252 A legitimate claim in a business can also be regarded as a stake, implying a stakeholder. A legitimate claim can result from a contract or amount to a legal title or legal right.
254 This notion of risk bearing is supported by the definition provided for stakeholders by Post, Preston and Sachs (2002 (45) California Management Review 8); Kochan and Rubenstein 2000 (11) Organizational Science 367 – 386; Clarkson "A Risk Based Model of Stakeholder Theory" 1994 as quoted in Mitchell, Agle and Wood 1997 Academy of Management Review. As an example of risk associated to stakes, stakeholders supply resources and place something of value at risk combined with this risk.
255 Clarkson "A Risk Based Model of Stakeholder Theory" 1994 as quoted in Mitchell, Agle and Wood 1997 (22) Academy of Management Review 856 – 857. The investment that voluntary stakeholders make in the business can be in the form of capital investments or other investments with monetary value.
256 Clarkson’s definition represents the narrower approach to defining stakeholders as opposed for example to the definition provided by Freeman. The narrower approach take cognisance of the fact that limited resources is available and that managers have limited time available to determine which stakeholders have a direct impact on the business’ core activities.
loss. The reference to risk to define a stake links up with the notion that only those with legitimate claims can be considered stakeholders of a business. The issue of legitimacy as a classification tool for stakeholders will be discussed in the following paragraph.

3.4.2.2.4 Stakeholder identification and classification

Each company will have a different set of stakeholders, depending on its core business.\(^{258}\) The stakeholder approach acknowledges the fact that a business can have an impact on stakeholders but also the fact that the actions of stakeholders can affect the business. As the interests of all stakeholders are of intrinsic value, the business should pay consideration to all of its stakeholders. In terms of this approach, a socially responsible business should attend to the legitimate interests of all of its stakeholders and act in the interest of all of the stakeholders, not just the shareholders.

One of the challenges facing a business is to identify the stakeholders with legitimate interests in the business – those stakeholders that merit and receive consideration in business decisions. As a result a business needs to conduct an analysis of its stakeholders.\(^{259}\) Carroll\(^{260}\) identifies two criteria for use in identifying stakeholders. The first criterion is the legitimacy of the stakeholders. This refers to the extent to which a group has a justifiable right to make a claim.\(^{261}\) The second criterion refers to the stakeholders’ power and the extent to which this power can be summoned to influence business decisions.\(^{262}\) Mitchell, Agle and Wood\(^{263}\) added a third attribute which refers

\(^{258}\) Stakeholder identification and stakeholder engagement are central to addressing a business’ social responsibility (ISO Guidance on social responsibility 16).

\(^{259}\) In its analysis of stakeholders managers need to establish who the stakeholders are and what stake they have in the business. Once the stakeholders are established, managers need to determine which social responsibilities they have toward the stakeholders and which actions to take in order to address these responsibilities – this process is commonly referred to as stakeholder engagement. For a discussion of how to engage stakeholders in the shaping and delivery of business strategies, see Grayson and Hodges Corporate Social Opportunity 205 – 243. To identify stakeholders, the ISO (Guidance on social responsibility 17) proposes that the business asks itself the following questions: To whom does the business have legal obligations? Who might be positively or negatively affected by the business’ decisions or activities and who is likely to express concerns about these decisions or activities? Who can affect the business’ ability to meet its responsibilities and who would be disadvantaged if excluded from the engagement?

\(^{260}\) Carroll 1991 (34) Business Horizons 43.

\(^{261}\) For a further discussion of stakeholder legitimacy, see Phillips 2003 (13) Business Ethics Quarterly 25 – 41.

\(^{262}\) For a further discussion of these attributes see Mitchell, Agle and Wood 1997 (22) Academy of Management Review 865 – 867.
to the urgency of the stakeholder’s claim on the business or the “degree to which stakeholder claims call for immediate attention”.264

Based upon the criteria of power, legitimacy and urgency Mitchell, Agle and Wood265 identified seven classes of stakeholders with, one, two or three of the attributes present.266 The classes identified are dormant stakeholders, discretionary stakeholders, demanding stakeholders,267 dominant stakeholders, dependent stakeholders, dangerous stakeholders268 and definitive stakeholders. Each of these categories will be discussed briefly.

a) Dormant stakeholders

This group of stakeholders possesses some power to influence the business but does not have any legitimate relationship with the business or an urgent claim, and as a result the power remains dormant and unused. Potential investors that have not yet invested in a business can be regarded as dormant stakeholders. Due to their power, this category of stakeholders can conceivably become more influential in the future.269

263 Mitchell, Agle and Wood 1997 (22) Academy of Management Review 854 and 867. The authors provide a useful summation of the key constructs in stakeholder identification based on power, legitimacy and urgency (Mitchell, Agle and Wood 1997 (22) Academy of Management Review 869).

264 In order to identify relevant stakeholders it is necessary to identify them through the process referred to as ‘stakeholder analysis’ (Lawrence and Weber Business and Society 11). The first step in the process is to identify the relevant stakeholders and then determine what each of the stakeholders’ interests is and once this is established it must be established what the power or each of the stakeholders is.

265 Mitchell, Agle and Wood 1997 (22) Academy of Management Review 874. Following from this, if a stakeholder is powerful, legitimate and urgent then its needs will require immediate attention and be given primacy (see Crowther and Capaldi (eds) Corporate Social Responsibility 49).

266 Phillips (2003 (13) Business Ethics Quarterly 25 – 41) on the other hand identifies only two types of stakeholders – normative and derivative stakeholders. Normative stakeholders represent those stakeholders that provide the answer to the question “For whose benefit should the business be managed?” Derivative stakeholders are “those groups whose actions and claims must be accounted for by managers due to their potential effects upon the organization and its normative stakeholders” (Phillips 2003 (13) Business Ethics Quarterly 31). For an example of the distinction between normative and derivative stakeholders, see Phillips 2003 (13) Business Ethics Quarterly 34 – 37.

267 Latent stakeholders are those who have only one of the three attributes of power, legitimacy or urgency (Mitchell, Agle and Wood 1997 (22) Academy of Management Review 874).

268 Expectant stakeholders have two of the three attributes. Stakeholders in this category are expecting something from the business (Mitchell, Agle and Wood 1997 (22) Academy of Management Review 876).

b) Discretionary stakeholders

Discretionary stakeholders have a legitimate relationship with the business, but have no power to exercise any influence over the business or any urgent claims. Since this group does not have any power or urgent claims, they are usually the recipients of philanthropic spending in the discretion of the business manager.\textsuperscript{270}

c) Demanding stakeholders

Where a stakeholder has no power to influence the business and no legitimate relationship with the business, but only some urgent claim, the stakeholder will be classified as a demanding stakeholder. This group is described as “irksome but not dangerous, bothersome but not warranting more than passing management attention”.\textsuperscript{271}

d) Dominant stakeholders

This group of stakeholders has both the power to influence a business as well as a legitimate claim, and warrants recognition by the business. This group represents one of the most important groups of stakeholders and usually includes a business' shareholders.\textsuperscript{272}

e) Dependent stakeholders

Where stakeholders have no power but urgent legitimate claims, they are classified as being dependent stakeholders. These stakeholders depend on the power of others to establish themselves.\textsuperscript{273}

f) Dangerous stakeholders

This group of stakeholders lacks legitimacy but has sufficient power and urgency in order to be able to influence the business. This group of stakeholders poses a threat to

\textsuperscript{270} Mitchell, Agle and Wood 1997 (22) Academy of Management Review 875. Discretionary stakeholders could for example include research institutions.

\textsuperscript{271} Mitchell, Agle and Wood 1997 (22) Academy of Management Review 875. These stakeholders could potentially include consumer organisations.

\textsuperscript{272} Mitchell, Agle and Wood 1997 (22) Academy of Management Review 876 – 877.

\textsuperscript{273} Mitchell, Agle and Wood 1997 (22) Academy of Management Review 877.
the existence of the business. For example, environmentalists may be spiking trees in areas to be logged.\textsuperscript{274}

g) Definitive stakeholders

The final category of stakeholders represents those stakeholders that have the legitimate and urgent power to influence the business. The shareholders act out of a sense of urgency when they see their share prices fall. They will be regarded as definitive stakeholders.\textsuperscript{275}

Beaver\textsuperscript{276} is of the opinion that despite the importance of stakeholders other than shareholders, many businesses are still primarily focussed on their shareholders and that shareholders' interest will continue to be served exclusively.

3.4.2.2.5 Critiques of the stakeholder approach\textsuperscript{277}

The stakeholder theory is not without its limitations. Beaulieu and Pasquero\textsuperscript{278} identified some of its possible limitations. One limitation is the static character of the theory. According to the authors the theory is unable to account for the dynamics of multi-stakeholder relations. They argue that the theory focuses primarily on managers and, that other stakeholders should be included in the core of the theory.\textsuperscript{279}

Critics of the stakeholder approach argue that the principal-agent relationship is distorted when managers act on behalf of stakeholders who are not shareholders and that this exacerbates agency problems.\textsuperscript{280} This critique is in line with Friedman's argument that the primary focus of managers should be profit maximisation and that they act as agents on behalf on their shareholders. A significant shortcoming of the

\textsuperscript{274} Mitchell, Agle and Wood 1997 (22) \textit{Academy of Management Review} 877.
\textsuperscript{275} Mitchell, Agle and Wood 1997 (22) \textit{Academy of Management Review} 878.
\textsuperscript{276} Beaver 1999 (42) \textit{Business Horizons} 8 – 12.
\textsuperscript{277} For a more detailed discussion concerning critique against the stakeholder theory, see Jensen 2002 (12) \textit{Business Ethics Quarterly} 235 – 256; Orts and Strudler 2002 (12) \textit{Business Ethics Quarterly} 215 – 233 and Phillips 2003 (13) \textit{Business Ethics Quarterly} 25 – 41. For a summation of the major points of criticism against the stakeholder approach see Laplume, Sonpar and Litz 2008 (34) \textit{Journal of Management} 1152 – 1189.
\textsuperscript{278} Beaulieu and Pasquero 2002 (6) \textit{Journal of Corporate Citizenship} 55.
\textsuperscript{279} For a complete discussion of the limitations identified, see Beaulieu and Pasquero 2002 (6) \textit{Journal of Corporate Citizenship} 55.
\textsuperscript{280} Doh and Guay 2006 (43) \textit{Journal of Management Studies} 56.
approach, according to Phillips\textsuperscript{281} is what he refers to as the “problem of stakeholder identity”. As was evidenced in the discussion of defining stakeholders no agreement exists in the literature as to precisely what is meant when one refers to stakeholders. The problem that Votaw\textsuperscript{282} identified regarding the definition for CSR also holds true for the definition of stakeholders. In his words we can now state that a stakeholder means something, but not always the same thing to everybody. Phillips\textsuperscript{283} is of the opinion that “an overly broad definition threatens the meaningfulness of the term stakeholder”\textsuperscript{284}. This attempt to provide a very broad definition for stakeholder is partially a result of the fact that businesses differ and that they would not necessarily have the same stakeholders.

A further limitation of the stakeholder approach is that it focuses only on the human participants of the business and does not include the natural environment as a potential stakeholder.\textsuperscript{285} Orts and Strudler\textsuperscript{286} conclude that

> stakeholder theories of the firm cannot supply the necessary perspective on the most difficult moral questions in business, such as the obligation to obey the law and to manage in an environmentally responsible manner.

Child and Marcoux\textsuperscript{287} and Cragg\textsuperscript{288} argue that the stakeholder theory lacks proper grounding and does not succeed as a normative theory. While Perrini\textsuperscript{289} is of the opinion that the theory does not apply to small or medium businesses, Gioia\textsuperscript{290} is of the opinion that the theory is too difficult to implement.

The domain approaches to CSR were formulated in response to some of this critique.

\textsuperscript{283} Phillips 2003 (13) Business Ethics Quarterly 28.
\textsuperscript{284} In the same vein, Phillips further argues that an overly narrow definition would possibly omit strategically important stakeholders from the theory (Phillips 2003 (13) Business Ethics Quarterly 28). This notion is further supported by Donaldson and Preston 1995 (20) Academy of Management Review 86; Phillips and Reichart (1998 (23) Journal of Business Ethics 185 – 198) and Dunham, Freeman and Liedtka 2001 http://papers.ssrn.com/abstract=284973.
\textsuperscript{285} Orts and Strudler 2002 (12) Business Ethics Quarterly 216.
\textsuperscript{286} Orts and Strudler 2002 (12) Business Ethics Quarterly 227.
\textsuperscript{287} Child and Marcoux 1999 (9) Business Ethics Quarterly 207 – 223.
\textsuperscript{288} Cragg 2002 (12) Business Ethics Quarterly 113 – 142.
\textsuperscript{290} Gioia 1999 (24) Academy of Management Journal 228 – 232.
CSR literature has identified three major domain approaches to CSR. The first approach is based on Carroll’s Pyramid of Corporate Social Responsibility, in terms of which four CSR domains are identified and depicted in a pyramid. The second approach is a result of Carroll’s Pyramid model and consists of three circles depicted in a Venn diagram. The three-domain approach proposed by Schwartz and Carroll is an expansion of work previously done by Carroll. The final approach is the concentric-circle model, which was initially formulated by the Committee for Economic Development in 1971 and which was expanded by Geva in a later model.

The following section will provide a discussion of each of the identified domain approaches.

3.4.2.3.1 Carroll’s Pyramid of Corporate Social Responsibility

In 1979 Carroll formulated the following definition of CSR:

The social responsibility of business encompasses the economic, legal, ethical, and discretionary expectations that society has of organizations at a given point in time.

This definition was incorporated into a pyramid of corporate social responsibility in terms of which each of the expectations identified in the definition represented a level of the pyramid. The aim of the pyramid was to “embrace the entire spectrum of society’s expectations of business”.

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293 Geva 2008 (113) Business and Society Review 22 – 39. The Committee on Economic Development supported the notion that a business should consider its customers, the community, shareholders and employees in its business actions (a precursor to what later became known as the stakeholder theory formulated by Freeman) and that business should set social goals and institute mechanisms to evaluate the extent to which these social goals are achieved. The committee identified opportunities in urban development and the transport system as social opportunities that could be considered as possible investments (a possible precursor to what Lantos refer to as strategic CSR) (CED as quoted in Elbirt and Parket 1973 (16) Business Horizons 8).
294 Carroll 1979 (4) Academy of Management Review 500. See par 3.2.2.3.5 for a discussion of Carroll’s definition.
At the basis of the pyramid is a business’ economic responsibility in terms of which a business is required to maximise profits in order to stimulate growth. In terms of this model, a business’ economic responsibility represents the foundation for the other tiers of the pyramid – without the economic responsibility all other responsibilities “become moot considerations”.  

The second tier of the pyramid refers to a business’ legal responsibilities. In terms of a business’ legal responsibilities, businesses are required to comply with laws and regulations. According to Carroll this legal compliance can be regarded as a partial fulfilment of the social contract that exists between business and society. Society expects business to fulfil its economic responsibilities in a legally responsible way – in line with the legal framework. Although legal responsibility is on the second tier, this responsibility should be seen as “coexisting with economic responsibilities as fundamental concepts of the free enterprise system”. In this regard the legal responsibility of the business includes being seen as a law abiding corporate citizen that fulfils its legal obligations and whose products or services at a minimum meet the required minimum legal requirements.

The third tier of the pyramid represents a business’ ethical responsibilities. In this regard it is expected of a business to act in an ethically responsible manner which is consistent with societal expectations and which goes beyond mere compliance with the legal requirements. Mere compliance with those norms already codified in law will be regarded as an activity that should be in the legal domain, not the ethical one. According to Carroll this level of responsibility is intertwined with the legal responsibility and is “constantly pushing the legal responsibility category to broaden”. The ethical domain requires businesses to do what is right, just and fair.

300 Carroll 1991 (34) Business Horizons 41.
301 Societal expectations can be based for example in religion and generally accepted human rights.
302 According to Geva (2008 (113) Business and Society Review 8) legal responsibility is restricted to the letter of the law, while ethical responsibility is concerned with the spirit of the law.
The top of the pyramid represents a business’ philanthropic responsibilities which “encompasses those corporate actions that are in response to society’s expectations that businesses be good corporate citizens”.\footnote{Carroll 1991 (34) \textit{Business Horizons} 42. Philanthropic contributions are considered by many as business’ way to “give back to society”. According to Lantos (2001 (18) \textit{Journal of Consumer Marketing} 598) most of the controversy regarding CSR lies with the altruistic responsibility. The author argues that genuine philanthropy which is not used as a marketing tool, is “not proper for corporate responsibilities to practice” (Lantos 2001 (18) \textit{Journal of Consumer Marketing} 600).} Philanthropic responsibilities are not expected from a business but are desired in order for the business to be perceived as a good corporate citizen. According to Jamali\footnote{Jamali 2008 (82) \textit{Journal of Business Ethics} 215.} this type of responsibility is the most controversial of the identified responsibilities since it could be regarded as being in direct conflict with economic responsibility in the sense that corporate funds are directed away from shareholders.\footnote{This notion that philanthropic contributions have an impact on the financial bottom line will be discussed in more detail in the section regarding the business case for CSR where it will be argued that these types of contributions can be of strategic value to the business if managed correctly. See par 3.5.} Society expects businesses to act in an ethical manner but it does not regard a business that does not engage in philanthropic activities as being unethical. A business that acts in a socially responsible manner will in terms of this pyramid strive to make a profit, obey the law, act ethically and contribute to society in order to be regarded as a good corporate citizen. The pyramid attempts to describe those social expectations that a socially responsible business should fulfil in order to be regarded a good corporate citizen.

3.4.2.3.2 Schwartz and Carroll’s Three Domain approach

In 2003 Schwartz and Carroll revisited Carroll’s 1991 Pyramid of Corporate Social Responsibility in order to propose an alternative approach to CSR based on the domains previously identified by Carroll. The pyramid required a revisit as a result of certain limitations identified in the application thereof.

The first notable issue with the four-part model is the use of a pyramid to depict the CSR domains.\footnote{Schwartz and Carroll 2003 (13) \textit{Business Ethics Quarterly} 505. For a further discussion on the possible limitations of the pyramid model, see Geva 2008 (113) \textit{Business and Society Review} 7 – 15.} The use of the pyramid construction creates what appears to be a hierarchy of CSR domains, where philanthropic responsibilities are the most important
and economic responsibilities are the least important. This was not how Carroll intended to rank the responsibilities. The author stipulated that the economic and legal responsibilities are required and form the basis of the domains, while philanthropic responsibilities are merely desired and less important. The second issue with the use of a pyramid is that it does not make provision for the overlapping nature of the domains. Certain actions by a business can be both economic and legal or both legal and ethical, a situation which is not provided for in the pyramid structure even though the domains are separated by dotted lines.

A further shortcoming in the pyramid approach is the provision of a separate philanthropic domain. It is argued that philanthropy does not represent a responsibility in itself and since it is not expected of businesses but merely desirable it should not be included as a category of its own. Philanthropic activities in this regard can be viewed as an example of ethically motivated activities. It is further possible that philanthropic activities can be motivated by economic objectives such as enhanced reputation. Where a business donates to a charitable organization in order to receive some benefit from the activity, this is also referred to as strategic philanthropy.

The final issue with Carroll’s model is the fact that the model provides an incomplete discussion of the criteria to be used in order to establish in which domain an activity falls, especially with reference to the ethical and legal domains. It is argued that legal responsibility entails more than just legal compliance. It also includes the avoidance of civil litigation and the anticipation of changes in the law.

In reaction to the shortcomings identified in Carroll’s model, Schwartz and Carroll proposed a model consisting of three CSR domains which are depicted in the form of a Venn diagram consisting of intersecting circles. The three domains or responsibility areas (each represented by circle) are economic, legal and ethical. The philanthropic or

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308 Carroll 1991 (34) Business Horizons 42.
309 This situation can be referred to as the problem of integration due to the fact that the pyramid structure does not provide for integration between the domains.
310 This domain is also referred to as the discretionary domain.
313 For a discussion of the Three-domain approach see Geva 2008 (113) Business and Society Review 15 – 22.
discretionary domain has been omitted as an individual domain and is included in both the ethical and economic domains. The use of the Venn diagram to depict the domains is preferred since it does not use a structure from which a possible hierarchy of domains can be established - all of the domains are of equal importance. The use of a Venn diagram further makes provision for the possibility that the different domains overlap at some point and accordingly recognises the “interpenetrating nature of the CSR domains”314 and that the responsibilities “are in dynamic interplay with each other”.315 It is possible to find an activity which falls within all three domains.

In terms of this revisited model, the economic domain refers to those activities that have a direct or indirect positive impact316 on the economic bottom line. The majority of a business’ activities would fall within this domain as long as the activities are aimed at profit or share value maximisation.

According to Schwartz and Carroll317 the legal domain of CSR refers to a business’ “responsiveness to legal expectations mandated and expected by society”. This domain encapsulates more than mere legal compliance. As was said in the description of the issues identified with the pyramid of responsibilities, the avoidance of civil litigation and the anticipation of changes in the law should also be included in the legal domain.318 The avoidance of civil litigation relates to those business activities which occur as a result of possible future civil litigation arising out of negligent conduct. Voluntary business activities resulting from an anticipation of possible changes to legislation are regarded as activities falling within the legal domain.

314 Geva 2008(113) Business and Society Review 15.
315 Geva 2008(113) Business and Society Review 15.
316 The positive impact of an activity can either be related to an increase in profits (profit maximisation) or an increase in share value (share value maximisation).
318 Schwartz and Carroll (2003 (113) Business Ethics Quarterly 509 -510) identifies three sub-categories of legal compliance – passive, restrictive and opportunistic. Passive compliance refers to the situation where legal compliance is a mere coincidence. Restrictive compliance occurs when a business is required to do something it would not have done otherwise. The issue of opportunistic compliance is found in instances where for example a business decides to take advantage of a weak legal system in order to produce products that for instance do not comply with international requirements, although they comply with the requirements of the weaker legal system. Another example is the exploitation of Western businesses of weak labour regimes in countries such as Sri-Lanka or Afganistan.
The ethical domain of the three-domain approach reflects those business activities which are in line with the ethical expectations of the general public and more specifically primary stakeholders. Ethical expectations in this regard refer to those norms which the business, the industry or society regards as being necessary for the optimal functioning of the business.\textsuperscript{319}

The use of a Venn diagram to depict the CSR domains makes provision for the fact that the domains overlap in certain instances. The diagram provides for seven possible mutations of the domains. The segments are the purely economic, the purely legal, the purely ethical, the economic/ethical, the economic/legal, the legal/ethical and the economic/legal/ethical. The following section will provide a brief description of each of these segments.

a) Purely economic

A purely economic activity implies that the activity is illegal,\textsuperscript{320} unethical and has a direct or indirect economic benefit. The conduct of Enron, where shareholders were deceived by the manipulation of the company’s balance sheet, might have had some short-term economic benefit for the company, but was illegal and unethical.\textsuperscript{321}

b) Purely legal

Purely legal activities are those activities that amount to legal compliance but which have no direct or indirect economic benefit and which are not regarded as being ethical. Schwartz and Carroll\textsuperscript{322} observe that very few activities would fall within this segment since compliance with the law is regarded by society as being the ethical thing to do.

\textsuperscript{319} Society in this regard refers to the business’ stakeholders (shareholders, employees, customers, suppliers, local communities etc) as well the general population (Schwartz and Carroll 2003 (13) \textit{Business Ethics Quarterly 512}).

\textsuperscript{320} Or that it passively complies with the law.

\textsuperscript{321} For more recent examples of purely economic activities, see Schwartz and Carroll 2003 (13) \textit{Business Ethics Quarterly 514}.

\textsuperscript{322} Schwartz and Carroll 2003 (13) \textit{Business Ethics Quarterly 515}. 
c) Purely ethical

Activities which are purely ethical have no direct or indirect economic benefit and do not amount to legal compliance. A donation by an agricultural co-operation to Alzheimer research might be regarded as a purely ethical activity. The donation does not lead to a direct or indirect benefit and is not required by law, although it might be considered ethical.323

d) Economic/ethical

These activities are not required by law (although passive compliance may occur), but are considered to be ethical and have an economic benefit. In a legal system with a weak environmental legal framework, a business that manufactures “green” products will be regarded as acting in an ethical manner and would receive direct financial benefits from increased consumer support. A donation by an agricultural co-operation of farming implements to a local community that received land in terms of the land reform program, although not required by law, will be considered ethical and will provide a financial benefit to the business if the business receives direct access to the produce from the community. This action will also provide the co-operation with a strategic advantage if it were to become known that the co-operation is supporting emerging farmers.

e) Economic/legal

As was the case with purely legal activities, very few business activities will fall within the economic/legal segment. As was the case with purely legal activities, it is most unlikely that there are such things as activities which have an economic benefit and engage the legal domain but are unethical. Examples of activities falling within this segment usually involve the opportunistic use of legislation to find loopholes in order to receive economic gain.324

323 For more recent examples of purely ethical activities, see Schwartz and Carroll 2003 (13) Business Ethics Quarterly 515 – 516.
324 For more recent examples of purely ethical activities, see Schwartz and Carroll 2003 (13) Business Ethics Quarterly 517.
f) Legal/ethical

Activities in this segment are legally and ethically required but are of no economic benefit to the business. If an agricultural co-operation that manufactures fertilisers is unexpectedly required by law to place a label on its fertiliser packaging indicating the dangers of a certain chemical contained in the fertiliser, such labelling would hold no financial benefit for the company but it would be complying with legislation and be seen as ethical practice.

g) Economic/legal/ethical

Activities in this segment provide a direct or indirect economic benefit, amount to legal compliance, and are based on ethical standards set by society. If an agricultural co-operative provides beneficiaries of land reform projects with assistance to become commercial farmers, such assistance would be rendered in terms of the Broad-Based Black Economic Empowerment legal framework and would be regarded as falling within the legal domain. The actions would also be regarded as being ethical since society supports the notion of improving the quality of life of the poor. Finally the support to these beneficiaries would create new markets for the co-operative and enable it to gain access to the produce from the projects. This central segment should represent the focal point of all CSR activities. Businesses that do not earn their profits in a legally and ethically responsible manner do not deserve to continue doing business.325

The three-domain model is not, however, without limitations of its own. Although Schwartz and Carroll created the model, they acknowledge the fact that the construct still has some limitations.

As an example they question the possibility that any action can be regarded as being purely economic, or purely legal or purely ethical. A further possible limitation is the fact that this model does not provide for a philanthropic domain and assumes that philanthropic activities will form part of the ethical and/or economic domains.326

326 For more limitations on this model see Schwartz and Carroll 2003 (13) Business Ethics Quarterly 520 – 521.
3.4.2.3.3 Geva’s concentric-circle model of CSR

The concentric-circle (CC) model exhibits various similarities with Carroll’s Pyramid as well as with the three-domain approach. In the first instance this model supports the notion that the core responsibility of a business is its economic responsibility, as is the case with the pyramid. The model further acknowledges the fact that the different CSR domains are interrelated, as does the three-domain approach. Despite the fact that both the pyramid and the CC model regard a business’ economic responsibilities as the foundational domain, the definitions provided for economic responsibilities differ substantially. Economic responsibilities in terms of the pyramid have to do with profit maximisation and have a distinctive self-interest character, while the same responsibility in terms of the CC model is focussed on “enhancing the good of society (“be constructively profitable”)”\textsuperscript{327} and “generating wealth that improves the nation’s standard of living”.\textsuperscript{328}

The CC model consists of four concentric circles, of which the inner circle represents the central responsibility.\textsuperscript{329} The four domains of the CC model are similar to those of the pyramid model, with the exception that the content of each of the domains differs. According to Geva\textsuperscript{330} the core idea of this model is that businesses “have an incurred obligation to work for social betterment”. The model further emphasises the interdependence between business and society and the fact that society can influence business and that business is able to influence society.

Legal responsibilities in terms of this model refer to actions taken in compliance with the letter of the law as well as those taken in accord with the spirit of the law. This approach is in contrast to both the pyramid as well as the three domain models, where a business’ legal responsibilities are limited to legal compliance. These two models view

\textsuperscript{327} Geva 2008 (113) \textit{Business and Society Review} 22.
\textsuperscript{328} Geva 2008 (113) \textit{Business and Society Review} 24 and Clarkson 1995 (20) \textit{Academy of Management Review} 112.
\textsuperscript{329} The original CC model as formulated by the Centre for Economic Development consisted of only three concentric circles, with no distinct domain for legal responsibilities, whereas the model as proposed by Geva situates the legal domain between the economic and ethical domains.
\textsuperscript{330} Geva 2008 (113) \textit{Business and Society Review} 23.
the legal system as a burden that should be avoided as opposed to something that should be embraced.

The ethical responsibilities in the CC model are defined in terms of “self-governance based on internal commitment to the good of society.”

With regard to the role of philanthropy, the CC model views philanthropy in the light of the obligation of a business to contribute to the good of society. This model views philanthropy as contributions aimed at solving social problems as a result of business' social power. This approach again draws on the notion that social power gives rise to social responsibilities.

3.4.2.4 Corporate citizenship

Corporate citizenship is based on the idea of the business as a citizen and is linked to the social power of business and the role of business in society. Central to the idea of corporate citizenship is responsibility towards and concern for local communities formalised through partnerships between business and communities, symbolising the business' willingness to get involved in local communities. At the core of this approach is the desire by business to be seen as good citizens and to be accepted by society in order to enable business to continue doing business. Being a good corporate citizen is a *sine qua non* of CSR.

Dion supports the notion that the foundation for corporate citizenship can be found in the social contract theory.

3.4.2.5 Social contract theory

Social contract theory originates in the work of Hobbes and Rousseau and within the business context is based on the notion that an implicit social contract exists between

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331 Geva 2008 (113) *Business and Society Review* 27.
332 For a discussion of the emergence of corporate citizenship, see Scherer and Palazzo (eds) *Global Corporate Citizenship* 25 – 49 and 62 – 64.
335 Andriof and McIntosh (eds) *Perspectives on Corporate Citizenship* 200 – 213.
business and the society in which it operates.\textsuperscript{336} Such an implicit contract spells out what society expects of business and what business expects of society, where the business and society are equal partners each with rights and reciprocal responsibilities. Businesses are expected to generate employment, create wealth and provide surpluses to sustain their activities while contributing to the preservation of the society in which they operate. They provide the means through which societal needs are met. Crowther and Capaldi\textsuperscript{337} remark that the social contract is a central tenet of social responsibility. As a result of this social contract, business has obligations towards society. The aim of the social contract is to “form mutually beneficial cooperative relationships”.\textsuperscript{338} Hasnas\textsuperscript{339} suggests that

... when fully specified, the social welfare term of the social contract requires that businesses act so as to 1) benefit consumers by increasing economic efficiency, stabilizing levels of output and channels of distribution, and increasing liability resources; 2) benefit employees by increasing their income potential, diffusing their personal liability, facilitating their income allocation; while 3) minimizing pollution and depletion of natural resources, the destruction of personal accountability, the misuse of political power as well as worker alienation, lack of control over working conditions, and dehumanization.

The social contract approach to CSR acknowledges the fact that a business is fundamentally a social institution and as a result businesses have social responsibilities.\textsuperscript{340}

Regardless of which one of the domain approaches, corporate citizenship or the social contract theory, is used to approach CSR, any CSR initiative should be linked to the

\textsuperscript{336} Cannon \textit{Responsibility} 31 and Lantos 2001 (18) \textit{Journal of Consumer Marketing} 598. For a discussion of the social contract and stakeholder perspectives on the contract, see Aras and Crowther \textit{The durable corporation} 112 – 118. Crowther and Aras argue that the social contract theory was the precursor to the modern-day stakeholder theory as discussed in par 3.4.2.3 (Crowther and Aras \textit{Corporate Social Responsibility} 26).

\textsuperscript{337} Crowther and Capaldi (eds) \textit{Corporate Social Responsibility} 22 and Crowther and Aras \textit{Corporate Social Responsibility} 11. Crowther and Aras (\textit{Corporate Social Responsibility} 11) remark that the social contract “implies some form of altruistic behaviour – the converse of selfishness – whereas self-interest connotes selfishness”.

\textsuperscript{338} Frederick and Wasieleski 2002 (107) \textit{Business and Society} 283.

\textsuperscript{339} Hasnas 1998 (8) \textit{Business Ethics Quarterly} 32.

\textsuperscript{340} For a further discussion of the social contract with regards to CSR, see Cooper \textit{Corporate Social Performance} 25 – 26 and Crowter and Rayman-Bacchas (eds) \textit{Perspectives on Corporate Social Responsibility} 3 – 5.
business’ core business and hold some benefit for the business as well as its stakeholders. The following paragraph will discuss the business case for CSR.

3.5 A business case for CSR

Despite extensive research on the subject of CSR, the business case for CSR has not been proven on a balance of probabilities nor has it been discredited. To illustrate, studies have reported positive, negative and neutral impacts of CSR on corporate financial performance. This is partly due to the fact that, as was stated previously, no universally accepted definition exists for CSR and various conflicting terms are used in the CSR dialogue. An issue that further compounds the difficulty in making the business case for CSR is the fact that businesses have unique and dynamic characteristics distinguishing them from other businesses, even those in the same sector or those conducting the same business. Barnett takes this a step further by noting that within the same business an identical CSR initiative instigated in different time periods will not necessarily yield the same financial results.

Businesses are increasingly becoming aware of the fact that “doing good” is expected of them and that “doing good’ could have positive effects not only on corporate financial performance but also on the business’ stakeholders. In this regard Bhattacharya and Sen note that the business case for CSR reflects

the pervasive belief among business leaders that in today’s marketplace CSR is not only an ethical/ideological imperative, but also an economic one.

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341 The business case for CSR approaches CSR contributions from an instrumental point of view which stresses the link between CSR principles and outcomes. This view holds that a business should adopt CSR because it would have a positive impact on the financial bottom line. In contrast, the normative view holds that CSR is the morally right thing to do and that a business should engage in CSR regardless of what the consequences are (Geva 2008 (113) Business and Society Review 12).


343 See par 3.2.


The primary focus of business in an economy is commercial and there is no imperative for a business to get involved in developmental issues. The challenge facing business is how to get involved in developmental issues whilst still protecting the bottom line. The business case for CSR could be described as making use of social initiatives in order to reach corporate objectives.\textsuperscript{346} The challenge facing the private sector is how to maintain profits on a sustainable basis whilst accepting that it has a responsibility to stakeholders, including shareholders, employees, customers and the communities within which the business operates.

The business case for CSR is found in the basic premise that acting in a socially responsible manner has a positive impact on the financial bottom line and is positively reflected in the business’ reputation. An improvement in a business’ reputation would improve the financial performance by improving the business’s relationship with all of its stakeholders. The further positive spin-off from improved relationships with stakeholders is that it could attract new customers and create new investment opportunities. Scholars in CSR generally support the notion that in the long term the market will reward a business for its social initiatives related to the business’ core business.

CSR should be treated as an investment in the future of the business and not as expenditure. It should be regarded as a strategic investment in the business’ future that requires initiatives that are specifically being planned for, that receive management support and that are constantly monitored. The key incentive for these investments is to improve social conditions and to contribute to the improvement of society. This social welfare orientation, where the focus is on furthering a social cause, is what distinguishes CSR investments from other forms of business investment. Traditional corporate investments are aimed at benefiting the shareholders whereas strategic CSR investments are aimed at addressing social problems.\textsuperscript{347} Strategic investments should

\textsuperscript{346} Frynas 2005 (81) \textit{International Affairs} 587.

\textsuperscript{347} In this regard, Drucker (1982 (26) \textit{California Management Review} 53) asserts: “the proper ‘social responsibility’ of business is to tame the dragon, that is to turn a social problem into economic opportunity and economic benefit, into productive capacity, into human competence, into well paid jobs, and into wealth”.

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be aimed at enabling the beneficiaries of these initiatives to become self-sustaining and eventually enable the beneficiaries to decrease dependence on “social handouts”.348

Strategic CSR occurs when a business identifies a public good which it would like to serve and then links the public good to the core services rendered by the business.349 Porter and Kramer350 remark that strategic CSR:

[...]

Once the CSR initiatives yield business-related benefits to the business and the initiatives support the core business activities, the initiatives can be regarded as strategic CSR initiatives that add to the financial performance of the business.351 Strategic initiatives should be proximate to the business’ core business and the

348 In the mid-1980s Peter Drucker (1984 (26) California Management Review 59) noted that “it will become increasingly important to stress that business can discharge its ‘social responsibilities’ only if it converts them into ‘self-interest’, that is, into business opportunities”. This statement recognizes that businesses must benefit from their socially responsible initiatives. Such initiatives should provide a strategic benefit. According to Drucker (1984 (26) California Management Review 59) the “proper ‘social responsibility’ of business is to tame the dragon, that is to turn a social problem into economic opportunity and economic benefit, into productive capacity, into human competence, into well paid jobs, and into wealth”. This position is supported by Carroll (Carroll “Ethical challenges” 200) who notes that good deeds are good for both business and society.

349 In contrast to strategic CSR, generic CSR initiatives are those initiatives which may address important social problems but have no link to a business’ core business and have no noticeable influence on the business’ long-term competitiveness. A donation by an agricultural co-operation to Alzheimer research can be regarded as a generic CSR initiative since it has no connection with the corporation’s core business and it does not provide the corporation with any competitive advantage. A further manifestation of CSR is responsive CSR which, according to Porter and Kramer (2006 (84) Harvard Business Review 85) consists of two elements: “acting as a good corporate citizen, attuned to the evolving social concerns of stakeholders, and mitigating existing or anticipated adverse effects from business activities”. Responsive CSR initiatives are not necessarily aimed at providing a company with a competitive advantage nor are they tied to the company’s core business. These initiatives remain incidental as opposed to strategic to the company’s business. Lantos (2001 (18) Journal of Consumer Marketing 595) distinguished between ethical CSR, which is obligatory and is related to avoiding societal harms, altruistic CSR, which is related to doing good works which could be at the expense of shareholders (and which is consequently not legitimate), and strategic CSR, which refers to getting involved in initiatives which are beneficial to both business and society. For a discussion of the nature of and debate about altruistic CSR, see Lantos 2001 (18) Journal of Consumer Marketing 608 – 618.

business’ goals and objectives. The closer the CSR initiatives are to the core business, the more likely it is that the initiatives would receive high-level support from within the business and the greater the opportunity is to use the business’ resources and capabilities to the benefit of the business and all its stakeholders.\(^{352}\) The more strategic an initiative is the more likely it is that a business would receive direct benefits from the initiative, benefits that would be internalised in the business. The test that should guide businesses in their CSR agenda is not whether the CSR initiatives will address a worthy cause, but whether the initiative represents an opportunity to add value to the business as well as to make a meaningful contribution to society.\(^{353}\) Through its strategic CSR initiatives a symbiotic relationship should develop between a business and its communities – a business will be able not only to make a significant social impact but also to reap financial benefits.

Businesses should constantly be aware of opportunities that arise in the market and should be able to react proactively to such opportunities. These opportunities could for example arise out of existing social problems. An agricultural company could consider the ever worsening situation in the land reform programme as an opportunity to create new markets and new producers. The early recognition of opportunities such as these would enable the company to strategically position itself in order to attain a market advantage.

Social problems such as poverty, unemployment and crime all impact on the financial wellbeing of a business. If a business is apathetic to surrounding poverty or unemployment these problems might escalate into social instability which may in turn threaten the bottom line. On the other hand, if a business is able to contribute to society in a manner that results in social improvements, such improvements would for instance help crime to decrease and as a result of the greater social stability the business would have to spend less on securing its property and less taxes would have to be levied for

\(^{352}\) This closeness between CSR initiatives and the core business is referred to as “centrality”, which according to Burke and Logsdon is a critical issue in strategic CSR (Burke and Logsdon 1996 (29) Long Range Planning 496).

In this regard it can be argued that businesses are becoming social investors – investors that upon making a social investment receive benefits including enhanced reputation and the ability to attract better employees.\textsuperscript{355}

Husted and Salazar\textsuperscript{356} identify at least three circumstances under which a business will engage in CSR that will also increase the value of the business. The first is where the possibility exists of strategic interaction based on governmental intervention. The situation regarding black economic empowerment is an excellent example of how government intervention guides businesses to consider strategic interactions in order to remain competitive. The second is where opportunities exist to differentiate products, and the third is where cost reduction may occur within the business.

The challenge facing a business is how to convert its social responsibilities into opportunities providing a strategic edge against competitors, to turn the magnitude of social problems into profit bearing opportunities that benefit both the business as well as its stakeholders.

Despite the fact that to date research has not conclusively found that a definite relationship exists between a business’s levels of social responsibility and its financial performance, it would appear that businesses still accept the business case for CSR. Businesses with a social conscience regard CSR as part of their business strategy and corporate identity and in most instances the CSR initiatives are internally driven.\textsuperscript{357} This social conscience is an acceptance of the fact that a business is responsible for those affected by the business’s core activities and that it is a reflection of the values of the shareholders. These businesses view CSR as a means to differentiate themselves from competitors in order to gain the competitive edge.

CSR initiatives are however not always driven by a social conscience or a realisation of the competitive edge associated with CSR, but rather by a need to avoid being branded

\textsuperscript{354} Davis 1973 (16) \textit{Academy of Management Journal} 313.
\textsuperscript{355} See par 3.6 for a discussion of the business benefits of CSR.
\textsuperscript{356} Husted and Salazar 2006 (43) \textit{Journal of Management Studies} 82.
\textsuperscript{357} Vogel \textit{The Market for Virtue} 73.
and becoming distinguished.\textsuperscript{358} These CSR initiatives are the result of the business being targeted by activists and the business wanting to minimise possible damage to its brand and reputation. Vogel\textsuperscript{359} notes that the displays of a corporate conscience by companies such as Shell and Nike have been primarily defensive and not as a result of corporate virtue.

In return for being socially responsible and addressing social issues through their strategic CSR initiatives, businesses expect some form of reward, which may be to turn a social problem into economic opportunity and economic benefit and wealth. The following paragraphs will address some of the direct and indirect economic benefits which might result from socially responsible practices.

3.6 The benefits of CSR

3.6.1 Introduction

The benefits of CSR for businesses are closely related to the business case for CSR. In short, businesses should derive benefits from their CSR practices in order to justify the use of business resources.\textsuperscript{360} The United Kingdom’s Department for International Development (DFID)\textsuperscript{361} remarked in this regard:

By following socially responsible practices, the growth generated by the private sector will be more inclusive, equitable and poverty reducing.

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\textsuperscript{358} See par 3.8 for a discussion of various drivers of CSR.
\textsuperscript{359} Vogel \textit{The Market for Virtue} 73.
\textsuperscript{360} If a business can show that it receives some “return” on its use of business resources for its CSR practices, Friedman (see par 3.4.2.1) would probably be satisfied. Weber (2008 (26) \textit{European Management Journal} 250) noted that the business benefits for CSR could be classified into monetary and non-monetary benefits. Monetary benefits refer to benefits that have a direct measurable financial benefit while non-monetary benefits refer to benefits that are not directly measured in monetary terms. For a more comprehensive discussion of CSR business benefits, see Epstein and Roy 2001 (34) \textit{Long Range Planning} 585 – 604; Heal 2005 (30) \textit{The Geneva Papers on Risk and Insurance Issues and Practice} 387 – 409; and Kong \textit{et al} 2002 (20) \textit{European Management Journal} 109 – 127. There is no attempt in this section to provide an encompassing overview of the possible benefits deriving from the practice of CSR, since the benefits vary from business to business. Porter and Kramer (2006 (84) \textit{Harvard Business Review} 80) remarked that CSR can be a source of opportunity, innovation, and competitive advantage.\textsuperscript{361} DFID \textit{Socially Responsible Team Strategy: April 2001 – March 2004} 2, as cited by Jenkins 2005 (81) \textit{International Affairs} 525.

\textsuperscript{361} DFID \textit{Socially Responsible Team Strategy: April 2001 – March 2004} 2, as cited by Jenkins 2005 (81) \textit{International Affairs} 525.
The following paragraphs will briefly refer to the business benefits resulting from CSR activities that have been identified.\textsuperscript{362}

\subsection*{3.6.2 Image and reputation}

The first benefit to a business relates to the impact that CSR activities have on the business’ image and reputation. With consumers becoming more and more aware of the impact of businesses on the natural environment for example, socially responsible businesses are viewed more favourably with a resulting positive impact on the business’ image and reputation.\textsuperscript{363} Although a business would not necessarily see an improvement in its image and reputation if it is acting in a socially responsible manner, it would see an instant decrease in its image and reputation if its socially irresponsible practices become known. This situation was witnessed when it became known that Nike made use of labour which did not comply with international labour standards. The discovery led to enormous image and reputational damage. In reaction to stakeholder criticism the company now requires that all of its suppliers comply with a strict code of conduct related to the payment of reasonable wages and acceptable working conditions.\textsuperscript{364}

Although an enhanced image and reputation is a benefit of being socially responsible, it should be noted that CSR initiatives should not be used purely as a marketing tool creating better public relations. If the main reason for an initiative is to better public relations the initiative will in all likelihood not contribute to the development of the community. Success lies in the long-term ability to support and develop the community.

\textsuperscript{362} It should be kept in mind that CSR should benefit not only the business but also society. For society these benefits include experiencing “less adverse impacts from ill-thought-through business initiatives; a gearing-up of social partnerships: capacity and innovation brought to bear on problems; and the full contribution of influential citizens to the general well-being” (IoD \textit{King Report} 230).

\textsuperscript{363} ISO \textit{Guidance on social responsibility} 21; Siegel and Vitaliano 2007 (16) \textit{Journal of Economics and Management Strategy} 773; IoD \textit{King Report} 12 and Den Hond, De Bakker and Neergaard (eds) \textit{Managing Corporate Social Responsibility} 86. The more socially responsible a business is, the more likely it is that public trust in the business will grow. The inverse is also true. The less socially responsible a business is, the more likely it is that the public will distrust the business. As an example, after the Exxon Valdez oil spill Exxon was targeted by various consumer groups in response to the environmental damage caused by the company’s actions (Thorne, Ferrell and Ferrell \textit{Business and Society} 27).

3.6.3 Employee retention

Being socially responsible not only improves reputation but also has positive effects on employee motivation, retention, and recruitment. The basic argument supporting this statement is that employees are more likely to be motivated to work for a socially responsible business than one which is not. The same holds true for employee recruitment, with potential employees being drawn to socially responsible businesses. CSR activities could affect the attractiveness of the business to potential employees. The workforce of a business with a strong commitment to being socially responsible will have a stronger positive feeling towards the business as opposed to a business with a history of causing harm to the environment without an acceptance of responsibility for its acts.

3.6.4 Cost savings

Many businesses that incorporate socially responsible practices throughout the business experience cost savings. These cost savings result in many instances from the implementation of environmentally responsible practices, for example, where as a result of these practices a business saves electricity because it is more aware of its electrical consumption or where labour costs are reduced through lower levels of absenteeism as a result of having a healthier workforce. Costs could also be lowered as a result of the implementation of practices leading to safer workplace conditions.

3.6.5 Revenue increase

This benefit relates to the positive impact that socially responsible practices have on the financial bottom line through increased sales or growth in market shares. This benefit is closely linked to image and reputation, where a ripple effect is evidenced. An increase

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368 See Den Hond, De Bakker and Neergaard (eds) Managing Corporate Social Responsibility 86 for a list of possible cost savings.
in a business’ image and reputation would benefit sales, which would give rise to revenue increases. Muller\textsuperscript{369} remarked that CSR is positively associated with a return on investment and assets, and a growth in sales.

Besides an actual increase in revenue, a socially responsible company might experience a competitive advantage over its competitors, which would increase its market opportunities.\textsuperscript{370} Having a good CSR track record could also be beneficial to a business when the business attempts to raise capital – either through investors or through financial institutions. Investors prefer to invest in businesses with established social records. This is commonly referred to as socially responsible investment. It has also been reported that financial institutions are increasingly making use of social (and environmental) checklists to evaluate risks before providing finance through loans.\textsuperscript{371}

3.6.6 Licence to operate

A benefit which is closely associated with the previous benefits addresses the business’ “license to operate” and the business’ legitimacy in society. The social licence to operate refers to societal acceptance and endorsement of the business’ practices.\textsuperscript{372} The idea of having a licence to operate is derived from the fact that every business should be granted a licence to operate by government and other stakeholders, including local communities. This permission to operate can be implied or explicit. Society will continue to accept and endorse a business as long as the business is regarded as socially responsible. Once society withdraws its licence to operate, a business’ reputation, employee retention and revenues will reflect the withdrawal. The licence to operate is linked to being regarded as a good corporate citizen. Good corporate citizens must be able to show that they are actively addressing social problems through their CSR initiatives.

\textsuperscript{369} Muller 1999 (November) Business Week 94. Also see Thorne, Ferrell and Ferrell Business and Society 28 – 29.
\textsuperscript{372} Porter and Kramer observed: “The notion of licence to operate derives from the fact that every company needs tacit or explicit permission from governments, communities, and numerous other stakeholders to do business” (2006 (84) Harvard Business Review 81 – 82).
The licence to operate could further refer to actual legal licences to operate. Within the South African context and with specific reference to black economic empowerment, if a business does not sufficiently contribute to transformation and consequently scores low on the BEE scorecard, such a business would be excluded from conducting business with the public sector, for example.

3.7 Limitations / Critique of CSR

3.7.1 No universally accepted definition

In the discussion of the definition of CSR it became evident that no universally or even locally accepted definition exists and that an array of interpretations and applications have been advanced to define CSR. Added to this difficulty is the fact that various alternative themes (such as corporate citizenship) have evolved, further clouding the definitional construct. The fact that no single accepted definition for CSR is available has very negative consequences for CSR research. Since almost every single business has its own definition of CSR it is an impossible task to do reliable empirical research for example on the question of whether or not a positive correlation exists between a CSR initiative and financial performance.

The absence of an authoritative definition implies that businesses are able to determine their own definition for CSR and align their CSR initiatives in accordance with their definition. This implies that an initiative which has no connection with a business’s core business but services some kind of public good must be accepted as a CSR initiative even though the initiative has no strategic value to the business. As an example, on the NWK website, under the heading “Social Responsibility”, the company reports that it held a Suppliers’ Golf day where R50 000 were collected for charity. This amount was divided in two and R25 000 was donated to Alzheimer’s SA. The donation to this charity has no bearing on the company’s core business, offers no strategic advantage to the company, and will in all likelihood not have any noticeable impact on the company’s

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373 See par 3.2.
374 This kind of initiative is best described as philanthropic contribution, and the question might rightfully be asked if it is true CSR?
376 The other R25 000 were donated to the North-West Women’s Agricultural Union.
It would appear that the company regards this contribution not as an investment and that it accordingly does not expect any returns. The fact that the money was collected (in all likelihood from the suppliers that sponsored the event) and did not come from direct company funds further raises the question about the companies’ true commitment to being socially responsible. Yet, despite this, since no authoritative definition for CSR exists, is it very difficult to criticise the company by claiming that their CSR contribution is indeed not CSR but pure philanthropic actions aimed at charities.

Sethi\textsuperscript{378} identified this limitation as early as 1975 when he wrote:

> Business executives, academic scholars, government regulators, and social activists view the corporation’s social role within their respective frames of reference, thereby allowing the evaluator maximum discretion as to the amount of funds expended, the nature of activities engaged in, and the types of groups whose needs are responded to. (emphasis added)

The various definitions provided for CSR suggest that CSR requires businesses to go beyond what is required by law. The problem that currently exists is, however, that CSR is not regulated by law and that the legal framework is not providing an enabling environment for CSR that assures socially responsible behaviour. The need for Government to provide this enabling legal framework will be discussed in the following chapter.

A further characteristic of the CSR definitions is the fact that they regard CSR as voluntary - going beyond legal requirements. This voluntary approach has been identified as one of the shortcomings of CSR.

\textbf{3.7.2 Voluntary nature}

The problem with the voluntary approach to CSR is that in most instances businesses cannot be trusted to voluntarily go beyond the legal requirements and as a\footnote{377 From the use of the word “charity” it is evident that the company regards its contribution as a philanthropic gesture as opposed to a strategic social investment.}
consequence acceptable legal requirements need to be set. This issue is highlighted by Villiers, who noted:

What advocates of voluntarism fail to recognize is that there are different types of company that are to be regulated: those who know the law and are willing to follow it, those who do not know the law but seek to be law abiding, those who do know the law but defy or ignore it and those who do not know the law and do not seek to be law abiding.

Added to these categories are those companies that know the law but comply only to the extent that they will not be prosecuted.

Friends of the Earth International identified a number of possible reasons why voluntary initiatives are failing to have a noticeable impact on advancing the CSR agenda. These include the fact that the voluntary measures do not “provide strong incentives for compliance to counterbalance the financial incentives for non-compliance”. A further shortcoming of voluntary measures is that they rely on businesses to comply through self-regulation without being monitored by independent agencies. The fact that voluntary measures rely on self-regulation is creating regulatory gaps which are compounded by inadequate enforcement of these measures. The voluntary measures do not make provision for any enforcement, which means that businesses that choose not to follow the guidelines are not open to any form of sanction.

### 3.7.3 Barrier to trade

One of the biggest points of criticism against CSR is that it causes a barrier to trade, as pointed out by Friedman. The pursuance of social and environmental objectives

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379 The assumption is that “corporate responsibilities are likely to be fully met only when it is in the self-interest of the corporation to do so – or when they are likely required to meet those responsibilities by government mandate” (Allouche (ed) Corporate Social Responsibility xxiii).

380 Boeger, Murray and Villiers (eds) Perspectives on Corporate Social Responsibility 97.

381 FOEI 2001 http://www.foei.org/en/resources/link/99/e990506.html/. Friends of the Earth International claims to be the world’s largest grassroots environmental network, working as a global network on environmental and social issues.

382 Voluntary measures such as the UN Global Compact will be discussed in more detail in par 5.4.3.

383 Boeger, Murray and Villiers (eds) Perspectives on Corporate Social Responsibility 98.

384 This criticism of CSR is addressed in the proposed CSR Act, which makes provision for enforcement measures to ensure compliance with the Act. See par 6.3.

385 See par 3.4.2.1 for a discussion of the Friedman approach to CSR.
engages resources that should be accruing to shareholders, thus lowering economic efficiency and profits.\textsuperscript{386}

When directing business funds towards social issues, the competitive advantage of the business is under threat due to the increased costs to the business. The devotion of business funds towards social issues is tantamount to the involuntary redistribution of wealth away from the shareholders who are entitled to the wealth towards others who are not. The use of business resources for purposes unrelated to the company’s core business has been described as theft and an unjustified appropriation of the shareholders’ property, which amounts to “corporate irresponsibility”.\textsuperscript{387} It is argued that the provision of social justice lies within the domain of state regulation, and if Government supports CSR it should also provide mechanisms for monitoring CSR initiatives.\textsuperscript{388}

\textbf{3.7.4 Corporate “greenwash”}

One of the major reasons why not only the general public, but also a large section of the business community is sceptical about CSR is found in what is generally referred to as “greenwash”. This quaint term refers to an attempt to improve a business’ image without changing the business model to incorporate CSR principles – camouflaging business-as-usual.\textsuperscript{389} Businesses make superficial changes to improve their image and create the impression that they are incorporating social interests into their management.

One of the most effective ways in which businesses communicate the extent of their CSR initiatives is through the publication of annual reports. Many of these reports are drafted in line with voluntary reporting requirements such as the UN Global Compact or the GRI.\textsuperscript{390} Despite the fact that such reporting models suggest the issues on which a

\textsuperscript{386} Lawrence and Weber \textit{Business and Society} 61 – 62.
\textsuperscript{387} Allouche (ed) \textit{Corporate Social Responsibility} 40 and Sternberg \textit{Just business} 42 and Mintzberg 1983 (4) \textit{Journal of Business Strategy} 5.
\textsuperscript{388} Blowfield and Frynas 2005 (81) \textit{International Affairs} 506. The proposed CSR Act makes provision for mechanisms for monitoring CSR initiatives. See par 6.3.
\textsuperscript{389} Utting 2003 (Third Quarter) \textit{Global Future} 10. Corporate greenwash is often a public relations attempt to obscure the true impact of business activities (Hamann, Khagram and Rohan 2008 (34) \textit{Journal of Southern African Studies} 23).
\textsuperscript{390} For a discussion of voluntary instruments used to facilitate CSR, see par 5.3 and par 5.4.
business should report, in many instances the glossy annual reports prepared by 
businesses are nothing more than mere public relations exercises which 

rarely offer a coherent framework for CSR activities, let alone a strategic one. Instead, 
they aggregate anecdotes about uncoordinated initiatives to demonstrate a company’s 
social sensitivity. What these reports leave out is often as telling as what they 
include.\footnote{Porter and Kramer 2006 (84) \textit{Harvard Business Review} 81.}

In many instances the sources of the data used in the reports are not available to the 
general public, raising serious concerns about the reliability of the data. Verification of 
the data provided in the reports is difficult. Many valuable resources are directed to the 
production of glossy annual reports, whilst the resources could have been better spent 
on social initiatives. It seems as if the appearance of the reports is more important that 
the content. In many instances they are perceived as “mainly tokenism”.\footnote{Fig (ed) \textit{Staking their claims} 115.}

An excellent example of this phenomenon is the Enron case. It was reported\footnote{Zamagni 2006 \texttt{http://www.stthomas.edu/cathstudies/cst/conferences/thegoodcompany/Papers/Zamagni\%20on\%20CSR\%20THE\%20E.pdf.}} that 
Enron’s 2000 Report on Sustainability included the following statements:

\begin{quote}
We want to work to promote reciprocal respect with the communities and stakeholders 
that are touched by our activities. We treat others as they would like to be treated.
\end{quote}

Unfortunately history proves that Enron did not practice what it preached and did not 
follow its “golden rule”. Due to Enron’s actions numerous communities and 
stakeholders were touched, sadly to their detriment.

\subsection*{3.7.5 Lack of skills}

A further point of critique against CSR is that in most instances business managers are 
not equipped to address social issues. This raises the question: Are businesses 
sufficiently equipped to get involved in community development if community 
development is not their core business activity?\footnote{Prieto-Carrón \textit{et al} 2006 (82) \textit{International Affairs} 984.} Business managers are skilled in 
managing a business. Their main focus is an economic one and their skills are the 
same. Managers are not qualified to address social issues and are not able to meddle
in social affairs. Constraints in the implementation of CSR projects include a lack of human resources, failure to involve beneficiaries in planning and executing the project, and failure to integrate the projects into larger development plans such as a local economic development plan. Businesses need someone with developmental experience to manage CSR initiatives. Davis remarks that involvement in social initiatives might

dilute business’s emphasis on economic productivity, divide the interests of its leaders, and weaken business in the marketplace, with the result that it would accomplish poorly both its economic and social roles.

As a result, it is argued that businesses are not equipped to engage in social betterment and that if they do become involved in social initiatives such involvement would distract business managers from their primary function – to maximise profits.

Regardless of these of critique against CSR businesses are still engaging in CSR practices, and although businesses might be opposed to the idea, various drivers exist that push businesses toward socially responsible activities. The following paragraphs will in brief refer to the most common drivers of CSR.

3.8 CSR drivers

3.8.1 Introduction

CSR drivers refer to those incentives or pressures directed at businesses to improve their socially responsible practices. A variety of drivers exists and the drivers discussed in this paragraph are not necessarily applicable to every business. Mazurkiewicz distinguishes between three types of drivers: economic drivers, social drivers, and political drivers. Economic drivers include company image/reputation; competitive advantage and competitiveness; pressure from consumers and pressure from investors,
while social drivers are pressure from NGOs; the need to be licensed to operate; and pressure from local communities. Political drivers refer to legal and regulatory drivers and political pressure. The following paragraphs will discuss drivers falling within each of these categories.399

3.8.2 Shareholder / investor activism

Shareholder or investor activism is closely linked to the business case for CSR, with these stakeholders wanting to see an increase in the value of their shares or investments in a business.400 The more socially responsibly a business acts, the more likely it is that the business will perform well.401 A business with a negative reputation for social responsibility would not be able to attract the same kind of future investments from shareholders as a business with a positive reputation for social responsibility.402 Shareholders are more inclined to invest in business with good social reputations.

One of the best examples of the potential driving force of investors is evidenced in the role that they play in making investments in socially responsible (SRI) funds.403 Vogel404 identifies three ways in which social investors can affect corporate social behaviour. If the share value of a business rises as a result of greater demand from social investors, the cost of capital would be lowered, providing a competitive advantage for socially responsible companies.

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399 Drivers could vary from country to country and from business to business. The drivers discussed in this paragraph represent a portion of the possible drivers. Other drivers not discussed in this paragraph include the media and top managers as drivers of CSR. (For a discussion of top managers as drivers of CSR, see Swanson "Top managers as drivers for Corporate Social Responsibility" in Crane et al (eds) Corporate Social Responsibility 227 – 248).

400 For a more detailed discussion of shareholder/investor activism as a CSR driver, see Kurtz’ discussion in Crane et al (eds) Corporate Social Responsibility 249 – 280. Utting (2005 (15) Development in Practice 377) identifies a number of prominent types of activism. These include watchdog activism (undertaken by watchdog organisations, which highlight incidents of socially irresponsible behaviour by businesses), consumer activism, and the fair trade movement (see par 3.8.7), shareholder activism and ethical investment, and litigation by activists and victims who make use of the legal route to prosecute corporate malpractice.

401 This is reflected by the economic benefits of CSR. See par 3.6.5.

402 See par 3.6.2. The European Commission (COM(2011) 681 7) notes that “consumers and investors are in a position to enhance market reward for socially responsible companies through the consumption and investment decisions they take”.

403 Within the South African context, the JSE was the first bourse in emerging markets that launched a sustainability index, called the JSE Socially Responsible Investment (SRI) Index, which provided the basis for SRI products. For a discussion of the JSE SRI Index, see Sonnenberg and Hamann 2006 (23) Development Southern Africa 305 – 320.

advantage. When businesses with poor CSR records become aware of the pool of capital available to socially responsible businesses they might be encouraged to change their policies in order to gain access to the pool of capital. Finally, socially responsible investors have the ability to change business policies through shareholder resolutions aimed at pressuring the management into adopting change.

### 3.8.3 Reporting requirements

Reporting requirements for businesses are increasingly being regarded as one of the most powerful drivers of CSR.\(^{405}\) Reporting requirements refer to the voluntary or involuntary requirements in terms of which a business is required to report on a variety of issues such as social, economic and environmental issues. Although the majority of the current reporting requirements are voluntary, businesses are increasingly realising the importance of reporting on issues important to their stakeholders. Based on the discussions held at the Third National Conference on Corporate Citizenship held in 2003, Birch and Littlewood\(^{406}\) conclude that Australian CEOs agreed that the increase in voluntary reporting is an effective means through which businesses can demonstrate their commitment to being good corporate citizens.

However, not all reporting requirements are voluntary. From 1 January 2009 all large businesses in Denmark are required by law\(^{407}\) to report on their CSR initiatives. Although CSR is not compulsory, large businesses should still take a position on CSR and reflect this position in their annual reports. In terms of this statutory requirement, businesses are required to report on their social responsibility policies and how these policies are put into action as well as the achievements of the business’ CSR initiatives. If a business has no CSR policies this should be reported.\(^{408}\) In the South African context, companies listed on the Johannesburg Securities Exchange are as part of their listing requirements required to annually report on their participation in social and

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\(^{405}\) The importance of reporting requirements as a driver of CSR will become evident from the discussion in chapter 5 where for example the GRI and other reporting instruments will be discussed.

\(^{406}\) Birch and Littlewood 2004 (16) *Journal of Corporate Citizenship* 62.

\(^{407}\) Act Amending the Danish Financial Statements Act (Accounting for CSR in large businesses.

environmental issues.⁴⁰⁹ As a result of the important role that reporting requirements play in driving CSR, the proposed CSR Act (see chapter 6) will include certain requirements with regard to annual reporting.⁴¹⁰

### 3.8.4 Peer pressure

Peer pressure refers to the situation where the behaviour of leading companies shapes the action of other companies to follow. Large companies have the necessary resources to demonstrate their commitment to CSR and to set standards for those who follow. Smaller companies often do not have a choice of whether or not to follow the example set by their larger counterparts. This is as a result of the fact that in many instances smaller companies form part of the larger companies’ supply chains and that the larger companies outsource some of their supply chains of products and services to the smaller companies. Since the smaller companies are then regarded as being a part of the larger companies, they are also expected to comply with specified social standards in their respective CSR programmes.⁴¹¹

### 3.8.5 Civil society pressures – NGOs

Civil society organisations and non-governmental or non-profit organisations play a significant role in furthering CSR. In the developed world pressure by civil society on the private sector to act in a socially responsible manner is far more advanced than in developing countries. In developed countries civil society groups such as NGOs, trade unions and community pressure groups are well organised and have considerable lobbying power. The same cannot be said, however, for the situation in developing countries, where these civil groupings are often weakly organised and do not have the ability to lobby any notable support.

A powerful tool in the armoury of international NGOs is the strategy of “naming and shaming”, in terms of which companies with unacceptable CSR records are identified and their practices exposed through the media. The value of this strategy is found in

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⁴⁰⁹ For a discussion of the listing requirements of the JSE see par 5.3.5.
⁴¹⁰ See par 6.4.2.7.
⁴¹¹ Fig (ed) Staking their claims 74.
the threat of a negative reputation. Businesses with highly visible brands are more likely to recognise the threat of a negative reputation and take measures to ensure that they do not become the target of a “name and shame” strategy.\footnote{Vogel \textit{The Market for Virtue} 53.}

The importance of NGOs as drivers of CSR is illustrated by the actions of the South African NGO, Treatment Action Campaign (TAC). At the turn of the century the TAC became involved in the fight against the exorbitant prices (which the majority of people living with HIV could not afford) which pharmaceutical companies were charging for their patented HIV/Aids treatment drugs. The aim of their action, together with the governments’ \textit{Medicines and Related Substance Control Amendment Act},\footnote{It should be noted that this 1997 amendment act was not enacted.} was to enable the import of generic drugs from countries where they could be sourced at a lower cost. As a result of their action a number of the pharmaceutical companies announced a significant reduction in the prices of the drugs used in the fight against HIV/Aids.\footnote{Ward \textit{Legal Issues} 23.}

3.8.6 Employees

Employees are in a position to put pressure on their employers to become more socially responsible. Employees want to be associated with a business with a reputation for being socially responsible. As is the case with civil society pressures, the organisation for example of consumer groups (as stakeholders in a business) in developing countries has also been weak, and they have been unable to exert any mentionable pressure on the private sector to accept its social responsibility.

Society expects business to act in a certain way and expects business to achieve a variety of social goods. The more sensitive a business is to the needs of its communities, the more likely it is that these communities will create an environment that is conducive to business.
3.8.7 Consumerism

The realisation by businesses of the positive relationship between CSR and consumer support is encouraging businesses to allocate more resources to CSR initiatives in order to strengthen their position in the market. It is accordingly no longer a matter of “whether or not” a business should engage in CSR initiatives but rather to what extent it should do so.\textsuperscript{415} The rise to prominence of the CSR movement has resulted in a change in the manner in which a consumer decides whether or not to purchase a product. The general contention is that consumers take note of the extent to which a business has accepted and acted on its social responsibility and that their behaviour as consumers is affected by the level of social responsibility of a particular business. Through their purchase and consumption power consumers have the ability to shape the behaviour of the private sector, a fact which should encourage businesses to accept their social responsibility and to act in a socially responsible manner. The power of consumers to encourage / force businesses to accept their social responsibility is multiplied when consumers organise themselves and start pressuring businesses through organised consumer boycotts.

Various examples of the power of organised consumer boycotts aimed at businesses not regarded as acting in a socially responsible manner are found throughout the literature. Many of these examples relate to consumer boycotts aimed at businesses that operated in apartheid South Africa, where pressure was placed on companies to divest. It was reported that at the height of the consumer boycotts against these businesses, one in four consumers in the United Kingdom indicated that they would not buy South African produce as a result of the apartheid regime.\textsuperscript{416} As a result of consumer pressure, Barclays Bank decided to withdraw from South Africa in order to protect its reputation in their home market.


\textsuperscript{416} Smith \textit{Morality and the Market} 184 – 196.
In most instances a consumer’s decision to boycott a product is based on ethical considerations. This is referred to as ethical consumerism. Ethical consumers base their decision to refrain from purchasing a product on motives that might be of a political, religious or social nature and by applying these motives consumers are using criteria other than price or quality to decide whether or not to purchase a product. These motives reflect the fact that consumers are increasingly becoming aware of the effect that certain purchasing decisions might have an impact on, for instance, the natural environment.

The fact that consumers are increasingly becoming aware of the effect of their purchasing decisions provides no guarantee that they will actually alter their decisions. Although consumers have very good intentions when indicating that they would support businesses with a good CSR track record, according to Vogel “There is a major gap between what consumers say they would do and their actual behaviour”. When confronted by two products of the same quality, but with different prices, consumers would in most instances still purchase the cheaper product despite the fact that the manufacturer of the more expensive product has a better CSR reputation. Given the current international economic crisis it is reasonable to expect that consumers will be even less likely to purchase on ethical grounds.

417 Crane et al (eds) Corporate Social Responsibility 285. Ethical consumerism has also been described as “ethical purchase behaviour” or “ethical consumption” (Harrison et al The Ethical Consumer 2). The 2005 United Kingdom Ethical Consumerism Report (Vickery et al The Ethical Consumerism Report 2005 7) defines ethical consumerism as “personal consumption where choice has been informed by a particular ethical issue – be it human rights, social justice, the environment or animal welfare”.

418 Harrison et al The Ethical Consumer 2. The 2007 United Kingdom Ethical Consumerism Report (The Cooperative Bank 2007 http://www.co-operativebank.co.uk/images/pdf/ethical_consumer_report_2007.pdf) found that 6% of the UK adult population are committed ethical consumers, shopping for ethical products and services on a weekly basis. As an example the 2007 Report noted that in 2006 the sales of free-range eggs exceeded the sales for non-free-range eggs, indicating that consumers are taking motives such as animal welfare in consideration in their purchasing patterns (The Cooperative Bank 2007 http://www.co-operativebank.co.uk/images/pdf/ethical_consumer_report_2007.pdf). Vogel (The Market for Virtue vii) notes that the market for responsibly produced products is expanding. As an example he refers to the increase in the sales of Fair Trade coffee in the United States, which has tripled since 1999 (for more on Fair Trade coffee see http://www.globalexchange.org/campaigns/fairtrade/coffee/).

419 Vogel The Market for Virtue 48. This notion is further supported by research conducted by Bhattacharya and Sen (Bhattacharya and Sen 2004 (47) California Management Review 9 – 24).
Whilst consumer boycotts refer to the situation where consumers intentionally decide not to purchase a particular product as a result of the manufacturer’s negative CSR reputation for instance, consumers also decide to support a product with a positive CSR reputation. This conduct has been described as “positive ethical consumerism”\textsuperscript{420} as opposed to boycotts which can be described as negative ethical consumerism. The idea of positive ethical consumerism is illustrated by initiatives such as the “Proudly South African” initiative, in terms of which consumers are encouraged to purchase products that have been manufactured locally in order to help address social problems such as unemployment.\textsuperscript{421} The Proudly South African logo confirms that the providers of goods or services are “socially responsible and are supporting the local economy”.\textsuperscript{422} The Proudly South African initiative is an example of what has become known as social labelling which is closely associated with consumerism and also regarded as a CSR driver. The purpose of a social label is to confirm that a product has been produced or manufactured in circumstances that are socially responsible.

The Fair Trade initiative is probably the best-known international social label and is primarily aimed at the sale of coffee.\textsuperscript{423} This label is based on the premise that producers of a product such as coffee have been paid a fair market-related price. The purpose of this initiative is to ensure that the income of small-scale farmers in developing countries is increased so that they become part of the global economy, and so that consumers are enabled to contribute to the social welfare of the farmers. This initiative enables consumers to “put their money where their values are”.\textsuperscript{424}

\textsuperscript{420} Crane et al (eds) Corporate Social Responsibility 291.
\textsuperscript{421} The Proudly South African campaign is aimed at promoting the produce and services of local companies in order to stimulate economic growth. For more details on the Proudly South African campaign, see http://www.proudlysa.co.za.
\textsuperscript{422} Proudly South African Date Unknown http://www.proudlysa.co.za/section/about.asp?include=./area/about_us/about.html&title=./gfx/pages/about.jpg.
\textsuperscript{424} For a discussion of the effect that culture has on a consumer's willingness to punish a business for irresponsible corporate behaviour, see Williams and Zinkin 2008 (17) Business Ethics: A European Review 210 – 226.
3.8.8 Government pressures

Many businesses engage in CSR initiatives in order to avoid governmental regulations. As soon as regulations are put in place a business’ ability to manoeuvre is restricted and the business is forced to comply with the regulations with the added costs of complying. Governments are in a situation where they can promote CSR as an indirect form of regulation. The Commission of the European Union has identified the important contribution that CSR initiatives can make in reaching public policy objectives. These objectives include investment in skills development, the better utilisation of natural resources, and poverty reduction.

In the national context, Government has to some extent played a role in thrusting CSR onto the corporate agenda. This was done mainly through legislative measures such as the BEE Act and the BEE Sector Charters such as the Mining Charter and the Financial Sector Charter, which includes CSR (or CSI or SED) as an element on the BEE scorecards.

3.8.9 Conclusion

According to the World Bank…

… drivers will not be effective unless human capacities and institutions are in place to enable them to work in their particular sectoral or geographic context.

Effective drivers require an enabling environment in which to function optimally. This enabling environment is created through institutions which include all branches of government and through the tools created by government, which include legislation and

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425 Vogel *The Market for Virtue*. Driving CSR through a regulatory framework will be dealt with comprehensively in chapter 4, while chapter 5 will focus exclusively on the content of a possible regulatory framework for CSR.


427 Other public policy objectives that CSR initiatives can assist in reaching include more integrated labour markets, higher levels of social inclusion and improvements in public health resulting from businesses becoming involved in providing consumers with nutritional advice on food products, for instance (EC COM(2006) 136 4).

428 De Wet remarked that: “The charter process laid the groundwork for new laws and regulations which have served to entrench CSI as a formal part of the corporate sector’s contribution to broad-based transformation” (De Wet (ed) *The CSI Handbook* 12th edition 5). The role that Government plays as a driver of CSR will be discussed in more detail in chapter 4 and 5.

429 Ward *Public Sector Roles* 3.
regulation as well as non-governmental tools such as codes of conduct, international standards and labels. Within the CSR dialogue the challenge is to strike a balance between governmental interventions providing the rules for the game on the one hand and on the other hand the awareness of the fact that over-regulation will stifle the private sector’s ability to operate in a free market. The ability of a government to create a regulatory framework in which the private sector operates places the government in a unique position where it is possible to enable CSR by creating an environment that encourages the private sector to act in a socially responsible manner.

The following two chapters will reflect on what the requirements are for establishing an enabling environment and will discuss the current enabling environment within the South African context. The discussions will focus on governmental interventions and more specifically on legislation enacted within the South African legal framework to facilitate CSR. The discussion will then move towards voluntary measures accepted by the international business community (so called “soft law”).

3.9 Concluding remarks

CSR is too often regarded as the panacea which will solve all societal ills ranging from the global poverty gap and social exclusion to environmental degradation.\textsuperscript{430} Despite the fact that CSR is not the magic remedy that will solve all of society’s problems, it can address societal issues to some extent and, if approached strategically, it should be beneficial to both business and society. And within the context of this research, CSR is an appropriate tool through which agricultural companies can ameliorate the crisis in land reform.

The second specific research question inquires as to how CSR is framed within the national context.\textsuperscript{431} The definition and historical development of CSR have been examined in order to answer this question. During the discussion of the various definitions in paragraph 3.2 it became evident that no universally accepted definition of CSR exists to date, supporting Votaw’s statement that CSR means “something, but not

\textsuperscript{430} Van Marrewijk 2003 (44) \textit{Journal of Business Ethics} 96.
\textsuperscript{431} See par 1.2.
always the same thing to everybody” and that the term is indeed a “confusing thing”.\textsuperscript{432}

The difficulty in defining the concept of CSR lies in the fact that CSR is context dependent and that the concept and its application could differ not only from country to country, but from business to business within the same sector, and even from activity to activity within a single business. This situation is confirmed by the fact that in general the definitions attached to CSR (or CSI or SED) in the South-African context differ from the definitions provided by international bodies such as the World Bank or the WBCSD. This is mainly as a result of the country’s unique history of apartheid. The discussion of the various definitions of CSR came to the conclusion that it is unlikely that a universally accepted definition will ever be provided. Rather than attempting to define CSR, elements of socially responsible actions were identified. Based on the definitions discussed it was concluded that in the first instance, at a minimum, CSR refers to legal compliance (the letter of the law), and that it then goes beyond the literal requirements of the law in accordance with the spirit of the law. Secondly, CSR practices should identify the targeted beneficiaries (or recipients) – who must benefit from the corporate initiatives? Thirdly it must be evident that the socially responsible initiatives should be beneficial to the business as well as to society (or the targeted beneficiaries). Fourthly, CSR activities are activities that are extraneous to regular business activities, and must have an identified objective such as the skills development objective of AgriBEE activities. Finally, CSR should be integrated throughout a business’ management and should feature in the entire business strategy.

Although neither of the identified agricultural companies has an official definition for CSR, it appears, judging from the companies’ annual reports, that they are involved in CSR initiatives. Regardless of the absence of a formal definition, the companies accept that they have a responsibility towards their stakeholders. It would appear that the companies also realise that they need to be socially responsible and that in return for their socially responsible actions they would receive some benefit. An example of this is Suidwes’ health programmes, which are aimed at its employees and their families, and the realisation that situating their employees in healthy families would decrease

\textsuperscript{432} See par 3.2.1.
absenteeism. However, from the information available on the companies’ websites it could not be established that all three of the companies are currently engaging land reform beneficiaries. In this regard it is proposed that the companies identify assistance to land reform beneficiaries, especially those beneficiaries who received agricultural land, as one of the specific objectives of their CSR programmes.

The aim of paragraph 3.3 was to trace the historical development of CSR. It became clear during the discussion that the concept of CSR has been evolving since the 1930s, although within the South-African context the notion of CSR is relatively new and as a result of the country’s history CSR sometimes has a negative connotation, with businesses preferring the term CSI. Despite the fact that South Africa does not have a well-established history of CSR, the country has made a contribution on the international stage – unfortunately for the wrong reasons. The Sullivan Principles, which are some of the earliest CSR principles, were a direct reaction to the system of apartheid practiced in South Africa. These principles were responsible, to some extent, for establishing the culture of CSR amongst international companies doing business in apartheid South Africa.

Following the discussion of the historical development of CSR, some of the leading approaches to CSR were addressed. From the discussion it emanated that two major approaches exist. On the one hand is the shareholder approach originally formulated by Friedman. According to this approach the only social responsibility that a business has is to make as much profit as possible, whilst operating within the parameters of the law. In terms of this approach CSR expenditure is viewed as a misappropriation of company resources, which might even be described as corporate theft. This approach is exclusively focused on shareholders. On the other hand there is the stakeholder approach originally formulated by Freeman, in terms of which it is understood that a business has a responsibility towards a variety of stakeholders due to the business’ impact on those stakeholders. It became evident from the discussion that a variety of stakeholders exists, ranging from employees and their families, to Government, to the natural environment. Businesses need to identify and classify their stakeholders
according to the impact that the business will have on the stakeholders or the measure of influence that the stakeholders could exercise over the business.

The identification of stakeholders and the business case for CSR was discussed in order to answer the third specific research question, which was aimed at establishing how CSR can contribute to the land reform programme. In the context of this research, beneficiaries of land acquired through restitution or redistribution should be regarded as important stakeholders to agricultural companies. These beneficiaries could potentially become suppliers of agricultural products to the companies as well as becoming clients through their purchase of agricultural inputs. Equally important is the fact that these beneficiaries could potentially become a threat to the company’s future profitability. If large tracts of productive commercial agricultural land are redistributed in terms of the land reform programme, a very real possibility exists that these farms could become unproductive – as was evidenced by the discussions of the challenges of the restitution and redistribution programmes.\textsuperscript{433} If these farms do not contribute to the national production of maize, for example, food security might be endangered. With no supply of maize to the agricultural companies these companies could face serious financial difficulties, since large portions of their income are derived from buying and selling grain. As a result of this, it appears as though in future agricultural companies will have no choice other than to get involved in the land reform programme, in order not only to contribute to the success of the programme but also to ensure their own survival.

Businesses should get involved in CSR initiatives especially when such involvement is beneficial for the business as well as society (or the targeted recipients of the initiatives). The business case for CSR is based on the notion that when a business is socially responsible, society will reward it for its actions. This reward will be more evident from CSR initiatives which are strategically linked to the company’s core business. The test to establish whether an initiative is strategic or not is based on the following question: Does the initiative represent an opportunity to add value to the business as well as to make a meaningful contribution to society?\textsuperscript{434} With this question

\textsuperscript{433} See par 2.4.1.4 and par 2.4.2.4.
\textsuperscript{434} See par 3.5 for a discussion of the business case for CSR.
in mind, it seems evident that initiatives aimed at assisting and empowering land reform beneficiaries who received commercial agricultural land would be regarded as being strategic CSR initiatives for the agricultural companies. These initiatives should be beneficial to companies as well as the beneficiaries.

It is expected that when a business is involved in strategic CSR not only the beneficiaries but also the business itself should reap the benefit. Paragraph 3.6 provided a brief overview of a selection of benefits that are associated with socially responsible behaviour. These include an improvement in a business’ image and reputation; better employee retention, morale and retention; cost savings and an increase in revenue; and a stronger licence to operate. Given the fact that the three agricultural companies operate in a very conservative portion of the country and that the agricultural scene in those parts of the country is dominated by white farmers – who are in many instances also shareholders in the companies – it might be that the companies do not experience the expected increase in image and reputation. In fact, given the conservative nature of some of the shareholders – who are also suppliers and clients – the companies might even experience negative reaction from these stake/shareholders, which would negatively impact their image and reputation. However, if the CSR is strategically positioned and properly communicated to the stake/shareholders, it is still likely that the companies would experience benefits from their CSR initiatives.

As was previously said, CSR is not the panacea that would solve all of society’s problems. This is supported by the limitations of CSR. The fact that the majority of CSR initiatives take place on a voluntary basis was identified as one of the possible limitations of CSR. In the South African context, with reference for example to the requirements of BEE, not all CSR initiatives take place on a voluntary basis, since businesses that want to conduct business with Government are required to conform with the BEE requirements. Another point of critique against CSR is fact that those who manage a business are not often sufficiently skilled to get involved in developmental issues. Although this is true in the majority of instances, many

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435 See par 5.2.2 in general for a discussion of CSR in the context of BEE, and par 5.2.2.4 for the requirements regarding transactions with Government.
companies now have dedicated divisions within the company that are responsible for managing the “CSR portfolio”. South-African companies are from 2011 required by law to have a social and ethics committee that is responsible *inter alia* for overseeing CSR. 436

Finally, the fact that companies are required to have a social and ethics committee is an indication that Government is one of the drivers of CSR. Paragraph 3.8 discussed some of the main drivers of CSR; which included shareholder/investor activism, the reporting requirements, and consumerism. Two of these drivers, Government and the reporting requirements, will be discussed in more detail in chapter 5, which will examine the current CSR framework in which businesses such as those in the agricultural sector have to operate. However, before these drivers can be discussed in any more detail, it is necessary to ask what the role of Government is in establishing an enabling CSR framework. This issue will be dealt with in the next chapter.

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436 See par 5.2.6.2 for a discussion of this committee and the regulations pertaining to the position.
Chapter 4: Creating a CSR-enabling environment: The role of Government

4.1 Introduction

The CSR movement has been described as a bundle of trends comprising regulatory frameworks aimed at improving corporate practices and leading to changes in these practices, the mobilisation of corporate role players to support the development of states, and a management trend enhancing the legitimacy of a business.¹ From the discussions in the previous chapter² it is evident that Government is regarded as one of the most important driving forces behind the CSR agenda and has a particularly important role to play in the creation of an enabling CSR environment.³

In general, advocates of legislative involvement in framing the CSR policy highlight the failure of existing voluntary systems as one of the main reasons why the state should play a more important role in the facilitation of CSR.⁴ Although governments realise the importance of encouraging socially responsible business, it should be noted that CSR should not replace regulation or legislation concerning social rights. Furthermore CSR should not be seen as shifting (or outsourcing) the state’s responsibility for the provision of basic services (such as education or the provision of health services) to the private sector and thus “privatising” the state’s responsibilities.⁵ However, the legacies of apartheid remain firmly entrenched in the social problems facing the country and it seems as if the Government is unable to deliver social and physical infrastructure, thus necessitating the engagement of the private sector.

The role of governments in establishing a CSR policy framework and driving CSR has become increasingly important. The (perceived) failure of the welfare state has given further impetus to the move of governments toward tapping into the resources of the

² See par 3.8.8.
⁴ Cannon Corporate Responsibility 80. According to Albareda et al “even when considered within a voluntarist approach to CR by companies, very few agents would today dispute the role that governments can and ought to adopt in promoting and developing CR” (Albareda et al 2006 (6) Corporate Governance 387).
private sector (through their CSR) in order to address socio-economic challenges. The
overload on public resources of the welfare state necessitated a move towards CSR.
Albareda et al\(^6\) argue that the challenges faced by post-industrial governments and
societies (such as unemployment and poverty) and the demand on governments with
limited resources to address the challenges have caused a crisis in the welfare state.
This crisis requires a new model of societal governance where innovative new ways
have to be found to address the social demands which cannot be met by the state. The
new model of societal governance has given rise to the appearance of partnerships
between governments and the private sector working in collaboration to address
societal issues.

Despite the importance of the partnership approach governments still have a pivotal role
to play in framing the CSR policy. The role of governments is aptly described by Moon
and Vogel in Crane et al.\(^7\):

> For all the increasing importance of CSR, public policy remains the most important
vehicle by which private business purposes and broader social objectives can be
reconciled. Accordingly, one of the critical dimensions of CSR involves not what firms
do voluntarily, but the role they play in affecting government regulation of business.
While CSR is often viewed as an alternative to regulation, in many areas, corporations
cannot afford to engage in more responsible behaviour unless public policy requires
that all firms act in a similar manner. (emphasis added)

This statement reaffirms the fact that a purely voluntary approach to CSR without any
legislative intervention will not succeed – a clear public policy requiring socially
responsible practices by the entire private sector is a necessity. Governments are
increasingly beginning to view CSR as cost-effective means to enhance their
sustainable development strategies, and as a part of their national competitiveness
strategies to attract foreign direct investment. According to Petkoski and Twose\(^8\) writing
in a report drafted for the International Finance Corporation:

> [T]he challenge today for the public sector in developing countries is to identify
corporate social responsibility priorities and incentives that are meaningful in their

\(^6\) Albareda et al 2006 (6) Corporate Governance 388.
\(^7\) Crane et al (eds) Corporate Social Responsibility 318.
national context, and to play a role in strengthening appropriate local initiatives. (emphasis added)

In order to ensure an effective policy for CSR, a regulatory foundation that promotes growth, employment and good governance is required whereby all participants have certainty about their rights and responsibilities. Regulation should be consistent, effective, transparent, fair and understandable. Given South Africa’s history, legislation should be viewed as one of the main instruments enabling the Government to address the private sector’s social, environmental and economic impact. The private sector’s social responsibility should accordingly ensure full compliance with the social, environmental and economic laws already in place.

According to Ward it is unarguable that law shapes CSR, that CSR is underpinned by public policy, and that CSR has unquestionable links with law. CSR is linked with law for example through legislative developments where CSR issues have been transformed into law. Laws addressing issues such as misleading advertising, taxation, competition policy, economic empowerment, or company committees, although not labelled as CSR, frames CSR. CSR could further be linked with law through the inclusion of CSR issues into contracts, for example with suppliers. The inclusion of the core elements of the ISO 26000 Standard into a supplier’s contract transforms the elements into legally binding commitments without any legislative intervention thus becoming legally binding as de facto minimum requirements.

The objective of this chapter is to contextualise and analyse the roles and responsibilities of Government in creating an enabling environment for CSR. This chapter will refer to the general elements of a government CSR framework and evaluate the current national position against these elements in order to establish the nature and extent of the national CSR policy framework.

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9 Ward “Corporate social responsibility in law and policy” and Ward Legal issues in Corporate Citizenship 1.
10 For a discussion of legislation addressing black economic empowerment, see par 5.2.2.
11 For a discussion of the requirement in the Companies Act that companies should have a social and ethics committee to guide them in CSR matters, see par 5.2.6.
12 Ward (Legal issues in Corporate Citizenship iii) identifies the inclusion of voluntary codes of conduct, as an example where voluntary approaches to CSR can have a legal context.
13 See par 5.3.2 for a discussion of the ISOs Guidance on social responsibility.
4.2 The roles of governments in strengthening and creating an enabling environment\textsuperscript{14} for CSR

In a report compiled for the World Bank, Fox, Ward and Howard\textsuperscript{15} identify four basic roles that governments have to play in the contemporary CSR agenda. The roles are mandating, facilitating, partnering and endorsing, where the role of governments are primarily centred on the governments’ role as mediator, facilitator or partner.\textsuperscript{16} Since the release of this report, authors such as Harrigan\textsuperscript{17} and Bell\textsuperscript{18} have identified further roles which include enforcing, legitimising, standardising, leveraging and modelling. It should be noted that these roles complement one another and should not be viewed in isolation.\textsuperscript{19} The following paragraphs will examine the extent to which governments in general are seen to have a role in shaping the CSR agenda.\textsuperscript{20}

4.2.1 Mandating (legislative)

In its mandating role (a role that is regarded as a pivotal CSR regulatory tool),\textsuperscript{21} governments provide certain minimum legal standards and targets that the private sector has to comply with. In performing this role, governments make use of their

\textsuperscript{14} Fox, Ward and Howard define an enabling environment as “a policy environment that encourages (or mandates) business activity that minimizes environmental and/or social costs and impacts while at the same time maintaining or maximizing economic gains” (Fox, Ward and Howard Public Sector Roles 1), while in a later work Ward suggests that an enabling environment for CSR is “a product of drivers, the tools and the human capacities and institutions directed towards that goal” (Ward "Corporate social responsibility in law and policy" 11).

\textsuperscript{15} Fox, Ward and Howard Public Sector Roles 3.


\textsuperscript{17} Harrigan Corporate Social Responsibility 146 – 165.

\textsuperscript{18} Bell 2002 http://www.g8.utoronto.ca/scholar/2002/bell11062002.pdf. The author has identified five potential key roles for government, which are goal setter, leader by example, facilitator, green fiscal authority, and innovator/catalyst.

\textsuperscript{19} As an example, Blowfield and Frynas (2005 (81) International Affairs 510) note that governments play a dual role of enforcer and facilitator.

\textsuperscript{20} According to Ward, “[t]he key challenge, for those governments that choose to engage, is to shape and apply CSR, to the greatest extent possible, to meet both national public policy goals and, at the same time, locally defined needs in areas such as capacity development, employment, environmental protection, social provision and poverty reduction” (Ward "Corporate social responsibility in law and policy" 20).

\textsuperscript{21} Harrigan Corporate Social Responsibility 159 and Michael 2003 (10) Corporate Social Responsibility and Environmental Management 118. Middtun (2005 (5) Corporate Governance 160) notes that, in order to embed the social dimension into civil society and self-regulatory processes, government will have to play a more prominent facilitating and endorsing role.
legislative competencies through “command and control”\textsuperscript{22} legislation that makes provision for legal and fiscal penalties for non-compliance and rewards for compliance. Governments’ regulatory and enforcement capacity is becoming critically important in the CSR agenda in order to monitor compliance and to act against instances of non-compliance.\textsuperscript{23} Governments must be in position where they are not only able to command the desired behaviour but also have the ability to exercise control in order to ensure compliance. The mere fact that aspects of CSR are addressed through legislation is of little consequence if no enforcement capacity exists. This illustrates the interdependency between the governments’ mandating and enforcing roles, in this instance.\textsuperscript{24}

In the South African CSR context, an example of Government’s mandating role is found in the legislation aimed at empowering black South Africans and providing those citizens with entrance into the mainstream economy through the enactment of the \textit{Broad-Based Black Economic Empowerment Act}.\textsuperscript{25} This Act serves as a good example of how CSR elements can be embedded into the legislative framework as part of a body of CSR-related law and regulation\textsuperscript{26} and reinforces CSR across the legislative domains of Government. The \textit{BEE Act} serves as an example of how an initiative which is not explicitly labelled as a “CSR initiative” has the potential to advance and promote socially responsible behaviour. However, the Government does not explicitly legislate for CSR

\textsuperscript{22} The “command and control” approach is viewed as the traditional approach to regulation and is based on a top-down approach where a government commands behaviour and controls the behaviour with sanctions. Unfortunately the traditional approach is not without its shortcomings. The problems with this approach include the inefficiency of the approach due to under- or over-deterrence, and over-regulation or the lack of monitoring and enforcement. For a discussion of these and other problems with the approach, see Hess “Corporate Social Responsibility and the Law” 159 – 163.

\textsuperscript{23} The CSR Act proposed in chapter 6 makes provision for penalties in instances of non-compliance with the requirements of the proposed Act. See paras 6.4.2.6 and 6.4.2.7.

\textsuperscript{24} See par 4.2.5 for a discussion of government’s enforcing role.

\textsuperscript{25} 53 of 2003 (hereinafter referred to as the \textit{BEE Act}). The \textit{BEE Act} and the accompanying Codes of Conduct as a form of legislative intervention forming part of a CSR policy framework will be discussed in par 5.2.2. Issues related to the economic empowerment of historically disadvantaged South Africans form an integral part of the South African CSR agenda. Peters and Roess (\textit{The role of Governments})\textsuperscript{28} identifies BEE as a mandating instrument used to advance CSR-related issues.

\textsuperscript{26} For a discussion of legislation with CSR content in the South African context, see par 5.2.
outside of the BEE framework, and no encompassing legal framework with regard to CSR exists.27

Through its mandating role, Government has the ability to shape the CSR framework and provide clear instructions as to what is expected of businesses. Government could for example make use of its mandating powers and create verifiable CSR measures that need to be complied with before granting a business licence or before entering into a business relationship with the business, thus making compliance a precondition for the conclusion of business.28

Despite mandating being a pivotal tool for the establishment of a CSR framework, it should not be considered as the only role that governments have to play in CSR. Governments have a role to play that extends beyond the command and control-style mandating of establishing minimum legal requirements for CSR.

4.2.2 Facilitating

Governments can use their imprimatur to encourage socially responsible behaviour in the private sector and facilitate CSR by setting clear frameworks to guide business’ social behaviour.29 In the facilitating role governments act as a catalyst where CSR initiatives are supported and encouraged but not necessarily directly regulated by law. As a facilitator, government needs to create enabling conditions for CSR. The aim is to create incentives that would encourage the private sector to engage in CSR initiatives or to raise the level of awareness of the CSR agenda or to create conditions which are conducive to CSR.30 Granting tax rebates for initiatives addressing social problems

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27 Schaller "South Africa" 123.
28 See par 4.3.4 for a discussion of the instruments which a government can use to create an enabling environment for CSR. The use of licensing requirements as a tool to shape socially responsible behaviour is endorsed by Hamann and Bezuidenhout. According to the authors “the role of the state goes beyond the enforcement of command-and-control regulations. In the first instance, it can use state licensing requirements and state procurement activity to affect corporate behaviour” (Fig (eds) Staking their claims 118).
30 Fox, Ward and Howard Public Sector Roles 3 and Harrigan Corporate Social Responsibility 155. Examples of regulatory instruments available to governments in their role as facilitator include the use of incentives, disclosure obligations, or the creation of Ministerial portfolios responsible for CSR. Zerk (Multinationals and Corporate Social Responsibility 36 – 38) identifies a range of common
through enabling tax legislation would be regarded as government’s acting as a facilitator. According to Harrigan\textsuperscript{31} the role of governments as facilitator includes facilitating CSR \textit{partnerships} and networks, promoting CSR outcomes within government procurement and departmental operations, and \textit{setting an overall framework}, agenda and set of key indicators for CSR outcomes for the greater well-being of the community. (emphasis added)

This statement further supports the notion that the role of government is not limited to a single role such as mandating or facilitating. The statement stresses the importance of a partnership approach which is needed between governments and businesses.\textsuperscript{32}

The Proudly South African campaign is an example of how Government can act as a facilitator. The campaign was initiated by the National Economic Development and Labour Council (NEDLAC) – a Government-led council – and is aimed at encouraging consumers to purchase products that have been manufactured locally in order to help address social problems such as unemployment.\textsuperscript{33} In order to make use of the Proudly South African logo, members must demonstrate their commitment to socially responsible practices and must attest to the local content of their product or services. Members must also demonstrate that their products or services are of a proven high quality, that the company complies with local labour legislation and adheres to fair labour practices, and that the company is environmentally responsible. Unfortunately the membership fees attached to becoming a member of this voluntary association limit its uptake by the majority of South African businesses. The annual membership fee for existing business is calculated as 0.1\% of annual sales to a maximum of R500 000. The result of this is that large companies will have to make an annual expenditure of up

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\textsuperscript{31} Harrigan \textit{Corporate Social Responsibility} 156.

\textsuperscript{32} The partnership role will be discussed in par 4.3.4.2.

\textsuperscript{33} See par 4.3.5.
to R500 000, expenditure that could have been utilised in a more “CSR-friendly” manner.

4.2.3 Partnering

Due to issues such as their having budgetary constraints and possessing limited resources it is becoming increasingly evident that governments acting on their own cannot address the ever-increasing needs to provide for their populace. The third role of government in promoting the CSR agenda is government’s partnering with the private sector. Partnering combines public resources with the resources of the private sector in order to address issues within the CSR agenda, is viewed as an innovative tool for solving social problems, and as way in which to implement CSR.

According to Ward et al “partnering is an essential tool of CSR”, which harnesses the strengths of both the private and public sectors, where governments bring in complementary competencies and resources to tackle societal issues. In this role, governments can either be direct contributors and participate directly or act as convenors between other contracting partners. This governmental role is closely related to the role of leveraging, where government-business partnerships have the potential to achieve outcomes which exceed the outcomes of unilateral approaches.

Partnering is of special significance for this research. It is argued here that government-business-community partnerships could provide a possible solution to the difficulties with which the land reform programme is faced. The inability of the Government to enforce measures to ensure a successful sustainable land reform programme shifts the

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34 Partnering can also be described as “co-investment”, where all of the partners in the partnership invest towards a common goal (Ward “Corporate social responsibility in law and policy” 12).
35 According to Albareda, Lozano and Ysa (2007 (74) Journal of Business Ethics 401) and Albareda et al (in Kakabadse and Morsing (eds) Corporate Social Responsibility: Reconciling aspiration with application 116 – 118) the partnership model, where the government and social actors assume co-responsibility in the establishment of a more inclusive society, is favoured by countries such as Denmark, Finland and Sweden. For a discussion of the application of this model in Nordic countries, see Lozano et al Governments and Corporate Social Responsibility 69 – 92.
37 Midttun 2008 (8) Corporate Governance 410.
38 Fox, Ward and Howard Public Sector Roles 5 – 6 and Crane et al (eds) Corporate Social Responsibility 314.
39 See par 4.2.8.
focus to contributions of the private sector in order to ensure sustainable farming enterprises that contribute to the national economy. In this regard Government must create an enabling framework supported by incentives in order to encourage the private sector to get involved in the land reform programme and become a strategic social investment partner alongside Government.

4.2.4 Endorsing

The fourth role that governments have to play in the contemporary CSR agenda is one of the public endorsement of CSR initiatives where governments show public (and political) support for CSR initiatives through for example governmental awards schemes awarding socially responsible behaviour.\(^{40}\) Governments need to play an active role in the promotion of CSR as a response \textit{inter alia} to social problems brought about by corporate action. In this regard, governmental endorsement of CSR can be demonstrated for example through governmental funding for projects that provide businesses with guidance on the issue of CSR or governmental funding for research on the issue of CSR.

Harrigan\(^{41}\) notes that “[g]overnmental endorsement of CSR can facilitate business take-up of favoured standards”, and although South Africa has no formal Government policy on CSR with any exclusive legislation aimed at legislating CSR, the Government has taken a decidedly important step towards endorsing CSR with its transformation of the ISO 26000 Standard on Social Responsibility into a national (SANS 26000) Standard.\(^{42}\) Except for the acceptance of the Standard as a national standard, Government has not provided any further guidance regarding the Standard or any other CSR-related issue.

4.2.5 Enforcing

The enforcement role complements governments’ mandating role and enables governments to provide for a system of policing for the regulatory frameworks created though legislation. In this regard, governments have the option to create legislative

\(^{40}\) Fox, Ward and Howard \textit{Public Sector Roles} 6.
\(^{41}\) Harrigan \textit{Corporate Social Responsibility} 155.
\(^{42}\) For a discussion of the \textit{Guidance on Social Responsibility} as a national instrument addressing CSR, see par 5.3.2.
regulators who will be responsible for the enforcement of a mandatory regulatory framework or they may follow a softer approach where no regulator exists and the policing of compliance is left to the businesses themselves.\textsuperscript{43} However, enforcement regimes could also include standards where a less aggressive approach is followed, such as the “apply or explain” approach advocated in the \textit{King Report on Governance for South Africa} and the \textit{King Code of Governance Principles}.\textsuperscript{44} Although these instruments do not have any legislative power and no enforcement body exists, the principles could be applied with success in voluntary government initiatives where the traditional “carrot and stick” approach is not desired.

4.2.6 \textbf{Legitimising}

Governments have a crucial role to play in legitimising CSR across the public and private sectors. Through its endorsement for example of an overarching CSR policy framework and the provision of official support or the establishment of a dedicated national department, governments are not only providing credence to the position of CSR but also embedding CSR in community consciousness.\textsuperscript{45}

4.2.7 \textbf{Standardising}

According to Harrigan\textsuperscript{46}

\begin{quote}
[O]ne of CSR’s created needs this century lies in establishing CSR standards of sufficient sophistication and acceptance to embed CSR in mainstream regulation and corporate practice.
\end{quote}

Government should be in a position to provide clarity to businesses regarding CSR norms through the use of legal standardisation and the transformation of “soft law” standards (such as the Global Reporting Initiative) into “hard law” which falls in the exclusive domain of government. Governments could also give official status to what they regard as being preferred CSR standards. In this regard it would appear as if the

\textsuperscript{43} The proposed CSR Act makes provision for the establishment of a CSR Commission responsible for the enforcement of the Act. See par 6.4.2.4.

\textsuperscript{44} For a discussion of these national instruments addressing CSR, see par 5.3 and for a discussion of the “apply or explain” approach as opposed to the “comply or else” approach, see par 5.3.4.5.

\textsuperscript{45} Harrigan \textit{Corporate Social Responsibility} 152.

\textsuperscript{46} Harrigan \textit{Corporate Social Responsibility} 153.
national Government has identified the ISO standard providing guidance on corporate responsibility (ISO 26000) as the preferred standard (although this is not a standard in the strict sense of the word since the standard does not set any requirements to be met or criteria to measure compliance) based on its establishment of the standard as a national standard (SANS 26000). However, Government should not only endorse existing standards. It should become involved in standard-setting, from the development of the standard, the endorsement of the standard, to the adoption of the standard. Government should further play a more prominent role in transforming a standard into a certifiable standard, as well as the monitoring and enforcement of the standard.

### 4.2.8 Leveraging

The basic principle behind leveraging is that in the CSR context, CSR as a whole is greater than the sum of its parts. The power of leveraging can be explained through government-business partnerships on CSR where the resources of each of the partners are deployed together in order to achieve a greater combined effect. The outcome of the ideal government-business partnership is greater than that which any of the individual partners can achieve on its own. If Government and the private sector join forces to address the issue of unsustainable and unproductive farms redistributed in terms of the national land reform programme, the outcome might be different from the usual present outcomes. Another example of governments’ leveraging role is found in their power as market actors and the use of public procurement. Through the use of public procurement, Government can use its power and resources to do business only with those businesses that incorporate CSR into their strategies. Government should restrict its business relationships with the private sector to those businesses who demonstrate a commitment to socially responsible practices.

### 4.2.9 Modelling / demonstration

In terms of this role, governments acting in their capacity as market actors should be seen by the public as being socially responsible through the demonstration of their

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47 See par 4.3.4.3 for a further reference to public procurement as an instrument used in creating a CSR policy.
socially responsible practices in their operations and purchasing policies – in other words, governments should lead by example. The demonstrating role “concerns the role of governments as market actors in their own right”.  

Based on these roles, Government needs to become an active participant in the CSR discourse and establish conditions where CSR can flourish. Government needs to make the rules and devise incentives for CSR. According to Peters and Roess:

“[c]reating a policy environment that facilitates, provides incentives, encourages or even mandates responsible business activities is crucial to building a sustainable and inclusive economy. By actively taking part in the CSR discourse and fulfilling these roles, Government can promote the private sector’s international image and help the sector to attain a positive competitive advantage and become more attractive investment possibilities to foreign investors, which in turn would be beneficial to domestic enterprise development.”

A key element in Government’s fulfilling the identified roles is through the establishment of a strong CSR framework which clearly spells out the Government’s CSR policy and policy instruments to create a conducive CSR environment. The following section will briefly discuss the elements of a government CSR framework as identified by Albareda, Lozano and Ysa.

4.3 Government CSR framework

4.3.1 Government CSR policy

The first element of a government CSR framework focuses on the government CSR policy. The CSR policy of a government should have a nuanced vision and mission and the objectives, strategies and priorities of the policy should be clearly identified. The policy should raise CSR awareness, use existing public policies to provide guidance,

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49 Peters and Roess The role of Governments 10.
50 Fox, Ward and Howard Public Sector Roles 8.
and promote the overall CSR framework.\textsuperscript{52} The vision of a CSR policy could be the integration of social concerns into all business operations (as is the case in Italy) or seeing businesses move beyond mere legal compliance to a situation where socially responsible business behaviour is integrated into businesses’ core values (as is the case with the United Kingdom).\textsuperscript{53} The strategy to achieve the vision of a CSR policy could be in the form of a multi-stakeholder approach or a more formal top-down approach. The policy could form part of the national policy on sustainable development, for example, or be a policy in its own right that is separate from the sustainable development policy. The objectives of a CSR policy could vary from a more general approach where the CSR culture is promoted among businesses or where business are merely supported in the developing of their CSR strategies, to the creation of a formal national CSR policy which is applicable to players in the public and private sectors. When formalising a government CSR policy, it is of the utmost importance that the policy identify priorities and issues which are of specific importance to the country, such as poverty reduction, community investment or competitiveness.

In the national context the first major issue with a government CSR framework is that the Government to date does not have a formal CSR policy in which it provides an indication of what its vision of or for CSR is. Due to this lack of a policy no strategies or priorities for CSR have been identified. It might be argued that the Government’s focus on black economic empowerment, for instance, and the encouragement of the private sector to participate in the empowerment drive should be viewed as a national CSR priority due to its specific significance for the country. However, despite the importance of BEE for the country, the Government has to date not formally identified BEE as a CSR priority. The only reasonable conclusion which can be drawn is that the Government to date has not formulated a formal approach to CSR and that a CSR policy is absent.

Simply having a formal CSR policy does not establish a CSR framework. In order to have a meaningful CSR framework, it is necessary to integrate CSR into the internal

\textsuperscript{52} Aaronson and Reeves \textit{The European response} 24.
\textsuperscript{53} Albareda \textit{et al} 2008 (17) \textit{Business Ethics: A European Review} 355.
government structures. Someone within government should take responsibility for the CSR portfolio – CSR should have an address in government. The following section will examine this element of the CSR framework.

### 4.3.2 Internal government CSR structure

The second element of a government CSR framework relates to the internal structure provided by a government, from which a CSR policy may be driven.\(^{54}\) According to Peters and Roess\(^{55}\)

\[
\text{[i]n order for C(S)R policies to be successful, it is crucial that a clearly defined and visible lead government agency be assigned. This agency will be responsible for defining the policy's rationale, co-ordinating implementation, and engaging in a monitoring and impact assessment process. The competency can lie with an already existing government function ... or can be given to newly created agencies.}
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This element addresses questions such as: Who within the governmental structures is responsible for the CSR portfolio? What is the position of the designated person? What organisational structure has been established to address CSR, and is the approach centralised, or decentralised? The internal governmental structures vary from instances where the CSR policy falls under state departments (or ministries) concerned with labour and social or environmental affairs (as in Italy), or where the CSR policy is designated to a Minister for CSR (as in the United Kingdom) who is responsible for coordinating CSR across all levels of government.\(^ {56}\) The UK Government's adoption of the concept of CSR, its incorporation into a public policy framework, and the creation of the portfolio for CSR in the UK Department of Trade and Industry represent the most important endorsements of CSR by any government.\(^ {57}\) The positioning of a CSR portfolio within governmental structures is not only a very powerful endorsement of the CSR notion, but is also probably the most significant legitimisation of CSR. The approach by the UK Government enables it to establish a policy framework which

\(^{54}\) See par 6.4.2.4 for a discussion of the CSR Commission as envisaged by the proposed CSR Act.

\(^{55}\) Peters and Roess *The role of Governments* 41 – 42.


\(^{57}\) Crane *et al* (eds) *Corporate Social Responsibility* 313. This view is endorsed by Moon (*Government as a Driver of Corporate Social Responsibility* 11), who describes the ministerial posts as having provided a “focal point” for CSR within the government structures.
encourages and enables responsible behaviour throughout the private sector.\textsuperscript{58} In other words, reinforcing governmental capacity (through the creation of a CSR portfolio within a government structure) represents a crucial condition for the establishment of a CSR framework and improving the impact of CSR.

If the questions raised in this paragraph are asked in the local context, the answers would provide further evidence of the lack of institutional commitment to CSR. Unlike the position in many developed countries, South Africa (as a developing country) does not have a co-ordination point for CSR, with no ministerial portfolio or national department tasked with overseeing a CSR portfolio, and no organisational structure as such has been established to address CSR. The Department of Trade and Industry is the most active public sector actor with reference to the promotion of CSR through its oversight over the BEE framework, but despite this, the “the lack of a CSR co-ordination point and of evaluation of CSR activities by the government point to limited public policymaking”\textsuperscript{59} and are “considered indicative of a public policy that displays little engagement with the issue as such”.\textsuperscript{60}

\textbf{4.3.3 CSR responsibilities at different levels of government}

This section builds on the previous section and assesses whether or not a CSR policy involves different levels of government or if it is concentrated within a central government. If a national policy on CSR is not properly coordinated with regional and local authorities it is likely that the policy will have little effect on those targeted by the policy. No clear evidence exists that CSR responsibilities are delegated to the various levels of Government within the national context.

\textsuperscript{58} Albareda \textit{et al} 2006 (6) \textit{Corporate Governance} 393. For a discussion of the integration of CSR into the UK government and the UK policy framework, see Ward and Smith \textit{Corporate Social Responsibility at a crossroad} and Moon \textit{Government as a Driver of Corporate Social Responsibility} 1 – 27. For a discussion on the policy approaches by other European governments such as the Danish, Austrian or Dutch governments, see Aaronson and Reeves \textit{The European response} 23 – 29.

\textsuperscript{59} Schaller "South Africa" 123. To a lesser extent the National Treasury is responsible for the implementation of public-private partnerships – partnerships which could include BEE and CSR elements.

\textsuperscript{60} Schaller "South Africa" 135.
4.3.4 The scope of CSR policy

Globally (South Africa included) the need exists for a CSR policy framework which is clear and progressive and which creates an enabling environment the purpose of which is to promote CSR, and which consists of an appropriate mix between legislation and voluntary (market-driven) initiatives. Various policy instruments (or combinations of instruments) are available to governments, which can be used to provide content to a CSR policy and create an enabling environment. Policy instruments include regulation and self-regulation, partnerships and public procurement requirements, each of which will be discussed in the following paragraphs.

4.3.4.1 Regulation and self-regulation

The first instrument at governments’ disposal is linked to its mandating role and enables governments to formulate policy through the use of formal regulation and in so doing to express public-sector engagement with CSR. Chahoud et al aptly describe the mandating role as follows:

Regulatory frameworks set out the boundaries for permissible behaviour in the market. They are particularly important in cases where markets do not incentivise or even disincentivise socially responsible or desirable behaviour. As there is no automatic inducement for corporations to behave responsibly, heavy sanctions and fines often need to be threatened to force corporate actors to behave in a socially responsible manner.

A clearly defined and strong regulatory framework is advantageous to both the private sector and the societies in which businesses operate and establishes the boundaries for corporate conduct. In its creation of an enabling CSR environment, the legal system must provide supportive infrastructure that assists the private sector in regulating itself. Should the private sector fail to accept this responsibility the legal system should act as

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61 Ward and Smith Corporate Social Responsibility at a crossroads vi and 36.
62 Fox, Ward and Howard Public Sector Roles 7 – 11. Peters and Roess (The role of Governments 16 – 18) identify awareness-raising, partnering, soft law and mandating as types of government intervention in CSR. Awareness-raising instruments are used to disseminate the idea of CSR, which the authors identify as the first important step leading to public sector engagement in CSR, while soft law refers to interventions which are non-regulatory as opposed to mandating instruments, which are used to define and enforce minimum standards. For a discussion of CSR public policy instruments and activities within the South African context, see Schaller "South Africa" 131 – 134.
63 Chahoud et al CSR and BEE in South Africa 40.
an enforcing mechanism and in this regard regulation is necessary to create a framework for non-regulatory instruments too. However, the possibility exists for voluntary regulation or standards to gain political endorsement and evolve into legal or quasi-legal minimum requirements over time. A possible example could be the evolution of the recommendations made in the *Code of Governance for South Africa – 2009* into legal requirements where, for example, all companies are required to draft integrated reports.64

A role exists for both voluntary and legally binding standards. Governments still have a pivotal role to play in shaping corporate behaviour. A recent World Bank Report65 states in this regard:

Public sector regulatory and enforcement capacity plays a critically important role in underpinning CSR. When minimum environmental standards are established and evenhandedly implemented by public sector actors or by citizens acting on rights reflected in public sector action, market-based signals can work to reward those players who go further. Without that capacity or the necessary attention to fundamental citizens’ rights, business face substantial difficulties in finding and maintaining appropriate boundaries for their CSR interventions, and they may find themselves pressured into activities that are beyond their core competence and represent a financial drain on business rather than a sensible CSR investment.

Although self-regulation is generally proposed as an alternative to the direct governmental intervention of command and control legislation, self-regulation in many instances entails various degrees of government involvement.66

4.3.4.1.1 Minimum legal requirements

The conventional mandating role of a government is setting and ensuring compliance with minimum legal requirements and standards on environmental or social issues through the use of a range of instruments. These instruments vary from direct legislation to a softer approach which is more reliant on self-regulation. The danger of the softer approach is that those who are being regulated have a variety of choices available to them and may interpret the rules or regulations in the manner that best suits the business. Reports can be edited in order to emphasise those matters in which the

64 See par 5.3.4.6.4 for a discussion of integrated reporting.
65 Fox, Ward and Howard *Public Sector Roles 7.*
66 Hess "Corporate Social Responsibility and the Law" 166.
business is excelling and to omit any subjects which could cause damage to the firm’s reputation.\textsuperscript{67}

An example of Government’s use of minimum requirements to formulate a policy is the use of the BEE Generic Scorecard. This scorecard identifies targets for the various elements of the scorecard which have to be met in order for the business to receive the maximum number of points. The higher the score on the scorecard, the more likely it is that a business would for example be regarded as a preferred business partner when Government contracts are awarded.\textsuperscript{68} However, due to the fact that complying with the \textit{BEE Act} is not compulsory (companies that do not have a procurement relationship with the Government are not obliged to comply),\textsuperscript{69} the Act has limited mandatory power and according to Chahoud \textit{et al}\textsuperscript{70} falls within the realm of “soft law”. The Act illustrates how the Government can, through its mandating role, compel companies to have a social conscience and to act responsibly.\textsuperscript{71}

4.3.4.1.2 Taxes

One of the most effective instruments at a government’s disposal in framing a CSR policy is the use of fiscal incentives such as taxes. Through the use of taxes, governments are in a position to either punish social irresponsibility or to reward and incentivise socially responsible practices.\textsuperscript{72} In the command-and-control approach which governments use in fulfilling their mandating role, taxes features prominently as a control measure.

Taxes are increasingly being used as an instrument to “punish” or deter practices which could be labelled as being undesirable. As an example, in response to the environmental threat of climate change the South African Government is considering imposing a carbon tax aimed at taxing excessive carbon emissions. Government is considering the implementation of a flat-rate specific excise tax based for example on

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{67} Sahlin-Andersson 2006 (6) \textit{Corporate Governance} 597. This issue is commonly referred to as corporate greenwash. See par 3.7.4 for a reference to this issue.
\item \textsuperscript{68} For a discussion of the BEE scorecard, see par 5.2.2.4.
\item \textsuperscript{69} See par 5.2.2.3.4 for a critique of BEE’s voluntary nature.
\item \textsuperscript{70} Chahoud \textit{et al CSR and BEE in South Africa} 37.
\item \textsuperscript{71} Esser and Dekker 2008 (3) \textit{Journal of International Commercial Law and Technology} 168.
\item \textsuperscript{72} Ward \textit{et al} Date Unknown \url{http://pubs.iied.org/pdfs/G02247.pdf}.
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passenger vehicle carbon emissions exceeding a determined level. Government has also proposed to increase the levy applied to electricity generated from non-renewable sources such as coal,\(^{73}\) while section 12(L)(2) of the *Income Tax Act* makes provision for an allowance for energy efficiency savings.

However, the *Income Tax Act* makes no reference to or special provision for CSR expenditure as deductible expenditure in terms of the Act. The issue of deductible expenditure is addressed in section 11 of the Act (the general deduction formula). Section 11 deals with the general deductions allowed in the determination of a taxpayer’s taxable income, while section 11(a) provides an indication of which expenditure would be deductible when determining a taxpayer’s tax liability. In terms of section 11(a) only expenditure and losses *actually incurred in the production of the income* will be allowed as a deduction against gross income, provided that such expenditure and losses are not of a capital nature.\(^{74}\) In order for expenditure to qualify as a deduction, section 23(g) of the Act requires the expenditure to be laid out or expended *for the purposes of trade*.\(^{75}\) Accordingly, in order for a taxpayer to claim CSR expenditure as deductible expenditure, the taxpayer must be able to demonstrate that the expenditure was trade related and actually incurred in the production of income. If for example business spends money for purely philanthropic purposes, SARS would in all likelihood not allow the deduction if it is not trade related and incurred in the production of income.\(^{76}\) If for example an agricultural company makes a donation to a home for the aged, the expense will not qualify in terms of sections 11(a) and 23(g)

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\(^{75}\) S1 of the Act defines “trade” as including: “every profession, trade, business, employment, calling, occupation or venture, including the letting of any property and the use of or the grant of permission to use any patent”. It should be noted that s 11(a), read with s23 (g) is commonly referred to as the general deduction formula and together these section govern the deductibility of expenditure.

\(^{76}\) This situation was confirmed by the appeal court in *CIR v Pick ‘n Pay Wholesalers (Pty) Ltd* 1987 3 SA 435 (A) where the court found that where expenditure is incurred for a purely philanthropic purpose it will not qualify for deduction in terms of s 11 of the Act.
since the expenditure is not trade related and not incurred in the production of income.\textsuperscript{77} If, however, the same agricultural company provides financial support to beneficiaries of the land reform programme in order to gain points on the company’s BEE scorecard, the link between trade and the production of income might be sufficient to satisfy the requirements of the Act in that it is incurred for the purposes of the taxpayer’s trade in the production of future income and is not of a capital nature.\textsuperscript{78}

The issue of the deductibility of CSR expenditure has only once come before the courts for adjudication – in \textit{Warner Lambert SA (Pty) Ltd v Commissioner, South African Revenue Service}.\textsuperscript{79} In this case the court had to rule on the question of whether or not social responsibility expenditure incurred in South Africa by a subsidiary of a foreign company in terms of foreign legislation qualified as deductions in terms of sections 11(a) and 23(g) of the Act. The parent company of the appellant as well as the appellant itself were signatories of the Sullivan Principles\textsuperscript{80} and under the US \textit{Comprehensive Anti-Apartheid Act} the American parent companies were obliged to ensure that their South African subsidiaries complied with the Act. Failure to comply would result in fines in the USA and even the possibility of imprisonment for directors.\textsuperscript{81} In compliance with the Sullivan Code and the \textit{Comprehensive Anti-Apartheid Act} the appellant incurred expenses towards working to eliminate laws and customs that impede social, economic and political justice.\textsuperscript{82} The appellant alleged that it would have been detrimental to its business if it had not incurred the expenses to the extent that it might have lost its privileged subsidiary status and other trade advantages. The court

\textsuperscript{77} This expenditure might be regarded as a donation, for which the company might even be liable to pay donations tax if the recipient is not registered as a public benefit organisation.

\textsuperscript{78} In the national CSR context BEE is of special significance (see par 5.2.2.5 for a discussion of BEE and CSR). Companies with a higher BEE rating (see par 5.2.2.4) are more likely to receive or retain contracts from government and as a result they will incur expenses in order to meet its BEE requirements.

\textsuperscript{79} 2003 5 SA 344 (SCA). Hereinafter referred to as the \textit{Warner case}.

\textsuperscript{80} The Sullivan Principles were one of the first CSR instruments. The Principles were specifically aimed at American companies trading in the then apartheid South Africa and predominantly addressed issues related to fair and equal labour practices such as equal pay and the development of training programmes.

\textsuperscript{81} At 349D.

\textsuperscript{82} This is the seventh principle of the Sullivan Code.
found that in this instance it was unthinkable that the appellant should not comply\textsuperscript{83} and that the Sullivan Code expenses were

\textit{bona fide} incurred for the performance of the appellant’s income producing operation and formed part of the cost of performing it. The social responsibility expenditure was therefore incurred for the purposes of trade and for no other.\textsuperscript{84}

Conradie\textsuperscript{85} JA noted that these payments had been made in order to ensure that the appellant would be able to continue with its trade and to preserve the business from harm or at least to avert the risk of harm. Consequently he equated the payments made to insurance premiums which are deductible expenses as they were aimed at protecting the income-earning structure of the business.

The central issue at hand in the \textit{Warner} case related to business expenses incurred in order to retain a “license to operate”. This issue was recently dealt with in a SARS Binding Class Ruling (BCR).\textsuperscript{86} On 12 May 2009 the South African Revenue Services released \textit{Binding Class Ruling: BCR 002}\textsuperscript{87} addressing the issue of expenditure incurred on CSR programmes. Although the ruling applies only to the applicant, a South African resident holding company and its wholly owned subsidiaries, it does provide some insight as to how SARS might in future approach certain CSR expenditure. The ruling related specifically to CSR expenditure made to socio-economic development in terms of the BEE Generic Scorecard.\textsuperscript{88} In order to achieve the maximum amount of points for the socio-economic development scorecard, a business must spend at least 1\% of its net profits after tax on socio-economic development. In order to comply with this

\footnotesize{\textsuperscript{83} At 352I. \\
\textsuperscript{84} At 353B. \\
\textsuperscript{85} At 353F. \\
\textsuperscript{86} According to SARS, a Binding Class Ruling is “in essence similar to a Binding Private Ruling but is applicable to a class of persons as defined in the Income Tax Act. A BCR is intended to promote clarity, consistency, and certainty in respect of the interpretation and application of the tax laws to a specific class of persons. A class member is a member of the Class to which the Binding Class Ruling applies such as legal entities or a shareholder in a company or an employee participant in a share investment scheme” (SARS 2009 \url{http://www.sars.gov.za/home.asp?pid=4262}). A BCR binds the Commissioner only in respect of the specific class of persons identified in the ruling and is governed by s 76E of the \textit{Income Tax Act}. \\
\textsuperscript{87} SARS 2009 \url{http://www.sars.gov.za}. For a discussion of this BCR, see Gaum 2010 \url{http://www.ey.com/ZA/en/Services/Tax/Tax-Alert-November-2010---CTAS---Corporate-Social-Responsibility-Expenditure}. \\
\textsuperscript{88} For a complete discussion of the socio-economic development element of the BEE scorecard, see par 5.2.2.5.5.}
requirement the executive committee of the applicant decided to contribute to socio-economic development through “the provision of bursaries to needy recipients from underprivileged backgrounds to be used by them for the payment of fees for schooling”. The costs of the bursaries which would be incurred for the purposes of earning BEE scorecard points will qualify as a deduction under the ruling in terms of sections 11(a) and 23(g).

This ruling confirms the approach followed in Warner and in summation it can be said that where businesses incur CSR expenses related for example to achieving a certain BEE rating, such expenses will be deductible if the taxpayer conforms to the requirements of sections 11(a) and 23(g). However, businesses should take note of the warning issued by Ernst and Young.

These days most companies incur CSR expenditure and often companies automatically treat all of these expenses as tax deductible without proper consideration of the merits for that treatment. Companies should be aware of the various ways in which CSR expenditure can be treated for tax purposes and should ensure that proper controls are in place to maximise the tax deductibility of their CSR expenditure and avoid the deduction (with resulting penalties) of amounts which do not qualify.

If it is accepted that CSR expenditure should result in the improvement of society, one would expect the Government to grant a full income tax deduction of this type of expenditure. Unfortunately socially responsible expenditure is not incentivised for example through an enhanced recognition of the expenditure (where the actual expenditure is multiplied perhaps by a factor of 1.5 in order to provide for a greater deductible sum) or with the provision of an additional deduction beyond the normal deductibility. In fact businesses considering incurring expenses related to (or labelled as) CSR should, as a result of the workings of section 11(a) of the Income Tax Act, make sure that the expenses actually qualify as deductible expenses.

89 Par 6 of the BCR.
90 The deduction will be allowed only if the company in the group claiming the expenditure actually carried on a trade and if the expenditure was incurred by a company in the group for its own empowerment rating. The BCR is valid for a period of five years from 28 August 2008.
92 S 12(H) of the Income Tax Act serves as an example where taxpayers are allowed in addition to the deductions allowable in terms of the Act to deduct an additional amount of R30 000 for certain qualifying apprenticeships that are incorporated into a registered learnership agreement.
4.3.4.1.3 Company-community agreements

Company-community agreements should form the basis of interaction between businesses and the communities with whom they interact and contribute to through their CSR initiatives. These agreements play an unmistakeable role in stakeholder engagement and representation. Within the South African context, the Government does not require companies to enter into stakeholder engagement through mandatory engagement. However, the Government of Ghana has realised the importance of these agreements (which in the Ghanaian context are referred to as social responsibility agreements). Logging companies in Ghana are by law required to conclude a social responsibility agreement with the customary owners of the land on which they wish to establish plantations. These agreements should include a description of the development contributions which would emanate from the company’s operations and should be fully negotiated with the local community. In order to protect the local community the agreement must also be approved by a government-appointed evaluation committee. This agreement protects the local community and is an attempt to ensure that local communities receive benefits from business operations on their land. These agreements show some similarities with the Shared Responsibility Agreements found in Australia.

On the national front, the regulations in terms of the Mineral and Petroleum Resources Development Act require some form of community engagement, but do not go so far as to legislatively require mining companies to conclude agreements with communities affected by mining operations. The MPRDA recognises the fact that Government must promote local and rural development as well as the social upliftment of communities affected by mining, and to this extent regulation 42 of the MPRDA Regulations requires applications for a mining right or for the conversion of an old order mining right.

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93 Although the national government is not a party to the agreement it does play a facilitating role.
94 Fox, Ward and Howard Public Sector Roles 11. For a discussion of the Ghanaian position, see Mayer and Vermeulen Company-Community forestry partnerships 77 – 82.
96 28 of 2000. Hereinafter referred to as the MPRDA.
97 GN R527 in GG 26275 of 23 April 2004. Hereinafter referred to as the MPRDA Regulations.
to be accompanied by a social and labour plan. The social and labour plan is aimed at promoting employment, advancing the social and economic welfare of South Africans, and ensuring that mining companies contribute towards the socio-economic development of the areas in which they are operating.\textsuperscript{98} A social and labour plan should \textit{inter alia} include a human resource development programme and a local economic development programme. The human resource development programme is primarily focussed on the skills development of employees,\textsuperscript{99} while the local economic development programme must identify the impact that the mine would have on the local and sending communities, as well as the infrastructure and poverty eradication projects that the mine would support.\textsuperscript{100}

Despite the fact that mining companies must annually submit a report on compliance with the social and labour plan to the designated Regional Manager of the Department of Mineral Resources, both the \textit{MPRDA} and the \textit{MPRDA Regulations} are silent on the enforcement of these plans. Although mining companies are required to submit reports it is unclear which measures are available if is it established that the mining company neglected to perform according to the plan. It should also be noted that the social and labour plan does not require any consultation with those communities who will be affected by the mining operations. Companies that do engage with communities before they finalise the social and labour plans are merely following what could be described as best practices. It should further be noted that the social and labour plans are not agreements between the company and the community, which again raises the issue: what happens if a company does not perform as indicated in the plan?

Based on the identified shortcomings of the approach followed in the mineral and petroleum sector, it is recommended that Government follow a more aggressive approach and make it a legal requirement that companies consult with communities before a social and labour plan is drafted. The plan should also be incorporated into an

\textsuperscript{98} Reg 41 of the \textit{MPRDA Regulations}.
\textsuperscript{99} Reg 41(b) of the \textit{MPRDA Regulations}.
\textsuperscript{100} Reg 41(c) of the \textit{MPRDA Regulations}. It should be noted that reg 41(c)(vi) also requires the plan to include a procurement progression plan and its implementation for companies owned by historically disadvantaged South Africans. The procurement progression plan could be seen as the mining company’s preferential procurement strategy, which is in line with the BEE requirements regarding preferential procurement. For a discussion of preferential procurement, see par 5.2.2.5.3.
agreement between the company and the community, giving the community a legal remedy in instances of non-compliance by the company.

4.3.4.1.4 Company reporting

Company reporting plays a crucial role in fostering an ethos of accountability and transparency, but despite this, to date no comprehensive CSR reporting requirements exist. CSR reporting has the potential to further strengthen the ethos of accountability and transparency and it is therefore something which governments should consider when formulating their CSR policies.

According to O’Rourke governments have an important role to play in both mandating and facilitating CSR reporting. In their mandating role governments can legally mandate CSR reporting and set standards for corporate reporting and legislatively prescribe reporting to promote socially responsible behaviour. In the milieu of UK pension funds, trustees are now legally required to disclose how they take social, environmental and ethical factors into consideration when making investment decisions. Governments could also choose to follow a less direct approach and instead of legally mandating CSR reporting support the development of voluntary guidelines for CSR reporting. Although not exclusively addressing CSR reporting, the

101 O’Rourke *Opportunities and obstacles* 31 – 32.
102 Aaronson and Reeves *The European response* 26 and Fox, Ward and Howard *Public Sector Roles* 5.

The trustees of a pension fund are required to draft a Statement of Investment Principles where amongst other things they should report on the extent or if at all social, environmental and ethical factors have been taken into consideration when making investment decisions. From this it appears as though trustees are not legally required to actually take these factors into consideration. In terms of the required Statement, trustees may merely indicate that they have for example not taken the factors into consideration and in so doing they will still be in compliance with the requirements. S 417(5) of the UK *Companies Act, 2006* follows a more direct approach and requires quoted companies (which are similar to listed companies in South Africa) to include in the directors’ report a business review which includes information about environmental matters and social and community issues as well as information about any policies of the company in relation to these matters and the effectiveness of those policies. Although South African legislation does not require pension funds to report on the extent to which social factors have been considered in their investment strategies, the preamble to the amended regulation 28 of the *Pension Funds Act* 24 of 1956 states that with reference to prudent investing appropriate consideration should be given to “any factor which may materially affect the sustainable long-term performance of a fund’s assets, including factors of an environmental, social and governance character” (GN R183 in GG 34070 of 4 March 2011). This approach emphasises the fiduciary responsibility of the board of a retirement fund to invest members’ savings in a way that promotes socially responsible investing.

103 O’Rourke *Opportunities and obstacles* 32.
approach to integrated sustainability reporting advocated in the *King II* and *King III Reports* could possibly be viewed as an example of Government’s playing a facilitating role in company reporting.\(^{104}\) However, it should be noted that the initiative to draft a code of governance was largely a business-led initiative and Government merely participated in some of the processes in the drafting of the code.

Although not regulated by law, companies listed on the JSE are now required to report on social, environmental and financial issues annually in an integrated fashion.\(^{105}\) In order to strengthen corporate disclosure on social and environmental issues, Government should consider transforming this requirement into a minimum standard for all companies, and not just those listed on the JSE.

### 4.3.4.1.5 Mandatory labelling and certification schemes

Labelling can be used as an instrument through which CSR is linked to law.\(^{106}\) It relies on public assurances that a business has complied with an established set of standards or certification criteria. In general, labelling is a means of communicating relevant information to the public. A “social” label would thus provide proof to consumers of a product that it was produced by a socially responsible business and that socially responsible practices were followed in the production of the product.\(^{107}\) These labels are normally displayed on the product itself or in the window displays of the retailer.\(^{108}\) Most labelling or certification schemes,\(^{109}\) whether they are government-sponsored or

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\(^{104}\) The *King II* and *King III Reports* as examples of national instruments addressing CSR issues will be discussed in more detail in par 5.3.3 and par 5.3.4. According to Hess (*Corporate Social Responsibility and the Law*” 172) “Sustainability reporting” is an example of information-based regulation where the basic goal of the approach is to provide stakeholders with enough information for them to be able to judge their corporate accountability.

\(^{105}\) For a discussion of integrated reporting as required by King III, see par 5.3.4.6.4.

\(^{106}\) Ward *Corporate social responsibility in law and policy*” 18.

\(^{107}\) Current social labels address a variety of issues, but are predominantly linked to labour and fair-trade issues. For a discussion of the Fair-Trade movement as an example of how consumerism can drive CSR, see par 3.8.7.

\(^{108}\) Urminsky (ed) *Self-regulation in the workplace* 38.

\(^{109}\) The Proudly South African initiative is an example of a voluntary national labelling initiative. The SA8000 Standard, which is an auditable standard addressing issues surrounding employment, is an example of a voluntary certifiable scheme. For a discussion of this Standard see par 5.4.4.
initiated by business, are characteristically voluntary in nature with little or no enforcement and little or no consequences for non-compliance. According to Hess\textsuperscript{110}

\[\text{[t]he success of these schemes depends on the willingness of consumers, investors and other businesses to reward corporations for meeting the labelling requirements, which would then encourage more firms to seek certification.}\]

However, one of the methods through which voluntary labelling schemes can be transformed into mandatory schemes is through the inclusion of the label as a precondition for doing business with Government, where failure to comply with the requirement effectively excludes the business from receiving any Government contracts. The process can be further strengthened by expanding the compliance requirement for example to supply chain producers, thus compelling them to comply as well.

Within the national context no state-sanctioned social (or CSR) label exists that can be used by businesses as a mark identifying them as socially responsible businesses. It is argued that a Government developed (or endorsed) CSR label based on a well-defined set of requirements would not only demonstrate Government’s commitment to CSR but would also enable businesses to be labelled in a positive way. In order to ensure the credibility of the label it is proposed that Government should identify verifiable standards against which businesses can be externally assessed (either by a designated Government department or Government-certified assessment institutions) and their actions verified.\textsuperscript{111} Government should thus establish monitoring structures which could for example conduct regular ongoing inspections and unannounced inspections (much like the labour inspectors inspecting compliance with the basic conditions of employment)\textsuperscript{112} in order to ensure compliance with the label’s requirements. Government’s involvement in the labelling process should further add to the legitimacy of the label and hopefully the uptake of the label by the business community. A well-supported Government-driven CSR label should help improve labour practices, since

\textsuperscript{110} “Corporate Social Responsibility and the Law” 170.
\textsuperscript{111} The aim of formulating verifiable parameters for a social label is to enable consistent implementation across the scope of application of the label.
\textsuperscript{112} Ss 63 to 70 of the \textit{Basic Conditions of Employment Act 75 of 1997} regulate the situation regarding labour inspectors.
those businesses who wish to receive the label would have to ensure that their labour practices were in compliance with set standards. The label would also serve as an important instrument to stimulate social concern among businesses and consumers and raise awareness of the important role that CSR has to fulfil in improving the socio-economic position of many South Africans.

4.3.4.2 Partnerships

Governments can engage the private sector through public-private partnerships in order to address socio-economic issues more effectively. Ward et al.\(^{113}\) note that partnerships as a policy instrument/approach

are potentially a valuable way for public sector actors to seek to combine the skills and competences of public and private sector actors as well as civil society in areas of broad societal concern such as HIV/Aids or sustainable economic development.

As was noted above, partnering is also one of the central roles that a government has to play in establishing an enabling CSR environment. However, the question should be asked: As an instrument, how sustainable is this approach? One of the dangers of the partnership approach is that all of the parties are not necessarily fully committed to the partnership, resulting in the situation where the success of the partnership is dependent upon only one of the partners. This would not be sustainable. What happens when one of the partners is unable to continue – what would the effect on the community be? It is accordingly of the utmost importance that the level of commitment of the parties should be assessed carefully. Another possible challenge to the partnership approach is the danger of dependency. This term refers to the situation where one of the partners becomes totally dependent on the other partners, as opposed to being self-supporting. This danger is especially prevalent in partnerships where local communities are involved, and the community becomes dependent on the contributions of the other parties.

Despite the possible dangers of the partnership approach, the most noticeable advantage of this approach is the potential to leverage additional resources or free up existing resources which could be used to address socio-economic challenges.

4.3.4.3 Public procurement and public procurement guidelines

Public procurement could potentially become a vital tool in the Government toolbox, if it procures goods or services from socially preferable businesses only, and in so doing includes CSR-related requirements in public procurement contracts and practices.\(^\text{114}\)

Through the use of public procurement Government would fulfil some of the roles discussed in paragraph 4.2, such as mandating, facilitating, partnering, and endorsing.\(^\text{115}\) Public procurement is based on the power of a government's purse where the public sector procures goods or services from the private sector or where goods or services are supplied to the country.\(^\text{116}\) Through the use of this purchasing power, Government is in a position where it can attach conditions or set requirements which have to be met before entering into an agreement with a private sector supplier. Through this leveraging and the use of public procurement guidelines, Government has

\(^{114}\)Bolton (2006 (6) *Journal of Public Procurement* 193) remarks that Government procurement has often been used to promote aims which are not directly linked to the primary aim of procurement (also see McCrudden 2004 (28) *Natural Resources Forum* 257 – 267; Watermeyer 2000 (5) *Public Procurement Law Review* 201 – 266; Williams and Quinot 2007 (124) *SALJ* 339 – 363; Arrowsmith *The law of public and utilities procurement* 8 and 1234 – 1242; and McCrudden "Corporate social responsibility and public procurement" 93). The author also notes that it is not “uncommon for governments to use procurement as a means of promoting objectives unconnected with the immediate object of procurement” (Bolton 2004 (121) *SALJ* 619). As an example, Bolton (2008 (32) *Natural Resources Forum* 1 – 10; and 2008 (1) *Journal of South African Law* 31) argues that the Government’s purchasing power could be utilised to address issues such as environmental protection. The notion that procurement can be used to address social issues is supported by various definitions of CSR discussed in par 3.2 (see for instance the definition of the Social Response Network that refers to “supports social causes” (par 3.2.2.2.3); or Frederick’s reference to “utilized for social ends” (par 3.2.2.3.3); or Eilbirt and Parker’s reference to “solution of broad social problems” (par 3.2.2.3.4). For a more complete discussion of Government procurement within the South African context, see McCrudden *Buying social justice* 245 – 266; Penford and Reyburn "Public Procurement" 25-1 – 25-36; and Bolton *Government Procurement* 1 – 127). McCrudden ("Corporate social responsibility and public procurement" 93) describes public procurement as “an extraordinarily adaptable tool, which has often been used to meet a regulatory need when other methods of regulation are not considered acceptable, available or effective“. The author notes that within the CSR context “procurement appears to be among a group of useful alternative regulatory mechanisms” (McCrudden "Corporate social responsibility and public procurement" 93).

\(^{115}\)See paras 4.2.1 – 4.2.4.

\(^{116}\)Chahoud et al (CSR and BEE in South Africa 37) note that the South African Government is the largest producer or goods and services in the country. For a discussion of governments in general as purchasers, see Trepte *Regulating procurement* 63 – 132.
the ability to embed CSR into corporate contracts. The inclusion of CSR requirements into Government contracts would have the further advantage of influencing those companies that do not directly deal with the public sector but which act as suppliers to companies that do have Government contracts. With reference to BEE, the effect of this trickle-down effect is that although companies at the bottom of the supply chain are not bound by the BEE requirements, compliance with the requirements becomes a necessity for future business transactions with those companies that do supply to the public sector.

Given the country’s history, it became necessary to give preferential treatment to those who were unable to meaningfully participate in the economy before 1994. One of the measures taken to address this situation was the enactment of the *Preferential Procurement Policy Framework Act*,117 which provides a framework for the implementation of the procurement policy as envisaged in section 217 of the *Constitution*.118 Section 2 of the Act makes provision for the use of a preference point system in a preferential procurement policy. Preference points may be allocated for specific goals which may include contracting with persons or categories of persons historically disadvantaged by unfair discrimination, or which relate to the implementation of programmes linked to the Reconstruction and Development Programme. Acting in accordance with section 5 of the *PPPFA* on 8 June 2011 the Minister of Finance promulgated the new *Preferential Procurement Regulations, 2011*119 that make specific provision for the allocation of preference points based on the BEE status of the contracting party.120

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117 5 of 2000. Hereinafter referred to as the *PPPFA*.
118 S 217 of the *Constitution* states that: “(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective. (2) Subsection (1) does not prevent the organs or state or institutions referred to in that subsection from implementing a procurement policy providing for – (a) categories of preference in the allocation of contracts, and (b) the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented”.
119 GN R502 in GG 34350 of 8 June 2011. Hereinafter referred to as the *Preferential Procurement Regulations, 2011*.
120 These regulations applied to public entities with effect after 7 December 2011 (GN R501 in GG 34350 of 8 June 2011).
In terms of the *Preferential Procurement Regulations, 2011* a preference point system of 80/20 for tenders for the acquisition of goods, works or services of less than R1 million will be used, and for those exceeding R1 million a preference point system of 90/10 will be used. The 20 in the case of the 80/20 and the 10 in the case of the 90/10 preference point system are linked to the tenderer’s BEE recognition level in terms of the BEE Generic Scorecard. In the case of a tender of less than R1 million, if the tenderer has the status of a level 1 BEE contributor, the tenderer would receive the maximum (20) points, whereas if the tenderer is a level 8 BEE contributor it would receive only 2 out of the possible 20 points. The points scored by the tenderer with regard to the BEE recognition level must be added to the points scored for the price criteria.

These measures provide a clear indication of how Government can, through the use of its purchasing power, advance social objectives and use public procurement as a key mechanism to implement legislation. A consideration of the preference point system makes it clear that businesses that comply with the BEE requirements (and assist black South Africans to contribute to the economy meaningfully) are more likely to receive Government tenders than those which do not. From the discussion in paragraph 5.2.2.5 it will become evident that a strong link exists between CSR and BEE and that a number of the elements of the BEE scorecard have CSR content. Based on the link between CSR and BEE, Government has, possibly unintentionally, already made CSR a requirement for Government contracts, thus setting a minimum requirement that has to be met. Although in this instance, CSR is implied in the preferential procurement framework, it would have contributed even more to establishing a CSR framework if the

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121 Tenderers must submit proof of their BEE status by way of a BEE status level verification certificate given by an accredited verification agency (*Preferential Procurement Regulations, 2011* 9).

122 For a discussion of the BEE generic scorecard, see par 5.2.2.4.

123 The same approach is followed for tenders exceeding R1 million. In the case of a tender of more than R1 million, if the tenderer has the status of a level 1 BEE contributor, the tenderer would receive the maximum (10) points, whereas if the tenderer is a level 8 BEE contributor it would receive only 1 out of the possible 10 points (*Preferential Procurement Regulations, 2011* 6 – 7). For a reference to the different status levels on the BEE scorecard, see par 5.2.2.4.

124 See par 5.2.2.1 for the definition of “black persons” for the purposes of BEE.

Government had explicitly included requirements in the procurement framework which are labelled “CSR”.

4.3.5 The CSR role of other organisations

The final topic to be addressed in a government CSR policy framework is the CSR role of other organisations such as government agencies, intermediary organisations or multi-stakeholder organisations. In order to provide further support to a CSR policy framework, some governments lead or are involved in multi-stakeholder forums which drive CSR. The Italian Government has, for example, established a CSR-Multi-Stakeholder Forum as well as the Italian Centre for Social Responsibility, while the Norwegian Government leads a multi-stakeholder forum, the Kompakt, which operates as a consultative body on CSR issues.

In the South African context, no Government agency or multi-stakeholder organisation led by Government and exclusively focussing on CSR exists. However, Government has created the National Economic, Development and Labour Council (Nedlac), which is tasked with promoting the goals of economic growth, participation in economic decision making, and social equity. Nedlac combines Government and representatives from organised business, organised labour and organised community groupings on “a national level to discuss and try to reach consensus on issues of social and economic policy” and conducts its work in four chambers (public finance and monetary policy, trade and industry, the labour market, and development) focussing on aspects of social and economic policy. Unfortunately Nedlac has not taken an official stance on CSR to date, and the furtherance of a CSR policy framework does not feature in the Council’s objectives. However, given the representation in the

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128 Nedlac was established in terms of the National Economic, Development and Labour Council Act 35 of 1994.
129 s 5(a) of the National Economic, Development and Labour Council Act.
130 Business South Africa (BUSA) is one of the organisations representing organised business.
131 Organised labour is represented by labour federations such as Cosatu and Fedusa.
132 Organisations such as the National Women’s Coalition and the African National Civics Organisation represent organised community groupings.
Council as well as the Council’s focus on economic growth and participation in economic decision making and social policy, it is argued that the Council has the potential to become a very important role player in the establishment of a CSR policy framework. With access to Government, organised business, labour and community groupings, the Council is the ideal multi-stakeholder forum through which CSR can be advanced.

4.4 What can the South African Government do to promote CSR?

Based on the evidence, Schaller\textsuperscript{134} concludes that the CSR public policy in South Africa can be described as being in the early second generation of maturity.\textsuperscript{135} This classification is based on the fact that within the national position, no single point of coordination for CSR exists, nor does Government evaluate CSR activities. Despite these shortcomings there is some development and application of CSR policy.\textsuperscript{136} Government has not explicitly dedicated policies, programmes or institutions to CSR. The question that needs to be addressed is what Government can do to promote CSR.

The following are examples of Government action which is required to establish a well-functioning CSR public policy. These recommendations are primarily based on the discussions in the previous paragraphs which identified gaps in the current situation.

The first recommendation specifically addresses the issue of a CSR policy. It was noted that the South African Government currently does not have a publicised stand on CSR, nor does it have a formal policy or strategy for CSR. It is recommended that Government should through consultation with structures such as Nedlac formulate an integrated CSR strategy supported by a strong public policy. In this regard greater

\begin{itemize}
\item \textsuperscript{134} "South Africa" 123.
\item \textsuperscript{135} Welzel et al (eds) The CSR Navigator 42 identifies seven CSR public policy maturity dimensions used to determine if a CSR public policy has reached the first, second or third generation of CSR policies. The dimensions include competency, the level of strategy development, the existence of a coordination point, the integration of stakeholders, communication and evaluation. A first generation CSR public policy has no specific CSR policies and no competency. Only one to three of the dimensions are fulfilled. With a second generation policy, basic policies are in place as well as significant CSR activities with core CSR instruments and initial partnerships. Three to four dimensions are fulfilled. Finally, the third generation CSR policy has cutting-edge CSR policies with mature CSR practices and established partnerships. Six or more dimensions are fulfilled (Welzel et al (eds) The CSR Navigator 42).
\item \textsuperscript{136} Schaller "South Africa" 123.
\end{itemize}
collaboration between the public and private sectors is necessary, especially with reference to addressing social issues. Government should give consideration to the development of multi-stakeholder partnerships such as the UK Ethical Trading Initiative, which provides standards for businesses and encourages monitoring. In order to oversee the implementation of a national CSR policy, it is recommended that Government establish a national department dedicated to CSR and make CSR a ministerial portfolio or include CSR into an existing portfolio. In support of the national department it is proposed that a CSR information centre be established, which could provide guidance to the private sector on issues such as the implementation of a CSR policy within a business or the provision of assistance with the identification of CSR initiatives.\textsuperscript{137} Furthermore, Government should dedicate funds for research into CSR and the potential contribution of CSR for example to the eradication of poverty or the upliftment of communities. It is further recommended that Government should make greater use of tax incentives/disincentives to reward/penalise behaviour. It should be made worthwhile to become socially responsible or conversely it should be made expensive not to behave with social responsibility. The use of dedicated tax deductions for CSR expenditure should be considered. If, as an example, a company provides finance to an emerging farmer, it is argued that although such expenditure is not strictly speaking incurred in the production of income and in relation to the company’s trade, such expenditure should nevertheless be deductible to the extent that it enables the emerging farmer to become economically active and to meaningfully participate in the economy. Finally it is proposed that Government should strongly consider the creation of a social label which could be utilised by businesses to illustrate to the public and other businesses that it is a socially responsible business which complies with pre-determined criteria set for socially responsible businesses. By enhancing the visibility of CSR and by giving greater public recognition to businesses that are being socially responsible, Government will encourage more businesses to become socially responsible.

\textsuperscript{137} Government should provide the necessary funds to enable the centre to function.
The challenge facing Government is to determine which regulatory approach would lead to the greatest social benefit. The implementation of these recommendations would contribute firstly to the establishment of a formal CSR policy supported through legislation and other less mandatory instruments. Secondly, if the policy were to be properly managed and enforced, the policy would grow in stature and evolve into a third generation CSR policy that could be regarded as having cutting-edge CSR policies with mature CSR practices and established partnerships.

4.5 Conclusion

As early as 1958 Levitt\(^\text{138}\) stated that “government’s job is not business, and business’s job is not government”. Although this might still be true to some extent the roles of government and business are becoming less distinguishable. In general government plays a central role in stimulating the economy through procurement policies, while business is providing services or infrastructure through its CSR initiatives which in Levitt’s time would have been considered the exclusive domain of government. To this extent the traditional roles of government and business are becoming blurred and Wood\(^\text{139}\) rightfully notes that government and the private sector are natural allies. The fact that government and the private sector are so regarded implies that government has an important role to fulfil in creating a regulatory framework that would enable the private sector \textit{inter alia} to fulfil its social roles. However, in a country with such a high degree of social exclusion, it is becoming increasingly necessary to build compliance through enhancing the state’s capacities in fiscal, regulatory and enforcement areas.\(^\text{140}\)

The need to enhance the state’s capabilities is partially brought about by the fact that the voluntary approach to CSR has not been able to meaningfully address issues caused by decades of oppression, and further legislative interventions might be required.

It should be noted that CSR should not be seen as replacing regulation or legislation concerning social rights, nor should it be seen as shifting the state’s responsibility to

\(^{138}\) Levitt 1958 (36) \textit{Harvard Business Review} 47 and Levitt 1960 (Spring) \textit{Modern Age} 176. \\
^{139}\) Agle \textit{et al} 2008 (18) \textit{Business Ethics Quarterly} 162. \\
^{140}\) Fig (eds) \textit{Staking their claims} 87.
address social issues to the private sector and thus “privatising” its proper responsibilities. In order to ensure an effective framework for CSR, a regulatory foundation that promotes equality, growth, employment and good governance is required within which all participants would have certainty about their rights and responsibilities. An effective regulatory framework for CSR would not only provide the “rules of the game” but would also provide a level playing field on the basis of which socially responsible practices could be developed and measured.

It appears as if the current national public policy fails to provide an appropriate enabling environment for CSR and that Government views CSR as a supplement to governmental activity. This situation is in stark contrast to that in the UK, for example, where the ministers within the Department of Trade and Industry are specifically tasked with the CSR portfolio. According to Moon the multi-faceted approach of the UK Government is evident for instance in its establishment of a Corporate Responsibility Academy, the initiatives taken to adjust the regulatory environment for CSR, and the fiscal changes made to elicit more CSR initiatives and to provide relief for socially desirable expenditure.

The objectives of this chapter were to contextualise and analyse the role that Government has to play in the creation of an enabling environment for CSR. From the discussion of the various roles that governments in general play in the establishment of a CSR policy framework, it has become evident that governments have a crucial role to play in the formulation and implementation of a CSR public policy due to the failure of the business-led voluntary approach. Each of the roles identified is applicable to the South African Government, which unfortunately is not fulfilling all of them. Government

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142 Moon *Government as a Driver of Corporate Social Responsibility* 14 – 15.
143 The Corporate Responsibility Academy provides training, support and advice on corporate responsibility.
144 Such as the regulations requiring pension schemes to disclose the extent to which they take account of social issues in their investment decisions.
145 Moon (*Government as a Driver of Corporate Social Responsibility* 14) identifies the 2002 Community Investment Tax Credit as a fiscal change aimed at attracting private capital into disadvantaged areas. For a discussion of tax and CSR in the UK, see Williams *Tax and Corporate Social Responsibility* 1 – 53.
should take a more visible stand on the issue of CSR and the recommendations made in paragraph 3 would serve this purpose exceptionally well.

Finally this chapter has described the elements of a CSR framework and evaluated the current national position against these elements. This analysis has shown that South Africa has a very limited national CSR policy framework with no explicit measures which are labelled as CSR. It was noted that within the national context an issue such as BEE might be regarded as the national notion of CSR. Given the importance of BEE within the CSR framework, the following chapter will discuss some legislation (including the BEE Act) which could be related to CSR, as well as national and international instruments aimed as CSR or which have linkages to CSR. The aim will be to discuss measures which could conceivably form part of a national CSR policy framework. The chapter will indicate how the different roles that Government has to play in the establishment of an enabling CSR environment are embodied in legislation and take a voluntary form, and how the elements of a CSR framework figure in the South African context.
Chapter 5: The regulatory framework for CSR

5.1 Introduction

In the previous chapter it became evident that the question of whether or CSR should be regulated or its voluntary nature kept intact has not yet been authoritatively settled. The most probable solution lays in a compromise between a rigid regulatory framework and an overly flexible voluntary framework – thus, a framework in which the private sector is required by law to engage in CSR activities but the content of the activities is left to the management of a business.¹

Chapter 2 highlighted the crisis in which the land reform programme finds itself.² From this discussion it became evident that land reform is at a crossroads. Unless Government starts looking at innovative solutions, land reform might end up in a Zimbabwe-style land grab with a devastating effect on the economy. One alley that has to date been left unexplored and could be labelled as an innovative solution is the contribution that socially responsible practices can make to the success of the land reform programme. Chapter 3 provided an overview of CSR as an innovative solution and discussed its definition and theoretical basis in order to identify the important role which CSR plays in development. The chapter also noted that involvement in CSR practices could potentially benefit not only businesses but also their stakeholders.³

As an instrument of development, CSR has a particularly important role to fulfil in the agricultural sector, which is inextricably linked to the land reform programme, especially in the redistribution programme, where the focus is on the transfer of white-owned agricultural land to previously disadvantaged citizens.⁴ The sector as a whole and the

¹ Government must provide a clear indication of how it understands CSR. No clear definition of CSR has been devised by Government. The only reference to what could possibly constitute CSR is found in the Codes of Good Practice on Black Economic Empowerment (Gen Not 112 in GG 29617 of 9 February 2007), where reference is made to socio-economic development initiatives (for a discussion of socio-economic development initiatives, see par 5.2.2.5.5), and the recently released Standard for social responsibility (for a discussion of this Standard, see par 5.3.2).
² See paras 2.4.1.3 and 2.4.2.3.
³ See par 3.6.
⁴ It should be noted that the central argument put forward in this research is that the private sector in general and the agricultural sector specifically could potentially have an important role to play in the success of land reform. Within the agricultural sector the focus is on the leading agricultural companies. The focus on these agricultural companies as opposed to other participants in the
identified agricultural companies specifically are strategically well positioned to address some of the challenges of the land reform programme through their CSR initiatives. Despite the fact that South Africa does not have a formalised CSR policy and Government has not expressly supported CSR, it is necessary to identify the CSR framework which potentially consists of legal requirements and relevant guidelines found nationally and internationally.

In order to identify the framework, this chapter will address the following question: Which legal requirements and relevant guidelines for CSR found nationally and internationally could form part of a national legal framework for CSR? This issue will be dealt with by examining national legislation with CSR content; investigating national guidelines concerned with CSR; and assessing international guidelines regarding CSR. It should be noted that internationally a proliferation of codes of conducts, industry norms and global initiatives that instrumentally address the issue of CSR have been observed. As a consequence this chapter will focus only on the pre-eminent instruments addressing CSR.

It is noteworthy that, except for a brief reference to land reform in the AgriBEE Charter, no other instrument, national or international, links the issue of land reform to CSR. As a result it is necessary to extrapolate content from the instruments that will be discussed in order to assist the Government in forming a CSR policy where land reform is included as a major theme.

Before the specific research question can be addressed a brief reference should be made to what the International Organisation for Standardisation (ISO) refers to as the principles of social responsibility or what Kerr, Janda and Pitts refer to as the CSR

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5 See paras 3.2.6.1 to 3.2.6.3.
6 See paras 2.4.1.4 and 2.4.2.4 for a discussion of these challenges.
7 See par 5.2.3.
8 Pitts (ed) Corporate Social Responsibility 91.
legal principles. In its *Guidance on social responsibility* the ISO identified seven principles that should guide a business throughout its CSR practices. The principles are accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for the rule of law, respect for international norms of behaviour and respect for human rights.

### 5.1.1 CSR principles related to law

The principle of accountability implies that a business should accept accountability and be answerable for the impacts of its decisions and practices on society at large - the economy as well as the environment. Accountability means not only being accountable as required by law, but also being accountable for any failure to meet set standards (ethical or other), *whether these standards are included in national or international guidelines*. Closely linked to the principle of accountability is the principle of transparency that requires a business to be transparent in the manner in which it conducts itself. Disclosures should be truthful and presented in a manner that would enable stakeholders to accurately assess the position of the business. The basic

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9 SABS *Guidance* 10 – 14. For a discussion of the *Guidance*, see par 5.3.2. It should be noted that the ISO was responsible for the creation of this *international* standard, which is internationally referred to as the ISO 26000:2010 Standard. This international standard was approved by the SABS and became a national standard in November 2010. The national standard, which is an exact replica of the ISO 26000, was released as SANS 26000:2010. Although the standard is now recognised as a national standard, for the purposes of this research any further reference will be made to the original drafting authority, which is the ISO and not the SABS, and released as ISO ISO 26000:2010 *Guidance on Social Responsibility* (ISO Geneva 2010).

10 See ISO *Guidance* 10, Anon 2009 (June) *Business and the Environment* 12 and Anon 2011 (February) *Business and the Environment* 12, which identifies accountability as the cornerstone principle for CSR. It should be noted that in terms of the stakeholder approach (see par 3.4.2.2) a business is accountable to more than just shareholders. The much wider concept of stakeholders (which includes shareholders, employees, communities etc.) is used to describe the extent of a business' accountability.

11 This point supports the approach followed in this research, where the focus goes beyond national legislation to include national and international standards and instruments. For a discussion of national guidelines and standards see paragraph 5.3, and for a discussion of international instruments see paragraph 5.4.

12 Ward (*Legal issues in Corporate Citizenship* 3) notes that transparency is a recurring theme of both the CSR and corporate governance theme and that within the CSR agenda transparency has several legal dimensions such as legislation requiring companies to report on environmental or social issues, social labelling or legislation requiring pension schemes to report on the extent to which environmental or social factors have been considered in making investment choices.

13 Anon 2009 (June) *Business and the Environment* 12. Based on the information provided by a business, stakeholders should be able to make informed decisions regarding the business and for example the extent to which it acts in a socially responsible manner.
principle behind transparency is that a business should demonstrate to its stakeholders that it is open about its decisions and activities and that it has nothing to hide. A transparent style of management is not negotiable when establishing a relationship of trust between a business and its stakeholders. In this regard a business should be transparent regarding issues such as the standards and criteria against which the business’ activities are evaluated, the manner in which business decisions are made and implemented, and the performance (economic and in terms of its internal set standards) of the business. It is evident that the principle of transparency has a strong focus on stakeholders and in this regard the guiding principle is that a business should have regard for and respect and respond to the interests of its stakeholders. In order to adhere to this principle a business must identify its stakeholders and have regard for their interests in the business – whether legal or otherwise.

The final three principles address distinct legal matters. Businesses should accept the supremacy of law and be guided by a respect for the rule of law, and should accordingly at a minimum comply with all of the legal requirements relevant to the business. Within the South African context, this principle has received constitutional endorsement. According to section 1(c) of the Constitution, the rule of law and constitutional supremacy represent two of the values on which the South African democracy is founded. Whilst adhering to the rule of law businesses should also respect international norms of behaviour, especially in areas where the national regulatory framework does not provide adequate safeguards. Finally businesses should respect and promote human rights and human rights compliance. Businesses have to ensure that they are

14 ISO Guidance 11. The issue of transparency features prominently in the Promotion of Access to Information Act 2 of 2002 which was inter alia enacted to foster a culture of transparency in and accountability in public and private bodies, and to give effect to the constitutional right of access to information held for example by a company and that is required for the exercise or protection of any right (supporting the horizontal application of the Constitution).
15 ISO Guidance 12. The identification of stakeholders is referred to as stakeholder mapping – the process followed by a business to identify the relevance of different stakeholder groups. For a discussion of stakeholder identification and classification, see par 3.4.2.2.4.
16 Within the CSR context, legal compliance should be seen as the minimum requirement to be met in order to be regarded as a socially responsible business.
18 Within the South African context, the issues of respect for and the promotion of human rights are firmly entrenched in chapter 2 of the Constitution, which contains the Bill of Rights which, according to s 7(1), forms the cornerstone of the South African democracy.
not in violation of any human rights or through their products or services support human rights violations by businesses in their supply chains.\textsuperscript{19}

The legal principles of CSR identified by Kerr, Janda and Pitts show noticeable similarities with the principles identified by the ISO. According to these authors the seven CSR legal principles are integrated, sustainable decision-making; stakeholder engagement; transparency; consistent best practice; the precautionary principle; accountability; and community investment.\textsuperscript{20} Integrated, sustainable decision-making requires a business to consider environmental, social and economic issues in its decision-making process,\textsuperscript{21} while stakeholder engagement refers to the necessity of businesses engaging continuously with all of their stakeholders as opposed to engaging only shareholders on environmental, social and economic issues, which could impact on the stakeholders.\textsuperscript{22} The principle of consistent best practice relates to the ISO principle of respect for international norms of behaviour as well as the principle of ethical behaviour.\textsuperscript{23} The precautionary principle entails that business should, especially when dealing with the natural environment, take cost-effective precautionary measures to ensure that potential environmental damage is limited to at least what is legally required.\textsuperscript{24} The principles of accountability as well as transparency reflect the principles identified by the ISO. The final principle of community investment stipulates that businesses should involve themselves in programmes and initiatives that address social

\textsuperscript{19} Since the Bill of Rights binds natural and juristic persons (s 8(2) of the \textit{Constitution}), businesses which are in violation of any of the rights included in the Bill of Rights will be held accountable for such violation.

\textsuperscript{20} Pitts (ed) \textit{Corporate Social Responsibility} 91.

\textsuperscript{21} For a more detailed discussion of this principle, see Pitts (ed) \textit{Corporate Social Responsibility} 105 – 158.

\textsuperscript{22} For a more detailed discussion of this principle, see Pitts (ed) \textit{Corporate Social Responsibility} 159 – 238. The issue of stakeholder engagement will be identified as CSR content in the \textit{King Report on Governance for South Africa}. See par 5.3.4.6.3.

\textsuperscript{23} For a more detailed discussion of this principle, see Pitts (ed) \textit{Corporate Social Responsibility} 285 – 346.

\textsuperscript{24} For a more detailed discussion of the precautionary principle, see Pitts (ed) \textit{Corporate Social Responsibility} 347 – 414. The precautionary principle is also included in the GRIIs environmental performance indicators (see par 5.4.2.4.2).
issues and that eventually lead to empowerment and enrichment of the communities in which they operate.25

With both the ISO social responsibility principles as well as the CSR legal principles of Kerr, Janda and Pitts in mind, the following sections will discuss legislation and other measures that could form the basis of a CSR legal framework in the national context. This discussion will be based on the fact that a fundamental principle of CSR is

... respect for the rule of law and **compliance with legally binding obligations**. Social responsibility, however, also entails **actions beyond legal compliance** and the **recognition of obligations to others that are not legally binding**.26 (emphasis added)

Although acting within the legislative framework is the core of being socially responsible, this chapter accepts the premise that the regulatory framework for CSR is wider and includes national and international standards and guidelines. However, the following section will focus on the current legislative framework guiding businesses’ CSR initiatives, or which at least can be described as having CSR content.

5.2 National legislation with CSR content

5.2.1 Introduction

As was previously mentioned,27 the Government is under a constitutional obligation to protect, promote and fulfil the rights enshrined in the **Constitution**.28 Since CSR also includes human rights issues such as the right to equality,29 human dignity,30 the right to

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25 Pitts (ed) *Corporate Social Responsibility* 91. The notion of community involvement or development features prominently in the ISO Guidance, and to a lesser extent in the national legislation with CSR content to be discussed in par 5.2. For a more detailed discussion of the principle of community investment, see Pitts (ed) *Corporate Social Responsibility* 497 – 530. Community investment or community development is a central theme of the proposed CSR framework Act (see par 6.4.2.5).

26 ISO Guidance 6. This fundamental principle provides further credence to the approach in the research where instruments other than legally binding obligations will be discussed.

27 See par 2.2.

28 S 7 of the **Constitution**.

29 S 9 of the **Constitution** prohibits unfair discrimination and promotes equality. Should someone for example be denied access to proper skills training, such a denial could amount to unfair discrimination. It should be noted that no right included in the **Constitution** is absolute. All of them are subject to limitation. The right to equality may for instance be limited by the application of legislation addressing black economic empowerment. (For a discussion of the constitutional issues regarding black economic empowerment, see par 5.2.2.3.6).

30 According to s 10 of the **Constitution**, everyone has inherent dignity and the right to have their dignity respected and protected. It might be argued that if a land reform beneficiary is not equipped with the
fair labour practices or the right to an environment that is not harmful.\textsuperscript{31} Government is under an obligation to create an enabling environment where the private sector is encouraged (through the use of voluntary or legislative measures) to take responsibility (and be held accountable) for the impact that its actions and decisions have on society at large and specifically on its stakeholders. Through the creation of this enabling CSR environment Government further has the opportunity to comply with the constitutional duty to take reasonable \textit{legislative} and \textit{other measures} within its available resources to foster conditions which would be conducive to land reform as required by section 25(5) of the \textit{Constitution}.\textsuperscript{32} An enabling CSR environment would not only assist the private sector to make a meaningful contribution to land reform through their CSR policies and practices but would also assist Government to perform in an area which has been criticised for its slow and unsatisfactory progress.\textsuperscript{33}

It must, however, be kept in mind that South Africa is considered to be a constitutional state and in terms of section 2 of the \textit{Constitution}, the \textit{Constitution} is the supreme law\textsuperscript{34} of the country and any law or conduct that is inconsistent with it is invalid.\textsuperscript{35} Consequently the supremacy of the \textit{Constitution} and the rule of law are the core values on which the democracy or legal system of the Republic of South Africa is founded. The preamble of the \textit{Constitution} acknowledges the fact that the constitutional dispensation is aimed at improving the quality of life of all citizens and freeing the potential of each person. As is the case with most constitutions, the \textit{Constitution} contains a Bill of Rights that not only forms the cornerstone of South African democracy,

\begin{itemize}
  \item required skills to properly manage the redistributed farm, he would most probably not be able to make a success of his farming endeavours which would ultimately have a negative bearing on his inherent dignity.
  \item Ss 23 and 24 of the \textit{Constitution}.
  \item For a discussion of the constitutional link between CSR and land reform, see paras 2.1 and 2.2.
  \item See paras 2.4.1.3 and 2.4.1.4 and paras 2.4.2.3 and 2.4.2.4 for a discussion of the challenges of the current land reform programme and the critique against the programme, especially the slow progress of the programme.
  \item The notion of constitutional supremacy encapsulated in s 2 amounts to a new constitutional dispensation which is contrary to parliamentary sovereignty which characterised the pre-constitutional era. For a discussion on the supremacy of the \textit{Constitution}, see Devenish \textit{The South African Constitution} 34 - 35; Devenish \textit{Commentary on the South African Bill of Rights} 10 – 11.
  \item According to Devenish (\textit{The South African Constitution} 35) the supremacy of the \textit{Constitution} implies that all authority must be exercised in terms of and in accordance with the provisions in the \textit{Constitution}.
\end{itemize}
but also enshrines the rights of all people living in South Africa and affirms the democratic values of human dignity, equality and freedom.\textsuperscript{36}

However, in post-apartheid South Africa, Government has to a large extent neglected its constitutional duty in the sense that very little has been done to legislate the social responsibilities that the private sector has towards its stakeholders. It is also fair to state that most South African businesses, especially those in the agricultural sector, have done very little to address current social issues such as poverty, the prevailing low levels of education, or unemployment. It appears as if the expectation amongst businesses is that the Government will take full responsibility for the social welfare of its citizens through legislation and systems of government welfare, and consequently businesses feel that they do not have to address social issues. On the other hand, Government is likely to increase its regulatory power only if it sees that self-regulation by the private sector is insufficient and is not contributing to the solution of social problems.\textsuperscript{37}

To date, the legislative landscape is devoid of any legislation expressly addressing the issue of CSR. Consequently it is necessary to evaluate various pieces of legislation and other measures which contain traces of CSR and which have a strong developmental character. Most of the legislation identified in this chapter addresses issues related to human capital and the upliftment of historically disadvantaged South Africans through empowerment. Human capital represents one of the most important national assets, especially within the context of land reform and the promotion of sustainable development. Government has recognised this fact and has taken various legislative steps towards utilizing this asset to its full potential. The most important legislation enacted in this regard includes the following: the \textit{Employment Equity Act},\textsuperscript{38} the \textit{Skills Development Act},\textsuperscript{39} the \textit{Skills Development Levies Act}\textsuperscript{40} and the \textit{Broad-Based

\textsuperscript{36} S 7(1) of the \textit{Constitution}.
\textsuperscript{37} Hamers, Schwarz and Bisschop 2005 (16) \textit{Stell LR} 307. Except for the legislation discussed in this paragraph, the approach to CSR in South Africa reflects the generally accepted approach in the rest of the world where CSR is largely based on a self-regulatory approach with little or no legislative intervention.
\textsuperscript{38} 55 of 1998.
\textsuperscript{39} 97 of 1998.
\textsuperscript{40} 9 of 1999.
These pieces of legislation are ultimately aimed at the eradication of poverty through the attainment of relevant skills, for instance, and enabling black South Africans to become economically empowered and to gain access to the economy.

In summary, it is stated that this legislation, if properly applied and enforced, would go a long way towards eradicating the inherited socio-economic legacy with which the majority of South Africans are faced. This legislation is required to assist in the upliftment and empowerment of socio-economically vulnerable groups in the country. However, it should be noted that the legislation discussed in this chapter has not expressly been promoted or identified as part of an enabling environment for CSR. Nonetheless all of the legislation discussed can be related to the CSR agenda.

The following sections will examine national legislation with CSR content in order to determine which legal requirements could form part of a national legal framework for CSR. Examination of the legislative framework will start with a discussion of the Broad-Based Black Economic Empowerment Act and General Code of Conduct, which are considered to be the flagship legislative framework addressing the issue of economic empowerment. Following this discussion, a critical evaluation will be provided of the AgriBEE Code and its impact. Finally a brief overview will be provided of other legislation which can be supportive in the sense that it contributes to the overall upliftment of previously disadvantaged persons.

The primary source of national legislation pertaining to CSR is the Codes of Good Practice on Broad-Based Black Economic Empowerment drafted in terms of section 9 of the Broad-Based Black Economic Empowerment Act. The main aim of the BEE Act is, however, not directly aimed at legislating CSR, but rather at the creation of a legislative framework for the promotion of black economic empowerment and ultimately the effective participation of the majority of South Africans in the economy in order to create a stable economy through sustainable development. As a matter of fact, the Act

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41 53 of 2003.
itself makes no reference to CSR. The only reference is found in the *Codes of Good Practice*.

Black Economic Empowerment (hereinafter referred to as BEE) provides an ideal opportunity for the private sector to demonstrate its CSR, be it through ownership deals, skills development, preferential procurement, enterprise development or socio-economic development programmes. In this regard CSR initiatives facilitated through the BEE legislative framework play a key role in economic and social development and ultimately in improving the quality of life of marginalised South Africans. According to Esser and Dekker:

> The BBBEE Act is but one example of the use of legislation to guide the corporate conscience. The Act confronts companies with the political and socio-economic reality in the country within which they operate and involves them in the process of reform and reconciliation. It is crucial that the corporate conscience and Government efforts for reforms are combined and coordinated to ensure that it functions to the benefit of the country at large.

The following sections will examine the *BEE Act* as an instrument that guides the corporate conscience and will identify the elements within the black economic empowerment framework that can be related to CSR or even labelled as being CSR.

### 5.2.2 Black Economic Empowerment

In *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another* justice Mogoeng stated that:

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43 According to Fox, Ward and Howard (Public Sector Roles 8) “[o]n occasion, legislation that may not appear to be part of the CSR agenda in one context set the public policy context for business-led ‘beyond compliance’ activities in another, reflecting the range of regionally specific definitions of CSR. For example, the South African government has introduced a raft of legislation to promote black economic empowerment as a means of tackling the legacy of apartheid. Business initiatives around race issues in this specific national context are understood as an integral part of the CSR agenda. As well as defining certain procedures that companies must follow, the government also gives a strong lead to the business community by defining national socio-economic priorities to which companies can contribute.” (emphasis added) This statement supports the inclusion of black economic empowerment as a national socio-economic priority and an initiative within the specific national context which can be directly linked to the CSR agenda and to which the private sector can contribute.

44 2008 (3) *Journal of International Commercial Law and Technology* 169.

45 2011 1 SA 327 (CC) 329.
One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontiers or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets.

Based on this statement, it is undeniable that BEE forms an essential part of redressing the legacy of apartheid, bringing about social redress and addressing economic inequality.

Motivated by the imperative to redress the imbalances caused by economic exclusion, Government has taken remedial measures and established a framework aimed at empowering black South Africans. Government’s commitment to empowering previously disadvantaged South Africans and achieving socio-economic transformation is underlined by its enactment of the Broad-Based Black Economic Empowerment Act which is aimed at creating social and economic justice. The BEE Act represents an attempt by Government to achieve substantive equality by placing black people in a position to fully participate in all spheres of society in order to develop their full human potential. The Act strives towards transforming society through the dismantling of economic inequality and is widely regarded as the pre-eminent vehicle for the redistribution of wealth in post-apartheid South Africa. The Act further represents an

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46 See par 5.2.2.1 for an explanation of the term “black”.
47 The BEE framework is directly aimed at addressing issues related to economic redistribution and wealth creation (Janse van Rensburg Constitutional Framework for BEE 121).
48 This Act was introduced in terms of the mandate provided in the Constitution to promulgate legislation which promotes conditions of equality and eradicates the legacy of the past.
49 According to Fredman (2009 SAJHR 419), writing on the topic of gender equality, “substantive equality takes into account existing power structures and the role of gender within them. Far from being irrelevant, gender may be highly relevant in addressing inequalities in society. Second, substantive equality does not simply aim at equal treatment. Where equal treatment leads to disadvantage for women, it may be necessary to treat women differently in order to achieve equalities of outcome. Third, substantive equality moves beyond the need for a male norm. In its transformative form, substantive equality requires social institutions to change, rather than expecting the individual to conform. Fourth, substantive equality is not neutral as to the outcome. Equality cannot be achieved by treating all equally badly, or by removing benefits from the advantaged class. It is substantive in the sense that it advances individuals rather than formal equality which only ensures consistency is not only aimed at equal treatment”. Albertyn (2009 SAJHR 253) suggests that “the idea of substantive equality contemplates both social and economic change and is capable of addressing diverse forms of inequality that arise from a multiplicity of social and economic causes”, and notes that substantive equality can be achieved only through the dismantling of systemic inequalities, the eradication of poverty and disadvantage (economic equality) and the affirmation of human identity and capabilities (social equality) (at 257). For a detailed discussion of substantive equality within the South African dispensation, see 2009 SAJHR.
attempt to address the disadvantages and vulnerability caused by apartheid and consequently has a clear remedial nature. The transformative nature of BEE promotes equality and is undeniably a furtherance of national constitutional commitments.

The BEE Act is probably the most aggressive legislative step taken by the post-apartheid government to address (and redress) the legacies left by a system based on discrimination, inequality and suppression of the majority of South Africans - a system which used race not only to control access to South Africa's productive resources but also to exclude the majority of South Africans from ownership of productive resources.

The Act provides a legislative framework for economic transformation through the promotion of black economic empowerment and seeks to create conditions which would enable meaningful participation in the economy by those previously excluded from participation, in order to ensure the future stability and prosperity of the national economy.

50 Albertyn "Equality" 4:6. Ponte, Roberts and Van Sittert (2007 (38) Development and Change 936) argue that BEE fits well within the developmental state with its primary objective of empowering black South Africans.

51 Shneiderman 2009 (25) SAJHR 257. Hamann, Khagram and Rohan (2008 (34) Journal of Southern African Studies 25) note that BEE was the result of the slow pace of social and economic transformation since 1994. The authors remark that several challenges such as poverty, unemployment, inequality and the prevalence of HIV/AIDS remain or have become even more acute. With reference to its transformative nature, Janse van Rensburg (Constitutional Framework for BEE 111) note "[t]he government’s broad-based black economic empowerment programme, with its basic objective of achieving economic justice, clearly forms part of the overall transformative spirit of the Constitution". This sentiment is echoed by the preamble to the Constitution, which recognises the Constitution as the supreme law of the country which strives to "improve the quality of life of all citizens and free the potential of each person". According to Janse van Rensburg (Constitutional Framework for BEE 114) transformative constitutionalism is "an umbrella description which embodies the notions of substantive equality, access to social and economic services and enforcement of such rights, social justice and economic justice".

52 Although the BEE Act is the centrepiece of the black economic empowerment framework, various other pieces of legislation form part of the broader BEE framework. These include in the first instance the Constitution, followed by legislation such as the Preferential Procurement Policy Framework Act 5 of 2000; the Employment Equity Act 55 of 1998; the Skills Development Act 97 of 1998 and regulations issued in terms of the Acts.

53 Neither the BEE Act, nor the Codes of Good Practice on Black Economic Empowerment (Gen Not 112 in GG 29617 of 9 February 2007) provides a definition of meaningful participation. (The preamble of the BEE Act also refers to effective participation.) However, with further reference to the preamble of the Act, it is argued that meaningful participation could in this instance refer to such participation as would lead to a higher growth rate, increased employment and more equitable income distribution. The Act requires meaningful participation as opposed to fronting or window-dressing. See par 5.2.2.3.1. Ponte, Roberts and Van Sittert (2007 (38) Development and Change 945) ask if the Act has succeeded in its attempt to create employment. The authors note that "employment creation has been limited, and has failed to keep up with the growth of the labour force, resulting in rising unemployment" (Ponte, Roberts and Van Sittert 2007 (38) Development and Change 945).
The effect of increased effective participation is that it would not only lead to the achievement of the constitutional right to equality, but would also be beneficial to the country as a whole. The benefit to the country lies in a more positive growth rate, better distribution of income and a lower rate of unemployment. These benefits will bring about social and economic justice, issues envisaged by the preamble to the Constitution.

Black economic empowerment is not a socio-economic right and no express mention of the concept is made in the Bill of Rights, although as stated before BEE could be viewed as a measure to achieve equality as envisaged in section 9 of the Constitution. However, the BEE framework can be regarded as a remedial instrument aimed at achieving equality and realising the socio-economic rights contained in the Bill of Rights. Through the BEE framework, provision is made to address the economic needs of a section of society that has been severely disadvantaged by past government policies. As the economic needs are progressively addressed, greater access for instance to education and housing would become available. Without the envisaged economic resources which would follow black economic empowerment, “self-realisation for the individual and the group remains a hollow concept”, which in turn would pressure the Government to see to the progressive realisation of the socio-economic rights included in the Bill of Rights.

54 According to the preamble of the BEE Act, unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race. The BEE Act has been described as an enabling Act which creates a framework aimed at promoting black economic empowerment (Cheadle Thompson & Haysom Inc Black Economic Empowerment 1-5).

55 DTI A Strategy for Broad-Based Black Economic Empowerment 5. With reference to the wording of the preamble of the BEE Act and specifically the references to the “constitutional right to equality”, a “more equitable income distribution” and the promotion of equal opportunities, Glaser (2007 (34 Politikon 106), argues that the principal justification for BEE is egalitarian.

56 For a discussion of social and economic justice in the context of BEE, see Janse van Rensburg Constitutional Framework for BEE 121 – 140.

57 Despite making use of various search engines, the author could not find any literature in which BEE is directly linked to or identified as a socio-economic right. Leading authors on the issue of socio-economic rights such as Liebenberg and Brand make no reference in their literature to the subject of BEE.

58 However, the inverse is also true. The less economically empowered an individual is, the more likely it is that the individual would have access to housing or health care services (as envisaged by ss 26 and 27 of the Constitution).

The introduction of the notion of *broad-based* black economic empowerment signalled a distinct policy shift away from the much narrower approach followed before the enactment of the Act, which focussed predominantly on the deracialisation of business *ownership* and *control* as opposed to issues such as enterprise development or socio-economic development.\(^{60}\) The outpouring of critique\(^{61}\) against the narrow approach, with its limited focus on ownership and control compelled the Government to repackage black economic empowerment in such a manner as not only to be seen as a project of equity redistribution but also as an intervention aimed at improving the socio-economic position of black South Africans.\(^{62}\)

### 5.2.2.1 Defining “black persons”

The definition of “black persons” is central to understanding BEE, which is specifically aimed at empowering black persons through BEE transactions and BEE initiatives.\(^{63}\) Section 1 of the *BEE Act* defines “black persons” as “Africans, Coloureds and Indians”.\(^{64}\) The *Codes of Good Practice on Black Economic Empowerment*\(^{65}\) further defines “black persons” as

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\(^{60}\) For a more detailed discussion of the distinction between BEE in narrow and broad terms, see Glaser 2007 *Politikon* 106 – 114 and Southall “Black Economic Empowerment and Corporate Capital” 456 – 457.

\(^{61}\) For a discussion of the critique not only of narrow BEE but also of its broader application, see paragraph 5.2.2.3.


\(^{63}\) The *Draft Broad-Based Black Economic Empowerment Amendment Act, 2011* (Gen Not 893 in GG 34845 of 9 December 2011, hereinafter referred to as the *Draft BEE Amendment Act*) defines a BEE transaction as “any transaction, practice, scheme or other initiative which affects, or may affect, the B-BBEE compliance of any person”. Although some literature refers to B-BBEE, an acronym which refers to broad-based black economic empowerment, this research will simply refer to black economic empowerment (BEE).

\(^{64}\) The *Draft BEE Amendment Act* proposes a substitution for the existing definition of black people (as opposed to black persons). According to the *Draft Act* “black people” is a generic term which refers to Africans, Coloureds, and Indians “who are citizens of the Republic of South Africa by birth or descent or who became citizens of the Republic of South Africa by naturalisation – (a) before 27 April 1994; or (b) on or after 27 April 1994 and who have been entitled to acquire citizenship by naturalisation prior to that date but were precluded from doing so by Apartheid policies” (italics added to emphasise the proposed substitution).
natural persons who are citizens of the Republic of South Africa by birth or descent; or are citizens of the Republic of South Africa by naturalisation; (a) occurring before the commencement date of the constitution of the Republic of South Africa Act of 1993; or (b) occurring after the commencement date of the Constitution of the Republic of South Africa Act of 1993 but who, without the Apartheid policy would have qualified for naturalisation before then.

In the unreported High Court case of Chinese Association of South Africa and Others v The Minister of Labour and Others the definition of “black persons” was extended to include South African Chinese people, who now fall within the definition of black people as referred to in the General Code.

It is important to note that the beneficiaries of the envisaged empowerment are “black persons” as per the definition provided by the Act and the General Code, as opposed to other legislation such as the Skills Development Act and the Employment Equity Act, which refer to historically disadvantaged South Africans – a wider concept which includes white women as a group. The same category of beneficiaries is targeted by the Government’s land reform programme, where the focus is on transferring white-owned agricultural land to black South Africans, and in this regard the BEE elements of enterprise development, for instance, or preferential procurement would in future play a crucial role in improving land reform.

5.2.2.2 Defining Black Economic Empowerment (BEE)

According to section 2 of the Act, broad-based black economic empowerment will be achieved through the promotion of economic transformation in order to enable the meaningful participation of black people in the economy; a substantial change in the...
racial composition of ownership and management structures; the promotion of investment programmes leading to meaningful participation in order to achieve sustainable development; and the empowerment of communities by enabling access in areas such as skills development and access to land. One of the ways in which the economic transformation is envisaged is through programmes of skills training and skills development. With its nuanced focus on transformation, it is important to establish how “black economic empowerment” is defined.

Section 1 of the Act, defines “black economic empowerment” as:

[T]he economic empowerment of all black people, including women, workers, youth, people with disabilities and people living in rural areas through diverse but integrated socio-economic strategies that include but are not limited to-

(a) increasing the number of black people that manage, own and control enterprises and productive assets;

(b) facilitating ownership, and management of enterprises and productive assets by communities, workers, cooperatives and other collective enterprises;

(c) human resource and skills development;

(d) achieving equitable representation in all occupational categories and levels in the workforce;

(e) preferential procurement; and

(f) investment in enterprises that are owned or managed by black people.

From the abovementioned definition it is clear that BEE is not only concerned with increasing the levels of black ownership but also includes the general upliftment of previously disadvantaged individuals and communities inter alia through human resource and skills development and socio-economic development. Based on the elements of this definition, a generic scorecard has been created to measure the level

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69 This approach is contrary to the narrow approach to BEE which primarily focuses on changes in equity and management.

70 For the purposes of this research reference to BEE will refer to broad-based BEE as opposed to the previous notion of narrow BEE. The Draft BEE Amendment Act proposes changes to the existing definition of broad-based black economic empowerment as included in s 1 of the BEE Act. In terms of the proposed change, BEE refers to the “sustainable economic empowerment of all black people, [including] in particular women, ...” It is likely that the proposed amendment is aimed at reinforcing the notion that BEE should be sustainable and be able to make a continuous contribution to empowering black people.

71 S1(c)(e) of the Draft BEE Amendment Act proposes that the scope of preferential procurement should be broadened to include the promotion of local content procurement.

72 In terms of the Generic BEE Scorecard which is discussed in the following sections, this aspect can also be labelled as “Enterprise Development”.

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of compliance in terms of the BEE Act and the General Code. Before the General Code and the Generic Scorecard can be discussed it is important to note that BEE has not been without critique. Critique in this regard centres on the creation of a black elite as opposed to broad-based empowerment, possible constitutional infringements, and the lack of compliance measures. The main critique against BEE will be discussed in the following sections.

5.2.2.3 Critique of BEE

Due to its ambitious objectives - to increase broad-based and effective participation of black people in the economy, the promotion of a higher growth rate, increased employment and more equitable income distribution - the BEE Act and its accompanying General Code are subject to critique. In fact, it is fair to state that the critique against BEE has perhaps tarnished the commendable spirit of empowerment behind BEE. The majority of black South Africans remain marginalised in the absence of meaningful participation in the economy, due largely to the limited transformation and empowerment brought about by BEE.

5.2.2.3.1 Fronting

The BEE Act requires the meaningful participation of black persons in the economy, as opposed to fronting or window-dressing. The issue of fronting practices and the misrepresentation of BEE status was comprehensively dealt with in Statement 1 of the Notice of the draft 2nd phase of the Codes of Good Practice on Broad-Based Black Economic Empowerment. The Statement defined fronting as:

[A]ny practices or initiatives which are in contravention of or against the spirit of any law, provision, rule, procedure, process, system, policy, practice, directive, order or any other term or condition pertaining to black economic empowerment under the Codes.

The Statement classifies window-dressing (the practice where black persons are appointed or introduced to a business on the basis of tokenism and where they are not substantially participating in for example the management or ownership of the business)

73 Gen Not 2036 in GG 28351 of 20 December 2005.
and benefit division (instances where black persons do not receive economic benefits in the ratio of their ownership, for instance) as possible fronting practices. Fronting in this regard occurs where an under-qualified person or persons lacking the required skills are promoted into managerial positions based solely on the strength of their colour as opposed to their abilities, amounting to what can be described as racial tokenism, where the focus is on compliance rather than the spirit of empowerment. An example of fronting would thus be where a business claims that it has black persons as shareholders, executives or management, while the persons referred to are unaware or uncertain of their role or participation within the business. The Statement further contains sanctions to be imposed on businesses that are found to take part in fronting practices. The sanctions vary from instances where the score of the business on the recognition scale will be decreased by one level to the forfeiture of all points scored on the BEE scorecard.

It is important to note that the final Codes of Good Practice on Black Economic Empowerment does not define fronting, but it does indicate that any misrepresentation or attempt to misrepresent a business’ true BEE status may lead to the disqualification of the entire scorecard of that business. The business would thus forfeit all of its points. The Code further states that a representation by a business about its BEE status must be supported by suitable evidence or documentation. If no such evidence or documentation is provided, the business will not receive any recognition for the specific BEE activity. It is unfortunate that the final Code does not make any reference to fronting or provide more guidance on what would constitute a misrepresentation of a business’ BEE status. According to the preamble of the Act, unless further steps are taken to increase the effective participation of the majority of South Africans in the economy, the stability and prosperity of the economy in the future may be undermined to the detriment of all South Africans, irrespective of race.


76 The BEE Act has been described as an enabling Act which creates a framework aimed at promoting black economic empowerment (Cheadle Thompson & Haysom Inc Black Economic Empowerment 1-5).
The issue of fronting was addressed in a recent Constitutional Court case. In *Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another*\(^{77}\) it was concluded that the City of Cape Town had to take steps against Hidro-Tech Systems based on Hidro-Tech’s fronting practices. Due to its apparently high historically disadvantaged ownership profile, Hidro-Tech was awarded more tenders than Viking Pony Africa Pumps. Although historically disadvantaged individuals held 70% of the shareholding, these shareholders were “neither remunerated nor allowed to participate in the management of Viking to the degree commensurate with their shareholding and their position as directors”.\(^{78}\) Should a contractor be found guilty of misrepresenting its empowerment status, section 9.4 of the *City of Cape Town’s Procurement Policy Initiative* dictates that such a contractor must be blacklisted on the supplier database for a period of twelve months and that no further contracts must be awarded to the contractor for the period of the blacklisting.\(^{79}\) The warning in this judgement is clear: if a business’ BEE status is misrepresented, such a business will have to face legal and financial consequences.

In a media statement released by the Presidency at the conclusion of the BEE Advisory Council Meeting in 2011, President Zuma addressed the issue of fronting and indicated that “fronting is an insult to the dignity of the poor and we have to act decisively against it”.\(^{80}\) As a result of the prevalence of fronting, it was reported in June 2011 that the Government is planning to amend the *BEE Act* in order to be able to act against businesses that act fraudulently and misrepresent their empowerment credentials.\(^{81}\) In this regard, the *Draft BEE Amendment Act, 2011* was released for comment on 9 December 2011. The *Draft Act* addresses the issue of fronting and provides a comprehensive definition of what a BEE fronting practice is.

In terms of section 1(e) of the *Draft BEE Amendment Act*, BEE fronting practices are defined as

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\(^{77}\) 2011 1 SA 327 (CC).

\(^{78}\) 2011 1 SA 327 (CC) at 331.

\(^{79}\) 2011 1 SA 327 (CC) at 345.


A transaction, arrangement or conduct that directly or indirectly undermines or frustrates the achievements of the objectives of this Act or the implementation of any provisions of this Act, including but not limited to practices in connection with a B-BBEE transaction –

(a) in terms of which black persons who are appointed to an enterprise are discouraged or inhibited from substantially participating in the core activities of that enterprise;

(b) in terms of which the economic benefits received as a result of the B-BBEE status of an enterprise do not flow to black people in the ratio specified in the relevant legal documentation;

(c) involving the conclusion of a legal relationship with a black person for the purpose of that enterprise achieving a certain level of B-BBEE compliance without granting that black person the economic benefits that would reasonably be expected to be associated with the status or position held by that black person;

(d) involving the conclusion of an agreement with another enterprise in order to achieve and enhance B-BEE status in circumstances in which –

(i) there are significant limitations on the identity of suppliers, service providers, clients or customers;

(ii) the maintenance of that business’ operations in a context reasonably considered to be improbable having regard to resources;

(iii) the terms and conditions were not negotiated at arms’ length on a fair and reasonable basis;

The Draft BEE Amendment Act further contains measures to be taken against those individuals or businesses which are guilty of fronting practices. In terms of section 9 of the Draft Act, any contract or authorisation awarded as a result of false information provided by an enterprise regarding its BEE status may be cancelled by the organ of state or public entity “without prejudice to any other remedies that the organ of state or public entity may have”. Section 20(1) of the Draft Act further stipulates that if a person knowingly misrepresents or attempts to misrepresent the BEE status of a business, or if such a person provides misleading or false information to a BEE verification body regarding its BEE status, such a person is guilty of an offence punishable by a fine or imprisonment for a period not exceeding ten years, or both. Any person or entity found guilty of transgressions in terms of section 20(1) will further be banned from doing business with any organ of state or state entity.

82 If the offender is a business, the fine for transgressing the offences in s 20 is 10% of the business’ annual turnover.
From the above it is clear that Government is sending a strong message to the business sector that it will no longer tolerate fronting practices and that it is prepared to take decisive steps against perpetrators, steps which would cause enormous financial damage to transgressing businesses.

5.2.2.3.2 Creating a black elite

BEE has, for the most part, failed in its aim to empower black persons, and has instead benefited only a small fraction of previously disenfranchised black South Africans. This has led to the creation of a black capitalist class as opposed to benefiting the majority of disempowered black South Africans. According to Freund,

there can be no doubt that the state is doing much to create a class of closely aligned capitalists. This includes share-holding members of government, former politicians who have become wealthy and successful members of corporate boards and those closely related to top figures in government.

5.2.2.3.3 Failure to empower

Besides creating a capitalist elite BEE has, for the most part, failed to make a difference in the lives of average black South Africans and employment creation has been dismal with no meaningful change in job creation and wages earned. Unemployment of especially people with a lack of basic skills and low levels of education remains unacceptably high and the effective illiteracy and innumeracy of the majority of the population suggests the only jobs available to these individuals are the really menial

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84 Freund 2007 (114) Review of African Political Economy 666; Southall 2007 (111) Review of African Political Economy 67 and Iheduru 2004 (42) Journal of Modern African Studies 1. In support of Freund’s position Tangri and Southall note that “[I]n practice, if not in policy, black equity acquisition is still viewed as the crux of empowerment, and this focus on black ownership has been to the benefit mainly of senior ANC members and their families” (Tangri and Southall 2008 (3) Journal of Southern African Studies 701). Regarding the creation of a black business elite, Southall notes that a feature of contemporary South African politics is the ease with which persons of stature in politics and government move into the private sector and use their credentials and stature as an instrument to get involved in BEE transactions (Southall "State of the Nation" 475).
85 Southall highlights examples of deals where members of government have been involved in possible questionable transactions with the private sector which was to the direct benefit of such officials (Southall "State of the Nation" 473 – 474).
and manual. To date BEE has failed to raise the level of skills and the level of education of its targeted beneficiaries.

5.2.2.3.4 Voluntary nature

This failure might be as a result of the voluntary approach, when it comes to the application of BEE. The compulsory nature of BEE is limited to organs of state and public entities as opposed to the private sector, for whom it is voluntary. While compliance is compulsory for the public sector, the private sector is merely “encouraged” to comply. Enforcement in the private sector is limited to the issuing of licenses, concessions or other authorisations in private-public partnerships. The current BEE framework does not create any mandatory compliance for the private sector and as a result the private sector is left with a cost-benefit analysis where the cost of non-compliance is weighed against the cost of complying with the set targets. If, for example, the future existence of a business is not reliant upon the issuing of a licence or other authorisation by the state, for which a high level of BEE compliance is required, compliance with the BEE requirements will be dependent on whether or not the compliance would provide any benefit to the business. If a business can gain no strategic benefit from BEE compliance it has no incentive to comply. Due to the failure of many BEE transactions, sections of the corporate world regard BEE as a risk factor which could influence its investment and which might deter foreign investment. The uncertainty surrounding the success of BEE transactions translates into risk which should be managed in order to ensure the success of the business.

5.2.2.3.5 Excessive focus on quotas

Hoffman identifies the excessive focus on achieving the numerical quotas regarding black ownership and management as a major structural flaw of BEE. As was indicated

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87 S 10 of the BEE Act.
89 The majority of reported BEE failures have been linked to transactions where the single focus was on a change of ownership as opposed to a broader transaction focusing on all of the BEE elements.
90 Glaser 2007 (34) Politikon 113. In 2003 Sasol, for instance, identified BEE as a risk which needed to be managed, much to the disgust of the then president Thabo Mbeki (Southall "Black Economic Empowerment and Corporate Capital" 455).
above, the excessive focus on effecting transformation through the mere transfer of ownership has created a black capitalist elite as opposed to benefitting the masses, while the disproportionate focus on increasing the number of black persons in higher levels of management has in many instances led to fronting practices, as previously discussed. The disproportionate focus on equity ownership rather than on the “softer” issues of skills development or socio-economic development has tarnished the objective of empowerment and consequently sections of the private sector view BEE in a very negative light.\(^92\) This point of critique has come to Government’s attention and amendments to the *BEE Act* are being considered. These amendments are specifically aimed at shifting the focus away from equity deals (involving ownership transfers), toward enterprise development, which would lead to greater participation by black people in the economy. One of the proposals that is currently under consideration is that businesses will need to achieve a minimum score on the elements of enterprise development and preferential procurement.\(^93\) Failure to meet the required minimum will lead to a penalisation on the overall score reached in terms of the Generic Scorecard.

The final two points of critique levied against BEE concern constitutional and international trade issues. The question of discrimination arises in both cases. In the constitutional context it is argued that the BEE framework infringes on the right to equality and amounts to unfair discrimination,\(^94\) while in the international trade context it is argued that the framework violates the rules of the World Trade Organisation, which directly prohibits discrimination\(^95\) – a defining aspect of BEE.

5.2.2.3.6 Constitutional issues

In order to achieve equality and to prevent further infringements on their rights it is sometimes necessary to treat people on an unequal basis. The fact that BEE amounts to unequal treatment of people based on their race is not in dispute. However, the question arises as to whether or not this form of discrimination will pass constitutional muster and be found to be a justifiable form of unequal treatment. In order to establish

\(^{92}\) Heese 2003 (12) *Journal of Corporate Citizenship* 97.  
\(^{95}\) Mortensen *WTO vs BEE*: 1 – 21.
whether or not the BEE Act will pass constitutional scrutiny, it is necessary to determine which right is infringed upon and if such infringement can be justified.96

Since the BEE Act is based on differentiated treatment based on race, it can be argued that the Act infringes on the right to equality as enshrined in section 9 of the Constitution. Section 9(1) lays the foundation for the right to equality and states that everyone is equal before the law and has the right to equal protection and benefit of the law, while section 9(2) makes provision for legislative measures which might infringe on other rights in order to achieve substantive equality.97 According to this section equality includes the full and equal enjoyment of all rights and freedoms. In order to achieve equality, the section authorises the use of legislative and other measures to protect or advance persons, or categories of persons disadvantaged by unfair discrimination.98 This section thus authorises the use of legislative measures such as the BEE Act in order to promote equality. If it is accordingly argued that the provisions of the BEE Act are unconstitutional, section 9(2) provides a complete defence to the allegation of unfair discrimination.99 The right to equality is not absolute and section 9(2) contains an

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96 This cursory discussion of the possible constitutional challenge to BEE is not an attempt to do justice to the complexity of the issue of equality, but mere serves as an indication that BEE might infringe on the right to equality. A complete discussion of the constitutionality of the BEE provisions falls outside the scope of this research and this section will provide a very brief discussion of the issue. For a more complete discussion of the right to equality, see Currie and De Waal The Bill of Rights Handbook 230 – 266; Rautenbach “General introduction to the Bill of Rights” 1A-69 – 1A-71; Van Zyl “Gender issues and the Bill of Rights” 3I-3 – 3I-6; De Vos “Sexual orientation and the Bill of Rights” 3J-7 – 3J-17; Kentridge “Equality” 14:55 – 14:66 and Devenish A commentary on the South African Bill of Rights 35 – 66. For a discussion of the interpretation of the right to equality by the Constitutional Court, see Carpenter 2001 (64) THRHR 409 – 422; Carpenter 2001 (64) THRHR 619 – 642; Carpenter 2002 (65) THRHR 37 – 58; Carpenter 2002 (65) THRHR 177 – 185 and Dlamini 2002 (27) Journal for Juridical Science 15 – 32.

97 This section provides constitutional support to affirmative action and has been used to justify affirmative action. See Minister of Finance and Another v Van Heerden 2004 6 SA 121 (CC) (hereinafter referred to as the Van Heerden case) where it was held by the Constitutional Court that “any action in accordance with permissible affirmative action policies does in fact not amount to unfair discrimination” (Thompson and Van der Walt 2008 Obiter 636). For a discussion of the limitations to affirmative action (or affirmative equality as referred to by Venter), see Venter 2004 (1) PER 1 – 27.

98 According to the Constitutional Court “... s 9(2), as an instrument of transformation and the creation of a truly unequal society, is powerful and unapologetic” (Van Heerden case at par 87).

99 In the Van Heerden case at par 32 the Constitutional Court stated that “[l]egislative and other measures that properly fall within the requirements of s 9(2) are not presumptively unfair. Remedial measures are not a derogation from, but a substantive and composite part of the equality protection envisaged by the provision of s 9 and of the Constitution as a whole. Their primary object is to promote the achievement of equality. To that end, differentiation aimed at protecting or advancing persons disadvantaged by unfair discrimination is warranted provided the measures are shown to conform to the internal test set by s 9(2)”. For a discussion of the development of defences in unfair
internal limitation.\textsuperscript{100} This internal limitation was formulated by the Constitutional Court in the \textit{Van Heerden} case.\textsuperscript{101}

The enquiry into the constitutionality of an infringement in terms of section 9(2) is based on three questions. The first question determines whether or not the measure targets persons or categories of persons who have been disadvantaged by unfair discrimination. According to Albertyn\textsuperscript{102} this question is in keeping with the “remedial and restitutionary” nature of section 9(2). The second question asks whether or not the measure is designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination. Does the measure protect or advance certain persons or groups and is the remedial measure reasonably capable of attaining the desired outcome?\textsuperscript{103} Hoffman\textsuperscript{104} argues that BEE does not meet the second requirement since no significant progress can be demonstrated under the current structure of BEE. This argument is based on the passage in the \textit{Van Heerden} case where Moseneke J stated that

\begin{quote}
if it is clear that they [the remedial measures] are not reasonably likely to achieve the end of advancing or benefiting the interest of those who have been disadvantaged by unfair discrimination, they would not constitute measures contemplated by s 9(2).\textsuperscript{105}
\end{quote}

Although to date BEE has to a large extent failed to achieve the end of advancing the majority of black people, some black people have benefited from the measures and it is likely that more will benefit if the measures are applied correctly.\textsuperscript{106} It is accordingly unlikely that the Constitutional Court would find that BEE is unconstitutional.

Finally it should be established whether or not the measure promotes the achievement of equality. Does the beneficial purpose of the measure outweigh the potential harm it

\textsuperscript{100} For a discussion of the application of internal limitation clauses related to socio-economic rights, see Illes 2004 (20) \textit{SAJHR} 448 – 465.
\textsuperscript{101} At par 37. Although the issue of equality has received much attention from the Constitutional Court, the \textit{Van Heerden} case is regarded as the leading authority on the issue of equality in affirmative action issues.
\textsuperscript{102} Albertyn “Equality” 4:29.
\textsuperscript{103} \textit{Van Heerden} case at par 41.
\textsuperscript{104} Hoffman 2008 (36) \textit{Syracuse Journal of International Law and Commerce} 107.
\textsuperscript{105} At par 41.
\textsuperscript{106} For a discussion of recommendations in this regard, see par 5.2.2.7.
might cause? This question is based on the assumption that transformation measures will inevitably be detrimental to some members of society, particularly, as is the case with BEE, to those who have been previously advantaged. From the preamble and identified objectives of the Act it is clear that the measure is aimed at the promotion of the achievement of the constitutional right to equality. Hoffman raises a valid argument that BEE fails this test and that it does not promote the achievement of equality based on the fact that only a small number of black people have to date benefitted from the measures. In order for BEE to fall within the constitutional framework it is submitted that BEE should be truly broad-based and to the benefit of the majority of black South Africans, as opposed to creating a black elite.

When assessing the BEE framework against the three-fold enquiry set out in the Van Heerden case the conclusion is that although it might appear that the framework unfairly differentiates against persons on the basis of race, such differentiation is not unconstitutional. In the first instance the BEE Act does target persons or categories of persons (black persons) who have been disadvantaged by unfair discrimination (under the system of apartheid). Due to the preferential treatment afforded to black persons in terms of the BEE Act it is clear that the Act has been designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination. Finally it is clear that the measure is aimed at the promotion of the achievement of the constitutional right to equality.

If on the other hand it is argued that BEE should not be adjudicated in terms of section 9(2), but possibly amounts to unfair discrimination in terms of section 9(3), it should be established if the discrimination is justifiable in terms of the general limitation clause in section 36. With reference to the limitation of a right contained in the Bill of Rights, it

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107 Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others 2004 4 SA 490 (CC) at par 76.
109 A complete discussion of the limitation clause and the limitation of rights fall outside the scope of research. This section serves merely as an indication that the rights in the Constitution are not absolute and that they are subject to limitation. Although the right to equality is constitutionally protected, the right is not absolute and subject to limitation. For a more complete discussion of the application of the limitation clause, see Cheadle "Limitation of Rights" 30:3 – 30:17; Rautenbach Introduction to the Bill of Rights par 1A43 – 1A57; Rautenbach "General introduction to the Bill of Rights" 1A-52 – 1A-67; Devenish A commentary on the South African Bill of Rights 541 – 554;
is important in the first instance to note that no right in the Bill of Rights is absolute and that all of these fundamental rights are subject to limitation in terms of the general limitation clause in section 36 of the Constitution.110 The limitation clause was necessitated by the fact that in some instances constitutional rights need to be balanced against social interests – the right to equality and equal treatment must be balanced against the societal interest of empowerment.111 In terms of section 36(1) it is permissible to limit a right included in the Bill of Rights (including the right to equality in section 9) in terms of a law112 of general application (referring to rules in a legal system) only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, whilst taking into account relevant factors such as the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the desired purpose.113

In order to establish if discrimination in terms of the BEE Act is reasonable and justifiable, a two stage enquiry is followed. In the first stage it must be established whether or not the right to equality has been infringed (based on the nature or importance and scope of the right), and in the second stage the justifiability of the infringement is examined. In terms of the second stage of the enquiry a right may be limited only through a law of general application (such as the BEE Act). According to Cheadle114 this requirement

is based on a fundamental assumption underlying the rule of law, namely that a law must apply equally to all and not be arbitrary in the scope of its application.

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110 S 7(3) of the Constitution reaffirms the fact that although the rights contained in the Bill of Rights are the cornerstone of democracy in South Africa, such rights are subject to the limitations in s 36.
111 Cheadle notes that fundamental rights might be limited by a law in order to give effect to social interests. The BEE Act and the General Code are prime examples of a legislative framework which is aimed at furthering a social interest (Cheadle "Limitation of Rights" 30:4).
112 In this regard "law" refers to legislation, common law, customary law etc.
113 Rautenbach notes that these factors do not constitute a closed list, nor have they been formulated as a test, nor is any order prescribed in which these factors should be considered (Rautenbach Introduction to the Bill of Rights par 1A47).
114 Cheadle "Limitation of Rights" 30:10.
In order to determine the justifiability of the infringement of the right in the light of the factors set out in section 36, it is necessary to do an exercise in proportionality where the relative significance of the right is balanced against the purpose of the limiting statute.\footnote{This “balancing act” was aptly explained by Chaskalson P in \textit{S v Makwanyane and Another} 1995 6 BCLR 665 (CC) in par 104: “The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality ... which calls for the balancing of different interests”. However, the Supreme Court of Appeal in \textit{Independent Newspapers Holdings Ltd v Suliman} 2005 7 BCLR 641 (SCA) at par 44 cautioned against this balancing process and stated that “[I]t is not a question of ‘balancing’ the conflicting rights in order to achieve equilibrium between them; it is a matter of \textit{ad hoc} assessment of what weight should be assigned to the respective rights in the particular circumstances of the case and giving precedence and effect to the right which weighs most heavily in such a manner as will impair the countervailing right as little as possible”.} It must be assessed whether the purpose of the infringing act is of such importance that it justifies the extent of the limitation. Is the infringement proportional to the outcome the infringement aims to reach and is there a rational connection between the limitation and its purpose?\footnote{For a discussion of the rationality test applied in Constitutional Court judgments, see Rautenbach 2010 (4) \textit{Journal of South African Law} 768 – 779.}

In summation it is noted that in terms of both section 9(2) as well as section 36, black economic empowerment in terms of the \textit{BEE Act} will pass constitutional muster. Although some might be label it as unfair discrimination, such discrimination is justifiable and consequently neither unfair nor not unconstitutional.

5.2.2.3.7 Transgressing WTO rules

The final point of critique is that BEE might be in violation of the rules of international trade as set out by the World Trade Organisation (WTO), with specific reference to the WTO rules which prohibit discrimination – a defining aspect of BEE.\footnote{For a discussion of the possible violations in terms of the rules of the WTO, see Mortensen \textit{WTO vs BEE:} 1 – 21, where the author comes to the conclusion that “it is no surprise that virtually all aspects of the BEE scorecard are inconsistent with WTO rules”.} Regarding the elements of BEE discussed in this section, Mortensen\footnote{Mortensen \textit{WTO vs BEE} 15 – 16.} argues that all are in contravention of WTO rules or related rules, based on the differentiation which forms the basis of each of these elements. Despite the possible contravention of international standards, it is submitted that the general objective of BEE should be kept in mind and...
that international organisations will support the spirit of BEE in reaching the constitutional goal of equality.

Regardless of the critique levied against BEE, it remains one of the predominant measures aimed at achieving socio-economic transformation through empowerment. One of the challenges which faced Government was how to measure BEE compliance and promote the purposes of the Act. The answer to this question is found in the codes of good practice issued in terms of section 9 of the Act, which make provision for aspects such as indicators which are to be used to measure BEE, and the weighting attached to the BEE indicators. The following section will discuss the Generic Scorecard as the instrument of measurement for BEE compliance.

5.2.2.4 Keeping score: The Generic Scorecard

In order to assess the extent to which businesses comply with the BEE measures, section 9(1) of the BEE Act authorises the Minister of Trade and Industry to issue codes of good practice to promote the purpose of the Act, which codes may include indicators used to measure the rate of compliance together with the weighting to be attached to the indicators. The indicators and the weight attached to each indicator were finalised in the Codes of Good Practice on Black Economic Empowerment. The indicators used to measure compliance are set out in a generic scorecard and include, amongst other factors, ownership, management control, employment equity, skills

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119 Ss 9(1)(c) and 9(1)(d) of the BEE Act.
120 Ss 9(1)(c) and 9(1)(d) of the Act.
121 On 9 February 2007 the final Codes of Good Practice on Black Economic Empowerment was gazetted by way of a General Notice (Gen Not 112 in GG 29617 of 9 February 2007 – hereinafter sited as DTI General Code). At the end of 2005 the Minister of Trade and Industry issued the Draft Code of Good Practice but for the purposes of this research the focus will be on the final version of the General Code, except to the extent that it is necessary to refer to the Draft Code. As will become evident from the discussion of the content of the General Code, a number of notable differences occurs between the content of the two documents, especially with reference to the CSR content of the two documents.
122 According to the General Code (DTI General Code 23), ownership in terms of the scorecard is divided into voting rights (which refers to exercisable voting rights which are voting rights attached to an equity instrument owned by or held for a participant (DTI General Code 93)) and economic interest (which refers to a claim against a business representing a return on ownership of the business and which is similar in nature to a dividend right (DTI General Code 89)).
123 This indicator allocates points based on the number of exercisable voting rights of black board members, the number of black executive directors, the number of black senior top management and the number of black other top management (DTI General Code 46).
development,\textsuperscript{124} preferential procurement, enterprise development and socio-economic development initiatives.\textsuperscript{125} Each of these indicators is afforded an individual weighting. The weightings for the respective indicators and the specific codes\textsuperscript{126} in which the indicators are addressed are set out below:\textsuperscript{127}

<table>
<thead>
<tr>
<th>Indicator</th>
<th>Weighting</th>
<th>Code series reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ownership</td>
<td>20 points</td>
<td>100</td>
</tr>
<tr>
<td>Management control</td>
<td>10 points</td>
<td>200</td>
</tr>
<tr>
<td>Employment equity</td>
<td>15 points</td>
<td>300</td>
</tr>
<tr>
<td>Skills development</td>
<td>15 points</td>
<td>400</td>
</tr>
<tr>
<td>Preferential procurement</td>
<td>20 points</td>
<td>500</td>
</tr>
<tr>
<td>Enterprise development</td>
<td>15 points</td>
<td>600</td>
</tr>
</tbody>
</table>

\textsuperscript{124} The \textit{Strategy for Broad-Based Black Economic Empowerment} refers to these core elements of BEE as direct empowerment (DTI \textit{A Strategy for Broad-Based Black Economic Empowerment} 14). According to the initial \textit{Draft Codes of Good Practice on Broad-Based Black Economic Empowerment} the key focus of these core elements is the economic impact on equity holders and management, where beneficiaries assume direct economic risk for their involvement in the business (DTI \textit{Draft for Comment: The Codes of Good Practice on Broad-Based Black Economic Empowerment} 13 and Jack \textit{The complete guide} 26).

\textsuperscript{125} The \textit{Strategy for Broad-Based Black Economic Empowerment} refers to these core elements of BEE as indirect empowerment (DTI \textit{A Strategy for Broad-Based Black Economic Empowerment} 14), which “enables and encourages an enterprise to facilitate broad-based BEE in entities within the communities with which it interacts” (DTI \textit{Draft for Comment: The Codes of Good Practice on Broad-Based Black Economic Empowerment} 13 and Jack \textit{The complete guide} 26).

\textsuperscript{126} The Code is divided into a number of sub-codes, while each of the sub-codes is afforded a number of its own. The framework for measuring BEE is set out in code 000, while the measurement of the socio-economic development contributions of a business is set out in code 700.

\textsuperscript{127} Table adapted from the \textit{General Code}. It is important to note that the generic scorecard is not applicable to all businesses. The \textit{General Code} makes provision for qualifying small entities (QSE) to be evaluated in terms of a different scorecard, known as the QSE scorecard. In terms of this scorecard each of the seven elements carries an equal weighing of 25 points. A QSE must select four of the seven elements on which it would like to be measured, failing which the four elements with the highest weighting will be used (DTI \textit{General Code} 79). A QSE is defined as an entity with an annual turnover of between R5 million and R35 million (DTI \textit{General Code} 91). The \textit{General Code} also refers to exempted micro enterprises which are businesses with an annual turnover of less than R5 million and which are deemed to have the status of a level four contributor with a 100% BEE recognition level (DTI \textit{General Code} 9).
<table>
<thead>
<tr>
<th>Indicator</th>
<th>Weighting</th>
<th>Code series reference</th>
</tr>
</thead>
<tbody>
<tr>
<td>Socio-economic development initiatives</td>
<td>5 points</td>
<td>700</td>
</tr>
<tr>
<td>Total</td>
<td>100 points</td>
<td></td>
</tr>
</tbody>
</table>

Based on the overall levels of compliance of these indicators, a measured entity receives a particular BEE status and a subsequent BEE recognition level. The recognition level is used to indicate, as a percentage, the level of recognition which a business will receive in its dealings with the state or other businesses. The recognition level is determined by the number of points that a business scores on the Generic Scorecard. A level one contributor is a business which received more than 100 points on the scorecard and has a BEE recognition level of 135%, while a level eight contributor scored at least 30 but fewer than 40 on the Generic Scorecard and has a corresponding BEE recognition level of 10%.

A business that receives 66 points on the Generic Scorecard will be regarded as being 100% BEE compliant, while a business with fewer than 30 points will be regarded as non-compliant. The BEE status of a business will in certain instances be used as a determining criterion for the issuing of licences (such as mining licences), concessions or other forms of authorisations. The BEE status also plays an important role where state-owned businesses are sold or where the private sector enters into partnerships with the state. A contract between the state and a private business would in all

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128 The *General Code* refers to measured entities as opposed to businesses or enterprises. Since the focus of this research is on the measured entities from the private sector, the rest of the paragraphs will refer to businesses as opposed to measured entities. Any reference to “business” will imply a measured entity, unless otherwise stated.


130 DTI *General Code* 11. It is noteworthy that in terms of the generic scorecard, a business can score a maximum of 102 points, with the ownership element being the only element on the current scorecard that makes provision for bonus points.

131 S 10(a) of the *BEE Act*.  

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likelihood be awarded to a level four contractor\textsuperscript{132} rather than for instance to a level six contractor.\textsuperscript{133}

The use of a business' level of BEE compliance as a determining criterion is confirmed in section 10 of the Act. This section confirms the legal status of the General Code and other codes of good practice issued in terms of the BEE Act. Section 10 is clear that when determining qualification criteria for the issuing of licences, concessions or other authorisations in terms of any law, or when developing criteria for partnerships between the public and private sector, every organ of state and public entity must take into account and in so far as it is reasonably possible apply the General Code. In other words, in transactions between the state and the private sector, compliance with the BEE Act should be viewed as mandatory, since non-compliance will effectively disqualify the private sector partner from entering into a contract with the state partner. In transactions between two private sector partners, though, compliance remains voluntary and non-compliance is not a criminal offence. Non-compliance is merely a risk which a business must manage.

Although the Generic Scorecard makes provision for the allocation of only 5% of the total number of points to socio-economic development (which, due to its nature, is in this context understood to be explicit CSR initiatives), the following sections will examine a number of the other performance indicators which relate to CSR and could also be regarded as being CSR related or having CSR characteristics. The reason behind including the indicators which are not labelled as being explicit CSR indicators is to be found in the definition of CSR. As was indicated in Chapter 3, the definition of CSR provided in the ISO/SANS 26000 Guidance on social responsibility is regarded as the most encompassing and internationally accepted definition provided for CSR. A business' social responsibility lies \textit{inter alia} in its contribution to sustainable

\textsuperscript{132} A business with a 100\% BEE recognition level, and scoring at least 66 but fewer than 75 points on the generic scorecard. In terms of the scorecard a level one contributor is a contributor who received the maximum amount of points available on the scorecard while a level eight contributor is regarded as being totally non-compliant.

\textsuperscript{133} A business with an 80\% BEE recognition level, and scoring at least 45 but fewer than 55 points on the generic scorecard. Shneiderman (2009 (25) SAJHR 255) notes that companies who perform on their scorecards might be “rewarded” for their compliance through the use of government procurement where the potential buying power of the government is used as incentive for those wishing to do business with the government.
development including the welfare of society, and based on this the following sections will discuss the performance indicators which contribute to sustainable development and the welfare of society.\textsuperscript{134}

5.2.2.5 Linking CSR to BEE: CSR and the General Code

5.2.2.5.1 Introduction

The BEE framework has raised awareness about corporate social obligations and established a strong platform from which businesses can launch their CSR initiatives and contribute to sustainable development.\textsuperscript{135} The CSR platform established in the BEE framework consists of four elements which have a distinct developmental aims and which contribute to sustainable development. These elements are skills development, preferential procurement, enterprise development and socio-economic development. The skills development element measures the degree to which employers develop the competencies of black employees through skills development initiatives. The preferential procurement element assesses the purchase patterns of a business with reference to procurement from other businesses with strong BEE recognition levels. Enterprise development focuses on initiatives undertaken by a business to develop other businesses and assist such businesses to become sustainable. The final element, socio-economic development, measures the extent to which a business contributes to the socio-economic development of black people. The following sections will provide an overview of each of these elements, as contained in the Generic Scorecard of the \textit{General Code}.\textsuperscript{136}

\textsuperscript{134} ISO \textit{Guidance} 3. The content of this important national standard will be discussed in par 5.3.2.

\textsuperscript{135} According to Hamann, Khagram and Rohan (2008 (34) \textit{Journal of Southern African Studies} 27) “it is apparent that BEE ... overlaps considerably with CSR-related issues”. The authors further note that “[m]any South Africans see BEE as a prerequisite for, and true manifestation of, CSR, with widespread social benefits” (Hamann, Khagram and Rohan 2008 (34) \textit{Journal of Southern African Studies} 27). De Wet (\textit{CSI Handbook} 12\textsuperscript{th} edition 16) notes that through the BEE framework, CSR “has become an explicit strategic priority for many large companies”.

\textsuperscript{136} It should be noted that very little academic literature have been published on the subject of BEE, and even less addressing any of the specific elements of the Generic Scorecard. As a result, the content of the following paragraphs is largely dependent on the content of the original source, being the \textit{General Code}. 

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5.2.2.5.2 Skills development

Skills development and business education lie at the core of the notion of empowerment – the higher the skill level of the national workforce, the greater the benefit would be not only to the economy but also to the beneficiaries of black economic empowerment. A skilled workforce is a central element of sustainable economic and social development and is essential to achieving global economic competitiveness, and should consequently be included in any programme aimed at empowering previously disadvantaged South Africans. The first indicator that addresses issues which directly contribute to sustainable development and the welfare of society and which can accordingly be labelled as CSR-related is the indicator dealing with skills development contained in Code 400 of the General Code. This code provides clarity on how the skills development element on the BEE scorecard will be measured. Besides providing the scorecard for measuring the skills development element of the Generic Scorecard, the code also defines the key measurement principles associated with this element.

Before making any skills development contributions, a business needs to be familiar with the definition of skills development. Once it has an understanding of how skills development is defined, a business must establish which contributions will be recognised as qualifying as skills development expenditure. Finally a business needs to identify the contribution target in order to receive the maximum number of points allocated to the skills development element.

As was previously stated, the weighting allocated to the skills development element of the Generic Scorecard is 15 points (or 15%). The skills development scorecard makes provision for two sub-categories addressing skills development expenditure. Nine points are allocated to skills development through learning programme investment on any programme specified in the Learning Programmes Matrix, and six points are

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137 For a discussion of the importance of skills development in sustainability, see McGrath and Akojee 2009 (29) International Journal of Educational Development 149 – 156.
138 For a discussion of the skills development element, see Jack The complete guide 272 – 293.
139 The Learning Programme Matrix is a matrix which provides guidance on the various categories of skills development programmes which a business can get involved in, in order to ensure that its expenditure on skills development will be recognised for the purposes of the skills development scorecard. Category A of the matrix makes provision for institution-based theoretical instruction
allocated to contributions through learnerships. The first category is further subdivided into two categories. The first measures skills development expenditure on programmes specified in the Learning Programmes Matrix for black employees as a percentage of the leviable amount\(^{140}\) using the Adjusted Recognition for Gender,\(^{141}\) while the second measures the number of black employees participating in learnerships of Category B, C and D Programmes as a percentage of the total employees.\(^{142}\)

Businesses may be scored in terms of the skills development scorecard only if they have complied with the requirements of the *Skills Development Act* and the *Skills Development Levies Act* and have been registered with an applicable SETA, have a Workplace Skills Plan in place, and have implemented programmes targeting the development of priority skills,\(^{143}\) especially for black employees.\(^{144}\)

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\(^{140}\) Leviable amount in this context bears the same meaning as defined in the *Skills Development Levies Act* 9 of 1999. S 3(4) of the *Skills Development Levies Act* defines leviable amount as follows: “the leviable amount means the total amount of remuneration, paid or payable, or deemed to be paid or payable, by an employer to its employees during any month, as determined in accordance with the provisions of the Fourth Schedule to the Income Tax Act for the purposes of determining the employer’s liability for any employees’ tax in terms of that Schedule, whether or not such employer is liable to deduct or withhold such employees’ tax”.

\(^{141}\) The *General Code* does not provide any definition for “Adjusted Recognition for Gender”, but from the formula provided for calculating the “Adjusted Recognition for Gender” it can be assumed that the greater the number of black women in employment, the greater the corresponding weighting points in terms of the skills development scorecard would be.

\(^{142}\) Although the category addressing learnerships in the skills development scorecard does provide an indication of which category B, C and D programmes it is referring to, it can be assumed that reference is being made to the Learning Programme Matrix (see footnote 140 above).

\(^{143}\) The *General Code* defines priority skills as “Core, Critical and Scare Skills as well as any skills specifically identified: a) in a Sector Skills plan issued by the Department of Labour … and b) by the Joint Initiative for Priority Skills Acquisition (JIPSA) established as part of the Accelerated and Shared Growth Initiative – South Africa (ASGISA)” (DTI *General Code* 91). The code defines core skills as those skills that are value-adding activities in line with a businesses’ core business or those within the production or operational component of the businesses’ value chain. Critical skills are those skills determined by the relevant sector SETA which are regarded critical for the defined sector. It should be noted that although the terms core and critical skills are included in the *General Code*, they are not used as measurement indicators as in the draft Codes and the question arises why the distinction is made if it is not used as a measurement indicator.

\(^{144}\) DTI *General Code* 55. See par 5.2.4 and 5.2.5.
One of the criteria laid down to assess a business’ level of compliance with the requirements set for skills development is the amount spent on priority skills for black employees. The focus on priority skills is a confirmation of Government’s commitment to ensure that skills development is not limited to peripheral skills but is extended to skills which would enable employees to become active in the mainstream economy.\textsuperscript{145} A business will be measured on the amount it spends on skills development over and above the amount levied in terms of the \textit{Skills Development Levies Act}.\textsuperscript{146} Should any of the employees on which money is spent be black women, the business will receive an adjusted recognition for gender. This supports the Government’s commitment towards the upliftment of women in particular.

In quantifying the amount spent on skills development not only are the direct training costs such as costs of trainers and training materials taken into consideration, but also indirect costs such as accommodation and travel costs. In order to improve the rate of literacy amongst employees, the code states that any skills development expenditure on an Adult Based Education and Training (ABET) programme is recognisable as a multiple of 1.25 of the value spent.\textsuperscript{147}

The criteria laid down for measuring the level of compliance with the element of skills development do, however, have serious shortcomings. The most important shortfall in this code is the fact that reference is made to employees only. Should a business as part of its CSR agenda assist in the development of the skills of members of one of its stakeholders (other than employees), like a local community,\textsuperscript{148} it would invariably not receive any recognition on the skills development element of the overall scorecard, despite the time, money and effort spent. The business would, however, be “rewarded” for its efforts on the socio-economic development element of the scorecard. This part of the scorecard regrettably provides for only 5 of the allocated 100 points that a business

\textsuperscript{145} Jack \textit{The complete guide} 277.
\textsuperscript{146} 9 of 1999. For further reference to the \textit{Skills Development Levies Act}, see par 5.2.4.
\textsuperscript{147} DTI \textit{General Code} 56. For example if a business spends R10 000 on training in terms of an ABET programme, the amount recognised as skills development expenditure would be R12 500. For an example of the practical application of the skills development scorecard, see Scholtz and Van Wyk \textit{BEE Service} 5:6 – 5:7.
\textsuperscript{148} Skills development expenditure on persons other than employees would be in line with the CSR principle of community investment as identified in Kerr, Janda and Pitts (Pitts (ed) \textit{Corporate Social Responsibility} 91).
can score, while the skills development of employees provides for 15 of the possible 100 points.\textsuperscript{149}

This is not to argue that the skills development of employees is in any way less important than the development of the skills of a local community. Regardless of the fact that businesses do not score as many points on the BEE scorecard for their “traditional” CSR efforts as they do with employee skills development, businesses should continue to assist in the upliftment of those who are not their employees.

The aim of the skills development element is to improve the level of skill of the national workforce, and as such it is focussed internally on the business. However, businesses do not operate in a vacuum but are part of a larger economy. In this regard businesses are procuring goods and services from preferred suppliers in a supply chain in order to continue doing business. The following section will provide an overview of the preferential procurement element in the Generic Scorecard – the element which assesses the level of procurement from preferred suppliers.

5.2.2.5.3 Preferential procurement

The preferential procurement indicator measures the extent to which a measuring entity has purchased goods or services from suppliers with a high BEE procurement recognition level.\textsuperscript{150} The idea behind preferential procurement is to encourage businesses to procure only from suppliers who are in compliance with the BEE guidelines. In this regard, the voluntary nature of BEE compliance in the private sector might undergo a change and become mandatory. Although BEE in the private sector is voluntary, the purchasing patterns of a business can influence another business to comply with BEE thus becoming mandatory. BEE becomes mandatory to the extent

\textsuperscript{149} Kloppers and Kloppers "Skills development as part of CSR" 422 – 423.

\textsuperscript{150} Preferential procurement in this regard should not be confused with preferential procurement in terms of the \textit{Preferential Procurement Policy Framework Act} 5 of 2000, which establishes a framework for the implementation of a procurement policy as contemplated in s 217(2) of the \textit{Constitution}. For a discussion of the scope of application of s 217, see Bolton \textit{Government Procurement} 63 – 72. For an analysis of preferential procurement legislation in South Africa, see Bolton 2007 (16) \textit{Public Procurement Law Review} 193 – 217. Preferential procurement is also one of the instruments of a government policy for CSR. See par 4.3.4.3 for a short discussion of public procurement as an instrument of a CSR policy.
that if a business chooses not to comply, it would not be an attractive supplier to other businesses and would accordingly lose business, to the detriment of the business.

From a CSR perspective, the value of preferential procurement lies in the contribution which is made to businesses with a recognised BEE status. The ultimate aim of preferential procurement is to enable black South Africans to become meaningful participants in the national economy, which contributes to sustainable development and the welfare of society at large, which in turn is in line with the international definition of CSR. Preferential procurement is also an important guidance measure to be employed by businesses when determining their stakeholders since suppliers are regarded as important stakeholders in all businesses. Through its preferential procurement practices a business demonstrates that it is acting with social responsibility and acknowledges the fact that its business decisions (such as its purchasing patterns) have an impact on society. Preferential procurement can potentially become an important mechanism which businesses can use to meet their CSR obligations.

A measured business will be scored on the basis of the procurement recognition level of its suppliers. Code 500 of the General Code provides the preferential procurement scorecard, which accounts for 20% of the overall points against which a business is measured in terms of the Generic Scorecard. The importance of this element is emphasised by the fact that this element, together with the ownership element, carries the highest weighting in terms of the scorecard.

One of the main reasons for the inclusion of preferential procurement in the Generic Scorecard is to encourage businesses to make their procurements from black-owned suppliers (or suppliers with a high BEE status) in order to assist these suppliers to meaningfully participate in the economy. The value of this element lies in what is referred to as the trickledown effect. Since organs of state and public entities are, by

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151 Identifying stakeholders is one of the seven legal principles identified by the ISO (ISO Guidance 12) and one of the legal principles of CSR according to Kerr, Janda and Pitts (Pitts (ed) Corporate Social Responsibility 91). For a reference to these principles, see par 5.1. See par 3.4.2.2.2 for a discussion of the stakeholder concept and par 3.4.2.2.4 for a discussion of stakeholder identification and classification.

152 For an example of the practical application of the preferential procurement scorecard, see Scholtz and Van Wyk BEE Service 6:6 – 6:7.
law, required to comply with the provisions of the Act, the trickledown effect will best be described in this context. Organs of state and public entities are required to procure from suppliers with an acceptable BEE status. Should the business from which procurement may be done (also referred to as a first-tier supplier) not have an acceptable BEE status, the organ of state or public entity will not procure from the business and that business, together with all the businesses in its supply chain, will be eliminated from the list of suppliers to the state entity. The level of BEE compliance of first-tier suppliers is dependent *inter alia* on its procurement from downstream or second-tier suppliers. As a result of this, every business will pressurise its downstream suppliers to comply with the requirements of the Generic Scorecard in order to ensure that the first-tier supplier has a high score on the preferential procurement element.\(^{153}\)

The preferential procurement scorecard allocates 12 weighting points to BEE procurement spent on all suppliers based on the BEE procurement recognition levels as a percentage of total procurement expenditure. In order to receive all of the points available, a business is required to initially spend at least 50% of its total procurement expenditure on goods or services purchased from suppliers with a high BEE rating. A further 3 points is allocated to BEE procurement spent on qualifying small enterprises or exempted micro enterprises based on the applicable BEE procurement recognition levels as a percentage of total measured procurement spent.\(^{154}\) The final criteria on the scorecard measures the BEE procurement spent on suppliers who are 50% black owned\(^{155}\) (3 points) and suppliers that are 30% black women owned\(^ {156}\) (2 points), as a percentage of total measured procurement expenditure.

\(^{153}\) For a schematic illustration of the trickledown effect, see Jack The complete guide 299.

\(^{154}\) In order to receive the full tally of points, the business must spend at least 10% of its annual procurement expenditure on these enterprises (DTI General Code 60).

\(^{155}\) “50% black-owned” refers to an entity in which “(a) black people hold more than 50% of the exercisable voting rights as determined under Code series 100; (b) black people hold more than 50% of the economic interest as determined under Code series 100 and (c) has earned all the points for Net Value under statement 100” (DTI General Code 90).

\(^{156}\) "30% black women-owned" refers to an entity in which “(d) black women hold more than 30% of the exercisable voting rights as determined under Code series 100; (e) black women hold more than 30% of the economic interest as determined under Code series 100 and (f) has earned all the points for Net Value under statement 100” (DTI General Code 91).
The following expenditure is to be included in the total measured procurement spent: cost of sales, operational expenditure, capital expenditure, pension and medical aid contributions, and empowerment related expenditure (which excludes contributions recognised as being part of enterprise development or socio-economic development contributions). Expenditure such as taxation, salaries, wages and remuneration or any amount payable to an employee in terms of a service agreement is also excluded from the total measured procurement spent.\footnote{157}

Whereas preferential procurement measures the extent to which enterprises buy goods or services from suppliers with strong BEE recognition levels, the enterprise development element evaluates the initiatives that the business takes which are aimed at assisting and accelerating the \textit{development and sustainability of other businesses}. The following section will discuss the enterprise development element of BEE.

\subsubsection*{5.2.2.5.4 Enterprise development}

The broad aim of enterprise development is to encourage social investment as well as to stimulate black businesses, and as a result this element is one of the key CSR-related initiatives in the BEE framework. It directly encourages black entrepreneurs to participate in the economy in order to stimulate economic growth. Both the preferential procurement element and the enterprise development element have an outward focus, whereas the primary focus is on businesses in the supply/value chain or those with the ability to enter the value chain. Jack\footnote{158} states in this regard:

\begin{quote}
Encouraging the support of enterprise development through preferential procurement stimulates reciprocal needs between the investor and the beneficiary and will ultimately lead to sustainable development of Black business. The enterprise development element encourages investment in Black business, while preferential procurement supports sustainability through ongoing procurement from the developed enterprise.
\end{quote}

This statement aptly describes the relatedness between the two elements and provides support for the argument that businesses have an important role to play in the development and transformation of the private sector. Enterprise development as an

\footnote{157} For further reference to expenditure which is included and excluded from the measurement, see Jack \textit{The complete guide} 310 – 315.

\footnote{158} Jack \textit{The complete guide} 320.
element is aimed at getting black entrepreneurs to become economically active and to participate in the economy. In this regard enterprise development can be considered as a manifestation of corporate social investment, where a business makes a strategic investment in a potential future supplier. For example, if an agricultural company such as Senwes or Suidwes, which specialises in the grain industry in the North-West Province, wants to make a strategic investment which would contribute to enterprise development, getting involved in the land reform programme with potential emerging black farmers would be an ideal starting point. Through its knowledge and expertise the business could assist land reform beneficiaries who wished to become involved in commercial farming, thus contributing to enterprise development and broadening its potential future supply of produce. Agri-businesses such as the major agricultural companies are strategically well positioned to provide massive inputs in enterprise development, which in turn could prove to be the answer that everyone is looking for in directing the land reform programme towards a successful outcome.

The enterprise development element of the Generic Scorecard accounts for 15% of the total points available. The criterion used to determine the level of compliance in terms of this element is the average annual value of all enterprise development contributions\(^{159}\) and sector specific programmes made by the business as a percentage of the target of 3% of net profits after tax.\(^{160}\) According to Code 600 of the *General Code*, enterprise development contributions consist of monetary or non-monetary, recoverable or non-recoverable contributions actually initiated and implemented in favour of beneficiary entities by a Measured Entity with the specific objective of *assisting or accelerating the development, sustainability and ultimate financial and operational independence of that beneficiary*. This is

\(^{159}\) Enterprise development contributions are defined as "monetary or non-monetary contributions carried out for the following beneficiaries with the objective of contributing to the development, sustainability and financial and operational independence of those beneficiaries: (a) Category A Enterprise Development Contributions involves Enterprise Development Contributions to Exempted Micro-Enterprises or Qualifying Small Enterprises which are 50% black owned or black women owned; (b) Category B Enterprise Development Contributions involves Enterprise Development Contributions to any other Entity that is 50% black owned or black women owned; or 25% black owned or black women owned with a BEE status of between Level One and Level Six" (DTI *General Code* 89).

\(^{160}\) Code 600 of the *General Code* (DTI *General Code* 66).
commonly accomplished through the expansion of those beneficiaries’ financial and/or operational capacity.\textsuperscript{161} (emphasis added)

From the above definition it is clear that enterprise development has a very strong, nuanced focus on sustainable development, which is in line with the working definition of CSR followed throughout this research. In this regard enterprise development can be seen as a manifestation of the practical implementation of social responsibility. Not only is enterprise development to be regarded as a crucial instrument of development, but also as a prime contributor to achieve the overall aim of BEE through the empowerment of previously disadvantaged South Africans.

Although the definition of enterprise development refers to contributions actually initiated and implemented in favour of beneficiary \textit{entities}, paragraph 3.2.9 of Code 600 recognises the costs of providing training or mentoring to beneficiary \textit{communities} as qualifying enterprise development cost. This paragraph is the only reference to beneficiary \textit{communities} in the Code and the question should be raised of whether the reference to communities in this regard was intentional or not. Strictly speaking, the provision of training or mentoring to communities falls within the ambit of socio-economic development, which is addressed in Code 700 of the General Code, an element with the lowest weighting of all of the elements in the Generic Scorecard.\textsuperscript{162}

But if the legislator intended to include contributions to communities under enterprise development, businesses are in the position where they can provide training or

\textsuperscript{161} DTI \textit{General Code} 67. The reference to “contributions actually initiated and implemented” has a noticeable link to the general deduction formulae contained in s 11(a) of the \textit{Income Tax Act} 58 of 1962. S 11(a) provides an indication of which expenses a taxpayer is allowed to deduct from his/her gross income in order to determine his/her normal tax liability. S 11(a) makes provision for the deduction of “expenditure and losses \textit{actually incurred} in the production of the income” (emphasis added) which seems to be reflected by the reference to “\textit{actually initiated and implemented}”. In line with s 11(a), “\textit{actually initiated}” implies that as long as the liability to make the contribution has been incurred, the contribution will be recognised as a qualifying contribution. However, reference in Code 600 is further made to “\textit{actually initiated and implemented}” (emphasis added) which might give rise to the argument that the mere liability to incur the expenditure is not sufficient – “something more”, referring to implementation, is required. It appears as if it is required that the contribution has actually been made, which is contrary to the approach in the general deduction formula, where actual payment is not a requirement. For a discussion of “\textit{actually incurred}” in terms of s 11(a), see Stiglingh (ed) \textit{Silke: South African Income Tax 2010} 111 – 113 and Williams \textit{Income Tax in South} 266 – 269.

\textsuperscript{162} For a discussion of the socio-economic development element of BEE see par 5.2.2.3.5.
mentoring to communities and achieve a higher score under this element than would be possible under the socio-economic development element.

Examples of enterprise development contributions include grant contributions\textsuperscript{163} to beneficiary entities, investments in or loans\textsuperscript{164} made to or credit facilities made available to beneficiary entities, the provision of training or mentoring to beneficiary entities enabling the beneficiary entities to increase their operational or financial capacity, or providing training or mentoring to beneficiary communities.\textsuperscript{165}

Before a business decides on enterprise development contributions it is of the utmost importance that the business identifies its targeted beneficiaries through a process of stakeholder mapping and stakeholder engagement. Once the beneficiaries are identified, their needs should be identified through a process of inclusive stakeholder dialogue.\textsuperscript{166} The needs of the beneficiaries should be identified through a consultative process instead of the business prescribing to the beneficiaries what it perceives their needs to be. When the beneficiaries and their needs have been identified, the parties should come to an agreement regarding the terms and objectives of the proposed development initiatives. This agreement could take the form of a memorandum of understanding (MOU) between the parties in terms of which the responsibilities of each party are spelled out together with a predetermined exit strategy allowing partners to exit from the agreement in certain instances, as well as the indicators and criteria to be used in order to measure the success of the collaboration.

\textsuperscript{163} In terms of the Benefit Factor Matrix contained in Code 600 of the General Code, a business will be able to claim the value of the full grant amount as an enterprise development contribution. However, when the business incurs overhead costs in support of enterprise development only 80\% of the verifiable cost will be included in the calculation of the qualifying contributions (DTI General Code 70).

\textsuperscript{164} The full amount outstanding of interest free loans with no security required, supporting enterprise development, will be included in the calculation of the qualifying contributions (DTI General Code 70).

\textsuperscript{165} These contributions are contributions which are made in the form of human resource capacity. Contributions made toward providing training or mentoring to beneficiary communities will be measured by quantifying the cost of the time (excluding travel time) spent by employees in carrying out the activities. The cost of time must be justifiable and should be based on the seniority and expertise of the person providing the training or mentoring (DTI General Code 68). For an example of the practical application of the enterprise development scorecard, see Scholtz and Van Wyk BEE Service 7:5 – 7:6.

\textsuperscript{166} See par 3.4.2.2.4 for a discussion of the various types of stakeholders and par 5.3.4.6.3 for a discussion of how to manage stakeholders, as proposed by the King Report on Governance for South Africa, 2009.
The effect of enterprise development is that it would lead to an improvement in the socio-economic position of the targeted beneficiaries. However, included in the Generic Scorecard is the socio-economic development element, which could be viewed as a “catch-all” element as a result of its broadly stated aim. The following section will discuss this final element and refer to the possible overlap between the elements of enterprise development and socio-economic development.

5.2.2.5.5 Socio-economic development initiatives

It is accepted that CSR has become a fundamental part of the corporate mandate and that the role of the private sector in transformation and development is ever increasing. As a result of the intensified focus on CSR, the Generic Scorecard has included socio-economic development as one of the criteria against which a business’ overall BEE compliance is measured. From a CSR perspective this measuring element represents the most important step towards entrenching CSR in a legal framework. The inclusion of the socio-economic development element is a reaffirmation of Government’s attempt to promote sustainable access to the economy, and as such the initiative is a welcome step toward empowering previously disadvantaged black persons.

Code 700 identifies SED contributions as those contributions which have actually been initiated and implemented in favour of beneficiaries “with the specific objective of facilitating access to the economy for those beneficiaries”.167 This formulation is much wider than the one provided in Schedule 1 (which provides a list of definitions) and it is argued that in measuring a business’ level of compliance with the compliance target, this wider formulation should be followed. This wider formulation is in line with the objectives of the BEE Act to promote economic transformation which would result in the meaningful participation of black people in the economy and to empower local communities through access to economic activities, land and skills.168 If at least 75% of the SED contributions are to the direct benefit of black people, the full value of the contributions will be recognisable. If less that 75% if the contributions are to the direct

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167 DTI General Code 74.
168 Ss 2(a) and (f) of the BEE Act.
benefit of black people, the value of the contribution made, multiplied by the percentage of direct black benefit, is recognisable. 169

The SED contributions of a business are measured in terms of the SED scorecard included in Code 700 of the General Code, which uses the average annual value of all SED contributions of the business as a percentage of the compliance target of 1% of net profits after tax. Five weighting points are allocated to the SED scorecard, making this element the element with the lowest weighting of all the elements. Schedule 1 of the General Code defines approved SED contributions as:

monetary or non-monetary contributions carried out for the benefit of any projects approved for this purpose by any organ of state or sector including without limitation: (a) projects focussing on environmental conservation, awareness, education and waste management; and (b) projects targeting infrastructural development, enterprise creation or reconstruction in underdeveloped areas; rural communities or geographic areas identified in the government’s integrated sustainable rural development or urban renewal programmes,

In the preceding discussion of the enterprise development element of the Generic Scorecard, it was noted that the provision of training and mentoring to beneficiary communities was a recognisable enterprise development contribution. From the definition of SED contributions in Schedule 1 of the General Code it is evident that these two elements overlap further. In terms of Schedule 1, contributions toward projects which target enterprise creation or reconstruction in certain identified areas170 will qualify as SED contributions while they appear to be contributions which are aimed at enterprise development and which should be measured in terms of the enterprise development element

To add further confusion to the distinction between the elements it is noted that the non-exhaustive list of SED contributions, for example, refers to grants made to the beneficiaries of SED contributions (which, as noted in the preceding paragraph, include contributions which could clearly be classified as being enterprise development contributions) as well as developmental capital advanced to the beneficiaries, both of

169 DTI General Code 74.
170 Such as underdeveloped areas; rural communities or geographic areas identified in the government’s integrated sustainable rural development or urban renewal programmes.
which are also identified as being enterprise development contributions.\textsuperscript{171} The confusion is further perpetuated by the fact that paragraph 3.2.9 of Code 600 and paragraph 3.2.6 of Code 700 are almost exact replicas of each other except for some minor semantic differences.\textsuperscript{172}

SED contributions could also refer to those contributions made to programmes which are aimed at the development of women, youth, people with disabilities and people living in rural areas, as well as those programmes which provide support for health care and HIV/AIDS. It could further include support for education programmes and programmes focussing on community training (including skills development for unemployed persons and adult basic education and training) or support arts, cultural or sporting development.\textsuperscript{173}

\textbf{5.2.2.6 Conclusion}

Despite the fact that BEE has produced very limited structural change in the lives of the majority of South Africans, BEE initiatives still represent one of the most crucial vehicles whereby the private sector can give expression to their CSR objectives. BEE remains decisive for transforming South Africa into a more just and equitable society.\textsuperscript{174}

\begin{itemize}
  \item \textsuperscript{171} The absence of astute legal drafting is further evident in par 3.2.4.8 of Code 700. This paragraph identifies the provision of training or mentoring to beneficiary communities which would empower them to increase their financial capacity as an SED contribution, subject to the par 3.2.5.1 of the same code. Unfortunately the code does not contain a par 3.2.5.1. In the same vein, par 3.2.4.9 refers to a non-existing par 3.2.5.2.
  \item \textsuperscript{172} Par 3.2.9 of Code 600 states that “providing training or mentoring to beneficiary communities by a business (Such contributions are measurable by quantifying the cost of time (excluding travel or commuting time) spent by staff or management of the business in carrying out such initiatives. A clear justification, commensurate with the seniority and the expertise of the trainer or mentor, must support any claim for time costs incurred)” is a recognisable enterprise development contribution, while par 3.2.5 of Code 700 states that “providing training or mentoring to beneficiary communities by a Measured Entity (Such contributions are measurable by quantifying the cost of time (excluding travel or commuting time) spent by staff or management of the business in carrying out such initiatives. A clear justification must support any claim for time costs incurred, commensurate with the seniority and the expertise of the trainer or mentor)” is a recognisable SED contribution. (emphasis added to stress the mere semantic distinction in the two paragraphs). For an example of the practical application of the socio-economic development scorecard, see Scholtz and Van Wyk\textsuperscript{100} BEE Service 8:4 – 8:5.
  \item \textsuperscript{173} DTI General Code 92.
  \item \textsuperscript{174} Wolmarans and Sartorius 2009 (12) SAJEMS 189 and Heese 2003 Journal of Corporate Citizenship 100. Schneiderman (2009 (25) SAJHR 262 – 270) also argue that BEE might be in contravention of various international investment rules.
\end{itemize}
Although the Generic Scorecard allocates only 5 out of a possible 100 points to socio-economic development contributions, thus possibly indicating that this element is of lesser importance in terms of the scorecard, this chapter has, in line with the ISO/SANS 26000 definition of CSR, been able to show that various other elements included in the Generic Scorecard can be categorised as being manifestations of a business’ social responsibility. If implemented in the spirit of BEE, the elements of skills development, preferential procurement and enterprise development all contribute to sustainable development, including the welfare of society, which is contained in the definition of a business’ social responsibility. However, it is evident that due to its voluntary nature these “softer” issues have been neglected and that the Act has to date failed to achieve its objectives of empowerment.

Based on the discussion of the elements and the general critique levied against BEE in the wider sense, the following section will propose recommendations which might improve the status of BEE.

5.2.2.7 Recommendations

Due to their perceived voluntary nature, the “softer” developmental issues have been neglected. A possible solution to the problem could lie in a change in the application and enforceability of the BEE Act and the General Code. With regard to the private sector it is recommended that the elements of ownership and management and control retain their voluntary nature, implying that businesses have the choice whether they want to comply with the guidelines or not. This would allay investor fears that established businesses might suddenly change their ownership and management structures merely to comply with the requirements which could threaten the sustainability of the businesses.

On the other hand it is recommended that the CSR elements (skills development, preferential procurement, enterprise development and socio-economic development) be

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175 See par 3.2.2.1.3 for a discussion of the ISOs definition of CSR.
176 As was noted in the discussion of the preferential procurement element it is possible that the voluntary nature of BEE could change as a result of corporate practice where businesses refuse to make any procurement from suppliers with an unacceptable BEE recognition level.
grouped together in a separate CSR scorecard and that compliance be made mandatory. The issue with a mandatory framework is how to monitor compliance and censure non-compliance. Given the current situation in the state departments, it is suggested that the South African Revenue Service is the most qualified branch of government to be tasked with ensuring compliance. It is proposed that businesses be encouraged to comply through the use of tax incentives. Businesses with a high level of compliance could for instance be taxed at a lower tax rate than businesses with the same taxable income but with a lower level of compliance. Alternatively the rate at which CSR expenditure is allowed as expenditure actually incurred in the production of income can be increased or decreased depending on the rate of compliance. It is proposed that the level of compliance or non-compliance be “rewarded” in terms of the sliding scale principle where, for instance, a business with a 100% compliance rate will be able to multiply its CSR expenditure with a factor of 1.5 or businesses with a compliance rate of only 50% will be able to deduct only a fraction of the total qualifying expenditure (for example the actual expenditure multiplied by a factor of 0.5). Unfortunately the obvious shortcoming of this approach is that businesses that decide not to comply at all will still not be penalised. An alternative could be that the rate at which a business is taxed is increased or decreased depending on its level of compliance. If, for example, two businesses have the same taxable income and one is compliant and the other non-compliant, the non-compliant business will be taxed at a higher rate than the compliant one. This will encourage non-compliant businesses to comply in order to be taxed at a lower rate.

With a mandatory focus on these elements the objectives of the *BEE Act* stand a greater chance of being achieved, since the focus is much wider and the range of beneficiaries is much wider, contrary to the current state of BEE transactions, which simply focus on equity. The focus of the CSR elements is on the genuine empowerment of marginalised South Africans. CSR has the ability to attract black entrepreneurs, to develop the levels of skill and education in communities, to assist in creating more awareness regarding health issues, and to create value down a business’ supply chain. However, in order for these elements to achieve these ambitious goals it is essential that effective institutional structures exist which would provide assistance to
businesses in their efforts to contribute to empowerment. For example, regarding skills development it is essential that the Sector Education Training Authorities (SETAs)\textsuperscript{177} function at an optimal level.\textsuperscript{178} Businesses look to the relevant SETAs in their sector to provide guidance on skills development and skills development programmes that could assist them in the training of their employees.

With reference to preferential procurement it is important for businesses to know what the BEE (CSR) status of potential suppliers is, in order to guide the decision of whether or not to procure from the supplier. This can be achieved only if the BEE (CSR) status of potential suppliers has been established and externally verified by an accredited rating agency. Unfortunately many current ratings have not been provided by accredited rating agencies, a fact which poses a serious threat to the legitimacy of the process.\textsuperscript{179} If a business procures from a supplier of which the BEE (CSR) status has not been verified, the business is in danger of losing points on the scorecard, which in turn would affect the business’ BEE (CSR) rating. It is proposed that the Department of Trade and Industry create a national rating register containing businesses’ ratings. Businesses could then consult this national database in order to confirm a prospective supplier’s current rating. In order to alleviate the administrative burden which this might place on businesses, it is recommended that businesses be required to be rated at least once every two years. In the periods between ratings, the businesses will retain their rating until the next rating.\textsuperscript{180}

\textsuperscript{177} SETAs are bodies responsible for the distribution of grants acquired though the levy system created by the \textit{Skills Development Levies Act} aimed at promoting training in businesses in the formal and informal sector through learnership programmes. For a reference to SETAs, see par 5.2.4.

\textsuperscript{178} Unfortunately the SETAs have not been functioning effectively. Kraak (2008 (60) \textit{Journal of Vocational Education and Training} 1 – 18) identified various reasons for the failure of the SETAs, which include governance problems brought about by the complex institutional architecture of the training regime, financial mismanagement and fraud, and operational problems.

\textsuperscript{179} The uncertainty regarding BEE rating has been addressed through legislative intervention. From 1 April 2011 BEE status certificates can only be issued by Verification Agencies accredited by the South African National Accreditation System (SANAS) or registered auditors approved by the Independent Regulatory Board of Auditors (IRBA) in accordance with the approval granted by the Department of Trade and Industry (Notice 1140 in GG 33900 of 31 December 2010).

\textsuperscript{180} The current position is that the Verification Certificate recording the weighting points achieved in terms of the scorecard, is valid for a period of only 12 months from date of issue (S 9(2)(c) of Notice 1140 in GG 33900 of 31 December 2010).
The elements of enterprise development and socio-economic development have a nuanced developmental focus, with a particular focus on the development of communities. It is recommended that the weighting allocated to elements focussing on community development should be increased in order to encourage businesses to become involved with their local communities. This approach would also be in line with the stakeholder theory of CSR, where communities are identified as the stakeholders of a business because they are directly or indirectly affected by the actions and decisions of a business. Since both the elements of enterprise development and socio-economic development address community development it is proposed that community development be removed from enterprise development and that an additional element which focuses exclusively on community development be included in the CSR scorecard.

Since this research primarily focuses on the contribution which the agricultural sector as a whole, and specifically the major agricultural companies, can make to a successful land reform programme through their CSR initiatives, it is inevitable that a further discussion on the topic should focus on the AgriBEE Sector Charter on Black Economic Empowerment, which is the transformation charter for the agricultural sector. Before the discussion of AgriBEE can commence, it is necessary to refer briefly to transformation charters and their status in the BEE framework.

5.2.3 CSR and Black Economic Empowerment in the Agricultural Sector (AgriBEE)

5.2.3.1 Transformation Charters

Industry sectors (such as the financial services sector, the construction sector, and the agricultural sector) have an opportunity in terms of section 12 of the BEE Act to develop transformation charters that constitute a framework and establish the principles upon which BEE will be implemented within a specific sector. These charters will establish transformation targets and in certain instances quantify the responsibilities of businesses in that sector and must be gazetted by the Minister of Trade and Industry.
before they can become effective.\textsuperscript{181} The status of transformation charters and their sector codes, once gazetted, is that they are not binding on organs of state or public entities. To this extent the \textit{General Code} states that code series 000 to 700 (addressing the seven elements of the Generic Scorecard) “remain applicable to enterprises in the sector, despite the gazetting of their Transformation Charter under section 12 of the Act”.\textsuperscript{182} A BEE transformation charter is \textit{published for information purposes} only and merely \textit{reflects the intent} of an industry although it is binding between businesses operating in the industry. The proposed transformation charter must in its sector code address all of the elements of the Generic Scorecard, use the same definitions in respect of all beneficiaries as those used in the \textit{General Code}, and use the same calculation methods to measure compliance.\textsuperscript{183}

A sector code gazetted in terms of section 9(1) of the \textit{BEE Act} shares the same status as the \textit{General Code} and is binding between and amongst businesses operating in the industry. To date, no agricultural sector code has been gazetted, nor has a draft sector code been published for public comment and input. As a result, the \textit{General Code} is still applicable to the agricultural sector until a sector code has been approved. The \textit{AgriBEE Sector Charter} that represents the first step towards formalising AgriBEE within the broader BEE framework was gazetted in 2008 and will be discussed in the following sections.

\textbf{5.2.3.2 The AgriBEE Sector Charter}

The \textit{Broad-Based Black Economic Empowerment Transformation Charter for Agriculture}\textsuperscript{184} was gazetted on 20 March 2008 in terms of section 12 of the \textit{BEE Act} and represents a continuation of the Government’s measures to create a united, prosperous agricultural sector as envisaged by the \textit{Strategic Plan for South African Agriculture}

\begin{footnotesize}
\begin{enumerate}
\item Transformation charters will be gazetted only once the Minister is satisfied that the charter has been developed by the major stakeholders in that sector and that the charter advances the objectives of the Act (ss 12(a) and (b) of the \textit{BEE Act}).
\item DTI \textit{General Code} 4.
\item DTI \textit{General Code} 2. This measure is aimed at creating certainty within the sectors of the economy and to ensure that businesses are evaluated against the same set of criteria.
\item GN 314 in \textit{GG} 30886 of 20 March 2008 (hereinafter referred to as the DTI \textit{AgriBEE Charter}).
\end{enumerate}
\end{footnotesize}
2001.\textsuperscript{185} This vision is furthered through the objective of AgriBEE, which strives to facilitate BEE in the agricultural sector through a variety of empowerment initiatives. These initiatives include the promotion of equitable access to and participation by black persons in the entire agricultural sector as well as facilitating structural changes in agricultural support systems which would enable black persons to own, establish, participate or run agricultural businesses.\textsuperscript{186} The Charter supports initiatives that would lead to social upliftment and those which would empower rural and local communities to gain access to agricultural economic activities, land, infrastructure and skills.\textsuperscript{187} Accordingly the aim of the Charter is to provide guidelines which the agricultural sector can use in its empowerment initiatives as well as to provide an Indicative AgriBEE scorecard which agricultural businesses can apply to measure their levels of compliance.

The Charter is applicable to the \textit{entire agricultural industry including businesses that derive the majority of their turnover from the production of agricultural products or that provide inputs or services to businesses involved in the production of agricultural products}.\textsuperscript{188} Agri-businesses are encouraged to contribute to BEE and measure their contributions against the seven BEE elements included in the AgriBEE scorecard.\textsuperscript{189} As is the case with BEE, AgriBEE also makes provision for various levels of application depending on the size of the business.\textsuperscript{190} Businesses with a 5-year moving average annual turnover exceeding R35 million have to be measured against all seven elements, with each element carrying a specified weight. Businesses with a 5-year moving average annual turnover between R5 million and R35 million are described as

\begin{itemize}
\item \textsuperscript{185} DoA \textit{The strategic plan for South African Agriculture} 3.
\item \textsuperscript{186} DTI \textit{General Code} 9.
\item \textsuperscript{187} The focus on social upliftment and the empowerment of rural and local communities links the Charter to the elements of CSR which focus on stakeholder engagement and community development, as referred to in the introduction to this chapter.
\item \textsuperscript{188} According to the Charter, the scope of application "shall include any Enterprise which derives the majority of its turnover from: the primary production of agricultural products; the provision of inputs and services to Enterprises engaged in the production of agricultural products; the beneficiation of agricultural products whether of a primary or semi-beneficiated form; and the storage, distribution, and/or trading and allied activities related to non-beneficiated agricultural products" (DTI \textit{AgriBEE Charter} 7).
\item \textsuperscript{189} The seven elements of the AgriBEE scorecard are replicas of the elements of the Generic scorecard. For a discussion of the elements of the generic scorecard, see par 5.2.2.4 and 5.2.2.5.
\item \textsuperscript{190} See par 5.2.2.4.
\end{itemize}
Qualifying Small Enterprises (QSEs) and are measured against the Indicative AgriQSE scorecard. In terms of this scorecard a business can choose to be measured on only five of the seven elements in which case each element will carry a weighting of 20 points. Businesses with a 5-year moving average annual turnover of less than R5 million are classified as Exempted Micro Enterprises (EMEs) and will enjoy the status of a BEE Level 4 contributor, without having to provide any proof of verification.\footnote{DTI AgriBEE Charter 7.} However, these businesses are encouraged to become involved in BEE and contribute to the transformation of the sector, especially in the areas of skills development and corporate social investment. This encouragement is backed up by an incentivised scheme in terms of which businesses contributing to any two of the seven elements of the scorecard (with the exception of employment equity) – each carrying a weighting of 50\% - will be regarded as Level 3 contributors if they obtain a score of between 50 and 70 on the AgriQSE scorecard. With a score exceeding 70, the business will be regarded as a Level 2 contributor. If an EME chooses to, it can contribute to three of the seven elements (with the exception of employment equity). Each of the three elements will carry a weighting of 33.3\%. If the EME scores between 45 and 65 on the AgriQSE scorecard it will be regarded as a Level 3 contributor, while with a score exceeding 70, the business will be regarded as a Level 2 contributor.\footnote{DTI AgriBEE Charter 8. It should be noted that the drafters of the Charter have created an anomaly. With reference to the enhanced recognition level of EMEs a gap of 5 points is created where a business contributes to three of the BEE elements. A business scoring between 45 and 65 is regarded as a Level 3 contributor while a business scoring 70 or more is a Level 2 contributor. This raises the question of what the recognition level of a business scoring 68, for instance, will be. It has scored more than 65 but less than 70. It is suggested that once the final Sector Code has been released the 65 threshold should be lifted to 70 in order to be in line with the situation where a business contributes to two of the seven BEE elements.} In order to receive the enhanced recognition levels exceeding level four, the business needs to obtain a BEE verification certificate. Without the certificate it will be regarded as a Level 4 contributor only.

5.2.3.3 CSR content in the Charter and Indicative AgriBEE Scorecard

The main argument of this research is that once the agricultural sector accepts its social responsibility it has a vital role to play in the success of the land reform programme through its consequent CSR initiatives. Black economic empowerment in the sector
provides agri-businesses with an ideal instrument through which it could engage with land reform beneficiaries and contribute to the success of the programme.

As is the case with BEE and the Generic Scorecard, AgriBEE and the Indicative AgriBEE scorecard are based on the same seven elements of the scorecard, namely ownership and control, management, employment equity, skills development, preferential procurement, enterprise development and socio-economic development, and as a result the same four elements will be discussed as being elements with CSR content.193

5.2.3.3.1 Skills development

In terms of the Charter, the Agri-Industry194 commits itself to identifying possible gaps in the training needs of employees within the sector and to addressing the gaps through dedicating resources to training, internships, and training infrastructure for managers and employees of farming businesses. The Industry further undertakes to undertake mentoring programmes which specifically target unemployed black people and underemployed graduates as well as to implement measurable in-house mentoring programmes aimed at skills development.195 The issue of mentorship is of crucial importance to the future success of land reform. It was noted in Chapter 2 that one of the reasons for the failure of current land reform projects was a lack of post-settlement support in the form of mentorships.196 The beneficiaries of agricultural land received little or no mentorship and did not have the requisite skills to manage an agricultural enterprise. Greater focus is currently being placed on providing more guidance to emerging farmers, whether the guidance takes the form of agricultural extension

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193 It should be noted that the caption of the seventh element on the AgriBEE scorecard is Rural Development, Poverty Alleviation and Corporate Social Investment (CSI) and not Socio-economic Development as is the case with the generic scorecard. The reason for this deviation is not apparent. A possible answer may be found in the fact that the AgriBEE Charter was drafted in terms of the draft Codes of Practice, which still made reference to Corporate Social Investment for the final element. See par 5.2.2.4 and 5.2.2.5 for a reference to the elements of the Generic scorecard.

194 In this context the Agri-Industry refers to the combination of farming enterprises and Agri-business enterprises (DTI AgriBEE Charter 26). Farming enterprises are defined as "those individuals, groups, cooperatives or companies engaged in primary agricultural activities as defined in the scope", while Agri-business enterprises are defined as "those individuals, groups, cooperatives or companies engaged in other activities as defined in the scope" (DTI AgriBEE Charter 31).

195 DTI AgriBEE Charter 17 – 18.

196 See par 2.4.2.4.3.
services provided by the relevant national department or is rendered by agricultural companies or individual farmers. It is in this regard that the agricultural sector has an important developmental role to play to ensure that emerging farmers are equipped with the necessary skills to become economically active and to make meaningful contributions to the sector and to the national economy.

The applicable industry SETAs undertake to establish training programmes aimed at enhancing technical and management skills funded by the relevant SETAs and further commit to encouraging, supporting and mentoring these programmes in the sector. The SETAs also undertake to provide support to QSEs and EMEs in the implementation of programmes aimed at improving skills.\(^{197}\) The SETAs, as the Government-instituted training authorities, have an important role to play as facilitators, especially between emerging farmers and the industry players that want to engage these emerging farmers through their CSR initiatives.

Finally, Government commits itself to encouraging agricultural and agro-processing training at schools and agricultural colleges and to promoting functional literacy and numeracy through ABET programmes.\(^{198}\)

These undertakings are aimed at enabling businesses within the sector to achieve the maximum level of compliance for the skills development element of the AgriBEE scorecard. The scorecard allocates 20 points to the skills development element, which is further subdivided into three sections addressing skills development expenditure (9 points), recognised training programmes (6 points) and the organisational transformation index (5 points).

\(^{197}\) DTI AgriBEE Charter 18.

\(^{198}\) One cannot refrain from questioning Government’s commitment in this regard. A 2010 Occupational Health and Safety report compiled by JFC Safety Services (Occupational Health and Safety Consultants) of the Agricultural College in Potchefstroom (which was widely regarded as one of the leading agricultural colleges in the country) concluded that “[t]he hazards, unsafe conditions and risks in this area were of a totally unacceptable nature. The situation would however have to be addressed as the present situation could not be tolerated and accepted. The unsafe electrical wiring may pose a fire hazard or risk of electrocution. The unhygienic conditions in the hostels will increase the health risk. The management needs to take accountability for this unacceptable condition of the college. If any incident or accident occurs as a result of the conditions of the college, management can be held liable” (JFC http://www.afriforumjeug.co.za/wp-content/uploads/2010/12/REPORT AgriculturalCollegePotchefstroom1.pdf).
Regarding money spent on skills development, in order to receive all 6 points allocated to expenditure on black employees, a business is expected to spend 2% of the leviable amount. As mentioned previously, at least 85% of the expenditure on this element should be directed towards core and critical skills development.\textsuperscript{199} The remaining three points of skills development expenditure is directed towards expenditure on black women (2 points) and expenditure on black employees with disabilities.\textsuperscript{200}

The following 5 points on skills development are allocated to recognised training programmes. The first 2 points are awarded for the number of black employees taking part in training programmes which lead to recognised qualifications,\textsuperscript{201} while a further 2 points are allocated to the number of black women participating in these programmes.\textsuperscript{202} The remaining 1 point is awarded if 1% of the total number of employees who are members of black designated groups participate in training programmes which lead to recognised qualifications.

The “Organisational Transformation Index” included in the skills development element follows a different albeit more confusing pattern. It is assumed that this section addresses the remaining 5 points on the scorecard. The section is based on the following six indicators:

1. The existence of a comprehensive strategy which is being implemented.

2. The payment of the skills development levy as well as claiming levy money.

3. The existence of a policy on non-discrimination which is widely published within the business\textsuperscript{203} and the ongoing facilitation of external diversity management training.

4. Compliance with relevant employment related legislation.

\textsuperscript{199} See par 5.2.2.5.2.

\textsuperscript{200} The target for expenditure on the skills development of black women is 0.93% of the leviable amount and 0.2% with regard to expenditure on disabled black employees (DTI Agr\textsuperscript{B}EE Charter 45).

\textsuperscript{201} If 5% of the total employees participate in this type of programme, the business will receive the maximum of 2 points.

\textsuperscript{202} The target of black women participating in these programmes is 2.5% of the total number of employees.

\textsuperscript{203} Although the text of the indicator refers to “company” it is more likely that the drafters wanted to refer to the enterprise or the business since not all businesses are conducted in a company.
5. The implementation of an effective human resource management programme.

6. The existence of a programme designed to give practical effect to the stated policies and programmes.\(^{204}\)

Under the heading “Indicator weighting points” no points are allocated to the indicators, as opposed to the weighting points allocated to skills development expenditure and recognised training programmes. Under this heading instead of providing a numerical number, the word “Yes” is included, while under the heading “target” it is indicated that the target for each of the factors is 1%. To illustrate the confusion created: if the fourth indicator of compliance with relevant related legislation is considered, it would seem that if a business can answer “yes” it does comply and then the set target is 1%. Does this then mean that a 1% compliance rate is the target? Surely not! The more acceptable answer would be that instead of 1%, if a business complies with relevant employment related legislation, such a business would receive one point on the scorecard. If it can answer “yes” to all the six indicators it would have to receive a point for each, implying six points. However, this raises further questions. Since 20 points are allocated to the skills development element on the scorecard this would imply that provision is made for 21 points, excluding the 2 bonus points.\(^{205}\) This is probably an oversight by the drafters and it is likely that when the Sector Code is released, an adjustment will be made and one of the six indicators will be removed. The fifth indicator refers to the implementation of an effective human resource management plan. The reference to “effective” raises issues such as: When is a human resource management plan to be regarded as effective? Effective in who’s eyes, that of Government, the Industry or the business? It is likely that unless this indicator is reformulated, it would have to be removed due to the measurement challenges it poses.

\(^{204}\) DTI AgriBEE Charter 45.

\(^{205}\) This element of the scorecard makes provision for two bonus points. If 70% of a business’ employees are at the ABET level 3, it would receive an additional two bonus points. The allocation of bonus points is not reflected in the General Code and it is likely that the final Sector Code for Agriculture would follow the same approach, where no bonus points are provided for. However, the use of bonus points should not be disregarded since it acts as an important tool to encourage businesses to go beyond what is required by the scorecard and in doing so further highlights their commitment to empowerment.
5.2.3.3.2 Preferential procurement

According to the Charter, the success of the agricultural sector’s commitment to AgriBEE will largely be determined by the extent of the implementation of preferential procurement initiatives which will influence contractual relationships within the value chain. This underlines the important trickledown effect of preferential procurement, where procurement from a specific supplier has the ability to affect a variety of businesses in the downstream value chain. In this regard the preferential element not only encourages procurement from suppliers with a recognised BEE compliance level, but also rewards businesses for their contributions toward BEE and efforts to contribute to transformation.

In order to make a success of preferential procurement, the Agri-Industry undertakes to report on an annual basis on its preferential procurement expenditure. It further undertakes to regard QSEs and EMEs as preferential procurement partners, which would encourage sustainable procurement from these sections of the sector. In turn, Government commits to align its procurement practices with AgriBEE when involved in transactions with the agricultural sector and to employ all legislative and other measures available to it to reach the objectives of BEE.

The preferential procurement has a weighting of 20 points on the AgriBEE scorecard. This element has only one indicator category as opposed for example to the three of skills development. As is the case with the Generic Scorecard in the General Code, this indicator measures the total preferential procurement expenditure. The indicator allocates 15 points to the BEE procurement from suppliers with a recognised BEE status. Although the target is that 50% of procurement should be spent on suppliers with a recognised BEE status, the scorecard does not provide any indication of the formula to be used in order to establish the level of compliance. It is probable that the formula will reward businesses that procure from suppliers with a higher BEE

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206 DTI AgriBEE Charter 19.
207 DTI AgriBEE Charter 20.
208 DTI AgriBEE Charter 20 – 21.
recognition level. A further 4 points are allocated to procurement from QSEs and 1 point for procurement from EMEs based on their recognition level.\footnote{DTI AgriBEE Charter 46.}

5.2.3.3 Enterprise development

In the context of AgriBEE, enterprise development is defined as “the establishment, support and integration of Black entrepreneurs in mainstream business processes”.\footnote{DTI AgriBEE Charter 21.} In order to ensure sustainable empowerment programmes it is important to support black entrepreneurs to become economically active. In this regard, the Agri-Industry undertakes to provide mentoring, access to inputs and extension services where required. Mentoring as a crucial element of enterprise development refers to the “provision of technical and/or general business assistance and support to black emerging farmers, land reform beneficiaries and Black entrepreneurs” (emphasis added).\footnote{DTI AgriBEE Charter 21.} The Industry further commits to providing support for land reform beneficiaries through the transfer of specialised skills in mentorship initiatives. In order to encourage the sector to become involved in the land reform programme, the cost of support\footnote{The cost of support in this instance refers to the actual expenses incurred as well as the cost of time spent on mentoring.} given to land reform beneficiaries will, for the purposes of the enterprise development element, be recognised at an increased level of 1.3. For every rand spent on support for land reform beneficiaries, the business will be able to multiply the qualifying expenditure by 1.3.

Unfortunately the section in the Charter containing the undertakings of the Agri-Industry is further evidence of careless drafting. Although paragraph 5.6.3 of the Charter states that support for land reform beneficiaries will enjoy an enhanced recognition level at a multiple of 1.3, paragraph 5.6.6 indicates that support for these beneficiaries in terms for example of mentoring and extension services will be recognised at a multiple of 1.5. Since the document provides no indication how internal inconsistencies should be addressed it is unclear which paragraph will receive preference. In this regard, and

\footnote{DTI AgriBEE Charter 21.}
assuming the error is not corrected in the Sector Code, it is recommended that the interpretation which is most favourable to the business (the multiple of 1.5) should be followed. Still on the issue of enhanced recognition, the Charter makes provision for further enhanced recognitions. Expenditure on programmes which directly contributes to the creation of employment opportunities in rural communities is recognised at a multiple of 1.5 while the costs of initiatives which assist and accelerate the development of EMEs are recognised at a multiple of 1.25.

The most significant undertaking by Government is to ensure that an enabling environment which supports agriculture is created through programmes such as the Comprehensive Agricultural Support Programme (CASP) and through making Land Bank funding available for black farmers.

The enterprise development element on the AgriBEE scorecard has been allocated 10 points with the possibility of getting another 4 bonus points.

Closely linked to the element of enterprise development, is the final element on the AgriBEE Indicative scorecard, which addresses the issues of rural development, poverty alleviation and corporate social investment (CSI). This element corresponds to the element of socio-economic development, which is the final element in the Generic Scorecard. The following section will refer to this element.

5.2.3.3.4 Rural development, poverty alleviation and corporate social investment (CSI)

The final element of the AgriBEE Indicative scorecard indicates that it measures rural development, poverty alleviation and corporate social investment. The reference to CSI as opposed to CSR appears to be in line with the South African approach, where businesses seem reluctant to refer to corporate social responsibility. The reference to responsibility as opposed to investment might be construed as implying that businesses accept some form of responsibility for the injustices brought about by the system of
apartheid and consequently initiatives giving expression to social responsibility are labelled as investments.\footnote{213 See par 3.2.4.1.} Any further reference to CSI in this section will imply CSR.

According to the AgriBEE Charter,\footnote{DTI AgriBEE Charter 23.} contributions addressing the issues of rural development, poverty alleviation and CSI refer to

contributions that are related to the agricultural industry and contributions actually initiated and implemented in favour of Black People with the specific objective of facilitating access to the economy.

The motive behind contributing to initiatives falling within this element should be the provision of social and economic opportunities to black South Africans and to establish an environment conducive to these opportunities. In order to provide these social and economic opportunities, farming enterprises (referring to those enterprises engaged in primary agricultural production activities)\footnote{DTI AgriBEE Charter 31. The term “farming enterprises” goes wider than the corporate agricultural sector to include individual farmers conducting their businesses as sole proprietors, or in trusts or Close Corporations.} undertake to contribute to CSI initiatives particularly focussing on rural community members and workers and their families. The following are identified as examples of CSI initiatives: the provision of good quality housing; the provision or implementation of health care programmes; investment in or the provision of support to farm or rural schools; engagement in collective contributions to social development or the provision of ABET to workers or community members as well as family of staff members.\footnote{DTI AgriBEE Charter 24.} The enterprises further commit themselves to making land available to farm workers.\footnote{DTI AgriBEE Charter 24. This commitment reaffirms the link between land reform and BEE. Making land available to farm workers represents one of the ways in which the Government attempts to achieve its target of transferring 30% of white-owned agricultural land into black ownership. The question in this regard that needs to be raised is, will the farm workers receive ownership of the land, and if so, to what extent will the current owner be compensated for the transfer?} Agribusiness enterprises (referring to those businesses engaged in agricultural activities other than agricultural production activities)\footnote{DTI AgriBEE Charter 31.} also commit themselves to CSI initiatives including support for community education or training facilities, the promotion of job creation programmes, support for
development programmes for sports or arts and culture, and support for community clinics and community health programmes.

It is noteworthy that unlike the previous three elements, this element contains no undertaking by Government where for example it commits itself to providing a framework for businesses operating within the sector to guide their CSR initiatives. Nor is there a commitment to providing incentives to the industry players in order to encourage them to get involved in CSR programmes. Despite the fact that the farming community undertakes to contribute to land reform, no commitment from Government addressing the deficiencies of the land reform programme is given. It is suggested that an undertaking of Government in this regard would have signalled its commitment not only to land reform but also to AgriBEE.

In the AgriBEE Indicative scorecard, this element carries a weighting of 10%. This element assesses the corporate social investment spent and/or the amount of land made available to farm workers. In respect of CSI contributions, in order to receive all 10 points available, businesses have been set the target of contributing 1.5% of net profit after tax, while a business which makes 10% of its land available to farm workers will also receive 10 points. The reference to “making land available” clearly targets the current farming community as land owners and encourages the farming community to contribute to land reform. The target of 10% of land refers to land made available to farm workers measured from the commencement date of the Charter over a period of ten years. The actual calculation of this element is not clear from the scorecard and some questions need to be asked. Does this mean that a business can receive the points only after 10 years? If a business makes 1% of its land available on an annual basis over a period of 10 years, will the business receive the maximum number of points in each year until it has reached the target of 10%? If a business makes 10% if

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219 Since this scorecard was drafted in terms of the draft Codes of Good Practice it allocates 10 points to this element, but the General Code has allocated only 5 points to the corresponding element of socio-economic development. It is expected that, despite the importance of this element, once the Sector Charter has been finalised it too would allocate only 5 points to this element.

220 The scorecard allocates a further 1 bonus point to a business if the CSI contributions benefit black people in rural communities or geographic areas identified in the integrated sustainable development or urban renewal programmes (DTI AgriBEE Charter 47).

221 DTI AgriBEE Charter 47.
its land available in one year, will it be able to receive the maximum points for each year after it met the target? Clarity regarding these questions will hopefully be provided once the Sector Code has been completed.

Another issue that needs to be addressed with regard to this element is the choice of heading. This element of empowerment is labelled “rural development, poverty alleviation and corporate social investment” as opposed to the “socio-economic development” of the General Code.222 As became evident in the previous paragraph, the indicative scorecard assesses two factors, those being CSI and the percentage of land made available to farm workers. No mention is made in the scorecard of either rural development or poverty alleviation and consequently it is unclear why these aspects were included in the scorecard. Since the inevitable consequence of true economic empowerment would be poverty alleviation, it is argued that all of the elements of empowerment included in the scorecard are ultimately aimed at poverty alleviation, which should therefore not be contained in a single element only. Regarding rural development, it is evident that a blurring of elements occurs again. Although the final element includes rural development in its heading, it does not provide any definition of what will be regarded as rural development, nor is any indication provided of what should be understood as rural development contributions, and no reference is made to rural development in the scorecard. On the other hand, the enterprise development element makes provision for the enhanced recognition of contributions which directly contribute to the creation of employment opportunities in rural communities.

5.2.3.4 Conclusion

Although AgriBEE has not yet been formalised by an enforceable Agricultural Sector Code, black economic empowerment within the sector remains a national priority. Despite its lack of enforceability, the AgriBEE Charter still provides important guidelines

222 Although the Charter indicates that it was drafted in terms of the draft Codes of Practice (DTI AgriBEE Charter 6), paragraph 7 refers to socio-economic development contributions and socio-economic development programmes. However, the content of the Charter makes no further reference to either of the two definitions and it is unclear why the definitions have been provided if they do not find any application in the rest of the document. It is also unclear why the sector has elected to deviate from simply referring to the final element as the CSI element or the socio-economic development element, if a definition for socio-economic development (contributions and programmes) is provided.
on how BEE should be approached within the sector. However, for the purposes of this research, the Charter establishes the important link between CSR and land reform. The Charter recognises that the agricultural sector is strategically positioned to contribute to the success of land reform and consequently refers to land reform (or the transfer of land in order to achieve the target of transferring 30% of white-owned agricultural land to black people) in at least two of the elements with CSR content. The Charter further represents an affirmation of the fact that businesses operating within the agricultural sector have the opportunity to contribute to land reform through the CSR elements on the scorecard. The contribution lies not only in the provision of land but more importantly in the supporting role that the sector can play in respect of land reform beneficiaries. Support to land reform beneficiaries, be it in the form of mentoring, the transfer of specialised skills or the provision of extension services, would enable these beneficiaries to become economically active and establish sustainable businesses, which in turn would stimulate economic growth.

It is apparent, therefore, that any CSR scorecard drafted for the agricultural sector should include an element which assesses the extent to which a business within the sector contributes to land reform. In order to clarify any possible confusion, any reference to land reform in any of the elements of enterprise development, preferential procurement or skills development should be removed and included in the land reform element. It is recommended that this element should not fall in the trap of exclusively focussing on the transfer of ownership, but should rather focus on issues such as mentoring and the provision of extension services which focus on the beneficiaries of land reform. The mere transfer of ownership of land does not empower individuals unless they are equipped with the necessary skills to manage the transferred land.

The reference to land reform in the scorecard could also be seen as an attempt by Government to comply with the constitutional obligation to take reasonable legislative

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223 The issue of the transfer of land as part of achieving the 30% target is also addressed in the ownership element of the scorecard. Owners of agricultural land are encouraged to transfer or sell commercial agricultural land to black people. For every 1% of land exceeding the 30% target, an agricultural business will receive 1 bonus point (to a maximum of 5 bonus points) on the scorecard (DTI AgriBEE Charter 41).

224 See par 2.1.
and other measures to enable citizens to gain access to land.\textsuperscript{225} In this regard once the Sector Code for the agricultural sector has been gazetted in terms of section 9(1) of the \textit{BEE Act} it would be regarded as a \textit{legislative} measure and would consequently be in line with the constitutional obligation.

Within the current legislative framework, the \textit{BEE Act} together with the \textit{General Code} and the various transformation charters and accompanying sector codes are the primary instruments linked to CSR. In the discussion of the elements included in the scorecards it became evident that skills development (of employees, land reform beneficiaries or communities) is central to the notion of empowerment. The following section will provide a brief discussion of the \textit{Skills Development Act}, which is the Act primarily responsible for governing skills development.

\subsection*{5.2.4 The Skills Development Act}

There are numerous advantages that improved skills might have not only for the businesses that provide the skills development but also for the country as a whole. Sustainable development and economic growth will follow as the levels of skills improve, which in turn would lead to an improvement in social welfare and would lighten the burden on the national treasury. By developing skills an investment is made in people and in their capacity to make a direct contribution to the overall economic growth.

The \textit{Skills Development Act}\textsuperscript{226} forms an important part of the Government's legislative framework regarding skills development. The purpose of the Act is to develop the skills of the South African workforce in order to improve the quality of life of workers and their prospects of work. The Act is also aimed at the improvement of productivity in the workplace, the promotion of self-employment, improvement in the employment prospects of persons previously disadvantaged by unfair discrimination, and the provision of redress through training and education.\textsuperscript{227} In order to achieve these purposes the Act makes provision for the establishment of an institutional and financial

\textsuperscript{225} S 25(5) of the \textit{Constitution}. For a discussion of s 25(5) of the \textit{Constitution}, see paras 2.2 and 2.4.2.

\textsuperscript{226} 97 of 1998.

\textsuperscript{227} S 2(1).
framework which consists of a National Skills Authority, a National Skills Fund, and Sector Education and Training Authorities (SETAs).\textsuperscript{228} The National Skills Authority advises the Minister on issues such as a national skills development policy and a national skills development strategy. The SETAs function within the various sectors of the economy such as the insurance sector (INSETA) and the bank sector (BANKSETA). These SETAs are responsible for the development of a sector skills plan within the framework of the national skills development strategy. One of the functions of the SETAs is to establish learnership programmes within the different sectors. These learnerships should consist of both a structured learning component and practical work experience.\textsuperscript{229}

As can be seen from the above, the Act does not prescribe to employers the manner in which they should approach skills development nor does it set any requirements for human capital development policies. It does, however, make provision for the establishment of training authorities that would assist businesses for example in registering employees in a learnership programme. The Act provides supporting tools for developing employees in line with the business objectives of the employer.

\subsection*{5.2.5 The Skills Development Levies Act\textsuperscript{230}}

This Act is closely linked to the \textit{Skills Development Act} discussed above and provides for the imposition of a skills development levy. In terms of section 3 of the Act every employer must pay a skills development levy of 1\% of the total amount of remuneration paid to its employees. The levies are payable to the Commissioner of the South African Revenue Service or to the applicable sector SETA. The levies received are in turn used to pay learnership grants to employers that enrol their employees in an approved learnership programme in order to improve the skills of such employees.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{228} S 2(2).
\item \textsuperscript{229} S 16.
\item \textsuperscript{230} 9 of 1999.
\end{enumerate}
\end{footnotesize}
5.2.6 The Companies Act

5.2.6.1 Introduction

The reform process of the company law reached its pinnacle with the enactment of the new Companies Act,\(^\text{231}\) which became effective on 1 May 2011 and changed the landscape of corporate law. The Act introduced new concepts such as business rescue practices\(^\text{232}\) providing companies in financial distress with an option other than continuing with insolvency procedures, and laid down new solvency and liquidity requirements.\(^\text{233}\) Despite the comprehensive changes brought about by the Act, it is lacking in one important respect – no explicit reference is made to corporate social responsibility, and as long as no legal requirement is set to integrate CSR issues into their decision-making and governance structures the majority of businesses will not act in a socially responsible manner. The legislature has taken cognisance of this fact, and the fact that the public is increasingly paying attention to social issues and has, through section 72 of the Act, made an attempt to ensure that CSR becomes infused and embedded in a company’s governance structures without specifically referring to CSR.

The contribution of the Act in the CSR context is, however, not immediately evident from the Act itself, which makes no reference to CSR. From a CSR perspective the Act’s contribution is found in section 72(4)(a), which authorises the Minister of Trade and Industry to prescribe, though the use of regulations, that a company or category of companies described in terms of their annual turnover, the size of their workforce and the nature and extent of their activities must have social and ethics committees.\(^\text{234}\) The

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\(^{231}\) 71 of 2008. The 2008 Companies Act repealed the previous Companies Act which had been in place since 1973, bringing an end to the 38 year reign of the previous Act.


\(^{234}\) Although the establishment of a social and ethics committee has now been enshrined in legislation, the notion of having a social and ethics committee – or a CSR committee, as they are generally referred to – is nothing new, with numerous companies listed on the JSE having established CSR board committees. Despite the fact that the membership of these committees does not necessarily reflect the composition as required by the Regulations (see par 5.2.6.2), many of these committees are already responsible for monitoring governance and implementing CSR as part of the companies’ efforts to enhance their levels of transparency and accountability. A search of the websites of the
Minister has acted on this mandate and on 26 April 2011 the Companies Regulations, 2011\textsuperscript{235} were released, which \textit{inter alia} introduced the new requirement that companies falling within a certain category \textit{must} establish a social and ethics committee.\textsuperscript{236} The introduction of these measures could be regarded as an attempt by Government from an external position to put pressure on the private sector to operate in a socially responsible fashion, thus enhancing its social legitimacy.\textsuperscript{237} In terms of the Regulations only certain companies are required to form a social and ethics committee. The following section will address the scope of application of this requirement.

5.2.6.2 \textbf{Which companies are required to have a social and ethics committee?}

In terms of regulation 43(1) of the Companies Regulations, 2011 companies that are state-owned, listed public companies or companies that have in any two of the previous five years scored above 500 points in terms of regulation 26(2)\textsuperscript{238} must appoint a social and ethics committee consisting of not less than three directors or prescribed officers of the company.\textsuperscript{239} At least one of these directors or prescribed officers must be a director

\textsuperscript{235} GN R351 in GG 34239 of 26 April 2011 (hereinafter referred to as the \textit{Companies Regulations, 2011}). It should be noted that these regulations were released only in the second quarter of 2011. Literature on the subject is extremely limited and the discussion of the relevant regulations will focus on the Regulations itself as the primary source.

\textsuperscript{236} Companies must appoint a social and ethics committee unless exemption has been provided in terms of s 72(5) and (6) of the Companies Act, or unless the company is a subsidiary of another company which has a social and ethics committee and which will perform the functions required by the Regulations on behalf of the subsidiary company (reg 43(2)(a)).

\textsuperscript{237} Weaver, Trevino and Cochrane 1999 (42) \textit{Academy of Management Journal} 539, DiMaggio and Powell 1983 (48) \textit{American Socio-logical Review} 147 – 160 and Wood 1991 (16) \textit{Academy of Management Review} 691 – 718.

\textsuperscript{238} Reg 26 addresses issues regarding the interpretation of the regulations affecting transparency and accountability, and reg 26(2) provides the method to be used to determine a company’s “public interest score” for the purposes of reg 43, amongst others. The 500 points referred to in regulation 43(1) refer to the public interest score, which is calculated as the sum of a) a number of points equal to the average number of employees of the company during the financial year; and b) one point for every R1 million (or portion thereof) in third-party liability of the company and c) one point for every R1 million (or portion thereof) in turnover during the financial year; and d) one point for every individual who at the end of the financial year is known by the company to directly or indirectly have a beneficial interest in any of the company’s issued securities.

\textsuperscript{239} This position is similar to the position proposed in the Indian \textit{Companies Bill, 2011}. In terms of s 135(1) of the said Bill, companies with a net worth exceeding an estimated R800 million (“rupees five hundred crore”) or with an annual turnover exceeding an estimated R1.6 billion (“rupees one
not involved in the day-to-day management of the company and who has not been so involved in the preceding three financial years.\textsuperscript{240} This requirement might in future develop to the point where it is required that a board member should be responsible for the CSR portfolio and be held responsible at board level for all matters related to CSR.

The requirement that at least one of the members of the committee should be an "independent" director (someone not involved in the day-to-day management of the company) represents an attempt by the legislature to enhance transparency in the functioning of the committee and to act as a counterbalance to corporate greenwash.\textsuperscript{241}

Although the regulation does not require the committee to include external CSR experts or stakeholder representatives, it is advised that the committee will add further value to its functioning if it could demonstrate that it is actively engaging with its stakeholders. It is further suggested that the committee should consist of key personnel within the thousand crore") will be required to constitute a Corporate Social Responsibility Committee (recognised as a Board committee) consisting of three or more directors, of whom one should be independent.

\textsuperscript{240} Reg 43(4). The social and ethics committee is appointed by the board of a company. Failure by the board to appoint the committee is addressed in s 84(6) which reads as follow:

If the board of a company fails to make an appointment as required by this Part—

(a) the Commission may issue a notice to that company to show cause why the Commission should not proceed to convene a shareholders’ meeting for the purpose of making that appointment; and

(b) if the company fails to respond to a notice contemplated in paragraph (a) or, in responding, fails to satisfy the Commission that the board will make the appointment, or convene a shareholders’ meeting to make the appointment, within an acceptable period, the Commission may—

(i) give notice to the holders of the company’s securities of a general meeting, and convene such a meeting, to make that appointment; and

(ii) assess a pro-rata share of the cost of convening the general meeting to each director of the company who knowingly permitted the company to fail to make the appointment in accordance with this Part.

From the wording of this regulation the conclusion can be drawn that all state-owned and listed public companies will in future be required to have a social and ethics committee, while the establishment of the committee is not required for all private companies.

\textsuperscript{241} This requirement exhibits similarities with the recent trend in trust law, where the move is towards having an independent trustee on the board of trustees to insure proper governance in the trust’s affairs. In the 2005 appeal court decision of \textit{Land and Agricultural Bank of South Africa v Parker} 2005 2 SA 77 (SCA) the court expressed the opinion that the time has come to require that at least one of the trustees of a trust should be an independent trustee who has no vested interest in the trust itself. This recommendation has already been implemented by a number of Masters offices requiring newly registered trusts to have an independent trustee. (For a discussion of the Parker-decision see Kloppers 2006 \textit{Journal of South African Law} 414 – 423. For a discussion of corporate greenwash see par 3.7.4. The requirement of an independent director is also similar to s 135(1) of the Indian \textit{Companies Bill, 2011} which states that at least one of the three directors of the CSR Committee should be independent.
company, who are directly involved in the company’s CSR management and who will be able to help embed and integrate CSR into the company’s business ethos and practices as well as the corporate structure.

The Act authorises the social and ethics committee to require from any director, prescribed officer or any employee to provide information or explanations necessary for the performance of the committee.\textsuperscript{242} The committee is further entitled to attend general shareholders meetings and be heard at such meetings to the extent that the functions of the committee are discussed.\textsuperscript{243} This step will ensure that CSR matters and policies are brought to the shareholders’ attention at the annual general meeting and that CSR will in future become a standing item on the agenda of company’s shareholder meetings.\textsuperscript{244}

5.2.6.3 Function of the committee

The function of the social and ethics committee is to monitor and report on matters within the committee’s mandate.\textsuperscript{245} In terms of regulation 43(5)(a), the committee should monitor the company’s activities having regard to any \textit{relevant legislation, other legal requirements or prevailing codes of best practice} with regard to matters concerning:

(i) social and economic development, including the company’s standing in terms of the goals and purposes of –
   (aa) the 10 principles set out in the United Nations Global Compact Principles; and
   (bb) the OECD recommendations regarding corruption;
   (cc) the Employment Equity Act; and
   (dd) the Broad-Based Black Economic Empowerment Act

(ii) good corporate citizenship, including the company’s –

\textsuperscript{242} Ss 8(a) and (b).
\textsuperscript{243} Ss 8(c) to (e).
\textsuperscript{244} In this regard reports by the social and ethics committee should be viewed as a furtherance of integrated reporting advocated by the various reports on corporate governance released by the Institute of Directors of Southern Africa. For a discussion of these reports see par 5.3.3 and 5.3.4.
\textsuperscript{245} In terms of s 135(3) of the Indian \textit{Companies Bill, 2011}, the CSR Committee of a company is required to (a) formulate a CSR policy and indicate which CSR initiatives the company indents to undertake; (b) recommend the amount of expenditure to be incurred in implementing the CSR initiatives identified in (a); and (c) monitor its CSR policy continuously. The Board of a company is required to ensure that the activities identified in the CSR policy are undertaken. Schedule VII of Bill identifies the following activities that may be included by companies in their CSR policies. These activities relate to those aimed at eradicating extreme hunger and poverty; promoting education; combating HIV; ensuring environmental sustainability; enhancing vocational skills; social business projects; or contributing to nationally identified funds aimed at socio-economic development.
(aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;
(bb) contribution to the development of communities in which its activities are
predominantly conducted or within which its products or services are
predominantly marketed; and
(cc) record of sponsorship, donations and charitable giving;
(iii) the environment, health and public safety, including the impact of the company’s
activities and of its products or services;
(iv) consumer relationships, including the company’s advertising, public relations and
compliance with consumer protection laws; and
(v) labour and employment; including –
   (aa) the company’s standing in terms of the International Labour Organization
       Protocol on decent work and working conditions; and
   (bb) the company’s employment relationships, and its contribution toward the
       educational development of its employees;

The following paragraphs will provide a concise overview of each of the sub-regulations
which the committee is required to monitor and report on, with the focus on social and
economic development, good corporate citizenship, the environment, health and public
safety, consumer relationships and labour and employment issues.246

5.2.6.3.1 Social and economic development

Although the Companies Regulations provides no definition for social and economic
development, it does provide guidance on what the committee should take into
consideration when reporting on social and economic development. It is proposed that
reporting on this subject should lean toward reporting on social development as
opposed to reporting on economic development, since reporting on economic issues is
dealt with by other committees such as the audit committee. When fulfilling its
monitoring role, the committee should in terms of regulation 43(5)(a)(i) be guided by two
recognised international instruments – the UN Global Compact247 and the OECD
recommendations regarding corruption.248 It is unfortunate that the Regulations do not

246 The matters on which the social and ethics committee is mandated to report on closely resembles the
core CSR principles as identified by the ISO that will be discussed in more detail in par 5.3.2.
247 For a discussion of the principles of the UN Global Compact, see paragraph 5.4.3.
248 A search of the official website of the OECD produced no document entitled OECD recommendations
regarding corruption. It is accepted that the drafters of the Regulations referred to the various
instruments released by the OECD addressing the issue of corruption such as the OECD Convention
on Combating Bribery of Foreign Public Officials in International Business Transactions (available at
http://www.oecd.org/dataoecd/4/18/38028044.pdf) or the 2009 Recommendation for further
Combating Bribery of Foreign Public Officials in International Business Transactions (available at
refer to the leading national instruments such as the *Guidance on Social Responsibility*, the only standard addressing social responsibility, or any of the *King Reports* addressing corporate governance. These reports are internationally regarded as being world leaders in the field of corporate governance. The Department of Trade and Industry, which released the Regulations, was presented with a unique opportunity to further the CSR agenda from a very important platform and provide a greater measure of legitimacy to these existing national instruments. Unfortunately the Department chose to refer to international instruments. Had the Department included the leading national instruments, it could have established by incorporation through reference these instruments as soft law which could eventually be transformed into national legislation.

When monitoring and reporting on social and economic development, the Regulations make express reference to the *Broad-Based Black Economic Empowerment Act* and the *Employment Equity Act* – two pieces of national legislation expressly aimed at improving the social and economic standing of black South Africans and addressing inequalities brought about by past racially discriminatory laws and practices. As is the case with the two international instruments referred to, compliance with the *BEE Act* or its *General Code of Conduct* is not a requirement (although it is morally and ethically right and commercially prudent), and companies in the private sector can elect not comply with the *BEE Act* without legal consequence. The *BEE Act* does not require a

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249 For a discussion of the *Guidance on social responsibility* as a national instrument addressing CSR, see par 5.3.2.

250 For a discussion of the *King Reports* as national instruments addressing corporate governance, see par 5.3.3 and par 5.3.4.

251 53 of 2003. For a discussion of the *BEE Act*, see par 5.2.2.

252 55 of 1998. Hereinafter referred to as the *Equity Act*.

253 See par 5.2.2.2 for a discussion of the scope of application of the *BEE Act*. The discussion in paragraph 1 has made it evident that BEE is a risk that requires management. (Also see IoD Practice Note 2.) Businesses need to decide whether or not they are willing to accept the risk of non-compliance and face the possibility of losing business based on the fact that non-compliance
business to draft a BEE-plan in which the business’ BEE strategy is spelt out and as a result the social and ethics committee will not have a clear indication of what management’s approach to BEE is. In this regard the Institute of Directors in Southern Africa has released a *Practice Note on Broad-Based Black Economic Empowerment and King III*\(^{254}\) providing guidance to a board of directors on how to integrate BEE and social transformation into its sustainability considerations.\(^{255}\) The *Practice Note* proposes that a board should ensure that the company has an established BEE policy in line with the overall company strategy and that transformation targets are included in performance and risk management targets.\(^{256}\) In addition, as a matter of good governance, the extent to which these set targets have or have not been reached should be included in the company’s integrated report and communicated to stakeholders.\(^{257}\) The *Practice Note* further advocates the establishment of a committee – chaired by an independent director who should ensure objective oversight – who should be responsible for monitoring compliance with the *BEE Act* as well as with the company strategy.\(^{258}\) Although the *Practice Note* was released in 2009, almost two years before the *Companies Regulations* were released, it is argued that the *Practice Note* envisaged the creation of a social and ethics committee which would assume the responsibility for monitoring and reporting on issues relating to social transformation.

Whereas compliance with the international instruments and the *BEE Act* is voluntary, compliance with the requirement of the *Equity Act* is compulsory for employers who employ more than 50 employees or who have an annual turnover exceeding the

\(254\) IoD *Practice Note on Broad-Based Black Economic Empowerment and King III.*
\(255\) IoD *Practice Note* 3. It should be noted that although the *Practice Note* identifies BEE and social transformation as board matters it would be equally well at home within the mandate of the social and ethics committee. Although the board remains the principal functionary responsible for BEE and its implementation in the company, the social and ethics committee will in future have an extremely important role to fulfil in ensuring that social transformation is taking place.
\(256\) IoD *Practice Note* 3.
\(257\) Integrated reporting refers to reporting that goes beyond reporting on financial issues. Integrated reporting includes environmental and social issues and requires reporting businesses to focus on the effect that these issues together with economic issues will have on sustainability. For a discussion of integrated reporting, see par 5.3.3.5.2 and par 5.3.4.6.4.
\(258\) IoD *Practice Note* 3. The idea of an independent director as a member of the committee monitoring and reporting on social transformation is re-affirmed in the *Companies Regulations*, which requires that at least one of the members of the social and ethics committee should be independent and not involved in the day-to-day management of the company (see par 5.2.6).
In terms of the Equity Act, employers are required to draft an employment equity plan setting out the business’ plan to achieve employment equity and once the plan has been drafted are required to report on an annual basis on its progress towards reaching employment equity in the business. Section 24(1) of the Equity Act instructs employers to assign one or more senior managers to take responsibility for implementing and monitoring the equity plan. The Act, however, does not specify that an employment equity committee must be established to monitor and report on employment equity and matters related thereto. It is unclear from the wording of regulation 43(5)(a)(i)(cc) whether the social and ethics committee will or will not in future be required to take responsibility for employment equity matters and the employment equity report, and whether or not the committee merely has an oversight function where it is only required to report that the equity report has been submitted as legally required. If the narrow approach is followed to the above issue, the committee will in all likelihood have an oversight function, but if the wider approach is followed the committee will be expected to take charge of employment equity matters.

5.2.6.3.2 Good corporate citizenship

The second issue that the social and ethics committee is to monitor and report on relates to good corporate citizenship. This term refers to the acceptance by a business that it has a responsibility toward various stakeholders resulting from its business operations, and that as a result of this responsibility it can be held accountable if it neglects to act responsibly. Accordingly, a socially responsible business – one that...
accepts and acts on its social responsibility – will be regarded as a good corporate citizen. The Regulations do not provide an explanation of what is understood under the term corporate citizenship, they do provide some clues. In terms of the Regulations a good corporate citizen would be one that promotes equality, prevents unfair discrimination, acts against corruption and contributes to community development. The reference to the promotion of equality and the prevention of unfair discrimination (aspects advocated by the *Equity Act*) clearly establishes the link between social and economic development (discussed in the previous paragraph) and corporate citizenship. A good corporate citizen refrains from unfairly discriminating against its employees.

One of the most important contributions of the *Companies Regulations* to embedding CSR in the corporate milieu is the reference to contributions to community development in regulation 43(5)(a)(ii)(bb). In line with this regulation, a good corporate citizen contributes to community development in the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed. The focus on community development is in line the developmental nature of CSR, in terms of which businesses attempt through their CSR initiatives to contribute to the development of communities. The social and ethics committees of agricultural companies will in future be required to report on the extent to which the companies contribute to community development. With reference to land redistribution, in many instances a single piece of land is transferred to numerous beneficiaries that might constitute a community. Due to its proximity to these beneficiaries, these companies have the opportunity to contribute to the development of these communities and

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a discussion of the *King Report* and the importance of corporate governance, see par 5.3.3. The *King Report* refers to various defining characteristics of good corporate citizenship, which include corporate governance (managing businesses in a responsible and accountable fashion), respect for human rights, environmental responsibility and community engagement through the promotion of collaborative partnerships (*IoD King Report 2002* 92 – 93).

During the discussion of corporate citizenship in par 3.4.2.3 it became evident that corporate citizenship is regarded as one of the theoretical underpinnings of CSR.

Reg 43(5)(a)(ii)(aa).
Reg 43(5)(a)(ii)(bb).
See par 5.2.6.2.

The issue of community development is central to CSR. The *ISO Guidance on Social Responsibility* identifies community involvement and development as one of its core CSR topics (see par 5.3.2.1.7) while community development is one of the outcomes of enterprise development in terms of black economic empowerment (see par 5.2.2.5.2 and par 5.2.2.5.5, as well as par 5.2.3.3.3 and par 5.2.3.3.4 in the agricultural context).
ultimately will have to report to their shareholders on the extent to which the company has contributed to social transformation.

The final aspect of this regulation indicates that the social and ethics committee should consider the company’s record of sponsorship, donations and charitable giving. Sponsorships, donations and charitable or philanthropic giving could be regarded as manifestations of socially responsible behaviour where funds are invested in communities, and these investments should therefore be monitored and reported on by the committee. This requirement is closely related to the previous regulation referring to community development, since the most sponsorships, donations and charitable giving are aimed at a section of the community with which the business interacts, and as a result it is necessary not only to monitor and report on the extent to which a business has contributed to community development but also the extent to which business funds have been utilised to bring the development about.

5.2.6.3.3 The environment, health and public safety

In terms of regulation 43(5)(a)(iii), the committee should monitor the company’s activities having regard to any relevant legislation, other legal requirements, or prevailing codes of best practice with regard to matters concerning the environment, health and public safety, including the impact of the company’s activities and of its products or services. This regulation extends the monitoring task of the committee to matters beyond those which are purely social in nature. In effect this regulation requires the members of the committee to have a working knowledge of legislation relating to the environment, health and public safety. The inclusion of these aspects in the

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268 Reg 43(5)(a)(ii)(cc). The requirement that the social and ethics committee should report on these issues is repeated in the Economic performance indicators of the Global Reporting Initiative, which require a business to indicate to what extent the business has distributed its economic value. See par 5.3.2.4.1 for a discussion of this requirement.

269 The need to report on donations or charitable giving features prominently in the social sustainability policies which companies participating in the JSE Socially Responsible Index are required to have in place. For a reference to these policies, see par 5.3.5.

270 Legislation such as the National Environmental Management Act 107 of 1998; the National Environmental Management: Air Quality Management Act 39 of 2004; the National Environmental Management: Biodiversity Act 10 of 2004; the National Environmental Management: Protected Areas Act 57 of 2003; the National Environmental Management: Waste Act 59 of 2008 or the National Water Act 36 of 1998.
mandate of the committee is in line with national and international trends. The SANS 26000:2010 *Guidance on social responsibility*,\textsuperscript{273} for example, identifies health and safety at work as one of the issues resorting under labour practices which is identified as one of the core CSR subjects,\textsuperscript{274} while protecting consumers’ health and safety is addressed as a consumer issue which requires businesses to ensure that their products or services are safe to use or consume.\textsuperscript{275} The *King Report on Corporate Governance for South Africa 2002*\textsuperscript{276} also addresses these issues and requires companies to report on an annual basis on the nature and extent of its policies and practices regarding health and safety and environmental management. This report should form part of the integrated sustainability report, and from this report the company’s commitment to improving health and safety should be evident.\textsuperscript{277} The Global Reporting Initiative\textsuperscript{278} also refers to the issue of occupational health and safety and includes it in the *Labour Practices and Decent Work Performance Indicator* – the indicator requiring reporting businesses to report\textsuperscript{279} on their performance *inter alia* in the area of occupational health and safety.\textsuperscript{280}

\textsuperscript{271} The regulations provide no indication of what is to be understood under the term “health”, but given the context in which the reference to health is made, it is accepted that “health” in this instance could refer to occupational health and safety, which is addressed in the *Occupational Health and Safety Act* 85 of 1993, which addresses the issue of the health and safety of persons at work. It should be noted that sn 19 of the *Occupational Health and Safety Act* requires employers to establish Health and Safety Committees in certain instances. The functioning of this committee should not be confused with that of the social and ethics committee. It is unclear why the issue of health and safety has been included in the mandate of the social and ethics committee if a separate legally required committee is tasked with monitoring the situation regarding occupational health and safety.

\textsuperscript{272} Public safety is not defined in the Regulations and in this regard it is accepted that public safety refers to issues such as product safety, which in turn relates to issues of the environment.

\textsuperscript{273} For a discussion of this leading national standard addressing the issue of social responsibility, see par 5.3.2.

\textsuperscript{274} See par 5.3.2.1.3 for a discussion of this core subject.

\textsuperscript{275} See par 5.3.2.1.6 for a discussion of the consumer issues identified in the standard.

\textsuperscript{276} For a discussion of the leading national instruments addressing corporate governance and CSR, see par 5.3.3 and par 5.3.4.

\textsuperscript{277} For a discussion of the integrated reporting requirement of the *King Report on Corporate Governance for South Africa 2002*, see par 5.3.3.5.2.

\textsuperscript{278} For a discussion of the GRI as a prevailing international reporting instrument, see par 5.4.2.

\textsuperscript{279} This reporting should also be done in an integrated sustainability report required by the *King Report on Corporate Governance for South Africa 2002*.

\textsuperscript{280} It should be noted that the GRI also requires businesses to report on issues relating to product responsibility. Business should report on how their products or services influence its users or customers and with reference to health and safety identify issues which could affect the business (see par 5.4.2.4.3).
The reference to the environment, health and public safety as matters which the committee should monitor is not misplaced, and is in fact found in various other national and international instruments which the committee is required to regard. However, since the regulations provide no further guidance regarding the definition of these concepts it is probable that social and ethics committees will be uncertain as to what is actually expected of them. A clearer indication regarding the definition of health and public safety is required. This regulation would have served its purpose more precisely if for instance instead of referring to health, the regulation had referred to occupational health or the health of consumers who consume a product of the company. A clearer indication of what is understood by public safety would also greatly assist the committee in knowing what it is required to monitor.

5.2.6.3.4 Consumer relationships

The fourth issue which the social and ethics committee is required to monitor and report on addresses consumer relationships, including the company’s advertising, public relations and compliance with consumer protection laws. Due to the fact that the regulations provide no guidance on what is actually required by the committee in this regard, the committee will have to refer to relevant legislation, other legal requirements or prevailing codes of best practice as instructed by regulation 43(5)(a). The reference to consumer relationships and public relations reflects the stakeholder-inclusive approach advocated by the King Report on Governance for South Africa, which requires transparent and effective communication with stakeholders (including consumers or customers). Accordingly the social and ethics committee has a key function to fulfil in ensuring that the company maintains transparent and effective relationships with all of its key stakeholders.

The regulation also requires the committee to monitor compliance with consumer protection laws. The enactment of the Consumer Protection Act introduced a new era in consumer protection in South Africa, providing South African consumers with

281 IoD King Report 202.
282 68 of 2008. Hereinafter referred to as the CPA. A complete discussion of the CPA falls outside the scope of this research and reference to the Act is made merely to refer to consumer protection legislation, which should be considered by the social and ethics committee.
some of the most comprehensive protection currently available. According to section 3(1) the purpose of the Act is to promote and advance the social and economic welfare of consumers through the establishment of a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally, by promoting fair business practices and providing consumers with protection against unconscionable and deceptive trade practices and conduct. From this section it is evident that the Act has a distinct social character and that the Act represents an attempt to educate consumers not only about what their rights are, but also about what is expected of socially responsible businesses. This Act has the potential to become one of the most important drivers of socially responsible behaviour through its attempts to improve consumer awareness and the encouragement of responsible and informed consumer choice and behaviour. The importance of the Act as a potential driver of CSR is further evident in the Act’s attempts to promote consumer confidence and the development of a culture of consumer responsibility – which would eventually influence responsibility within the private sector. According to the Act, the culture of consumer responsibility will be strengthened through individual and group education, vigilance, advocacy and activism. The CPA has introduced a number of fundamental consumer rights, as it addresses equality, privacy, the right to choose, the right to disclosure and information and the right

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283 For a discussion of consumer behaviour as one of the main drivers of CSR, see par 3.8.7.
284 S 3(1)(e) of the CPA.
285 S 3(1)(f) of the CPA.
286 According to the preamble of the Act, the CPA was enacted inter alia to promote and provide for consumer education, including education concerning the social and economic effects of consumer choices, and to facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests. In this regard the preamble consequently provides a clear indication that the South African public should be educated amongst other things on the power of consumer activism and become active in consumer protection groups. Ss 77 and 78 of the Act specifically address the issue of civil society’s support for consumer’s rights.
287 For a discussion of the fundamental consumer rights established by the CPA, see Jacobs, Stoop and Van Niekerk 2010 (13) PER 301 – 406.
288 Ss 8 – 10 give content to the consumers’ right to equality in the market, prohibit discriminatory marketing, and extend the Equality Court’s jurisdiction over these sections. For a discussion of this right, see Tait and Tait 2010 (31) Obiter 434 – 445.
289 S 11 provides protection against unwanted direct marketing.
290 Ss 13 – 21 address issues such as the consumer’s right to select suppliers (s 13); the consumer’s right to a cooling-off period (s 16) and a consumer’s right to choose or examine goods (s 18).
to fair and responsible marketing, all of which have to be considered by the social and ethics committee when monitoring and reporting on issues related to consumer relationships.

From a consumer protection point of view, the second Act which was introduced to provide consumer protection is the National Credit Act, the aim of which is to promote a fair and non-discriminatory marketplace for access to consumer credit specifically. The Act is of special importance to businesses which are involved in the credit market or which provide credit as part of their services. All of the major agricultural companies provide credit facilities to their clients and are consequently bound by the Act and, as a result, the social and ethics committee is required to know what is needed to comply with the Act. The purposes of the NCA are similar to those of the CPA in that both of the Acts are aimed at promoting and advancing the social and economic welfare of South Africans and protecting consumers. The NCA represents an attempt to promote the development of a credit market which is equally accessible to all South Africans and which promotes responsibility in the credit market and prevents the over-indebtedness of consumers. From a consumer protection point of view some of the

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291 Ss 22 – 28 make provision for the consumer’s right to receive information in plain and understandable language (s 22) as well as the consumer’s right to product labelling and trade descriptions. For a discussion of the right afforded to consumers by s 22, see Gouws 2010 (22) SA Merc LJ 79 – 94.

292 Ss 29 – 39 address numerous aspects of the right to fair and responsible marketing including general standards for the marketing of goods or services (s 29); bait marketing (s 30); negative opinion marketing (s 31); direct marketing to consumers (s 32) and catalogue marketing (s 33). The CPA also addresses the right to fair, just and reasonable contractual terms and conditions which provide protection against unfair, unreasonable and unjust contract terms. For a discussion of this right see Naude 2009 (126) SALJ 505 – 536 and Naude 2010 (127) SALJ 515 – 547. For a discussion of the consequences of non-compliance with the CPA see Meiring 2010 (10) Without Prejudice 28 – 29.

293 For a more detailed discussion of the CPA, see Melville Know your consumer rights: pocket guide to the Consumer Protection Act; Melville The Consumer Protection Act made easy and Van Eeden A guide to the Consumer Protection Act.

294 34 of 2005. Hereinafter referred to as the NCA. A complete discussion of the NCA falls outside the scope of this research and reference to the Act is made merely to refer to further consumer protection legislation which should be considered by the social and ethics committee. For a more detailed discussion of the Act, see Otto National Credit Act explained and Juta’s Statutes Editors The National Credit Act 34 of 2005 and regulations.

295 S 3(a) of the NCA.

296 S 3(c) of the NCA.

297 S 3(g) of the NCA.
most important innovations introduced by the Act include new debt relief measures and a debt counselling process.298

These two Acts are only some of the legislation of which the social and ethics committee must have knowledge in terms of this specific regulation. The question arising from this is whether this regulation does not overburden members of the committee? The wider the scope of the committee’s duties, the more unlikely it is that individuals would make themselves available to become members of a social and ethics committee, especially when members are expected to have regard to any relevant legislation, other legal requirements or prevailing codes of best practice.

5.2.6.3.5 Labour and employment issues

The final issues which the social and ethics committee is required to monitor and report on in terms of regulation 43(5)(a) address the company’s standing in terms of the International Labour Organisation Protocol on decent work and working conditions,299 the company’s employment relationships, and its contribution toward the educational development of its employees.300

By “labour and employment issues” is meant the International Labour Organisation’s Protocol on decent work and working conditions. It should be noted that by 6 June 2011 no protocol or international standard had been released by the ILO under this heading, although the ILO does have a Decent Work Agenda with the overarching goal of effecting positive change in people’s lives on the local level.301 The aim of the Decent Work Agenda is to promote decent work for all based on

the understanding that work is a source of personal dignity, family stability, peace in the community, democracies that deliver for people, and economic growth that expands opportunities for productive jobs and enterprise development.302

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299 Reg 43(5)(a)(v)(aa).
300 Reg 43(5)(a)(v)(bb).
However, given the actual wording of this regulation it is unclear which international instrument the social and ethics committee is required to have regard for. A further possibility is that the drafters mistakenly referred to a non-existing protocol and instead expected the social and ethics committee to have regard for the Global Reporting Initiative’s Labour Practices and Decent Work Performance Indicators, in terms of which a business should include in its integrated report information on the size of the workforce, for example, and the percentage of the total workforce taking part in education or training.\footnote{For a discussion of the GRIs indicator on Labour Practices and Decent Work, see par 5.3.2.4.1(a).} This statement is, however, pure speculation and it is unclear what is expected of the committee in this regard.

The second matter that is included in the social and ethics committee’s mandate concerning labour and employment issues addresses the company’s employment relationships and its contribution toward the educational development of its employees. The specific reference to the educational development of employees might refer to the skills development element included in the BEE scorecard\footnote{For a discussion of the skills development element of the generic scorecard, see par 5.2.2.5.2.} or to the Skills Development Act,\footnote{97 of 1998.} which is aimed at developing the skills of the South African workforce and encouraging employers to use the workplace as an active learning environment where employees acquire new skills to enhance their employment prospects.\footnote{See par 5.2.4 for a reference to the Skills Development Act.}

It is evident from the above that the members of the social and ethics committee will be faced with a daunting task, in the sense that they are required to have sufficient knowledge of a variety of issues, most of which have a strong legal basis. As a result of this it is pertinent to ask whether or not individuals will be willing to expose themselves to having their conduct judged against the requirements, and the consequential liability? This raises the following questions: What is the standard of conduct and liability of members of the committee in instances of non-compliance with the Act or the prescribed regulations, and what are the powers of the committee if it is of the opinion...
that the company’s activities are not conforming to relevant legislation, other legal requirements or prevailing codes of best practice?

5.2.6.4 Standards of conduct and the liability of members of the committee

The standards of conduct set for members of the social and ethics committee are addressed in section 76 of the Act, while section 77 deals with the liability of the members of the committee for non-compliance with the set standard. Despite the fact that the heading of section 76 is “Standards of directors’ conduct”, the section is equally applicable to prescribed officers or members of board committees such as the social and ethics committee or the audit committee.\(^{307}\) In terms of section 76(3) a member of the social and ethics committee is required to exercise the powers and perform the functions of a member of the committee in good faith and for a proper purpose,\(^{308}\) in the best interest of the company,\(^{309}\) and with the degree of care, skill and diligence that may be reasonably expected of a person carrying out the same functions in relation to the company as those carried out by the member of the committee.\(^{310}\) With regard to the duties to act in the best interest of the company and to act with the required degree of care, skill and diligence, a committee member will escape liability if it can be proven that reasonably diligent steps have been taken to become informed on the matter or that he or she had a rational basis for believing and did believe that the decision taken was in the best interest of the company.\(^{311}\)

For the purposes of the Act, no distinction is drawn between the liability of a director and the liability of a member of a board committee.\(^{312}\) In terms of section 77(2) of the Act, a member will be held liable

\(^{307}\) S 76(1)(a) and (b).
\(^{308}\) S 76(3)(a).
\(^{309}\) S 76(3)(b).
\(^{310}\) S 76(3)(c).
\(^{311}\) S 76(4)(a)(i) and (iii).
\(^{312}\) The liability of these office bearers are set out in s 78(2) – (5). White (2006 BSR Occasional Papers 4) identifies three similar pillars that summarise the duties of directors, namely the duty of loyalty, the duty of care, and good business judgement. The duty of loyalty requires a director to act in the best interest of the company, while the duty of care requires a director to equip himself with the necessary information to take responsible business decisions. The duty of good business judgement requires a director to make business decisions that are supportive of the company’s long-term goals (White 2006 BSR Occasional Papers 4).
(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as consequence of any breach by the director of a duty contemplated in section 75, 76(2), or 76(3)(a) or (b); or (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as consequence of any breach by the director of (i) a duty contemplated in section 76(3)(c); (ii) any provision of this Act not otherwise mentioned in this section; or (iii) any provision of the company's Memorandum of Incorporation.

If a member of the social and ethics committee fails to act in good faith or in the best interest of the company, the member will be deemed to have breached the fiduciary duties and will be held liable for any loss, damages or costs sustained by the company as a consequence of the breach. In the same sense a member of the committee will be held open to delictual claims if the member neglects to act with the degree of care, skill and diligence required.313

5.2.6.5 Powers of the committee

Although sections 72(8)(a) – (e) of the Act confer certain powers on the social and ethics committee which are deemed necessary to fulfil its mandate, neither the Act nor the Regulations provide any express guidance on what the powers of the committee are. The most effective tool at the committee’s disposal is found in section 72(8)(e) of the Act. This section entitles the committee to address the general shareholders meeting on matters that concern the committee’s functions and provides the committee with an opportunity to raise matters at a meeting where the owners of the company (the shareholders) are present.

5.2.6.6 Conclusion

The fact that some companies are now legally required to include a social and ethics committee in their governance structures represents a welcome move towards institutionalising and legitimising CSR. Although the Government does not have a formal policy on CSR, the inclusion of the social and ethics committee requirement in both the Act and the Regulations serves as an indication that it has taken note of the

313 For a discussion of a director’s fiduciary duty and duty of care and skill, see Bouwman 2009 (21) SA Merc LJ 509 – 534; Bekink 2008 (20) SA Merc LJ 95 – 116; and Cassim (ed) Contemporary company law 463 – 475 and 504 – 515.
CSR movement and has taken steps (although not explicit steps such as calling the committee the “CSR committee”) toward mainstreaming the notion of CSR. The committee has an important function to fulfil. In future it will be responsible for ensuring that the company acts in a socially responsible manner in order to maintain its social licence to operate. It is, however, unfortunate that the legislature has not provided a more concise indication of what is expected of the committee. The current regulations are in many instances vague and refer to international instruments such as the GRI and the UNGC, while more suitable national instruments such as the Guidance on social responsibility or the King Reports on Governance are available. The legislature has further missed an opportunity to provide clear terms of reference for the CSR committee. The terms of reference of the CSR committee should focus on functions such as establishing policies and standards based in the nationally and internally recognised instruments addressing CSR, reviewing CSR issues which could potentially affect the company, monitoring and reporting to the full range of stakeholders on compliance against the established policies, standards, rules and regulations, and overseeing the company’s CSR initiatives. Through the inclusion of these functions the committee would have the opportunity to further embed CSR into the corporate structure.

Despite its possible shortcomings, the requirement that companies should have a social and ethics committee is a welcome step in the right direction.

5.2.7 Concluding remarks on the legislative framework for CSR

In conclusion it can be said that, within the South African context, a legislative framework that facilitates CSR as such is insufficient, although it does contain very

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314 Some of the risks which could potentially harm the company can be identified early through the process of meaningful stakeholder engagement. Galbreath (2009 (21) European Business Review 109 – 127) supports the approach where CSR is built into the entire business strategy, which according to him consists of the business’ mission, its strategic issues, the markets in which it operates, the customers’ needs, the business’ resources and its competitive advantage. The notion of the total integration of CSR into business strategy implies that the CSR framework should be integrated into the entire business ethos including the business’ systems, objectives, targets and performance measures, as well as into the business’ governance structures (Castka 2004 (16) TQM Magazine 216 – 224).

315 The committee should be tasked with the development, implementation and communication of its CSR policies.
unique characteristics, especially when addressing empowerment. There is no specific set of regulations creating a situation where a business can be compelled, through legal means, to have a CSR policy or strategy in place or to engage in CSR activities. A framework that provides for rewards such as tax relief and the penalisation of non-compliance or poor performance is required. This sentiment is echoed by the *King Report on Corporate Governance for South Africa 2002*, which makes a call for policies (including probably legislation) defining the prioritisation of social responsibility and the need for the private sector to assume a greater role in the facilitation of CSR.\(^\text{316}\)

Government needs to have a greater sense of CSR and to set a legislative framework that encourages businesses to take pro-active steps through their CSR initiatives towards sustainable development, whilst guarding against over-regulation. The creation of a legal framework for CSR without proper policing thereof may lead to unintended consequences, such as the added costs of compliance, which may have a negative impact on sustainable development and the economic welfare of the country as a whole. Should the Government not have the required capacity to implement, the efforts aimed at poverty alleviation and sustainable development will be useless. If, on the other hand, CSR policies are properly implemented, communities as well as the Government would be the benefactors of such policies. Government would benefit in the sense that contributions by the agricultural sector would alleviate the pressure placed upon the Government’s social welfare programmes, which in turn would free up funds that the Government could utilise in other developmental programmes.

In Chapter 4 it became evident that CSR should not be regulated only through legislation, nor should it be entirely voluntary, but that a hybrid framework with the characteristics of both the mandatory and voluntary approaches should be the preferred approach. Whereas the previous discussions addressed the question of which *legal requirements* within the national context are relevant for a national CSR framework, the following sections will focus on the relevant national *guidelines*.

\(^{316}\) The *King Report on Corporate Governance for South Africa 2002* as well as the *King Report on Governance for South Africa and the King Code of Governance Principles*, reports issued by the Institute of Directors, will be discussed in the section addressing the voluntary guidelines within the national context.
5.3 National guidelines relevant to CSR

5.3.1 Introduction

The following discussion will focus on the SANS 26000:2010 Guidance on social responsibility as well as the King Report on Corporate Governance for South Africa 2002 (generally referred to as King II), and the King Report on Governance for South Africa including the King Code of Governance Principles (collectively known as King III), which provided the roadmap not only for corporate governance in South Africa but also contributed to establishing CSR as an important pillar of corporate governance. Finally the discussion will provide insights into the Johannesburg Securities Exchange's Socially Responsible Index (SRI), which is regarded as an important step towards encouraging businesses to engage in social issues through their CSR initiatives. Although the SRI is focussed on listed companies, it serves as a good example of how companies, including companies which are not listed, could approach their CSR initiatives.

The first (inter)national guideline, the Guidance on social responsibility,\(^\text{317}\) was drafted under the auspices of the International Organisation for Standardisation (ISO) by the Working Group on Social Responsibility, and involved experts from more than ninety countries, which included experts from six different stakeholder groups representing government, industry, labour, consumers, NGOs and academics.\(^\text{318}\) The following paragraphs will examine the Guidance and will specifically focus on the core subjects of social responsibility as identified in the standard. This focus on national guidelines is

\(^{317}\)ISO Guidance v.

\(^{318}\)According to Castka and Balzarova (2008 (111) International Journal of Production Economics 275) the result of the multi-stakeholder approach followed to draft the ISO 26000 is that global consensus was reached by international experts on what constitutes the CSR agenda. For a discussion of the historical development of the ISO 26000, see Ward 2010 Foundation for democracy and development 3 – 8; Mueckenberger and Jastram 2010 (97) Journal of Business Ethics 233 – 235 and Castka and Balzarova 2007 (24) International Journal of Quality and Reliability Management 740. Waddock (2008 (August) Academy of Management Perspectives 91) notes that the ISO’s move into the arena of corporate responsibility “highlights the seriousness of efforts to quantify, measure, and standardize approaches to managing responsibilities in companies, since if companies adopt the new standard and drive it through their own supply and distribution chains, it will create a huge ripple effect”.

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based on the fact that respect for national and international norms of behaviour is regarded as one of the key principles of social responsibility.\textsuperscript{319}

\textbf{5.3.2. SANS 26000:2010 Guidance on social responsibility}

\textbf{5.3.2.1 Introduction}

As stated in the previous paragraph, the \textit{Guidance on social responsibility} was drafted by the ISO as an international guide on the subject of social responsibility, was approved by the SABS as a national standard (SANS 26000:2010), published in November 2010, and effectively became part of the pantheon of ISO standards.\textsuperscript{320} It is important to note that the Standard does not contain any requirements and is not intended to be used as a certification criterion (as opposed for example to ISO 14001), and any offer to provide certification would represent a misrepresentation of the Standard.\textsuperscript{321} Since the Standard does not contain any requirements, it would not be possible to measure conformity with the Standard and consequently certification would not be possible.\textsuperscript{322}

The Standard is based in the generally accepted notion that the objective of social responsibility is to contribute to sustainable development. Accordingly it provides guidance on the principles of social responsibility\textsuperscript{323} and advises an organisation\textsuperscript{324} on

\textsuperscript{319} See par 5.1 as well as par 5.3.2.1 for a reference to the key principles of social responsibility as identified by the ISO.

\textsuperscript{320} SANS 26000:2010 was confirmed as a national standard in GN 230 in GG 34107 of 18 March 2011. Although the notice indicates that the standard has been issued in terms of s 16(3) of the \textit{Standards Act} 8 of 2008, it should be noted that it is more likely that the standard was issued in terms of s 24 of the Act, which addresses the issuing of South African National Standards. S 16(3) of the \textit{Standards Act} deals with the responsibilities of the chief executive officer of the SABS.

\textsuperscript{321} ISO \textit{Guidance} vii. Although ISO 26000 is not a certifiable standard, other ISO standards such as ISO 14001 do make provision for certification. Also see Castka and Balzarova 2008 (111) \textit{International Journal of Production Economics} 277.

\textsuperscript{322} For a discussion of the question of whether or not ISO 26000 should be only a guide or should be reinforced through certification, see Castka and Balzarova 2008 (27) \textit{Human Systems Management} 231 – 242. The authors conclude that ISO 26000 should remain as a guiding standard and not become a certifiable standard (at 240). Bowens (2011 (March) \textit{The Diary Mail} 96) is of the opinion that the Standard “can be used as the basis for an assessment system that defines and measures an organisation’s performance and improvements in the area of socially responsible behaviour”. However, since the Standard contains no requirements, it is not clear how the Standard can be used as an assessment system.

\textsuperscript{323} Accountability, transparency, ethical behaviour, respect for stakeholder interests, respect for the rule of law, respect for international norms of behaviour and respect for human rights. See par 5.3.2.
ways to integrate socially responsible\textsuperscript{325} behaviour into a business regardless of whether the business has a well established CSR approach or whether is just beginning to include CSR in its way of doing business. The Standard advocates the approach where businesses, through their CSR initiatives, take ownership of the impact that their decisions and activities have on the society and environment where they operate. The Standard identifies seven core CSR subjects that should\textsuperscript{326} be considered by a business in conjunction with the principles of social responsibility when practising social responsibility. These seven core CSR subjects will form the core of the discussion in this section.

According to the \textit{Guidance}\textsuperscript{327} the aim of the Standard is to encourage businesses to go beyond legal compliance, recognizing that compliance with law is a fundamental duty of any organization and an essential part of their social responsibility. It is intended to promote common understanding in the field of social responsibility, and to complement other instruments and initiatives for social responsibility, not replace them.

This statement stresses the fact that despite the Standard being drafted under the auspices of the ISO, it does not create a hierarchy of CSR instruments and initiatives with the Standard at the top of the hierarchy, nor does it attempt to alter the duties and responsibilities of the state.\textsuperscript{328} The acceptance by the Government of the \textit{Guidance} as a national standard is an indication of Government’s willingness to assist businesses in

\textsuperscript{324}The Standard is intended to be used by organisations from the private, public and non-profit sectors. This necessitated the reference to “organisations” as opposed to businesses. Since the focus of this research is on the private sector, any reference to organizations in the text of the standard will be interpreted as implying “businesses”.

\textsuperscript{325}The Standard refers to “social responsibility” as opposed to “corporate social responsibility”. This reference is the result of the reference to “organisation” as opposed to “business”. For the remainder of this section any reference to “social responsibility” will imply corporate social responsibility.

\textsuperscript{326}Since the Standard is a guide it is not prescriptive and contains no requirements that have to be met. Consequently the standard has purposefully omitted the word “shall” and used only “should” to imply a recommendation as opposed to a requirement.

\textsuperscript{327}ISO \textit{Guidance} 1.

\textsuperscript{328}Although no hierarchy of CSR instruments and initiatives is created, it is probable that due to the ISO’s good reputation in the field of corporate governance the Standard will become a leading instrument addressing CSR. Schwartz and Tilling (2009 (16) \textit{Corporate Social Responsibility and Environmental Management} 294) note that the involvement of the ISO accorded further legitimacy to the international regard for the Standard). According to Jimena (2010 (August) \textit{Canadian Mining Journal} 10) the Standard embraces rather than supersedes other existing standards.
their efforts to operate as socially responsible corporate citizens.\textsuperscript{329} The influence of Government in pursuing the CSR agenda is crucial and future support for the agenda is a necessity. Castka and Balzarova\textsuperscript{330} envisage that the role of governments will in future not be limited to encouraging businesses to adopt the Standard, but will develop to a situation where \textit{national policies to reinforce the quality of its adoption} are put in place.\textsuperscript{331} However, only time will tell if Government will go beyond this step and, for example, create a body that would encourage and promote the diffusion of CSR in the private sector – a body that would increase awareness levels regarding the advantages of engaging in CSR practices. Although following the Standard is currently voluntary, Government is not precluded from using coercive pressure to further the CSR agenda and, for instance, make the Standard a contractual requirement for governmental contracts or funding, as it has with the \textit{BEE Act}.\textsuperscript{332}

The Standard is generic and does not focus on a particular industry or sector, and abiding by the Standard is voluntary.\textsuperscript{333} The Standard provides general guidance on the underlying principles of CSR and concepts and definitions related to CSR. It further includes a description of the core subjects and issues of CSR and how to integrate and implement CSR throughout a business, as well as how to identify and engage with stakeholders. Finally it provides guidance on how to communicate on the topic of CSR.\textsuperscript{334} The following sections will discuss the core CSR subjects in terms of the Standard.

\begin{itemize}
  \item \textsuperscript{329} For a discussion of the steps which the Italian and Swiss Governments took in preparation to implement the ISO 26000, see Ferrante, Gandolfi and Meneguzzo 2010 (3) \textit{Economia Aziendale Online International Business Review} 311 – 321.
  \item \textsuperscript{330} Castka and Balzarova 2008 (108) \textit{Industrial Management and Data Systems} 305.
  \item \textsuperscript{331} For a discussion of the content of a government CSR framework, see par 4.3.
  \item \textsuperscript{332} See par 5.2.2.4 for a reference to s10 of the \textit{BEE Act}, which requires BEE compliance in contracts between the State and the private sector.
  \item \textsuperscript{333} Although implementing the Standard is voluntary, Castka and Balzorova (2008 (27) \textit{Human Systems Management} 232) note that ISO standards have the potential to establish self-regulatory regimes of which compliance eventually becomes a legal requirement. Thus, the possibility that the Standard could at some stage become legally binding is not excluded. Some of the content of the Standard has been included in the proposed CSR framework Act. See par 6.3.
  \item \textsuperscript{334} Anon 2011 (January) \textit{Business and the Environment} 13 and Anon 2011 (February) \textit{Business and the Environment} 11.
\end{itemize}
5.3.2.2 Core CSR subjects

5.3.2.2.1 Organisational governance

The first core social responsibility subject addresses the topic of governance within the business. Governance in this context is “the system by which an organization makes and implements decisions in pursuit of its objectives”\(^{335}\) and according to the ISO\(^{336}\)

...organizational governance is the most important factor in enabling an organization to take responsibility for the impacts of its decisions and activities and to integrate social responsibility throughout the organization and its relationships. (emphasis added)

This subject reaffirms the position that businesses need to take responsibility for their actions and create an environment conducive to social responsibility by incorporating issues such as transparency, accountability and ethical behaviour into their everyday business practices.\(^{337}\) A business’ commitment to socially responsible behaviour should be reflected throughout its decision-making processes and should be evident in all of its strategies, objectives and targets.\(^{338}\) Socially responsible behaviour is accordingly not a matter which should be dealt with in a separate silo in the management structure of a business. The commitment to social responsibility should be noticeable throughout the business.\(^{339}\)

In this regard a business governance system which identifies socially responsible behaviour as one of the cornerstones of the business management process and structures is essential for any CSR framework. A further essential element for a CSR framework is recognition of and respect for human rights.\(^{340}\)

\(^{335}\) ISO Guidance 21 and Anon 2009 (July) Business and the Environment 11.
\(^{336}\) ISO Guidance 21.
\(^{337}\) These issues feature prominently in both King II and King III, which are discussed in more detail in par 5.3.3 and par 5.3.4.
\(^{338}\) This approach is echoed by the CSR legal principle of integrated, sustainable decision-making identified by Kerr, Janda and Pitts, which requires a business to consider environmental, social and economic issues in its decision-making process (Pitts (ed) Corporate Social Responsibility 105 - 158).
\(^{339}\) The King Report on Corporate Governance for South Africa 2002 identifies social responsibility as one of the characteristics of good governance, stressing the important link between (organisational) governance and CSR. For a discussion of this link, see par 5.3.2.1.
\(^{340}\) For an in-depth discussion of the corporate responsibility to respect human rights, see Ruggie Business and human rights 13 – 20.
5.3.2.2.2 Human rights

The inclusion of human rights as a core CSR subject serves as a reaffirmation of the fact that businesses are obliged to recognise and respect human rights within their sphere of influence.\textsuperscript{341} Businesses are under an obligation to ensure that they do not infringe on the rights of others and to avoid any complicity in human rights transgressions or abuses.\textsuperscript{342}

The Guidance\textsuperscript{343} identifies eight human rights issues dealing with due diligence, human rights and risk situations, avoidance of complicity, resolving grievances, discrimination and vulnerable groups, civil and political rights, economic, social and cultural rights and fundamental principles and rights at work.\textsuperscript{344} These issues call on businesses to identify, prevent and address possible human rights issues resulting from their business activities and to avoid complicity.\textsuperscript{345} The issues further appeal to businesses to refrain from discrimination that violates human rights, as well as to distance themselves from all forms of forced labour or child labour.\textsuperscript{346} These issues address labour practices, which are dealt with as a separate, third issue.

5.3.2.2.3 Labour practices

Businesses are under an obligation to ensure that their labour practices comply with national legislation and, if national legislation is insufficient, then with international

\textsuperscript{341}“Sphere of influence” refers to the zone within which a business has the ability to influence the decisions or activities of others. For a critical discussion of the concept of sphere of influence, see Wood 2011 (7) Osgoode CLPE Research paper series 1 – 21.

\textsuperscript{342}In the national context, the issue of respect for and promotion of human rights is firmly entrenched in chapter 2 of the Constitution, containing the Bill of Rights which, in terms of s 7(1), forms the cornerstone of the South African democracy.

\textsuperscript{343}ISO Guidance 25 – 33.

\textsuperscript{344}Anon 2009 (July) Business and the Environment 12.

\textsuperscript{345}Complicity can either be direct, where a business knowingly participates in human rights transgressions or is silent where a business is aware of human rights violations but fails to take any action to stop the violations. A business can also benefit directly or indirectly from human rights abuses committed by someone other than the business itself in which instance such complicity is referred to as beneficial complicity (ISO Guidance 26).

\textsuperscript{346}The issue of respect for human rights is especially important to businesses operating in more than one country. These trans-national businesses must ensure that they are not involved in any human rights transgressions in any of the jurisdictions in which they operate. Since none of the traditional agricultural companies, such as Senwes or NWK are trans-national companies, this research will not address the issue of trans- or multi-national businesses’ CSR practices or responsibility for human rights transgressions.
standards. Contributing to employment creation and paying reasonable compensation for services rendered by employees are recognised as two of the most prevalent economic and social responsibilities of a business, the absence of which give rise to various social dilemmas.\footnote{ISO Guidance 34. The issue of reasonable compensation has been addressed in the agricultural sector through various sector determinations prescribing a minimum wage. For example, \textit{Sectoral determination 13: Farm worker sector} addresses \textit{inter alia} the issue of minimum wages for farm workers (GN R149 in \textit{GG} 28518 of 17 February 2006). On the May 22\textsuperscript{nd} 2011 the Department of Labour gave notice of the commencement of an investigation into minimum wages and conditions of employment in the Farm Worker Sector (GN 469 in \textit{GG} 34339 of 22 May 2011).} The ISO recognised that socially responsible labour practices are necessary for the achievement of social justice, stability and peace and consequently included labour practices as the third core subject of social responsibility.\footnote{ISO Guidance 34.}

Labour practices are divided into five issues: employment and employment relationships; conditions of work and social protection; social dialogue; health and safety at work; and human development and training in the workplace.\footnote{ISO Guidance 34.} As an employer, a business creates opportunities for its employees to improve or at least maintain a standard of living, and in so doing the business contributes to society.\footnote{ISO Guidance 34.} In recognition of this contribution, businesses need to constantly be aware of the importance of providing secure employment.\footnote{ISO Guidance 35.} A socially responsible business pays a fair wage, provides safe working conditions and ensures that its conditions of work are in compliance with standards laid down by legislation. Acting as an employer, a business has the potential to further contribute to human development by expanding the capabilities of its employees. Businesses are expected to provide their employees with access to skills development, training and other opportunities to further their capabilities.

\footnote{ISO Guidance 34. In the local context, these issues have been addressed through various pieces of legislation such as the \textit{Basic Conditions of Employment Act} 75 of 1997 addressing \textit{inter alia} conditions of work; the \textit{Occupational Health and Safety Act} 85 of 1993 addressing health and safety at the workplace, and the \textit{Skills Development Act} 97 of 1998 addressing skills development. For a brief discussion of the \textit{Skills Development Act}, see par 5.2.4.}

\footnote{ISO Guidance 34. This core subject reflects to some extent the labour and employment issues which the social and ethics committee has to report on. For a discussion of these issues, see par 5.2.6.3.5.}

\footnote{ISO Guidance 35.}
5.3.2.2.4 The environment

The fourth core CSR subject is based on the acknowledgement that a business does not operate within a vacuum and that its decisions and activities invariably have an impact on the natural environment. In this regard the ISO advocates an integrated approach that takes into consideration the direct and indirect economic, social, health and environmental implications of their decisions and activities.\(^{352}\)

The need to act responsibly toward the environment is essential not only for present generations, but also for future generations, and based on this realisation four basic principles which relate to the environment are identified.\(^{353}\) The four principles are: environmental responsibility, where the businesses accepts responsibility for its impacts on the environment; the precautionary approach, requiring businesses to take precautionary measures to limit their impact on the environment;\(^{354}\) environmental risk management,\(^{355}\) requiring businesses to have systems in place which enable them to assess and reduce environmental risks; and the polluter pays principle,\(^{356}\) in terms of which a business should carry the cost of pollution caused by its operations.\(^{357}\)

Four environmental issues are identified: the prevention of pollution, sustainable resource use, climate change mitigation and adaptation and protection of the environment, biodiversity and the restoration of natural habitats. The Guidance\(^{358}\) encourages businesses to improve their environmental performance through pollution prevention, which includes reductions in emissions to air and discharges to water as well as having a proper waste management system in place. The issue of sustainable

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\(^{352}\) ISO Guidance 41.

\(^{353}\) This core subject exhibits some similarities with reg 43(5)(a)(iii) of the Companies Act, which requires the social and ethics committee of a company to monitor the company’s environmental performance – see par 5.2.6.3.3.

\(^{354}\) This principle strongly reflects the precautionary principle identified by Kerr, Janda and Pitts as one of the seven legal principles of CSR (Pitts (ed) Corporate Social Responsibility 347 – 416).

\(^{355}\) The issue of environmental risk management lies at the heart of the National Environmental Management Act 107 of 1998.

\(^{356}\) The polluter pays principle is a well established principle in South African environmental law and is addressed in s 2(4)(p) and s 28 of the National Environmental Management Act 107 of 1998. For discussions of this principle see, Field 2004 (121) SALJ 772 – 784; and Du Plessis and Kotze 2007 (18) Stell L.R. 161 – 193.

\(^{357}\) Anon 2009 (July) Business and the Environment 13.

\(^{358}\) ISO Guidance 42 – 43.
resource use raised in the Guidance is based on the acceptance that resource availability is under threat due to unsustainable patterns of consumption, and businesses are expected to progress towards more sustainable resource use through more efficient energy use and more effective use of raw materials, for example. These issues are becoming increasingly relevant in the agricultural sector, and any future land redistribution should ensure that emerging farmers are familiar with these measures to ensure more sustainable resource use.

5.3.2.2.5 Fair operating practices

Fair operating practices are based on ethical behaviour, and the promotion of standards of ethical behaviour is crucial for all operating practices as well as any dealings which a business has with other businesses.359

According to the ISO with reference to social responsibility, this core subject refers to

the way an organization uses its relationships with other organizations to promote positive outcomes. Positive outcomes can be achieved by providing leadership and promoting the adoption of social responsibility throughout the organization’s sphere of influence.360

The consists of five issues addressing anti-corruption, responsible political involvement, fair competition, promoting social responsibility in the value chain, and having respect for property rights. Businesses are expected to identify the risks associated with corruption and implement and maintain policies aimed at counteracting corruption. Businesses are further encouraged to take part in the development of public policies that are to the benefit of society at large. Businesses within the agricultural sector should have their voices heard in issues such as land reform. Due to their knowledge of the sector, agricultural sector businesses have the potential to make meaningful contributions to the formulation of the land reform policy. These businesses could for instance inform the relevant state department that settling hundreds of beneficiaries on

359 This principle strongly resembles the principle of consistent best practice identified by Kerr, Janda and Pitts as one of the seven legal principles of CSR (Pitts (ed) Corporate Social Responsibility 285 – 346).

a specific piece of land would not be sustainable and that the beneficiaries would not be able to farm in a sustainable manner on the land provided.

The ISO also took cognisance of the fact that businesses have the ability through their procurement policies to influence other businesses which are part of their value chain.361 Through their purchasing power businesses have the ability to promote the principles of social responsibility and actively participate in raising awareness of social responsibility.362

5.3.2.2.6 Consumer issues

Consumer issues that are linked to social responsibility include fair marketing, protecting consumers' health and safety, sustainable consumption, access to essential services, and education and awareness.363 Regarding fair marketing, businesses should ensure that when communicating with consumers they do not engage in any practice that is deceptive or misleading. Instead businesses should provide complete and understandable information that would be beneficial to consumers.364 Businesses should further ensure that products and services rendered to consumers are safe to use or consume regardless of whether or not any safety measures are required by law.365 Finally, the Guidance366 notes that in educating consumers, businesses should for

361 ISO Guidance 51.
362 This principle can be related to the preferential procurement element of the BEE generic scorecard, which is also based on the principle that businesses are in a position though their purchasing power to influence the actions of supply-chain businesses. For a discussion of the preferential procurement element, see par 5.2.2.5.3.
363 This core issue resembles the requirement that the social and ethics committee of a company should monitor and report on consumer issues including the company's advertising and public relations – see par 5.2.6.3.4.
364 ISO Guidance 54. The issue of fair marketing has recently received legislative attention through the enactment of the Consumer Protection Act 68 of 2008. S 8 of the Act provides protection against discriminatory marketing, while ss 40 and 41 prohibit the use of physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, as well as the making of false, misleading or deceptive representations. S 22 of the Act supports the client or consumer's right to receive information in plain and understandable language. Information will comply with this requirement if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the information is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the information without undue effort.
365 S 55 of the Consumer Protection Act protects the consumer's right to safe and good quality goods.
366 ISO Guidance 60.
example address issues such as sustainable consumption, environmental protection, and health and safety.\textsuperscript{367}

5.3.2.2.7 Community involvement and development

Reaching out to a community through community involvement and development lies at the heart of improving land reform through CSR.\textsuperscript{368} The strategic positioning of the agricultural sector enables the sector to make a meaningful contribution to land reform \textit{inter alia} through community involvement and development, and in this regard the \textit{Guidance} encourages businesses through their social responsibility committees to support public policies, of which land reform is an example.\textsuperscript{369}

The ISO has recognised the importance of community involvement\textsuperscript{370} and development\textsuperscript{371} and has included the issue as a core subject of CSR.\textsuperscript{372} This inclusion stems from the fact that businesses have the potential, through their decisions and practices, to get involved in communities, and through this involvement to contribute to the development of those communities falling in their sphere of influence, thus ultimately supporting sustainable development.\textsuperscript{373} Community involvement not only strengthens the relationship of trust between a business and the community but also serves as a tool through the use of which development can take place – development that empowers the community and improves its quality of life.

This core issue recognises that a partnership approach is central to community involvement and development - an approach where \textit{“[s]hared responsibility is needed to...”}

\textsuperscript{367} In the local context the issue of consumer education and awareness is addressed in the preamble to the \textit{Consumer Protection Act}, which identifies one of the aims of the Act as the promotion and provision of consumer education, including education concerning the social and economic effect of consumer choices.

\textsuperscript{368} Community development is also one of the issues which a company’s social and ethics committee is required to report on, in accordance with reg 43(5)(a)(ii)(bb) of the \textit{Companies Act} – see par 5.2.6.3.1.

\textsuperscript{369} ISO \textit{Guidance} 62.

\textsuperscript{370} The aim of community involvement in this regard is to address social issues and to establish partnerships in order to maintain a social licence to operate (ISO \textit{Guidance} 63). For a discussion of the concept of a licence to operate, see par 3.6.6.

\textsuperscript{371} Community development can be in the form of employment creation and skills development, social investments, education, or addressing health issues such as HIV/AIDS.

\textsuperscript{372} This principle mirrors the principle of community investment identified by Kerr, Janda and Pitts as one of the seven legal principles of CSR (Pitts (ed) \textit{Corporate Social Responsibility} 497 – 530).

\textsuperscript{373} ISO \textit{Guidance} 60.
promote the well being of the community as a common objective.” This “shared responsibility” approach is of the utmost importance for a successful land reform programme, where all the parties involved in the partnership are bearers of rights and obligations.

Central to the notion of community involvement and development is the need to identify the needs and priorities of the community as a stakeholder (or potential stakeholder) of a business through a transparent consultative process – which needs to be an inclusive approach. When engaged in the process of identifying needs, one of the issues which are normally raised relates to education and the need to promote education at all levels. Given South Africa’s high rate of adult illiteracy and the economic drawback created by this illiteracy, providing access to education and the promotion of learning opportunities should be one of the main focal points of businesses’ social responsibility initiatives.

Another critical issue of community involvement and development is employment creation and skills development. Whereas the fifth issue of the labour practices core subject focuses on human development and the training of employees in the workplace, the critical issue of community involvement and development addresses a wider field of development. The Guidance supports the notion that due to its contribution to poverty reduction, employment creation is non-negotiable for economic and social development, while skills development is regarded to be an essential component of employment promotion. Within the national context, the importance of employment creation is reaffirmed by the introduction of black economic empowerment aimed at enabling black South Africans to meaningfully participate in economic activities. According to the Guidance, businesses should familiarise themselves with the potential impact of their investment decisions on the creation of employment

374 ISO Guidance 61.
375 It is estimated that the current level of adult illiteracy could be as high as 18% of persons over the age of 15, and that up to 9 million adults are not functionally literate (Anon 2011 http://www.southafrica.info/about/education/education.htm).
376 See par 5.3.2.1.3 in this regard.
377 ISO Guidance 65.
378 See par 5.2.2 for a discussion of BEE.
and consider creating direct employment as opposed to making use of temporary or seasonal workers. Businesses are further encouraged to identify skills shortages in their sphere of influence and engage in skills development programmes to address such shortages.

Closely related to employment creation and skills development is the issue of wealth and income creation. According to the Guidance, businesses can

... contribute positively to wealth and income creation through entrepreneurship programmes, development of local suppliers, and employment of community members, as well as through wider efforts to strengthen economic resources and social relations that facilitate economic and social welfare or generate community benefits.

As is the case with employment creation and skills development, this issue has a unique application in the South African context, where wealth creation and the fair distribution of the spoils of economic activities are central to the empowerment drive facilitated through the BEE Act. In relation to wealth and income creation, businesses are requested to consider

- supporting initiatives which would stimulate the diversification of existing economic activities (a good example would be BEE); and

- giving preference to local suppliers and contributing to local supplier development and providing assistance to the development of community-based associations of entrepreneurs. (This request is similar to the elements of preferential procurement and enterprise development on the BEE Generic Scorecard.)

The final issue of community involvement and development addresses social investment as a separate issue. Social investment in this regard refers to the situation where businesses “invest their resources in initiatives and programmes aimed at improving social aspects of community life” through activities likely to promote economic and social development. However, it is not apparent why social investment is

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380 ISO Guidance 66.
381 ISO Guidance 67. For a discussion of the elements of preferential procurement and enterprise development, see par 5.2.2.5.3 and par 5.2.2.5.4.
382 ISO Guidance 68.
addressed as a separate issue. Tall of the issues previously referred to in this section could be classified as being social investments. If a business elects to launch an initiative focussing on adult literacy, for example, or supports an initiative which enhances the skills levels of community members, it could be argued that through these initiatives the business is investing its resources in initiatives and programmes aimed at improving the social aspects of community life - thus engaging in social investment. It can accordingly be argued that any contribution to any of the issues identified under the heading of community involvement and development can be classified as social investment. It is suggested that instead of labelling social investment as a separate issue, it should have been noted in an introduction that any investment of business resources in initiatives and programmes aimed at addressing social issues is to be regarded as social investment.

5.3.2.3 Conclusion

The Standard can aptly be described as comprehensive, based on the core subjects identified. However, since the Standard was released only in late 2010 it is still unclear what the corporate uptake of the Standard will be. The release of the Standard as a South African National Standard has gone by almost un-noticed. The media gave no attention to its release and neither the SABS nor any of the state departments made any media statements on the issue. It is unclear whether this silent approach is due to a lack of understanding of the importance of CSR or whether the political will to drive this important issue is simply absent. It is recommended that the Government should embark on a much more active awareness programme to bring the importance of this national instrument to the attention especially of the private sector, which stands to gain the most from the content of the Standard. It is further recommended that the private sector should familiarise itself with the Standard and should start making use of the Guidance in its CSR policies and initiatives. Businesses in the agricultural sector should use the Guidance as a guideline when engaging in CSR activities, and when getting involved in land reform should pay special attention to the sections focussing on community involvement and development. One of the strategic benefits of getting involved in the land reform programme and assisting emerging farmers who have
received land in terms of the redistribution programme is that once these farmers become economically active they would be able to sell their produce to a company with which they have an established business relationship. This initiative would be further beneficial to the agricultural company since the actions would be recognised as enterprise development in terms of BEE, which would lead to an increased BEE score on the Generic Scorecard.383

Finally it should be noted that the voluntary nature of the Standard might lead to a lower uptake than with certifiable standards. The Standard guides businesses to implement their CSR initiatives without the coercive pressures of certification, but unfortunately in many instances businesses want to be able to show something for their efforts.384 Businesses want to be able to use their implementation of the Standard as a marketing tool. Consequently businesses would want to use a logo, similar to the one used when in compliance with the Global Reporting Initiative or the United Nations Global Compact, to indicate to the public that they are socially responsible businesses that deserve their licences to operate.385 However, as was indicated in the previous paragraphs, the Standard does not contain any requirements that have to be met and tools with which compliance could be measured. The fact that it is not a measurable Standard might in future prove to be a significant shortcoming, and in this regard it is recommended that the ISO as the international drafting body or the SABS as the local authority provide measurable targets in terms of which a business implementing the Standard can be measured.

Despite its possible shortcomings, the Standard remains as the only (inter)nationally accepted Standard for CSR and represents a welcome step in the development of CSR. Within the South African context, the Standard was, however, preceded by two extremely important documents which sculpted the South African corporate governance landscape and which linked corporate governance inter alia to CSR. The following paragraphs will discuss the King Report on Corporate Governance for South Africa 2002 (King II) and the King Report on Governance for South Africa together with the

383 See par 5.2.2.5.4 for a discussion of the enterprise development element and the generic scorecard.
385 For a discussion of the GRI, see par 5.4.2 and for a discussion of the UNGC, see par 5.4.3.
King Code of Governance Principles (collectively known as King III), which not only provided the roadmap for corporate governance in South Africa, but also assisted in establishing CSR as an important pillar of corporate governance.

5.3.3 King Report on Corporate Governance for South Africa 2002\textsuperscript{386} (King II)

5.3.3.1 Introduction

Eight years after the release of the King Report on Corporate Governance 1994,\textsuperscript{387} King II was published, representing the second edition of the trilogy of King reports promoting corporate governance.\textsuperscript{388} King II reviewed and expanded the corporate governance measures contained in King I and succeeded in linking the concept of CSR and good governance.\textsuperscript{389} The report was necessitated \textit{inter alia} by legislative developments brought about as a result of King I,\textsuperscript{390} as well as legislative interventions dealing with aspects of corporate governance.\textsuperscript{391} In its promotion of good corporate governance King II distinguishes between accountability and responsibility. According to King II\textsuperscript{392}

\begin{quote}
[\textit{o}]ne is liable to render account when one is accountable and one is liable to be called to account when one is responsible. In governance terms, one is accountable at common law and by statute to the company if a director, and one is responsible to the stakeholders identified as relevant to the business of the company.
\end{quote}

This denotes that the board of directors of a company, acting within its fiduciary capacity and responsibility, is not merely accountable to the company shareholders, but also

\textsuperscript{386} IoD King Report on Corporate Governance for South Africa 2002 (IoD Parklands 2002). The main points of King II were summarised and released in an executive summary (IoD Executive summary of the King Report 2002).

\textsuperscript{387} IoD King Report on Corporate Governance for South Africa 1994 – hereinafter referred to as King I.

\textsuperscript{388} In this context King II represents the second step in the evolutionary process of corporate governance in South Africa.


\textsuperscript{390} Legislative developments in the area of labour law (such as the Labour Relations Act 66 of 1995 and the Employment Equity Act 75 of 1997), environmental law (such as the National Environmental Management Act 107 of 1998) and commercial law (statutory amendments to the Companies Act 61 of 1973).

\textsuperscript{391} Legislative interventions such as the Insider Trading Act 135 of 1998, the Public Finance Management Act 1 of 1999 and amendments to the Banks Act 94 of 1994. For a discussion of these legislative advancements, see IoD King Report 2002 9.

\textsuperscript{392} IoD King Report 2002 7.
responsible to other stakeholders of the company. Following from this, in the language of King II a good corporate citizen acting with its license to operate is one which accepts that it has a responsibility toward various stakeholders resulting from its business operations, and that as a result of this responsibility it can be held accountable if it neglects to act responsibly. A responsible corporate citizen not only recognises that it co-exists in “an environment where many of the country’s citizens disturbingly remain on the fringes of society’s economic benefits” but also takes meaningful steps toward addressing this societal issue.

The notion that a company is responsible to its stakeholders (as opposed to shareholders) represents an important move away from the traditional shareholder supremacy approach to a more inclusive stakeholder approach, with stakeholders such as local communities, employees and suppliers having moral claims on the company.

The report further introduced a shift in the focus from the single bottom line (focused exclusively on the financial aspects of a company’s activities) to the now generally accepted triple bottom line, which encompasses the economic as well as environmental and social performance of a company’s activities. This shift corresponds with the

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393 Rossouw 2005 (44) Business & Society 97. West (2006 (68) Journal of Business Ethics 437) is of the opinion that it appears as if the principle of accountability as identified in the report is applicable to shareholders only, and not to other stakeholders.
394 IoD King Report 2002 18. The reference to accountability and responsibility corresponds with the key principles of social responsibility as identified by the ISO Guidance (see par 5.1).
395 The shareholder supremacy approach identifies shareholders as the only grouping with a legitimate interest in the business. King II stipulates that this approach is not in line with the international approach to corporate governance, where inclusivity is one of the foundations. According to King II (IoD King Report 2002 11) one of the reasons for the rejection of this approach is to be found in the fact that a company “becomes a separate persona in law and no person whether natural or juristic can be owned”. For a discussion of the stakeholder supremacy approach to CSR, see par 3.4.2.1.
397 Who, according to Reed, “are the primary object of social and economic development and who not infrequently suffer negative development effects from irresponsible corporate practice” (Reed 2002 (37) Journal of Business Ethics 239).
399 IoD King Report 2002 10. For a discussion of the triple bottom line approach, see par 3.4.2.1.
global focus on sustainability and the need for companies to contribute in a sustainable manner in their various spheres of influence. The move to triple bottom line management and reporting encourages companies to embrace the “non-financial” (i.e., environmental and social) aspects in integrated sustainability reports.

The content of King II is divided into an introduction providing a background to the report and a Code of corporate practices and conduct (the Code) containing recommendations addressing issues such as: dealing with boards and directors (section 1), risk management (section 2), integrated sustainability reporting (section 4) and compliance and enforcement (section 6). The report does not provide a prescriptive list of disclosure requirements. It does, however, encourage companies to follow its guidelines to improve their overall governance.

The recommendations contained in King II are not prescribed by law, nor does the Report favour a legislative approach. The recommendations are voluntary and based on self regulation and as a result no provision is made for enforcement through an enforcement agency. Despite its voluntary nature, Rossouw notes that an adequate legal and regulatory framework is needed for the proper functioning of any

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401 Although environmental and social aspects are referred to as non-financial matters, it should be stressed that these aspects have very real financial consequences. The reference to “non-financial” merely serves to distinguish these aspects from the traditional financial bottom line.

402 According to Mervyn King, the chairperson of the King Committee, as quoted by Barrier 2003 (Aug) Internal Auditor 68 – 73 “[t]here’s some suggestion that certain aspects of the recommendations in King II should be legislated – in other words, be compulsory for all companies. Business is a difficult matter, and those who run it can’t have the prescience to envisage what is going to happen from day to day, so they need flexibility in the process associated with administering their companies. To have the rigidity of a statute doesn’t make sense”.

403 The Johannesburg Securities Exchange Limited (JSE) does, however, require listed companies to disclose their compliance (or lack thereof) with the recommendations in King II through the use of a narrative statement which would enable shareholders and potential investors to evaluate the company’s application of the principles of corporate governance (JSE Listing Requirements par 7.F.5; Esser and Coetzee 2004 (12) Juta’s Business Law 26 – 27; and Deloitte & Touche Date unknown www.deloitte.com/assets/Dcom-SouthAfrica/Local%20Assets/Documents/JSE%20Listings%20Requirements.pdf).

404 King II does, however, identify shareholder activism as an important enforcement mechanism which can be utilised by shareholders to ensure the implementation of the recommendations contained in King II (IoD King Report 2002 149 – 151). For a discussion on King II, corporate governance and shareholder activism, see Rademeyer and Holtzhausen 2003 (120) SALJ 767 – 776, where the authors refer to a variety of mechanisms available to shareholders in terms of the Companies Act 61 of 1973 through which concerns about corporate governance can be raised.

405 Rossouw 2005 (44) Business & Society 98.
voluntary governance code stressing a link between the law and the Code.\textsuperscript{406} The non-prescriptive nature of \textit{King II} implies that enforcement of the Code should be regarded as an issue between company boards and their stakeholders. The focus is on corporate governance at a business level rather than on a regulatory level.

The discussion of the relevant content of \textit{King II} will start with a short explanation of its focus and scope of application. Following these explanations, the discussion will then turn to the definitions which are relevant for a discussion of CSR, and finally the section will provide an overview of recommendations with a CSR scope.

5.3.3.2 \textit{What is the focus of King II?}

From a CSR perspective the primary focus of \textit{King II} is the move from concentrating purely on the single (financial) bottom line to a more inclusive approach in which the environmental and social aspects of a company’s activities are also included in business management and reporting. Following this move from the single to the triple bottom line, the report recommends that companies annually report on sustainability issues in which disclosures on “non-financial” issues (\textit{ie} social and environmental) are included.\textsuperscript{407}

\textit{King II} takes cognisance of the fact that the introduction of a Code of corporate practices and conduct across the entire business sector could be costly and give rise to burdensome administrative requirements. Consequently its scope of application has been limited.

5.3.3.3 \textit{Scope of application}

The principles and recommendations contained in the Code\textsuperscript{408} are applicable to companies listed on the JSE, banks, financial and insurance entities and certain public

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\textsuperscript{406} It should be noted that in many instances the reason for following the voluntary, self-regulatory approach is found in legal frameworks which do not make sufficient provision for the control of corporate activities. As a result of this inadequate legal framework, business sectors “almost have no other choice than starting the process of corporate governance reform in a voluntary self-regulatory manner” (Rossouw 2005 (44) \textit{Business & Society} 98).

\textsuperscript{407} For a discussion of the requirement of integrated sustainability reporting, see par 5.3.4.6.4.

\textsuperscript{408} IoD \textit{Executive summary} 20 and IoD \textit{King Report} 2002 21.
sector enterprises. Furthermore, all other companies are encouraged to give consideration to the application of the Code to the extent that the principles are relevant to the company. The application of the Code is consequently limited to the company as a legal entity and is not applicable for instance to close corporations, trusts or any other legal entity other than a company. Despite the fact that *King II* is not applicable to the majority of business enterprises, it is important that the recommendations in the report are “capable of being attained by all companies”.

5.3.3.4 Relevant definitions

Although *King II* does not define CSR, it does identify social responsibility as one of the seven characteristics of good corporate governance. A socially responsible company is viewed as a company which is not only aware of social issues but which also responds to these issues. *King II* links the notion of being socially responsible to being a good corporate citizen. According to *King II* a good corporate citizen is seen as one that is non-discriminatory, non-exploitative, and responsible with regard to environmental and human rights issues.

Being a good corporate citizen and having good governance policies and practices in place can potentially add value to the company, not only to the financial bottom line but also to the social and environmental balances. The following section will discuss the

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409 *King II* follows the “comply or explain” approach, where those entities which fall within its scope of application are required to comply or provide justification for non-compliance (Aka 2007 (33) *North Carolina Journal of International Law & Commercial Regulation* 250). A much more flexible approach of “apply or explain” is followed in *King III*. For a discussion of this approach see par 5.3.4.5.


411 Although the focus of *King II* is on companies, other legal entities used to conduct business should take note of the content and adapt and apply the recommendations to the extent that the recommendations could guide their business management.

412 IoD *King Report 2002* 143.

413 IoD *Executive summary* 11 and IoD *King Report 2002* 12. The other characteristics of good governance according to *King II* are discipline, transparency, independence, accountability, responsibility and fairness (IoD *Executive summary* 10 – 11 and IoD *King Report 2002* 11 – 12).


415 Corporate citizenship has been identified as one of the major approaches to CSR. See par 3.4.2.4 for a reference to this approach.
CSR content found in *King II*. It should be noted that much of the content which is relevant to CSR relates to the social and environmental aspects of business activities.

5.3.3.5 **CSR content in King II**

From a CSR perspective, the most important topics addressed in *King II* are compliance and enforcement and the requirement that companies should follow the inclusive approach to corporate governance and report annually on sustainability issues.

5.3.3.5.1 Compliance and enforcement

As was stated above, compliance with the recommendations of *King II* remains voluntary for the majority of companies\(^ {416}\) and no enforcement authority has been established.\(^ {417}\) However, the report stresses the fact that

> [t]he board should ensure that the company complies with all relevant laws, regulations and codes of business practice, and that it communicates with its shareowners and relevant stakeholders (internal and external) openly and promptly and with substance prevailing over form.\(^ {418}\)

This statement underscores the fact that a director has a legal obligation to comply with legislation and relevant business codes and practices, as well as a responsibility toward all relevant stakeholders (including shareholders). A responsible citizen, according to this statement, communicates (in company reports too) in such a manner to its stakeholders that its stakeholders would be able to form an informed opinion of the business based on its disclosures. This is a further endorsement of the inclusive approach advocated by the report.

From a CSR point of view the Report’s stance on disclosure is to be welcomed. According to the Report\(^ {419}\) the adoption of a more open disclosure regime would benefit the company by highlighting misconduct or non-performance, resulting from which

\(^{416}\) Except for listed companies for which compliance with *King II* is a listing requirement.

\(^{417}\) Despite the fact that no enforcement authority is established, various legal mechanisms exist to enforce the principles of corporate governance which overlap with existing legal principles. Such principles include the director’s fiduciary duties and the duty to act with care and skill as well as other statutorily imposed duties. Contravention of these duties would subject the director to criminal as well as civil prosecution.

\(^{418}\) IoD *Executive summary* 21.

\(^{419}\) IoD *King Report 2002* 147.
remedial action could be taken. The move towards a more open disclosure regime is important for the establishment of a culture of compliance, which is to be furthered by the requirement that companies should provide sustainability reports.

5.3.3.5.2 Integrated sustainability\textsuperscript{420} reporting

As stated in the introduction to the discussion of \textit{King II}, one of the most important developments brought about by \textit{King II} was the requirement that companies should provide sustainability reports. According to the report\textsuperscript{421}

\begin{quote}
[s]ustainability can be seen therefore to focus on those non-financial aspects of corporate practice that, in turn, influence the enterprise’s ability to survive and prosper in the communities within which it operates, and to ensure future value creation. This, in turn, represents the essence of corporate social responsibility ...
\end{quote}

This statement supports the argument that a good corporate citizen\textsuperscript{422} acting with social responsibility is one which is concerned about more than just economic performance. A socially responsible business realises that its business practices have an influence on society at large and more specifically on the communities within which it operates. It realises that a balance needs to be struck between economic performance and social and environmental performance. \textit{King II} requires companies to report on what is now generally referred to as the “triple bottom line” – reporting which includes economic, social and environmental issues, providing a clear signal to companies that social and environmental issues should become part of everyday business management in order to secure the company’s longevity.\textsuperscript{423}

The report stipulates that a company should on an annual basis report on the nature and extent of its policies and practices regarding stakeholder relations, social issues, social responsibility and environmental performance. These reports should be included in the annual report and should be prepared by a person with the appropriate skills and experience. The report should be signed by someone with the necessary authority and should be made available to shareholders and other stakeholders.

\begin{footnotes}
\item[420] The term “sustainability” in this context is derived from “sustainable development” which is defined as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (IoD \textit{King Report 2002} 91).
\item[421] IoD \textit{King Report 2002} 91.
\item[422] \textit{King II} refers to various defining characteristics of good corporate citizenship, which includes corporate governance (managing businesses in a responsible and accountable fashion), respect for human rights, environmental responsibility and community engagement through the promotion of collaborative partnerships (IoD \textit{King Report 2002} 92 – 93). See par 3.4.2.4 for a reference to corporate citizenship as an approach to CSR.
\end{footnotes}
transformation, health and safety, and environmental management.\textsuperscript{424} Certain matters must be specifically included in the sustainability report. These matters include a description of health and safety practices, reporting on environmental corporate governance, policies defining the prioritisation and spending on social investment, and a disclosure of human capital development.\textsuperscript{425}

The integrated sustainability report requires a company to report on its compliance with safety, health and environmental (SHE) legislation and regulations, and how any of these issues may impact on the financial bottom line.\textsuperscript{426} Regarding the description of health and safety practices, a company must demonstrate its commitment to improving health and safety practices through a demonstrated effort to reduce workplace accidents, for example. Reporting on health and safety issues should also include a description of the company's policies and practices with regard to HIV/AIDS and its potential impact on the company.\textsuperscript{427}

Specific attention should further be given to the extent of initiatives supporting social transformation such as employment equity, BEE and social investment. A company must show how it has contributed to social transformation and in particular how its procurement practices have benefitted those in need of upliftment.\textsuperscript{428} Stakeholders should be informed about the company's performance on employment equity issues. How have previously disadvantaged individuals, and in particular women, been provided with equal opportunities to reach executive levels in the company?\textsuperscript{429} Stakeholders should further be provided with information regarding the company's

\begin{itemize}
  \item \textsuperscript{424} IoD Executive summary 34.
  \item \textsuperscript{425} IoD Executive summary 35 – 36.
  \item \textsuperscript{426} IoD King Report 2002 107. This issue is also one of the issues which a company's social and ethics committee is now required to monitor. See par 5.2.6.3.3.
  \item \textsuperscript{427} Compliance with this requirement would also be in line with the board’s responsibility to have proper risk management systems in place (as required by paragraph 3 of the Code). HIV/AIDS represents a potential risk to any business. It requires dedicated attention from management.
  \item \textsuperscript{428} This requirement reflects the indicator on the BEE scorecard referring to preferential procurement. For a discussion of the BEE scorecard, see par 5.2.2.5.3.
  \item \textsuperscript{429} IoD King Report 2002 115 – 116. The issue of equal representation in the workplace is addressed in the Employment Equity Act, which specifically requires an employer to draft an employment equity plan which provides an outline of how it intends to achieve proper racial representation in all levels of employment.
\end{itemize}
Which measures has the company taken to enable historically disadvantaged South Africans to become economically active and enter the economy?

In the context of CSR, the most important reporting requirement in *King II* is the requirement dealing with social investment disclosures. Unfortunately *King II* does not provide many insights as to what is required from companies when reporting on this subject. According to *King II*\(^ {431}\) boards should become familiar with the criteria in regard to socially responsible investment used by investment managers responsible for investment of corporate and pension funds on its behalf. (emphasis added)

*King II* does not provide any further guidance regarding the criteria to be used when reporting on and accessing socially responsible investment. It does, however, refer to community investment as one of the three categories of socially responsible investment.\(^ {432}\) Community investment refers to investing in the development of communities in order to contribute to the growth and upliftment of the communities. Unlike other jurisdictions, South Africa does not for example require pension funds to indicate to what extent socially responsibility is used as a criterion for placing investments.\(^ {433}\)

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\(^{430}\) A company’s contribution to BEE will be evident from the points which it has achieved on the BEE scorecard. For a discussion of the BEE scorecard, see par 5.2.2.4.

\(^{431}\) IoD *King Report 2002* 118.

\(^{432}\) IoD *King Report 2002* 118. The other two categories of socially responsible investment referred to are positive and negative screening, and shareowner advocacy and corporate engagement. In terms of the first of these, positive screening is used to identify companies with a good CSR record, while negative screening refers to criteria used to exclude companies with unacceptable CSR track records. “Shareowner advocacy and corporate engagement” refers to “the process of using shareowner influence to help bring about corporate social and environmental change” (IoD *King Report 2002* 118). Community investment is not only one of the seven legal principles of CSR, but also features very prominently in the ISO Guidance. For a discussion of community investment in terms of the Standard, see par 5.3.2.1.7.

\(^{433}\) In July 2011 the Institute of Directors of Southern Africa released the *Code for Responsible Investing in South Africa 2011* (CRISA), which is intended to provide guidance to institutional investors on responsible investing. This Code builds on the recommendation of King II to integrate environmental, social and governance considerations into investment decision-making (IoD CRISA 4) and is aimed at institutional investors as asset owners (such as pension funds or insurance companies). The Code is based on the following five principles: Principle 1: An institutional investor should incorporate sustainability (which is defined as “the ability of a company to conduct its operations in a manner that meets existing needs without compromising the ability of future generations to meet their needs. Sustainability includes managing the impact that the business has on the life of the community...” (IoD CRISA 9), considerations into its investment analysis and
The matters referred to above which require specific consideration can be labelled as the disclosure of non-financial information.\textsuperscript{434} Such disclosure should be based on the principles set out in the GRI Sustainability Reporting Guidelines on matters such as social performance.\textsuperscript{435} It should be noted that when reporting on financial matters, such reporting is addressed to those who are financially literate. When reporting on non-financial matters such as stakeholder relationships, however, it should be kept in mind that the style of disclosure should be appropriate to the targeted audience.

Reporting on the environmental and social dimensions of a business can be truly integrated only if it is approached in an inclusive manner. This approach is based on the notion that all stakeholders\textsuperscript{436} (including shareholders)\textsuperscript{437} should be considered and that the directors owe responsibility to the company as an entity, and not only to its shareholders. According to West,\textsuperscript{438} \textit{King II} justifies the inclusive approach by appealing to the possibility that companies might experience improved economic effectiveness\textsuperscript{439} or by appealing to the prevalent socio-economic conditions in the country.\textsuperscript{440}

\begin{itemize}
  \item investment; Principle 2: An institutional investor should demonstrate its acceptance of ownership responsibilities in its investment arrangements and investment activities; Principle 3: Where appropriate, institutional investors should consider a collaborative approach to promote acceptance and implementation of the principles of CRISA and other codes and standards applicable to institutional investors; Principle 4: An institutional investor should recognise the circumstances and relationships that hold a potential for conflicts of interest and should pro-actively manage these when they occur and; Principle 5: Institutional investors should be transparent about the content of their policies, how the policies are implemented and how CRISA is applied to enable stakeholders to make informed assessments (IoD CRISA 10 – 11).
  
  Although these are labeled as non-financial issues, they have potentially significant financial implications for the company.

  For a discussion of the GRI guidelines, see par 5.4.2. These principles include reliability, relevance and clarity.

  According to \textit{King II} (IoD King Report 2002 6) “[T]he inclusive approach recognises that stakeholders such as the community in which the company operates, its customers, its employees and its suppliers need to be considered when developing the strategy of a company”.

  “The modern approach is for a board to identify the company’s stakeholders, including its shareholders” (IoD King Report 2002 7).

  West 2006 (68) \textit{Journal of Business Ethics} 437.

  “A company is likely to experience indirect economic benefits such as improved productivity, and corporate reputation by taking those factors into consideration” (IoD King Report 2002 12).

  “... companies in South Africa must recognise that they co-exist in an environment where many of the country’s citizens disturbingly remain on the fringes of society’s economic benefits” (IoD King Report 2002 18).
\end{itemize}
The words of Miles and Jones\textsuperscript{441} aptly summarise the approach as follows:

\textit{[T]riple bottom line reporting informs stakeholders about the intentions of the company to enhance its social performance, emphasises its positive actions, signifies its respect for Corporate Social Responsibility (CSR) and demonstrates the legitimacy of the company in the eyes of stakeholders.}

Despite the fact that \textit{King II} was a refreshingly welcome move toward establishing a culture of corporate governance where CSR plays an important role, the report is not without its limitations.

5.3.3.6 Limitations

Although \textit{King II} represented an important step in the direction of instilling in companies the concept of being a good corporate citizen through the use for example of sustainability reporting, the biggest stumbling block in the success of this initiative lies within its scope of application.\textsuperscript{442} Since the recommendations of \textit{King II} are aimed at a very secluded section of the business sector, the majority of South African business enterprises fall outside of its scope of application. Such businesses are merely encouraged to consider the application of \textit{King II} to the extent that the principles are applicable. Application remains totally voluntary for them. According to Loubser\textsuperscript{443} “there is no general consensus that all companies will voluntarily comply if they are not compelled to do so”. In this regard \textit{King II} finds itself between a rock and a hard place. On the one hand \textit{King II} must remain voluntary in order not to become overly burdensome and in order to provide businesses with some scope of flexibility in applying the recommendations.\textsuperscript{444} On the other hand the question might rightfully be asked whether or not companies will comply if they are not legally required to. Should there be a move beyond the selective scope of application? Andreasson\textsuperscript{445} is of the opinion that such a move would in all likelihood materialise only in the event of an increase in big corporate scandals similar to the Enron scandal, which gave rise to the American \textit{Sarbanes-Oxley Act}. He further notes that due to the fact that from a

\textsuperscript{441} Miles and Jones 2009 (14) \textit{Deakin Law Review} 66.
\textsuperscript{442} For a discussion of the scope of application, see par 5.3.3.3.
\textsuperscript{443} Loubser 2002 (22) \textit{Juta’s Business Law} 138.
\textsuperscript{444} Andreasson 2009 \textit{Business & Society} 16.
\textsuperscript{445} Andreasson 2009 \textit{Business & Society} 17.
government point of view it is impossible for governmental departments to enforce voluntary disclosure,\textsuperscript{446} “they often try to mitigate this difficulty with mandatory legislation”.\textsuperscript{447}

Although one of the purposes of requiring companies to report on sustainability issues is to enable stakeholders to form an informed opinion of the company, Sonnenberg and Hamann\textsuperscript{448} in an evaluation of the sustainability reports of listed companies come to the conclusion that

\begin{quote}
    beyond the prescribed description of the structures and internal reporting processes, very little information about their actual operation or the results of their interventions is divulged in a manner that would make it possible to assess their effectiveness.
\end{quote}

Regarding social reporting and stakeholder engagement, the authors find that fewer than 5\% of companies included in their case study provided any information that would enable an assessment of their stakeholder engagement procedure. They concluded that reporting on social issues was at best anecdotal and unsystematic.\textsuperscript{449}

Unfortunately it would seem that despite its good intentions, \textit{King II} would be successful only once companies are convinced of the benefits associated with good corporate governance.

Due to its limited scope of application and the limitations identified above, the revision of \textit{King II} became inevitable. Seven years after the release of \textit{King II}, the King Committee released the third part in the ongoing corporate governance trilogy. The following

\begin{flushright}
\textsuperscript{446} The voluntary nature of initiatives gives rise to the inability of Government to enforce them. \\
\textsuperscript{447} Andreasson 2009 \textit{Business & Society} 17. \\
\textsuperscript{448} Sonnenberg and Hamann 2006 (23) \textit{Development Southern Africa} 313. \\
\textsuperscript{449} Regarding reporting on social issues, the authors found that companies did report on issues of occupational health and safety, employment equity and BEE. The reason for reporting in these areas is to be found in the fact that these disclosures are required by law and that companies are merely complying with their legal obligations (Sonnenberg and Hamann 2006 (23) \textit{Development Southern Africa} 316). This problem is not unique to South Africa, however. On the international front Gray (2001 (10) \textit{Business Ethics: A European Review} 13) writes “the quality of attestation to social and environmental reports is woefully poor” while, with reference to the United Kingdom Sittle (2002 (107) \textit{Business and Society Review} 349) notes that “there are significant distortions and omissions of information concerning ethical issues in current U.K. reporting systems”. Laufer (2003 (43) \textit{Journal of Business Ethics} 254) concludes that “simply relying on the integrity of corporate representations should seem increasingly naïve to those inside and outside the SRI community”.
\end{flushright}
sections will dissect this third King report in order to determine whether or not it represents an improvement on King II.

5.3.4 The King Report on Governance for South Africa\textsuperscript{450} and the King Code of Governance Principles (collectively known as King III)\textsuperscript{451}

5.3.4.1 Introduction

King III can be described as the map providing management with direction on how to manage a business within the changing world of corporate governance. It provides a list of best practice principles aimed at guiding businesses to “do the right thing”.\textsuperscript{452} It is aimed at those managers who are forward-looking and who strive toward a business operating with a licence to operate endorsed by society.

King III was necessitated by the recommendations contained in King II together with the recent reform of corporate law, most significantly the new Companies Act\textsuperscript{453} which unlike its predecessor did not deal with corporate governance.\textsuperscript{454} International trends and developments in corporate governance created the need for King II to further evolve. Although King III represents a voluntary approach (with no statutory obligation to comply) to corporate governance, section 7(b)(iii) of the new Companies Act identifies one of the purposes of the Act as

encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation. (emphasis added)


\textsuperscript{451} Institute of Directors in Southern Africa King Code of Governance for South Africa – 2009 (IoD Parklands 2009) (hereinafter referred to as the King III Code).

\textsuperscript{452} Anon 2009 (July 23) FinWeek 46.

\textsuperscript{453} 71 of 2008.

This purpose is indicative of the linkage between the law (the *Companies Act*) and governance (*King III*) and stresses the interplay between the Act and *King III*.\(^{455}\) It is further an acknowledgement of the role that businesses play not only as corporate citizens but also to a large extent as agents of change. *King III* stresses the importance of companies accepting the fact that they are part of a larger environment and that they have a duty to act in a sustainable manner.\(^{456}\)

Since the work done by the King Committee is internationally recognised as being at the forefront of corporate governance, it was decided that the Committee should also be responsible for drafting the third report. A further reason for the drafting of *King III* is to be found in the recent international financial crisis and corporate scandals – had proper good governance practices been followed, the crisis and scandals might have been averted. South Africa’s strong governance approach brought about by the predecessors of *King III* might be one of the reasons why the country has to a large extent been spared from the worst effects of the international economic crisis. In world markets a good governance climate is conducive to gaining access to the global capital of institutional investors.\(^{457}\)

The international economic crisis has left many institutional investors wary of investing in countries with a weak corporate governance regime and they have turned their attention to countries with a strong governance approach. *King III* implicitly accepts the premise that institutional investors are increasingly taking note of the governance practices and principles of a business before deciding to invest in it. In this regard institutional investors as a stakeholder group have an important role to play in driving governance practices and sustainability.\(^{458}\) The issues of governance and sustainability are central themes of the report, which will be discussed in more detail in the sections to follow.

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\(^{455}\) Regarding governance, it should be noted that since *King III* is based on a voluntary approach, compliance with it will result in compliance with the Act, but that compliance with the prescriptions of the Act does not necessarily imply compliance with *King III* (King 2010 *Acta Juridica* 447).

\(^{456}\) Gstraunthaler 2010 (7) *Corporate Ownership and Control* 147.

\(^{457}\) Institutional investors’ commitment to corporate governance is evident from the fact that institutional investors are willing to pay a substantial premium for companies with strong corporate governance policies (Picou and Rubach 2006 (65) *Journal of Business Ethics* 56; and Newell and Wilson 2002 (3) *The McKensey Quarterly* 2 – 23).

\(^{458}\) Institutional investors have also been identified as one of the major drivers of CSR. See par 3.8.2.
King III heralds a new era for good corporate governance and places a critical emphasis on issues such as sustainability and corporate citizenship. It is currently the benchmark against which future governance requirements will be measured.

Currently very little academic literature has been written on King III and as a result of this, the following sections will largely be based on the text of the Report as well as the King III Code. The following sections will provide a brief outline of, and reflection on those aspects contained in the Report which relate to CSR in general and the CSR of agricultural companies specifically. The outline will initially identify the focus of the Report as well as the scope of its application. Following this it will be demonstrated how concepts such as CSR and corporate citizenship are defined in King III and then continue to identify the principles relevant to CSR. Finally the section will demonstrate the relevance of the Report for agricultural companies and their CSR.

5.3.4.2 What is the focus of King III?

As stated above the main focus of King II is on sustainability reporting. King III identifies the need for integrated reporting where social, environmental and economic issues are combined in a single report providing a more encompassing view of a business to its various stakeholder groups. King III strongly exhorts businesses to include integrated reporting in their business management and strategies. The aim of integrated reporting is to report on the effect that a business has on the three environments in which it operates – the social (people), the natural (the planet) and the economic (profit)459 – to highlight the positive effect that the business has in each of these environments and to indicate any existing negative impacts it may be having together with possible remedial activities to address these negative impacts. King III supports the notion that a responsible corporate citizen will embrace the concept of integrated reporting and will use this reporting to demonstrate its commitment to the society in which it operates in order to receive the community’s approval and, in so doing, its licence to operate.460

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459 These three environments are commonly referred to as the 3Ps.
460 In this regard Gstraunthaler argues that corporate governance “might be used as a tool to enhance the legitimacy of companies” (Gstraunthaler 2010 (7) Corporate Ownership and Control 147).
this regard it can be argued that businesses are accountable to the public from which a
number of its stakeholders will emerge.\footnote{One of the key features of accountability is that once it is established who is accountable to whom and what they are liable to account for, it should be established what the standards are against which accountable actions are to be measure. (For a general discussion of accountability under the new Companies Act, see Ncube 2010 Acta Juridica 43 – 72.)}

King III recognises the fact that a business has various stakeholders and stresses the
importance of the various stakeholders by proposing an inclusive stakeholder approach,
where the interests and expectations of legitimate stakeholders are considered in
decision-making.\footnote{IoD King III Report 13 and IoD King III Code 12. The inclusive stakeholder approach will be referred to in more detail in par 5.3.4.6.3.}

5.3.4.3 Scope of application\footnote{The recommendations contained in the King III Report became effective on 1 March 2010.}

Unlike its predecessors, which focussed exclusively on companies\footnote{See par 5.3.3.3 regarding the scope of application of King II.} (hence the specific reference to corporate governance), King III is applicable to all forms of legal entities “regardless of the manner and form of incorporation or establishment”\footnote{IoD King III Report 17.} and not specifically focused on specified types of companies. It is also applicable to all forms of business, whether a business is in the public, private, non-profit or non-governmental sector.\footnote{IoD King III Report 17, Colman 2009 (April) Without Prejudice 8 and Good 2009 August De Rebus 19.} The broader, inclusive approach should be viewed as an attempt to create a
culture of good governance throughout the entire South African economy. Since the
scope of application of King III is much wider than its predecessor, its goal of creating a
culture of good governance throughout the economy has a better chance of being
attained.

5.3.4.4 Relevant definitions

In order to examine the principles and practices relevant to CSR recorded in King III it is
important to establish how relevant concepts such as CSR, corporate social investment
and corporate citizenship are defined. According to the King III Report\footnote{IoD King III Report 117.} and the King
responsible citizenship entails “an ethical relationship of responsibility between the company and the society in which it operates”. Resulting from this relationship is the acceptance by a business that being a citizen implies having rights and responsibilities in the economic, social and natural environments. A responsible citizen takes responsibility for the economic, social and environmental well-being of the society in which the citizen functions. According to Miles and Jones

King III asserts that a good corporate citizen is one which has comprehensive policies and practices in place which enable it to make decisions and conduct its operations ethically, meet legal requirements and show consideration for society, communities and the environment.

From this it is evident that a responsible corporate citizen is inter alia a socially responsible citizen. Corporate social responsibility is defined as

… the responsibility of the company for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that: contributes to sustainable development, including health and the welfare of society; takes into account the legitimate interests and expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the company and practiced in its relationships.

Corporate social investment is seen as one of the manifestations of a business’ CSR, where the business invests (through financial or other contributions) in activities within the company’s area of influence.

The core elements of this definition for CSR are the acceptance by a business that its decisions and activities have an impact on the society in which it operates – a society consisting of more than mere clients or shareholders – and that a business has an important role to play in sustainable development.

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468 IoD King III Code 50.
469 Miles and Jones 2009 (14) Deakin Law Review 60.
470 IoD King III Report 118 and IoD King III Code 51. When the definition of CSR in King III is compared to the definition provided by the ISO Guidance, the similarities are evident. Both of these leading instruments regard CSR as the acceptance of responsibility (accountability) for the impacts that a business’ decisions and actions have on society and the environment. Both of these instruments further establish the link between CSR and sustainable development and identify the important role of businesses in contributing to sustainable development. Further, both of the definitions place a strong emphasis on the role of stakeholders and the fact that the legitimate interests of stakeholders have to be taken into account in business decisions and actions.
The *King III* definition of CSR differs in a very important respect from the definition provided by the majority of international authors, with the exception of the ISO *Guidance*.472 No reference is made to the notion that CSR consist of voluntary actions that go beyond the requirements of the law. This definition regards CSR as decisions or activities that are “in compliance with applicable law and consistent with international norms of behaviour”.473 A business applying the recommendations of *King III* (as norms of behaviour) will be regarded as a socially responsible corporate citizen.

The basic approach of *King III* is that governance compliance (of which CSR is a facet) should be predominantly done on a voluntary, non-legislated basis. This approach does not, however, denounce the important role played by legislation in governance compliance as evidenced by the referral to corporate governance in section 7 of the *Companies Act*.474 The international approach to corporate governance varies between the “comply or else” approach and the “apply or explain” approach.

5.3.4.5 “Comply or else” vs “apply or explain”

In terms of the “comply or else” approach, compliance with governance requirements is not optional (*comply*) and non-compliance will give rise to the business being sanctioned (*or else*).475 This approach normally has a regulatory body which acts as a “watch dog”. It is responsible for overseeing compliance and sanctioning non-compliance. Points of critique against this approach are that these compulsory governance requirements will result in additional costs to a business, will cause a further administrative burden on the business, and will be time consuming – all of which will have a negative impact on a business’ financial bottom line.

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472 For an overview of definitions provided for CSR, see par 3.2.
473 IoD *King III Report* 118 and IoD *King III Code* 51. Although the definition could not refer to itself, the impact of *King III* is such that reference should be made to decisions and activities that are in compliance with applicable law and consistent with national and international norms of behaviour. *King III* represents an important step towards establishing national norms of behaviour for businesses.
474 See par 5.2.6 above.
475 The American *Sarbanes-Oxley Act* of 2002, which is aimed at preventing financial scandals such as the Enron or World Com scandals, follows the “comply or else” approach (IoD *King III Report* 6 and IoD *King III Code* 5). This act follows the government regulation approach to governance instead of the voluntary self-regulation approach advocated by *King III* (Esser 2009 (2) SA Merc LJ 189 and Good 2009 *De Rebus* 19).
Regarding governance, South Africa currently follows a dual or hybrid system of governance consisting of compulsory legislative compliance (such as the *Companies Act*) and voluntary governance principles (such as *King III*). The approach followed in *King III* is one of “apply or explain” and is in line with the approach followed by the European Union.\(^\text{476}\) *King III* promotes the voluntary and much more flexible approach to governance compliance. Since it is applicable to all types of businesses, regardless of its formation, a more cost effective and less time consuming approach had to be followed. Those responsible for the management of a business are required to apply the principles and practices proposed in *King III* or provide reasons for the fact that the principles and practices have not been implemented or followed (explain). If a business’ management elects not to follow a particular recommended practice, the business will not face the threat of sanctions. Instead management merely needs to indicate why it is not in the best interest of the business to apply the practice.\(^\text{477}\) In order to support the voluntary nature of *King III*, no explicit regulatory body exists which is charged with overseeing compliance with it.\(^\text{478}\) This approach takes recognition of the fact that a one-size-fits-all approach is not desirable and that smaller business would for instance not be able to bear the burden of additional costs brought about by governance requirements. The requirement of apply as opposed to comply is to be preferred in an economy where entrepreneurial activities are encouraged.\(^\text{479}\) However, where the apply approach fails, the more rigid comply approach must be followed.

\(^{476}\) In the context of CSR, the “apply or explain” approach is also favoured by the Indian Government. In terms of s 135(5) of the Indian *Companies Bill, 2011* certain companies are required annually to contribute at least 2% of the average net profits of the company made during the financial years preceding the current financial year to activities identified in its CSR policy. The section continues to state that if a company fails to spend the prescribed percentage, the Board should provide reasons for not spending the amount. Companies should “apply” the section or “explain” the failure to do so without any further sanctions.


\(^{478}\) The exception to this rule is the board of the JSE. Since compliance with *King III* is non-optional for listed companies the board of the JSE will act as an overseeing regulatory body responsible for ensuring compliance.

\(^{479}\) It should be noted that although *King III* relies on self-regulation, certain aspects contained therein might be included in legislation or industry specific requirements, thus requiring compliance. In this regard South Africa is one of the first countries requiring companies listed on the JSE to show their compliance with *King III* in order to maintain their listing. Listed companies are now required to report in an integrated manner instead of reporting on financial and sustainability issues in separate reports (SAPA 2010 [www.southafrica.info/news/business/143897.htm](http://www.southafrica.info/news/business/143897.htm)).
The principles applicable to a business’ social responsibility are based on the same premise of apply or explain. The following section will examine the principles contained in *King III* that are applicable to CSR and which should be integrated into the day-to-day management of a business.

5.3.4.6 CSR content in King III

The following section will identify and examine the principles and practices contained in *King III* which are applicable to the social responsibility of a business in general and will indicate how these principles and practices might affect agricultural companies.

5.3.4.6.1 Ethical leadership and corporate citizenship

Chapter 1 of the *King III Report* deals with the issues of ethical leadership and corporate citizenship. Principle 1.1 requires a board to provide effective, responsible leadership based on an ethical foundation. This principle acknowledges that a responsible board appreciates the fact that a business operates within a society and that the decisions and practices of the business have an impact on society in the social, economic and environmental spheres. Through the acceptance of its corporate responsibility a responsible board will be able to build a sustainable business and contribute to sustainable development – governance and sustainability have become inseparable. The issue of ethical leadership and corporate citizenship have received legislative support through the enactment of section 72 of the *Companies Act* that makes provision for the establishment of a social and ethics committee for certain categories of companies and that requires the committee *inter alia* to report on issues addressing good corporate citizenship.

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480 In this context “board” refers to the “functional responsibility of those charged with governance” in a business and does not necessarily imply a board of directors (IoD *King III Code 19*). Due to the fact that the agricultural enterprises referred to in this thesis are all companies the reference to “board” will imply a board of directors.

481 IoD *King III Report 20*.

482 *King 2010 Acta Juridica 449*.

483 See par 5.2.5 for a discussion of the requirements relating to social and ethics committees.
In line with the definition for CSR\(^{484}\), this principle further recognises that it is a responsibility of a board to give direct consideration to the legitimate interests and expectations of all relevant stakeholders – both internally and externally – referred to by the *King III Report*\(^{485}\) as inclusive stakeholder governance. In inclusive stakeholder governance stakeholders should be considered in the business’ decisions and activities – an inclusive approach to governance.\(^{486}\) It is argued by the *King III Report*\(^{487}\) that including and considering stakeholders in decision-making and activities would create a greater level of trust between the business and its stakeholders, which would provide the business with its licence to operate and which is required to operate sustainably. Without trust no business will be able to operate sustainably.

In line with the definition of corporate citizenship,\(^{488}\) Principle 1.2 deals with the requirement that a business should be seen as being a responsible corporate citizen which has the rights and responsibilities attached to its citizenship. Apart from having legal obligations, being a corporate citizen implies that the business also has social and moral obligations towards society, which are consistent with internationally accepted norms of behaviour.\(^{489}\) In terms of the *King III Code*\(^{490}\) a business will be regarded as a good corporate citizen when the board not only considers the financial performance of the business but also the impact that the business has on the social and environmental spheres. A good corporate citizen also ensures that its business principles and activities are in compliance with the spirit and the letter of the law.\(^{491}\) At a minimum the board should comply with the requirements set out in the *Constitution* and especially the obligation to adhere to the rights afforded to individuals in the Bill of Rights. In terms of

\(^{484}\) See par 5.3.3.4 above.


\(^{486}\) The *King III Code* recommends that the board should promote the stakeholder-inclusive approach of governance and that all decisions and actions taken by the board should be based on the values of good corporate governance as identified by the *King III Report* (IoD *King III Report* 21) i.e. responsibility, accountability, fairness and transparency (IoD *King III Code* 20).

\(^{487}\) IoD *King III Report* 21.

\(^{488}\) See par 5.3.4.4 above.

\(^{489}\) The United Nations Global Compact (UNGC) is an excellent example of a voluntary initiative containing accepted principles aimed at guiding business behaviour. The UNGC as a voluntary measure will be discussed in more detail in par 5.4.3.

\(^{490}\) IoD *King III Code* 20 – 21.

\(^{491}\) This notion of compliance with legislation and other governance instruments is repeated in Principle 6 of the *King III Code*, which will be discussed below.
the *Constitution* businesses (as corporate citizens) have a responsibility to act in accordance with the values on which the Republic is founded – values such as respect for human dignity, the achievement of equality and the advancement of human rights.\(^{492}\)

According to the *King III Report*\(^{493}\) a responsible corporate citizen will “protect, enhance and invest in the wellbeing of the economy, society and the natural environment” and will respond positively to challenges facing the society in which it operates, whether such challenges are on the economic, social or environmental fronts. In the final instance, Principle 1.2 stresses the need for what it refers to as a “collaborative response”. A collaborative response requires businesses, especially those within the same sector, to start addressing sustainability challenges together. The recommended combined approach by businesses sharing the same business ethos will not only be beneficial to the societies in which the businesses operate but also to the businesses themselves.

Finally, this principle refers to the linkage between sustainability and black economic empowerment.\(^{494}\) Although the *King III Code* does not recommend a specific practice giving effect to the link between sustainability and BEE, businesses should be encouraged to become involved in social transformation efforts in order to be regarded as responsible corporate citizens.\(^{495}\)

Chapters 2 to 5 and 7 of the *King III Report* deal with issues such as the composition of boards of directors, the duties of the company secretary, audit committees, the governance of risk, the governance of information technology, and the internal audit. These subjects do not expressly fall within the definition of CSR provided by the report and will not be discussed.

5.3.4.6.2 Compliance with laws, rules, codes and standards

Chapter 6 of the *King III Report* addresses the issue of compliance with laws, rules, codes and standards. Principle 6.1 requires the board to ensure that the business

\(^{492}\) S 1(a) of the *Constitution*.
\(^{493}\) IoD *King III Report* 22.
\(^{494}\) IoD *King III Report* 24.
\(^{495}\) For a discussion of BEE and specifically AgriBEE within the agricultural sector, see par 5.2.2.
complies with applicable laws,\textsuperscript{496} and that it considers adherence to voluntary non-binding rules, codes and standards. The fact that a board should consider adherence to voluntary measures is in line with the “apply or explain” approach followed throughout \textit{King III}. Boards are required to apply these voluntary measures to the extent that they are relevant to the particular business or provide an explanation for the non-application of those measures. The extent to which a business has applied relevant non-binding measures should be disclosed in the integrated report in order to confirm the business’ commitment to good governance. In line with the definition provided for CSR, this principle emphasises the fact that a socially responsible business is one which not only complies with the letter of the applicable legislation, but also with the spirit of such legislation. The \textit{King III Report}\textsuperscript{497} supports the notion that businesses should not try to find “loopholes” or shortcomings in legislation, but should rather act ethically within the spirit and context of the law.\textsuperscript{498}

5.3.4.6.3 Stakeholder management

The introduction to this section made reference to the fact that one of the main focuses of \textit{King III} is the central role that stakeholder relationships play in governance.\textsuperscript{499} Managing these relationships is an essential requirement for being a good corporate citizen as well as for good governance.\textsuperscript{500} It is imperative for a business to manage (maintain and enhance) its reputation and ensure that stakeholders regard the business as a responsible corporate citizen. The more favourable stakeholders’ assessments of the business are, the more likely the stakeholders are to form a positive image of the

\textsuperscript{496} The recommended practice for Principle 6.1 is that businesses must comply with all applicable legislation – the use of the word must makes this a legal requirement. Practices which would result in good governance but which are not legally required are identified by the use of the word “should”, while the use of the word “may” refers to a practice that could be considered (\textit{King III Code} 16).

\textsuperscript{497} IoD King III Report 89.

\textsuperscript{498} In this regard the \textit{King III Code} recommends that compliance should be an ethical imperative where the board understands the context of the law and how various pieces of legislation relate to one another (IoD King III Code 42).

\textsuperscript{499} See par 5.3.4 above.

\textsuperscript{500} This statement reiterates two important theoretical underpinnings of CSR – the stakeholder approach and corporate citizenship. For a discussion of these two approaches, see par 3.4.2.2 and par 3.4.2.3.
business. Principle 8.1 is a reaffirmation of the requirement in Principle 1.1, which recognises that it is a responsibility of a board to give direct consideration to the legitimate interests and expectations of all relevant stakeholders. A legitimate interest requires a reasonable and informed outsider to conclude that the interest is “valid and justifiable on a legal, moral or ethical basis in the circumstances”. The King III Report identifies stakeholders as any group that has the ability to affect the business’ activities or those groups which are affected by the business’ operations including shareholders, investors, creditors, customers and affected communities. Stakeholder relationships should be dealt with proactively. Management should ensure that an appropriate balance is achieved between the various stakeholder groupings and that effective communication channels exist between the business and the stakeholders.

5.3.4.6.4 Integrated reporting

King III advocates integrated reporting and focuses on the need for businesses to link the consequences of their business policies and practices to the impact they has on society and the business. Chapter 9, the final chapter of the King III Report, concentrates on the requirement that a business should annually report on matters beyond financial performance – sustainability issues such as social and environmental performance should also be included. A business should thus report in an integrated fashion across all areas of its performance and should be managed accordingly.

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501 The recommended practice according to the King III Code is that a business should in the first instance identify its main stakeholder groups, establish what these stakeholder groups perceptions of the business are, and based on these perceptions continue to manage the business’ reputation (IoD King III Code 46).
502 Esser 2009 (2) SA Merc LJ 197. For a discussion of the various types of stakeholders and stakeholder identification, see par 3.4.2.2.4.
503 IoD King III Report 100.
504 IoD King III Report 100. Also see Esser 2009 SA Merc LJ 198. For an in-depth discussion of stakeholders and the stakeholder approach in CSR in general, see par 3.4.2.2.
505 Principles 8.2, 8.3 and 8.5 respectively of the King III Report (IoD King III Report 101 – 103)
506 As recommended by the King III Code 49.
507 This approach is reflected in the regulations addressing the social and ethics committee. As described previously (see par 5.2.6.3.1), the committee is under an obligation to also monitor and report on matters related to social development.
508 Miles and Jones 2009 (14) Deakin Law Review 60.
King III Report\textsuperscript{509} requires that substance be preferred to form, implying that businesses should ensure that their annual integrated reports amounts to more than just mere “tick box” reporting or corporate greenwash,\textsuperscript{510} where reporting is seen as a token effort made only to satisfy its stakeholders.\textsuperscript{511} An integrated sustainability report should provide a true reflection of the state that the business finds itself in, in all three of the sustainability spheres, and should enable the various stakeholder groups to form an opinion about the business, to assess the business’ economic value, and to establish the business’ credibility. Principle 9.1 places an obligation on the board to ensure that the integrated report is reliable and transparent and that the integrity of the report is above reproach.\textsuperscript{512}

The inclusion of sustainability disclosures in the integrated report is highlighted by Principle 9.2. In terms of this principle, businesses are required to integrate sustainability reporting and disclosures with legally required financial disclosures to form the integrated sustainability report. The report should therefore show how the business has made its money.\textsuperscript{513} The aim of the integrated report is not to replace reporting on financial performance. According to the King III Report\textsuperscript{514} the integrated report goes further than reporting on financial performance only. The report contextualises the financial performance by indicating the effect that the business has had on its stakeholders. The ultimate aim of the integrated report is to identify the positives of the business and build on them and identify the negatives in order to try to address them in a pro-active manner. Stakeholders are looking for reports which justify the business’ licence to operate and which provide proof of the business’ good stewardship over societal resources. According to King:\textsuperscript{515}

\begin{quote}
By using an integrated report incorporating its social, economic and environmental impacts, a company increases the trust and confidence of its stakeholders and the legitimacy of its operations.
\end{quote}

\textsuperscript{509} IoD King III Report 108.
\textsuperscript{510} For a discussion of corporate greenwash, see par 3.7.4.
\textsuperscript{511} Laufer 2003 (43) Journal of Business Ethics 253.
\textsuperscript{512} The business should have measures in place to insure the integrity of the report though the use of controls enabling the business to verify the content of its integrated report (IoD King III Code 48).
\textsuperscript{513} IoD King III Report 109 and IoD King III Code 49.
\textsuperscript{514} IoD King III Report 109.
\textsuperscript{515} King 2010 Acta Juridica 452.
The move towards sustainability reporting is an international phenomenon with various international instruments such as the Global Reporting Initiative (GRI) and the UNGC advocating the need to place greater priority on reporting on sustainability issues.\(^{516}\) Integrated reporting represents one of the most important developments in the field of corporate governance and although it might be seen as an administrative burden, the benefits of reporting in an integrated manner outweigh the negatives.

\textbf{5.3.4.7 Conclusion}

Although still limited in its application, the contribution of \textit{King III} with regard to CSR lies in the fact that issues related to CSR should now be reported on and be integrated into the annual report as opposed to the amalgamation of the sustainability report and the financial statements recommended by \textit{King II}. However, \textit{King III} does not provide a clear framework for the integrated report. In order to address this, the Integrated Reporting Committee (IRC) of South Africa released a discussion paper titled \textit{Framework for integrated reporting and the integrated report},\(^{517}\) identifying the principles on which the report should be based and suggesting the elements to be addressed in the report. The paper identifies three categories of reporting principles. The first category deals with the principles informing the scope and boundary of the report, where the management identifies the entities represented in the report. The second category addresses the principles relating to the selection of the content of the report, where it must be established what content are relevant and material to the report. The final category relates to the principles informing the quality of the reported information and includes issues such as verifiability, comparability and consistency.\(^{518}\)

Besides identifying the reporting principles, the \textit{Framework} also identifies suggested elements to be addressed in the report. These elements include the report profile, which identifies the scope and boundary of the report; an organisational overview and governance structure; a description of the operating context; an account of the

\(^{516}\) The guidelines of the GRI for reporting on socially responsible behaviour will be discussed in more detail in par 5.4, which analyses non-binding international instruments.

\(^{517}\) IRC 2011 \url{http://www.sustainabilitysa.org/Portals/0/IRC%20of%20SA%20Integrated%20Reporting%20Guide%20Jan%202011.pdf}.

\(^{518}\) For a discussion of these principles see paragraph 2 of the \textit{Framework}.
organisation’s performance and future performance objectives; and an analytical commentary providing an overview of the views of the organisation’s leadership about the organisation.\textsuperscript{519} The inclusion of these elements in the integrated report would provide stakeholders with the necessary information to form an informed opinion of the business.

The integrated report will in future prove to be an important instrument used by a company to illustrate to its stakeholders and future stakeholders that amongst other things it is committed to socially responsible practices, and that it views CSR as an important aspect of its day to day management. Companies can also include their BEE status in this report,\textsuperscript{520} thus linking their sustainability practices with their BEE position, providing readers of the report with an instant picture of the current position of their business. Agricultural companies can further utilise this report to report on their contribution to the land reform programme, for example. If the company can show to its stakeholders that it is involved in programmes which are of national importance and which could possibly in the future be beneficial to the company, such reporting would further establish the company’s commitment to socially responsible practices.

One of the characteristics of good governance as set out in \textit{King II} is accountability. In order to be held accountable it is necessary to establish criteria against which to be held accountable.\textsuperscript{521} This requirement represents one of the biggest challenges to the implementation of \textit{King III}. \textit{King III} advocates integrated reporting but does not provide the framework against which businesses’ compliance will be measured. For example, if a good corporate citizen wishes to indicate to what extent it has accepted the imperative of CSR and excelled in its CSR practices, what are the accepted criteria against which this performance can be measured? Standards need to be set for integrated reporting in order to indicate not only how a business has applied the recommendations but also to provide the business with an opportunity to explain its reasons for non-compliance. It has been reported that major role players such as the Institute of Directors, Business Unity South Africa and the South African Institute of Chartered Accountants formed an

\textsuperscript{519} For a discussion of these principles see paragraph 3 of the \textit{Framework}.
\textsuperscript{520} For a discussion of the method used to determine BEE status, see par 5.2.2.4.
\textsuperscript{521} Anon 2010 (July) \textit{Business and the environment} 5 – 6.
Integrated Reporting Committee (IRC) to determine the standards and a framework for the integrated reports. Various international instruments such as the Global Reporting Initiative (GRI) and the UNGC have the specific goal of providing standards for reporting. These and other instruments will be examined in the sections to follow in order to identify the criteria against which the performance of businesses on issues such as CSR can be measured. However, before these instruments are discussed, it is important to refer to the effect that King II and King III have had on the corporate world, especially companies listed on the Johannesburg Securities Exchange, as well as the attempt made by the JSE to establish a Socially Responsibility Index. The discussion in the following paragraph provides an excellent example of how voluntary approaches to reporting (advocated by King II and King III) can effectively become mandatory by virtue of the authority of a financial institution to regulate its members.

5.3.5 The Johannesburg Securities Exchange’s Socially Responsible Index

With reference to Mr King, the chairman of the King Committee on Corporate Governance, it was reported that in 2010 South Africa became the first country to require integrated reporting for all of its listed companies, effectively making compliance with King III a legally enforceable requirement.

As indicated above, Government has taken various legislative steps to encourage the business sector to become more socially responsible. The laws described and discussed above have helped to some extent to facilitate change and to contribute towards the realisation of the goals set in the various governmental programmes. It is noteworthy, though, that stakeholders should be informed as to the extent to which a business is meeting the requirements laid down by law. One way is through the Johannesburg Stock Exchange (JSE) Socially Responsible Investment (SRI) Index. The JSE launched the first Socially Responsible Investment Index in May 2004, thus recognising the steps that listed companies have taken towards fulfilling their social responsibilities.

523 Ward Legal issues in Corporate Citizenship 4.
525 See par 5.1.
responsibility and the investments that they have made towards social development.\textsuperscript{526} With the launch of its Socially Responsible Investment Index in 2004, the JSE led the way for bourses in emerging markets.\textsuperscript{527}

Companies listed on the JSE are \textit{invited} to be assessed annually against the criteria of the SRI Index in order to identify to what extent the principles of the triple bottom line have been integrated into their business activities. Companies are assessed on their social sustainability with specific reference to the promotion of social upliftment, development and poverty alleviation.

Not ignoring the importance of the SRI Index, it is also noteworthy that the process of being assessed is a voluntary one, and that companies listed on the JSE are under no legal obligation to divulge their levels of compliance with the set criteria. The SRI Index also has relevance for listed companies only, which represent a very small number of businesses within the South African context.

The JSE launched the SRI Index in order to create a means through which companies’ efforts to apply the principles of the triple bottom line may be measured and benchmarked in order to attract investments to such companies.\textsuperscript{528} The Index provides detailed criteria for each of the triple bottom line criteria in order to reflect the complex nature of social responsibility.\textsuperscript{529} Only companies registered on the FTSE/JSE All Share Index are allowed to participate in the Index. However, reporting is still voluntary and companies are invited to submit data to be assessed against the criteria.

As was pointed out in the discussion of the \textit{King Reports}, one of the pillars of the triple bottom line is social sustainability.\textsuperscript{530} Companies are required to “develop and maintain

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{526} JSE 2004 \url{http://www.jse.co.za/sri/}.
\item \textsuperscript{527} Sonnenberg and Hamann 2006 (23) \textit{Development Southern Africa} 305.
\item \textsuperscript{528} JSE Date Unknown \url{http://www.jse.co.za/About-Us/SRI/Introduction_to_SRI_Index.aspx}.
\item \textsuperscript{529} This section will focus on the social aspect of the triple bottom line.
\item \textsuperscript{530} The other two pillars of the assessment are environmental sustainability and economic sustainability. Environmental sustainability measures the strategies that a company adopts in order to measure and monitor its impact on the environment. It also measures if the systems that are implemented are of such a nature as to ensure that resources are consumed and used in a sustainable manner and in such a manner as to reduce the negative impacts to a minimum (JSE 2011 \url{http://www.jse.co.za/About-Us/SRI/Criteria.aspx}). Economic sustainability measures if the company has positioned itself for long-term growth rather than short-term performance (JSE 2011
\end{itemize}
\end{footnotesize}
positive relationships with a far wider structure of stakeholders, including staff, Government and the community generally”.\(^\text{531}\) In order to be regarded as good corporate citizens companies need to indicate what their strategies for the promotion of social upliftment and poverty eradication are, and the steps that are being taken to ensure that these strategies are implemented. If a company has no strategies in place to meet the three pillars or if the strategy is applied only sporadically, the company will not receive any points. If objectives/systems are in place but the company does not meet the level set by the criteria, or if evidence exists that regular/systematic efforts are being made to set objectives or to implement a system, the company will receive one point. Should the level set by the criteria be fully met, two points will be scored. If the objectives/systems that are in place exceed the level set, a company will score three points.\(^\text{532}\)

In order to qualify for inclusion in the Index, a company must score at least 25 points in relation to social sustainability practices.\(^\text{533}\) A company should strive towards continual development and improvement of its social and stakeholder relationships \textit{inter alia} by recognising the stakeholders’ rights to dignity and equality. Despite this recognition a company should also actively promote the development and empowerment of its employees and other stakeholders.\(^\text{534}\) The social sustainability policies of a company should include the following:

- a demonstrated commitment towards upliftment and skills development and the creation of equal opportunities;

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\(^\text{531}\) JSE 2005 http://www.jse.co.za/Libraries/SRI_Criteria_Documents/06_Background_and_criteria_2005.sflb.ashx. These stakeholders represent some of the most important stakeholders for a business.


\(^\text{533}\) In relation to corporate governance practices, a company must have a score of at least 16. A score of 21 for economic sustainability must be achieved, while the score for environmental sustainability practices will depend on the level of impact that the company has on the environment (JSE 2005 http://www.jse.co.za/Libraries/SRI_Criteria_Documents/06_Background_and_criteria_2005.sflb.ashx).

• a demonstrated commitment to stakeholder involvement on social sustainability issues;

• a demonstrated commitment to practices recognising the importance of partnerships in the implementation of corporate social responsibility strategies as well as a commitment to the implementation of corporate social responsibility strategies which are aligned to the company’s overall business strategy and which reflect an ongoing commitment from the company.535

The mere fact that a company has the above policies in place does not imply that the company is actively implementing the strategies. The criteria for social sustainability also focus on the management and performance of the company’s policies. In order to determine the extent to which a participating company implements and manages its policies the following must be in place:

• documented targets, initiatives or programmes to address skills development, empowerment and equal opportunities as well as programmes or initiatives relating to corporate social investment and programmes addressing the impact of HIV/Aids on the company’s activities;

• evidence of charitable donations and active community relations, which include continued involvement of available company skills in upliftment programmes should be provided; and

• evidence of corporate social responsibility schemes and programmes for employee involvement in the community should also be provided.536

Once the level of management and performance has been established, the participating company is scored on its reporting of the above. Reporting is measured against the

535 JSE 2005 http://www.jse.co.za/Libraries/SRI_Criteria_Documents/06_Background_and_criteria_2005.sflb.ashx. The societal criteria of the Index focus on issues such as employee relations, health and safety, equal opportunities, community relations, stakeholder engagement, BEE, and HIV/Aids. For a reference to these criteria, see JSE 2011 http://www.jse.co.za/About-Us/SRI/Criteria.aspx. They reflect to a large extent the CSR content discussed in par 5.3.4.6 and the duties of the social and ethics committee discussed in par 5.2.6.3.

public disclosure of data on social sustainability issues relevant to the company as well as stakeholder engagement.\textsuperscript{537}

Once a company achieved met the qualifying score on all of the pillars, a company will be rated on the Index, depending on the score achieved. The Index and all of its participants are reviewed annually in December, based on information provided by the end of September of each year. If, in terms of the \textit{Ground Rules for the Management of the JSE SRI Index},\textsuperscript{538} a company no longer qualifies as a constituent of the All Share Index, it will be removed from the SRI Index as well. Removal will be simultaneous with the removal from the All Share Index.

Although the JSE Index appears to be a move in the right direction in the sense that listed companies now take responsibility for the social aspects of their activities and their responsibility is measured against set criteria, the system cannot escape criticism. In the first instance, participation in the Index is purely voluntary. In its current form companies listed on the JSE are not required by law to disclose their adherence to triple bottom line principles. If a company chooses not to be measured in terms of the Index it will not face any form of penalty. It should further be noted that it is probable that only companies that do adhere to the principles of the triple bottom line would elect to be measured for the purpose of the Index. A company that has something to hide will not elect to be measured, and yet the choice not to be measured will hold no consequence for such a company.

In this regard it is submitted that at the very least all companies on the All Share Index should be required by law to be annually assessed on their levels of compliance with the set criteria. It is further suggested that a complete list of the performance of the listed companies should be published annually in prominent newspapers by way of a supplement. This step will insure that the public are informed about the contributions, or lack thereof, of the listed companies. It is suggested that not only the overall scores should be indicated in the publication, but the performance of each company on each of

\textsuperscript{537} JSE 2005 \url{http://www.jse.co.za/Libraries/SRI_Criteria_Documents/06_Background_and_criteria_2005.sflb.ashx}
\textsuperscript{538} JSE 2009 \url{http://www.jse.co.za/Libraries/SRI - Development of Index/Revised_Ground_Rules.sflb.ashx}
the three pillars should be described. This step might not only be harmful to a
corporation’s reputation but might eventually lead to consumers deciding not to do
business with a company that does not comply with the principles of the triple bottom
line.539

Secondly, only companies listed on the All Share Index are invited to submit data in an
attempt to be included in the Index. There is currently no similar Index for companies
listed on the Alternative Stock Exchange, and the author proposes that the system be
extended to include the Alternative Stock Exchange.540

Although following the criteria laid down by the Index is not compulsory, and the Index
itself has a limited scope of application, it nevertheless is of importance to businesses
falling outside its scope of application. The criteria laid down by the Index represent a
useful tool which can be applied with success by businesses which are not listed on the
JSE. The criteria can be used as an instrument guiding businesses in their CSR efforts.
The criteria of the Index might in future become a useful tool in creating a CSR
scorecard for all businesses, where businesses will be required to demonstrate their
commitment towards upliftment, skills development and the creation of equal
opportunities, as well as their commitment to stakeholder involvement on CSR issues
and the implementation of corporate social responsibility strategies.

The previous paragraphs focused exclusively on the South African legislative framework
and national instruments related to CSR. However, the aim of this Chapter is also to
provide an overview of relevant international guidelines addressing CSR which would
be of assistance when formulating a national framework for CSR. Unfortunately the last
few decades have seen a proliferation of international guidelines or standards which
exclusively address the issue of CSR or which address CSR through inference.

According to Waddock:541

539 A study published in 2006 indicated that there is a decline in environmental and social reporting by
mines over the last 9 years. See De Villiers and Van Staden 2006 (31) Accounting, Organisations &
Society 763 – 781.

540 The AltX is an alternative exchange created by the JSE for smaller companies that are not yet able to

The proliferation of standards, principles, reporting initiatives, and codes threatens confusion and continued lack of implementation unless there is a common set of principles shared among them.

The ISO’s *Guidance on social responsibility*\(^{542}\) provides 40 examples of cross-sectoral initiatives and 35 sectoral-specific initiatives which include some or all of the core socially responsible subjects\(^{543}\) and practices for integrated social responsibility.\(^{544}\) The following sections will explore the proliferation of international voluntary initiatives aimed at CSR or which have CSR content, with the goal of attempting to identify applicable CSR principles which are embedded with these initiatives.

### 5.4 International guidelines relevant to CSR

#### 5.4.1 Introduction

On the international front, the last few years have been characterised by the emergence of a plethora of initiatives dealing directly or indirectly with the issue of CSR, the promotion of good corporate governance, and sustainable development. The aim of this proliferation of initiatives is to provide a framework within which businesses can structure their approaches to CSR. These initiatives vary from identifying global principles, providing standards or guidelines that could be used as benchmarks against which CSR practices can be measured, devising instruments dealing with certification, or providing reporting frameworks.\(^{545}\) Rasche\(^{546}\) labels these initiatives as multi-stakeholder\(^{547}\) standards and sub-categorises them into five core categories. These

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\(^{542}\) ISO Guidance 87 – 97.

\(^{543}\) For a discussion of the core CSR subjects, see par 5.3.2.1.

\(^{544}\) These initiatives include all of the initiatives discussed in par 5.4 as well as numerous other initiatives such as the Ethical Trading Initiative (ETI), the European Business Ethics Network (EBEN), the Rainforest Alliance, Social Accountability International (SAI), Transparency International (TI), the CSR Europe Toolbox and the Global Sullivan Principles of Social Responsibility (ISO Guidance 87 – 97). The discussion of international guidelines relevant to CSR will, however, be limited to the most notable international instruments, which include the Global Reporting Initiative and the United Nations Global Compact.


\(^{546}\) Rasche 2010 (10) *Corporate Governance* 503 – 504.

\(^{547}\) The reference to “multi-stakeholder” implies that a variety of stakeholders have been involved in the drafting process. These stakeholders include governments, the private sector, trade unions, labour organisations and non-governmental organisations. The involvement of various stakeholders representing different sections of society contributes to the legitimacy of the instrument and gives rise to a better buy-in into the instrument by those at whom the instrument is aimed.

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categories are reporting standards, principle-based standards, certification standards, process standards, and integrating guidance-based standards. The discussion of this section will focus on initiatives from these categories in order to provide an overview of the various types of initiatives which should be considered when formulating a national legal framework for CSR.

None of these multi-stakeholder standards were developed nationally, nor do they have a distinct national focus, but their impact is undeniable. They are gradually persuading local businesses to become more socially responsible. Businesses have to communicate to their stakeholders on their performance (which is not limited to financial performance), but do not always have a clear idea of how to do it. Multi-stakeholder standards provide businesses with an answer on the how to question. During the discussion of King III it became evident that local businesses should for example use the guidelines provided by the Global Reporting Initiative as guidance when drafting their integrated sustainability reports, while regulation 43(5)(a)(i)(aa) of the Companies Regulations state that the social and ethics committee of a company should consider the principles of the United Nations Global Compact.

The following sections provide an overview of the Global Reporting Initiative’s sustainability reporting guidelines as an example of a reporting standard. The overview

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548 An example of a reporting standard is the Global Reporting Initiative (GRI). For a discussion of the GRI, see par 5.4.2.
549 An example of a principle-based standard is the UN Global Compact. For a discussion of the Global Compact, see par 5.4.3.
550 The SA8000 is an example of a certification standard with a special focus on social issues. This certification standard will be discussed in more detail in par 5.4.4.
551 Process standards, according to Leipziger (The Corporate Responsibility Code Book 39) place the focus on the issue regarding the integration of corporate responsibility into the business. They provide managerial guidance on how to manage in a socially responsible manner. An example of a process standard is the AA1000 standard series, which was launched by the Institute of Social and Ethical AccountAbility (ISEA). The Standard deals with stakeholder engagement and stakeholder identification (Rasche and Esser 2006 Journal of Business Ethics 262) and specifies the tools to be used in stakeholder engagement. The Standard is designed to ensure the quality of the social and ethical accounting, auditing and reporting process (Perrini, Pogutz and Tencati Developing corporate social responsibility 100). However, the Standard does not specify a particular field of application such as economics, society or the environment, nor does it make provision for any mechanism of verification.
552 The ISO 26000 standard dealing with CSR is an example of an integrating guidance-based standard and has already been discussed in par 5.3.2.
553 See par 5.3.4.
554 See par 5.2.6 for a discussion of reg 43(5)(a).
will address issues such as the aim of the GRI as a whole, with a specific focus on the reporting guidelines. The principles (especially those dealing with CSR-related issues) defining the manner in which a sustainability report should be drafted will be disentangled in order to provide an indication of what should be reported on.

5.4.2 The Global Reporting Initiative (GRI)

5.4.2.1 Introduction

The GRI, a network-based organisation, is the pre-eminent international organisation in the field of voluntary sustainability reporting, and its guidelines on sustainability reporting are being followed by businesses across the globe and in every sector. The GRI sustainability report establishes an instrument which can be used to assist businesses in their CSR reporting and is considered to be the most comprehensive of the guidelines currently available. Owen and O'Dwyer describes the GRI as

the most comprehensive in scope, and influential in terms of guiding reporting practice, of all the ever-growing number of standards and guidelines for sustainability reporting produced in recent years.

According to Waddock the GRI

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555 The GRI is a multi-stakeholder network consisting of numerous experts in many countries participating in its workings (GRI 2011 http://www.globalreporting.org/AboutGRI/WhoWeAre/).
556 Although the GRI advocates a voluntary, non-legal approach to sustainability reporting, Brown, De Jong and Levy (2009 (April) Journal of Cleaner Production 572) argue that GRI should rather be seen as an instrument of civil-private regulation. According to the authors, GRI reports have the potential to strengthen not only civil-private regulation, but also CSR and governance in the wider sense (Brown, De Jong and Levy 2009 (April) Journal of Cleaner Production 572). Sutantoputra (2009 (14) Corporate Communications: An International Journal 41 – 42) postulates that the voluntary approach favoured by the GRI accords with the voluntary disclosure theory, which suggests that "superior CSR performers want to differentiate themselves from the inferior performers. Thus they will disclose more information based on their performance to make it harder to be copied". CSR performers want to be seen as forward-looking businesses which appreciate the value of having a strategic advantage over their competitors.
557 For a discussion on the international uptake of the GRI Guidelines, see par 5.3.2.5. For a discussion of the evolution of the GRI, see Willis 2003 (43) Journal of Business Ethics 234 – 235.
558 The GRI defines sustainability reporting as “the practice of measuring, disclosing, and being accountable to internal and external stakeholders for organizational performance towards the goal of sustainable development” (GRI Sustainability Reporting Guidelines 3).
559 Owen and O’Dwyer "Corporate Social Responsibility" 394.
provides a common reporting tool that provides for comparability across companies and other institutions using it, as well as a degree of transparency not currently available.

The GRI identified the need to provide guidance to businesses regarding their sustainability reporting and in 2006 it released the third version of its sustainability guidelines. These guidelines foster transparency and accountability about social, environmental and economic impacts, enabling oversight and activism through the use of a single, consolidated sustainability report providing a balanced view of the business' performance and enabling stakeholders to form a judgment of the business' performance. A consolidated sustainability report drafted in terms of the sustainability guidelines requires entities to include non-financial detail (such as social and environmental matters) in their reports, contributing to transparency, and ultimately the legitimacy of the report. The G3 Guidelines attempts to establish an internationally shared framework consisting of identified principles (assisting businesses on how to report) and making provision for standard disclosures (giving an explanation of what to report on). This is in line with the GRI’s mission to provide a credible framework for sustainability reporting that can be used by organisations regardless of size, sector or location. Reporting done in terms of the Guidelines is done on a voluntary basis and is intended for use by all types of businesses, and although no express requirement is set that businesses should provide a sustainability report on an voluntary basis and is intended for use by all types of businesses, and although no express requirement is set that businesses should provide a sustainability report on an

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561 This third version of the GRI sustainability reporting guidelines became known as the G3 guidelines.
562 Nielsen and Thomsen 2007 (12) Corporate Communications: An International Journal 29; Buhmann 2006 Corporate Governance 196; Crawford and Williams 2010 (10) Corporate Governance 517 and Isakson and Steimle 2009 (21) The TQM Journal 175. According to Slater and Gilbert the GRI guidelines provide “a road map of key risks facing companies and a common platform that helps ensure consistent and timely release of comparable information” (Slater and Gilbert 2004 (Autumn) Environmental Quality Management 45).
563 The similarities between the GRI and King III with regard to integrated reporting are evident. For a discussion of integrated reporting as proposed by King III, see par 5.3.4.6.4.
565 GRI Sustainability Reporting Guidelines 2. According to Painter-Morland the GRI’s specific ambition is to “elucidate a number of concepts that are essential in advancing business organizations’ CSR initiatives and internal ethics initiatives beyond the level of shallow window dressing” (Painter-Morland 2006 (15) Business Ethics: A European Review 355).
annual basis, the majority of the businesses report annually in line with their financial reporting.566

The GRI Guidelines is an attempt to provide mechanisms for social and environmental reporting through the use of a sustainability report of which the aim is to provide a balanced view of the business on all three levels.567 With the GRI’s focus on all three spheres of influence (social, environmental and economic), the move in sustainability reporting is clearly in the direction of the triple bottom line approach, with an attempt to create a framework for substantive reporting.568 The Guidelines is a welcome instrument which will enable stakeholders to gain access to information regarding sustainability issues and enabling them to evaluate the performance of a business. In this regard the Guidelines can be seen as an instrument of empowerment for stakeholders. With its view on the importance of stakeholder communication, the GRI advocates an inclusive approach to governance with stakeholder engagement at its core, and the Guidelines therefore extend the target audience to include more than just shareholders or employees.

The G3 guidelines consist of reporting principles, reporting guidance and standard disclosures which should be included in sustainability reports. Entities electing to follow the guidelines are required to include the specified indicators identified in the sustainability reporting guidelines when reporting on their CSR practices. The following sections will examine principles, guidance and standard disclosures with special attention being given to the performance indicators.

5.4.2.2 Reporting principles and guidance

The Reporting Guidance included in the G3 Guidelines provides assistance to a business regarding what to report on and how to define the report content, while the

566 Willis 2003 (43) Journal of Business Ethics 235. Willis notes that the Guidelines should not be viewed as a code of conduct or performance standard but that it could assist a company in its reporting on relevant codes (2003 (43) Journal of Business Ethics 235 – 236).
567 Waddock 2004 (50) Journal of Business Ethics 323. Sustainability reporting is synonymous with triple bottom line reporting since both focus on reporting on the social, environmental and financial performance of a business. Since the GRI refers to sustainability reporting, this section will continue with this terminology.
Reporting Principles “describe the outcomes a report should achieve” and focus the reporting process.\textsuperscript{569} Regarding the Principles, the G3 Guidelines provide a definition, an explanation and set of tests for the reporting institution to assess the use of the Principle.

When defining the content of a sustainability report a business must consider principles such as materiality,\textsuperscript{570} stakeholder inclusiveness,\textsuperscript{571} sustainability context\textsuperscript{572} and completeness.\textsuperscript{573} Defining the quality of a report is guided by the principles of balance, comparability, accuracy, timeliness, clarity and reliability, all of which are fundamental for effective transparency.\textsuperscript{574} The more transparent the report is, the easier it is for stakeholders to reach informed conclusions regarding the business and its performance. Both favourable and unfavourable results and topics should be included in a report in order to provide an unbiased picture of the business.

\textsuperscript{569} GRI Sustainability Reporting Guidelines 6.

\textsuperscript{570} On the issue of materiality the sustainability report should provide a reflection of the social, environmental and economic impact of the business or any other information that could “substantially influence the assessments and decisions of stakeholders” (GRI Sustainability Reporting Guidelines 8). Materiality moves beyond reporting on those sustainability issues which have a distinct financial impact on the business. In determining whether or not information should be regarded as material, issues such as social expectations, stakeholder concerns and expectations expressed in international instruments must be considered.

\textsuperscript{571} The importance of stakeholder engagement is stressed by this Principle. In terms of this Principle, stakeholders should be identified and the sustainability report needs to indicate how the reasonable legitimate expectations of the stakeholders have been responded to. For the purpose of the report, stakeholders are defined as “entities or individuals that can reasonably be expected to be significantly affected by the organization’s activities, products, and/or services; and whose actions can reasonably be expected to affect the ability of the organization to successfully implement its strategies and achieve its objectives. This includes entities or individuals whose rights under law or international conventions provide them with legitimate claims vis-à-vis the organization” (GRI Sustainability Reporting Guidelines 10). In order to assure compliance with this Principle, the reporting business should document the stakeholder engagement process including issues such as how a stakeholder is defined and engaged and how the engagement influenced the business’ strategies and objectives.

\textsuperscript{572} A sustainability report must indicate on the positive side how the business contributed or aims to contribute to the improvement of social, environmental and economic conditions or on the negative side how it contributed to deterioration in these three spheres (GRI Sustainability Reporting Guidelines 11).

\textsuperscript{573} In terms of this principle, the sustainability report must include a scope of sustainability topics which would enable stakeholders to be able to sufficiently reflect on the business’ social, environmental and economic impacts (GRI Sustainability Reporting Guidelines 12).

\textsuperscript{574} For a discussion of these principles see GRI Sustainability Reporting Guidelines 13 – 17.
5.4.2.3 Standard disclosures

The section addressing standard disclosures to be included in a sustainability report contains the foundational content which should appear in a report. In terms of the recommended standard disclosures, a report must contain disclosures regarding strategy and profile,\(^{575}\) the management approach, and performance in terms of the identified performance indicators.\(^{576}\)

From a reporting viewpoint, the “flesh” of the report is found in the performance indicators on which the business’ overall performance is evaluated. The sustainability performance indicators are categorised into economic, environmental and social categories, with the social category being further sub-categorised into labour, human rights, society and product responsibility. These indicators provide reporting entities with an indication of what to report on and whether they want to report.\(^{577}\) The following section will identify the possible CSR content in each of these performance indicators.\(^{578}\)

5.4.2.4 CSR content in the performance indicators

5.4.2.4.1 Economic performance indicators

With reference to economic performance, one of the core indicators addresses donations and community investments made by the business, indicating the extent to

\(^{575}\) In terms of the strategy and profile disclosures, the reporting business should include aspects such as the organisational profile, the governance structure of the business and stakeholder engagement, including the basis for identification of the stakeholders and approaches to stakeholder engagement. For more detail on the content of the standard disclosures, see GRI Sustainability Reporting Guidelines 20 – 24.

\(^{576}\) A performance indicator is defined as “[Q]ualitative or quantitative information about results or outcomes associated with the organization that are comparable and demonstrate change over time” (GRI Sustainability Reporting Guidelines 39).

\(^{577}\) Sutantoputra 2009 (14) Corporate Communications: An International Journal 35. When drafting a report, the reporting entity should report on material issues as identified in the performance indicators. Should an indicator not be material to the reporting entity, it should provide an explanation of why it is not applicable.

\(^{578}\) Each of the performance indicators consists of Core Performance Indicators and in some instances Additional Performance Indicators. The Core Indicators were developed through the GRI’s multi-stakeholder approach and are generally accepted as being material for most businesses. A reporting entity should report on the Core indicators or else provide an explanation of why they are not deemed material as per the GRI principles (GRI Sustainability Reporting Guidelines 24).
which the business has distributed its economic value.\textsuperscript{579} This core indicator refers to voluntary contributions and the investment of funds in the broader community as a stakeholder of the business.\textsuperscript{580} The investment of funds in the broader community refers to investments targeted at beneficiaries who are external to the business, and includes contributions to support community infrastructure or the direct cost of social programmes such as those aimed at providing education on an issue which could affect the business, such as HIV/Aids.\textsuperscript{581} This indicator does not require the reporting entity to indicate whether or not a donation or community investment was made to gain a degree of strategic mileage or whether the expenditure was purely philanthropic. For example, the expenditure by an agricultural company that makes a donation to a regional cricket team in order to develop young and upcoming players, which provides no strategic benefit to the company, will have to be included in its report.

Regarding market presence, two core indicators are identified. These indicators \textit{inter alia} deal with the issue of expenditure relating to locally-based suppliers as well as the employment of local workers.\textsuperscript{582} The first of these indicators, which deals with spending on locally-based suppliers, is an acknowledgement of the fact that many businesses are dependent on other businesses for their success. Through its support of locally-based suppliers a business contributes to the economic development of those businesses in its supply chain, which in turn enables the business to demonstrate its positive contribution to a local economy, thus enhancing its social licence to operate and maintaining positive community relations.\textsuperscript{583} This indicator has found local application in

\textsuperscript{579} GRI \textit{Sustainability Reporting Guidelines} 26. This core indicator correlates strongly with the community investment principle identified by Kerr, Janda and Pitts as one of the seven CSR legal principles (see the introduction to this chapter as well as Pitts (ed) \textit{Corporate Social Responsibility} 497 – 530) as well as the community involvement and development principle identified as one of the core principles of social responsibility in the ISO \textit{Guidance} (for a discussion of this principle see par 5.3.2.2.7).

\textsuperscript{580} GRI \textit{Indicator Protocols Set: EC} 4.

\textsuperscript{581} Through this indicator, businesses demonstrate their commitment to CSR and their commitment to bring about change in the lives of beneficiaries who are external to the businesses. See par 5.2.6.3.1 for a discussion of a similar indicator within the South African context.

\textsuperscript{582} GRI \textit{Sustainability Reporting Guidelines} 26.

\textsuperscript{583} GRI \textit{Indicator Protocols Set: EC} 10.
the *BEE Scorecard*, and especially the sections dealing with preferential procurement and enterprise development.\(^{584}\)

The core economic performance indicator addressing indirect economic impacts assesses the development and impact of infrastructure investments and services *provided primarily for public benefit* through business engagement.\(^{585}\) In terms of this indicator the reporting business should provide an explanation of the extent of investment with a developmental aim and how those investments impacted on the local community.\(^{586}\) This explanation should be supported by a statement indicating whether or not a needs analysis of the community’s needs has been conducted in order to establish which infrastructure investments or services are required.\(^{587}\) An additional indirect economic impact indicator has also been provided. In terms of this indicator a reporting business needs to explain its efforts to understand the indirect economic impact of its business activities on the local level.\(^{588}\) According to the *Indicator Protocols Set: EC*\(^{589}\)

indirect impacts are an important aspect of an organization’s role as a participant or agent in socio-economic change, particularly in developing economies.

This statement underlines the facts that through its actions a business has the potential to impact on the lives of more than just its employees, and that a business can unknowingly have a positive or negative impact on the socio-economic scene, supporting the important role that a business has to play as an agent of change. Indirect economic impacts could include making a contribution to poverty alleviation

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\(^{584}\) For a discussion of preferential procurement and enterprise development, see par 5.2.2.5.3 and par 5.2.2.5.4. Preferential procurement is one of the critical components of *BEE* since a business has the ability to influence contractual relationships within its value chain, while enterprise development is focussed on the support provided to black entrepreneurs within the specified sector (ie the agricultural sector).

\(^{585}\) GRI *Sustainability Reporting Guidelines* 26.

\(^{586}\) See par 5.2.6.3.1 and par 5.3.2.2.7.

\(^{587}\) The indicator protocol dealing with economic performance defines infrastructure as “Facilities (e.g., water supply facility, road, school, or hospital) built primarily to provide a public service or good rather than a commercial purpose, and from which the organization does not seek to gain direct economic benefit” (GRI *Indicator Protocols Set: EC* 12).


through the number of dependents supported from one job or the economic impact of improving (or deteriorating) social conditions or enhancing skills in a community.\textsuperscript{590}

5.4.2.4.2 Environmental performance indicators

The environmental indicators address factors dealing with materials (used by weight or volume and the percentage of materials used which are recycled), energy (consumption, saved, and initiatives to reduce consumption), water (use and recycled) and compliance (the value of fines and non-monetary sanctions for non-compliance).\textsuperscript{591}

5.4.2.4.3 Social performance indicators

The operations of any business have a distinct social dimension and reporting entities are therefore required to report on the impacts which the entity has had on the social milieu where it operates. The inclusion of the social indicators represents an important expansion in the scope of sustainability reporting, thereby acknowledging the social dimension of business operations. These indicators detail the parameters used to determine the reporting entity’s social performance. The social performance indicators are divided into sub-categories dealing with labour practices and decent work, human rights, society, and product responsibility.\textsuperscript{592} The following paragraphs will discuss each of these sub-categories.

a) Labour practices and decent work performance indicators

These indicators address issues such as employment, occupational health and safety, training and education and diversity and equal opportunities. An integrated sustainability report should include information on the size of a workforce with details on

\textsuperscript{590} GRI Indicator Protocols Set: EC 13.
\textsuperscript{591} GRI Sustainability Reporting Guidelines 28 – 29, and GRI Indicator Protocols Set Environment: EN 1 – 40. The environmental indicators will not be further discussed in this research. These indicators represent a separate field of research which does not form part of the focus of this research. It should be noted that the issue of the environment features prominently in the duties of the social and ethics committee (see par 5.2.6.3.3) and is also identified as one of the core CSR subjects in terms of the ISOs Guidance (see par 5.3.2.2.4). Environmental issues also feature prominently in the UNGCs normative basis (see par 5.4.3.2.3).
\textsuperscript{592} GRI Sustainability Reporting Guidelines 29. These indicators reflect to some extent the functions of the social and ethics committee (see par 5.2.6.3); the CSR core subjects (see par 5.3.2.2); the UNGC’s human rights and labour issues (see par 5.4.3.2); and the core elements of the SA8000 Standard (see par 5.4.4).
employment type and the rate of employee turnover.\(^{593}\) It should further provide details of the percentage of the total workforce taking part in education, training and prevention programmes regarding serious diseases such as HIV/AIDS or tuberculosis. The Guidelines require a reporting entity to report on its health and safety performance and on injuries, occupational diseases, lost days and absentee rates.\(^{594}\) In addressing the aspect of training and education, the report should indicate the average hours of training per annum per employee.\(^{595}\) This performance indicator addresses the issue of human capital development through the expansion of the knowledge base through training. The indicator attempts to establish the scale of the business’ investments made in its employees which contributes to the social performance of the business. Finally the reporting entity needs to provide details of its commitment to diversity and equal opportunity. This indicator provides a quantitative measure of the diversity within the business.\(^{596}\)

b) Human rights performance indicators

The social performance indicators addressing human rights require a reporting entity to report on the extent to which it has considered human rights in its investment and procurement practices, for example, or with reference to non-discrimination.\(^{597}\) A reporting entity also needs to indicate to what extent the “track records” of supply chain businesses has been considered in its selection process.\(^{598}\) The aim of the human rights performance indicators is to provide detail of the impacts that a business’

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\(^{593}\) For a discussion of integrated reporting in terms of national guidelines, see par 5.3.4.6.4.


\(^{597}\) GRI Sustainability Reporting Guidelines 32 and GRI Indicator Protocols Set Human Rights: HR 1. Further aspects covered by these indicators include freedom of association and collective bargaining, child labour, security practices and indigenous rights. The issue of human rights also features explicitly in the ISO’s Guidance (see par 5.3.2.2.2) and the UNGC (see par 5.4.3.2.1), while most of the elements of the SA8000 standard address human rights issues such as equality. See par 5.4.4.2 for a discussion of the core elements of the standard.

activities have on the human rights of its stakeholders - in other words, what the degree of recognition of and respect for human rights is, internally and externally.

The first relevant core indicator dealing with the issue of investment and procurement practices evaluates the total number of investment agreements which include human rights clauses or which were subjected to human rights screenings.\(^599\) This Indicator provides an indication of the degree to which human rights are integrated into the policies and practices of a business. The performance indicator refers only to those investment agreements which are significant in terms of size and strategic importance. The second core indicator addressing the issue of investment and procurement practices requires a reporting entity to indicate which of its supply chain businesses have been screened in terms of their human rights practices.\(^600\) The reporting entity needs to illustrate how its supply networks apply human rights. For example, a large agricultural company buying maize from local suppliers needs to familiarise itself with the extent to which those suppliers respect human rights. The company needs to be satisfied that the supplier does not, for example, make use of child labour in the production of the product.

On the issue of non-discrimination a reporting business needs to report on the number of incidents of discrimination (on the grounds of race, colour, gender and other such issues) as well as the remediation taken to address the incidents.\(^601\)

c) Social performance indicators

According to the G3 Guidelines\(^602\) these performance indicators

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\(^599\) GRI Indicator Protocols Set Human Rights 1.
\(^600\) GRI Sustainability Reporting Guidelines 33 and GRI Indicator Protocols Set Human Rights 3. In addition to these two core indicators, the reporting business should report on the extent to which its employees have received training in human rights-related issues (GRI Indicator Protocols Set Human Rights 5).
\(^602\) GRI Sustainability Reporting Guidelines 33.
The specific factors addressed by the society performance indicators include community, corruption, public policy and compliance. The core indicator dealing with the aspect of community requires the reporting business to report on the social impacts that its operations have on local communities. For the purposes of this indicator, social impacts could include issues such as community health, involuntary resettlement or other forms of displacement, as well as cultural issues.

On the topic of compliance, this society indicator requires a reporting entity to report on the monetary value of sanctions against the entity for failing to comply with laws or regulations. Stakeholders need to be informed of the extent of non-compliance with the legal framework in order to enable them to determine whether or not such non-compliance is a sufficient reason to withdraw the business’ licence to operate, for example, or the nature and extent of the remedial actions required in order to ensure future compliance.

d) Product responsibility indicators

The products and services of a business influence its users and customers. In order to address the impact that these products and services have on users and customers, a performance indicator dealing with product responsibility has been established. Issues addressed by this performance indicator include customer health and safety, product and service labelling, and marketing communications. The indicator dealing with health and safety is a measure developed to enable the reporting business to identify health and safety issues throughout the life cycle of a product or service.

603 The issues of community development and community engagement feature in the majority of the instruments discussed in this chapter. See for example paras 5.2.2.5.5; 5.2.6.3.1; and 5.3.2.2.7.
604 GRI Indicator Protocols Set Society: SO 3. Excluded from these impacts are those impacts covered by other indicators.
606 See paras 5.2.6.3.4; 5.3.2.2.5; and 5.3.2.2.6 for a discussion of this issue in other relevant instruments.
607 GRI Sustainability Reporting Guidelines 36.
608 GRI Indicator Protocols Set Product Responsibility: PR 3. Reporting businesses are also required to report on the total number of incidents of non-compliance with health and safety regulations as well as the remedial actions taken to address the non-compliance in accordance with the additional customer health and safety indicator (GRI Indicator Protocols Set Product Responsibility: PR 4).
Reporting on product and service labelling provides an overview of the degree to which “information and labelling addresses a product’s or a service’s impact on sustainability”. In compiling the report it should for instance be noted whether or not information regarding the sourcing of the components of the product is required to be given.

5.3.2.5 Application levels

Entities drafting GRI-based reports should declare their level of application of the guidelines. The declaration of a level of application is used to provide stakeholders with clarity about the extent to which the guidelines have been implemented. In order to assess the level of compliance, three levels of application are provided for. These levels are A, B and C, with level C being the lowest application level. Level C is designed to enable new entrants to get used to the reporting guidelines in order to guide them towards a higher application level with higher degrees of transparency. In terms of the C application level, the reporting entity needs to report on at least 10 of the GRI performance indicators, while an entity reporting on 20 or more can allocate the B application level to its report. At the A level a reporting entity must present data on all 50 core indicators or provide an explanation of why a particular indicator is not applicable to the entity’s report. The rising levels of application “reinforce the importance and value of an incremental approach to reporting which expands over time” and serves as an incentive for beginners to get involved in sustainability reporting.

Additional to each of these levels are the plus (+) levels. The plus levels indicate that the self-assessed level of application provided by the business has been externally
assured. The aim of the external assurance is to assure that what the business has disclosed is a true reflection of the current situation. The plus level can be achieved only if the independent external assurance provider has included a statement in the report to the effect that the report represents a balanced and reasonable reflection of the performance of the business in terms of the performance indicators, based on the data included in the report. The effect of having a report externally assured is that it contributes to the legitimacy of the report and enhances the reporting entity’s credibility. Having a report externally assured is an indication that the reporter does not have anything to hide.

The international uptake of the GRI’s Sustainability Reporting Guidelines has been substantial, and its reach was confirmed by the 2008 KPMG *International Survey of Corporate Responsibility Reporting*. The survey tracked corporate reporting trends in some of the world’s largest companies. Over 2200 companies in 22 countries were included in the survey. Included in the sample were the Global Fortune 250 (G250) and the 100 largest companies (N100) by revenue in the countries. The survey confirmed the international uptake of the GRI Guidelines and found that 77 percent of the G250 and 69 percent of the N100 companies followed the GRI Guidelines. On the topic of assurance of corporate responsibility reports, the survey found that 40 percent of G250 companies and 39 percent of N100 companies made use of formal assurance for their

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614 “External assurance” refers to “activities designed to result in published conclusions on the quality of the report and information contained within it” (GRI *Sustainability Reporting Guidelines* 38). Besides the use of an external, third party, a business electing to draft a GRI-based report may also request the GRI to check the business’ self-assessment (GRI *Application Levels* 1). Once the application level has been established by the GRI, it will provide an icon for the corresponding level of application, which can be used by the business in its reports. It should be noted that the GRI application check does not replace external assurance, and a business electing to make use of the GRI check may not indicate its status as being ‘plus’.

615 An independent external assurance provider can be an accounting practice, a business specialising in certification, or other technical businesses with expertise in the field of evaluating reports in a systematic, evidence-based manner. According to the GRI *Sustainability Reporting Guidelines* preparers of reports should also make use of stakeholder panels consisting of competent groups or individuals who are external to the business and who are not “unduly limited by their relationship with the organisation or its stakeholders” (GRI *Sustainability Reporting Guidelines* 38).

616 GRI *Application Levels* 4. A reporting entity can further request the GRI to check the application level without the GRI providing a view on the quality of the report and its content. The GRI application check is merely a statement regarding the extent to which the G3 guidelines had been followed and is not to be equated to the external assessment (GRI *Application Levels* 3).


618 KPMG *International Survey 2008* 35.
reports. In this regard it is noteworthy that 15 percent of South Africa’s companies included in the survey had their reports externally assured. The reasons put forward for this low level of assurance were a possible low demand for assurance from stakeholders or a lack of awareness about the benefits of assurance. The survey found that although the top South African companies do use the GRI guidelines in their reports, they provide little substance on issues such as their sustainability strategy or other material issues.

5.3.2.6 Critique of the GRI

The GRI is, however, not without its weaknesses. A major point of critique against the Guidelines is that the external assurance of the reports, in order to ensure its validity, is not required. Assuring the accuracy of these reports remains a major challenge. With reference to assurance and the verification of report content, Brown, De Jong and Levy raise the question of what the object of the verification should be – the report or sustainability performance - since different types of firm doing the verification (for instance, an accounting firm as opposed to a CSR consultancy) will focus on different aspects in their verification process. The fact that the Guidelines do not require those reporting to have the report externally assessed or certified could be regarded as a further shortcoming. Besides the fact that the legitimacy of a report not externally assessed is possibly questionable, it might be argued that businesses that publish reports that have not been assessed may have something to hide, or that the reporting entity is not as transparent as it would like to be seen. On the flipside of the coin, reporting entities do not have their reports externally assessed as a result of the costs associated with such an assessment.

A further issue in this regard deals with the standard against which a sustainability report is assessed. When an external assurance provider is required to assess a sustainability report, the provider needs to be able to assess the report against a pre-

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619 This represents a 10% increase for G250 companies and a 6% increase for the N100 companies compared to the 2005 survey (KPMG International Survey 2008 65).
620 KPMG International Survey 2008 93.
621 KPMG International Survey 2008 93.
determined set of standards – a set of standards not provided for by the GRI. Some criteria for verification are provided by standards such as the AA1000 Standard, developed by the Institute for Social and Ethical Accountability.

A further point of critique against the GRI is the fact that reporting in terms of the Guidelines remains voluntary, a fact which might weaken its impact. The GRI is based on guidelines and does not establish a framework with legal effect.\textsuperscript{624} Given the international uptake of the GRI Guidelines it does, however, seem as if the general trend is towards self-regulation, except in instance where compliance with the Guidelines is required in listing requirements, for instance.

Despite its faults the GRI has made an important contribution in advancing the concepts of inclusive multi-stakeholderism and social impact indicators, and has contributed toward sustainability reporting becoming an integral component of standard business practice. The GRI sustainability reporting guidelines will in future be regarded as one of the most important contributions in the development of CSR.

The GRI Guidelines provide an instrument which could be used to communicate the progress of a business on the principles set out in the United Nations Global Compact. The interrelatedness between the GRI and the Global Compact is supported by the fact that signatories of the Global Compact are required to use the GRI Guidelines. Isakson and Steimle\textsuperscript{625} note that

\begin{displayquote}
\textit{in the context of a comprehensive CSR approach it can be seen as a strength that the GRI guidelines are compatible with the principles of the United Nations Global Compact.}
\end{displayquote}

The second sub-category which multi-stakeholder CSR initiatives are divided into is referred to as principle-based standards. As can be deduced from the name of the category, initiatives in this category are focussed on identifying principles by which businesses are required to conduct their business.\textsuperscript{626} The following sections will

\textsuperscript{624} Nielsen and Thomsen 2007 (12) Corporate Communications: An International Journal 25.
\textsuperscript{625} Isakson and Steimle 2009 (21) The TQM Journal 175.
\textsuperscript{626} See Rasche 2010 (10) Corporate Governance 503 – 504.
discuss the United Nations Global Compact as the leading international principle-based standard.627

5.4.3 The United Nations Global Compact628

5.4.3.1 Introduction

The GC is a voluntary international network-based initiative which was launched in 2000 by the United Nations as an instrument to promote CSR. The GC is described as

a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.629

This strategic public-private initiative provides a policy framework (not a legal framework) to businesses which would assist them with the development, implementation, and disclosure of sustainability principles and practices in order to enable them to manage the risks and opportunities in the social, financial and environmental spheres.630 In order to achieve this, the GC requests businesses to embrace and support ten universally accepted principles dealing with the issues of human rights, labour, environment and anti-corruption.631 In essence the GC

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627 According to the web-page of the United Nations Global Compact, the Global Compact is the “largest corporate citizenship and sustainability initiative in the world — with over 7700 corporate participants and stakeholders from over 130 countries” (UN 2011 http://www.unglobalcompact.org/AboutTheGC/index.html).

628 Hereinafter referred to as the GC or the Global Compact. According to Sahlin-Andersson (2006 (6) Corporate Governance 598) the GC can be described as a “soft regulatory framework” due to the fact that it is a voluntary initiative with no legal sanctions for those who do not comply, as well as the fact that those businesses who do decide to follow the GC have “considerable leeway” in the application of the regulations.

629 UN 2011 http://www.unglobalcompact.org/AboutTheGC/index.html. Vormedal (Governance Through Learning 9) describes the GC as the “largest and most ambitious institution of its kind”, while according to Arevalo and Fallon (2008 (8) Corporate Governance 456) “The UN Global Compact (GC) provides perhaps the most far-reaching instance of a non-governmental effort to catalyze the voluntary participation of business in the corporate citizenship movement”. Kell (2005 (59) Journal of Business Ethics 74) describes the GC as a “tool to explore effective ways of implementing existing norms legitimized by the international community” and views the GC as a pragmatic response to government-governance failure.


631 These principles are deduced from prominent international instruments such as the Universal Declaration of Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development and the United Nations Convention Against Corruption. According to Bremer (2008 (17) Business Ethics: A European Review 230) these universally accepted principles “articulate behavioural norms that the GC organization describes as
encourages participants to commit to being good citizens that contribute to a more sustainable and just future. The fact that businesses are requested and not required to commit to the principles is indicative of the voluntary approach advocated by the United Nations when dealing with issues which could be related to CSR.632

Being a network-based initiative, the GC provides a platform for its participants to interact and discuss issues related to CSR and to facilitate the integration of CSR into business management, thus creating a platform for dialogue.633 The GC represents an attempt to induce collaboration between various sectors of society, and as a consequence it has participants from the private sector, NGOs, academic institutions and governments in order to “forge a coalition of social actors promoting the universality of the principles”.634 In order to understand the impact of the GC it should be noted that the aim of the GC is not to establish a formal code of conduct, nor does it create a reporting standard as is the case with the GRI, nor is it meant to be a binding set of regulations.635

Through its association with the UN and the variety of its international participants, the GC has a global scope which provides credibility to the claims that it is the leading international principle-based standard.

Membership of the GC is attained by providing a letter signed by the most senior officer of the participant, containing a commitment to the principles of the GC. Upon becoming a member, the member is required on an annual basis to provide a Communication on Progress (CoP) indicating the member’s efforts to adhere to the principles. According to the official website of the Global Compact, the purpose of the CoP is to enhance

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632 The voluntary nature of the UNGC is unfortunately also regarded as one of its main weaknesses. This issue will again be referred to in par 5.4.3.4.
633 Runhaar and Lafferty 2009 (84) Journal of Business Ethics 480. For a discussion of the main instruments used for the implementation of the GC’s goals, see Fritsch 2008 (22) Global Society 1 – 26.
transparency and accountability and to serve as a driver for performance improvement.\(^{636}\)

No formal format for the CoP is provided for and no external verification of the report is required, nor are any membership fees payable.\(^{637}\) The GC accordingly follows a very minimalist approach when addressing reporting requirements. Although the GC lays down minimal reporting requirements, many participating companies fail to comply with these basic reporting requirements,\(^{638}\) and it can consequently be said that the GC fails to require more than mere corporate representations of social responsibility.\(^{639}\)

5.4.3.2 The Global Compact’s normative basis

5.4.3.2.1 Human rights

Addressing the area of human rights, the Global Compact asks businesses to commit to internationally recognised human rights\(^ {640}\) and ensure that they are not complicit in human rights abuses.\(^ {641}\) These principles are based on the fact that businesses are important role players in the global society and that through their actions they impact on various levels of society. Supporting and respecting human rights are crucial for the promotion of the rule of law and play a vital role in providing businesses with their social licence to operate. Due to the fact that many businesses have an international footprint, businesses are in a unique position to strengthen the rule of law in the countries in

\(^{636}\) UN 2010 http://www.unglobalcompact.org/COP/communicating_progress.html. The CoP should include a statement of continued support and renewed commitment to the GC by the CEO (or equivalent) together with a description of the practical steps the participant has taken to implement the GC principles and the measurement of outcomes (UN 2010 http://www.unglobalcompact.org/COP/communicating_progress/cop_policy.html).

\(^{637}\) Although no formal format is provided for, the UN does provide a Practical Guide to Communication on Progress (accessible at http://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/Practical_Guide_2008.pdf) together with a step-by-step guide on how to submit a CoP on the GC website (accessible at http://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_posting_doc_eng.pdf). The UN has also provided a basic online CoP template, which assists participants with the completion and submission of their reports.

\(^{638}\) Utting 2008 (39) Development and Change 965.

\(^{639}\) Laufer 2003 (43) Journal of Business Ethics 259.

\(^{640}\) Principle 1 of the UNGC. For a complete discussion of this Principle, see UN 2010 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle1.html. For a discussion of human rights issues addressed in other instruments see par 5.3.2.2.2 and par 5.4.2.4.3b.

\(^{641}\) Principle 2 of the UNGC. For a complete discussion of this Principle, see UN 2010 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html.
which they operate which have a weaker rule of law and where respect for human rights is not considered to be a priority. These principles require businesses to familiarise themselves with the extent to which their supply chains recognise and respect human rights in order to ensure that such rights are respected in all aspects related to the business.

In order to demonstrate that a business is adhering to the request to support and respect human rights, the issue needs to be incorporated into the day-to-day management of the business. In this regard a business should have a policy statement in place in which it provides a public commitment to fulfilling its responsibility. Based on this policy statement a business needs to continuously assess its human rights impacts and report on its performance in this area. Participants in the Global Compact are required to provide communications on progress in order to provide evidence of their adherence to the request to respect human rights.\textsuperscript{642}

As stated above, businesses should further ensure that they are not complicit\textsuperscript{643} in any human rights abuses. Complicity in this regard could occur in a direct, beneficial or silent context. In the direct context, a business provides goods or services in the knowledge that they will be used to perpetrate abuse. In the beneficial context a business benefits from human rights abuses even though it did not perpetrate the abuse itself; and in the silent context, the company is aware of abuses but does nothing to act on these abuses.\textsuperscript{644}

5.4.3.2.2 Labour issues

Principles 3 to 6 of the UNGC address labour issues such as respect for the freedom of association,\textsuperscript{645} the elimination of forced and compulsory labour,\textsuperscript{646} and the abolition of

\textsuperscript{642} UN 2010 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle1.html.

\textsuperscript{643} According to Principle 2, complicity in this regard occurs "where a corporation knowingly provides practical assistance, encouragement or moral support that has a substantial effect on the perpetration of the abuse" (UN 2010 (http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html). Also see par 5.3.2.2.2 for a reference to complicity as used in the ISOs Guidance.

\textsuperscript{644} UN 2010 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle2.html

\textsuperscript{645} Principle 3 of the UNGC. For a complete discussion of this Principle, see UN 2009 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle3.html. The issue of freedom of association is also addressed in the SA8000 Standard – see par 5.4.4.2.4.
all forms of child labour,\textsuperscript{647} as well as the elimination of discrimination in respect of employment and occupation.\textsuperscript{648} The consequences of not adhering to these principles can be extremely severe, as became evident when it was reported that Nike made use of child labour in the production of their shoes in countries outside of the United States. Not only did Nike experience a huge drop in its market share, but the disclosure also caused irreparable damage to its reputation.\textsuperscript{649}

5.4.3.2.3 Environmental issues

The third set of principles addresses the realm of the environment. These principles ask businesses to support a precautionary approach to environmental challenges;\textsuperscript{650} to undertake initiatives to promote greater environmental responsibility;\textsuperscript{651} and to encourage the development and diffusion of environmentally friendly technologies.\textsuperscript{652} The precautionary approach solicits businesses to consider the degree of environmental damage which could be caused by their services or products and take appropriate measures to prevent such damage. This approach is based on the age-old notion that prevention is better than cure. The call for greater environmental responsibility supposes a management system in which it is possible to track the extent to which the

\textsuperscript{646} Principle 4 of the UNGC. For a complete discussion of this Principle, see UN 2009 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle4.html. The issue of freedom of forced labour is also addressed in the SA8000 Standard – see par 5.4.4.2.2.

\textsuperscript{647} Principle 5 of the UNGC. For a complete discussion of this Principle, see UN 2009 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle5.html. See par 5.4.4.2.1 for a discussion of child labour as an element of the SA 8000 Standard.

\textsuperscript{648} Principle 6 of the UNGC. For a complete discussion of this Principle, see UN 2009 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle6.html. See par 5.4.4.2.5 for a discussion of the elimination of discrimination as an element of the SA 8000 Standard.


\textsuperscript{650} Principle 7 of the UNGC. For a complete discussion of this Principle, see UN 2009 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle7.html. See paras 5.2.6.3.3; 5.3.2.2.4; and 5.4.2.4.2 for a reference to environmental issues included in other instruments.

\textsuperscript{651} Principle 8 of the UNGC. For a complete discussion of this Principle, see UN 2009 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle8.html.

\textsuperscript{652} Principle 9 of the UNGC. For a complete discussion of this Principle, see UN 2009 http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/Principle9.html.
business has incorporated sustainability issues into its core management. Through the acceptance of a greater environmental responsibility

business gains its legitimacy through meeting the needs of society, and increasingly society is expressing a clear need for more environmentally sustainable practices.653

The penultimate principle requires businesses to promote the expansion and distribution of environmentally friendly technologies. The key benefit of complying with this principle is an increase in the overall competitiveness of the business and the associated long-term economic benefits. 654

5.4.3.2.4 Anti-corruption

The final principle requests businesses to take a stand against corruption and eliminate all forms of bribery or extortion. This principle acknowledges the fact that the private sector has to share the responsibility for the elimination of corruption and bribery. The principle represents an attempt to ameliorate the effect of corruption and bribery on poor communities especially. According to this principle,655 corruption and bribery do not only have a “disproportionate impact on poor communities and [are] corrosive on the very fabric of society”, but they also pose a threat to economic growth and stability as well as sustainable development.

The principle identifies an ethical as well as a business case why the private sector should combat corruption in all its forms. In terms of the ethical case the principle notes that corruption is not only inherently wrong, but also represents an abuse of power which undermines the integrity of society.656 The business case is found in the fact that corrupt actions could lead to legal actions being taken against a business with accompanying reputational damage and financial costs.

5.4.3.3 Critique

Although the GC is a commendable attempt to provide a platform for the development and implementation of CSR strategies, it is not without its weaknesses. As is the case with the majority of international instruments dealing with CSR issues, the most prevalent point of critique against the GC is its voluntary nature, the fact that no provisions are made for enforcement, and no instruments exist for punishing non-compliance. Furthermore, no provision is made for procedures or instruments which monitor a participant’s compliance with the identified principles.657

Runhaar and Lafferty658 identify three reasons for the voluntary nature of the GC. In the first instance they note a lack of support for more authoritative regulations resulting from the private sector’s opposition to being over regulated. Secondly the authors refer to negative experiences with previous attempts to regulate transnational companies through codes of conduct, and finally they identify the UN’s lack of capacity to monitor and enforce compliance as a reason for the voluntary nature of the GC.

The UN made an attempt to address the issue of compliance through its “Integrity Measures”,659 which requires participants to annually provide a Communication of Progress (CoP) in which they report on their implementation of the principles identified in the GC. This requirement was introduced in 2003 and is a precondition for participants to maintain their membership. If a participant fails to submit a CoP by the determined deadline, such a participant will be listed as “non-communicating” on the GC’s website. If the participant fails for two consecutive years to submit a report on progress, the participant will be de-listed for the failure to communicate.

The introduction of the required CoP can be considered as an enforcement instrument and a step toward increased transparency, although these reports do not need to undergo any form of verification.660 This fact detracts from the status of the GC, is

658 Runhaar and Lafferty 2009 (84) Journal of Business Ethics 481. These reasons are further supported by Arevalo and Aravind (2010 (10) Corporate Governance 409).
contrary to the calls for greater accountability and transparency in reporting, and leaves the task of assessing the degree of compliance to the participant itself.661 This form of self-policing (the GC is designed to be largely un-policed)662 might detract from the overall legitimacy of the instrument. It is recommended that stronger mechanisms for accountability and transparency should be incorporated into the GC, with built-in checks and balances enabling participants to monitor their progress.663 According to Sethi664 the GC provides a venue for opportunistic companies to make grandiose statements of corporate citizenship without worrying about being called to account for their actions.

A point of critique closely related to the issue of accountability and transparency is that the Global Compact lacks the provision of an instrument of measurement or criteria against which the progress of participants can be measured. Although a participant should, in its annual CoP, provide a description of the practical steps it has taken to implement the GC principles, together with a measurement of outcomes,665 no instrument of measurement is provided. It is left to each participant to decide what it wants to report and what not.

A further point of critique against the GC is found in its membership. As was indicated earlier, membership is achieved by simply submitting a letter of undertaking in which the approach followed through the use of a CoP stresses the minimalistic approach to reporting and despite this minimalist approach many participating companies fail to comply with these basic reporting requirements (Utting 2008 (39) Development and Change 965).


662 The result of having a largely un-policed instrument with no external verification requirements is that the majority of reports provided by participants follow a piecemeal approach and are fragmented, subjective and overly positive (Arevalo and Fallon 2008 (8) Corporate Governance 460).

663 Mechanisms to enhance accountability include peer accountability within networks, where members of a network subject themselves to peer reviews from other members in the network; and mechanisms though which naming and shaming occur. The value of naming and shaming lies in the threat that such actions pose to reputation and image (Arevalo and Fallon 2008 (8) Corporate Governance 465). According to Kel (2005 (59) Journal of Business Ethics 73) “The belief is still deeply rooted in the development community that initiatives can only be effective at improving the social and environmental performance of private enterprises through the use of intense monitoring”, stressing the need for formal mechanisms of monitoring to be included in the GC.


665 A measurement of outcomes requires a participant to identify targets and define performance indicators.
participant confirms its commitment to the GC principles. In this regard the GC lacks any membership criteria and process for selecting potential members. The GC should establish more reliable criteria for membership selection in order to ensure a higher standard of transparency. Arevalo and Fallon\textsuperscript{666} propose that participants should be selected based on issues such as their competence and willingness to communicate in an open and transparent manner.

5.4.3.4 The benefits of membership

The voluntary nature of the GC does, however, have the benefit of flexibility, which formal regulation normally does not offer. The flexible nature of the GC allows participants to change their CSR strategies when required without having to wait for legislative changes. The voluntary approach in this instance might enhance CSR to levels exceeding those which could be attained through a regulatory framework due to the existence of the platform created by the GC for dialogue and learning, for instance.\textsuperscript{667}

To date, no definitive answer has been provided to the question of whether or not the GC has actually effected changes in the manner in which CSR is approached, nor of whether or not a business adhering to the principles of the GC will benefit in any way. Research by Cetindamar and Husoy\textsuperscript{668} investigated the question of whether or not participation in the GC had any value for participating companies. The research concluded that the major benefits of participation were confined to acquiring better network opportunities and an improved corporate image.\textsuperscript{669}

5.4.3.5 Conclusion

Although research regarding the benefits of implementing the principles of the Global Compact is inconclusive, it is argued that following the GC principles would give rise to there being more responsible corporate citizens with a greater awareness of the societal

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\textsuperscript{666} Arevalo and Fallon 2008 (8) Corporate Governance 466.
\textsuperscript{668} Cetindamar and Husoy 2007 (76) Journal of Business Ethics 173.
\textsuperscript{669} Cetindamar and Husoy 2007 (76) Journal of Business Ethics 173.
impacts of their actions. The value of the GC lies in the fact that it provides network-based learning opportunities enabling participants to learn from one another and to create stronger CSR initiatives. However, it is unfortunate that the Compact has a relatively weak enforcement mechanism and does not provide any measurement criteria against which participants can measure their progress in their application of the GC principles. In order to become a more serious CSR initiative, it is argued that the GC should create stronger enforcement mechanisms through which those participants who are not acting in accord with the ten principles are identified and held accountable for their non-compliance. It is further recommended that the GC should provide a clearer indication to participants of what is required of them. In this instance a scorecard approach might be the most effective way of establishing the level of compliance and provide a clearer indication to a participant about its level of compliance with the ten principles.

One of the major points of critique against both the UNGC and the GRI is the fact that these instruments are not certifiable standards and do not make provision for third-party verification.\textsuperscript{670} This shortcoming might negatively impact on the corporate uptake of these instruments and raises questions about their practicality. However, within the CSR context some instruments are certifiable through third-party verification – instruments such as the Social Accountability 8000 (SA8000) standard of Social Accountability International (SAI) and the AA1000 series standards of AccountAbility. Unfortunately both of these instruments focus on limited aspects of CSR, with SA8000 focussing exclusively on the fundamental (social) rights of workers and employees,\textsuperscript{671} and AA1000 focussing on stakeholder engagement.\textsuperscript{672}

\textsuperscript{670} See par 5.3.2.6 for the critique against the GRI in this regard.
\textsuperscript{672} AA 1000 focuses on the “process of reporting on how businesses must link the principles of accountability and sustainability”. Thus the focus is on the process of accountability (Suntantoputra 2009 (14) Corporate Communications: An International Journal 35).
The following section will provide a brief overview of SA8000 as an example of an international certifiable standard to illustrate the point that within the CSR context a certifiable standard addressing the full scope of CSR is necessary, but currently lacking.

### 5.4.4 Social Accountability 8000 (SA8000) standard

#### 5.4.4.1 Introduction

SA8000 is a universal process and performance standard setting voluntary requirements for employers addressing issues of employment and human rights, and can be classified as an instrument developed for social accounting. The Standard is based on the principal international instruments on human rights and labour laws as defined in the ILO Conventions and the UN Universal Declaration of Human Rights and focuses on the protection of workers’ rights by providing a set of auditable standards for third-party verification. The auditable standards provided for – which are to be discussed in the following paragraph – lay down the social accountability requirements to be met by employers in order to qualify for certification, and are vital to enable auditors to verify compliance. Before the issue of certification can be

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673 Leipziger *The corporate social responsibility code book* 156.

674 The standard applies universally with no industry-specific versions thereof. The standard was released by Social Accountability International, a non-profit organisation focussing on the social accountability of businesses. According to the Guidance document (Social Accountability International *Guidance document for Social Accountability 8000* 11) the use of the standard is available to several types of companies including companies which seek to independently verify their social record or their own record as well as the record of their contractors. From this it is evident that the standard has definite application in the supply chain as well. Göbbels and Jonker (2003 (18) *Managerial Auditing Journal* 54 – 58) describe the Standard as “an auditable standard for a third-party verification system to ensure both ethical sourcing of products and goods and workplace conditions worldwide”.

675 Rasche and Esser 2006 (65) *Journal of Business Ethics* 251. Social accounting has also been referred to as social and ethical accounting, auditing and reporting (SEAAR), which addresses the measurement, assessment and communication of social and ethical performance. For a discussion on social accounting see Mathews *Accounting, Auditing & Accountability Journal* 481 – 531; Owen and Swift 2001 *Business Ethics: A European Review* 4 – 8; Owen, Swift and Hunt 2001 *Accounting Forum* 264 – 282 and Owen *et al* 2000 *European Accounting Review* 81 – 99.

676 Göbbels “Standards for corporate social responsibility” 188. ILO Conventions include ILO Conventions 29 and 105, focussing on forced and bonded labour; ILO Conventions 100 and 111, focussing on equal remuneration for male and female workers for work of equal value; and ILO Convention 155 and Recommendation 164, focussing on occupational safety and health (SAI *Social Accountability 8000* 4 and SAI *Guidance document* 8).

677 Perrini, Pogutz and Tencati *Developing corporate social responsibility* 102. This standard places an exclusive focus on the social (labour) dimension of a company’s operations.

678 The issues of certification and third-party assessment will be addressed in par 5.4.4.2.
addressed, a brief overview of the core elements of the Standard should first be provided.

5.4.4.2 Core elements of the standard

The Standard consists of nine social accountability requirements, of which the first eight address human rights and labour issues, while the final requirement deals with the issue of management systems to oversee the other eight issues. The first eight elements address issues of child labour; forced and compulsory labour; health and safety; freedom of association and the right to collective bargaining; discrimination; disciplinary practices; working hours; and remuneration.

5.4.4.2.1 Child labour

The criteria applied to this requirement is that the company shall not engage in or support the use of child labour and that it shall have policies and procedures in place not only to ensure compliance with the requirement but also to remedy situations where the company contravenes the requirement. Companies further commit to ensuring, when employing young workers, that these workers work only outside of school hours, that they are not required to work during night hours, and that they shall not be exposed to a workplace that is hazardous to their physical and mental health and development.

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679 For a complete discussion, including the standard requirements, auditing considerations and background information, of the various core elements of the Standard, see SAI Guidance document 14 – 113.

680 A child is defined as: “Any person less than 15 years of age, unless the minimum age for work or mandatory schooling is stipulated as being higher by local law, in which case the stipulated higher age applies in that locality” (SAI Social Accountability 8000 5). S1 of the Basic Conditions of Employment Act (hereinafter referred to as the BCEA) defines a child as a person who is under 18 years of age. However, it should be noted that s 43(1) of the BCEA mirrors the Standard to the extent that s 43(1)(a) expressly prohibits the employment of children under the age of 15. This requirement is similar to the labour practices and decent work performance indicators of the GRI (see par 5.4.2.4.3a) and the labour issues addressed by the GC (see par 5.4.3.2.2).

681 SAI Social Accountability 8000 5.

682 A young worker is defined as: “Any worker over the age of a child, ..., and under the age of 18” (SAI Social Accountability 8000 5).

683 SAI Social Accountability 8000 5 – 6. This requirement has been included in s 28(1)(f) of the Constitution and is aimed at providing further protection to children. S 43(2) of the BCEA reinforces this prohibition. In terms of this section business may not employ a child where the employment is
5.4.4.2.2 Forced and compulsory labour

Under this requirement companies are required not to engage in or support the use of forced and compulsory labour. Companies are also required not to require employees to pay “deposits” or lodge identification documents upon commencement of employment. In terms of this requirement it is impermissible for a company to withhold payment, benefits or documents in order to compel an employee to continue his or her employment.

5.4.4.2.3 Health and safety

This requirement addresses health and safety in the workplace and requires companies to provide a safe and healthy workplace. Companies are required to take effective steps to prevent potential accidents and injury to workers’ health arising out of, associated with, or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the workplace environment, and bearing in mind the prevailing knowledge of the industry and of any specific hazards.

In order to ensure compliance with the above requirements, companies are required to appoint a senior management representative responsible for ensuring workplace health and safety and for implementing this element of the Standard.

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684 Forced and compulsory labour is defined as: “All work or service that a person has not offered to do voluntarily and is made to do under the threat of punishment or retaliation, or is demanded as a means of repayment of debt” (SAI Social Accountability 8000). 685 SAI Social Accountability 8000 6. 686 S 8 of the Occupational Health and Safety Act is similar to this requirement and identifies the duties of employers to their employees. These duties include taking such steps as may be reasonably practicable to eliminate or mitigate any hazard or potential hazard to the safety or health of employees, supplying personal protective equipment and providing such information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety at work of employees (ss 8(1)(b) and (e)). Health and safety issues are also issues which a local company’s social and ethics committee are required to monitor and report on (see par 5.2.6.3.2).

687 Companies are further required to provide employees with the required training to ensure compliance; establish systems to detect, avoid, or respond to potential threats to personnel health and safety; and provide protective equipment where applicable (SAI Social Accountability 8000). This requirement is echoed by s 17 of the Occupational Health and Safety Act, which requires employers with more than 20 employees to appoint a health and safety representative who will be responsible for fulfilling the duties identified in s18 of the Act.
5.4.4.2.4 Freedom of association and the right to collective bargaining

The fourth requirement addresses labour relations and requires companies to respect the right of employees to form, join, and organise trade unions of their choice and to enter into collective bargaining.\(^688\) Companies undertake not to discriminate against any employee who exercises this right and to ensure that representatives of employees are not subjected to harassment, intimidation, or retaliation as a result of their being members of a union or participating in union activities.\(^689\)

5.4.4.2.5 Discrimination

In terms of this requirement, companies are required to refrain from engaging in or supporting discrimination related to hiring, remuneration, promotion based on race, nationality, or caste.\(^690\) Companies should further not interfere with the exercise of employees’ rights related to religion or allow any behaviour that is threatening, abusive or sexually coercive.\(^691\)

5.4.4.2.6 Disciplinary practices

Companies will comply with this requirement when they treat their employees with dignity and respect and refrain from engaging in the use of corporal punishment, mental or physical coercion or verbal abuse.\(^692\)

5.4.4.2.7 Working hours

A company is required to ensure that an employee does not work more than 48 hours (excluding overtime) in a normal work week and that the employee shall be provided with at least one day off following every six days of consecutive work.\(^693\)

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\(^{688}\) This issue is also included in the GC – see par 5.4.3.2.2.

\(^{689}\) SAI Social Accountability 8000 7. Ss 4 – 10 of the Labour Relations Act (hereinafter referred to as the LRA) addresses the issue of freedom of association. S 4 of the LRA acknowledges the employee’s right to take part in the activities of trade unions, while the entire Ch3 of the Act focuses on the right to collective bargaining.

\(^{690}\) SAI Social Accountability 8000 7.

\(^{691}\) SAI Social Accountability 8000 7.

\(^{692}\) SAI Social Accountability 8000 7. See paras 5.3.2.2.2; 5.4.2.4.3; and 5.4.3.2.1 for other instruments addressing the issue of discrimination in the workplace.
5.4.4.2.8 Remuneration

The final requirement places a company under the obligation to ensure that its remuneration always at least meets the legal or industry minimum. Companies are further obliged not to make any deductions from wages for disciplinary reasons except to the extent that it is permitted by national law, and to remunerate employees for overtime at a premium rate prescribed by national law.

5.4.4.3 Management of the Standard: Social management system

The ninth requirement that companies are required to meet does not address a human rights or labour issue, but requires the development of a management system to facilitate compliance with the first eight requirements, thus ensuring that social issues are integrated into all aspects of the company policy. Companies are required to have a policy for social accountability and labour conditions in which their commitment to the requirements of the Standard is made clear. The policy must be effectively documented, implemented, maintained and made accessible to all employees. In order to ensure that the requirements of the Standard are met, companies are under an obligation to employ a management representative who will be responsible for overseeing compliance with the requirements. The required policy shall be periodically reviewed by the top management in order to ensure that the policy is still current and suitable for the company’s needs. Finally companies are under an obligation to establish and maintain procedures to communicate information on a regular basis to stakeholders regarding compliance with the requirements.

5.4.4.4 Certification

SA 8000 is an auditable standard through an evidenced-based process conducted by independent auditors. The aim of certification is to demonstrate to stakeholders and

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693 SAI Social Accountability 8000 7. Ss 6 – 18 of the BCEA address the issue of working hours. It should be noted that s 9(1)(a) of the BCEA refers to a 45-hour work week as opposed to the 48-hour work week of the Standard.

694 Or in terms of a negotiated collective bargaining agreement (SAI Social Accountability 8000 8). S 34 of the BCEA provides clarity on what South African employers are allowed to deduct from their employees’ remuneration.

695 SAI Social Accountability 8000 8.

696 SAI Social Accountability 8000 10.
interested parties that existing company policies and practices conform to the requirements set out in the Standard and that the company is thus acting in a socially responsible manner. The certificate attesting to compliance with the requirements of the Standard is valid for a period of three years and may be issued only by SAI-accredited independent organisations. A certificate of compliance serves as a demonstration of a company’s commitment to the wellbeing of its employees and enhances its social licence to operate.

Three types of compliance assessments, first-party assessment, second-party assessment and third-party assessment are available, although only third-party assessment would lead to certification. According to the Guidance document first-party assessment occurs when the company assesses itself in order to determine its level of compliance with the requirements of the Standard. Second-party assessment occurs when the company is assessed by a purchaser of its products, while third-party assessment is conducted on a voluntary basis by an independent, accredited external body. The third-party assessment will assess the extent of the company’s compliance with the requirements of the Standard, and if the compliance is deemed to be in conformance with the Standard a certificate of compliance will be issued.

The third-party assessment requires a public description of the management systems implemented by the assessed business in order to demonstrate the business’ adherence to the requirements as set out in the Standard. Once a business has been certified to be in compliance with the requirements, the businesses will be monitored by the certification authority in order to ensure continuous compliance. The certifications authority must carry out surveillance audits every six months, while the business itself should conduct continuous monitoring through internal audits to ensure that the management system still conforms to the Standard’s requirements.

697 SAI Guidance document 10.
698 Ciliberti et al 2011 (19) Journal of Cleaner Production 885 – 894. The idea behind continuous monitoring is that it should lead to continuous improvement in order to embed socially responsible behaviour firmly in the company management and strategy (Göbbels and Jonker 2003 (18) Managerial Auditing Journal 57).
5.4.4.5 Local application

By 31 March 2011 a total of 2606 facilities had been certified as being SA8000 compliant. However, despite its generic nature, according to statistics provided by Social Accountability Accreditation Services, South Africa does not have a single facility which has been certified in terms of this Standard, indicating that local businesses are either unaware of the possibility of certification or are unwilling to carry the additional expense associated with external verification.

Although no local facility/business has been certified in terms of the Standard, it should be noted that every requirement on which a business is evaluated in terms of the Standard is, within the South African context, regulated by law. Issues such as child labour, forced and compulsory labour, freedom of association and the right to collective bargaining, and the prohibition of discrimination are legally regulated and some of them have received constitutional endorsement, while issues such as health and safety, remuneration and working hours have been addressed by legislation such as the BCEA, the LRA and the Occupational Health and Safety Act. Thus, despite the fact that no South African business has been certified in terms of this Standard, local businesses have unknowingly complied with the requirements of the Standard. Should local businesses comply with the provisions of the Constitution and various labour and other legislation it would not be difficult for them to be certified in terms of the Standard. Certification in terms of this Standard would enable a business to use the certification to

699 Göbbels and Jonker (2003 (18) Managerial Auditing Journal 57) indentify the generic nature – as a result of its application to different types of businesses – of the Standard as one of its common characteristics.


701 S 28(1)(e) of the Constitution affords every child the right to be protected from exploitative labour practices. The prohibition against child labour is further regulated by ss 43 – 48 of the Basic Conditions of Employment Act.

702 In terms of s 13 of the Constitution no one may be subjected to slavery, servitude or forced labour. This notion is further reinforced by s 28(1)(f), which prohibits requiring children to perform work or provide services that are inappropriate for a person of that child’s age, or that place the child’s well-being, education or physical or mental health at risk.

703 S18 of the Constitution affords everyone the right to freedom of association, while s 23(5) recognises the right to engage in collective bargaining.

704 The issues of equality and the prohibition of discrimination are addressed in s 9 of the Constitution.
indicate visibly to its stakeholders that it is taking its social responsibility seriously and that the business regards itself as a good corporate citizen.

5.5 Conclusion

According to Horrigan\textsuperscript{705}

an overarching CSR policy framework is a fundamental foundation for countries which take CSR seriously.

This statement raises the following two very important questions in the South African context: Is the South African Government taking CSR seriously, and does South Africa have an overarching CSR policy framework? From the lack of formal endorsement, the absence of a Government supported facilitation body (or of a Government department addressing the issue) and the lack of an enforcement authority it appears as though the South African Government is not taking CSR seriously enough. Since a governmental policy and regulatory framework expressly addressing the issue of CSR is lacking, this chapter has addressed the following issue: \textit{Which legal requirements and guidelines found nationally and internationally could form part of a national legal framework for CSR?} In order to address this question, a discussion was provided of national legislation which could be related to CSR (since CSR is not expressly referred to in any legislation). From the perspective of a regulatory framework it became evident that the two most important legislative steps taken by Government are found in black economic empowerment and in the regulations promulgated in terms of the \textit{Companies Act}. The discussion then turned to national instruments addressing aspects of CSR, most notably ISO 26000, which is the (inter)national standard on social responsibility, and \textit{King II} and \textit{King III}, addressing CSR in the corporate governance context. Finally the discussion focussed on leading international instruments dealing with CSR, distinguishing between instruments which are voluntary and which have no assurance or certification (such as the United Nations Global Compact), and instruments such as the Global Reporting Initiative, which allocates application levels but does not require external verification; to certifiable instruments (such as the SA8000 Standard).

\textsuperscript{705} Horrigan \textit{Corporate Social Responsibility} 139.
Regarding national legislation it became evident that the issue of CSR is currently not explicitly dealt with in any legislation, although some legislation does have what could be labelled CSR content. The lack of express legislation addressing CSR raises some concern about the national Government’s commitment to the subject. Despite the absence of legislation expressly addressing the CSR, legislation such as the BEE Act or the regulations in terms of the Company Act do, to some extent, provide a platform from which agricultural companies can launch their CSR initiatives. The contribution of the BEE Act is of special importance since it encourages the private sector to contribute to the empowerment of black South Africans through initiatives that address skills development, preferential procurement, enterprise development and socio-economic development. Of further importance is the contribution especially of AgriBEE, which has a nuanced focus on providing training and training infrastructure for managers and employees of farming businesses, for instance, or providing mentoring and extension services to black emerging farmers and land reform beneficiaries. The contribution of the Companies Regulations with reference to CSR lies in the inclusion of a committee responsible for overseeing issues such as social and economic development, good corporate citizenship, or community involvement and development – a committee which directly reports to the annual meeting of shareholders. Regardless of the fact that the Regulations do not provide the committee with any executive powers, it is argued that the committee will in future have an important function to fulfil in ensuring that the company takes ownership of the impact that company decisions and activities have on the society in which the company operates and that CSR is integrated throughout the company and its relationships. Through its compliance with legislation an agricultural company must be able to demonstrate how it has contributed to social transformation and, in particular, how its procurement practices have benefited those in need of upliftment.

This chapter has paid specific attention to measures which are not included in a legislative framework, but which could be included in a policy framework for CSR. Since the legislative framework does not deal comprehensively with CSR, agricultural companies need to go beyond legal compliance, recognising that although legal compliance is a fundamental duty and an essential part of their social responsibility
other instruments and guidelines also form part of a possible CSR framework. In this regard the ISO’s Guidance on social responsibility might in future prove to become the leading instrument which provides guidance to businesses on the identification and implementation of their CSR strategies. Unfortunately the instrument is only a guidance document and does not include any measurable requirements which could be certified. The focus on community development as a core element of social responsibility is to be welcomed and should be included in any future framework addressing CSR. While the Guidance identifies the core elements of social responsibility, the national reports on corporate governance (King II and King III) identify CSR as a characteristic of corporate governance, advocate the inclusive stakeholder approach, and require listed companies from 2011 to draft integrated reports that focus on the need for businesses to link the consequences of their business policies and practices to the impact they have on society and the business. The value of these reports is that companies should integrate sustainability reporting and disclosures with legally required financial disclosures, thus enabling the drafters to contextualise the financial performance. Unfortunately neither of the reports on governance specifically prescribes how companies should report on CSR, or how a company’s CSR initiatives can be measured. As a result, South African companies still do not have a clear indication of how to report on CSR and how to measure their initiatives.

In order to widen the scope of the research, this chapter also included discussions of leading international instruments addressing CSR issues. The first instrument discussed, the Global Reporting Initiative, advocates a similar approach to that followed by the national reports on corporate governance. The GRI provides guidance on consolidated sustainability reporting and provides guidance on what to report on and how to define the report content, based on the sustainability performance indicators addressing economic, environmental and social performance. From the CSR perspective, social performance indicators provide guidance on issues related to labour practices and decent work, human rights, product responsibility and society. The societal performance indicator is of specific significance since it requires businesses to report on the social impact that its operations have on local communities as well as how the business has contributed to social upliftment. Unfortunately, although this
instrument has various application levels, the GRI is not a certifiable standard and does not require third-party assessment. The same shortcoming was identified in the United Nations Global Compact, which “requests” businesses to consider the issues of human rights, labour, the environment and anti-corruption, and ensure that they are not in violation of rights afforded in any of these areas. Finally, the chapter discussed the SA8000 standard as an internationally certifiable standard. Whereas the GRI and UNGC are not certifiable standards, SA8000 is a certifiable standard addressing social accountability. Unfortunately the Standard focuses predominantly on labour issues such as child labour, health and safety, freedom of association and collective bargaining. The importance of this Standard lies in its requirement of a social management system, which requires the development of a management system to facilitate compliance with the requirements of the standard, a requirement which is lacking in any of the other instruments discussed in this chapter and which should be included in a framework for CSR.

From the discussion of the legislation and national instruments it is evident that no express government-established framework for CSR exists and that no broad spectrum measures exist to compel the private sector to involve themselves in CSR initiatives. As a result of this absence, the following chapter will make recommendations on how to institutionalise CSR through the use of a government-enacted CSR framework Act. In order to propose the content of the framework Act, a discussion will be provided of the central CSR themes to be included. These themes are extrapolated from the instruments discussed in this chapter. The following table will be used for the discussions in paragraph 6.2. The table is a reflection of the themes identified in the instruments discussed and indicates how many times a theme is reflected in the various instruments.
## Themes in CSR instruments

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- Ensure not complicit, incorp in management
- Social indicator – how considered in investment
- Local community needs analysis – social indicator
- Businesses must comply
- Report annually
- Integrate sustainability reporting with legal

- Report on social invest & initiatives supporting transformation, community investment
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Key:

- **Appears in 6 instruments**
- **Appears in 5 instruments**
- **Appears in 4 instruments**
- **Appears in 3 instruments**
- **Appears in 2 instruments**
- **Appears in 1 instruments**

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Chapter 6: Legislating CSR through framework legislation

6.1 Introduction

Every political society is, and ought always to remain in constant need of adaptations to the persistent and inevitable changes in the social structure.¹

This remark, although made more than 35 years ago, is still applicable to the current situation in South Africa and now, more than ever, it is inevitable that changes should be made through legislation to achieve social reform (such as land reform). Especially in the area of social responsibility it is necessary to implement social innovations through the use of legal compulsion. However, Van der Vyver² cautioned:

The problem with democracy is that the government that owes its political power to the popular vote of the people must constantly bear the wishes and prejudices of the electorate in mind. Although it is within the power of the government of the day to take action which goes against what may conveniently be termed public opinion, such action can, in a democratic society, lead to the speedy downfall of the political party in office.

Given South Africa’s political history and the extreme levels of inequality on various levels (including inequality with reference to land ownership), it is, in the opinion of the author, unlikely that the majority of South Africans who have to live with these inequalities on a daily basis will oppose moves by Government to regulate CSR. In all likelihood a CSR Act will be popular amongst the poor and the marginalised and unpopular amongst some in the private sector. Any attempt to regulate CSR will be popular with some of the people some of the time, but certainly not with all the people, all the time. Nevertheless, this chapter is in response to the sixth specific research question, which asked: What should be included in a proposed CSR framework Act aimed at institutionalising CSR?

At the outset of this chapter it should be stressed that the CSR framework law proposed in this chapter does not intend to create a right to corporate social responsibility or to create any individual entitlements giving rise to claims against private sector actors.³

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¹ Van der Vyver 1976 SALJ 56.
² 1976 SALJ 59.
³ Individuals can thus not institute a claim based on the proposed CSR Act in terms of which compliance with the Act is insisted upon. However, businesses can be held accountable by the state for failure to comply with the requirements of the Act.
However, as will be become evident from the discussions to follow, it does propose the creation of certain obligations on the state and on the private sector which give rise to sanctions in instances of failure to comply. In the context of this research the broad notion of CSR could conceivably include an array of socio-economic, labour, environmental or other human rights without creating an explicit right to CSR. The framework legislation proposed in this chapter should be regarded as being complementary to existing legislation addressing the rights addressed. This is similar for example to the *BEE Act*, which does not create any constitutionally protected socio-economic rights but is regarded as a measure which *facilitates the realisation* of socio-economic rights.\(^4\)

During the discussions in chapter 4 it became evident that an enabling CSR environment is established through positive state action that includes developing and implementing policies and strategies supported by legislation that guides CSR activities. However, it was noted that despite the fact that governments (in general) are regarded as one of the main drivers behind CSR,\(^5\) South Africa does not have any formal coordinated policies or strategies addressing the issue, nor, as evidenced by chapter 5, does it have any legislation which explicitly regulates the issue.\(^6\) Government efforts which could be labelled as CSR or which have CSR content are inadequate and utterly fragmented, as was evidenced by the discussion in chapter 5. The CSR activities of private sector enterprises such as agricultural companies are not directed by legislation. As a result many businesses are dressing their purely philanthropic contributions (which have no strategic benefit) in a CSR coat, thus creating the appearance that they are acting in a socially responsible manner. The need exists to provide proper legislative guidance on CSR-related matters.

With no comprehensive policy framework and no overarching legislation that addresses CSR in existence in South Africa, it is reasonable to claim that the current measures aimed at facilitating CSR and embedding the notion in the corporate conscience are

\(^4\) See par 5.2.2 for a discussion of the BEE legislation and its relation to CSR.
\(^5\) See par 3.8.8 for a discussion of government as a driver of CSR.
\(^6\) According to Coomans and Yakpo (2004 (4) *AHRLJ* 19) when drafting a national strategy the principles of accountability, transparency, participation and implementation should be complied with. This presupposes a consultative process in which various stakeholders are acknowledged and engaged.
inadequate and fail to establish an effective enabling environment. As a result, South Africa is in need of a framework law that addresses CSR and provides the necessary legal impetus for the establishment of a corporate conscience based on its social responsibility. The Government needs to adopt framework law\(^7\) to give content to the private sector’s social responsibility towards society. Such framework law would confirm Government’s commitment to embedding CSR in the domestic legal framework. The enactment of (framework) legislation provides an opportunity for the legislature to get involved in and establish accountability mechanisms which provide legitimacy to the process.\(^8\)

The move towards a framework law in this context is supported by the fact that various sections included in the Bill of Rights\(^9\) place Government under a constitutional obligation to take *legislative* and other measures to ensure that the rights created are respected, protected, promoted and fulfilled, as required by section 7(2) of the *Constitution*.\(^{10}\) Based on this constitutional duty, a framework has to be provided for CSR, which provides the overarching instrument for the implementation of a national CSR strategy and policy.

It is evident, then, from noting the lack of an effective CSR enabling framework, that the need exists to regulate aspects of CSR by means of a framework law. As a result, the aim of this chapter is to combine relevant national legislation and national and international guidelines into a framework Act that would institutionalise CSR. To achieve this, the first discussion will extrapolate commonalities from the CSR instruments discussed in the previous chapter in order to determine which aspects of them should be included in a CSR framework law. The paragraph following this discussion will introduce the concept of framework legislation by way of a discussion of the nature, scope and advantages of such legislation. The final paragraph will discuss

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\(^7\) Khoza noted that the use of framework legislation or a framework law is “a relatively new and an undeveloped concept in legal theory and practice” and that there is “scant literature or scholarly work on the term and its application in a national context” (Khoza “The role of framework legislation” 187).

\(^8\) Khoza 2004 (20) *SAJHR* 679.

\(^9\) Ss 24(b); 25(5); 26(2); and 27(1). For a discussion of s 25(5), see par 2.2.

\(^{10}\) See par 2.2.2.2 for a discussion of these duties in the context of the right of access to land in terms of s 25(5) of the *Constitution*. 

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elements of the proposed Corporate Social Responsibility Act and apply the elements to
the Act.

It has to be emphasised that this chapter does not purport to provide the full content of a
possible CSR framework Act. However, the chapter will discuss issues which in the
opinion of the author have to be included in a possible framework Act.

6.2 General trends in CSR or CSR-related instruments

6.2.1 Introduction

Chapter 5 was dedicated to a discussion of various instruments ranging from legislative
measures to voluntary private sector measures which could conceivably form part of an
enabling environment for CSR. From these instruments it is possible to extrapolate
some commonalities or general trends that would be useful when proposing a CSR
framework Act.11

Due to CSR’s multidimensional nature, it is not strange that a variety of priority issues or
themes are identified when working with CSR. As an example, the WBCSD identified a
number of CSR priority issues including human rights, employee rights, environmental
protection, supplier relations, community involvement, and related issues addressing
the rights of stakeholder (interested parties) and monitoring and assessing CSR
performance.12 The European Commission identified human rights, labour and
employment practices, environmental issues, combating bribery and corruption,
community involvement and consumer interests as elements of the multidimensional
nature of CSR.13 Wan-Jan14 notes that Business for Social Responsibility (BSR)
identifies the following CSR “issues”: business ethics, community investment, the
environment, governance and accountability, human rights, and workplace policies.
The author has noted that the International Business Leaders Forum identifies the
following 6 CSR “themes”: human rights, labour and security, enterprise and economic

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11 See par 5.5 for the table in which commonalities in the instruments were identified.
12 WBCSD CSR: Meeting changing expectations 2.
development, business standards and corporate governance, health promotion, education, and the environment.\textsuperscript{15}

In the afore it is evident that commonalities can be identified in the position that leading international institutions take with regard to CSR. Core issues such as human rights, employee rights, environmental aspects and community development feature prominently. However, it is important to establish whether these issues are also featured in the national and international instruments that address CSR or which are related to CSR.

During the discussion of the instruments in chapter 5 it became evident that South African national instruments such as those included in the BEE framework or the JSE Socially Responsible Investment index follow a more context-specific approach with the focus on distinct national issues such as skills development and a demonstrated commitment towards upliftment and the creation of equal opportunities. International instruments such as the ISO \textit{Guidance on social responsibility}, the GRI and the UNGC address more generic issues such as human rights and health and safety.

Based on the discussions of the instruments in chapter 5 a number of recurring CSR “themes” or “issues” are identified. It must be noted that a number of these themes can be linked directly to land reform. The following paragraphs will briefly discuss them.

\subsection*{6.2.2 Health and safety}

The focus of this element is in the first instance on the occupational health and safety of employees in the workplace and secondly on the health and safety of consumers. Businesses must ensure that their employees work in a safe working environment and that the products which they produce are not harmful to consumers.\textsuperscript{16}

\textsuperscript{15} Wan-Jan 2006 (6) \textit{Journal of Public Affairs} 182.

\textsuperscript{16} The issue of health and safety features most prominently in the instruments, with 6 of the 9 instruments referring to the subject. See paras 5.2.2.5.4, 5.2.6.3.3, 5.3.2.2.3, 5.3.2.2.5, 5.3.3.5.2, 5.4.2.4.3.a and d, and 5.4.4.2.3.
In the context of land reform the contribution of the agricultural sector can be found in instances where these companies can provide guidance to emerging farmers\(^{17}\) regarding health and safety issues. As an example, agricultural companies can provide guidance on the use of fertilizers for their crops and assist the emerging farmers with the distribution of the fertilizers between the crops. Through this assistance the farmers will be made aware of the potential dangers associated for example with handling the fertilizers. The farmers could also be provided with environmentally friendly alternatives to the use of non-organic fertilizers, which in turn relate to the following theme.

6.2.3 **Natural environment**

This theme addresses issues related to the natural environment and is referred to in both national and international instruments.\(^ {18}\) Businesses are required to consider the effect of their operations on the natural environment and to take steps to minimise any adverse effects their actions might have on the environment. Businesses must accept their environmental responsibility, must follow the precautionary approach to environmental management, and must acknowledge the fact that the polluter pays. Businesses must further continuously monitor their usage of materials, energy and water and institute practices in terms of which they reduce their consumption of these resources and re-use and recycle them as much as possible.

6.2.4 **Labour and employment**

Labour and employment issues in the CSR instruments appear predominantly in international instruments and focus on labour-related issues such as a prohibition on child or forced labour, freedom of association, and the regulation of working hours.\(^ {19}\) Although these issues are not expressly dealt with in any national CSR instrument they have received legislative attention in the national context with section 13 of the *Constitution*, for example, prohibiting slavery, servitude and forced labour, and section 23 regulating labour relations. Issues such as the regulation of working hours are also

\(^{17}\) “Emerging farmers” for the purposes of the discussion in this paragraph are those farmers who have gained access to agricultural land through either land restitution or land redistribution.

\(^{18}\) See paras 5.2.6.3.3, 5.3.2.2.4, 5.3.3.5.2, 5.4.2.4.2, and 5.4.3.2.3.

\(^{19}\) For labour and employment matters see paras 5.3.2.2.6, 5.4.2.4.3.a, 5.4.3.2.2, 5.4.4.2.1, and 5.4.4.2.2.
regulated by the *Basic Conditions of Employment Act*.\(^{20}\) Businesses should not only ensure that they are complying with local labour laws, but should also satisfy themselves that those businesses in their supply chains are complying with local requirements. As an example, companies in the agricultural sector dealing with local producers (farmers) should be satisfied that their local producers comply with the major labour legislation. These companies could also provide assistance to those emerging farmers who are not sure about what is required of them with reference to labour and employment.

### 6.2.5 Community involvement and development

As is the case with labour and employment issues, community involvement and development is addressed in 4 of the 9 instruments.\(^{21}\) Due to it is importance in the CSR context, the fact that this issue is not addressed in the majority of CSR instruments should be questioned. Community involvement and development is central to the notion of CSR and should consequently be included in the proposed draft Corporate Social Responsibility Act. This inclusion would be in line the constitutional values of equality and the advancement of human rights and freedoms and would also contribute to the empowerment of those in most need of being empowered. Businesses should conduct an analysis of the needs of the communities in which they operate in order to determine the communities’ needs and then involve themselves in initiatives that contribute to the transformation of these communities. Community involvement and development should be central to any CSR enabling framework.

It is recommended that once a business has identified its stakeholders\(^{22}\) and established their needs an agreement be concluded between the business and the stakeholder community, represented by duly elected community representatives. This agreement, which could be referred to as a mutual responsibility agreement, should then embody the business’ CSR practices. In terms of this agreement the expectations and responsibilities of the parties (the business and the community) with regards to the

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\(^{20}\) 75 of 1997.

\(^{21}\) For community involvement and development see paras 5.2.6.3.2, 5.3.2.2.6, 5.3.3.5.2 and 5.4.2.4.1.

\(^{22}\) See par 3.4.2.2.4 for a discussion of the various types of stakeholders.
community involvement should be clearly spelt out. If for example, a community has a low rate of literacy, the business would agree to make education facilities available, subject to an undertaking by the community that they would ensure that community members make use of the facilities. A step such as this would be beneficial to both the business and the community. A rise in the literacy level would benefit the members of the community and provide them with access to higher skilled employment, while the business would be able to recruit literate employees from the community.

The situation regarding emerging farmers also serves as an excellent example of how agricultural businesses can involve themselves in community development. Through their support of emerging farmers agricultural businesses will not only be contributing to the development (economic and otherwise) of these communities, but would also be contributing to a successful land reform programme by assisting these farmers to become productive commercial farmers.

6.2.6 Skills development and education

With reference to skills development, businesses are expected to involve themselves in issues such as training, internships and mentoring, which amounts to human development. This type of involvement would signal a business’ commitment to contributing to the enhancement of the overall skill levels of the business’ stakeholders (including, but not limited to employees). In this regard skills development exhibits similarities with the issue of education, which also features in some of the instruments. It is recommended that the proposed CSR Act should include skills development and education programmes as possible manifestations of CSR initiatives.

The issues of skills development and education are crucial to the success of the land reform programme. The discussion of community involvement and development in the previous paragraph made it evident that the private sector could, through its community involvement, contribute to the upliftment of the beneficiaries of its CSR programmes. Agricultural companies are so centrally located in the agricultural sector that it almost

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23 For references to skills development, see paras 5.2.2.5.2, 5.3.2.2.3, and 5.3.5.
24 For references to education issues, see paras 5.2.2.5.4, 5.2.6.3.5, and 5.4.2.4.3.a.
seems like stating the obvious that their CSR programmes should be aimed at beneficiaries of the land reform programme. Unfortunately this position is not so very obvious to some of the major agricultural companies operating in central South Africa, which are still not engaging with emerging farmers in an attempt to develop not only the skills of the farmers but also to develop future suppliers.

6.2.7 Consumer relationships and stakeholder management

Consumer issues largely focus on fair marketing and the health and safety of consumers, though they also have to do with labelling and other forms of communication with customers. Consequently consumer issues are related to public relations and are used as one of the indicators to measure social compliance. Since consumers are also regarded as legitimate stakeholders (as identified in paragraph 3.4.2.2.) the issue of consumer relations can also be included under stakeholder management. Stakeholder management features prominently in the national instruments, with both of the King Reports as well as the JSE SRI Index referring to the issue. Businesses should manage their stakeholder relations and consider the legitimate interests of stakeholders in their business activities. This can be done only if businesses are aware of who their stakeholders are and what their legitimate interests are. These matters should be established through a process of stakeholder mapping in terms of which the stakeholders are identified and classified according to their role in the business as well as their potential threat to the business. It is evident that the issue of stakeholder management is also closely linked to the issue of community involvement and development, as discussed in paragraph 6.2.5.

6.2.8 Human rights (including the prohibition of discrimination)

The majority of the international instruments which were discussed identified human rights as one of the major CSR themes. These instruments indicate that businesses should ensure that they are not complicit in human rights transgressions and that the

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25 For references to consumer relationships, see paras 5.2.6.3.4, 5.3.2.2.5, and 5.4.2.4.3.d.
26 For references to stakeholder management, see paras 5.3.3.5.2, 5.3.4.6.3, and 5.3.5.
27 See par 3.4.2.2.3 for a discussion of the content of stakeholder claims or stakes in a business.
28 For references to human rights issues, see paras 5.3.2.2.2, 5.4.2.4.3.b, and 5.4.3.2.1.
human rights track records of suppliers should also be considered when concluding business contracts. Businesses should be able to demonstrate how they considered human rights issues in their investment decisions. Some of the instruments, such as the ISO Guidance on social responsibility, include the prohibition on discrimination\(^{29}\) under their discussion of human rights issues,\(^{30}\) while the SA8000 standard addresses the issue under its discussion of labour issues.\(^{31}\)

Given the fact that human rights are priority issues nationally and are extensively dealt with and protected by the Constitution, it would not be necessary for a CSR Act necessarily to make specific reference to human rights issues. However, it would be prudent if the proposed Act required businesses to demonstrate to what extent suppliers have been screened for their human rights track records and how human rights issues have been considered in the selection of their socially responsible investment decisions.

### 6.2.9 Compliance and reporting

Although the issue of compliance and enforcement is referred to in only a third of the instruments discussed, the author is of the opinion that this issue is crucial to the success of any attempt to provide a framework Act for CSR.\(^{32}\) If CSR is to be embedded in the private sector’s social conscience and supported by an effective enabling framework it is crucial that any proposed legislative intervention create enforcement mechanisms to ensure compliance. Compliance requires businesses to ensure that they adhere to applicable laws and that they consider adherence to voluntary non-binding rules and codes of conduct. The issue of compliance and enforcement can be linked to the majority of the themes identified in the instruments discussed. Businesses need to comply with labour standards and health and safety standards, and respect and promote human rights. If contributions to land reform programmes as a manifestation of CSR were included in a framework Act, businesses in the agricultural sector would legally be compelled to comply.

\(^{29}\) For references to the prohibition against discrimination, see paras 5.2.6.3.2, 5.4.2.4.3, and 5.4.3.2.2.

\(^{30}\) See par 5.3.2.2.2.

\(^{31}\) See par 5.4.4.2.2.

\(^{32}\) For references to compliance and enforcement issues, see paras 5.3.3.5.1, 5.3.4.6.2, and 5.4.2.4.3.c.
The issue of integrated reporting is closely linked to compliance and enforcement as well as several of the other themes.\textsuperscript{33} Although only three of the instruments explicitly refer to integrated reporting it is recommended that it should at the very least be compulsory for all registered companies to report annually on the nature and extent of their CSR policies and practices and how these impacted on the beneficiaries of the CSR practices.

\textbf{6.2.10 Socio-economic development}

Socio-economic development is referred to in some of the national instruments only, and no reference is made to the theme in the international instruments.\textsuperscript{34} The aim of socio-economic development (and socio-economic development initiatives) should be to empower individuals in order to enable them to improve their quality of life. It was noted in paragraph 5.2.2.5.5 that the notion of SED could be regarded as CSR under a different label, and as a consequence SED could in theory include the majority of the themes identified in the instruments. An important and useful approach with regards to SED contributions is followed in the BEE framework, where a compliance target of 1% of net profits after tax is set for SED contributions. In this regard it is recommended that the proposed CSR Act should include a requirement that businesses are to contribute a set percentage of their annual income to CSR initiatives.

This issue is fairly similar to community involvement and development. It could be argued that socio-economic development should be based on engaging the community and result in the community’s socio-economic development. Since the aim of socio-economic development is to empower individuals to enable them to improve their quality of life, it is not difficult to see that an issue such as skills development could easily be classified as a socio-economic development initiative.

\textsuperscript{33} For references to integrated reporting, see paras 5.3.3.5.2, 5.3.4.6.4, and 5.4.2.3.
\textsuperscript{34} See paras 5.2.2.5.4 and 5.2.6.3.1 for references to socio-economic development.
6.2.11 Corporate citizenship

Although both the *Companies Regulations, 2011* and the *King III Report* make reference to corporate citizenship,\(^{35}\) the author is of the opinion that it is not necessary to make any explicit reference to the subject. This opinion is based on the fact that a business that respects and promotes human rights, that observes fair labour practices, that contributes to socio-economic development initiatives, or that complies with environmental and health and safety regulations will be regarded as a being a good corporate citizen. A good corporate citizen also acts against corruption and eliminates all forms of bribery or extortion.\(^ {36}\) However, since the issue of corruption and bribery is extensively dealt with in numerous pieces of legislation, it is recommended that a CSR Act should not be burdened with sections addressing the issue.

6.2.12 Preferential procurement and enterprise development

Preferential procurement\(^ {37}\) and enterprise development\(^ {38}\) are unique to the South African instruments and more specifically those included in the BEE framework. The aim of these two issues is firstly to encourage businesses to make their procurement from designated suppliers (in the context of BEE, the designated suppliers should be black-owned), and secondly, to encourage social investment through enterprise development contributions. Enterprise development should focus on matters such as the provision of training or mentoring to beneficiary entities, enabling the entities to increase their financial or operational capacity.

In the context of AgriBEE, “enterprise development” also refers to the provision of support to black emerging farmers and land reform beneficiaries. Although preferential procurement and enterprise development are addressed in the BEE framework, it is recommended that, given South Africa’s history and the persistent levels of inequality, these themes should also be included in the proposed CSR Act, thus reiterating the

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\(^{35}\) See paras 5.2.6.3.2 and 5.3.4.6.1. For a discussion of corporate citizenship as an approach to CSR, see par 3.4.2.4.

\(^{36}\) For references to anti-corruption see paras 5.2.6.3.1, 5.2.6.3.2, and 5.4.3.2.4.

\(^{37}\) See par 5.2.2.5.3 for a discussion of preferential procurement in the BEE context.

\(^{38}\) See par 5.2.2.5.4 for a discussion of enterprise development in the BEE context.
Government’s commitment to improving the socio-economic position of historically disadvantaged South Africans.

Regardless of what is included in the AgriBEE framework, both of these issues can be linked to land reform. With reference to preferential procurement, the Government could for example indicate that in certain areas it would transact only with those agricultural businesses that can confirm their contribution to assist land reform beneficiaries.

6.2.13 Management system

The final theme addressed in the discussion of the instruments relates to the establishment of a social management system to facilitate compliance with the prescriptions. The fact that the only reference to the establishment of a social management system is in the SA8000 standard does not detract from the important role that such a system would play in a CSR framework. Businesses should have an internal management system through which they manage their CSR initiatives. In this regard it is recommended that when a business reports on an annual basis on its CSR initiatives, it should also report on the management system implemented in order to ensure compliance with the proposed Act.

With the above commonalities and recommendations in mind, an act to serve as a framework law for CSR is recommended. However, in order to make proposals regarding the content of such a framework Act, it is necessary to briefly explain the concept of framework legislation by addressing its nature and scope as well as the advantages of making use thereof.

39 See par 5.4.4.3.
40 Framework legislation for the purposes of this research shows similarities to framework legislation used in other jurisdictions such as the USA. According to Garrett (2004) “framework laws establish internal procedures and rules that shape legislative deliberation and voting with respect to a specific subset of laws or decisions in the future. They are laws about lawmaking in a particular arena”. For a discussion of the purposes of framework legislation in the US context, see Garrett 2005 (14) Journal of Contemporary Legal Issues 717 – 766.
6.3 Framework legislation in general

6.3.1 Introduction

A number of the socio-economic rights enshrined in the Bill of Rights (including the right of access to land) require the state to take reasonable legislative and other measures to realise these rights. Framework legislation is regarded as one of the possible guises of legislative measures that could fulfil the state’s obligation with regards to the obligation to take such measures. Although delivered in another context, the use of framework legislation as part of a comprehensive strategy has been endorsed by the Constitutional Court in the *Grootboom* case. In its judgement the Court noted “[i]t may also require framework legislation at national level”, thus acknowledging the use of framework legislation within a broader legislative context. In this regard, Terblanche remarked that

raamwerk wetgewing as wetgewende maatreël ter verwesenliking van sosio-ekonomiese regte is nie ’n vreemde verskynsel in die Suid-Afrikaanse reg nie. [framework legislation as a legislative measure in the realisation of socio-economic rights is not a strange phenomenon in the South African law.] own translation

This remark is supported by various pieces of framework legislation aimed at realising socio-economic rights, such as the *National Health Act*, the *National Environmental Management Act*, and the *National Water Act*.

Framework legislation refers to

a legislative technique used to address cross-sectoral issues and facilitate a cohesive, coordinated and holistic approach to them.

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41 These rights include the right of access to land (s 25(5)); access to housing (s 26(1)); and access to water (s 27(1)(b). For a discussion of the right of access to land as a limited socio-economic right, see par 2.2.
42 Terblanche *Voedselsekerheid* 185 and 188.
43 *Grootboom* case at par 40.
44 Terblanche *Voedselsekerheid* 188.
45 61 of 2003. This Act provides the framework for a structured uniform health system within the Republic based *inter alia* on the constitutional duty included in s 27(1)(a) of the *Constitution*.
46 107 of 1998. This Act establishes a framework for integrating good environmental management into all development activities and is regarded as a legislative measure taken in terms of s 24(b) of the *Constitution*.
47 36 of 1998. This legislative measure was taken in accordance with the Constitutional duty in s 27(1)(b) of the *Constitution*. 

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In the context of CSR the need exists for social regulation that provides guidance to businesses on how to approach CSR and structure their internal policies accordingly. This need arises from the current institutional failure to comprehensively address CSR. In order to draft a framework law for CSR, Government needs to demonstrate that it has the necessary political will to introduce measures that would in all likelihood be met with fierce resistance from the private sector, and that it has the managerial capacity and resources available to implement such legislation.

A concrete, effective, and implementable CSR framework consisting of a framework law supported by a sound policy and strategy is required – a framework that defines the scope of application of CSR and provides for implementation provisions and sanctions for failure to comply.

6.3.2 The nature and scope of framework legislation

The primary aim of framework legislation is to “provide an overarching and coordinated tool for implementing national strategies and policies”. As an overarching implementation tool, framework legislation can be used to harmonise existing (and often disjointed) policies and strategies not regulated by law, as is the case with the current national approach to CSR.

Khoza identifies the purpose of framework legislation as an attempt to get a systematically defined and complex process of implementation started. A framework law consolidates an agreement over procedures for regulating this process.

According to Coomans and Yakpo a framework law is meant to facilitate a more cohesive, co-ordinated and holistic approach to a specific issues. Such legislation lays down the basic legal principles and competences without a detailed codification. Usually it includes a declaration of objectives and policies, the establishment of relevant institutions and a definition of procedural principles. It may also lay down rules and principles for responsibility and accountability of actors involved.

48 FAO Guide on legislating for the right to food 57.
49 Khoza 2004 (20) SAJHR 672.
50 Khoza “The role of framework legislation” 194 and Khoza 2004 (20) SAJHR 672.
51 Coomans and Yakpo 2004 (4) AHRLJ 20.
According to the Food and Agricultural Organization of the United Nations (FAO), framework legislation creates a broad outline for action without regulating the areas it covers in detail. However, it does lay down general principles and obligations but leave[s] it to implementing legislation and other authorities to determine specific measures to be taken to realize such obligations...52

Framework legislation identifies and addresses the shortcomings (or lack of coherence) in an existing framework and ultimately results in the development of a policy supported by legislation.53 It should further establish guiding principles for future policy development. The absence of an established enabling framework for CSR necessitates and justifies legislative intervention aimed at guiding CSR.

Unlike framework legislation which is aimed at giving content to a constitutionally enshrined socio-economic right such as housing or food, a CSR framework law would not provide for the core content of the right due to the fact that the proposed framework law should not be regarded as a law creating specific rights.

6.3.3 The advantages of framework legislation

Although the process of enacting framework legislation is more complicated and time-consuming than for example regulating CSR through soft law measures (including policies or strategies), once enacted, framework legislation as a manifestation of hard law presents numerous advantages.54 A CSR framework Act would serve as confirmation of Government’s commitment to embed CSR within the national legislative framework and its identification as a priority area.55 And it has the further advantage of spelling out the obligations of the private sector with reference to CSR.

52 FAO Guide on legislating for the right to food 57.
53 Khoza "The role of framework legislation" 194. Coomans and Yakpo (2004 (4) AHRLJ 23 – 24) note that before a framework law is drafted, the existing framework (consisting of legislation, policies or strategies) should be evaluated in order to identify possible weaknesses in the existing framework and then to address the weaknesses through a framework law.
55 Khoza ("The role of framework legislation" 197) noted that the adoption of a framework law could be regarded as a “firm political and legislative statement” regarding its commitment to the issue at hand. Also see Khoza 2004 (5) ESR 4 and Khoza 2004 (20) SAJHR 676.
Connected to the identification of obligations, a framework Act would make provision for legal sanctions in the event of violations of the act. The threat of sanction would compel the private sector to engage in CSR activities which would gradually lead to a greater commitment to CSR initiatives. A further advantage of a framework Act is that it would assign the responsibility for ensuring that the act is enforced to a designated state department or independent body. By assigning the ‘CSR portfolio’ to a designated department or body, compliance with the stipulations of the act would be monitored with greater ease. According to Khoza,\textsuperscript{56} the allocation of specific responsibilities to a designated department or body would ensure that the department or body accepted responsibility for ensuring compliance with the act and would be held accountable for a failure to do so. This would give rise to enhanced accountability.

Since framework legislation is in fact legislation, the normal legislative process would have to be followed in order to approve it. One of the advantages of addressing an issue through framework legislation as opposed to voluntary, self-regulatory measures is the participation of non-governmental organisations and other private sector actors in the process leading up to the final acceptance and enactment of the legislation. This inclusive approach provides greater legitimacy to the content and process. This position is in contrast for example to the process in which Government formulates a national strategy or in which individual private sector actors decide to introduce voluntary self-regulatory measures.

Despite its advantages, Coomans and Yakpo\textsuperscript{57} caution against the adoption of framework law on the grounds that it may be an exercise in window-dressing. The authors note that framework law should not be used as an excuse for the lack of more direct measures.

\textsuperscript{56} Khoza “The role of framework legislation” 196.
\textsuperscript{57} Coomans and Yakpo 2004 (4) \textit{AHRLJ} 21.
6.4 The draft *Corporate Social Responsibility Act*

6.4.1 Introduction

Businesses are obliged to consider the interests of society by accepting responsibility for the effect that their business activities have on an array of stakeholders, including customers, employees, shareholders and communities. However, the notion of CSR is not yet firmly embedded in corporate South Africa and as a result it is necessary to consider the provision of legislative guidance (through social regulation) in order to get corporate South Africa involved in CSR and CSR initiatives. An attempt to legislate CSR through the promulgation of a CSR Act would be unique and a clear indication to the rest of the world that the South African Government appreciates the benefits of CSR as an instrument to bring about change in the lives of millions of struggling South Africans. It ought to be reiterated that the proposed CSR Act should not be regarded as an attempt to comprehensively legislate every aspect of CSR. The proposed Act should be regarded as an instrument that could guide Government if and when it decides to formulate a formal position on CSR.

It should be noted that to date no comprehensive act addressing CSR exists anywhere in the world. Nigeria and the Philippines have made attempts to draft CSR legislation but neither of these countries has moved beyond the drafting stage. India has included some CSR reporting requirements in their 2011 *Companies Bill*, while in Denmark companies are required to report on their CSR policies and the extent to which CSR was considered in its investment decisions. It became evident during the discussion of the national instruments in chapter 5 that the issue of CSR is indirectly addressed in some legislation. This situation necessitates legislative intervention in order to compel businesses to act in a socially responsible manner and to contribute to projects that are regarded as a manifestation of their social responsibility. An attempt to legislate CSR would enhance the manner in which businesses respond to the needs of stakeholders and ensure that businesses contribute to socio-economic development with a view to achieving sustainable development. The following paragraphs will briefly discuss the

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58 Similar to *Bill 1239* introduced in the Philippines aimed at institutionalising CSR.
59 See for example the discussion of the regulations of the *Companies Act* in par 5.2.6.
content of a proposed CSR framework Act aimed at addressing businesses’ contributions to socio-economic development.

Finally, by legislating CSR, Government would not only be creating an enabling CSR environment,60 but it would also fulfil a number of the roles of governments in strengthening and creating an enabling environment for CSR.61 These roles include the mandating, facilitating, endorsing, enforcing, and legitimising roles.62

6.4.2 Content of the draft Act

The paragraphs to follow will refer to the most prominent issues that, in the opinion of the author, should be included in any attempt to formulate an Act regulating CSR.

6.4.2.1 Preamble / explanatory note

The CSR Act should be introduced through an explanatory note (this could also be the preamble) providing an account of why it is necessary to intervene in an area which has largely been left unregulated or regulated through soft law and instruments based on voluntary self-regulation. Legislative intervention is necessitated by the fact that the majority of South Africa’s business enterprises are focussed on maximising profits while failing to properly address pressing social issues (such as the crisis with land reform).

The explanatory note should further confirm Government’s commitment to creating an environment which is conducive to CSR. A statement should be included in which the Government recognises the vital role of the private sector in creating a society based on social justice and fundamental human rights. The statement should further acknowledge the sector’s role in improving the quality of life and freeing the potential of each person. As such, the Government encourages the sector’s active participation in fostering sustainable development and strengthening CSR.

The explanatory note should not only recognise the role of the private sector but should also acknowledge the fact that the Act stems from Government’s inability to effectively

60 See chapter 4 in general.
61 See par 4.2 for an overview of the roles of government in strengthening and creating an enabling CSR environment.
62 See paras 4.2.1, 4.2.2; 4.2.4; 4.2.5, and 4.2.6 respectively.
provide for the full realisation of all individual rights, especially socio-economic rights such as access to land, access to housing, and access to education. However, despite the Government’s inability to deliver, the Government remains committed to the realisation of these rights and it consequently regards the CSR Act as a manifestation of the required legislative measures and other measures as envisaged in several of the sections in the Constitution addressing socio-economic rights (such as the right of access to land enshrined in section 25(5)).

Finally the explanatory note should provide an indication of what the aim of the Act is, as well as give an outline of its purpose. The purpose of the proposed Act is institutionalising the social responsibility of private sector actors through inter alia the establishment of a Commission of CSR and the creation of legal obligations on the private sector with regards to CSR.

6.4.2.2 Definitions

The discussion of more than 25 national and international definitions of CSR in paragraph 3.2 made it clear that a generally accepted definition does not exist. Any attempt to define CSR should recognise that the definition attached to CSR differs from society to society and can be influenced by factors such as culture and belief. As a result, a definition of CSR in a developing country such as South Africa will differ from an American definition. In this regard, CSR should rather be used as an umbrella term to indicate that businesses have a responsibility towards the societies within which they operate and that this responsibility needs to be managed and integrated throughout all levels of a business and practised in all of its relationships with its stakeholders. An acceptable definition of CSR should reflect the fact that CSR goes beyond philanthropic contributions to communities and that CSR activities should, where possible, be linked to a business’ core business and ultimately deliver sustainable value to society.63 Given South Africa’s unique history the majority of CSR initiatives will identify historically disadvantaged South Africans as the beneficiaries of these initiatives. However, for the purposes of the CSR Act it is proposed that no distinction be drawn on the grounds of

63 See par 3.2.7.
race and that the choice of beneficiaries of CSR initiatives be left up to the businesses themselves. This step recognises that the social problems which could be addressed through CSR initiatives are not limited to a specific race group. This is in contrast for example to the approach followed in the BEE framework, which is exclusively focussed on black South Africans.

Given that South Africa has transformed the ISOs *Guidance on social responsibility* into a national standard (SANS 26000:2010)\(^{64}\) it is recommended that for the purposes of the CSR Act, CSR be defined as: The responsibility of a business for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that delivers sustainable value to society and manifests itself in initiatives that are aimed at social upliftment, that are strategic in nature, and that go beyond purely philanthropic contributions; that take into account the expectations of stakeholders; that are in compliance with applicable law and consistent with international norms of behaviour; and that are integrated throughout the business and practised in its relationships.

The proposed Act could also include a number of definitions provided in the ISO *Guidance* such as “stakeholder” and “stakeholder engagement”, “CSR initiative”, and “impact of a business”, thus ensuring that definitions related to CSR receive legal recognition and become part of the legal vocabulary.

6.4.2.3 Application of the Act

One of the most important sections of the proposed Act would be a section dedicated to the scope of application of the Act. This section should identify which businesses are targeted by the legislation. In the first instance it is recommended that the Act be applicable to all businesses operating in South Africa – whether domestic or foreign. Foreign businesses operating nationally are specifically included since these businesses also impact on the local society and communities. It is further proposed that an approach similar to the one followed by the *BEE Act* is followed where a distinction is made between businesses based on size. The determination of size could either be

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\(^{64}\) See par 5.3.2.
based on annual turnover or on the number of employees, or a combination. A further although more extreme classification could be made based on the sector in which a business operates. The reasoning behind such a move is that certain sectors such as the mining sector probably cause more damage to the environment and result in more health and safety issues than for example the financial services sector.

6.4.2.4 Commission on Corporate Social Responsibility

One of the most important developments which would be introduced by the proposed CSR Act would be the establishment of a Commission on Corporate Social Responsibility (or CSR Commission in short). The establishment of this Commission would be in response to the requirement that CSR should have an "address" in Government. An internal government structure would have to be established. This step would also be in line with the enforcing role of Government in strengthening and creating an enabling environment for CSR. The proposed Act would seek to establish the Commission on Corporate Social Responsibility that would be responsible for regulating and overseeing the CSR activities of the business sector. The Commission would be the institution responsible for the implementation of the Act.

In the first instance, this section of the Act should address administrative issues such as the composition of the Governing Board of the Commission. It is recommended that the Board consists of: a National Director (chairperson) – this person should be appointed by the President in order to provide legitimacy to the position; a human rights lawyer; representatives from environmental agencies; organised labour; and the private sector. It is further recommended that the Board should also include a community development expert on CSR in order to provide advice on developmental issues and at least two representatives from either non-governmental organisations or community based organisations. Although the Commission will be independent it is recommended that the Commission should fall under the auspices of a specific national ministry. It is recommended that, given CSR’s proximity to trade and industry, the Commission should resort under the Department of Trade and Industry.

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65 See par 4.3.2 for a discussion of the requirement of an internal government structure for CSR
66 See par 4.2.5.
The section should also identify the functions and powers of the Commission. The functions of the Commission could be the creation of a CSR label based on a standard developed by the Commission or the development of strategies to promote CSR together with guidelines addressing the implementation of CSR practices. The Commission would further be responsible for integrating CSR into national trade policies and for the implementation of specific CSR regulations.

6.4.2.5 CSR themes

The discussions in paragraph 6.2 identified a number of trends in the national and international instruments discussed in chapter 5. Based on these trends it is possible to identify priority areas where the private sector is well suited to provide assistance or relief. Once these priority areas have been identified it is crucial that businesses are encouraged to tailor their CSR initiatives to these themes. Given South Africa’s history, a number of these areas will have a distinctly South African nuance, with the focus on improving the lives of historically disadvantaged citizens.

The theme with the first priority relates to human rights. Although human rights are constitutionally protected it is important that the CSR Act reiterates the fact that businesses should not be complicit in human rights abuses and that these rights should be promoted and protected by the private sector.

The theme with the second priority relates to skills development. Given the importance of skills development and the fact that the Government cannot alone be held responsible for providing education and skills development it would be prudent to include a section that reaffirms the importance of human capital development. Skills development in this context is not limited to the development of the skills of employees, but also includes improving the overall skills levels of persons living in local communities which are linked to the business. This section must identify skills development programmes as an example of CSR programmes to which a business can contribute in order to fulfil the obligations set in terms of this Act.

Given the importance of land reform in the national context and the immense pressure that Government finds itself under to achieve the reform, it is logical that support for
initiatives related to the land reform programme be identified as possible CSR programmes. The agricultural sector is strategically situated to contribute to land reform. It is proposed, for example, that programmes which relate to providing support to emerging farmers be recognised as qualifying CSR programmes. Support should be understood in a broad sense to include financial support (such as access to credit) and support related to the provision of extension services, or the provision of guidance through mentorship programmes. Through the provision of this type of support it might be possible to turn the vast number of unproductive agricultural land reform projects into projects that in the first instance contribute to an improvement of the quality of life of the beneficiaries and secondly contribute to the national economy.

An issue that is closely related to both skills development and land reform is that of enterprise development. By providing support to emerging entrepreneurs (including emerging farmers) businesses have the ability to contribute to the establishment and development of new businesses. Businesses should be encouraged to make social investments in developing businesses. In the context of land reform, enterprise development will include the provision of support (financial and other) to emerging farmers and land reform beneficiaries.

Community involvement could be explicitly identified as a priority theme, although the majority of the priority areas already referred to can be related to some form of community involvement. The ultimate aim of community involvement programmes should be to contribute to the transformation of communities in which businesses operate. Programmes by agricultural sector companies to provide support to emerging farmers will be regarded as activities that would contribute to the economic transformation of the local communities (of which the emerging farmers would be members).

The final priority issue that has to be specifically identified in the Act is the issue of HIV/AIDS and other diseases which negatively impact on business and society. It is proposed that the Act identifies programmes that are specifically aimed at addressing these health issues as another manifestation of CSR initiatives. Given the devastating effect of HIV/AIDS and tuberculosis on society in general and the workforce specifically,
it is recommended that programmes aimed at preventing the spread of these diseases or programmes that provide support to those who are suffering as a result of the diseases be recognised as CSR initiatives. Government will not be able to fight the spread of HIV/AIDS on its own, and is in dire need of assistance from the private sector.

Finally, it is recommended that the relevant Minister be given the authority, as time progresses, to identify other priority issues that are related to CSR and which could be addressed by the private sector through its CSR activities.

6.4.2.6 Statutory requirements

The purpose of the Act is to foster conditions that provide an enabling environment for CSR and that give rise to sustainable businesses that contribute to society. In order to achieve this it is necessary to identify those who are charged with ensuring compliance and to assign and define responsibilities. From a CSR perspective this section would be the most significant, since it requires actual measures to be taken by businesses with regards to CSR.

Government is faced with two distinct options when it comes to regulating CSR on a fiscal level, with both options related to taxes. The first option is to incentivise CSR through the use of tax incentives. The second option is to set a mandatory contributory target. In the first instance, Government will incentivise CSR contributions through the use of tax rebates or the recognition of CSR expenditure as tax deductible. Although section 11(a) of the *Income Tax Act* makes provision for the deduction of expenditure in the production of income, it is unlikely that all CSR-related expenditure would be tax deductible, given the current tax position. This is mainly due to the fact that not all CSR-related expenditure is incurred in the production of income. In this regard the Government has an option to encourage CSR contributions through the recognition of

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67 The use of taxes as a regulatory instrument in a CSR policy is discussed in par 4.3.4.1.2.
68 58 of 1962.
69 The effect of deducting CSR expenditure would be that a business' taxable income would decline. The lower the business' taxable income is, the lower the amount of tax that has to be paid. Any attempt to recognise expenditure which is not addressed in s 11 of the *Income Tax Act* must be supported through an amendment of the *Income Tax Act*.
70 However, if CSR expenditure is truly strategic and thus related to a business' activities with an expected return, such expenditure would in any evident be deductible in terms of s 11(a) of the *Income Tax Act*. 

CSR expenditure as fully tax deductible – if of course the expenditure is on recognised CSR initiatives (which the Act would stipulate).\textsuperscript{71} It is recommended that the Act encourage businesses to contribute to initiatives in fields in which they have a direct interest. A company in the agricultural sector would in all likelihood not have a direct interest in research related to Alzheimer’s disease. It will, however, have an interest in supporting land reform or emerging farmers. One of the obvious issues with providing this type of tax relief is that since businesses’ taxable incomes will decrease the amount of tax collected will also decrease. This in turn will negatively impact on the total revenue collected through taxes, which would mean that fewer resources would be available to provide services.

In order to direct private sector expenditure into a specific area, Government could identify priority areas which the Government would like the private sector to address, and thus determine the extent to which the Act is applicable to a specific sector. If, for example, land reform is identified as a priority area, the Government could provide advanced recognition to contributions by businesses in the agricultural sector in order to encourage further contributions in this area. The effect of these measures would be that funds are directed to a specific issue in a more expedient manner, thus providing quicker results.

The second option available to Government is to require businesses in law to contribute a percentage of their annual taxable income to CSR initiatives without receiving any tax credits.\textsuperscript{72} It is recommended that an approach similar to the \textit{BEE Act} be followed in terms of which businesses are classified according to their size in order to determine the extent of their contributions. For example, businesses which are described as micro

\textsuperscript{71} Government could even provide advanced recognition for CSR expenditure. As an example, businesses could receive a tax deduction of R1.50 for every R1 of expenditure.

\textsuperscript{72} S 5(o) of the Nigerian \textit{Bill for an act to provide for the establishment of the Corporate Social Responsibility Commission} (available at \url{http://senatorchukwumerije.net/id64.html}) provides that Nigerian companies should annually contribute at least 3.5\% of their gross annual profit to CSR initiatives (which could include educational, cultural, environmental or economic programmes). Failure to make these contributions would result in financial penalties of at least 3.5\% of gross annual profit for repeated violations (s 7(3) of the \textit{Bill}). Another and potentially more severe penalty is envisaged by s 7(2) of the \textit{Bill}, which empowers the Commission to “temporarily shut down and suspend operations of an organization, corporation or company for a minimum of 30 working days as a penalty for non-compliance with statutory requirement of the corporate social responsibility as stipulated in this Act”.

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businesses will be required to contribute 1% of their annual taxable income to qualifying CSR initiatives, while small and medium businesses will be required to contribute 2%. The remaining businesses will be required to contribute 3% of their annual taxable income to CSR programmes. The fact that these contributions will not be deductible implies that Government’s income will not decline. The income available to Government to fund its projects will remain unaffected. The imposition of a mandatory CSR contribution could be regarded as a Government tax simply in another guise. Although this might be true it is argued that direct contributions to CSR initiatives which support land reform, for example, would be more successful than attempts by Government to provide the same support. Businesses are strategically well positioned to get directly involved in issues which affect them and their stakeholders. An initiative by one of the major agricultural companies in terms of which it supports beneficiaries of the land reform programme (such as emerging farmers) would provide more immediate benefits to these beneficiaries than any attempt by Government to do the same as there is less bureaucracy to contend with in the private sector and the private sector is more proximate to the areas in need of attention. The private sector also has the ability to respond quicker to social issues as they arise.

A hybrid of the two options is also possible. In terms of this third option, businesses are still required to contribute a percentage of their taxable income, but amounts exceeding the prescribed minimum will become allowable deductions. This approach might encourage businesses to go beyond what is legally required.

In the author’s opinion the second approach is preferable to the first. More funds would be available to address social issues and businesses would realise that they need to make strategic contributions in order to receive the benefits of CSR. If an agricultural company supports emerging farmers it would not only be empowering those farmers but would also be assisting future suppliers to the company.

73 See par 3.6 for a short overview of the benefits of socially responsible business practices.
6.4.2.7 Monitoring mechanisms

Taking note of the concern of Coomans and Yakpo referred to in paragraph 6.3.3, the proposed CSR Act must include enforcement measures in order to ensure compliance which would support Government’s commitment to the issue and prevent window-dressing.

In terms of this section, businesses are required to annually submit a report to the CSR Commission detailing the businesses’ CSR policies.\(^\text{74}\) It is recommended that the content of the reports be determined by the size of the business in line with the classification used to determine the scope of the compulsory CSR contribution. Large businesses will, for example, be required to report on the content of their CSR policy and how the policy is implemented and managed throughout the business. These businesses will also be required to indicate if and to what extent social responsibility has been considered in their investment decisions. All businesses will be required to provide details of the CSR programmes to which they have contributed as well as what the relation between the programmes and the businesses are. In order to facilitate the process the Commission should introduce an electronic filing system in terms of which businesses can submit their annual reports electronically.\(^\text{75}\)

Failure to submit a report as required must result in criminal liability and depending on the size of the business could also include personal criminal liability for board members. By criminalising a failure to report, Government would reiterate its commitment to CSR and give a clear indication that in this context it is approaching CSR in a “comply, or else” manner.

\(^\text{74}\) This resembles the provision in s 134(3)(o) of the Indian Companies Bill, 2011 that requires the board of directors of Indian companies to report on the details of the company’s CSR policy along with their annual financial statements, and to say how the policy has been implemented during the year. In terms of s 134(3)(o) of the Bill, companies should also report on their CSR initiatives undertaken during the year. Failure to report is a contravention of the section and punishable. Both the company and the officer who is in default will be held liable (see s 134(8)).

\(^\text{75}\) This would also be a more environmentally friendly approach, since less paper would be used in the drafting of the reports.
6.4.2.8 Offences

A crucial element of the CSR Act is the section addressing the creation of offences for instances of non-compliance with the Act. Without the creation of offences the Act will remain toothless and will have a limited impact. If no offences exist, businesses will not be deterred from non-compliance and the Act would be no more than a mere guideline. If businesses are required to contribute a percentage of their annual income to CSR initiatives, it is recommended that the penalty for non-compliance should be linked to the contribution required. If a large business is required to contribute 3% of its annual taxable income to CSR programmes and it contributes less than the prescribed percentage, the difference between the actual contribution and the required contribution should be levied as a penalty. It is further recommended that habitual non-compliers be “named and shamed”. The details of persistent defaulters should be placed on a list of CSR offenders and should, for example, be considered by Government when awarding contracts.

6.4.2.9 Separation clause

Finally the Act should include a separability section. In terms of this section if any section of the Act is held to be unconstitutional or invalid, the other sections will not be affected and will remain in force.

6.5 Conclusion

In chapter 1 reference was made to Frederick’s six fundamental principles of CSR.\(^{76}\) Two of these principles are related to this chapter. Frederick\(^{77}\) noted that a voluntary assumption of responsibility is preferable to government intervention and regulation; and greater economic, social, and political stability will result if every business adopts a socially responsible posture. Although it might be true that a voluntary assumption of responsibility is preferable to government intervention, this chapter noted that a voluntary assumption of responsibilities is lacking and that government intervention is indeed necessary to embed social responsibility in the corporate conscience. The

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\(^{76}\) See par 1.1.2.

\(^{77}\) Frederick "Theories of corporate social performance" 144 – 145.
second contention, that greater economic, social, and political stability will result if all businesses adopt a socially responsible posture, holds true for this chapter and is central to the argument that Government should draft a framework Act for CSR. If all businesses contribute to CSR programmes greater economic, social, and political stability will follow.78 In line with this argument, if an agricultural company provides assistance (through their CSR programmes) to emerging farmers who have received land in terms of the land reform programme, such assistance would undeniably contribute to economic stability, since both the farmers as well as the company would benefit financially. Given the fact that land reform is an emotional issue, measures taken to improve the success of the programme would also give rise to greater social and political stability with fewer inciting calls to occupy land illegally.

The aim of this chapter was to combine relevant national legislation and national and international guidelines into proposed framework legislation that would institutionalise CSR. In order to address this research objective, this chapter proposed a Corporate Social Responsibility Act which is aimed at facilitating a cohesive approach to CSR. It extrapolated commonalities from the national legislation and national and international guidelines in order to identify recurring themes which should be included in a CSR Act. From the discussions of the commonalities a number of issues were identified which should be included in the Act. These commonalities included issues related to human rights, labour and employment; skills development, enterprise development, community involvement and a stakeholder management system. Following the discussion of the commonalities, the concept of framework legislation was introduced. It became evident that framework legislation is not a new concept in South Africa, that the concept in general has been referred to by the Constitutional Court, and that it has been used by the legislature to address environmental management, health, and water issues. The advantages of making use of framework legislation include the fact that a CSR Act would serve as a confirmation of Government’s commitment to embed CSR within the national legislative framework and establish CSR as a priority issue. Finally, the chapter introduced the draft CSR Act and identified sections which are pertinent to the

78 For a discussion of the benefits of CSR, see par 3.6.
establishment of an enabling CSR environment. During the discussions of the content of the proposed Act it became evident that the Act should at a minimum identify which businesses were to be targeted by the legislation. It was recommended that an approach similar to the one followed in the BEE framework be followed, where obligations are assigned according to the size of the business. It was further recommended that the Act make provision for the establishment of a CSR Commission responsible for the regulation and oversight of CSR activities. Recommendations regarding the Commission’s composition and functions were also made. The discussion also identified a number of important themes to be referred to in the Act. These themes would include skills development, land reform and enterprise development. The proposed Act would contain a section which required a mandatory contribution by businesses to CSR programmes within the model of the proposed themes. The scope of the contribution would be based on the size of the business with micro businesses required to contribute less than large businesses. In order to ensure compliance, the Act would introduce penalties for non-compliance and also create mandatory reporting requirements in order to improve accountability.

Such a CSR Act would provide further legal impetus to the democratic transformation of the South African economy and highlight the undeniably important role that the private sector has to play in addressing contemporary social issues. The Act would serve as an affirmation of Government’s commitment to its constitutional duty to take legislative and other measures to realise the socio-economic rights (including the right to access to land) included in the Bill of Rights.
Chapter 7: Conclusion and recommendations

7.1 Revisiting the research questions

The central focus of this thesis, as identified by the general research question, was to establish to what extent land reform can be improved by the introduction of a CSR legal framework.\(^1\) The need for this research emanated from the increasing need to address the potentially explosive situation surrounding land reform – a situation created mainly as a result of the slow progress of the land reform programme in general.

Encapsulated in the general research question are various issues that were addressed through a number of specific research questions. These questions were formulated in order to unpack the general research question and address the subject area of the research. In order to answer the general research question comprehensively, the following specific research questions were formulated:

1. How is land reform currently being addressed in South Africa?
2. How is CSR framed within the national context?
3. How can CSR contribute to the land reform programme?
4. What are the roles and responsibilities of Government in creating an enabling environment for CSR?
5. Which legal requirements and guidelines found nationally and internationally could form part of a national legal framework for CSR?
6. What should be included in a proposed CSR framework Act aimed at institutionalising CSR?

These specific research questions formed the foundation for the discussions in chapters 2 to 6. Chapter two addressed question 1 and identified land reform as the situational context for the research. Chapter 3 addressed questions 2 and 3, framed CSR in the national context, and provided a discussion of the business case for CSR along with the

\(^1\) See par 1.2.
benefits, limitations and drivers of CSR. Chapter 4 provided an overview of the role and responsibilities of Government when creating an enabling environment for CSR and addressed question 4. Chapter 5 focussed on the regulatory framework for CSR in order to answer the fifth specific research question. Finally, chapter 6 was structured to answer the last specific research question and propose a framework Act for CSR.

7.2 Responding to the research questions through the research objectives

Based upon the formulation of the general research question, the primary objective of this research was to determine to what extent land reform could be improved by the introduction of a CSR legal framework. In order to reach the primary objective, the existing legal framework for CSR (consisting of national and international instruments) was evaluated. Based on that evaluation, framework legislation was proposed that would not only mandate CSR in general but also provide guidance to businesses (especially agricultural businesses) when addressing important societal issues (such land reform) as part of their CSR programmes.

In reaching the primary objective, the secondary research objectives were identified in paragraph 1.3. Each of these specific research objectives had been formulated to support the primary research question. The following paragraphs will retrospectively reflect on how each specific research question was answered. Based on these answers, the general research question will be addressed.

7.2.1 Addressing land reform in South Africa

7.2.1.1 Introduction

In order to answer the specific research question how land reform is currently being addressed in South Africa, access to land as a socio-economic right was discussed in the first instance. The constitutional basis of land reform specifically focuses on access to land, as envisaged by section 25(5) of the Constitution. Once the constitutional basis was established the performance of the Government in terms of its obligations as set out in the section was evaluated. This was done through a discussion of the progress and challenges of the land reform programme. The slow and tedious progress and
numerous challenges necessitate a new approach to land reform which is based on proposals in the *Draft Green Paper on Land Reform, 2011*.

### 7.2.1.2 Access to land as a socio-economic right

The right to access to land as envisaged by section 25(5)\(^2\) of the *Constitution* as a qualified socio-economic right places the state under a constitutional duty to take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. The right is qualified due to the fact that the Government has only to provide access to land with no provision for a right to land.\(^3\) Section 25(5) should be read in conjunction with section 7(2) of the *Constitution*, which places the duty on the state to respect, protect, promote and fulfil the rights enshrined in the Bill of Rights (of which the right of access to land is one). Since the right of access to land is regarded as a socio-economic right, the state’s measures to foster equitable access to land must be measured against the reasonableness standard\(^4\) in order to determine whether or not the state has complied with its constitutional duty to provide access. The reasonableness of the measures is determined with reference to the comprehensiveness of the measure, the availability of sufficient financial and human resources, and the manner in which the measures are implemented.

Section 25(5) explicitly refers to the use of *other measures* to foster access to land.\(^5\) Creating an enabling CSR environment could be regarded as such *other measures* as envisaged by the section. However, given the proposal in chapter 6 to draft a CSR framework Act it could inevitably be regarded as true legislative measures aimed *inter alia* at facilitating access to land.

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\(^2\) Read with s 25(8) of the *Constitution*.

\(^3\) See par 2.2 for a discussion of access to land as a socio-economic right.

\(^4\) For a discussion of the reasonableness review and how the review evolved, see par 2.2.2.3.

\(^5\) Reference to *other measures* in the context of land reform is also made in s 25(8) of the *Constitution* empowering the state to take legislative and other measures to *inter alia* achieve land reform.
7.2.1.3 Progress and challenges of the land reform programme

The progress made in terms of the restitution and redistribution programmes is unsatisfactory. Unless the Government takes decisive action to increase the pace of land reform a situation similar to the Zimbabwe-style land grabs could become a reality. Since the majority of agricultural land reform projects became unproductive once the land had been transferred to the land reform beneficiaries, it should be noted that any attempt to increase the pace of land reform has to be coupled with measures to ensure that these land reform projects make meaningful contributions to the national economy. Numerous challenges facing both of these programmes exist. These challenges include the poor performance of the programmes, fiscal restraints, the absence of post-settlement support, and the unsustainability of the land reform projects. The majority of these challenges can be addressed with assistance from the private sector through its CSR programmes.

7.2.1.4 New direction

The need to involve the private sector in the land reform programme was acknowledged in the Draft Green Paper on Land Reform, 2011 which envisages a Recapitalisation and Development Programme. This programme is aimed at increasing the productivity of existing land reform projects through the provision of financial and other support. The need to involve strategic partners from the private sector together with an attempt to involve existing players in the agricultural sector (such as farmers) in mentorship programmes is central to the proposed new direction. The realisation by the state that it needs the private sector if it wishes to make a success of land reform is a welcome step in the right direction.

7.2.1.5 Conclusion: land reform in South Africa

Access to land as a socio-economic right is facilitated inter alia through the land reform programme. A programme that is currently governed by a legislative framework – a framework that has constantly failed to meet the targets set. As a result, the need exists to find alternative measures through which the failing land reform programme can be improved.
7.2.2 Framing CSR in the national context

7.2.2.1 Introduction

Whereas land reform established the situational context within which the research took place, the main focus of the research was on improving the situational context (land reform) through CSR practices within a Government-established CSR framework. In describing the existing practice of CSR in South Africa, the definitions of and approaches to CSR were discussed.

7.2.2.2 Defining CSR

Defining CSR is an important step in determining how CSR is framed. However, the attempts to define CSR could aptly be described as “terminology in turmoil”, and defining CSR was one of the major challenges to research into the topic. No consensus exists regarding a single universally acceptable definition of CSR. This conclusion is ad idem with the remark by Votaw in 1972 that CSR “means something, but not always the same thing to everyone”. The discussion of the definitions confirmed that it is inevitable that CSR definitions will differ from society to society and as a result no single definition will be universally accepted. However, certain characteristics are included in many CSR definitions. These characteristics include references to the identification of the beneficiaries of the CSR initiatives, CSR’s being beneficial to both the business and society, CSR initiatives being extraneous to regular business activities, and CSR practices being integrated throughout all levels of a business.

CSR was not officially defined in South Africa until the King III Report was published. Both the King III Report and the SANS 26000:2010 Standard on social responsibility endorse the definition of CSR proposed by the ISOs Guidance on social responsibility. The King III Report and the SANS 26000:2010 Standard are regarded as two of the major instruments dealing with CSR in South Africa. In terms of these instruments, CSR in South Africa is currently defined as the

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6 This was confirmed by the discussions in paragraph 3.2 that examined numerous international and national definitions of CSR.


8 See par 3.2.7.
responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organization and practised in its relationships.9

This definition includes most of the identified characteristics and is a useful point of departure for discussions on the topic of CSR.

7.2.2.3 CSR approaches

The fact that various definitions are used to describe CSR is related to the different approaches to CSR. Although not all of the approaches discussed are directly related to a study of the law, a discussion of the major approaches provides a more encompassing picture of CSR for readers not familiar with the subject field. The approaches to CSR conflict to some extent. The shareholder approach10 is based on an acceptance of the supremacy of the shareholders in a business, which results in an exclusive focus on maximising profits. Conversely, the stakeholder approach advocates a more inclusive approach11 in which businesses recognise that they have to consider a variety of stakeholder claims. Given that the definition of CSR (see par 7.2.2.2) requires businesses to take the expectations of stakeholders into account, to be responsible to society and the environment, and to contribute to sustainable development, it can be concluded that CSR in South Africa is addressed through a stakeholder approach as opposed to a strict shareholder approach.

7.2.2.4 Conclusion: framing CSR in South Africa

It is possible to conclude from the above that CSR in South Africa should as a starting point be defined in terms similar to the definition provided by the ISO and supported by King III and that the aim of CSR in the national context should be to contribute to the development and empowerment of stakeholders. The focus on stakeholders is supportive of the predominant stakeholder approach to CSR.

9 ISO Guidance on Social Responsibility 3. See par 3.2.2.1.3 for a discussion of the ISO’s definition.
10 See par 3.4.2.1 for a more complete discussion of the shareholder approach advocated by Friedman.
11 See par 3.4.2.2 for a discussion of the stakeholder approach as introduced by Freeman.
7.2.3 *The possible contribution of CSR to land reform*

7.2.3.1 *Introduction*

With the purpose of examining the possible contribution of CSR to land reform reference was made to the business case for CSR, together with the benefits, limitations and drivers of CSR.

7.2.3.2 *The business case for and benefits of CSR*

Regardless of whether the stakeholder approach or any of the domain approaches is followed to describe CSR, the business case for and benefits of CSR must be clear to a business before business resources will be allocated to any CSR initiative. This is also true for businesses operating in the agricultural sector.

The business case for CSR is based on the notion that businesses should adopt CSR because it would have a positive impact on the financial bottom line and that it is the morally right thing to do. Since the business case refers to the financial bottom line, it is necessary to discuss the business-related benefits of CSR. Given that CSR can enhance relationships with various stakeholders, benefits can include an enhanced business image and reputation; attracting investors; better employee retention; a possible increase in revenue; and a legitimate licence to operate.

7.2.3.3 *CSR drivers*

Although it is generally accepted that CSR should in principle be voluntary and that businesses get involved in CSR initiatives because it is the right thing to do, the reality is unfortunately that many businesses do not have CSR programmes. The phrase “CSR drivers” in this context refers whatever motivates businesses to take up their social responsibility. Some of the most important drivers are shareholder or investor activism; pressure exerted by peers, civil society, employees, and consumers. However, within the context of this research, the most important driver is government pressure exerted through both hard and soft law requirements. Government as the primary driver of CSR is the focal point of the discussion in chapters 4 to 6.
7.2.3.4 Conclusion: the possible contribution of CSR to land reform

Given the fact that the agricultural sector (as a representative of the private sector) is strategically positioned in relation to the land reform programme, it is not difficult to appreciate why the sector is well suited to improving land reform through its CSR initiatives. CSR has the potential not only to benefit the land reform beneficiaries but the businesses themselves, thus benefitting the economy as a whole. Despite the potential beneficial contribution that CSR can make to the success of land reform it is unfortunately true that many businesses do not engage in CSR and do not act on their social responsibilities. As a result, Government as a driver of CSR has a crucial role to play with regard to the establishment of an enabling CSR environment.

7.2.4 The roles and responsibilities of Government in establishing an enabling CSR environment

7.2.4.1 Introduction

In order to provide an answer to the fourth research question, the roles of governments in creating an enabling CSR environment was firstly discussed. Based on these roles an overview was provided of what the content of a government-established CSR framework should be. Finally, recommendations were made regarding steps that the South African Government can take in order to promote a CSR framework.

7.2.4.2 Identifying the roles of governments when establishing a CSR-enabling environment

The roles of governments when creating an enabling environment for CSR have become increasingly significant, which necessitated a closer examination of them. These roles vary from a very direct role that is based on legislative intervention to more indirect ones where governments through their own actions demonstrate their commitment to CSR. The mandating role is a crucial government responsibility. The

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12 See par 4.2 for an overview of the roles of governments in strengthening and creating an enabling environment for CSR.
13 See par 4.3 for a discussion of the content of a governmental CSR framework.
14 See par 4.4 for a discussion of the steps that the South African Government can take to promote CSR.
The proposed CSR Act confirms the importance of this role. However, other important roles include facilitating CSR through the use of governments’ imprimatur to encourage socially responsible behaviour and to facilitate CSR by setting clear frameworks to guide business’ social behaviour. The enforcing role complements governments’ mandating role and enables governments to provide for a system of policing for the regulatory frameworks created through the mandating role. This role is of major importance for the proposals included in the CSR Act.

A strong CSR framework which clearly spells out the Government’s CSR policy is central to Government fulfilling these identified roles.

7.2.4.3 The content of a government-established CSR framework

A government-established CSR framework consists of an official government policy for CSR supported by an internal government CSR structure, where CSR has an “address” within the government structures. The CSR policy encompasses regulation and self-regulation, partnerships, and public procurement guidelines. Regulation and self-regulation could be embodied in setting minimum legal requirements, the use of fiscal incentives and taxes, company-community agreements, company reporting, and mandatory labelling and certifications schemes. Given their applicability a number of these instruments, such as minimum legal requirements, taxes, and company reporting are included in the proposed CSR framework Act discussed in chapter 6.

Governments should encourage the private sector to become involved in public-private partnerships in order to address socio-economic issues more effectively. This approach is central to this research. It was accepted as a general point of departure that society’s needs exceed the capabilities of Government to meet them, and as a result Government should as a matter of urgency involve the private sector in addressing

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15 See par 4.3.1 for an overview of the content of a government CSR policy and par 4.3.2 for a discussion of the internal government CSR structure. Also see par 6.4.2.4 for proposals regarding the establishment of a CSR Commission which would provide CSR with an address in the governmental structures.

16 These instruments are discussed more comprehensively in par 4.3.4.

17 See par 6.4.2.6.

18 See par 6.4.2.7. Reporting requirements have also been identified as an important CSR driver. See par 3.8.3.
A measure through which the Government can encourage the private sector to get involved in addressing social issues is the use of public procurement. This is a potentially vital instrument that the Government can use to ensure that businesses become more socially responsible. Goods and services should be procured from socially preferable businesses only.

### 7.2.4.4 Towards a South African regulatory framework for CSR

Regarding the role of the South African Government in promoting CSR, it is clear that South Africa is in need of an official CSR policy and that the Government needs to consult with representatives of the private sector in order to formulate such a policy. Government also needs to dedicate funds for research into CSR and the potential contribution of CSR to the eradication of poverty. It is also recommended that Government should make greater use of tax incentives/disincentives to reward/penalise social behaviour. This recommendation is included in the proposed CSR Act.

### 7.2.4.5 Conclusion: the roles and responsibilities of government

In conclusion, governments (including the South African Government) have numerous roles to fulfil when creating an enabling environment for CSR. These roles include the important mandating and enforcing roles which are central themes in this research. Governments further have responsibilities related to policy formulation, and the South African Government needs to take more decisive steps toward the creation of a CSR framework supported by a strong CSR policy. Regulation and self-regulation are important instruments that should be used in the formulation of a CSR policy. Examples of legal requirements and guidelines (as manifestations of regulation and self-regulation) that could form part of a national legal framework for CSR are discussed in the following paragraph.

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19 See par 1.4.
20 For a discussion of the importance of public procurement, see par 4.3.4.3. The use of public procurement as an instrument in the CSR policy exhibits similarities with the notion of preferential procurement in the BEE context. The issue of preferential procurement in relation to CSR is dealt with in par 5.2.2.5.3.
21 See par 6.4.2.6.
7.2.5 Legal requirements and guidelines that could form part of a national legal framework for CSR

7.2.5.1 Introduction

In order to identify which legal requirements and guidelines found nationally and internationally could form part of a national legal framework for CSR, national legislation with CSR content was discussed first. Following this, a discussion was provided of national guidelines relevant to CSR, and finally international instruments relevant to CSR were examined.

7.2.5.2 National legislation with CSR content

Although CSR is not explicitly regulated through legislation, it is apparent that some legislation addresses issues connected with CSR. The Broad-Based Black Economic Empowerment Act\(^\text{22}\) (supported by the General Code of Conduct) and the Companies Act\(^\text{23}\) (specifically the Companies Regulations, 2011) are two of the most important pieces of legislation with CSR content.\(^\text{24}\)

The importance of the BEE Act lies in the Act’s attempt to empower black South Africans economically and enable these individuals to participate meaningfully in the national economy. In order to achieve this outcome provision was made for a Generic Scorecard in terms of which the attempts by businesses to empower black South Africans are rated. The scorecard is based on seven elements, of which four are linked to CSR or address CSR issues without labelling the issues as CSR. The elements of skills development, preferential procurement, enterprise development and socio-economic development can be linked to CSR, and play a crucial role in CSR in the national context. Given the relative importance of these issues, these elements also feature in the proposed CSR framework Act as discussed in chapter 6.\(^\text{25}\)

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\(^\text{22}\) 53 of 2003. Also referred to as the BEE Act.

\(^\text{23}\) 71 of 2008.

\(^\text{24}\) See paras 5.2.2 and 5.2.6 for a reflection on these Acts.

\(^\text{25}\) See par 6.4.2.5 where these elements are included in the CSR Act as “CSR themes”. 
Since the context of this research is land reform, the position regarding BEE in the agricultural sector was also examined, and although the AgriBEE Sector Charter has not yet been approved, it does make some reference to land reform. However, not enough emphasis is placed on land reform in the current document, and the final version of the Charter should contain more precise measures regarding land reform.

From the perspective of a CSR framework, the requirements in the Companies Regulations, 2011 are an important step in making companies aware of their social responsibility. The Regulations require certain companies to have a social and ethics committee that is responsible for overseeing issues related to CSR such as social and economic development, consumer relationships and labour and employment issues. Despite the fact that the requirement of a social and ethics committee is to be welcomed, the limited scope of application and powers of the committee is questioned as a possible limitation to the usefulness of this measure.

7.2.5.3 National guidelines related to CSR

The national guidelines related to CSR include the Guidance on social responsibility (SANS 26000:2010) and the second and third King Reports on Governance. These instruments are soft law measures aimed at providing guidance to businesses.

The SANS 26000:2010 standard is an exact replica of the Guidance on social responsibility released by the ISO (ISO 26000:2010) and provides guidance on issues related to social responsibility. The standard identifies a number of core CSR subjects which should be considered by businesses when formulating their CSR policies. These subjects include human rights, labour practices, the environment, consumer issues, and community involvement and development. These issues are reflected in the proposed CSR framework Act discussed in chapter 6 to some extent.

From a CSR perspective, the contributions of the two King Reports lies in the requirements related to integrated reporting. Both of these reports advocate some form of integrated reporting in terms of which businesses (specifically noted companies) are...
required to include issues related to their social performance in an integrated annual report.  

7.2.5.4 A selection of major international instruments related to CSR

The major international instruments related to CSR are the Global Reporting Initiative (GRI), the United Nations Global Compact (UNGC), and the Social Accountability 8000 (SA8000) Standard. The GRI guidelines are the pre-eminent international guidelines addressing reporting issues. The CSR content in the GRI's guidelines are situated in the guideline's performance indicators, with the most important content being found in the social performance indicators that address *inter alia* society performance indicators. The society performance indicator, for example, requires the reporting business to report on the social impacts that its operations have on local communities, which is clearly a CSR issue.

The UNGC is a voluntary international instrument encouraging businesses to commit to being good corporate citizens that contribute to a sustainable and just future. Businesses are requested to commit to issues related to human rights, labour, the environment and anti-corruption. However, the fact that the instrument is voluntary with no certification possible is a major weakness of the instrument that possibly limits its usefulness.

The final international instrument is the standard addressing social accountability, as formulated by the international body Social Accountability. SA8000 is a voluntary universal standard, setting requirements for employers. The standard addresses issues of employment and human rights and is classified as an instrument developed for social accounting. The relative importance of the instrument is found in the instrument's certifiability. Businesses that commit to the standard can have their level of compliance

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27 For an overview of the reporting requirements, see paras 5.3.3.5.2 and 5.3.4.6.4.
28 See par 5.4.2.
29 See par 5.4.3.
30 See par 5.4.4.
31 These guidelines are fairly similar to the guidelines of the *King Reports* (see paras 5.3.3.5.2 and 5.3.4.6.4).
with the standard’s requirements certified, thus providing an external endorsement of their commitment. Unfortunately to date no South African business has been certified.

7.2.5.5 Conclusion: legal requirements and guidelines

All of the instruments include content that could form part a national legal framework for CSR. Although none of the instruments deals exclusively with the issue of CSR it is possible to identify some commonalities in these instruments and based on these commonalities to identify general trends in order ultimately to propose framework legislation that addresses CSR. These trends are discussed as part of the proposed CSR framework Act.

7.2.6 A proposed CSR Framework Act

7.2.6.1 Introduction

In order to determine what should be included in a proposed CSR framework Act aimed at institutionalising CSR commonalities or trends in the relevant instruments referred to in paragraph 7.2.5 were identified. These trends are central to the proposed CSR framework Act.

7.2.6.2 Trends identified in CSR instruments

As a result of the multi-dimensional nature of CSR a variety of priority issues or themes were identified. These themes include human rights, employee rights, community involvement, and governance and accountability. All of these themes appear in some of the instruments, although no single theme appears in every one of the instruments discussed. The fact that a certain theme, such as health and safety, features prominently in more than half of the instruments does not necessarily imply that the theme should be included in the proposed CSR Act. Conversely, a theme occurring only once is not necessarily excluded from the Act, as was evidenced by the fact that issues that are unique to the South African position, such as socio-economic development, enterprise development or preferential procurement, are included in the proposed Act. The inclusion of certain issues is based on the relevance of the issues to CSR in South Africa rather than the number of times that the issue appears in existing
instruments. The following paragraph will briefly reflect on the content of the proposed Act.

7.2.6.3 The CSR Act

It is proposed that the Act should include a preamble in which Government acknowledges its commitment to creating an environment which is conducive to CSR and where the role of the private sector in addressing social issues is reaffirmed. The Act further includes a number of definitions that are relevant to the understanding of the subject. The proposed Act defines CSR as:

the responsibility of a business for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that delivers sustainable value to society and manifests itself in initiatives that are aimed at social upliftment and that is strategic in nature and goes beyond purely philanthropic contributions; that takes into account the expectations of stakeholders; that is in compliance with applicable law and consistent with international norms of behaviour; and that is integrated throughout the business and practised in its relationships.

Regarding the application of the Act it is proposed that the Act be applicable to all businesses operating in South Africa, whether domestic or foreign, and that businesses be classified according to their size, an approach similar to that followed in the BEE Act. In line with the recommendations in chapter 4 regarding the CSR policy, it is proposed that the Act should make provision for the establishment of a Commission on Corporate Social Responsibility that would be responsible for the implementation of the Act. The Act identifies a number of priority themes that should be included in the Act. These themes include issues such as skills development, land reform, enterprise development, community development and issues related to HIV/AIDS or other diseases that negatively impact on business and society.

32 See par 6.4.2.1.
33 See par 6.4.2.2.
34 See par 6.4.2.3.
35 See par 5.2.2.2.
36 See par 6.4.2.4.
The Act further proposes the introduction of a mandatory contribution to CSR initiatives.\textsuperscript{37} The extent of a business’ mandatory contribution is determined by its size, with larger businesses required to contribute a larger percentage of their annual taxable income to CSR initiatives. Finally, in order to ensure compliance the Act introduces strict penalties for non-compliance and requires businesses to annually submit a report to the CSR Commission detailing the businesses’ CSR policies and contributions.\textsuperscript{38}

This proposed framework Act is the culmination of the research done in chapters 4 to 6. It would, if enacted, institutionalise CSR and signify Government’s commitment to creating a framework through which the private sector can address a variety of social issues (such as land reform).

7.2.6.4 Conclusion: the CSR framework Act

The content of the proposed CSR framework Act is divided into nine sections. Section 1, the preamble, provides an overview of the reasons giving rise to the enactment of the Act. Section 2 contains the most important definitions which are required to interpret the Act, while section 3 addresses the application of the Act. The most prominent contributions of the Act are found in sections 4 to 8, which make provision for the establishment of a CSR Commission, the identification of relevant CSR priority areas (such as land reform), and the creation of statutory requirements related to compulsory CSR contributions, monitoring mechanisms and offences. Finally the Act includes a separation clause that makes provision for the divisibility of sections of the Act which might contravene existing legislation.

7.3 Answering the primary research question

The research question upon which this research was founded asked how land reform could be improved through a CSR legal framework. This question was answered by referring to the current situation regarding land reform, CSR within the South African context, the possible contribution of CSR to land reform, the roles and responsibilities of Government in creating an enabling CSR environment, the legal requirements and

\textsuperscript{37} See par 6.4.2.6.
\textsuperscript{38} See paras 6.4.2.7 and 6.4.2.8.
guidelines relevant to CSR and finally a proposed CSR framework Act aimed at institutionalising CSR.

Access to land is a socio-economic right, and Government needs to demonstrate that it is taking measures to foster equitable access to land. In terms of section 25(5) of the Constitution, the state is under a constitutional obligation to take reasonable legislative and other measures, within the scope of its resources, to create conditions that would enable historically disadvantaged citizens to gain access to land on an equitable basis.

One of the aims of land reform is to enable black people to enter into the economy through the use of agricultural land for agricultural activities. The success of land reform is in dispute, however, as a large number of redistribution programmes have failed because they have not been able to facilitate sustainable livelihoods and consequently pose a threat to a sustainable economy. The reasons for the perceived failure of these programmes include a lack of post-settlement support from Government and a lack of skills to manage and maintain a farm as a productive agricultural unit. In the case of land reform, beneficiaries are often resettled on agricultural land and are expected to engage in agricultural activities, but do not have the necessary knowledge and farming skills to make a success thereof.

Since Government does not have the resources to provide adequate post-settlement support to emerging farmers, it is proposed in this study that the agricultural sector should contribute to land reform through its CSR initiatives.

One of the dilemmas regarding CSR is that there is no universally accepted definition for CSR to guide organisations when planning and implementing their CSR initiatives. It is argued in this study, however, that there cannot and should not be a universal definition for CSR, since CSR should differ from society to society, addressing the needs of that particular society. Although a universal definition for CSR is not possible, there are a number of characteristics that should underpin all CSR initiatives. These characteristics include that CSR should benefit both business and society, be extraneous to regular business activities, and be integrated in all levels of a business.
The agricultural sector is strategically and ideally situated to improve the current land reform process through providing support to emerging farmers as part of their CSR initiatives. Through CSR the agricultural sector can contribute not only to land reform but also to itself as a business as well as to the economy as a whole. These CSR initiatives will also reflect the universal characteristics of CSR since they will benefit both society (through the sharing of expertise and the making of a contribution to the economy) and business (through the development of improved relationships with most stakeholders), will be extraneous to the regular activities of the business and can be integrated in all decisions of the business. Despite these potential benefits, the reality is that not all businesses are engaging in CSR initiatives voluntarily, necessitating that Government act as a driver of CSR by creating an enabling CSR environment.

The most important role for Government to play as a driver of CSR is in formulating policy whereby business is compelled to fulfil its social responsibility. A CSR framework Act is proposed in this research as an instrument for ensuring that the agricultural sector contributes to land reform through its CSR initiatives. National legislation and guidelines, as well as major international instruments relevant to CSR, are used to inform this proposed framework Act. The CSR framework Act proposed in this study is focussed not only on the agricultural sector. A broad/general Act has been designed, which will be applicable to the agricultural sector amongst others.

The proposed CSR framework Act includes a preamble where Government should acknowledge its commitment to an enabling CSR environment and outline the role of the private sector in addressing social issues in South Africa. The Act should also give a clear definition of CSR in South Africa to assist the private sector in planning and implementing its CSR initiatives. Based on the characteristics identified, CSR in South Africa can be defined as:

*The responsibility of a business for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that:

- delivers sustainable value to society;
- manifests itself in initiatives that are aimed at social upliftment;*
- is strategic in nature;
- goes beyond purely philanthropic contributions;
- takes into account the expectations of stakeholders;
- is in compliance with applicable law and consistent with international norms of behaviour; and
- is integrated throughout the business and practised in its relationships.

The proposed Act includes a section where the application thereof is explained, and also a section regarding the establishment of a Commission on Corporate Social Responsibility responsible for the implementation of the Act.

The Act further identifies a number of priority issues that should be addressed in CSR initiatives, including skills development, land reform, enterprise development, community development, and HIV/Aids and other diseases impacting on business and society.

Mandatory contributions to CSR are also explained in the Act, after which the monitoring mechanisms are described. In order to ensure compliance, the Act recommends strict penalties for non-compliance, and explains reporting requirements.

It is concluded that if the proposed CSR framework Act were to be enacted, land reform could be improved through the CSR contributions of the agricultural sector, strategically positioned to contribute to land reform by sharing its expertise with the beneficiaries of land reform programmes.

7.4 Recommendations

Resulting from this study, the following recommendations are made:

It is recommended that Government should:

- raise awareness regarding CSR in general;
• acknowledge the potential contribution that CSR could make to improve the success of the land reform programme;

• encourage the private sector, especially the agricultural companies, to structure their CSR initiatives in such a way that they are beneficial to the land reform beneficiaries;

• through consultation with structures such as Nedlac formulate an integrated CSR strategy supported by a strong public policy;

• embark on a much more active awareness programme to bring the importance of the Guidance on social responsibility to the attention of the private sector, which stands to gain the most from the content of the Standard. Government should publicly endorse the Guidance on social responsibility and include the content thereof in its CSR framework;

• follow a more aggressive approach to CSR and enact legislation to institutionalise CSR.

• establish a national department dedicated to CSR and make CSR a ministerial portfolio or include CSR into an existing portfolio;

• enact the CSR framework Act based on the proposals included in chapter 6.

It is recommended that the private sector should:

• accept responsibility for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour;

• deliver sustainable value to society through engaging in CSR practices that are aimed at social upliftment;

• acknowledge that in certain sectors, such as the agricultural sector, contributing to the social transformation is strategic in nature;

• get involved in CSR practices that go beyond purely philanthropic contributions that provide no strategic benefits;
• identify its stakeholders and take their expectations into account;

• integrate CSR throughout each business and practice it in all business relationships;

• accept the content of the proposed CSR framework Act, comply with its content, ensure that the required annual contributions are made to CSR initiatives, and that the matters are properly reported on.

It is recommended that beneficiaries of the land reform programme should:

• work together with the private sector and accept the sector’s willingness to assist them through the sector’s CSR initiatives.

In February 2012 Minister Joemat-Petterson, the Minister of Agriculture, Forestry and Fisheries, acknowledged that the current land reform policy has not been working. She made a call to role players to formulate an alternative land reform policy that would contribute to the success of land reform. This thesis is a response to the call and provides a unique alternative to the current policy.
BIBLIOGRAPHY

Books

A

Aaronson S and Reeves J The European response to public demands for global corporate responsibility (National Policy Association Washington DC 2002)

African Institute of Corporate Citizenship Corporate social responsibility (CSR) in South Africa: Implications for a potential standards organisation (ISO) management standard (AICC Johannesburg 2004)

African National Congress A basic guide to the Reconstruction and Development Programme (ANC Pretoria 1994)


Aliber M Poverty-eradication and sustainable development (HSRC Publishers Cape Town 2002)


Andriof J and McIntosh M (eds) Perspectives on Corporate Citizenship (Greenleaf Sheffield 2001)

Aras G and Crowther D The durable corporation – strategies for sustainable development (Gower Surrey 2009)

Arrowsmith S The law of public and utilities procurement 2nd edition (Sweet & Maxwell London 2005)
B

Badenhorst P; Pienaar J and Mostert H Silberberg and Schoeman’s *The Law of Property* fifth edition (LexisNexis Durban 2006)

Boeger N, Murray R and Villiers C (eds) *Perspectives on Corporate Social Responsibility* (Edward Elgar Cheltenham 2008)

Bolton P *The law of Government Procurement in South Africa* (LexisNexis Durban 2007)

Bosman F *Land reform: A contextual analysis* (FW de Klerk Foundation Johannesburg 2007)

Bowen H *Social responsibilities of the businessman* (Harper & Row New York 1953)


C

Cannon T *Corporate Responsibility* (Pitman Publishing 1992)

Cannon T *Corporate Responsibility* (Prentice Hall Harlow 1994)


Cassim F (ed) *Contempory company law* (Juta Cape Town 2011)


467

Chahoud T et al *Corporate Social Responsibility (CSR) and Black Economic Empowerment (BEE) in South Africa – A case study of German transnational corporations* (German Development Institute Bonn 2011)


Cheadle Thompson & Haysom Inc *Black Economic Empowerment: Commentary, legislation and charters* (Juta Cape Town 2005)


Cooper S *Corporate Social Performance: A stakeholder approach* (Ashgate Aldershot 2004)

Council for Scientific and Industrial Research (CSIR) *A review of communal property institutions* (CSIR Pretoria 2005)


Crowther D and Capaldi N (eds) *The Ashgate research companion to Corporate Social Responsibility* (Ashgate Hampshire 2008)


D

Davis K and Blomstrom R *Business and its environment* (MaGraw-Hill New York 1966)


Department of Rural Development and Land Reform *Strategic Plan 2011 – 2014* (DRDLR Pretoria 2010)


De Villiers B *Land reform – A Commentary* (Konrad-Adenauer-Stiftung Johannesburg 2008)

De Vos P "Sexual orientation and the Bill of Rights" in Anon *Bill of Rights Compendium* (LexisNexis Durban 2002) 3J-7 – 3J-17


Department of Agriculture *The strategic plan for South African Agriculture* (DoA Pretoria 2001)

Department of Agriculture *The Land and Agrarian Reform Project (LARP) concept document* (DoA Pretoria 2008)

Department of Land Affairs *Private sector initiatives in land reform* (DLA Pretoria 1996)


Department of Land Affairs *Grants and services policy (Version 7)* (DLA Pretoria 2001)

Department of Land Affairs *Implementation plan for the Proactive Land Acquisition Strategy (Version 1)* (DLA Pretoria 2006)
Department of Rural Development and Land Reform *Strategic Plan 2009 – 2012* (DRDLR Pretoria 2009)

Department of Rural Development and Land Reform *Strategic Plan 2010 – 2013* (DRDLR Pretoria 2010)

Department of Rural Development and Land Reform *Strategic Plan 2011 – 2014* (DRDLR Pretoria 2011)


Department of Rural Development and Land Reform *Policy framework for the Recapitalisation and Development Programme* (DRDLR Pretoria 2011)

Department of Trade and Industry *Draft for Comment: The Codes of Good Practice on Broad-Based Black Economic Empowerment* (DTI Pretoria 2004)

Department of Trade and Industry *South Africa’s Economic Transformation: A Strategy for Broad-Based Black Economic Empowerment* (DTI Pretoria Date Unknown)

Devenish G *The South African Constitution* (LexisNexis Durban 2005)

Devenish G *A Commentary on the South African Bill of Rights* (LexisNexis Durban 2006)

**E**


Fig D (ed) Staking their claims – Corporate Social and Environmental Responsibility in South Africa (University of KwaZulu-Natal Press Scottsville 2007)

Food and Agricultural Organization of the United Nations (FAO) Guide on legislating for the right to food (FAO Rome 2009)


Freeman R Strategic management: A stakeholder approach (Pitman Boston 1984)

Global Reporting Initiative Application levels version 3. (GRI Amsterdam 2006)

Global Reporting Initiative Sustainability reporting guidelines version 3.0 (GRI Amsterdam 2006)

Global Reporting Initiative Indicator protocols set economic: EC (GRI Amsterdam 2006)

Global Reporting Initiative Indicator protocols set environment: EN (GRI Amsterdam 2006)

Global Reporting Initiative Indicator protocols set labour practices: LA (GRI Amsterdam 2006)

Global Reporting Initiative Indicator protocols set human rights: HR (GRI Amsterdam 2006)

Global Reporting Initiative Indicator protocols set society: SO (GRI Amsterdam 2006)

Global Reporting Initiative Indicator protocols set product responsibility: PR (GRI Amsterdam 2006)

Grayson D and Hodges A *Corporate Social Opportunity! 7 steps to make corporate social responsibility work for your business* (Greenleaf Sheffield 2004)


H


Hall R *The impact of land restitution and land reform on livelihoods* (PLAAS Bellville 2007)


Harrison R *et al The Ethical Consumer* (SAGE London 2005)

Henochsberg E *An explanation of the Group Areas Act, 1950* (Butterworth Durban 1950)

Hiemstra V *The Group Areas Act* (Juta Cape Town 1953)

Horrigan B *Corporate Social Responsibility in the 21st century: Debates, models and practices across government, law and business* (Edward Elgar Cheltenham 2010)
I


Institute of Directors *Executive summary of the King Report 2002* (IoD Parklands 2002)


Institute of Directors in Southern Africa (IoD) *King Code of Governance for South Africa – 2009* (IoD Parklands 2009)

Institute of Directors in Southern Africa *Practice code for responsible investing in South Africa 2011* (IoD Parklands 2011)


J

Jack V *Broad-Based BEE – The complete guide* (Frontrunner Publishing Northcliff 2007)

Jacobs P *Support for agricultural development* (PLAAS Bellville 2003)


Juta’s Statutes Editors *The National Credit Act 34 of 2005 and regulations* (Juta Cape Town 2008)
K


Khoza S "The role of framework legislation in realising the right to food: Using South Africa as a case study of this new breed of law" in Eide W and Kracht U (eds) Food and human rights in development volume 1 (Intersentia Antwerpen 2005) 187 – 204

KPMG International Survey of Corporate Responsibility Reporting 2008 (KPMG Amsterdam 2008)


Kirkwood K The Group Areas Act – an analysis (South African Institute of Race Relations Johannesburg 1950)


Kotler P and Lee N Corporate Social Responsibility: Doing the most good for your company and your cause (John Wiley & Sons New Jersey 2005)

L

Lahiff E Business models in land reform (PLAAS Bellville 2007)

Lahiff E et al Land Redistribution and poverty reduction in South Africa: The livelihoods impacts of smallholder agriculture under land reform (PLAAS Bellville 2008)

Lahiff E Land Reform in South Africa: A status report 2008 (PLAAS Bellville 2008)

Leipziger D *The corporate responsibility code book* (Greenleaf Sheffield 2003)


Liebenberg S *Socio-Economic Rights* (Juta Claremont 2010)

Lozano J *et al* *Governments and Corporate Social Responsibility* (Palgrave Macmillan Hampshire 2008)

M

Manenzhe T and Lahiff E *Restitution and Post-settlement Support: Three case studies from Limpopo* (PLAAS Bellville 2007)

Mayer M and Vermeulen S *Company-Community forestry partnerships – from raw deals to mutual gain?* (IIED London 2002)


Melville N *Know your consumer rights: pocket guide to the Consumer Protection Act* (Book of Life Publications Pretoria 2010);


Ministry of Rural Development and Land Reform *The Comprehensive Rural Development Programme Framework (version 1)* (MRDLR Pretoria 2009)

Mortensen J *WTO vs BEE: Why trade liberalisation may block black South Africans’ use to wealth, prosperity or just a white-collar job* DISS Working Paper 2006/30 27 (Danish Institute for International Studies Copenhagen 2006)


National Treasury *Reducing greenhouse gas emissions: The carbon tax option* (National Treasury Pretoria 2010)


Olivier N *et al* (eds) *Restitution operational strategy: Partnership for sustainable pre- and post-settlement support 2010* (SADC Centre for Land-related, Regional and Development Law and Policy Pretoria 2010)

O’Rourke D *Opportunities and obstacles for corporate social responsibility reporting in developing countries* (World Bank Washington 2004)

Otto J *National Credit Act explained* (LexisNexis Durban 2010)


Peters A and Roess D *The role of Governments in promoting corporate responsibility and private sector engagement in development* (Bertelsmann Stiftung Gütersloh 2010)


Pitts C (ed) *Corporate Social Responsibility – A legal analysis* (LexisNexis Canada 2009)


Ponte S, Roberts S and Van Sittert L *To BEE or not to BEE? South Africa’s ‘Black Economic Empowerment’ (BEE), corporate governance and the State in the South DIIS Working Paper no 2006/27* (Danish Institute for International Studies Copenhagen 2006)

R

Rautenbach I "General introduction to the Bill of Rights" in Anon *Bill of Rights Compendium* (LexisNexis Durban 2002)

Rautenbach I *Introduction to the Bill of Rights* (LexisNexis Durban 2008)


Ruggie J *Business and human rights: Towards operationalizing the "protect, respect and remedy" framework* (United Nations Geneva 2009)

S


Scherer A and Palazzo G (eds) *Handbook of research on global corporate citizenship* (Edward Elgar Cheltenham 2008)

Scholtz W and Van Wyk C *BEE Service Empowerment* 8th issue (LexisNexis Durban 2010)

Smith N *Morality and the market consumer pressure for corporate accountability* (Routledge London 1990)

Social Accountability International *Guidance document for Social Accountability 8000* (SAI New York Date unknown)

Social Accountability International *Social Accountability 8000* (SAI New York 2008)

Social Accountability International *Guidance document for Social Accountability 8000* (SAI New York Date unknown)

South African Institute of Race Relations *The Native Bills described and analysed* (South African Institute of Race Relations Johannesburg 1935)


Sternberg E Just business (Little, Brown London 1994)


T

The Presidency Together Doing more and better – Medium Term Strategic Framework (The Presidency Pretoria 2009)

Thomas G and Nowak M Corporate social responsibility: a definition (Curtin University of Technology Perth 2006)


Trepte T Regulating procurement – Understanding the ends and means of public procurement regulations (Oxford University Press Oxford 2004)

U

Ukpabi O Re-thinking rural transformation in South Africa (PLAAS Cape Town 2011)

Urminsky M (ed) Self-regulation in the workplace: Codes of conduct, social labelling and socially responsible investment (International Labour Office Geneva Year Unknown)

V

Van der Walt A Constitutional property law (Juta Cape Town 2005)

Van der Walt A Constitutional property law 3rd edition (Juta Cape Town 2011)

Van der Walt A and Pienaar G Introduction to the law of property (Juta Cape Town 2006)

Van Eeden E A guide to the Consumer Protection Act (LexisNexis Durban 2009)
Van Zyl L "Gender issues and the Bill of Rights" in Anon *Bill of Rights Compendium* (LexisNexis Durban 2002)


W


Ward H and Smith C *Corporate Social Responsibility at a crossroads: Futures for CSR in the UK to 2015* (International Institute for Environment and Development London 2006)

Welzel C *et al* (eds) *The CSR Navigator – Public policies in Africa, the Americas, Asia and Europe* (Bertelsmann Stiftung/GTZ Gütersloh 2007)

Werther W and Chandler D *Strategic Corporate Social Responsibility* 2nd edition (SAGE Washington DC 2011)

Williams D *Tax and Corporate Social Responsibility* (KPMG London 2007)


Woolman S "Limitation" in Chaskalson M *et al* (eds) *Constitutional Law of South Africa* (Juta Cape Town 1999)


Z


**Academic journals**

A


Agle B *et al* "Toward superior stakeholder theory" 2008 (18) *Business Ethics Quarterly* 153 – 190


Albareda L *et al* "The government’s role in promoting corporate responsibility: A comparative analysis of Italy and UK from the relational state perspective" 2006 (6) *Corporate Governance* 386 – 400


Arevalo J and Aravind D "The impact of the crisis on corporate responsibility: The Case of the UN Global Compact Participants in the USA" 2010 (10) *Corporate Governance* 406 – 420


Anon "ISO 26000 – Guidance on Social Responsibility" 2009 (June) *Business and the Environment* 11 – 14

Anon "ISO 26000 – Guidance on Social Responsibility (2)" 2009 (July) *Business and the Environment* 11 – 14

Anon "In the right direction" 2009 (July 23 2009) *FinWeek* 46 and 48

Anon "King III Code – comply vs apply, what's the difference? 2009 (June) *Occupational Risk Management* 16

Anon "King III commands integrated reporting in South Africa" 2010 (July) *Business and the Environment* 5 – 6


Anon "ISO 26000, Part 2" 2011 (February) *Business and the Environment* 11 – 13

Anon "Property" 2011 6 *The Contemporary Gazette* 18 – 22

Auger P *et al* "What will consumers pay for social product features?" 2003 (42) *Journal of Business Ethics* 281 – 304

B

Banerjee S "Corporate citizenship and indigenous stakeholders - exploring a new dynamic of organisational-stakeholder relationships" 2001 (1) *Journal of Corporate Citizenship* 39 – 55


Barry M "Now another thing must happen: Richtersveld and the dilemmas of land reform in post-apartheid South Africa" 2004 (20) *SAJHR* 355 – 382

Beaver W "Is the stakeholder model dead?" 1999 (42) *Business Horizons* 8 – 12

Bekink M "An historical overview of the director’s duty of care and skill: From the nineteenth century to the Companies Bill of 2007" 2008 (20) *SA Merc LJ* 95 – 116


Beaulieu S and Pasquero J "Reintroducing stakeholder dynamics in stakeholder thinking" 2002 (6) *Journal of Corporate Citizenship* 53 – 69

Bilchitz D "Giving socio-economic rights teeth: the minimum core and its importance" 2002 (119) *SALJ* 484 – 501

Bilchitz D "Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence" 2003 (19) *SAJHR* 1 – 26

Bird R *et al* "What Corporate Social Responsibilities are valued by the market?" 2007 (76) *Journal of Business Ethics* 189 – 206

Birch D and Littlewood G "Corporate citizenship: Some perspectives from Australian CEOs" 2004 (16) *Journal of Corporate Citizenship* 61 – 69

Blowfield M "Corporate Social Responsibility: reinventing the meaning of development?" 2005 (81) *International Affairs* 515 – 524


Boasson E "On the management success of regulative failure: standardised CSR instruments and the oil industry's climate performance" 2009 (9) *Corporate Governance* 313 – 325

Bolton P "Protecting the environment through public procurement: The case of South Africa" 2008 (32) *Natural Resources Forum* 1 – 10


484

Bolton P "The use of Government procurement as an instrument of policy" 2004 (121) SALJ 619 – 635

Boraine A and Van Heerden C "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: a tale of two judgements" 2010 (13) PER 83 – 124


Bouwman N "An appraisal of the modification of the director’s duty of care and skill" 2009 (21) SA Merc LJ 509 – 534

Bowens R "Understanding the ISO 26000 responsibility Standard" 2011 (March) The Dairy Mail 93 – 96


Bremer J "How Global is the Global Compact?" 2008 (17) Business Ethics: A European Review 227 – 244


Brown H, De Jong M and Levy D "Building institutions based on information disclosure: lessons from GRI’s Sustainability Reporting" 2009 (April) Journal of Cleaner Production 571 – 580


C

Carpenter G "Equality and non-discrimination in the new South African constitutional order (1): The early cases" 2001 (64) THRHR 409 – 422

Carpenter G "Equality and non-discrimination in the new South African constitutional order (2): An important trilogy of decisions" 2001 (64) THRHR 619 – 642

Carpenter G "Equality and non-discrimination in the new South African constitutional order (3): The saga continues" 2002 (65) THRHR 37 – 58


Carroll A "The four faces of corporate citizenship" 1998 (100) Business and Society Review 1 – 7


Castka P et al "Integrating corporate social responsibility (CSR) into ISO management systems – in search of a feasible CSR management system framework" 2004 (16) TQM Magazine 216 – 224


Castka P and Balzarova M "Social responsibility standardization: guidance or reinforcement through certification?" 2008 (27) Human Systems Management 231 – 242

Castka P and Balzarova M "Adoption of social responsibility through the expansion of existing management systems" 2008 (108) Industrial Management and Data Systems 297 – 309

Cavanagh G "Global business ethics: Regulation, code, or self-restraint?" 2004 (14) Business Ethics Quarterly 625 – 642


Child J and Marcoux A "Freeman and Evan: stakeholder theory in the original position" 1999 (9) Business Ethics Quarterly 207 – 223

Ciliberti F et al "CSR codes and the principal-agent problem in supply-chains: four case studies" 2011 (19) Journal of Cleaner Production 885 – 894


Colman K "The King is dead; long live the King" 2009 (April) *Without Prejudice* 8 – 9

Coomans F and Yakpo K "A framework law on the right to food – An international and South African perspective" 2004 (4) *AHRLJ* 17 – 33

Cragg W "Business ethics and stakeholder theory" 2002 (12) *Business Ethics Quarterly* 113 – 142


Crawford E and Williams C "Should Corporate Social Reporting be voluntary or mandatory? Evidence from the banking sector in France and the United States" 2010 (10) *Corporate Governance* 512 – 528


Davenport T "Can sacred cows be culled? A historical review of land policy in South Africa, with some questions about the future" 1987 (4) *Development Southern Africa* 388 – 400

Davenport T "Land legislation determining the present racial allocation of land" 1990 (7) *Development Southern Africa* 431 – 440
Davenport T "Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the State to impose political and economic control" 1985 *Acta Juridica* 53 – 76

Davis K "Can business afford to ignore social responsibilities?" 1960 *California Management Review* 70 – 76

Davis K "Understanding the social responsibility puzzle" 1967 (10) *Business Horizons* 45 – 50

Davis K "The case for and against business assumption of social responsibilities" 1973 (16) *Academy of Management Review* 312 – 322

Davis D and Corder H "Restructuring the rural economy: Legal issues" 1990 (5) *SA Public Law* 157 – 168

Deakin S "Corporate governance, finance and growth: unraveling the relationship" 2010 *Acta Juridica* 191 – 218

De Villiers C and Van Staden CJ "Can less environmental disclosure have a legitimising effect? Evidence from Africa" 2006 (31) *Accounting, Organisations & Society* 763 – 781

De Villiers D "National Credit Regulator versus Nedbank Ltd and the practice of debt counselling in South Africa" 2010 (13) *PER* 128 – 204


Dlamini C "Equality or justice? Section 9 of the Constitution revisited – Part II" 2002 (27) Journal for Juridical Science 15 – 32


Du Plessis W "Dorpstigting: SAOT en selfregerende gebiede" 1991 (54) THRHR 444 – 457


Du Plessis W, Olivier N and Pienaar J "Land reform – trends developing in case law" 1999 (14) SA Public Law 528 – 533


Du Plessis W, Olivier N and Pienaar J "Expropriation, restitution and land redistribution: an answer to the land problems in South Africa" 2003 (18) SA Public Law 491 – 514


Du Plessis W, Pienaar J and Olivier N "Land affairs and rural development; agriculture: 2009 (1)" 2009 (24) SA Public Law 151 – 190


E


Energy Research Centre "Reducing greenhouse gas emissions: The carbon tax option discussion paper" 2011 (17) Energy Management News 1 – 4


Esser I "The Protection of stakeholder interests in terms of the South African King III Report on Corporate Governance: An improvement on King II?" 2009 (2) SA Merc LJ 188 – 201


Feinberg H "Pre-Apartheid African land ownership and the implication for the current restitution debate in South Africa" 1995 (40) Historia 48 – 63


492

Field T "Realizing the National Environmental Management Act’s potential to bring polluters to book" 2004 (121) SALJ 772 – 784

Fig D "Manufacturing amnesia: Corporate Social Responsibility in South Africa" 2005 (81) International Affairs 599 – 617

Fredman S "Engendering socio-economic rights" 2009 (25) SAJHR 410 – 441

Frederick W "The growing concern over business responsibility" 1960 (2) California Management Review 54 – 61

Frederick W "From CSR₁ to CSR₂ – The maturing of business-and-society thought" 1994 (33) Business & Society 150 – 164

Frederick W and Wasieleski D "Evolutionary social contracts" 2002 (107) Business and Society 283 – 308


Fritsch S "The UN Global Compact and the global governance of Corporate Social Responsibility: Complex multilateralism for a more human globalisation?” 2008 (22) Global Society 1 – 26

Frynas G "The false developmental promise of Corporate Social Responsibility: evidence from multinational oil companies" 2005 (81) International Affairs 581 – 598


Geva A "Three models of corporate social responsibility: Interrelationships between theory, research, and practice" 2008 (113) Business and Society Review 1 – 41


Glaser D "Should an Egalitarian support Black Economic Empowerment?" 2007 (34) Politikon 105 – 123

Göbbels M and Jonker J "AA1000 and SA8000 compared: a systematic comparison of contemporary accountability standards" 2003 (18) Managerial Auditing Journal 54 – 58


Good S "King III review" 2009 (August) *De Rebus* 17 – 23

Gouws M "A consumer’s right to disclosure and information: comments on the plain language provisions of the Consumer Protection Act" 2010 (22) *SA Merc LJ* 79 – 94

Gray R "Thirty years of social accounting, reporting and auditing: What (if anything) have we learned" 2001 (10) *Business Ethics: A European Review* 9 – 15

Gray R "Social, Environmental and Sustainability Reporting and organisational value creation? Whose value? Whose creation?" 2006 (19) *Accounting, Auditing & Accountability Journal* 793 – 819


Gstraunthaler T "Corporate governance in South Africa: The introduction of King III and reporting practices at the JSE Alt-X" 2010 (7) *Corporate Ownership and Control* 146 – 154


Hamann R "Mining companies’ role in sustainable development: the ‘why’ and ‘how’ of corporate social responsibility from a business perspective" 2003 (20) *Development Southern Africa* 237 – 254

Hamann R "Corporate social responsibility, partnerships and institutional change: The case of mining companies in South Africa" 2004 (28) *Natural Resources Forum* 278 – 290
Hamann R et al "Universalizing Corporate Social Responsibility? South African challenges to the International Organization for Standardization’s new social responsibility standard" 2005 (110) *Business and Society Review* 1 – 19

Hamann R and Acutt N "How should civil society (and the government) respond to 'corporate social responsibility'? A critique of business motivations and the potential for partnerships" 2003 (20) *Development Southern Africa* 255 – 270


Hamers J, Schwarz K and Bisschop B "Corporate social responsibility trends in the Netherlands and Europe" 2005 (16) *Stell LR* 298 – 312

Harsch E "South Africa tackles social inequities" 2001 (January) *Africa Recovery* 12 – 18


Hillman A and Keim G "Shareholder value, stakeholder management, and social issues: What’s the bottom line?" 2001 (22) *Strategic Management Journal* 125 – 139

Hoffman E "A wolf in sheep’s clothing: discrimination against the majority undermines equality, while continuing to benefit few under the guise of black economic
empowerment" 2008 (36) Syracuse Journal of International Law and Commerce 88 – 104

Hopkins K "Should whites necessarily qualify as ‘claimants’ for the purposes of land restitution?" 2006 (21) SA Public Law 175 – 184


I


Iles K "A fresh look at limitations: Unpacking section 36" 2007 (23) SAJHR 68 – 92

Iles K "Limiting socio-economic rights: Beyond the internal limitations clauses" 2004 (20) SAJHR 448 – 465


J


Jenkins R "Globalization, Corporate Social Responsibility and Poverty" 2005 (81) International Affairs 525 – 540
Jensen M "Value maximization, stakeholder theory, and the corporate objective function" 2002 (12) Business Ethics Quarterly 235 – 256

Jimena J "ISO 26000 Standard is almost ready" 2010 (August) Canadian Mining Journal 10

Jones T "Corporate social responsibility revisited, redefined" 1980 (22) California Management Review 59 – 67

Jones T and Wicks A "Convergent Stakeholder Theory" 1999 (24) Academy of Management 206 – 221

K

Katz M "Governance under the Companies Act 71 of 2008: flexibility is the keyword" 2010 Acta Juridica 248 – 262


King M "The synergies and interaction between King III and the Companies Act 61 of 2008" 2010 Acta Jurídisca 446 – 455


Klare K "Legal culture and transformative constitutionalism" 1998 (14) SAJHR 146 – 188


Klonoski R "Foundational considerations in the Corporate Social Responsibility debate" 1991 (34) Business Horizons 9 – 18


Khoza S "Protecting the right to food in South Africa: The role of framework legislation" 2004 (5) *ESR Review* 3 – 5

Khoza S "Realising the right to food in South Africa: Not by policy alone – a need for framework legislation" 2004 (20) *SAJHR* 664 – 683


Kraak A "A critical review of the National Skills Development Strategy in South Africa" 2008 (60) *Journal of Vocational Education and Training* 1 – 18

L

Lahiff E "'Willing buyer, willing seller': South Africa’s failed experiment in market-led agrarian reform" 2007 (28) *Third World Quarterly* 1577 – 1597


Lantos G "The boundaries of strategic corporate social responsibility" 2001(18) *Journal of Consumer Marketing* 595 – 630

Lantos G "The ethicality of altruistic corporate social responsibility" 2003 (19) *Journal of Consumer Marketing* 205 – 230

Lantos G "Corporate socialism unethically masquerades as "CSR" – The difference between being ethical, altruistic and strategic in business" 2003 (19) *Strategic Direction* 31 – 35


Laufer W "Social accountability and corporate greenwashing" 2003 (43) *Journal of Business Ethics* 253 – 261

Lawrence R and Gibson C "Obliging indigenous citizens?" 2007 (21) *Cultural Studies* 650 – 671


Levitt T "Business and the plural society" 1960 (Spring) *Modern Age* 173 – 179


Loubser A "Does the King II Report solve anything?" 2002 (22) Juta’s Business Law 135 – 140

M

Mapadimeng M "The Land Redistribution for Agricultural Development (LRAD) sub-programme: Opportunity for or constraint to land redistribution, rural economic development and poverty alleviation?" 2003 (52) Transformation 20 – 41


Mathews M "Twenty-five years of social and environmental accounting research – is there a silver jubilee to celebrate?" 1997 Accounting, Auditing & Accountability Journal 481 – 531


McCrudden C "Using public procurement to achieve social outcomes" 2004 (28) Natural Resources Forum 257 – 267

McGrath S and Akooee S "Vocational education and training for sustainability in South Africa: The role of public and private provision" 2009 (29) International Journal of Educational Development 149 – 156


McWilliams A, Siegel D and Wright P "Corporate Social Responsibility: Strategic implications" 2006 (43) Journal of Management Studies 1 – 18


Michael B "Corporate Social Responsibility in international development: An overview and critique" 2003 (10) Corporate Social Responsibility and Environmental Management 115 – 128

Middtun A "Realigning business, government and civil society" 2005 (5) Corporate Governance 159 – 174


Miles L and Jones M "The prospects for corporate governance operating as a vehicle for social change in South Africa" 2009 (14) Deakin Law Review 53 – 77


Moellendorf D "Reasoning about resources: Soobramoney and the future of socio-economic rights claims" 1998 (14) SAJHR 327 – 333

Moir L "What do we mean by Corporate Social Responsibility?" 2001 (1) Corporate Governance 16 – 22


Mostert H "Land restitution, social justice and development in South Africa" 2002 (119) *South African Law Journal* 400 – 428


Mueckenberger U and Jastram S "Transnational norm-building networks and legitimacy of corporate social responsibility standards" 2010 (97) *Journal of Business Ethics* 223 – 239

Muller J "Ford: The high cost of harassment" 1999 (November) *Business Week* 94 – 96


Ncube C "Transparency and accountability under the new company law" 2010 *Acta Juridica* 43 – 72


Naude T "The consumer’s ‘right to fair, reasonable and just terms’ under the new Consumer Protection Act in comparative perspective" 2009 (126) *SALJ* 505 – 536

Naude T "Enforcement procedures in respect of the consumer’s right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective" 2010 (127) *SALJ* 515 – 547
Okoye A "Theorising Corporate Social Responsibility as an essential contested concept: Is a definition necessary?" 2009 (89) Journal of Business Ethics 613 – 627

Olivier N, Du Plessis W and Pienaar J "Wette op grondbesit herroep" 1991 (6) SA Public Law 115 – 125

Olson J "South Africa moves to a global model of corporate governance but with important national variations" 2010 Acta Jurídica 219 – 247


O’Regan K "Introducing socio-economic rights’ 1999 (1) ESR Review 1 – 4


Owen D, Swift A and Hunt K "Questioning the role of stakeholder engagement in social and ethical accounting, auditing and reporting" 2001 Accounting Forum 264 – 282

Owen D et al "The new social audits: accountability, managerial capture or the agenda of social champions?" 2000 European Accounting Review 81 – 99


Partington J and Van der Walt A "The development of defences in unfair discrimination cases (Part 1)" 2005 Obiter 357 – 370

Partington J and Van der Walt A "The development of defences in unfair discrimination cases (Part 2)" 2005 Obiter 595 – 608


Pienaar G "Aspects of land administration in the context of good governance" 2009 (12) PER 15 – 55


Pienaar J "Restitutionary road: Reflecting on good governance and the role of the land claims court" 2011 (14) PER 30 – 48

Pieterse M "A different shade of red: Socio-economic dimensions of the right to life in South Africa" 1999 (15) SAJHR 372 – 385

Pieterse M "Coming to terms with judicial enforcement of socio-economic rights" 2004 (20) SAJHR 383 – 417

Pieterse M "What do we mean when we talk about Transformative Constitutionalism?" 2005 (20) SA Public Law 155 – 166

505
Pieterse M "Towards a useful role for section 36 of the Constitution in social rights cases? Residents of Bon Vista Mansions v Southern Metropolitan Local Council" 2003 (120) SALJ 41 – 48


Ponte S, Roberts S and Van Sittert L "Black Economic Empowerment, business and the State in South Africa" 2007 (38) Development and Change 933 – 957

Porter T "Managerial applications of Corporate Social Responsibility and systems thinking for achieving sustainability outcomes" 2008 (25) Systems Research and Behavioral Science 397 – 411


Poroch N "Welfare reform and indigenous empowerment" 2006 (1) Australian Aboriginal Studies 3 – 11


Prieto-Carrón M et al "Critical perspectives on CSR and development: What we know, what we don't know, and what we need to know" 2006 (82) International Affairs 977 – 987
Pryce V "CSR – should it be the preserve of the usual suspects" 2002 (11) *Business Ethics: A European Review* 140 – 142

Q


R

Rademeyer C and Holtzhausen J "King II, corporate governance and shareholder activism" 2003 (120) *SALJ* 767 – 776


Rasche A "Collaborative Governance 2.0" 2010 (10) *Corporate Governance* 500 – 511

Rautenbach I "Means-end rationality in Constitutional Court judgements" 2010 (4) *Journal of South African Law* 768 – 779

Raynolds L "Consumer/Producer links in Fair Trade coffee networks" 2002 (42) *Sociologia Ruralis* 404 – 424

Reed D "Corporate governance reforms in developing countries" 2002 (37) *Journal of Business Ethics* 223 – 247

Renard M "Fair trade: Quality, market and conventions" 2003 (19) *Journal of Rural Studies* 87 – 96

Reynolds M and Yuthas K "Moral discourse and Corporate Social Responsibility reporting" 2008 (78) *Journal of Business Ethics* 47 – 64

Robinson L "Rationales for rural land redistribution in South Africa" 1997 (23) *Brooklyn Journal of International Law* 465 – 504

Roestof M "Enforcement of a credit agreement where the consumer has applied for debt review in terms of the National Credit Act 34 of 2005" 2009 (30) Obiter 430 – 437

Roestof M "Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim" 2010 (31) Obiter 782 – 792

Roestof M ea "The debt counselling process – closing the loopholes in the National Credit act 34 of 2005" 2009 (12) PER 246 – 306

Rossouw GJ "Business ethics and corporate governance in Africa" 2005 (44) Business & Society 94 – 106


Roux T "Legitimating transformation: Political resource allocation in the South African Constitutional Court" 2003 (10) Democratization 92 – 111


Runhaar H and Lafferty L "Governing Corporate Social Responsibility: An assessment of the contribution of the UN Global Compact to CSR strategies in the telecommunications industry" 2009 (84) Journal of Business Ethics 479 – 495


S


Schaap A "Power and Responsibility: Should we spare the king’s head?" 2000 (20) Politics 129 – 135

Schoombee J "Group areas legislation – the political control of ownership and occupation of land" 1985 Act Juridica 77 – 107


Scott C and Alston P "Adjudicating constitutional priorities in a transnational context: A commentary on Soobramoney’s legacy and Grootboom’s promise" 2000 (16) SAJHR 206 – 268


Sittle J "U.K. Corporate ethical reporting – a failure to inform: Some evidence from company annual reports" 2002 (107) Business and Society Review 349 – 370


Sonnenberg D and Hamann R "The JSE Socially Responsible Investment Index and the state of sustainability reporting in South Africa" 2006 (23) *Development Southern Africa* 305 – 320


Strakosch E "A reconsideration of the political significance of shared responsibility" 2009 (55) *Australian Journal of Politics and History* 80 – 96


T

Tait M and Tait M "Equality, the Consumer Protection Act and customer-segment pricing strategies: Is there relief for the poor rich tourist?" 2010 (31) *Obiter* 434 – 445


Thompson D and Van der Walt A "Affirmative action: Only a shield? Or also a sword?" 2008 *Obiter* 636 – 646

Utting P "Promoting development through Corporate Social Responsibility – Does it work?" 2003 (Third Quarter) *Global Future* 11 – 13

Utting P "Corporate responsibility and the movement of business" 2005 (15) *Development in Practice* 375 – 388

Utting P "The struggle for corporate accountability" 2008 (39) *Development and Change* 959 – 975

Van Bueren G "Alleviating poverty through the Constitutional Court" 1999 (15) *SAJHR* 52 – 72


Van der Vyver J "The function of legislation as an instrument for social reform" 1976 *SALJ* 56 – 67

Van der Walt A "Towards the development of post-apartheid land law: An exploratory survey" 1990 (23) *De Jure* 1 – 46

Van der Walt A "Land law without the land acts – predicaments and possibilities" 1991 (54) *THRHR* 738 – 752

Van der Walt A "An overview of developments in constitutional law since the introduction of the property clause in 1993" 2004 (19) *SA Public Law* 46 – 89

Van Heerden C and Boraine A "The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law" 2009 (12) PER 22 – 161

Van Marrewijk M "Concepts and definitions of CSR and corporate sustainability: Between agency and communion" 2003 (44) Journal of Business Ethics 95 – 105


Venter F "Die beperkings van regstellende gelykheid" 2004 (1) PER 1 – 27


W

Waddock S "Parallel universes: Companies, academics and the progress of corporate citizenship" 2004 (109) Business and Society Review 5 – 42


Walton A "What is Fair Trade?" 2010 (31) Third World Quarterly 431 – 447


Ward H "The ISO 26000 international guidance standard on social responsibility: implications for public policy and transnational democracy" 2010 Foundation for democracy and development 1 – 44
Watermeyer R "The use of targeted procurement as an instrument of poverty alleviation and job creation in infrastructure projects" 2000 (5) Public Procurement Law Review 201 – 266


Winkler H and Marquard A "Putting a price on carbon in the context of development" 2010 (5) *Climate Policy* 489 – 493


White A "The stakeholder fiduciary: CSR, governance and the future of boards" 2006 *BSR Occasional Papers* 4


Wood D "Corporate responsibility and stakeholder theory: Challenging the neoclassical paradigm" 2008 (18) *Business Ethics Quarterly* 153 – 190


Wood S "Four varieties of social responsibility: making sense of the "Sphere of Influence" and "Leverage" debate via the case of ISO 26000" 2011(7) *Osgoode CLPE Research paper series* 1 – 21

Wynberg R and Sowman M "Environmental sustainability and land reform in South Africa: A neglected dimension" 2007 (50) *Journal of Environmental Planning and Management* 783 – 802
Zimmerman F "Barriers to participation of the poor in South Africa’s land redistribution" 2000 (28) *World Development* 1439 – 1460

**Case law**

A

*Alexkor Ltd v Richtersveld Community* 2004 5 SA 460 (CC)

B

*Baphiring Community v Uys and others* 2010 3 SA 130 (LCC)

*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 4 SA 490 (CC)

C

*CIR v Pick ‘n Pay Wholesalers (Pty) Ltd* 1987 3 SA 435 (A)

*Chief Nchabeleng v Chief Phasa* 1998 3 SA 578 (LCC)

*Chinese Association of South Africa and Others v The Minister of Labour and Others* (unreported case no59251/2007)

D

*Dulabh & another v Department of Land Affairs* 1997 4 SA 1108 (LCC)

E


G

*Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC)
In re Kranspoort Community 2000 2 SA 124 (LCC)

Independent Newspapers Holdings Ltd v Suliman 2005 7 BCLR 641 (SCA)

Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 6 SA 505 (CC)

Land and Agricultural Bank of South Africa v Parker 2005 2 SA 77 (SCA)

Macleantown Residents Association Re: Certain Erven and Commonage in Macleantown 1996 4 SA 1272 (LCC) 1282

Mazibuku and Others v City of Johannesburg 2010 3 BCLR 239 (CC)

Minister of Health and others v Treatment Action Campaign and others 2002 5 SA 751 (CC)

Minister of Finance and Another v Van Heerden 2004 6 SA 121 (CC)

Minister of Land Affairs v Slamdien 1994 4 BCLR 413 (LCC)

Port Elizabeth Municipality v Various Occupiers 2005 1 SA 217 (CC)

President of the Republic of South Africa and Another v Modderkloof Boerdery (Pty) Ltd 2005 5 SA 3 (CC)

Randal v Minister of Land Affairs; Knott v Minister of Land Affairs 2006 3 SA 216 (LCC)
S

S v Makwanyane and Another 1995 6 BCLR 665 (CC)

Soobramoney v Minister of Health (KwaZulu-Natal) 1998 1 SA 765 (CC)

T

The Government of the Republic of South Africa and others v Grootboom and others 2000 11 BCLR 1169 (CC)

V

Viking Pony Africa Pumps (PTY) LTD t/a Tricom Africa v Hidro-Tech Systems (PTY) LTD and Another 2011 1 SA 327 (CC)

Warner Lambert SA (Pty) Ltd v Commissioner, South African Revenue Service 2003 5 SA 344 (SCA)

Legislation – National

Abolition of Racially Based Land Measures Act 108 of 1991

Banks Act 94 of 1994

Basic Conditions of Employment Act 75 of 1997

Broad-Based Black Economic Empowerment Act 53 of 2003

Companies Act 61 of 1973

Companies Act 71 of 2008


Constitution of the Republic of South Africa 200 of 1993

Consumer Protection Act 68 of 2008

Employment Equity Act 55 of 1998
Group Areas Act 41 of 1950

Group Areas Act 36 of 1966

Income Tax Act 58 of 1962

Insider Trading Act 135 of 1998

Labour Relations Act 66 of 1995

Land Reform: Provision of Land and Assistance Act 126 of 1993

Mineral and Petroleum Resources Development Act 28 of 2000

Natives Land Act 27 of 1913

National Credit Act 34 of 2005


National Environmental Management Act 107 of 1998

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Air Quality Management Act 39 of 2004


National Health Act 61 of 2003

National Water Act 36 of 1998

Occupational Health and Safety Act 85 of 1993

Pension Funds Act 24 of 1956

Preferential Procurement Policy Framework Act 5 of 2000

Promotion of Use to Information Act 2 of 2002
Public Finance Management Act 1 of 1999

Restitution of Land Rights Act 22 of 1994

Skills Development Act 97 of 1998

Skills Development Levies Act 9 of 1999

Standards Act 8 of 2008

Subdivision of Agricultural Land Act 70 of 1970

Subdivision of Agricultural Land Act Repeal Act 64 of 1998

Legislation – Foreign

Denmark Act Amending the Financial Statements Act

Indian Companies Bill, 2011

Philippines Bill 1239

US Sarbanes-Oxley Act of 2002

UK Companies Act of 2006

Government publications

General Notice 1954 in Government Gazette 16085 of 23 November 1994


General Notice 2036 in Government Gazette 28351 of 20 December 2005

General Notice 110 in Government Gazette 29610 of 9 February 2007

General Notice 112 in Government Gazette 29617 of 9 February 2007


General Notice 639 in Government Gazette 34607 of 16 September 2011
General Notice 893 in *Government Gazette* 34845 of 9 December 2011

Government Notice R149 in *Government Gazette* 28518 of 17 February 2006


Government Notice R183 in *Government Gazette* 34070 of 4 March 2011

Government Notice 230 in *Government Gazette* 34107 of 18 March 2011

Government Notice R351 in *Government Gazette* 34239 of 26 April 2011

Government Notice 469 in *Government Gazette* 34339 of 22 May 2011

Government Notice R501 in *Government Gazette* 34350 of 8 June 2011

Government Notice R502 in *Government Gazette* 34350 of 8 June 2011

Notice 1140 in *Government Gazette* 33900 of 31 December 2010

**Thesis and dissertations**

Janse van Rensburg A *The constitutional framework for broad-based black economic empowerment* (LLD Thesis University of the Free State 2010)

Terblanche A *Die landelike swart vrou se reg op grondbheer* (LLM-dissertation North-West University 2005)


Van der Walt M *The concept ’beneficial use’ in South African water law reform* (LLD Thesis North-West University 2011)

Internet sources


Dardagan C 2008 Land reform to be more hands-on http://www.iol.co.za/news/politics/land-reform-to-be-more-hands-on-1.421880 [date of use 15 Sept 2011]


Department of Land Affairs Date Unknown DLA date unknown Settlement and production land acquisition grant policy framework


Ensor L 2011 *New state bid to make BEE more hands-on* http://www.businessday.co.za/articles/Content.aspx?id=140775 [date of use 21 April 2011]


Friedman M 1970 *The Social Responsibility of Business is to Increase its Profits* www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html [date of use 1 Nov 2011]


Global Reporting Initiative 2011 *GRI Network structure* http://www.globalreporting.org/AboutGRI/WhoWeAre/ [date of use 12 Mar 2011]


International Labour Organisation Date unknown Decent work agenda http://www.ilo.org/global/about-the-ilo/decent-work-agenda/lang—eng/index.htm [date of access 6 June 2011]

International Organisation for Standardisation Date Unknown About ISO http://www.iso.org/iso/about.htm [date of use 26 Oct 2011]


Johannesburg Stock Exchange Date Unknown Introduction to SRI Index http://www.jse.co.za/About-Us/SRI/Introduction_to_SRI_Index.aspx [date of use 10 Aug 2011]


Kane-Berman J 2010 *White farmers being set up as the new land reform scapegoats*  http://www.businessday.co.za/articles/Content.aspx?id=124768 [date of use 19 Sept 2011]


Lund T 2010 *Farmers have nothing to fear*  http://www.fin24.com/Economy/Farmers-have-nothing-to-fear-20100317 [date of use 19 Sept 2011]


NWK Date Unknown *About* [http://www.nwk.co.za/eng/index.asp](http://www.nwk.co.za/eng/index.asp) [date of use 14 Nov 2011]

NWK 2009 *Begunstigdes van NWK leveransiersgholfdag* [http://www.nwk.co.za/Afr/Bertokke/leveransiersgholfdag.pdf](http://www.nwk.co.za/Afr/Bertokke/leveransiersgholfdag.pdf) [date of use 15 Jun 2009]


Comment on the newly released Green Paper on Land Reform
http://us2.campaign-archive1.com/?u=1ef2bf75c99750631a09a7141&id=0d793df2c0 [date of use 26 Sept 2011]

Proudly South African Date Unknown About the campaign – overview
http://www.proudlysa.co.za/section/about.asp?include=../area/about_us/about.html&title=../gfx/pages/about.jpg [date of use 4 Jun 2009]

Radebe H 2011 DA targets communal land in reply to reform proposals

Radebe H 2011 State get tougher on foreign land ownership
http://www.businessday.co.za/articles/Content.aspx?id=146974 [date of use 17 Sept 2011]

Radebe H 2011 Minister proposes more land reforms


Roodt M 2008 Impediments to the delivery of socio-economic rights in South Africa
http://eprints.ru.ac.za/1258/1/Roodt_Impediments_to_the_delivery.pdf [date of use 13 Jan 2012]


SAPA 2009 ‘Use or lose’: Govt takes back unproductive farm [http://www.witness.co.za/index.php?showcontent&global%5B_id%5D=21586](http://www.witness.co.za/index.php?showcontent&global%5B_id%5D=21586) [date of use 19 Oct 2011]


SAPA 2010 *Farm equity schemes to be relaunched soon* [http://www.businesday.co.za/articles/Content.aspx?id= 126736](http://www.businesday.co.za/articles/Content.aspx?id= 126736) [date of use 17 Sept 2011]


SAPA 2011 *Social grants now support 15.2m* [http://www.fin24.com/Budget/Mini-Budget-2011/Social-grants-now-support-152m-20111025](http://www.fin24.com/Budget/Mini-Budget-2011/Social-grants-now-support-152m-20111025) [date of use 21 Nov 2011]


Temkin S SA leads world in integrated reporting, says King www.businessday.co.za/Articles/Content.aspx?id=116895 [date of use 3 Aug 2010]


United Nations 2010 Overview of the UN Global Compact (http://www.unglobalcompact.org/AboutTheGC/index.html [date of use 10 Sep 2010]


