

Land reform: Issues and challenges

A comparative overview of experiences
in Zimbabwe, Namibia, South Africa
and Australia

BERTUS DE VILLIERS

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60 Hume Road
Dunkeld 2195
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Republic of South Africa

PO Box 1383
Houghton 2041
Johannesburg
Republic of South Africa

Telephone: (+27 +11) 214-2900

Telefax: (+27 +11) 214-2913/4

E-mail: info@kas.org.za

www.kas.org.za

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The author

Dr Bertus de Villiers (LL.B, LL.D) is a widely recognised expert in constitutional law. His background includes comparative research in constitutional law, extensive publications (more than 70 articles and 5 books) and practical experience that covers a wide range of constitutional topics such as the protection of human rights, land reform, federalism, intergovernmental relations and electoral systems. He is currently manager: Legal and Native Title, Goldfields Land and Sea Council, Kalgoorlie, Australia, as well as solicitor at law (Western Australia) and advocate of the High Court (South Africa). He is therefore ideally placed to engage the topic of land reform due to his extensive practical experience in the theory and application of land claims and the management thereof in South Africa and Australia. He was previously involved as lead negotiator and drafter for South African National Parks in the settlement of the Makuleke claim in the Kruger National Park and is currently involved in assisting various Aboriginal groups in Australia in the preparation and management of their native title claims.

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Introduction

Land reform is probably one of the most difficult domestic policy issues to be dealt with by Zimbabwe, Namibia, South Africa and Australia. In each of these countries the process of land reform is incomplete. Zimbabwe, on one side of the spectrum, is facing a crisis in democratisation due to its radical approach to land reform. On the other side of the spectrum is Australia which, as a stable and respected democracy, has difficulty explaining why the land needs of such a small minority of its people cannot be dealt with more effectively. In between there is Namibia, where the winds of change and the pressure to ‘radicalise’ land reform are increasing. And then there is South Africa where systems and policies to deal with land reform are probably the most advanced from a legal perspective, but where the resources, patience and other practical issues to execute reform effectively are becoming serious hurdles in implementing policies.

The stability of Australia is not threatened by the lack of effective land reform, but its credibility as a leading democracy is eroded by the apparent inability or unwillingness to deal with the land aspirations of Aboriginal people. In the three African studies, however, the very democratic basis that took so long to be established could be threatened if land reform fails.

Land reform is generally accepted to mean restitution,¹ redistribution² and/or confirmation of rights in land to the benefit of the poor or dispossessed.³ Land reform is therefore more than a mere land claim–driven process where ancestral land is claimed back by people who were dispossessed. It includes a land claim process, but is widened to refer also to the acquisition of land for distribution to the landless, and the changing and securing tenure to ensure protection for

those who occupy it. In its broadest sense, land reform therefore entails a wide spectrum of options such as land claims, acquisition and distribution of land, access to land for certain purposes, land use planning, infrastructure development, farming and commercial support, resettlement programmes, security of tenure and training. (Refer to Annexure 1 for a brief overview of the main land reform programmes under way in South Africa.)

The focus of this publication is primarily on land restitution whereby rights to ancestral land are restored (be it by a claim-driven process or a land acquisition process) as an important element of land reform, although some comments will be made to land reform in general. It therefore falls beyond the scope of this study to compare and analyse different land reform policies in the broadest sense. The emphasis is rather on the legal arrangements used in four countries—Zimbabwe, Namibia, South Africa and Australia—to effect land restitution (return of ancestral land), the institutions responsible for overseeing the process, and progress made with the restitution process.

It is not intended to provide a detailed overview of historical land practices and discriminatory policies in each of the countries. Suffice to say that in all four countries the themes of inequality, colonial dominance and discrimination have led to the indigenous inhabitants being forced off their land for the benefit of white settlers. While the scale of dispossession in Africa may be more visible than in Australia, the fact is that Aboriginal people's land rights aspirations in Australia remain one of the most neglected topics in public policy making. The recognition of native title in Australia was forced upon the country by the High Court and as yet there is no consistent nationwide land reform policy to assist Aboriginal people to return to, live on and manage their ancestral lands. Native title, at its very core, is a weak right that does not fully address the land needs of Aboriginal people.

Several reasons can be advanced for choosing these four countries as case studies. Extensive research has been done on each of the countries but little comparisons have been made between their respective legal arrangements and experiences. All four are what could be termed non-treaty dispensations, which contrast with countries such as the United States (US), Canada and New Zealand where some form of historic treaty was entered into between the colonial power and local indigenous people. All four have embarked upon land reform fairly recently. In the case of the three countries in Southern Africa, the land reform process was activated by the launch of democratisation with newly elected regimes taking office, while in Australia the High Court in 1992 virtually forced

the Commonwealth Parliament to deal with the topic of native title. Although ‘native title’ has not been recognised in any of the Southern African case studies, it is quite possible that in time to come the doctrine of native title may reverberate in Southern Africa and even in other parts of Africa which share a common law tradition. All four countries are engaged—Zimbabwe until recently—in what can be called market-based land reform. This essentially entails the acquisition of land by the government on the basis of the willing buyer–willing seller principle.

A key element that impacts upon the way in which land restoration is approached is whether land reform is market-driven, non-market driven or a combination of the two. By market-driven reform is meant where new tenants or the state have to acquire land on a willing buyer–willing seller basis. Whether the state or new tenant acquires the land, experience shows that the process can be very costly and is usually driven by land that becomes available on the market rather than acquiring land in a cohesive manner in pursuance of a land acquisition plan.

Non-market driven reform is where the state opts for a policy of expropriation whereby land is taken (with or without adequate compensation) for redistribution. It could also include packages to assist new tenants to find their feet, establish their businesses and support them for a period of time. Non-market driven reform has the benefit that government can decide where and when it wants to expropriate land, but if abused, as in Zimbabwe, it has obvious implications for democratic standards and economic development and stability.

A successful land reform model probably requires a combination of market and non-market reform. Any land reform programme should therefore be reflective of the social, cultural and economic realities that impact upon the new landowners. In essence land tenure systems are not “simply products of planning institutions. They are forms of social organisation”⁴ that reflect the value systems, culture and traditions of people.

The research methodology employed in undertaking the research is essentially based on an overview of literature on an interdisciplinary basis as well as the conducting of qualitative interviews with persons who are involved in, or who have made a study of, the land reform processes in the four case studies. Any research is limited by crucial resource factors such as time and budget and the same applies in this case.

It is generally acknowledged that a mammoth task stands ahead for those involved in land reform. Extensive research and ongoing monitoring is required

by multidisciplinary teams for the duration of a land reform programme, to determine its success, make alterations to policy and develop new initiatives to address shortcomings. The absence of reliable planning and information regarding implementation can make it virtually impossible to determine the success or failure of any land reform programme.

The outline of the publication is briefly as follows: Each of the four case studies will be discussed by providing a historical overview of land dispossession, analysis of legislative and other measures to restore rights to land, commenting on institutions that are involved in the restitution process, reference to the progress with restitution and finally a brief comment or observations on the experiences of each country. In the cases of Australia and South Africa a separate section is added where the experiences of these two countries are compared. In conclusion, observations are made of the processes and policies of all four case studies with some brief recommendations with regard to South Africa.

NOTES

- 1 Restoration of rights in ancestral land that were dispossessed by previous regimes.
- 2 Acquisition of private land or distribution of state-owned land to the landless.
- 3 M Adams, *Breaking ground: Development aid for land reform*, Overseas Development Institute, 2000, p 1.
- 4 D Weiner, The land question in South Africa, in RL Posterman, MN Temple and TM Hanstad, *Agrarian reform and grassroots development*, Lynne Rienner Publishers, 1990, p 299.

Chapter 1

ZIMBABWE: FROM LAND REFORM TO LAND OCCUPATION

Land reform during the past few years in Zimbabwe has been at the forefront of headlines in Southern Africa and other parts of the world. For the first two decades following independence, Zimbabwe's land reform policy had a low profile and to many it became a model of how land reform should be undertaken. Since the mid 1990s, however, it became clear that the political currency of land, the demands of the landless, unlawful occupation of land and unfulfilled promises of land reform could soon develop a momentum that would be difficult to control. The following chapter provides a brief overview of, and comment on, the main phases of land reform in Zimbabwe since independence.

PRE-INDEPENDENCE

The colonialism process in Zimbabwe began in 1889 when the British South Africa Company received a Royal Charter of Incorporation from Britain. The company, under the leadership of Cecil John Rhodes, established Northern and Southern Rhodesia (now known as Zambia and Zimbabwe respectively). The charter included the right of the company to expropriate and distribute land. The company was so 'successful' in the execution of its responsibilities that by 1902 it had succeeded in expropriating three-quarters of the land for the benefit of new settlers who numbered approximately five per cent of the population.⁵

Since 1889, whites therefore basically had "their pick of the land";⁶ huge investments were made to assist the new farmers, infrastructure was developed to open markets, international markets were established and employment created. All of this was accompanied by state subsidies, loans and various tax

incentives to assist white farmers to develop their land. Blacks were to a large extent limited to 'native reserves' and over a period of time huge efforts were made to move blacks into these reserves.

The first African reserves were created in the 1890s in Matabeleland and thereafter the exercise was repeated in other parts of the country. Various statutes such as the Southern Rhodesia Order in Council 1898, Land Appropriation Act 1930, Native Land Husbandry Act 1951 and the Land Tenure Act 1969, compartmentalised land holding into racial categories, forced the peasantry into marginal areas and reserved almost half of the agricultural land for whites.

For example, the Land Tenure Act allocated 15.5 million ha to 6,000, mainly white, commercial farmers, 16.4 million ha to 700,000 black families and 1.4 million ha to 8,500 small-scale commercial farmers. In addition to this inequity, the land held by whites was generally in areas with higher rainfall and better soil quality.

The 1919 case of *Re Southern Rhodesia*⁷ confirmed that all vacant land belonged to the Crown and that land taken from indigenous groups vested in the Crown. It was concluded that in accordance with the common law:

The estimation of the rights of Aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usage's and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known in our law and then to transmute it into the substance of transferable rights of property as we know them.

The distribution of land in Zimbabwe at independence was therefore the result of nearly a century of successive governments wanting to establish and expand the economic and political dominance of whites.⁸ By the end of colonial rule 42% of the country was owned by 6,000 (white) commercial farmers. This unequal distribution of land was exacerbated by the bush war—African populations of entire regions fleeing their homes, thousands leaving the country and the rounding up of peasants by the government to live in 'protected villages'.

The deeply rooted agrarian structure inherited from colonial rule had two major sub-sectors: a commercial sector dominated by large-scale land holdings in the hands of whites; and a peasant sector comprising traditional structures, small-holdings and common grazing areas. At independence the commercial sector

produced about 80% of the national agricultural production by value, 90% of the formally marketed produce and employed a third of the total labour force.

The British government—having experienced the conflict for land in post-independence Kenya where it had assisted in the purchasing of white-owned farms—attempted in the mid-1970s to establish a Zimbabwe Development Fund aimed at acquiring white-owned farms for distribution. This and other proposals culminated in the Lancaster House negotiations, where several principles were put forward, of which the most important were:

- acquisition of land only on a willing seller–willing buyer basis;
- compensation to be remittable in a foreign currency; and
- under-utilised land could be acquired for public purposes but at the full market value.⁹

The British government undertook to assist with financing of the programme provided its contribution was met on a pound for pound basis by Zimbabwe. Unfortunately the Lancaster House agreement did not contain a detailed and enforceable commitment from any of the foreign donors to actually contribute to land reform. In essence there were no guarantees of any kind, which in turn left the new government exposed to take political responsibility for the programme without necessarily having the means to abide by the constitutional guarantees. The government of Britain promised £75 million and the US promised US\$500 million, but none was in the form of written guarantees. By the year 2000 Zimbabwe had only received approximately £30 million, in contrast to Kenya where in its land restoration and resettlement process £500 million was provided.¹⁰

The Lancaster House negotiations which took place in 1979 led to the independence constitution which, among other safeguards, set the basis for the first 10 years of land reform. The negotiations took place between Britain, internal political parties and the liberation movements with some powerful behind-the-scenes parties, such as Southern African states, also playing an important role.

It was generally accepted at the time of the drafting of the Lancaster Constitution that land reform would be required. As early as 1977 it was estimated by the German Development Institute that at least 75% of white-held land would be needed to settle the excess population of the reserves and tribal trust areas.¹¹ It was therefore realised that the inequalities and inequities of the past would be impossible to sustain.

The question was essentially how to undertake land reform in a way that

would address the fears and expectations of all sides. It was, after all, not a simple task to reverse policies of more than a century of colonial rule that saw Africans lose much of their land to the benefit of the new colonial arrivals.¹²

The bush war of the late 1960s and 1970s were therefore not only fought on the basis of achieving political power but also to ensure a return to the land, hence the remark by Robert Mugabe that “the land question was at the centre of the factors that propelled us to launch our war of national liberation”.¹³

The ZANU/ZAPU alliance led by Mugabe was under severe pressure from the other Frontline states to accept the Lancaster House outcomes in order for the war to end. In addition, the “lure of immediate political independence” meant that certain legal and constitutional guarantees for the protection of the white population were accepted, albeit grudgingly.¹⁴

To some this acceptance meant a “crucial capitulation”¹⁵ but to others it was necessitated by political compromise. The situation is best described in the words of Mumbengegwi:

This agreement so compromised the character of the new Zimbabwean state that it was constrained from acting decisively in the interests of the peasants, especially over the land issue ... The post-independent state found itself reduced to the role of mediator between the conflicting interests of the two agrarian classes (commercial farmers and peasants). The commercial farmers demanded continuity while the peasants expected change.¹⁶

When Zimbabwe became independent on 18 April 1980 the ‘land question’ was therefore already at the forefront of issues that the young nation had to address. It was predicted at the time that:

the most acute and difficult question confronting the first ... Government ... of ... Zimbabwe will be that of land. The problem would not be an easy one to resolve.¹⁷

The war and international isolation brought about by sanctions also caused commercial farmers to switch from export markets to domestic markets at the expense of peasants.¹⁸ By the time of the Lancaster House negotiations, commercial farmers were producing 90% of the country’s marketed food requirements.¹⁹ It was therefore obvious that whatever land reform arrangement was agreed to, it had to offer some sense of security to commercial farmers.

The experience of Mozambique, where the flight of commercial farmers after independence led to massive poverty and unemployment in the agricultural

sector, served as a warning to policy makers. As a result an ironic situation developed in Zimbabwe: white farmers who stood at the forefront of the war against independence suddenly became an “almost protected species”.²⁰

The key elements of the Lancaster House Constitution in regard to land reform can be summarised as follows:

- The constitutional guarantees had a lifespan of 10 years and could only be changed prior to the expiry of the 10 years with consensus of all members of Parliament.
- The right to property was guaranteed. Only ‘under-utilised’²¹ land could be compulsorily acquired, with all other property being subject to the willing buyer–willing seller principle.²²
- Proper notification had to be given to inform land owners of the state’s intention to acquire their land:
 - Land would be bought only on a willing buyer–willing seller basis at market-related prices.
 - Payment had to be “prompt” and “adequate”²³ and could be remitted in any other country of choice.²⁴
 - Any white farmer who wanted to sell land had to offer it to the government first before being allowed to sell it on the open market.
 - Under-utilised land could be expropriated but at market-related prices.
 - The British government would contribute half of the costs provided the Zimbabwean government could match it pound for pound.

IMPLEMENTING THE LANCASTER HOUSE CONSTITUTION: 1980–1990

On 17 April 1980 the state of Zimbabwe was born, bringing to an end what started as administration by the British South Africa Company (1890–1923), followed by self-government (1923–1967) and the Unilateral Declaration of Independence (1965–1980).²⁵ The influence of the British government in the Lancaster House negotiations was very strong and although the basic principles of a majority government were accepted, various ‘safeguards’ were built into the constitution to protect the rights of the white minority for a period of 10 years.²⁶

The new government was faced from the outset with the almost impossible task of striking a balance between the need for immediate and tangible land reform and maintenance of skills and investment to support economic growth. Warning signals were noted at an early stage with Riddell cautioning that:

In short, it appears that the proposed Zimbabwean constitution has been designed more to maintain the present structure of commercial agriculture than to address comprehensively the national problem of land.²⁷

The main objectives of the land reform programme were to:

- reduce civil conflict by transferring white held land to black people;
- provide opportunities for war veterans and landless people;
- relieve population pressure on communal lands;
- expand production and raise welfare; and
- maintain levels of agricultural production.²⁸

In the initial phase two schemes were envisaged for land distribution according to the National Land Policy, namely Model A (Normal Intensive Resettlement), whereby individual households would each be given five to six hectare plots, plus a share in a communal grazing area, and Model B (Communal Farming), which provided for farming of commercial farms on a cooperative and mechanised basis. A Model C was later added to provide for a core commercial estate with individual small-holdings as well as a Model D, which provided for pastoral grazing areas. The land distribution programme embarked upon was regarded as the most extensive programme in Africa to date.²⁹

One of the important aspects of the land reform programme was that the acquired land was owned by the state and not by the farmers or community responsible for working the land. In strictly legal terms the state was therefore the main beneficiary of the land reform programme. An occupancy permit was issued but this fell well short of secure tenure in the form of a lease or freehold. Land could not be subdivided, sub-leased or inherited. Non-agricultural activities were also prohibited and inspections were carried out to ensure that actual farming activities occurred.

The uncertainty of tenure and the possible abuse that could result from a renewal system not only created insecurity but also limited the ability of farmers to access credit for farming activities. The problem was not rectified and in an empirical study conducted in 1995, 76% of respondent permit holders felt insecure under the tenure arrangement.³⁰

The uncertainty of tenure in communal areas and for farm workers was also problematic. Efforts to secure the tenure of farm workers were described by an official report in 1994 as being implemented “without proper objectives or direction. That is probably why it has been shrouded in secrecy and controversy...”³¹

The initial targets set by government for resettlement soon proved to be overly optimistic.

It was proposed in 1980 that 18,000 households would be resettled in the first five years. In the following year (1981) the estimation grew to 54,000 families and in March 1982 government promised a resettlement of 162,000 households within two years.³² These targets were virtually plucked from the air with little account of the practicality thereof. The British thought it to be “unrealistic”³³ and these targets have come back to haunt the Zimbabwean government. It has to be acknowledged, however, that by some estimates the overpopulation of communal areas in 1969 was already as high as 220,000 families. The seriousness of the need for land reform therefore necessitated drastic action and, from a political perspective, inflated promises.³⁴

By the end of the first 10 years a total of 52,000 families had been resettled, which in itself could have presented quite a feat, but compared to the 1982 target of 162,000 was only a 32% achievement. During the time close to three million hectares was acquired, which in turn represented 16% of the area owned by commercial farmers.³⁵

The government was “scrupulous” during the first decade to comply with the Lancaster House Constitution. Owing to a variety of reasons the process was made easier because more land was available than could be acquired,³⁶ but the government still fell well short of its target.

Irrespective of all constraints, the government’s accomplishments during the first decade were described as “impressive” from a quantitative perspective, although from a qualitative perspective it had not “brought about a transformation of inherited patterns of ownership ...”.³⁷

Given the restrictions imposed by the Lancaster House Constitution much of the land reform of the first decade was aimed at resettlement of black families, ad hoc acquisition of land where it became available, and the establishment of cooperatives for new farmers. It is estimated that close to 80% of all those resettled during the first 10 years formed part of the Model A regime.

The initial decade of independence saw a high level of interest from foreign organisations such as USAID, the World Bank, the Overseas Development Institute, various think-tanks and non-governmental organisations (NGOs), the European Union (EU) and, of course, the government of Britain to assist and even fund the reform process.³⁸ The real contribution by international donors, however, remained limited and there remained great reluctance to contribute to the actual acquisition of land. With the exception of Britain, most potential

donors held back on supporting land acquisition, which is in contrast with Kenya where more than 95% of the financing for land acquisitions came from foreign sources.

A 1986 United Nations (UN) Food and Agriculture Organisation study³⁹ proposed that land resettlement should be integrated with a comprehensive strategy to address land shortages, the upgrading of land, and settlement and training across the whole country. Rather than approaching land reform in an ad hoc manner it was therefore suggested that a national strategy be developed which could guide policy makers, with the aim of approaching land reform in a holistic way. The recommendations were unfortunately not implemented and as a result Zimbabwe had by 1989 “no clear policy on land reform ...”.⁴⁰

In contrast to the heated discussions during the Lancaster House process, the land issue all but disappeared from the policy scene during the mid-1980s. This caused some observers to conclude that “there may really be no ‘land question’ worth talking about in 1986, given Zimbabwe’s star agricultural performance”. At the time it was “common internationally to acclaim” Zimbabwe for its unique “success” story in comparison to other African countries.⁴¹

Account should, however, be taken of the fact that during this period some squatting on vacant and unutilised land began. The government was forced in some instances to evict but in others had to prioritise the acquisition of such occupied land. Squatters therefore forced the hand of government by illegally occupying land, thereby ensuring that it was acquired for their use.

Bratton describes the latter part of the 1980s as “a story of the decline of the prominence of land distribution as a policy issue ...”, which in turn caused the flow of new settlers to slow to a trickle.⁴²

Some factors that contributed to the scaling down of the land issue during the 1980s included the following:

- More land was available than could be acquired⁴³ but this also signifies the high cost of acquiring land. In addition, the land made available was not necessarily spread out over the whole country but was concentrated in certain areas where farming activities had been most disrupted by the war. The situation is best summarised by Mugabe himself: “We had wanted to resettle 162,000 families within three years. It just proved to be impossible, because it was beyond, completely beyond, our management and our resources ... And even if we had the resources, we just do not have the capacity to do it.”⁴⁴
- Land prices had stabilised and even started to rise⁴⁵—in some areas prices “soared” due to political and economic stability.⁴⁶ Since the mid-1980s it

became very much a seller's market—much to the credit of government but also perversely to its detriment from a land reform perspective, as it meant that good quality land became even scarcer. Although enough land was available for acquisition, the government was not in a position to target certain areas and therefore had to be guided by land being offered to it and to purchase that land at market-based prices.

- Most of the initial acquisitions involved abandoned farms or unproductive areas made available by commercial farmers. The acquisition process was therefore of a “haphazard” nature.⁴⁷ It was also realised that land reform in isolation could not solve the problem of rural poverty and economic empowerment. In many instances the need for basic education, employment and housing was as high, if not more so, than for access to land. As Bratton concludes:

Land reform policies will always have to be coupled with other policies to create alternative forms of employment that involve people leaving the land altogether.⁴⁸

- The land reform process, and in particular granting access to peasants, progressed well⁴⁹ to the extent that the peasant farmers were seen as producing a “miracle”.⁵⁰
- The Commercial Farmers Union (CFU) expanded its ranks to include approximately 300 new black farmers of which at least 10 were Cabinet ministers. As such its position of influence had increased from a purely white-interest body to serving a wider audience. This also meant that a new ‘class’ of land owners was created, which had more interest in “taking land for themselves than giving it to the peasants”.⁵¹
- Other social, economic and welfare needs became of primary importance, for example, education, health and housing. Due to bilateral agreements that required the government to match donor funding, it could not sustain the land acquisition programme in the face of other competing social and economic demands. In addition, foreign donors were reluctant to contribute to land acquisition as such, as opposed to land development programmes.
- The drought and severe budgetary restraints limited the options of government which, added to the requirement to pay ‘adequate’ compensation for expropriated land, severely drained the budget. The ‘real’ constraint on land acquisition was therefore not so much the statutory framework but the cost associated with the programme as well as post-acquisition demands.⁵²
- Post-acquisition settlement of new farmers turned out to be highly resource-

intensive and complicated.⁵³ In addition to basic resettlement of people, the infrastructural, technical, financial and educational⁵⁴ support programmes required for new settlements were not adequately in place. As a result, much funding was spent on the acquisition of land rather than on resettlement.⁵⁵ Contributions from overseas towards implementation strategies were “modest”⁵⁶ and government departments lacked the experience to oversee and implement the settlement process.⁵⁷

- The country experienced a steep growth in peasant and communal production, which led some to think that large-scale land distribution may not be necessary—there was indeed a “leap” in peasant output performance to the extent that they dominated staple food production.⁵⁸
- ‘Counter-solutions’ became popular whereby land distribution as such was not seen as the solution but rather promotion of economic development of rural communities *in situ*.⁵⁹ (Refer, for example, to the Communal Land Development Plan which emphasised rural development and issues related thereto.)

In summary, the following main results in land reform were achieved during the first 10 years:

- The statistics and outcomes present a mixed bag. In the first 10 years close to three million hectares were acquired—52,000 households affecting more than 400,000 people where beneficiaries. Where 6,000 white farmers owned 42% of the country in 1980, they owned 29% in 1990. More than 90% of the land went to Model A schemes (individual lots). However, it also became clear that the demand for land would soon outstrip the land on offer, especially when it came to productive land. Estimates at the time were that approximately nine million hectares were required for resettlement. Such a huge demand was not only unaffordable but was unlikely to become available on the open market.
- Many of the beneficiaries of land reform were senior members of government⁶⁰ and the “new black ruling elite”.⁶¹ The previously white-dominated CFU managed to expand its ranks to include key black land owners, which in turn increased its influence and lobbying ability with government.⁶² As a result the position of commercial farmers in 1990 appeared “more secure” than at almost “any time previously”.⁶³ There was, however, still slow penetration of black farmers in the large-scale commercial operations and in general the unequal distribution of land continued—hence the prophetic observation by Bratton that:

The number of beneficiaries must be increased. The initial target of resettling 162,000 families has been rendered irrelevant by time, and the current *de facto* target of 15,000 families per year will not make a meaningful impact on the problem of landlessness.⁶⁴

- The Model A programme was described as “an impressive achievement for a new regime.”⁶⁵ As a result Zimbabwe “stands out as an agricultural success story among African countries because of the productivity of its small farmers and a regular ability to feed itself”.⁶⁶ A study undertaken by Britain’s Overseas Development Administration described the scheme as “one of the most successful aid schemes in Africa”.⁶⁷
- The resettlement programme slowed down remarkably during the final years of the 1980s. The annual rate of resettlement decreased from about 7,000 families a year to 4,000 families. The family-based farm model won the favour of peasants and international financiers. Few transfers took place on the basis of the collective model. The family model has indeed shown positive signs of economic viability.⁶⁸
- Post-acquisition support and continued poverty in communal areas remained serious problems.⁶⁹ Government departments were not well organised or properly equipped to deal with the many practical matters arising from the settlement programme. As far as the initial intensive scheme was concerned, there was criticism that it had been “rushed” through with “minim[al] planning”.⁷⁰ The absence of suitable infrastructure, inadequate provision of support services, tenure uncertainty as well as the absence of off-farm employment opportunities all contributed to the unsustainability of some of the initial programmes.
- Irrespective of the success achieved with the rural peasantry, the reforms of the first 10 years did not fulfill the “land hunger” of the landless⁷¹ and the “uneven agrarian capitalist development which began eighty years ago, has tended to be reinforced” since independence.⁷²
- One of the major criticisms against the land reform process was whether the costs were justified by the outcomes/benefits. In essence the acquisition programme of the 1980s did very little to relieve the population pressure in communal areas. The population in communal areas had in fact increased due to normal population growth and the return of many refugees. In addition there was the risk that, in order to assist the new farmers to settle, other important socio-economic objectives which may benefit a wider range of people were neglected.

CHANGING COURSE: 1990–2000

The restrictions imposed by the Lancaster House Constitution expired on 18 April 1990. In the run-up to the expiry and the upcoming election, the ‘land issue’ became a core rallying point for constitutional and political change. As summarised by Mugabe: “The biggest single problem yet to be resolved is that of land distribution.”⁷³ Land reform began to emerge as a political issue early in 1989.⁷⁴ With the rise of political opposition under opposition party leader Tekere and the need to regain political ground in rural areas, the land issue became a rallying point for support.

Mugabe therefore joined the “acquisition bandwagon” and (again) promised a “revolutionary land reform programme”.⁷⁵ In essence all parties were seeking to associate themselves with the “renewal of the *chimurenga* (revolutionary war)”⁷⁶ and as a result the land issue became the most volatile of electoral politics and promises.

The British government—behind the scenes and even in public—did what it could to encourage a continuation of a regime similar to the Lancaster House Constitution. The Zimbabwean government perceived British interference as uncalled for and unjustified, while the British were unwilling to commit economic support unless certain assurances were received. The British were insisting that the land acquisition programme should continue to be based on a willing buyer–willing seller principle, while the Zimbabwean government wanted to include in the options the possibility of expropriation if agreement could not be reached.

The expiry of the Lancaster House Constitution gave the post-independence government the first real opportunity to deal with the land issue and other constitutional matters in its own way. Some observers found it strange that the land issue, which was so high on the agenda during the Lancaster House negotiations, experienced a “curious silence” for much of the 1980s,⁷⁷ while others saw the government’s proposed new sweeping reforms as “a precarious tightrope walk”.⁷⁸

The government legislated the introduction of its new land policy in two phases—first by amending the constitution and second by new legislation in terms of the constitution. The Constitution of Zimbabwe Amendment Act (No. 11) Act No. 30 of 1990 and the Constitution of Zimbabwe Amendment Act (No. 12) Act No. 4 of 1993 allowed for land—both commercial and unutilised⁷⁹—to be acquired for resettlement with “fair”⁸⁰ compensation being payable in a “reasonable time”. This was in contrast to the Lancaster provision

for “adequate”⁸¹ compensation that had to be paid “promptly”.⁸² “Fair” compensation was generally seen as being more flexible and therefore conducive to the land reform programme.⁸³ The provision of the Lancaster House Constitution for payment to be remitted in any currency of choice was also abolished.

Parliament was also empowered to specify through legislation certain principles upon which compensation could be calculated—thereby moving away from the market-value principle—and the period within which the compensation had to be paid.⁸⁴ In addition, the constitution provided that “no law shall be called into question by any court on the ground that the compensation provided by that law is not fair”.⁸⁵

The package of reform introduced by the government in 1990 included the amendment of Section 16 (property right) of the constitution and the subsequent Land Acquisition Act 1992, which paved the way for expropriation of white-owned, rural⁸⁶ land. The initial draft, which excluded the right to “fair” compensation for expropriated land, was dropped after fierce local and international pressure.

The Act was presented as a compromise between commercial farmers, who preferred the continuation of the Lancaster House arrangement, and government, which favoured wider powers to effect land reform that would include the taking of land without compensation.

From the perspective of especially the white farmers, some NGOs and church groups, the United Kingdom (UK) and many in the international community, the new land policy was seen as a fundamental breach of human rights.⁸⁷ The political reality of the time, however, was that the decline in the ruling party’s rural support as well as economic hardships faced by the country, played a key role in the radicalisation of the land acquisition and distribution policy.

The irony is that the drastic policy did not necessarily benefit the peasants and poor of society. A ‘scramble’ for land by the new elites in government took place and the corruption that accompanied the unchecked taking and allocation of land meant that any notion of an orderly process of land reform was replaced with farm invasions and forced seizure of land.⁸⁸ While introducing the new reforms as a means of empowering the poor, “the ruling elite have made little more than token resettlement of the landless peasant farmers on acquired land”.⁸⁹ Makumbe goes on to note that “the elites have made effective use of the Land Acquisition Act to feather their own nests ...”.⁹⁰

The Land Acquisition Act 1992 provided the vehicle for the acquisition of

land.⁹¹ It empowered the president to acquire rural land compulsorily and set out the procedure in accordance with which that acquisition should take place.⁹² Once written notice had been given to an owner that his/her land fell within the acquisition category, he/she could not dispose of the land or make any permanent improvements thereon. Such notice had a one-year duration. As soon as notice of the acquisition was published, ownership “immediately” transferred to the state even though the question of compensation still had to be settled.⁹³

The minister also had the absolute discretion to designate any land as ‘rural’ land that could be compulsorily acquired in the public interest. The minister had to specify the purpose for which the land was to be acquired and the period in which it was intended to be acquired. Such period may not extend beyond 10 years. During such period of designation an owner was not allowed, without the minister’s permission, to sell or otherwise dispose of the land.⁹⁴

The Act required that an owner of acquired rural land had to receive at least one half of the compensation within a reasonable time after the acquisition, at least one half of the remainder within two years of the acquisition and the balance within five years.⁹⁵

A Compensation Committee was established to determine the amount that was payable for rural land.⁹⁶ The committee had to consider factors such as the size of the land, soil type, the nature and conditions of improvements, the type of activities carried out on the land, fencing, water supply and general infrastructure. In the event of the acquisition of non-rural land, compensation had to be fair and reasonable, taking into account the right of the owner as well as the public interest.⁹⁷ The Act provided that disputes regarding the compensation could be referred to an administrative court.⁹⁸

The legality of the Act was challenged in *Davies and Others v Minister of Land, Agriculture and Water Development* in 1994.⁹⁹ The principal contention of the applicants was that the “designation” of a property impaired the rights of the owner to such an extent that it could not be done without compensation, as determined by the constitution.¹⁰⁰ The court distinguished between “acquisition” and “designation”¹⁰¹ and found that the latter does not fall within the ambit of acquisition and therefore does not require any compensation.¹⁰² As a result the position of individual land owners was such that their ability to deal with their land by selling or disposing of it in another way was severely curtailed, but without any compensation remedy being available.¹⁰³

Notwithstanding these drastic measures, the resettlement process remained slow and, by the government’s own statistics, by 1995, of the 162,000 families

that needed to be resettled, only 60,000 had been resettled on 3.4 million ha. Some 10.9 million ha still fell within the domain of 4,000 large-scale commercial farmers (predominantly, but not exclusively, white).¹⁰⁴

Controversy continued to plague the process of land transfer as there were many examples of it being abused for political purposes.¹⁰⁵ Makube concludes that the decline of political support for Mugabe's ruling Zanu-PF "dictated that political considerations rather than economic rationality would prevail" and that the ruling party was essentially "taking care of only its own interests in this whole exercise".¹⁰⁶

The occurrence of large-scale squatting on land took off again in the mid-1990s, although this time government was not as active as in the 1980s in evicting people. The repeat of the 1980s-style eviction became virtually impossible due to "legitimacy problems" at local level.¹⁰⁷ Government therefore initially turned a blind eye and later even encouraged the taking over of land by occupation.

It should, however, be noted that land policy did shift towards distributing land to "capable" farmers rather than to peasants.¹⁰⁸ This trend, according to Moyo, is reflective of the agenda of so called "black business people".¹⁰⁹ This was in turn indicative of the "shift from socialism to a more market-oriented economic management system", which in turn "sidelined" the landless and poor in rural areas.¹¹⁰ Government was also cautioned that land distribution may be "part of the solution ... but it is not a panacea".¹¹¹

During the late 1990s the Mugabe government endeavoured to speed up land reform by introducing a land resettlement scheme that identified a further 850 white-owned farms for confiscation. The farms covered approximately 2.3 million ha. In order to prevent any delays the government developed a 'fast track' system whereby farmers would receive only 30 days' notice to vacate their property instead of the previous 60 days' notice.

The late 1990s also saw the drastic increase of farm invasions. According to a survey by the CFU, more than 1,700 invasions took place. Due to inaction by police the CFU sought a court order to evict squatters. Although granted by the court, the order remained unenforced following a declaration by Mugabe that "we will summon our people to take which is their own".¹¹² According to Maposa, the 'vacuum' that developed in the land policy field could have been prevented had the government taken steps in the following areas:

- Proper community-based land management, which should have included communities in decision-making processes.

- Improved education programmes and channels of communication.
- Equality in access to resources such as land and credit facilities.
- Clear tenure rights, which had as their aim security of tenure.
- The need for “strong institutional capacity and [an] equally strong policy of political and economic empowerment to bring the population within the planning and decision making framework of the resettlement programme”.¹¹³

TAKING THE LAND—2000 AND BEYOND

The 1990s (as the 1980s) saw a lagging behind in the meeting of targets set in the National Land Policy due to a number of reasons—one being the country’s rapidly deteriorating economic situation. By 2000 over 3.5 million ha had been transferred to 75,000 black families—way short of the 1980 estimates. The relationship with foreign donors and in particular the UK soured more with assistance basically coming to a standstill. The UK emphasised the need for macro-economic stability and democratic governance as a condition to continued support, while the government of Zimbabwe believed that stability could only be achieved by a more radical and effective land transfer process.

It is therefore not surprising that with the run-up to the 2000 election, the issue of land reform again became a useful tool to mobilise public opinion and divert the attention from other serious socio-economic issues facing the country. The government again amended the constitution and the Land Acquisition Act with the aim of speeding up land reform.¹¹⁴

The principal aim of the constitutional amendments was to place Britain under the obligation to pay compensation for agricultural land compulsorily acquired for resettlement and simultaneously to relieve Zimbabwe from paying any compensation for such land.¹¹⁵ Even in such instances where compensation was payable, there was no requirement for it to be “fair” or “adequate” or in any other way to represent the value of the land. Should Britain refuse to pay the Zimbabwean government was absolved from any obligation to pay compensation.

The formula to be used in determining compensation included vague criteria such as the history of ownership, the use and occupation of the land, the resources available to the acquiring authority responsible for implementing land reform and any other financial constraints.¹¹⁶

Following the amendments to the constitution, the way was open for government to amend the Land Acquisition Act; and it did so promptly and

with “minimal discussion”.¹¹⁷ As expected the most controversial part of the amendments concerned compensation for land taken. In contrast to the 1992 Act, the amendments provided that, should Britain not establish a compensation fund, compensation would only be payable for improvements to the land and not the value of the land itself.¹¹⁸ In addition, only one-quarter of the compensation is payable at the time the land is required, with a quarter being payable within two years and the remainder in five years.¹¹⁹ No appeal is possible on the basis that the compensation is not “fair”.

The amendments were therefore aimed at legalising expropriation of land without compensation in the hope that the land reform process could be faster, cheaper, less complicated and less legalistic.

Although the amendments made the process of land acquisition easier, it did not address the fundamental problems with land reform experienced during the first two decades of independence. Hence the concern expressed by Goldham that:

... it is unlikely that in the longer term, without proper planning, without infrastructure investment, without security of tenure and without appropriate criteria for the selection of settlers, these schemes are unlikely to prosper, let alone solve the problem of poverty and landlessness ...¹²⁰

An issue that also arose, and has not been dealt with in any coherent manner, is compensating or taking care of farm workers who are basically retrenched by the occupation process, but without being the beneficiaries of the new land.

Any attempt to engage in an orderly and just process of land reform has come to an end. Mugabe’s Zanu-PF ran the election on the basis of “Land is the economy, economy is land” and thereby won the most “violence-ridden” election in Zimbabwe’s history.¹²¹ In July 2002, notices were given to 2,900 farmers out of the 4,500 to stop all farming activities by 8 August, whereafter they had to vacate their land without any compensation.¹²²

Zimbabwe’s Parliament in September 2002 rushed through further legislation to ease the process of expropriation and to shorten even further the notice period required for farmers. Under the new legislation only seven days’ notice is needed instead of the previous 90 days’. Fines for not complying with an eviction order have also been raised.¹²³ By the end of October 2002 an estimated 600 to 800 out of 4,500 white farmers remained on their properties.¹²⁴ At the same time criticism mounted that in the face of famine, only a fraction of the new settlers have been able to plant crops. It is reported

that 11 million ha had been ‘reclaimed’—6 million more than originally targeted.¹²⁵

SUMMARY

The Zimbabwean land reform process has gone through three major phases, each having unique characteristics:

- *Lancaster House (1980–1990)*, during which the main elements were: market-driven acquisition; the return of exiles and displaced persons; priority on the accelerated resettlement programme; availability of donor funds to assist with reform; huge increases in small farmer activity; main distribution of marginal and under-used land; 60% of land since independence distributed during the first decade.
- *Post-colonial land reform (1990–2000)*, during which the main elements were: a different legal order; the first steps of a social justice-driven acquisition programme; economic decline and drought; reduction of donor funds to a trickle; increased criticism of nepotism in the allocation of land; problems experienced with implementation programmes to sustain land reform; increased farm invasions and occupations; real distribution well below targets.
- *Land invasion and occupation (2000–)*, during which the main elements are: a general absence of a clear and sustainable land reform policy; a legal framework that enables the taking of land without due process; termination of international aid; large-scale illegal occupation; economic decline and famine. Although “legitimate beneficiaries” such as peasant workers have been allotted small plots, they have not been given any farm training, “no money to buy seeds, not even a spade.”¹²⁶

After three decades of independence Zimbabwe has finally reached a goal it envisaged during the liberation struggle—a radical redistribution of land at the cost of white settlers. The ultimate price which the country is set to pay for the radicalisation of land restitution during the past four to six years is yet to be seen. The resettlement process has been described as “chaotic” with little attention to implementation or support services such as clinics, schools and roads.¹²⁷

The impact of the process has reverberated across Southern Africa and international confidence in the ability and willingness of young democracies to uphold liberal democratic values has received a serious set-back.

Zimbabwe's land reform process embarked on at independence has not been simple but it has also not been an outright failure. What it does demonstrate is the complexity of land reform, the difficulty in turning back the clock of past injustices and the impact that a lack of resources can have on the acquisition and post-settlement processes. If land reform is pursued merely on the basis of political ideology and expediency, the economic and social costs will soon outstrip the perceived benefits of radical land acquisition. On the other hand, it must be recognised that the majority in the newly formed democracies have reasonable expectations for land holding patterns to change in order to address historical imbalances. At the same time, however, it should be taken into account that governance is the art of the possible and if a balance is not kept between long-term vision and short-term policies, the stresses that arise from the system may become too difficult to manage.

The kick-off for land reform in Zimbabwe began on a sour note. The new government never took effective ownership of the process; it was always seen as a measure imposed by a foreign power and as a continuance of control by remote, through a legal straightjacket called the Lancaster House Constitution. The first decade nevertheless progressed well, but then the land reform process was caught up in the complexities of political competition, the struggle to retain power and the souring of international relations between the UK and Zimbabwe. Although land reform has been part of the political campaign since 1980, it increased over the years in order for the governing party to sustain support and to distract attention from other burning social and economic issues.

Questions facing Zimbabwe at the end of its third decade of independence are whether the radical distribution of land will in fact result in a nation capable of feeding itself and whether the fragile democracy is able to withstand and survive such draconian measures.

NOTES

- 5 BL Peters and N Malan, Caveats for land reform in South Africa: Lessons from Zimbabwe, *South African Journal of International Affairs*, 7, 2000, p 152.
- 6 R Palmer, Land reform in Zimbabwe, 1980-1990, *African Affairs*, 89, 1990, p 163.
- 7 1919 AC 211 CD 7509 at 233-234.
- 8 R Palmer, *Land and racial discrimination in Zimbabwe*, London, 1977, p 1.
- 9 C Stoneman and L Cliffe, *Zimbabwe: politics, economics and society*, Pinter, 1989, p 3.
- 10 S Moyo, The interaction of market and compulsory land acquisition processes with social action in Zimbabwe's land reform. Paper read at the Southern African Regional Institute

for Policy Studies' annual colloquium—2000, 24-27 September 2000, Harare, Zimbabwe.

- 11 Referred by R Riddell, Zimbabwe's land problem: The central issue, in WH Morris-Jones, *From Rhodesia to Zimbabwe*, Frank Cass, 1980, p 11.
- 12 For more information refer for example to R Riddell, *The land problem in Rhodesia*. Mambo Press, 1978; P Mosley, *The settler economies: Studies in the history of Kenya and Southern Rhodesia 1900–1963*, Cambridge UP, 1983; and H Moyana, *The political economy of land in Zimbabwe*, Mambo Press, 1984.
- 13 *The Herald*, 20 December 1989.
- 14 C Ng'ong'ola, The post-colonial era in relation to land expropriation laws in Botswana, Malawi, Zambia and Zimbabwe. *International and Comparative Law Quarterly*, 41, 1992, p 118.
- 15 J Cobbing, The imperialising of Zimbabwe, *Transformation*, 9, 1989, p 85.
- 16 C Mumbengegwi, Continuity and change in agricultural policy, in I Mandaza (ed), *Zimbabwe: Political economy*, p 219.
- 17 R Palmer, *Land and racial domination in Rhodesia*, Heinemann, 1977, p 246.
- 18 T Ranger, Growing from the roots: Reflections on peasant research in central and southern Africa, *Journal of Southern African Studies*, 5, 1978, p 119.
- 19 Palmer, 1990, op cit, p 167.
- 20 Ibid.
- 21 It was not clear what was meant by 'under-utilised' land. Some have claimed that commercial farmers utilise up to 90% of their land while others have argued that as little as 15-30% of land is utilised. Refer for example to S Moyo and D Weiner, *Land use and productivity: Myth or reality*, Work-in-Progress, 1984.
- 22 S16 of the Constitution.
- 23 S16(1)(a)-(c) of the Constitution.
- 24 S16(5) of the Constitution.
- 25 For a brief overview refer to P Slinn, Zimbabwe achieved independence. *Commonwealth Law Bulletin*, 8, 1980, pp 1038-1046.
- 26 For example, the election of 20 out of 100 MPs from a separate voters' role for European, Coloured and Asian voters, a bicameral parliament with a racial composition of the Senate, entrenchment of key provisions of the Declaration of Rights.
- 27 Riddell, 1980, op cit, p 12.
- 28 M Bratton, Ten years after: Land redistribution in Zimbabwe: 1980-1990, in RL Prosterman, MN Temple and TM Hanstad, *Agrarian reform and grassroots development: Ten case studies*, Lynne Rienner, 1990, p 274.
- 29 Ibid.
- 30 I Maposa, *Land reform in Zimbabwe—an inquiry into the Land Acquisition Act (1992)*. Catholic Commission of Justice and Peace for Zimbabwe, 1995, p 183.
- 31 M Rukini (chairman), *Report of the Commission of Inquiry into appropriate agricultural land tenure systems*, 2, Technical Reports, October, 1994, p 318.
- 32 Bratton, 1990, op cit, p 274.
- 33 J Cusworth, and J Walker, Land resettlement in Zimbabwe: A preliminary evaluation, *ODA Evaluation Report*, 1988, p 19.
- 34 J Ashcroft, *Land reform in Kenya and Zimbabwe: Some lessons for South Africa*, Newick Park Initiative, February 1988, p 8.

- 35 C Legum (ed), *African contemporary record: Annual survey and documents: 1981-82*. London, 1981, pp 870-890.
- 36 Bratton, 1990, op cit, p 274.
- 37 Bratton, 1990, op cit, p 288.
- 38 Refer for example to JW Harbeson, *Land and rural development in independent Zimbabwe: A preliminary assessment*. USAID Job 81, 1981; World Bank, *Zimbabwe Agricultural Sector Study*. Report No. 4401, 1983; Whitsun Foundation, *Land reform in Zimbabwe*, Harare, 1978.
- 39 *Policy options for agrarian reform in Zimbabwe*, 1986.
- 40 Bratton, 1990, op cit, p 277 quoting a government official.
- 41 S Moyo, The land question, in I Mandaza, *Zimbabwe: The political economy of transition 1980-1986*. Codesria, 1986, p 165.
- 42 Bratton, 1990, op cit, p 275.
- 43 It was estimated in 1978 that 2.8 million ha were empty, which amounted to approximately 2,000 farms. R Riddell, op cit, 1980, p 4.
- 44 *The Herald*, 27 October 1989.
- 45 In 1980/81 the average price per hectare was Z\$15.67 and in 1987/88 this increased to Z\$92.24. Palmer, 1990, op cit, p 170.
- 46 Land debate is the most important issue since 1980, *Financial Gazette*, 25 August 1989.
- 47 S Goldham, The Land Acquisition Act, 1992 of Zimbabwe, *Journal of African Law*, 37, 1993, p 83.
- 48 Bratton, 1990, op cit, p 290.
- 49 "The success of thousands is the result of a conscious government policy and a lot of hard work. Since independence in 1980 the government of Prime Minister Robert Mugabe has vigorously promoted agricultural production, particularly among the country's peasants. While many African countries were making headlines with tragic stories of famine and starvation, Zimbabwe's farmers brought 925,000 tonnes of corn to the market last year, almost enough to feed the entire country despite three consecutive years of drought." *New York Guardian*, February 1985.
- 50 Ibid.
- 51 L Grant and J McCarthy, *African experiences in rural land reform: Focus on Kenya, Zimbabwe and Namibia*. Report 4 Urban Foundation, 1993, p 34.
- 52 B Hlatshwayo, Legal expropriation laws in Zimbabwe and their compatibility with international legal norms, *Zimbabwe Law Review*, 1993-94, p 56.
- 53 There were several ministries responsible for overseeing different aspects of settlement. This in turn affected planning and budgeting and contributed to interdepartmental conflict, competition and confusion.
- 54 In many rural areas the demand for education was more intense than for land. D Gasper, What happened to the land question in Zimbabwe? *Review of rural and urban planning in South and Eastern Africa*, 1, 1990, p 52.
- 55 Refer for example to *Report of the Commission of Inquiry into the Agricultural Industry* Government printer, 1982; Cliffe *Prospects for agrarian transformation in Zimbabwe* University of Leeds, 1988; and C Stoneman, (ed) *Zimbabwe's prospects*, Macmillan, 1988.
- 56 Bratton, 1990, op cit, p 282.
- 57 Gasper, 1990, op cit, pp 45-47.

- 58 Moyo, 1986, op cit, p 178.
- 59 Moyo, 1986, op cit, p 172.
- 60 “For some members of government, indeed, land redistribution might now signify the taking of land for themselves, rather than giving it to the peasants.” Palmer, 1990, op cit, p 175.
- 61 Palmer, 1990, op cit, p 170.
- 62 It was estimated that at least 10 government ministers had become members of the CFU. K Maier, Zimbabweans grapple with the law of the land, *The Independent*, 28 October 1989.
- 63 Palmer, 1990, op cit, p 170.
- 64 Bratton, 1990, op cit, 285.
- 65 Cusworth and Walker, 1988, op cit, p 14.
- 66 Bratton, 1990, op cit, p 267.
- 67 *The Economist*, 28 October 1989, p 52.
- 68 Bratton, 1990, op cit, p 279.
- 69 Refer for example to problems experienced due to a lack of provision of water to new settlements. S Moyo, and T Skalness, Land reform and development strategy in Zimbabwe: State, class and agrarian lobby. *Review of rural and urban planning in South and Eastern Africa*, 1, 1990, p 15.
- 70 Ashcroft, 1988, op cit, p 9.
- 71 Moyo, 1986, op cit, 187.
- 72 Ibid, p 198.
- 73 *The Herald*, 20 December 1989.
- 74 Refer for example to, Tekere speaks out on land issue, *Financial Gazette*, 21 July 1989; Land issue, *Sunday Mail*, 16 July 1989; and, Land issue is complex and highly political - Brown, *Financial Gazette*, 14 July 1989.
- 75 Mugabe to allow takeover of white-owned land, *Financial Times*, 21 August 1989.
- 76 Bratton, 1990, op cit, 283.
- 77 Palmer, 1990, op cit, p 163.
- 78 Land reforms are coming, but the waiting continues, *African Business*, October 1990, p 23.
- 79 The question of when land can be considered as ‘un-utilised’ is in itself controversial. Land reform: Art of the impossible, *Africa South*, May/June 1990.
- 80 No definition is given as to the meaning of ‘fair compensation’ but government emphasised that the aim should be for compensation to take account of the “permanent improvements” on land rather than the value of the land itself. *Zimbabwe Parliamentary Debates*, 18(61), col 4446.
- 81 This was interpreted by the court as “sufficient to compensate the owner for the loss of property without imposing an unwarranted penalty on the public ...” *Metsola v Chairman, Public Service Commission and Ors* 1989 155.
- 82 S16(1)(c) of the Lancaster House Constitution.
- 83 G Naldi, Land reform in Zimbabwe: Some legal aspects, *The Journal of Modern African Studies*, 31, 1993, p 595. Refer in particular to Naldi for a discussion of the validity of these new measures in light of international law principles. His conclusion is that, although aspects of the programme may be criticised, it is lawful from the viewpoint of international law.
- 84 S16(1) as amended provided that (a)(ii) an acquisition must be “reasonably necessary”;

- with (b) “reasonable notice” being given to the owner and (c) “fair compensation” is payable within a “reasonable time” after acquiring the property or interest.
- 85 S16(2).
- 86 This excluded, among others, communal land, state land, and municipal land. S2 of the Land Acquisition Act.
- 87 For a response from the CFU refer to *Proposals for land reform for Zimbabwe*, 1991 CFU Harare, 1991.
- 88 Maposa, 1995, op cit, p 177 observes that: “Black economic empowerment is indeed a key issue, but we must be wary of political gimmickry. That is, the indigenisation process is susceptible to being ‘hijacked’ which could possibly lead to unjust enrichment of the black elite to the exclusion and detriment of the black majority”.
- 89 JW Makumbe, The political dimension of the land reform process in Zimbabwe. Unpublished paper University of Zimbabwe, 1999, p 14.
- 90 Ibid, p 15.
- 91 For a discussion refer to Goldham, 1993, op cit, pp 82-88.
- 92 For a discussion on the debate whether there are certain “essential features” implied in the constitution that cannot be amended by Parliament refer to A Van Horn, Redefining ‘property’: The constitutional battle over land distribution in Zimbabwe, *Journal of African Law*, 38, 1994, pp 144-172.
- 93 S8(1).
- 94 S12.
- 95 S19(5).
- 96 S17.
- 97 S20.
- 98 S23.
- 99 1996 SACLR Lexis 29 (ZS June 27, 1996).
- 100 For a discussion of the case refer to R Ford, Law, history and the colonial discourse: *Davies v Commissioner* and Zimbabwe as a colonialist case study, *Howard Law Journal*, 45, 2001, pp 213-245.
- 101 The Catholic Commission for Justice and Peace in Zimbabwe argues that the system of ‘designation’ was unnecessary and that government could have progressed the process of land reform by using the land made available to it. After referring to various examples of available land Maposa concludes that “government has enough land under its control and has also been offered enough land on a willing buyer-willing seller basis and accordingly does not require the process of designation.” 1995, p 179.
- 102 The court relied on *Hewlett v Minister of Finance* (1981) ZLR 571 (S) at 589 to conclude that “designation” is similar to “deprivation” in the sense that it may limit the exercise of a property right but does not amount to acquisition.
- 103 For a discussion of the case refer to GJ Naldi, Constitutional challenge to land reform in Zimbabwe, *The Comparative and International Law Journal of Southern Africa*, 1998, pp 78-91.
- 104 *The Guardian*, 1997, p 22.
- 105 Refer for example to the acquisition of the farm ‘owned’ by the leader of the opposition Sithole; *Alistair Davies and others v The Minister of Lands, Agriculture and Water Development* 1994; and the discussion in B Hlatshwayo, Churu and Elshworth farm designations: Fighting illegality with illegality, *Legal Forum*, 6, 1994, p 11.

- 106 Makumbe, 1999, op cit.
- 107 Moyo, 2000, op cit, p 25.
- 108 S Moyo, *Economic nationalism and land reform in Zimbabwe* SAPES Trust, 1994, p 2.
- 109 Note in this regard also the change of policy in South Africa where since 1999 the focus of land acquisition falls upon those that have a demonstrated ability to undertake commercial activities. A similar move is afoot in Australia where the emphasis on land acquisition falls with those Aboriginal people who can demonstrate some expertise and experience in land management.
- 110 Moyo, 1994, op cit, p 3.
- 111 Maposa, 1995, op cit, p 176.
- 112 *BBC News Online*, Zimbabwe squatters defiant, 5 May 2001.
- 113 Maposa, 1995, op cit, p 182.
- 114 Refer to s16A(1) of the Constitution (Amendment No. 16) Act No 5 of 2000.
- 115 S16A(1).
- 116 S16A(2).
- 117 S Goldham, Land Acquisition Amendment Act, 2000 (Zimbabwe), *Journal of African Law*, 45, 2001, p 228.
- 118 S29C(1) Land Acquisition Act.
- 119 S29C(3) Land Acquisition Act.
- 120 Goldham, 2001, op cit, p 229.
- 121 Moyo, 2000, op cit, p 6.
- 122 Land grabs scare South Africa, *The Citizen*, 4 September 2002.
- 123 Mugabe rams through land law, *The Citizen*, 19 September 2002.
- 124 Nag op sy donkerste, *Beeld*, 17 October 2002.
- 125 Why Mbeki needs to be Mugabe's friend, *Sunday Times*, 20 October 2002.
- 126 *Time Magazine*, 30 December 2002, p 98.
- 127 Zim crisis hits Mugabe's reforms, *News24.com*, 6 December 2002.

Chapter 2

NAMIBIA: SLOW BUT ENOUGH?

Land reform in Namibia is still in its infancy. Limited success has been achieved in the acquisition of land for the landless but demands are increasing for a more drastic and radical approach to reform current land holding. The reclaiming of ancestral lands has been rejected by Namibians, however, it remains an issue that could cause turmoil in an otherwise stable land reform process. On the one hand, current landowners and international donors are encouraging the government to abide by a willing buyer–willing seller approach and not to entertain a Zimbabwean-style dispossession of land. On the other hand, however, there are increasing demands from the landless and from within the governing party for a more drastic approach to land reform, similar to that of Zimbabwe. There is general agreement in Namibia on the merit and importance of land reform. The question is rather how to progress it in a manner that would balance the seemingly competing interests of the landless and landowners. The following chapter provides a brief overview of, and comment on, the main phases of land reform in post-independence Namibia.

BACKGROUND: PRE-INDEPENDENCE

Namibia—previously called South West Africa—was colonised by Germany in 1883 and remained so until 1915¹²⁸ when it was conquered by South African troops, whereafter, in 1919, it became a South African protectorate (‘C’ Mandate) under the League of Nations.

The South Africans were initially welcomed as ‘liberators’ and there were expectations of South Africa returning some of the land the Germans had taken.¹²⁹ The main aim of the German colonialists was that the “native tribes would have to give up their land on which they had previously grazed their stock in order that the white man might have land for the grazing of his stock”.¹³⁰

However, South Africa almost immediately commenced in implementing a land policy along racial lines similar to that adopted in its domestic law. It was

therefore concluded as early as 1930 that “the mandatory policy [of South Africa] appears to be devoted to white rather than native interests”.¹³¹

The key role of land in Namibia is easily demonstrated by the fact that 90% of the population derive their livelihood from the land as commercial or subsistence farmers or as workers employed on commercial farms.¹³²

The racial allocation of land predates South Africa’s control of Namibia. The entrance of Germany as the first colonial power already marked the acquisition of vast tracks of land for new settlers. Before the Germans, the San were pushed off their land by black tribes moving into their areas.

Even before the 1903 German–Herero war, the German authority owned more than 19 million ha, concession companies more than 29 million ha and the new settlers 3.5 million ha, with the remaining 31 million ha being under the control of the indigenous people.¹³³ The German land policy left a ‘special legacy’ on the future policies and settlement of people. The creation of reserves not only increased the effectiveness of colonial control, it also enabled the remainder of the country to be made available to the new settlers.¹³⁴ In addition, German land and labour policies were closely related, which meant that the reserves became a useful recruitment base for cheap labour¹³⁵ and this was continued and expanded by South Africa in later years.

A comprehensive understanding of the land policy therefore requires a grasp of the labour policy of the day.¹³⁶

The resource utilisation of the various ethnic communities differs from a historical perspective, which in itself complicates any attempt at land reform. For example, the San (Bushmen) are hunter-gatherers, the Ovambo are agrico-pastoralists,¹³⁷ while the Herero and Nama are pastoralists and the ‘chief’ herders of the nation.¹³⁸ The different ethnic groups also have historically different systems of land holding.

Although general reference is made nowadays to ‘communal land’ as if it has a universal meaning, the ethnic communities’ respective land holding systems were unique and quite distinct from one another. In Ovambo, for example, communal property is such that the household head has lifelong use-rights. The occupier also has rights to improve his land subject to certain conditions. In Okavango a different system exists whereby land can be freely obtained without permission provided it does not encroach upon the land of another. The San, as hunter gatherers, have a different system whereby bands have hunting areas but not necessarily to the total exclusion of others.¹³⁹

The scarcity of resources, however, required communities to disperse widely

and as a result no fixed boundaries existed, although there were loosely defined jurisdictions for traditional leaders.¹⁴⁰ The notions of freehold land and fixed boundaries were introduced with the arrival of the German colonists.¹⁴¹

After the Herero and Nama people's revolt against the taking of their land, the remainder of their land was confiscated by the Germans as punishment. The land was sold and increased the holding of settlers to 13 million ha. By the time Namibia became a South African protectorate the land owned by black people had declined from 31 million ha to 13 million ha.

In the 1920s a 'second scramble' for land took place.¹⁴² South Africa started with the implementation of a racially based homeland and reserve system and by 1938 a further 25 million ha had been set aside for settlers. Due to generous financial assistance for white farmers, by 1926, 880 new farms covering 7.5 million ha had been allocated to them.¹⁴³ In 1937 the Administrator of Namibia acknowledged that suitable land for settlement was "fast running out".¹⁴⁴

The Odendaal Commission, which was appointed in the 1960s, recommended in 1962 that a policy of ethnic homelands, similar to that of South Africa, be pursued in Namibia.¹⁴⁵ The commission recommended the creation of 10 homelands for the respective ethnic groups, each being clothed with limited power of self-governance through an elected assembly.¹⁴⁶ Each of these homelands had limited control over the land subject to their self-governance and could release land to individuals or on a communal basis. The reserves covered approximately 33 million of the country's total 82 million ha.

South Africa managed Namibia as a *de facto* fifth province with similar policies being pursued in regard to racial and many other matters. As a result the main beneficiaries were, as in Zimbabwe and South Africa, the new white settlers, and in particular commercial farmers. Intensive schemes to support commercial farmers were introduced with financial and technical assistance, while few resources were directed to communal areas. Soft loan schemes were also made available to white farmers. (Refer, for example, to the Agricultural Credit Act 1966 that limited assistance to white farmers.)

Adams and Werner therefore observe that "the lack of financial support for reserve residents was matched by an absence of agricultural support services".¹⁴⁷ According to them "massive state intervention ensured the rapid growth of the commercial white sector", while black farmers were left in a position where lack of land and substandard support services "diminished the ability to be self-sufficient". As a result "black agriculture" had been reduced to "residual not subsistence".¹⁴⁸

During the period of South African administration an impressive infrastructural system was developed which—albeit directed mainly at the interests of whites and fighting the war against the South West Africa People’s Organisation (SWAPO)—provided the country with a headstart compared to many other African nations.

Namibia has at face value an abundance of land, but relatively little of its total area is suitable for commercial farming. By the late 1960s land settlement had basically come to an end with the commercial farmers well entrenched and the system of homelands/reserves in place.

According to Adams and Werner, white settlers had control of the “best pastures” accounting for 50% of all agricultural land, while the black population had a “meagre 25%” of less quality land allocated to them.¹⁴⁹ As a result white farmers in 1962 owned 75% of the total cattle herd, 96% of karakul sheep and 50% of all goats.

In making recommendations on land reform for the newly independent state, Adams and Werner highlight the following priorities¹⁵⁰—the complexity of the problem is illustrated by the generality of the recommendations:

- The ‘façade’ of the Odendaal Commission has to be stripped away to ensure that a Namibian nation is built, that administrative support services reach the whole nation and that vested interests that resulted from the commission be countered.
- A form of decentralisation to move away from the idea that all decisions are made in Windhoek by bringing closer administrative interaction between government and the end-user.
- Improvement of the education system to enable the new generation to understand and practice new farming methods.
- Training and development of skills of peasant farmers including basic training in mathematics and science.
- Deployment of a ‘cadre of advisors’ who can assist with agricultural training at all levels.
- Increased attention to experiences at international level with land reform and the implementation thereof. The more effective involvement of NGOs in training is regarded as essential.
- Conducting more research. Namibia is regarded as one of the most ‘under researched’ countries in the world.
- ‘Prudent public policy’ requires a land acquisition process based on market principles of willing buyer–willing seller.

LAND REFORM: 1989–2002

Namibia became independent on 21 March 1990. The new government inherited a system of land distribution along racial lines which had developed over more than a century with intensive state interference and financial and other support. Approximately 4,500 commercial farmers held 43% of all agricultural land while 15,000 black households had access to 42% of the land.

One difference, however, from Kenya, Zimbabwe and to a lesser extent South Africa, was that the settlers occupied mainly marginal agricultural regions while the areas that were better suited for farming remained under the control of the indigenous communities.¹⁵¹ Commercial farming areas comprise approximately 44% of the agriculturally usable land while communal areas comprise approximately 41%, although the latter carries approximately 70% of the total population.¹⁵² Moreover, communal areas have restricted tenure and cannot be offered as security for funding or loans or for trading.¹⁵³

Within the first month of the first National Assembly convening, a motion was put forward requesting Prime Minister Hage Geingob to call a national conference on the 'land question'¹⁵⁴ which, according to President Nujoma, was "one of the most burning issues facing our young nation".¹⁵⁵

A National Conference on Land Reform and the Land Question was subsequently held from 25 June to 1 July 1991 under chairmanship of the prime minister.

The conference set the scene for the land reform process that followed. It was attended by a broad spectrum of more than 500 local and international participants and, in contrast with Zimbabwe, the government saw it as a home-grown policy of which it could take ownership. The objective of the conference was to "achieve the greatest possible national consensus on the land question".¹⁵⁶

Although it had no decision-making powers, it was seen as a sincere effort by government to consult with all affected by land matters and to develop policy proposals that would be difficult for government to ignore.

One of the main questions on the agenda was: What should the basis for land reform and in particular the restoration of land rights be? Should ancestral land be returned or should another option of acquiring land as it becomes available be pursued? It was realised that it would be practically impossible to reconcile many of the claims and competing claims to freehold land. The conference therefore concluded that "given the complexities in redressing ancestral land claims, restitution of such claims in full is impossible."¹⁵⁷

General consensus was reached that communal areas should be retained and further developed and even expanded if necessary.¹⁵⁸ Communal farms were seen as a way of empowering the poor by giving them access to land on a shared basis with the possibility of acquiring land outside the communal area once they became established. It was also seen as the “lowest cost per hectare” option, as existing infrastructure could be used effectively.¹⁵⁹

Without perpetuating the principle of ethnic communal areas the conference indicated that any person who sought access to a communal area should take into account the rights and customs of those already living there. To many this may be unacceptable due to associations with the past, but at the same time ‘realities’ had to be taken into account.¹⁶⁰

It was also proposed that the role of traditional rulers be clarified and that land boards be established to oversee the allocation of communal land.

The conference addressed tenure rights of farm workers and their right to remain on farms after retirement.¹⁶¹ The position of foreign and absentee landowners was considered, especially in light of the fact that many such people have alternative sources of income and their land could therefore be targeted for land reform.¹⁶² It was also proposed that a land tax be introduced to serve as an additional source of income for the state and as a penalty for landowners who hold large tracts of land.¹⁶³

Although the conference was rich in discussion and general consensus was reached on important matters, little new ground was broken regarding post-resettlement assistance, developing a national land use plan to guide the acquisition programme and the careful balance that had to be reached between land reform and continued economic growth, agricultural employment and foreign investment. All in all the conference was a good opportunity to “let off steam”¹⁶⁴ but it was clear that the complexities facing government were not to be underestimated.

Following the conference the prime minister appointed the Technical Committee on Commercial Farmland (TCCF) in December 1991 with the brief to formulate recommendations on the implementation of matters raised at the conference.¹⁶⁵ The TCCF specifically turned its attention to issues such as abandoned farms, land held by foreigners and under-utilised land.

It was recommended that foreigners should not be allowed to hold freehold land and that absentee foreign-held land should be expropriated.¹⁶⁶ Some of the other pertinent recommendations of the TCCF were:

- capping the total amount of land a single person could own;

- fixing the minimum size of land for the different regions of the country in order to qualify for government assistance; and
- lease arrangements for foreigners.

The National Assembly subsequently adopted the Agricultural (Commercial) Land Reform Act, 1995 to give effect to some of the TCCF's recommendations. The Act received widespread support and was endorsed by all major parties (with the exception of a small right-wing group) in the National Assembly.

The Act essentially provides for the acquisition of freehold land on a willing buyer–willing seller basis, although government would have the “preferent right” to acquire agricultural land that comes on the market. Although the Act enables government to expropriate land at payment of compensation, that power has not yet been used.

The market-based principle guiding the process was not, and is not, without controversy. At the time of the Act being debated criticism was expressed at the willing buyer–willing seller principle and it is questioned why farmers should be compensated for land that was taken from the original owners without compensation.¹⁶⁷

A Land Reform Advisory Commission was established to assist the minister of Lands, Resettlement and Rehabilitation and to advise him on matters such as the suitability of land on offer. Once land is acquired, the committee makes recommendations to the minister on the utilisation of that land based on a land use plan.¹⁶⁸ The Act describes as follows the beneficiaries of the land acquisition programme:

Namibian citizens who do not own or otherwise have the use of agricultural land or adequate agricultural land, and foremost to those Namibians who have been socially, economically or educationally disadvantaged by past discriminatory laws and practices.¹⁶⁹

The fact that the reform process was not directed at the return of ancestral land was severely criticised in some quarters but it was also realised that such a process may cause division even among the black people. Given the experiences of Zimbabwe and Malawi there was general agreement that “Namibia’s history is too complicated and too bitter to think of returning ancestral lands”.¹⁷⁰

There was also the perception that with the governing party SWAPO having its main base in Ovamboland where ancestral lands were not taken away to the same extent as in other parts of the country, SWAPO was not interested in pursuing the matter. In addition, it should be taken into account that the large number of mixed farming areas of the north were not dispossessed in the same

way as the pastoral holdings to the south. Refer, for example, to the remark by United Democratic Front leader Justus Garoeb:

Regard must be had that it is mainly the Hereros, the Namas and Damaras who lost their land and cattle through the German and South African colonialists, and the attitude of some of the SWAPO leadership is that these groups did not participate in SWAPO's armed struggle and thus do not deserve to be awarded in any way.¹⁷¹

The outcome of these initial debates regarding restoration of ancestral land was that political reality demanded that the rights of exiles to land (in the north) be pursued rather than the return of ancestral land to those dispossessed (in the south). Werner concludes that "politically, therefore, the principle of restoring ancestral land rights had to be abandoned in order to develop a land distribution policy which would benefit all previously disadvantaged farmers, and not only those who were dispossessed."¹⁷²

The Act came into effect without a general land reform plan to guide the process of acquisition and settlement of new farmers. A draft outline of a National Land Policy was released for comment in 1996 and discussed at various regional and national workshops.

The restrictions imposed by the Act on land holding by foreigners are not as severe as were recommended by the TCCF. No prohibition was placed against foreigners owning land but provision was made for foreigners to obtain a Certificate of Status Investment to demonstrate that the land they sought to acquire was not required by the state on behalf of beneficiaries.

The land reform process during the first decade of independence has been so slow that some have asked whether there is indeed a 'land question' in Namibia. In the first year (1996) after the passing of the Act, 17 farms were acquired, with that number more than doubling the following year. The cost at which the process takes place (in 1997 N\$30 million) has, however, given rise to the question of whether such a poor country can afford its scarce resources to be directed at acquisition for the mere purpose of accessing land.

It was generally realised that the actual costs of resettlement only started after the return of land and hence the question whether the process of acquisition is indeed sustainable. It was estimated that the cost of resettling a single household in 1997 amounted to N\$81,250 excluding post-resettlement social and economic support.¹⁷³ The estimated cost of settling a family on the minimum size of land recommended by the TCCF was N\$195,000—excluding post-settlement training and development costs.

Government initially set a target in the first National Development Plan to resettle 14,000 people by the year 2000 on 150,000 ha of newly acquired land. This target was criticised as being too conservative as the number of landless people was estimated to be at least 90,000.¹⁷⁴ Criticism was also expressed at the accuracy of government statistics as there was no independent reliable source to verify them. Although the number of farms acquired had increased, the scale of the acquisition “pales”¹⁷⁵ in comparison with the number of purchases made under the Odendaal plan for the establishment of separate ethnic homelands.

A potential hurdle, similar to Zimbabwe, is that as long as the sole mechanism for land reform is based on the market forces of willing buyer–willing seller, the process will remain very expensive, and in most instances only marginal land is put up for sale. This not only limits the ability of new farmers to settle successfully but also reduces the number of persons who could benefit from a return to land. The obvious risk is that people on newly returned land are set up to fail.

Taking into account that commercial agriculture is the biggest single employer in the country, a cost benefit analysis is required to ensure that the net result of people benefiting from land reform outstrips the potential unemployment that may result from commercial operators winding down. It is therefore perceivable that the “net result of land redistribution could amount to a net loss of people on commercial farms”.¹⁷⁶

Although it was generally recognised at independence that Namibia had to deal with the issue of land, the first legislation to deal with this took six years to take effect. The “striking” aspect of the process in the first few years was in fact the slowness at which it progressed.¹⁷⁷ One of the reasons for this was that, at least in the first few years, the “dispossessed and landless are not organised in any coherent way and thus are unable to exert any political pressure”.¹⁷⁸

That has now changed with NGOs becoming more effective in the land debate—the Zimbabwe experience having a spill-over into Namibia—and as the political benefit of using land reform as a campaign tool is realised. It is also estimated that some 10% of the population was affected by dispossession as a result of colonialism,¹⁷⁹ and as a result the political demand for reform was initially not as high as in Zimbabwe and South Africa.

The return of ancestral land without complying with market forces remains a heated topic. Increasing support is being given to a more drastic land reform programme advocating that the acquisition process be drastically upgraded, or

alternatively, that ancestral agricultural land be expropriated without compliance with market prices.

The National Union of Namibian Workers—the main electoral base of the governing party—recently proclaimed that the policy of buying land back from “thieves” should be discontinued and that the requirement to limit acquisitions to a willing buyer–willing seller basis be abolished. Nujoma also voiced his concern that a system whereby the white minority controls 70% of the productive land could no longer be “tolerated”.¹⁸⁰

The cost of providing adequate training and services for newly established settlers is not catered for in the budget. Foreign assistance has provided some relief but not on the scale required for resettlement to be successful. Support services such as schools, clinics and other facilities are scarce in rural areas, which is one of the reasons why farms are sometimes offered for sale. It is therefore difficult for new settlers to return to land and to have to cope without basic facilities.¹⁸¹ Since 1990 approximately 461,000 ha have been acquire and a mere 34,000 landless people have been given access to farms, leaving approximately 200,000 in the queue.¹⁸² It is estimated that only 7.4% of commercial farmland has been reallocated; at the current pace it would take 60 years before black farmers owned half the commercial land.¹⁸³

The Namibian Institute for Public Policy Research attributes the slow process to “leaden-footed bureaucracy rather than commercial farmers dragging their heels”.¹⁸⁴ According to the Institute, rather than overspending its budget, the Ministry of Lands has been underspending. In its analysis of land reform over the past 12 years, the Institute found that of the 142 farms offered for sale to government in 1999, only four were acquired. In 2000 only 15 out of 125 farms were acquired.

According to a senior government spokesperson, the current imbalance cannot be maintained as “we would be knowingly sitting on a time bomb”.¹⁸⁵ While the recent SWAPO conference decided that land belonging to absentee owners should be expropriated, it does not take into account the contribution such farms are making in terms of tourism, hunting and employment. Many of the foreign owners are holders of German passports and taking their land may be destructive to the economy—not only due to the loss of direct investment but also on the basis of the 1993 Protection of Investment Agreement between the German and Namibian governments, by which Namibia would have to compensate Germans whose land is confiscated at market value and in hard currency payable in Germany.¹⁸⁶

The president of the Namibian Agricultural Union assured members that it had a good relationship with government and that a 'Zimbabwe-style' land grab was not in the offing. Some sceptics point out, however, that as little as three years ago the Commercial Farmers Union of Zimbabwe gave similar assurances to its members. The recent attacks by Nujomo on critics of Zimbabwe's policy and his refusal to condemn it, have raised concern that Namibia may be heading the same way.

There are, however, allegations that as competition for voter support becomes intense and as social and economic issues take the headlines, the ruling party needs "scapegoats to divert attention from the real issues of poverty and unemployment... ." ¹⁸⁷ At present there seems to be no major support in the National Assembly for moving away from the willing buyer-willing seller principle, although that does not necessarily represent the views at grassroots where support for a Mugabe-style land reform process is gaining popularity. ¹⁸⁸

There is, however, little doubt that the land issue in the whole of Southern Africa—but in particularly in Zimbabwe, Namibia and South Africa—holds the key to stability or instability in the region; hence Nujoma's remark when opening a recent meeting of ministers of land of the Southern African Development Community (SADC) that land reform was important to the whole of the sub-region and that "land is the key to social and economic development". ¹⁸⁹

He then went on to say that Namibia could not continue with a regime where white farmers owned 30.4 million ha of commercial farms and blacks only 2.2 million ha. He did not signal a moving away from the current legal arrangements that regulate acquisitions but rather called on Namibia's international partners to contribute to the estimated N\$900 million Namibia will need over the next five years to acquire an estimated 360,000 ha for distribution. ¹⁹⁰ The impact of the limited resources on high expectations is highlighted when this figure is compared to the N\$20 million Namibia has been spending a year to acquire land.

"We need more funds to buy more land," Nujoma said recently, thereby putting western donors under pressure to assist with the financing of land reform. ¹⁹¹ He refused to criticise the Zimbabwe policies but at the same time stressed that Namibia remains committed to the willing buyer-willing seller principle. Nujoma told a recent Agricultural Union conference that his government was investigating new legal ways to acquire land for resettlement because the process of finding willing sellers was too slow, cumbersome and

expensive. He said it was unacceptable for each white farmer to own more than one farm. “The deliberate practice of inflating land prices, which has become a common tactic of many land owners, is counterproductive, dangerous and could backfire,” Nujoma said. “It serves only to slow down land redistribution, and that could result in social (upheaval) as the landless people become impatient.”¹⁹²

However, in a recent meeting of the Commonwealth Parliamentary Association in South Africa, Prime Minister Gurirab again committed Namibia to market-related land reform based on willing buyer–willing seller.¹⁹³

Germany has indicated support for Namibia’s refusal to follow the “bad example” set by Zimbabwe, but time will tell whether the scale of assistance matches the government’s programme.¹⁹⁴ A German spokesman noted that “there is nothing shyer than foreign money” and that “many questions” would have to be settled before funds to acquire land would be granted.

Another complicating factor is that Namibia would be competing with South Africa, which is also pursuing international donors to assist with its own land reform programme that in scale eclipses the Namibian effort many times over.

SUMMARY

The land reform process in Namibia was slow to get off the starting block. This is not totally surprising as the dispossession was not as large-scale as in Zimbabwe and South Africa, and also because SWAPO’s main base, Ovamboland, was not really affected by previous dispossession; the areas where most people had lost their land fell mainly outside the political base of the governing party.

There are, however, clear signs of the land debate picking up momentum and gaining in political currency. According to the Namibia Agricultural Union, white farmers still own approximately 4,456 of the country’s 5,273 commercial farms.¹⁹⁵ Although some 30,000 persons have been resettled, it is estimated that at least 243,000 landless are awaiting their share of land—hence the increase in the land acquisition budget from N\$20 million to N\$100 million a year.¹⁹⁶ In terms of expropriation, it has also been decided to focus on land belonging to foreigners (192 farms).

While a Zimbabwe-style land grab is not yet in the offing, it must be remembered that Zimbabwe embarked on its radical programme some two decades after independence. The grass in Namibia is therefore still green. The

success of land reform through market forces during the next few years will impact greatly on the direction that land reform is going to take.

Namibia's 1991 land conference was a unique event and contributed greatly to the relatively low profile that land reform has received in the past decade. There was a sense at the conference that the voice of the people had been heard and that the programme that followed the conference was reasonably aimed at implementing the main recommendations.

Namibia, as did Zimbabwe, chose not to adopt a claims-based approach to land reform but rather to acquire land as it becomes available on the open market. The decision not to restore ancestral land has, on the one hand, simplified the process and made it less legalistic and adversarial. On the other hand, it left a bitter taste in the mouth of those who lost their ancestral land without any compensation and this will remain a festering sore.

The fact that farms can only be bought as they come on to the market means that government, not to mention the landless, has little control over where to direct resources in terms of a sub-regional land development policy. Government is also limited to acquiring only land that is offered. It is possible that the government may start using its expropriation powers to obtain land on a more structured basis while retaining compensation at market-related prices.

The use, development and expansion of communal land require more consideration. Large sections of the population are based on communal land and farming practises are outdated with land being overutilised. However, communal areas usually have basic infrastructural support services that are not necessarily available on individual farms. It may therefore be more effective to use communal areas as a base from which to expand either the communal area itself or the acquisition of neighbouring farms for purposes of commercial farming by individual families.

The role of the international community in financing land reform is stressed by the Namibian experience. Given the scarcity of resources and budgetary constraints, it is virtually impossible for government to direct funds which could be used for education, health and other socio-economic objectives to compensate individual farmers for their land—especially since those communities removed from the land were not compensated for their loss. This dilemma is exacerbated by families returning to land only to find that the support programmes for farmers that were available under the South African government have been discontinued. The extensive government safety net that existed for many years to support white farmers is therefore no longer in place.

The international community can make a contribution here but it is doubtful that the scale would be similar to the investment made under the South African administration. The demand for foreign assistance in the South African land reform process could usurp most available grants, with Namibia remaining very much in the background.

The willingness by foreign governments to become deeply involved in financing land reform in Namibia, and for that matter in Zimbabwe and/or South Africa, would also be influenced by continued democratisation efforts in those countries. The experience of Zimbabwe has caused a deep cynicism among foreign observers about the commitment of new regimes to sustainable democratic processes. The reluctance of the leadership of Namibia and South Africa to come out strongly against land grabs in Zimbabwe has contributed to concerns that legal mechanisms to secure and guarantee market-based land reform could become the target of populist and political pressure in the foreseeable future.

The complex nature of land reform and the time it takes to implement it in a successful way cannot be emphasised enough. Political reality may demand shorter time frames but the economic reality—which in turn has political consequences—is that the resettlement of farmers on land is one of the most complex programmes any government can tackle. It can only be done with a long-term vision guiding short-term programmes. The challenge for Namibia is therefore not only to speed up the slow pace of land reform but also to prevent the high risk of failure after new farmers have been resettled.

NOTES

- 128 There were three broad phases of German occupation: the period of protection treaties with the indigenous people (1884–94); increased military and bureaucratic control (1894–1904); and destruction of African resistance (1905–15). A Du Pisani, Namibia: The historical legacy, in G Totemeyer, V Kandetu and W Werner (eds), *Namibia in perspective*, Council of Churches, Windhoek, 1987, p 16.
- 129 A Du Pisani, *SWA/Namibia: The politics of continuity and change*, Jonathan Ball, 1986, p 18.
- 130 R Segal, and R First, *South West Africa: Travesty of trust*, Deutch, 1967, p 180.
- 131 Wright quoted in Du Pisani, 1986, op cit, p 19.
- 132 L Mathiessen, Landbouontwikkeling in SWA/Namibie. Paper presented at the conference, Namibia: perspectives for national reconstruction and development, Lusaka, 1986, p 106.
- 133 F Adams, and W Werner, *The land issue in Namibia: An inquiry*, Namibia Institute for

- Social and Economic Research, University of Windhoek, 1990, p 12.
- 134 A Du Pisani, 1986, op cit, pp 29-30.
- 135 W Werner, A brief history in land dispossession in Namibia, *Journal of Southern African Studies*, 19, March 1993, p 135.
- 136 Du Pisani, 1987, op cit, p 18.
- 137 Refer in this regard to the differences of opinion in the 1970s within the ranks of the Ovambo to the question of whether land should be privately owned or owned by communities. G Totemeyer, *Namibia: Old and new: Traditional and modern leaders in Ovamboland*, Hurst and Co, 1978, pp 76-78.
- 138 Du Pisani, 1987, op cit, p 14.
- 139 C Parker, Legal aspects of access to land and tenure in Namibia: A case study of social inequality supported and regulated by the law, *Lesotho Law Journal*, 7, 1991, pp 96-97.
- 140 Werner, 1993, op cit, p 137.
- 141 H Bley, *South West Africa under German rule 1894-1914*, London, 1971, pp 104-107.
- 142 J Van Wyk, The Namibia land conference—a first step towards addressing a burning problem, *SA Public Law*, 1992, p 31.
- 143 Werner, 1993, op cit, p 143.
- 144 Quoted in Werner, *ibid*.
- 145 *Report of the Commission of Enquiry into South West African Affairs 1962-1963* (RP 12/1964).
- 146 The Development of Self-Government for Native Nations in South West Africa Act 54 of 1968.
- 147 Adams and Werner, 1990, op cit, p 37.
- 148 *Ibid*, p 38.
- 149 *Ibid*, p 37.
- 150 *Ibid*, pp 116-119.
- 151 W Werner, *Land reform in Namibia: The first seven years*. The Namibian Economic Policy Research Unit, 1997, p 1.
- 152 Van Wyk, 1992, op cit, p 33.
- 153 S Haring, The constitution of Namibia and the ‘rights and freedoms’ guaranteed communal land holders: Resolving the inconsistency between article 16, article 100 and schedule 5, *South African Journal on Human Rights* 1996, pp 467-484.
- 154 *Debates of the National Assembly*, 1, 1990, pp 44-45.
- 155 Consensus needed on land question, *Pretoria News*, 27 June 1991, p 10.
- 156 National Conference on Land Reform and the Land Question: Conference Brief, Windhoek, 1991, p 2.
- 157 Clause 2 of the Resolution.
- 158 Clause 12 of the Resolution.
- 159 R Purcell, Economic analysis of land reform options in Namibia, *Working paper for the Namibian Economic Policy Research Unit*, July 1994, p 18.
- 160 Van Wyk, 1992, op cit, p 38.
- 161 Clause 10 of the Resolution.
- 162 Clause 4 of the Resolution.
- 163 Clause 7 of the Resolution.
- 164 Looking for answers, *Southern African Economist*, June/July 1992, p 2.
- 165 *Report of the Technical Committee on Commercial Farmland (Report)*, Windhoek, 1992.

- 166 Ibid, p 175.
- 167 *Debates of the National Assembly*, 47, 10-17 March 1995, p 35.
- 168 Werner, 1997, op cit, p 5.
- 169 S14 of the Act.
- 170 Looking for answers, op cit, p 2.
- 171 *Debates of the National Assembly*, 42, 19-28 October 1994, p 98.
- 172 Werner, 1997, op cit, p 10.
- 173 Ibid, p 14.
- 174 *The Windhoek Advertiser* 6 and 15 September 1995.
- 175 Werner, op cit, p 13.
- 176 Werner, ibid, p 16.
- 177 Werner, ibid, p 15.
- 178 Werner, ibid, p 24.
- 179 Werner, ibid, p 15.
- 180 Voer grondoorlog, se Namibiese Unie, *Beeld* 30 August 2002.
- 181 As one person remarked on the lack of facilities in a recently resettled area in a recent interview: "Here we all die together." J Pienaar, *Almal dood saam*, *Beeld* 27 November 2002.
- 182 Namibia: land reform programme, *ANB-BIA Supplement* 15 February 2001 <www.peacelink.it/anb-bia>
- 183 Reform for the landless? *Mail and Guardian Online*, 19 September 2002.
- 184 Ibid.
- 185 J Flanagan, The whites are being driven out, *Mail and Guardian*, 13-19 2002.
- 186 Reform for the landless? op cit.
- 187 Secretary-general of the opposition Congress of Democracy Ignatius Shixwameni quoted by Flanagan, 2002, op cit, p 13.
- 188 Namibia: land reform programme, op cit.
- 189 Land reform basis for development in Southern Africa, *AFROL News*, 30 October 2001.
- 190 This figure was presented by the prime minister during a briefing to European leaders in 1991.
- 191 Namibia: German aid to finance land reform? *Southern African Documentation and Cooperation Centre*, 14 June 2002 <www.sadoc.at/news>
- 192 Namibian farmers growing uneasy, 12 October 2002 <www.news24.com/News24/Africa/Southern_Africa/>
- 193 Land reform will not destabilise country, says PM, 10 September 2002, <www.sustainable.allafrica.com/stories/200209100546.html>
- 194 Namibia: land reform programme, op cit.
- 195 Mugabe kin turn on his henchmen, *The West Australian*, 20 January 2003.
- 196 Grond tot kommer, *News24*, 26 December 2002.

Chapter 3

SOUTH AFRICA: THE CHALLENGE FOR 'REAL' TRANSFORMATION

Land reform in South Africa is seen by many as the ultimate test for the social, political and economic transformation of that country. The framework for land reform in South Africa is more advanced than in any of the other three case studies but it has to be acknowledged that the extent of dispossession and issues to be dealt with are also more extensive. The land reform process is based on three main pillars, namely restoration of rights to ancestral land, acquisition of land and securing tenure to land. In addition, various support programmes exist to facilitate land reform. The complexity of land reform should not, however, be underestimated. The following chapter provides a brief overview of, and comments on, the main elements of land reform and in particular land claims in South Africa since the first democratic election in 1994.

BACKGROUND

The social engineering that characterised the apartheid system—the scars of which will remain visible for many years to come—was directly linked to the ways in which occupation of, access to and rights on land were regulated. The struggle for land predates colonial presence in Africa. The first people to be dispossessed of their traditional lands were the San (Bushmen). But the process did not end there. Many wars and skirmishes over land control were fought before and after the first white settlers arrived. In short, land has for many years been the key for empowering and disempowering people; and spatial segregation based on race became entrenched in the body politic long before the National Party (NP) took power in 1948.¹⁹⁷

It is therefore no surprise that as the government attempts to rectify some of the damage of the past, among the most difficult battles—and arguably the most

complex to address—are land-related issues. Many thought it would be relatively easy to scrap certain discriminatory laws to create a more balanced playing field. This has proved to be a somewhat simplistic approach,¹⁹⁸ and even perhaps a little naive.¹⁹⁹

The history of South Africa—as in the other three case studies—is fraught with struggles over land.²⁰⁰ From the earliest days of European settlement conflict existed between the indigenous people and the new arrivals, as well as between local inhabitants themselves. The consecutive colonial powers simply declared land as ‘Crown’ and later ‘state’ land, as other forms of land ownership were not recognised by the new settlers’ legal system.

With the four colonies forming a union in 1910, control of land in South Africa was to become the backbone of racial segregation under ‘grand’²⁰¹ apartheid. In 1913, the Black Land Act placed vast areas of South Africa under the sole control of whites, while blacks were given some ‘traditional’ areas where they were believed to have resided historically. The 1913 Act was followed in 1936 by the Black Trust and Land Act, which allocated 13% of South Africa to black people, although they comprised 80% of the population. It is estimated that 32% of the population currently continue to live in these areas.²⁰²

The extent of dispossession in South Africa, the low quality of land available in communal areas, and the violence that accompanied resettlement, coupled with the overpopulation of such areas impacted more severely on South Africa’s black population than was the case in Zimbabwe, Namibia or arguably in any other part of Africa.²⁰³

In South Africa, all political rights of blacks came to be restricted to these homeland areas, and it was hoped that the homelands would in due course become ‘independent’ from the rest of (white) South Africa. Black people who lived outside the main black areas were removed over time to eliminate ‘black spots’ and to secure an exclusively white South Africa. It is estimated that about 470,000 people were relocated in terms of this policy.

The extent of the impact of this policy on the whole social, economic and political fabric of South African society is impossible to measure; the resentment it caused is too deep to fathom, its scars too sensitive to touch. It is estimated that irrespective of the increased urbanisation South Africa has experienced during the past decade, more than 70% of the poor still live in rural areas. In short, the “social transformation (after 1913) was swift, sweeping and severe”.²⁰⁴

The debate over land and the efforts to find a balance between the rights of those dispossessed and the rights of the current occupiers should therefore be

seen against the background of the “suffering, injustice and poverty created by an enormous and ill-advised programme of social engineering carried out by white nationalist governments over a period of forty years”.²⁰⁵

1993 AND 1996 CONSTITUTIONS: RESTITUTION OF LAND RIGHTS

Land reform started soon after the 1990 unbanning of liberation movements and the release of political prisoners. The initial steps, albeit hesitant, had already been taken by the De Klerk government before the first democratic elections. Just as the political reforms initiated on 2 February 1990 took many by surprise, so was the process of land reform sudden and unexpected. As a result there has been a “frantic scramble” by property lawyers to keep up with developments.²⁰⁶

The most important first step to start the process of restitution under the De Klerk government was the Abolition of Racially Based Land Measures Act 108 of 1991 which repealed the 1913 and 1936 land acts, as well as the Group Areas Act of 1966.²⁰⁷ A Commission on Land Allocation was established in terms of this legislation to consider how to use state-owned land for restitution purposes.²⁰⁸ The commission therefore had as its brief the investigation of the use of all state-owned land and its history, to determine whether it was acquired under racially discriminatory legislation and, if that was the case, to recommend whether it should be returned to its original occupiers.²⁰⁹ During its first three years—before the first democratic election and the new land restitution legislation—the commission received 300 claims covering close to one million hectares.²¹⁰

The 1993 constitution²¹¹ (also called the ‘interim’ constitution as it had a limited lifespan from 1993–96)²¹² introduced a new phase in the land restitution process.²¹³ For the first time, the right to have land²¹⁴ restored was recognised as a constitutional right.²¹⁵ In drafting the constitution, extensive debate took place on the scope of application: who would qualify for restitution and what was the timeframe of application—when did the history of dispossession start?²¹⁶

An important principle set by the new constitution was that land reform could not be limited to the scrapping of discriminatory legislation; it had to involve “a major transformation of the whole legal system” in order to restore rights to land where possible.²¹⁷

Surprisingly, the African National Congress (ANC) seemingly entered the transition that followed the 1990 unbanning “with no analysis of the agrarian questions, and no agenda of agricultural restructuring and land distribution”²¹⁸

although land reform had been on their agenda for many years. The World Bank was subsequently very active in assisting the ANC as a political party, and later as the new government, in formulating a land reform scheme.²¹⁹

The main objectives of the land reform programme are to:

- redress the injustices of apartheid;
- foster national reconciliation and stability;
- underpin economic growth; and
- improve household welfare and alleviate poverty.²²⁰

The 1996 (current) constitution further set out the legal framework for land reform. The key provisions of the constitution dealing with land reform are:

Section 25. (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

- a. for a public purpose or in the public interest; and
- b. subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- a. the current use of the property;
- b. the history of the acquisition and use of the property;
- c. the market value of the property;
- d. the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- e. the purpose of the expropriation.

(4) For the purposes of this section—

- a. the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and
- b. property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) 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.

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

(9) Parliament must enact the legislation referred to in subsection (6).

The land reform policy of the first democratic government comprised three elements (set out in more than 22 statutes), namely: tenure reform; redistribution; and restitution. (Refer to Annexure III for a summary of the main outcomes of the respective programmes up to 31 December 2002.)

Tenure reform refers to improving the rights especially of farm workers and persons within communal and homeland areas.²²¹ It was estimated that approximately four million people could benefit by upgrading tenure and providing a better legal basis for their rights to be present on land and to access land.²²² Owing to the complexity of the issues, government decided to approach the implementation on the basis of a series of pilot projects or case studies per province.²²³

Two of the most important pieces of legislation to improve the rights of farm workers are the Land Reform (Labour Tenants) Act 3 of 1996 ('the Labour Tenants Act')²²⁴ and the Extension of Security of Tenure Act 62 of 1997 ('the Extension Act').²²⁵ Workers now derive their rights from the Labour Tenants Act and not from the 'whim' of the property owner.²²⁶ Such rights include the right of the tenant and members of his family to occupy and use a part of the farm they were using up to 2 June 1995.²²⁷ An eviction may only occur by order of the Land Claims Court (LCC). In terms of the Extension Act, security of tenure is offered to many people who may not have secure tenure of their homes or dwellings and are therefore vulnerable to eviction.

A draft Land Rights Bill aimed at addressing outstanding elements of tenure especially in the homeland areas, was shelved by Minister Didiza after taking

office in 1999. A national conference on land tenure was held in 2001 to consider all problem areas and options to address outstanding issues. A wide range of resolutions were adopted by the conference dealing with matters such as achieving a balance between community and individual tenure rights, taking into account customary law and requirements of the constitution, accountability of community structures and the relationship between traditional leadership and other levels of government.

In 2002, the Communal Land Rights Bill aimed at dealing with tenure in the former homelands, was published by the government for comment. It is not within the ambit of this paper to comment on the Bill, suffice to say that a number of issues—including ownership of land within the previous communal systems—remain unresolved.²²⁸ According to Kepe and Cousins “very little has been achieved to date”²²⁹ regarding tenure reform in homelands and even in the case of evictions from farms the implementation of legal guarantees to the practical situation still requires much work.

Redistribution involves making available grants to individuals and families who do not qualify for tenure reform or restitution in order to assist them to purchase land on a willing buyer–willing seller basis. The amount allocated per household is R16,000 (Settlement/Land Acquisition Grant or SLAG), which means that a community could, by working together, qualify for a substantial sum towards acquiring land.

A central piece of legislation to regulate the programme is the Provision of Land and Assistance Act 1993. The Land Redistribution for Agricultural Development (LRAD) programme has become the government’s ‘flagship’ in recent years.²³⁰ The main aim is to facilitate the transfer of agricultural land to landless people who have the resources and experience to become commercial farmers. Under the SLAG and LRAD programmes, a total of one million hectares was transferred between 1994 and 2001. The LRAD is, however, criticised for “missing the point”²³¹ in that it aims to benefit the ‘haves’ in the black community to the detriment of the rural poor.

The redistribution programme is also criticised for being “very slow indeed”.²³² Over the past eight years only 1.2% of commercial farmland was distributed and that figure includes redistribution, farm equity schemes, and labour tenant projects. The target of transferring 30% of commercial farmland by 2015 would require a sevenfold increase per annum of transfers under the redistribution scheme. The setting of targets has been criticised by organised commercial farmers (Agri-SA), pointing at the inherent risk of rising

expectations,²³³ while at the same time committing organised agriculture to assist with coherent land reform in order to prevent a repeat of the Zimbabwe situation. While commercial farmers were raising concerns about sustaining South Africa's level of food production, the director general of the Department of Land Affairs recently caused concern by saying that the process of willing buyer-willing seller is a "fallacy".²³⁴

Restitution—the main focus of this paper—as per the Restitution of Land Rights Act 22 of 1994 Act ('Restitution Act') is specifically aimed at compensating people who were removed from their land as part of the consolidation of homelands or the so called 'black spot' removal programme. The process is therefore claim-driven and requires basic evidence that people were deprived of their ancestral land in a manner that would be unconstitutional under the new constitution of South Africa. Approximately 63,000 claims had been lodged by the deadline of 31 December 1998.

The ANC's Reconstruction and Development Programme (RDP) initially set as its target the transfer of 30% of medium to high quality white-owned farms to approximately 600,000 beneficiaries, but this has been shown to be far too optimistic. With the current budget of approximately R1 billion a year, the likelihood of large-scale reform within the short term is limited unless substantial donor funds are accessed. Even in such a case the market-driven model causes huge amounts to be absorbed in the acquisition process with little or no wealth, employment or capacity being created. It is impossible to predict how sustainable the acquisition programme is, given the severe imbalance in land ownership and limited resources.

While the interim and current constitutions established the principle of restitution of rights to land, the details of the procedure to claim land were set out in the Restitution of Land Rights Act 22 of 1994. The principle established in the constitution is that any person or community²³⁵ is entitled to restitution of land rights by the state if the applicant was dispossessed after 1913 (date of first Land Act) in terms of racial legislation (or practices after the 1996 amendment to the Act),²³⁶ since this would have been inconsistent with the prohibition of discrimination as provided for in the new constitution.²³⁷

It is important to note that neither the new constitution nor the subsequent legislation was designed to address all possible land disputes by means of restoration. Only persons who were deprived of their rights after 1913 could claim full restoration: 1913, the year of the Land Act, was used as the "symbolic date"²³⁸ of the formal start of statutory apartheid.²³⁹ But it is not inconceivable

that arguments will be raised in future that land dispossession of the previous century should also be corrected by means of a form of ‘native title’.²⁴⁰ However, for the purpose of the current process of restitution, the scope and application as set out in the constitution are limited to:

- certain forms of dispossession (resulting from discrimination²⁴¹ without adequate compensation); and
- dispossession suffered within a particular period—between 1913 and 1994.

The test that is applied to determine whether dispossession was a result of past discriminatory practices comprises three elements:

- whether the action relied upon was indeed ‘practices’ as per the Restitution Act;
- whether the specific action was the cause for the dispossession; and
- whether the action was racially discriminatory.²⁴²

The date for the final submission of claims was extended to 31 December 1998,²⁴³ although the settlement of all claims will take many more years to complete—especially in cases where the land is currently owned by private persons who would have to be compensated for their investment. A total of 63,455 claims were lodged by the deadline.²⁴⁴

The government published a White Paper on South African Land Policy in April 1997 with the aim of providing an overall plan for land reform dealing with restitution, restoration and tenure reform. Issues that impact on land policy were identified, such as market-driven reform, the statutory framework within which land reform has to occur, environmental issues, budgetary constraints and the three main elements of the policy, namely restitution, tenure reform and restoration. It was made clear that no priority would be given to invaders of land or illegal occupiers of land. In some instances, however, government might have its hand forced by large-scale invasions of private land that would leave it (government) with little choice but to buy the land.²⁴⁵ The land policy was described by the White Paper as a “cornerstone in the development of our country”.

The land restitution process is in some way the “most straightforward”²⁴⁶ of the three land reform programmes: it has a clear legal base in the constitution and the Land Restitution Act; the institutions dealing with claims and the investigation thereof are established; and it is mainly a legal, claim-driven process. Whether the programme will live up to expectations is another question. The land redistribution and tenure reform programmes are far more complex in that a diversity of needs have to be accommodated and post-settlement support is

seriously lacking or even completely absent. The key provisions of, institutions and processes arising from the Restitution Act are as follows:

NATURE OF THE RIGHT CLAIMED

'Rights in land' is defined in a very general manner to include not only formal, registered property rights, but also occupation of land for a beneficial purpose²⁴⁷ for at least 10 years.²⁴⁸ Important is that only certain categories of persons qualify for restitution—persons who were removed from or dispossessed of the land, or their direct descendants.

A period of three years was initially allowed for the registration of claims.²⁴⁹ This was subsequently extended to 31 December 1998²⁵⁰ to enable further claims to be lodged—although claims will take much longer to verify and settle. There are various arguments for and against the setting of a specific time limit for registration. While it limits the period of uncertainty,²⁵¹ it may prove to be too short a period to convey the message to all potential claimants. The fact that so many new claims were lodged after the initial deadline, validated the decision to allow for additional time.

LODGING A CLAIM

The land claim process commences with a claim being lodged at the Commission on the Restitution of Land Rights in the prescribed manner.²⁵² In addition to identifying the land that is claimed, the nature of the right that was dispossessed and what redress is sought should also be specified. The commission has regional offices in the provinces to assist in the investigation and processing of claims. The first task of the commission is to validate a claim—in other words, to determine that there is indeed a *prima facie* claim that justifies further investigation,²⁵³ mediation and, if necessary, referral to the LCC. The commission is responsible for assisting claimants with the investigation of their claim. It is aided in this by the Department of Land Affairs which, simultaneously, is the main respondent in all claims on behalf of the South African government.

LAND CLAIMS COURT

The LCC has been established to decide on the validity of claims and to award appropriate remedies. It has the power to determine the right to restitution of

any right in land, to determine or approve the compensation payable when the land of a private person is expropriated, and to determine the person entitled to the right in land.²⁵⁴ The LCC may, if inadequate compensation was paid earlier when land was expropriated, order the state to pay additional compensation.²⁵⁵

The LCC may make any of the following orders regarding a claim:²⁵⁶

- the restoration of the land or a portion thereof as full or partial settlement of the claim;
- the state to grant the claimant an appropriate right in alternative state-owned land;
- the state to pay compensation to the claimant;
- the state to include the claimant as a beneficiary of a state support programme for housing or the allocation of rural land; or
- the grant of alternative relief (s.38E9d).

The LCC is a fully fledged court of law; its decisions are therefore binding and final.²⁵⁷ In order to be appointed to the LCC a person has to have legal experience of at least 10 years or by reason of his/her training or experience “[have] expertise in the fields of land and land matters” of relevance to the application of the Act.²⁵⁸

The members of the LCC have in general been perceived as representing ‘new blood’ on the bench and demonstrating an understanding of the need for land reform without becoming bogged down in legal technicalities and procedural complexities.²⁵⁹ The fact that a specialised court was established to deal with such a contentious issue has also been widely welcomed.

The LCC has been described as being at the “forefront” of the government’s social engineering programme.²⁶⁰ The set of legislation dealing with land reform is also regarded as “social legislation” that requires a “different mindset and perspective from the legal profession and courts alike”.²⁶¹ Appeals can, however, be directed to the Constitutional Court or the Supreme Court as may be determined by the LCC.²⁶²

An important feature of the LCC is that, although it is a legal organ, it is also a court of equity, which means that it is not bound by the strict legal rules normally applied in civil courts.²⁶³ Account may thus be taken of evidence which in a normal court might be inadmissible²⁶⁴—for example the views of experts in anthropology, history and sociology. The weight given to hearsay evidence will be as the court deems “appropriate”.²⁶⁵

The Act enables the LCC to use pre-trial conferences as a management tool

with the view to expediting the process, clarifying issues²⁶⁶ and, as has happened in many instances, settling or reducing disputes through judicial mediation.

The LCC may also at any time during the proceedings refer a claim for mediation.²⁶⁷ If it becomes evident to the court that 'any issue' might be resolved through mediation and negotiation it can make an order directing the parties to mediation *and* pending the mediation the litigation process is stayed.²⁶⁸ The court may appoint a person as mediator. The court has been active in encouraging parties to settle and has so far used pre-trial conferences effectively for mediation and not just to settle legal procedures.

The LCC may also take into account factors such as the desirability for providing restitution of land, equity and justice, the desirability of avoiding major social disruption and any other factor that may be relevant and consistent with the spirit and objectives of the constitution.²⁶⁹

The Act distinguishes between the way in which government bodies and private individuals can respond to the LCC when the validity of a claim has been determined. Government bodies may seek an order that specific rights to land shall not be restored for reasons that the land is used, or is to be used, for a public purpose which makes actual restoration undesirable.

A variety of matters to be considered by the LCC when making a decision are identified, such as the desirability of compensating people who have been dispossessed and of rectifying past human rights violations, the requirements of equity and justice, and the avoidance of major social disruption.²⁷⁰

The LCC also has additional powers that include the prohibiting or setting aside of a sale or other disposal of land if such acts will defeat the objectives of the Restitution Act, prohibiting the eviction of any claimant, and prohibiting entry to land without permission of the owner.

COMMISSION ON THE RESTITUTION OF LAND RIGHTS

A Commission on the Restitution of Land Rights is established to administer the process of restitution.²⁷¹ It has, for practical purposes, appointed various regional commissioners to receive and investigate claims. The regional commissioner decides whether a *prima facie* case exists;²⁷² if so, the claim is published in the *Government Gazette* to invite all interested parties to comment²⁷³ and to advise the registered land owner of the claim.²⁷⁴

The commission is attempting to review all claims lodged for purposes of

validation before the end of 2002. A remark during the opening of Parliament by President Mbeki in February 2001 that all claims will be *settled* within three years has been described by observers as 'hair raising' and 'void' of any realism. At the present rate and given the complexity of claims that remain, at least a decade or two would probably be required to settle all the claims.

If a claim does not meet the requirements,²⁷⁵ the commissioner may recommend to the Minister of Lands the most appropriate form of alternative relief.²⁷⁶ The commissioner may also order a full investigation of the background of a claim to determine the factual basis thereof.

The commission is not only responsible for the administration of claims, but also for assisting claimants in preparing their case and, where necessary, for assisting with research²⁷⁷ in doing so.²⁷⁸

The research process in South Africa is far easier than that in Australia. This is because:

- the period to be researched commences after 1913 while in Australia it goes back to sovereignty;
- the state (both Commonwealth and state governments) in Australia generally oppose the determination of native title or at least 'test' the claims vigorously, while in South Africa the state sees it as its constitutional obligation to assist claimants in researching their claims so as to restore their rights;
- the process of apartheid removals was generally well documented while the plight of Aboriginal people since the founding years until fairly recently was not the subject of detailed record keeping; and
- the issues affecting the validity of a claim in South Africa are mainly of a factual nature while in Australia the proving of native title is a daunting factual and legal hurdle to Aborigines.

In addition to his/her research function, the commissioner may also take into account factors that could impact upon the prioritisation of claims.²⁷⁹ In this regard the Act envisages claims that may involve a substantial number of people or persons with particularly pressing needs.²⁸⁰ The process of prioritisation is open for abuse and lobbying by political parties and NGOs that would like to move a certain claim up the proverbial ladder.

The role of the commission in prioritisation also contrasts with Australia where the determination of priorities forms part of the legal process under supervision by the Federal Court. This means that claimants may be required to present their case without having had the time or resources to prepare it properly or without having exhausted all options at mediation. Once cases are

handed to the respective docket judges it is not easy to coordinate the programming of one judge with that of another. Recently, area-wide case management conferences have been held to facilitate coordination but the actual management and programming of each claim remains within the management of each individual judge.

Among its tasks, the commission seeks to settle claims by allowing parties to negotiate and, if necessary, by appointing a mediator.²⁸¹ The mediation can occur between overlapping claimant groups or between claimants and the respondents. The mediation therefore assists parties to reach an out of court settlement, which is then submitted to the court for a final decision.²⁸²

The experience with mediators has been varied. A panel of expert mediators was initially appointed and parties could choose a person to assist them. The panel was criticised for being dominated by white experts, and simultaneously it was felt that the commission should be more active in hands-on mediation. The cost of appointing a mediator is generally high; it is difficult to pre-determine an accurate budget and problems may arise between the parties and a mediator, which could impact on the possibility of settlement. In some instances a mediator was used effectively. (Refer, for example, to the settlement of the Makuleke claim on part of the Kruger National Park.)²⁸³

The commission seems to be using fewer mediators nowadays due to, among other reasons, budgetary constraints.

An interesting aspect of the interaction between the commission and the LCC compared to the role of the Federal Court and the National Native Title Tribunal in Australia is that in South Africa a claim only reaches the LCC in one of two ways: either referred by the commission or by direct access to the LCC.²⁸⁴ In Australia, however, all claims are lodged with the court, which means that they automatically become part of a litigation process.

The South African arrangement therefore enables the commission to engage in an investigation and mediation prior to a dispute being referred to the LCC,²⁸⁵ and even in an instance where a claimant seeks direct access to the LCC, the LCC could refer the matter to the commission for investigation and mediation.²⁸⁶

The mediation function of the commission includes reduction of issues to enable parties to approach the LCC with a clearer understanding of the matters under contention. In addition to referring a matter for formal mediation the LCC is also known to actively assist and encourage parties behind closed doors, through conferences and pre-trial meetings, to explore all mediation options. It would seem as if the judges in Australia in general are not as 'hands-on' during

pre-trial conferences and mediation, in terms of encouraging and even assisting parties to reach an agreement.

OPTIONS FOR RESTITUTION

Various options are identified in the Restitution of Land Rights Act for restitution, namely:

- restoring the actual title by transferring the land to the claimant's name;
- providing alternative land for the claimant; and
- making financial payment as compensation.²⁸⁷

The latter two options can be considered only if full restoration of the rights is not feasible. If the commission believes that a claim does not have sufficient merit to be progressed, it could make recommendations to the minister regarding appropriate alternative relief that may be provided to the claimants even though they do not qualify for restitution of rights.²⁸⁸

Depending on the status of the land, there are various ways of effecting restitution. Restoration of state land can occur only if the Minister of Land Affairs certifies that restoration is feasible, and if it is just and equitable, taking into account all relevant factors such as the current use of the land, the way in which it was acquired, hardship suffered and the interests of all parties. If restoration of the state land claimed is not feasible, alternative state land may be used in settlement. If the claim involves private land and its acquisition is feasible according to the Minister of Land Affairs, the state may purchase it, or set aside state land to settle the claim, or pay the claimant compensation.²⁸⁹

A combination of options can also be considered—refer for example to the St Lucia settlement whereby the Mbuyazi community received a combination of cash compensation, access to the nature reserve and the development of a cultural centre.²⁹⁰ Once the LCC has pronounced on the validity of a claim and orders that the rights be restored, the persons affected²⁹¹ qualify for a state-supported programme for housing and a resettlement grant.²⁹² A cash amount of R16,000 per household is awarded, as well as a settlement grant for development planning of the acquired land.²⁹³

ADMINISTRATIVE SETTLEMENT

The Restitution Act also provides for the settlement of claims through administrative procedures instead of a legal process, in accordance with the

LCC. Since 1998 the Act provided for such decentralisation of powers to the minister, director general and regional land claims commissioner to settle uncontroversial land claims. This process was given further momentum by the appointment of Minister Thoko Didiza in 1999, who expanded administrative decision making in cases where an agreement is possible. This has led to an increase in consent settlements. The administrative process is aimed at speeding up settlements and encouraging parties to reach agreement rather than referring disputes to the litigation process. It has indeed “significantly accelerated restitution performance”.²⁹⁴ The Minister of Land Affairs can therefore in his own capacity²⁹⁵ or by delegation²⁹⁶ to the director general of the department of a regional land claims commissioner, award land to a claimant, authorise payment of compensation, acquire or expropriate land or a combination of options in the settlement of a claim.²⁹⁷

The streamlining of administrative settlements has led to an increase in settlements—especially where cash compensation is paid rather than transfer of land. Some criticism has, however, been expressed at what is called ‘cheque book restoration’, whereby claimants receive a cash amount as compensation without restoration of a specific right to the land they lost.²⁹⁸ A standard settlement offer was introduced for urban claims whereby R40,000 per property is paid to the claimant. The number of claims settled therefore does not necessarily mean a transfer of land.²⁹⁹

Time will tell whether government will also devise a cash compensation formula to be applied in the case of rural land claims. This will also be controversial and may cause a rethink of key aspects of the restitution process. As Du Toit remarks “the mass processing of claims for compensation may well seem an attractive solution for those concerned with getting claims off the government’s books as quickly as possible”.³⁰⁰ The financial cost of such an approach could, however, be disastrous. Refer, for example, to the claim by the 1200-member Ntambanana community covering Richards Bay. It is expected to be the “most expensive claim in the country” amounting to a possible R375 million pay-out.³⁰¹

There is also a concern that the paying of mere compensation or even acquisition of land is putting the public purse under so much pressure that “other forms of redress will be investigated”.³⁰² The payment of cash as compensation also raises questions about the objectives of the Act and whether the payment of moneys is really an effective and sustainable way of fulfilling such objectives.

STATUS OF THE LAND THE SUBJECT OF A CLAIM

Once a claim has been validated, it is formally published in the *Government Gazette* in order for third parties to be informed of the existence of the claim³⁰³ and for the owner to be formally apprised of the claim on the land by the regional commissioner. Although the Restitution Act does not provide for a detailed ‘future act’ process as in Australia (refer to next chapter in regard to native title in Australia) there are certain obligations on a landowner once the claim has been gazetted.³⁰⁴ However, in contrast with Australia the claim group need not be notified of such an event and no procedural rights or formal consultation processes is provided for to canvass the views of claimants.

No person may sell, exchange, lease, rezone or develop land without having given the regional land claims commissioner one month’s written notice of the intention to do so. The commissioner is empowered to obtain an injunction/interdict prohibiting the sale, exchange, lease, subdivision or development of land or the removal of an improvement if it believes that such an act may be prejudicial to the objectives of the Act.³⁰⁵ If such notice has not been given, the LCC may grant any order it sees fit.³⁰⁶

The Act also provides that no claimant may enter on to or occupy the land claimed without the permission of the owner.³⁰⁷

ROLE OF THE DEPARTMENT OF LAND AFFAIRS

The Department of Land Affairs (DLA) has a dual role in that it has to support the claims process by assisting the claimants in having their title to land restored, if possible, and rendering support to the LCC, while at the same time liaising with all affected government departments to solicit their views as to the legality of the claim and the utilisation of the particular land. The state is also responsible for assisting expert researchers in the compilation of their reports. The expert reports have been used to facilitate mediation by way of demonstrating that a valid claim exists and that it would probably pass the scrutiny of the LCC. The state, however, has an obligation to ensure that at least a minimum threshold of evidentiary material is provided in order for a claim to be settled. The standard procedure is for the DLA to call meetings of all state parties in order to develop a common approach, if possible, on a particular claim.

Criticism has been expressed at the apparent confusion of roles between the DLA and the Commission on the Restitution of Land Rights. The commission is not autonomous and its budget is approved by the DLA. The DLA is the main

respondent to claims; it supports the restitution of rights but at the same time it has to ensure that claims have legal merit prior to settlement. The commission, at least during the initial years, had few staff and had to rely on the research and mediation skills of DLA staff. There is also confusion within the DLA as to its role as respondent to claims, while undertaking research to assist claims and verifying or testing to ensure that claims do in fact have merit. In addition the minister may delegate some of his powers to the regional commissioner, which in turn adds to possible confusion regarding the role of the commission and that of the DLA.

Clarity of roles is especially important in order to prepare properly for post-restoration issues that may arise out of the implementation of a settlement. Criticism has been expressed that the DLA and the commission do not take sufficient account of post-settlement issues when negotiating settlements in especially rural areas. Linked to this issue is the question of when the DLA's role in restitution ends. To what extent is the department responsible for assisting with, coordinating and even overseeing post-settlement problems, and when do line function departments such as the Department of Agriculture take over from the DLA?

ABORIGINAL (NATIVE) TITLE IN SOUTH AFRICA?

Native title is the right of a community to land based on the maintenance of their traditional laws and customs since the time of colonial occupation. (For more about the theory and practice of native title refer to the chapter dealing with Australia.) For dispossessed people in South Africa the recognition of native title may provide a remedy in instances where they do not qualify for restitution under the Restitution Act. In order to have the existence of native title determined, a community has to show that they are descendants of the people who occupied the land at the time of colonisation and that a traditional physical and spiritual connection to country is still maintained by adherence to traditional law and custom, even in an adapted or modernised form.

The common law basis for native title is found in the principle that acquisition of territory by a foreign power does not necessarily extinguish the property rights and legal system of the indigenous people.

It is generally agreed that, although the argument of native title can find fertile ground in South Africa, it may be very difficult for many black tribes or ethnic groups to demonstrate that their traditional title had not been extinguished

through previous acts of government. However, the existence of native title has been argued in the case of Namaqualand which, although it formed part of the Cape Colony, retained its Roman-Dutch law as per agreement with Britain. In general the people of Namaqualand can still trace their ancestry and tradition back to the beginning of the 19th century and even further. Although there has been interracial mixing and traditional ways have changed, the unique sense of identity is still present. In particular the Richtersveld, which forms part of Namaqualand, is a case in point due to the occupancy of its indigenous people being traced back long before Dutch colonisation. The entire area was placed under British rule when annexed in 1847.³⁰⁸

Native title is not yet recognised in South African law. It may become part of South African law in three ways: as a rule of international customary law; as part of the Roman-Dutch law; or on the basis of British common law.³⁰⁹ The most likely source would be the British common law which in the *Calvin* case of 1608³¹⁰ recognised that after the union with Scotland, Britain would continue to recognise the existing laws of the conquered until repealed or replaced by new laws. In *Campbell*³¹¹ it was confirmed that after the annexation of a colony the indigenous law continues to exist until replaced or otherwise modified by the Crown.

In order for native title to be recognised, a legal system must be in place that is capable of recognition—in other words it has to be ‘civilised’. If a territory is unoccupied—*terra nullius*—it is deemed that no legal system is capable of recognition and that the laws of the new power automatically apply. In instances where land is occupied by an indigenous people with their own legal system, it can be taken by conquest or cession.

In South Africa the argument of *terra nullius* does not really arise, so the question is whether the systems that were in place at colonisation were capable of recognition. In the *Re Southern Rhodesia* case³¹² the court ruled that the rights of the Ndebele in Southern Rhodesia were too basic and could not be harmonised with the “legal ideas of civilised society”. In South Africa, however, various consecutive governments recognised the continued existence of African customary law.

In the case of the people of Namaqualand, and in particular the Richtersveld community, the source of their potential recognition of native title can be traced back to the recognition by Britain when the Dutch ceded the Cape to it in 1806. Section 8 of the treaty of cession provided that the “citizens and inhabitants” of the colony “shall preserve all their rights and privileges which they have enjoyed

hitherto". In this manner the Roman-Dutch law continued to apply as it was regarded by the British as 'civilised' and therefore capable of recognition.

In order to succeed in a claim for native title it has to be shown that they:

- are descendant from those who occupied the land at the time of colonisation or that they derived their rights to the area in accordance with indigenous law and custom;
- constitute a community of people that is recognised by its own laws and customs; and
- still practice their traditional laws and customs.

The claim can be challenged on any of the above grounds, or in the alternative that native title has been extinguished by acts of the state or by prescription or non-adherence of laws and customs.

Legal and political hurdles arise when proving the existence of native title in South Africa, but there may be "fertile soil" for it to be recognised.³¹³ Due to the 'ethnic' or 'tribal' undertones of native title it would probably not be smiled upon politically due to the sad history South Africa has with the abuse and misuse of ethnicity as a source of rights. Recognition may also open up a "Pandora's box of land disputes".³¹⁴ Native title is also associated with the protection of minority interests and has not been recognised as a source of land rights in Africa.

From a legal perspective it would be difficult to pursue native title due to the inherently different legal system South Africa has compared with those jurisdictions where native title has been recognised. However, the South African constitution allows the taking into account of legal developments of other jurisdictions and especially in regard to international law it is binding on South African courts. The extinguishment acts by the state (either explicit by legislation or due to inconsistency) taken by successive governments, the change of composition of groups, population movements and the risk of competing and overlapping claims would also make it difficult to sustain a native title land ownership regime.

The Supreme Court of Appeal recently considered an application by the Richtersveld community to have their native title recognised (*The Richtersveld Community and Others v Alexkor Limited* Case no 488/2001 24 March 2003). On appeal was the dismissal by the LCC of a claim by the community for recognition of their communal title.³¹⁵ The LCC found that the doctrine of native title does not fall within its jurisdiction, that communal title had been extinguished by previous acts of government and that the dispossession did not

fall within the framework of the Restitution of Land Rights Act. The LCC relied heavily on chapter 8 of the constitution which deals with the jurisdiction of the respective courts and concluded that it could only develop the common law on matters that fall within its jurisdiction.³¹⁶ Should the Constitutional Court recognise the existence of native title, the LCC would have it included in its jurisdiction for further application.

The Court of Appeal found unanimously in favor of the Richtersveld community that the case was indeed unique given the system of occupation, the cohesiveness of the community, their laws and customs and the recognition they had from previous governments. As a consequence the court held that the community did indeed qualify for redress under the Restitution of Land Rights Act on the basis that they have a form of exclusive entitlement to the land, that the rights they hold are akin to those rights held under common land ownership, that their rights survived annexation and consequently brings it within the ambit of 'rights in land' or 'customary law interest', as defined by the Act. The way in which the community was dispossessed of their rights in the 1920s fully falls within the circumstances provided for by the Restitution of Land Rights Act and hence they are entitled to redress as per the Act.

PROGRESS WITH RESTITUTION—A CRITICAL ANALYSIS

- The restitution process started very slowly³¹⁷ with only 19 claims out of the more than 25,000 claims lodged being settled in the first three years.³¹⁸ Since then, however, the process has picked up momentum and, at least on paper, close to half of the claims have been settled. According to Chief Land Claims Commissioner Wallace Mcoqi, a total of 33,510 claims have been settled since 1995. The target to validate the remaining claims is December 2002 and while government has expressed the hope that all claims would be settled by 2004, it appears unlikely that progress will be so quick. Although political awareness of the land issue has become more prevalent over the past two years, "for the time being, the slow performance of restitution is doing very little political damage to the government".³¹⁹ It is, however, recognised by key government figures that the Zimbabwe experience as well as political pressure from the Pan Africanist Congress (PAC) demonstrate that the past few years could be a honeymoon phase. The actions of the Zimbabwean government over the past 12 to 24 months have contributed to an urge for land restitution in South Africa to be speeded up.

- According to the Department of Land Affairs, the status of settled land claims on a national basis as of 31 August 2002 was as follows:³²⁰

Number of claims settled	33,510
Number of households involved	72,251
Number of beneficiaries	385,781
Total area of land restored	445,248 ha
Total land cost	R424 million
Financial compensation	R1.2 billion
Restitution discretionary grant	R132 million
Settlement grant	R46 million

The basis upon which the restitution figures are calculated gives rise to concern regarding their reliability. For example:

- The basis on which a claim is lodged can be an individual, group or community claim. Some claims may therefore represent as many as 8,000 people,³²¹ while in other cases a single person can also lodge a claim (refer, for example, to the District Six urban settlement where 1,200 individual claims were settled). It is therefore not clear what the total number of community claims and individual claims are or the total number of potential beneficiaries caught up in the claim process.
- Not all claims have been validated; the target to validate all claims is end 2002. It is not yet clear what the exact number of claims is and it therefore seems premature to conclude that half of the claims have been settled.
- Claims that are settled sometimes involve individual compensation to members of a community, either by means of cash compensation or individually registered blocks of land. It could therefore happen that a community lodges a single claim but chooses to receive compensation on an individual basis, thereby inflating the number of 'settlements'. All such beneficiaries are then added to the total list of successful settlements. In Cato Manor, for example, one claim was settled but the number of people receiving compensation was 400—statistically, this is the number of settlements recorded. In the case of the Makuleke claim a single claim was settled albeit that the number of beneficiaries were as many as 8,000.
- The successful settlements demonstrate a clear urban bias where the beneficiaries are usually counted in households rather than in whole communities. It is estimated that of the 80% of claims in urban areas only about 10% of the total number of actual claimants are represented. Urban claims are also generally easier to validate, hence the ability to deal with

them earlier in the process and to pay cash as compensation.

The statistics should therefore be regarded as fluid and merely indicative of progress rather than as audited figures.

- The emphasis on statistical analysis of progress regarding settlements is understandable but may cause the real objective of restitution to be missed. Irrespective of the impressive progress made statistically, “the most important problem in the restitution programme is not only the slow rate of delivery but also the question of *what* is being delivered ... unless we come to a clear answer on how to implement restitution in a way that is consonant with its ends, we might very well find we have no restitution programme at all”.³²² According to Kepe and Cousins the restitution programme “has not contributed much thus far to rectifying the extreme imbalance of ownership of productive resources”.³²³ They conclude rather pessimistically that land reform programmes since 1996 have made “little difference” to the lives of most rural people and “have failed” to bring about the expected transformation that people were hoping for following the new government’s taking of office.³²⁴ This view is reflected in many interviews conducted by the author during which concern was expressed that government was merely aiming at “counting settlements with no vision of post-settlement reform”, as put by one observer.
- Many resources are directed at the claims-driven, legal process but there is “widespread agreement” that it will not result in any substantial land distribution.³²⁵ Due to the legal nature of the process it requires meticulous research; the undertone is very much adversarial in nature and the “process has turned out to be legalistic, bureaucratic and slow”.³²⁶ Given the Zimbabwean example, the claims process has also contributed to local and international concerns about the respect for property rights and the security of long-term investments. In a development sense the money spent on the claims process is therefore “wasted”.³²⁷ In Mpumalanga province, for example, 41% of commercial farmland is under claim. The commercial farmers are not being effectively included in the process of land reform, and they now band together to oppose claims.³²⁸ The founding fathers of the policy may have designed it to be adversarial on the assumption that sufficient land would not be available for restoration. That has proven not necessarily to be the case as state-owned land and land available on the market would at present seem to be sufficient to address the demand for land.
- Experts across a wide spectrum are pessimistic about the prospects of

restitution in isolation addressing poverty and increasing standards of living. Included in the reasons for this are the following:

- In preparing for restitution the emphasis is on claimants as 'victims' of apartheid rather than as 'beneficiaries' of a new land policy system. This impacts on the nature and direction of discussions, planning and post-restoration support. It also impacts on the process leading to restoration. Due to the litigious process of land claims, the beneficiaries are often marginalised, with lawyers, consultants and other experts dominating the pre-restitution process, while beneficiaries feel isolated and let down in many post-settlement arrangements.
- Restitution is competing with many other socio-economic and welfare priorities. Given the scarcity of resources, each rand (South African currency) spent on buying a piece of land from a land owner or paying a claimant cash compensation, could have been used to improve health or education, or to create employment. It is estimated that between R40–R70 billion is required to fund the total restitution process—and that excludes implementation and settlement costs.³²⁹ Where does restitution fit in as a priority when unemployment is around 30-40%, the education system is struggling, millions are seeking better housing³³⁰ and public health is in crisis? The apparent danger is that depleting scarce resources on the acquisition of land without creating any wealth, employment, commercial enterprises or sustainable development may cause the restitution process (at current terms and conditions) to lose its attraction and credibility.
- The settlement of many urban claims by means of cash compensation raises the question whether the objectives of restoration are being met at all. If 'access to land' and 'relief of poverty' are criteria by which restoration is to be measured, monetary compensation can hardly be justified nor sustained. It may increase the statistical base but the core problem of equity and access to land may not be addressed at all. In addition, there is concern that rural claimants may also demand cash compensation, which in turn would erode the process even further.
- Turning back the clock in order to rectify past injustices may have a special place in post-apartheid society but whether it is the most appropriate way of addressing land access, employment and regional development is not as clear. The fact is that many of the forced removals that took place three or four decades ago occurred in times of low urbanisation and different economic conditions. The agricultural practices

at the time were quite different and the elders who used to toil on the land may now have passed away or are retired. The return to ancestral land may therefore not always be the best way to address the needs of urbanised youth or other marginalised groups within the black community.

Hence “all of this means that the prospects for rural livelihoods and rural poverty in South Africa are poor”.³³¹

- Availability of land for the purpose of redistribution is not the main problem inhibiting or delaying land reform. As happened in Namibia and Zimbabwe, many farmers are all too willing to sell their properties and in addition millions of hectares of state land are also available. The farming sector has been through rough times; subsidies have been slashed, security and safety concerns³³² are driving farmers off their land and in general there is a depopulation of rural areas. It is estimated that up to 1999 only 120,600 ha of the available 25.5 million ha of state land have been distributed and at the same time government was hoping to sell some state land to generate income.³³³ The land reform process could be progressed substantially by focusing more effectively on making state land available and on the acquisition of available, privately owned land. However, because the focus is a claims-based approach the emphasis is not on land reform as such, but on the claiming of specific parcels of ancestral land.³³⁴ The ability of the state to develop an integrated regional development policy and to acquire land in consonance with such policy is therefore inhibited.
- Given the large number of unsettled claims and the costs involved in investigating a claim and acquiring the land, a question arises regarding the sustainability of the programme. Since 1996 a total of R1.6 billion has been spent on acquisition and cash compensation under the restitution programme. Under the redistribution programme many communities have found that once they have pooled their R16,000 per household to acquire a property, nothing or little is left for infrastructure and development. This problem is exacerbated by the absence of integrated development programmes in rural areas.³³⁵ In short, there is a risk that scarce resources are swallowed up by the acquisition of land and that in the post-settlement phase communities are virtually set up to fail—hence the remark by a community leader that “we cannot eat the ground”.³³⁶ Thus far there are “very few” instances of the establishment of successful and viable agricultural enterprises. Negotiations are under way with the World Bank to finance land reform to prevent South Africa becoming a “second Zimbabwe”³³⁷ but the cost of land

transfer or financial compensation “remains dangerously high”.³³⁸

- The role of different government institutions in pre- and post-restoration requires better definition and clarity. For example:
 - During the claim phase the DLA initially directed the process in a very centralised manner to the virtual exclusion of other national and provincial government departments. The DLA had an exclusive claim settlement style and paid little, if any, attention to the development of a land management policy that would follow restitution. (Refer, for example, to the disappointment that arose in areas such as Riemvasmaak, Elands-kloof and Doornkop where the return to land was celebrated with great fanfare but was soon forgotten in the rush as the DLA headed off to settle the next claim.) In recent years the DLA has shown greater awareness in involving other national and provincial departments as well as local authorities in the pre-acquisition process but there is still no integrated and coherent strategy whereby the role and functions of the respective departments are spelt out at a national level.
 - It is unclear who takes responsibility to make the land policy ‘work’ and who takes ownership of the process once land has been acquired. The DLA is not geared to oversee implementation but at the same time no other department has been instructed to oversee or to coordinate the process. The skills required to assist in the settlement of new landowners are in many instances not found in a single government department as the needs of people may span various departments such as Education, Finance, Agriculture and Environment. An integrated policy is therefore required with a single department taking responsibility for general guidance and policy development but with the actual fieldwork being undertaken by the respective specialist line function departments.
 - There is no coherent or sufficient national land use policy that could guide the actions of specific departments or levels of government in dealing with problems experienced by new landowners. As a result many new owners have a sense of being left alone to fail as the type of support that kept white farmers on the land for generations is simply no longer available. Although efforts are being made to involve local governments more effectively, it should also be noted that many local governments suffer serious capacity and financial problems—this is especially the case in rural areas. It may also not be fair to burden local governments with the implementation of a land policy they played little role in developing.

– Dealing with poverty at national level, and in particular in rural areas, requires a national policy that is drafted along the lines provided for in chapter 3 of the constitution, which envisages cooperative governance in matters of national importance. An inherent risk in aspects of the current policies is that they do not necessarily transfer benefits to the next generation. In some instances the return of people to land without the necessary support systems in place may create more long-term problems than it solves. The risk is therefore that issues and grievances may be building up and that the next generation may want to revisit questions that the current generation thought had been adequately dealt with. In essence “the restitution of lost land rights offers no assurance with regard to livelihoods”.³³⁹ Thus far there has therefore been no successful link between restitution, development, creation of employment and relief of poverty.

– Agrarian reform in South Africa would inevitably become higher priority as the land reform process continues. “One core problem is that land agrarian reform has not been part of a broader, integrated rural development process.”³⁴⁰ The experience of Zimbabwe shows that even if matters seem to be calm, nothing should be taken for granted. The build-up of poverty in rural and even fringe urban areas cannot be afforded by any government and if it is not dealt with in a pre-emptive manner it will force itself on to the national agenda.

- An external issue that already impacts on the implementation of the restoration policy is the increase in HIV/AIDS among the urban and, in particular, rural populations. It is estimated that up to 35% of potential land reform beneficiaries are HIV positive and up to 35% of staff in agencies supporting land reform and implementation are positive.³⁴¹ Land development plans therefore have to cater for the reality that many beneficiaries may not live long enough to oversee the implementation of the plans and may require additional health and other support services in the short- to medium-term. This in turn highlights the importance of having a multidisciplinary approach to implementation rather than leaving it to a single department to implement.
- A common legal mechanism for communities to register their land holding is to establish a communal property association (CPA). More than 500 group titles have been issued since 1996.³⁴² These associations have not necessarily been a resounding success. While in some instances it has provided the community with *legal personae* and therefore a basis upon which to manage

their land in accordance with corporate procedures, the CPA process has also been perceived as imposed and foreign. In many instances communities have perceived a CPA to be artificial and not reflective or responsive to local needs, and some new landowners were even forced to agree to a legal mechanism simply to speed up their restitution, although the mechanism did not suit their customary, community or cultural purposes. Many CPAs have become the battleground for in-fighting, dominance and despotism. The relationship between the CPA as land holding body and traditional authorities in rural areas is ambivalent and has caused power struggles. Government has also not been able to provide ongoing support to CPAs to assist them in the development and management of corporate procedures that are appropriate for the land they are holding.³⁴³

- The long term financing of land reform in general and restitution in particular remains a headache not only within South Africa but also in Southern Africa. The events in Zimbabwe and the reluctance by Southern African leaders to take a firm stand against the Mugabe policies have increased donor scepticism. The availability of financial support for Southern Africa is also affected by international competition for scarce funds—in particular for the expansion of the European Union (EU). It can also be expected that any form of substantial donor assistance would be linked to sustainable democratisation³⁴⁴ and respect for human rights.
- Land invasions and illegal occupation in South Africa are on the increase,³⁴⁵ especially in fringe urban areas where population pressure is at its highest. The National Landless People's Movement established in 2001 has identified 2003 as the year of 'land occupations'. A senior criminologist has predicted that South Africa will be experiencing a Zimbabwe-type scale of farm invasions by 2005.³⁴⁶ This follows pressure at the ANC 2002 national policy conference for unutilised agricultural land to be expropriated. Land invasions may be a way of turning the domestic spotlight on land reform, but from an international perspective it is one of the surest ways to make donor funds even scarcer.
- At the commencement of land reform it was envisaged by the ruling party as well as international actors such as the World Bank that the three programmes would jointly greatly reduce poverty and unemployment. Although the programmes have only been in application phase for less than a decade, in practice the 'problem' with the vision has turned out to be twofold, namely: it depends on a 'superficial' understanding of the past; and "it was far too optimistic about the ability of the government to change historic

realities".³⁴⁷ The vision was therefore inappropriate and generated 'false hopes'. It is now realised by those who are involved at the practical level of programme implementation that "without incomes and without external support poor people will not be able or prepared to farm, no matter how much land they receive".³⁴⁸

- Although this study is not aimed at analysing the redistribution process, the following brief remarks can be made on that process:

- It would seem that in some instances the redistribution process has been more successful than the restoration process due to redistribution being driven by demand rather than by claim. The process enables communities to acquire land of their choice and to take greater ownership of the process prior to acquisition, which in turn is beneficial during the implementation phase.

- The DLA is committed to the distribution of 30% of agricultural land within the next 15 years. The target is a transfer of 28 million ha. This compares to the 2.1 million ha distributed during the past two years. In order to achieve this goal, the resource commitments to acquisition, post-settlement support and regional development for at least the next two to three decades would have to be massive. Only time will tell whether the resources—from the taxpayer or from international donors—will be able to sustain a programme of this scale.

- The inherent risk in the redistribution process is that the emphasis has shifted from relieving poverty to assisting those black farmers who have already demonstrated a capacity to be successful. While such an objective in itself is valid, it should not exclude the drive for poverty reduction in rural areas.

- Many of the redistribution applications have been put together to increase the 'kitty' (R16,000 per household) without real group cohesion—this has been referred to as a 'rent a crowd' strategy whereby people are signed up with little knowledge or understanding of what is involved.

- There is in many instances 'no coherent' plan to assist post-settlement problems that arise.³⁴⁹

- The influence of consultants to assist with the drafting of business plans in the restoration and restitution programmes is very high. This is understandable but there is a risk of plans being written with the aim of satisfying the DLA or foreign donors rather than to address the realistic needs of beneficiaries. As a result beneficiaries do not always take

ownership of proposals and are reluctant to be held accountable for the implementation of the projects. This again illustrates the very “front-loaded”³⁵⁰ nature of the process with little after care.

- South Africa has, in contrast with the other three case studies, developed a range of support options to assist landowners in finding their feet. One such institution is the Land Bank. The Land Bank is regarded as the “principle government agency responsible for transforming the rural financing sector to facilitate rural development and alleviate poverty”.³⁵¹ The aim of the bank is to provide services to the rural sector and in particular disadvantaged communities, such as emerging black commercial farmers and rural people, especially women.³⁵² Partnerships have been established between organised farming interests and new landowners; the DLA assists with its Land Reform Programme; the Land Reform Credit Facility, a credit agency owned by the Department of Trade and Industry, has been established; and farm worker equity schemes have started, enabling workers to buy a stake in the land they are farming.
- It should be acknowledged—as was done by the 1997 White Paper on Land Reform—that not all land aspirations and claims can be dealt with by the Restitution Act. There is no doubt that dispossession also took place before 1913 and the rights of such people are not catered for by the Act. The provision for a broader system of land acquisition is therefore envisaged through the restoration programme. The question of whether a form of native title will in future be recognised by the South African courts is, however, yet to be resolved. Should that happen it would no doubt further complicate an already complex and congested system. The recent decision affecting the Richtersveld community is according to the court “unique” and does not establish a basis for the recognition of native title as such but rather brings the rights of the Richtersveld community within the ambit of the Restitution of Land Rights Act as a ‘customary interest’ in land. The applicability of the ruling to other cases would have to be analysed. Many groups do not constitute themselves today in a manner they did a century or more ago, and the risk of re-activating a form of ‘ethnic’ system where the rights of people are based on ethnicity would probably not attract wide political support.

NOTES

197 It was not limited to South Africa. In Zimbabwe—earlier Southern Rhodesia and then Rhodesia—land allocation also took place on racial grounds as part of a ‘social construct’

to move black people to rural areas. Van Horn, Redefining 'property': The constitutional battle over land redistribution in Zimbabwe, *JAL*, 1994, p 148.

- 198 Van der Walt, Land reform in South Africa since 1990—an overview, *SA Public Law*, 1995, p 2.
- 199 Comparisons with international experience in land reform—such as in India, Australia, New Zealand, Malaysia and Brazil—show that effective land reform is not only very complicated, but that it also takes many years and extensive resources to accomplish.
- 200 Refer, for example, to experiences in the Philippines, Germany after the Second World War, the ongoing problems in the Middle East, Latin America, the US, Canada and New Zealand.
- 201 A distinction was drawn by political scientists between 'grand' apartheid, which included matters such as independence for the homelands, and 'small' apartheid, which had to do with all forms of day-to-day discrimination—such as separate public facilities.
- 202 M Adams, B Cousins, and S Manona, Land tenure and economic development in rural South Africa: Constraints and opportunities, in B Cousins, (ed) *At the cross-roads: Land and agrarian reform in South Africa into the 21st century*, University of the Western Cape, 2000, p 111.
- 203 H Bernstein, Social change in the South African countryside? Land and production, poverty and power, *Occasional Paper Series No 4*, Programme for Land and Agrarian Studies, University of the Western Cape, 1997, p 2.
- 204 Bundy, *The rise and fall of the South African peasantry*, 1979, p 230.
- 205 Van der Walt, 1995, op cit, p 4.
- 206 Van der Walt, *ibid*, p 11. The reforms were initiated by the White Paper on Land Reform 1991 in which broad policy measures and objectives for land reform were set out. The most important principle was the abolition of racially based land legislation.
- 207 Du Plessis, Pienaar and Olivier, Nuwe grondmaatreëls, *SA Publiekreg*, 1991, pp 255-269.
- 208 Refer for instance to the land claim at the Augrabies Falls National Park where the area of Riemvasmaak, comprising more than 70,000 ha and controlled by the Defence Force and SANP, was handed back to the community. A small portion of 5,000 ha, called Melkbosrand, is still in dispute due to its conservation value, but it is expected that a settlement providing for joint management will be implemented in this case. The settlement is complicated by the fact that there is no consensus in the community as to the future use of the land—be it for conservation, grazing or mining.
- 209 One of the weaknesses of this commission was that it could only make *recommendations* on how a land claim could be settled, while the Restitution of Land Rights Act of 1994 provided for a *binding court order* to be given.
- 210 Van der Walt, 1995, op cit, p 15.
- 211 Sections 121-123.
- 212 For a general background on the process of negotiations leading up to the 1993 constitution as well as a discussion of the key elements of the constitution refer to B De Villiers, *Birth of a constitution*, Juta, 1994.
- 213 For a general overview of land developments in the period just before and after the adoption of the 1993 constitution refer to Du Plessis and Olivier, Land: New developments, *SA Public Law*, 1994, pp 179-190.
- 214 The concept 'rights in property' was opted for by the Negotiating Council which drafted the new constitution, to guarantee that "the protective umbrella of the property clause

- will cover not only real rights, but also patrimonial rights, including personal rights in property." Van der Walt, Notes in the interpretation of the property clause in the new constitution, *THRHR (Journal of Modern Roman Dutch Law)*, 1994, p 193.
- 215 s8(3)(b) and s121-123.
- 216 Klug, Constitutional law, *Annual Survey of SA Law*, 1995, p 13. There is ample evidence of communities being dispossessed of their land throughout the history of South Africa. Such dispossession was not only perpetrated by colonialists but also by indigenous people.
- 217 Van der Walt, 1995, op cit, p 16.
- 218 Bernstein, 1997, op cit, p 4.
- 219 The World bank envisaged that the redistribution of 30% of white-owned land over a period of five years to 800,000 black households would cost R17.5 billion. G Williams, J Ewert and J Hamann, Liberalising markets and reforming land in South Africa, *Journal of Contemporary African Studies*, 16, 1998, p 66.
- 220 Department of Land Affairs, White Paper on South African Land Policy, 1997.
- 221 Approximately 17 million ha land falls within previous Bantustans or homelands where tenure reform is also required.
- 222 M Adams, B Cousins and S Manona, Land tenure and economic development in rural South Africa: Constraints and opportunities. Paper read at the National Conference on Land and Agrarian Reform in South Africa, 26-28 July 1999.
- 223 A Claasens, Land rights and local decision-making processes: Proposals for tenure reform. Paper read at the National Conference on Land and Agrarian Reform in South Africa 26-28 July 1999.
- 224 For some of the case law arising from this Act refer to *Mahlangu v De Jager* 1996 3 SA 235 (LCC); *Zulu v Van Rensburg* 1996 4 SA 1236 (LCC); and *Klopper v Mkize* 1998 1 SA 406 (N).
- 225 For some of the case law arising from this Act refer to *Karabo v Kok* (LCC 5/98); *Lategan v Koopman* (LCC 1R/98); and *City Council of Springs v The Occupants of the Farm KwaThema* (LCC 10R98);
- 226 N Coertse, A new deal in land reform, *Juta's Business Law*, 7, 1999, p 57.
- 227 JM Pienaar, Farm workers: extending security of tenure in terms of recent legislation, *SA Public Law*, 1998, pp 423-437.
- 228 For a critique refer to B Cousins, Reforming communal land tenure in South Africa—why the draft Communal Land Rights Bill is not the answer. Unpublished paper, Programme for Land and Agrarian Studies, University of the Western Cape, 2002.
- 229 T Kepe and B Cousins, Radical land reform is key to sustainable rural development in South Africa, *Policy Brief* No 3, Programme for Land and Agrarian Reform, 2002, p 3 and B Cousins, Draft Land Bill should be rejected, *Mail and Guardian Online*, 19 September 2002.
- 230 Turner, 2002: 9.
- 231 Ibid, p 10.
- 232 Kepe and Cousins, 2002, op cit, p 3.
- 233 South Africa set to fast track land reforms, *Pretoria News*, 16 September 2002.
- 234 Farmers agree with land reform, *Pretoria News: Business Report*, 16 September 2002.
- 235 'Community' is defined as "any group of persons whose rights in land are derived from shared rules determining access to land held in common," S1 Restitution Act.
- 236 s25(7) Restitution Act.

- 237 s121 Restitution Act.
- 238 This is the concept used by one of the negotiators of the National Party, Sheila Camerer in, Property rights and restitution in the constitution—a behind-the-scenes look, *De Rebus*, April 1994, p 301.
- 239 A claim dating back to before 1913 is not automatically rejected—but it follows a different process. It is regarded as a ‘historical’ claim, and the community may be entitled to alternative land as compensation for the land they lost.
- 240 The issue of ‘native title’, as it is known in Australia and was recognised in the famous *Mabo* case (discussed later), has not yet been settled in South Africa. The recent decision of the Supreme Court of Appeal in the case of the Richtersveld community brings the recognition of the customary rights within the ambit of the Restitution of Land Rights Act rather than providing a basis for the general recognition of ‘native title’ in South African law.
- 241 ‘Discrimination’ is taken to refer not only to acts of discrimination but also omissions and practices. *Jacobs v Department of Land Affairs* LCC 3/98 (par. 24).
- 242 *Ibid*, (par. 22-25).
- 243 S2 Restitution Act. In *Former Highlands Residents concerning the Area formally known as the Highlands, Pretoria* (LCC 116/98) the court confirmed that no late claims will be accepted and, if possible, new claimants should be accommodated by amending the original claim and including their names thereon.
- 244 Spamer, ANC in land claim squeeze, *Sunday Independent*, 13 February 2000.
- 245 Refer, for example, to the recent case where up to 40,000 persons occupied a farmer’s land close to Johannesburg. The High Court ordered the government to protect the property rights of the land and remove the people. Court slams South Africa over farm squatters case, *Australian Financial Review*, 25 November 2002. The case puts the government in a catch-22. On the one hand it is virtually impossible to remove 40,000 people and find alternative accommodation for them. On the other hand, a dangerous precedent could be set if the farm were acquired as it could set the scene for further land grabs.
- 246 S Turner, and H Ibsen, *Land and agrarian reform in South Africa: A status report*. Research Report No. 6, Programme for Land and Agrarian Studies, University of the Western Cape, November 2000, p 11.
- 247 ‘Beneficial occupation’ has been interpreted not only to mean exclusive and permanent occupation but also non-exclusive, seasonal occupation or even occupation with the permission of the landlord. *Kranspoort Community* LCC 26/98 (par. 49-67).
- 248 s1 Restitution Act and s8 of the Constitution. The Act provides that a ‘right in land’ means “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”. This is a problematic issue in the case of a nomadic community such as the San to whom permanent settlement in a particular area was not known.
- 249 s2(1)(b) Restitution Act. The court may also recommend to the Minister of Land Affairs that the claimant be given “priority access” to state resources to facilitate the process of development and resettlement. S35(2)(d) Restitution Act.
- 250 S2 Restitution Act.
- 251 It goes without saying that while a land claim on a particular piece of land exists, owners

- will be reluctant to improve or develop the land, possible buyers will shy away and the claimants may feel that they are still being deprived of what is rightfully theirs. Refer to s11(7) Restitution Act for limitations on both the owner and claimant.
- 252 S6(1) Restitution Act.
- 253 S12 Restitution Act.
- 254 S22(1) Restitution Act.
- 255 *Former Highlands Residents: Ash v Department of Land Affairs* LCC 116/98.
- 256 S35(1) Restitution Act.
- 257 Chapter 8 of the Constitution and S22(2) of the Restitution Act.
- 258 S23 Restitution Act.
- 259 Refer, for example, to section 30 of the Restitution Act which deals with the admissibility of evidence.
- 260 CJ Coertse, *The Restitution of Land Rights Act and the Land Claims Court, De Rebus* March 1999, p 33.
- 261 JM Pienaar, Recent developments relating to automatic review proceedings in the Land Claims Court, *De Jure*, 2001, p 163.
- 262 s37 Restitution Act.
- 263 s30 Restitution Act. In its first reported case of *Ex Parte Macleantown Residents' Association: In re: Certain Erven and Commonage in Macleantown* (1996) 3 All 259 (LCC) the Land Claims Court identified a number of principles that have to be fulfilled, such as: the claimants have to prove that they were dispossessed of their land after 1913, they must make it clear on what basis their claim rests and they must be able to prove the particulars of the erven of which they were dispossessed.
- 264 This is of crucial importance given the fact that many communities and individuals never had any formal legal documentation to prove their ownership or occupation of land. The very concept of registering land or holding title thereto was foreign to them. In the case of the recent settlement of the San claim over parts of the Kalahari-Gemsbok National Park, the notion of exclusive property rights to a particular area did not exist. In order to determine the extent and period of their occupation, opportunity had to be created for oral and hearsay evidence and accounts which in a normal court would not have been allowed.
- 265 S30(3) Restitution Act. The court may also become involved in a pre-trial conference which could serve as a forum where settlement is reached on key issues. Klug, 1995: 16.
- 266 S31 Restitution Act.
- 267 S35A Restitution Act.
- 268 S35A(1)(b) Restitution Act.
- 269 S33 Restitution Act.
- 270 S30 and 33 Restitution Act. Provision is also made for a pre-trial conference to clarify some issues in dispute. s31 Restitution Act.
- 271 s4 Restitution Act.
- 272 If the commissioner decides a claim is "frivolous" or "vexatious" it can be rejected. s11(3) Restitution Act. A third party is not entitled to a hearing prior to the publication of a claim. It is purely an "administrative function" and has no bearing on the validity of the claim. *Transvaal Agricultural Union v Minister of Agriculture and Land Affairs and others* LCC 33/01, 18 October 2002.
- 273 s11 Restitution Act.
- 274 Rule 13(2) Rules of Commission.

- 275 Refer for example to *Farjas v The Regional Land Claims Commissioner, KwaZulu/Natal* (LCC 21/96), where a decision by the commissioner that the expropriation of land for purposes of urban development does not qualify for restitution, was taken on review. The court found that the commissioner acted outside of her powers in that she did not have to consider the merit of a claim, merely whether it justified further investigation.
- 276 s6(2)(b) Restitution Act.
- 277 Rule 5 of the Rules regarding procedure of Commission in terms of the Restitution of Land Rights Act ("Rules of Commission").
- 278 S12(3) Restitution Act.
- 279 Such as the presence of elderly and sick people on the claim, the size of the community, and the positive impact the claim might have on the process of land reform by setting a precedent. Rules 3 and 5(k) Rules of Commission.
- 280 S6(2)(d) Restitution Act.
- 281 s13 Restitution Act.
- 282 Various considerations have to be taken into account when deciding on the use of a mediator. He/she may take care of practical arrangements—keeping of minutes, preparing discussion points, interacting with the parties individually and arranging experts' inputs into the negotiating process. However, he/she may introduce a formal or bureaucratic element into the negotiations which may limit direct and informal interaction between the parties, the mediator may have difficulty winning the confidence of all parties and the end result may be his/hers rather than the parties.
- 283 B De Villiers, *Land claims in national parks—the Makuleke experience*, HSRC Publishers, 1999.
- 284 Chapter IIIA Restitution Act.
- 285 S14 Restitution Act.
- 286 S35 Restitution Act provides that the court may direct the parties to a process of mediation, and order that the hearing be stayed while such mediation takes place.
- 287 s123 Restitution Act.
- 288 S6(2)(b) Restitution Act.
- 289 s123(3) Restitution Act.
- 290 Grondoooreenkoms op 'n keerpunt, *Beeld*, 25 September 2000.
- 291 Only direct descendants of the person or community who was deprived of the land qualify for restitution. s1 and 3 Restitution Act.
- 292 s35 Restitution Act.
- 293 For a discussion of some recent developments in the field of land reform, refer to Du Plessis, Olivier and Pienaar, Land reform continues, *SA Public Law*, 1996, pp 297-316.
- 294 Turner and Ibsen, 2000, op cit, p 13.
- 295 S42D Restitution Act.
- 296 S42C(3) and S42D(3) Restitution Act.
- 297 S42D(1) Restitution Act.
- 298 Refer for example to *Blaauwberg Municipality v Bekker* 1998 1 All SA 99 (LCC) where account was taken of previous moneys received by claimants when the land was expropriated.
- 299 For example, out of 5,000 claims settled in Gauteng, none involved the return of any land. Turner, 2002, op cit, p 7.
- 300 A Du Toit, The end of restitution: Getting real about land claims. Paper prepared for the

- Land and Agrarian Reform Conference, Pretoria, 26-28 July 1999, p 5.
- 301 Community demands R376 m for port city, *Sunday Times*, 1 December 2002.
- 302 W Du Plessis, N Olivier and J Pienaar, Land reform: A never-ending process, *SA Public Law*, 15, 2000, p 231.
- 303 S11 Restitution Act.
- 304 S11(7) Restitution Act.
- 305 S10 Restitution Act.
- 306 For some case law regarding an interim application to prevent a development from taking place refer to *Pillay v Taylor-Burke Projects (Pty) Ltd and others* (LCC) 119/99; *Hlapi v Le Grange and another* (1999) a All SA 125 (LCC). The court will take into account the normal considerations that apply in cases of such relief, namely the balance of convenience, the risk of disproportionate prejudice, and options for redress should the order not be granted.
- 307 S11(7)(d) Restitution Act.
- 308 KK Mwenda, Land claims and mineral rights in Namaqualand: A comparative legal study, *SA Public Law*, 1994, pp 81-93.
- 309 TW Bennett, Redistribution of land and the doctrine of aboriginal title in South Africa, *South African Journal on Human Rights*, 1993, p 447.
- 310 (1608) 7 Coke's Rep 1a; 77 ER 377 at 398.
- 311 (1774) 1 Cowper 204.
- 312 (1919) AC 211 (PC).
- 313 TW Bennett, and CH Powell, Aboriginal title in South Africa revisited, *South African Journal on Human Rights*, 1999, p 484.
- 314 Bennett, 1993, op cit, p 476.
- 315 *Richtersveld Community v Alexkor (Pty) Ltd* 2001, 1 SA 1293 at Par 44-53, 117.
- 316 For a critical analysis of the decision refer to LA Hoq, Land restitution and the doctrine of native title: *Richtersveld community v Alexkor Ltd and another*, *South African Journal of Human Rights*, 2002, pp 421-443.
- 317 See for example E Braude, Red tape bogs down land claims, *The Sunday Independent*, 30 August 1998.
- 318 For a very useful annual overview of progress with aspects of the land reform refer to W Du Plessis, N Olivier and J Pienaar, Land: still a contentious issue, *SA Public Law*, 13, 1998, pp 149-169; W Du Plessis, N Olivier and J Pienaar, Land reform surging forward, *SA Public Law*, 13, 1998, pp 470-489; W Du Plessis, N Olivier and J Pienaar, Land reform—trends developing in case law, *SA Public Law*, 14, 1999, pp 528-553; W Du Plessis, N Olivier and J Pienaar, Land reform: a never ending process, *SA Public Law*, 15, 2000, pp 230-254; and W Du Plessis, N Olivier and J Pienaar, New measures to expedite land reform, *SA Public Law*, 15, 2000, pp 549-573.
- 319 Turner and Ibsen, 2000, op cit, p 12.
- 320 For complete statistics refer to the DLA website <www.land.pwv.gov.za/restitution>
- 321 Refer for example to the Makuleke community which lodged a single claim representing between 8,000–10,000 persons. B De Villiers, *Land claims in national parks—the Makuleke experience*, HSRC Publishers, 1999.
- 322 Du Toit, 1999, op cit, p 1.
- 323 Kepe and Cousins, 2002, op cit, p 3.
- 324 *Ibid*, p 4.

- 325 Bernstein, 1997, op cit, p 6.
- 326 Turner and Ibsen, 2000, op cit, p 11.
- 327 Ibid, p 36.
- 328 Farmers band together to fight claims, *Sunday Independent*, 13 February 2000.
- 329 Du Toit, 1999, op cit, p 6.
- 330 Refer for example to the groundbreaking *Grootboom case (Government of RSA and others v Grootboom and others 2001 (1) SA 46 (CC))* in which the Constitutional Court recognised the ‘right to shelter’ of a person and ordered the government to set aside a reasonable proportion of the budget for persons who have no access to land, no roof over their heads and who are living in intolerable conditions or crisis situations. This case illustrates the competing demands on an already strained public purse.
- 331 Turner and Ibsen, 2000, op cit, p 47.
- 332 Approximately 150 farmers have been murdered a year for the past few years—a ‘decline’ compared to previous years. SA boere wil leer uit Zim situasie, *Rapport*, 17 November 2002 <www.news24.com/Rapport/Content_display/RapportArticleIndex/0,5798,752_1286077,00.html> According to police statistics 906 farm attacks occurred in 2000 and 723 in 2001 with 256 people dying in farm attacks in 2001. It is estimated that a total of 1,020 farm attacks occurred in 2002 with 120 persons losing their lives. Farms attacks mark year end, *Mail and Guardian Online*, 13 January 2003.
- 333 Swart, Regering gaan binnekort oortollige grond verkoop, *Beeld*, 6 August 1999.
- 334 Staat moet sy grond weggee, se DP, *Beeld*, 24 January 2001.
- 335 W Du Plessis, N Olivier and J Pienaar, New measures to expedite land reform, *SA Public Law*, 15, 2000, p 549.
- 336 Quoted in Schirmer, 2000, op cit, p 162.
- 337 Miljarde vir grondeise, *Beeld*, 25 September 2002.
- 338 Turner and Ibsen, 2000, op cit, p 13.
- 339 Ibid.
- 340 Ibid, p vi.
- 341 Turner, 2002, op cit, p 6.
- 342 Cousins, 2002, op cit, p 2.
- 343 Refer for example to the San community which ran the risk of losing some of their land restored three years earlier due to bad debt incurred by the CPA. San risk losing their land, *Mail and Guardian*, 12-19 September 2002.
- 344 Aid is linked to democracy, warns European parliament, *Mail and Guardian*, 1 November 2002.
- 345 Refer for example to, Boere in KZN loop deur soos in Zim, *Beeld*, 8 July 2000; Threat of EC land invasions, *Mail and Guardian*, 28 April 2000.
- 346 Regering wil grond vinniger herverdeel, *Rapport*, 22 September 2002.
- 347 S Schirmer, Policy visions and historic realities: land reform in the context of recent agricultural developments, *African Studies*, 59, 2000, p 161.
- 348 Ibid, p 163.
- 349 Togna, There’s no promise of a rose garden once land is given back to communities, *Sunday Independent*, 13 February 2000.
- 350 Turner and Ibsen, 2000, op cit, p 16.
- 351 Director’s report as quoted in Du Plessis, et al, 2000, p 572.
- 352 Black boers change colour of Free State farming, *Sunday Independent*, 7 May 2000.

Chapter 4

MANAGING LAND CLAIMS IN SOUTH AFRICA: IMPROVING THE PROCESS

Land reform in South Africa is still in its infancy, yet few countries have embarked on the scale of land reform that is being undertaken in that country. The unequal allocation of, and access to, land developed during a century of racially discriminatory policies. This will take decades and even generations to rectify. Any suggestion of speedy land reform should therefore be tempered by realism, taking into account the scale of the problem, the limited resources to address it and the instability that could follow an unsuccessful land reform policy.

In order to improve the current system of claim management, an analysis is required at a far larger scale than allowed for within the limitations of this study.

Based on experiences in the four case studies thus far, the following brief suggestions can be made for consideration in terms of South Africa's land claim process:

DOWNSCALING OF EXPECTATIONS

The greatest risk to an orderly process of land reform and land claims is that expectations spiral out of control and that a government is judged by its own unrealistic rhetoric. It ought to be made clear to the South African public that the settlement of land claims is a very complex issue, that land cannot be handed back without sufficient infrastructural and post-settlement support and that realistic time-frames have to be pursued. In the same way that historical imbalances in education, health, housing and social services will take decades to

rectify, it should be made clear that there is no short cut or quick fix when it comes to land claims. What would ultimately count is not so much the haste at which land is handed back, but the success or failure that results from it. By hastening the process in an undue way, government may in a few years have a far bigger problem on its hands in terms of resettled people turning to it for assistance due to failed implementation strategies.

CLARITY ON AIMS AND OBJECTIVES

Land claims cannot be the sole focus in a sustainable policy of land reform. While the claim process has its place within the spectrum of land reform options, it should not become the sole driving force. The realisable objectives of land claims are few and should be clearly spelled out. If the main objective is the redress of historical wrongs, a different strategy is required compared to when the aim is poverty reduction and employment creation. In short, a strategic rather than a political approach is required to guide land reform in general and land claims in particular during the short, medium and long term. Government should therefore approach land reform in a business-like manner where a clear long-term vision is defined and short- and medium-term objectives and strategies are adopted to realise that vision. Promises that the land claims process will be complete in three years may not only inflame the debate but could also turn out to be totally unrealistic. At present it would seem as if government is fixated on a numbers game and cheque book settlements whereby the mere settlement of claims is accepted as a valid objective. While that may have some attraction from a political perspective, it could turn out to be shortsighted, especially if complicated claims delay the process and enterprises on settled claims turn out to be unsustainable. It is even possible that in a few years claimants complain to government that they had been rushed into settlement and would rather revisit it.

IS RESTORATION ALWAYS THE BEST?

The state and claimants should, with the assistance of experts, consider whether the restitution of rights on a specific piece of land is indeed the most appropriate option in the settlement of a particular claim. Although the symbolic significance of the return of ancestral land is important, there are many instances where the actual return of ancestral land has not necessarily lived up to expectations. In

some instances farming practices have changed or families have been removed from land for many years and have lost their day to day interaction with it. In many instances the younger generation has different priorities to their parents or grandparents. This again stresses the importance of having clear objectives prior to the restitution of a right. If the objective is mainly rectification of a historical wrong then restitution of rights in ancestral land might be appropriate. However, if the objective is also the relief of poverty or the creation of employment, it may be more appropriate to make available other, more suitable, land. Two cases in point are those of Riemvasmaak and the Makuleke community where ancestral land was returned but where it is debatable whether the benefits resulting from the return are the best the communities could have opted for. In both instances the communities' needs might have been better addressed by securing some access rights to the respective national parks but also to have made available alternative land where farming, grazing and other employment-generating enterprises could have been pursued.

MAINTAIN RULE OF LAW

It is essential that the rule of law is maintained as the basis for orderly land reform. The same principle applies to government processes in general. There is no real political benefit for any government to allow the land claims process to slip out of control by occupation of land in accordance with the Zimbabwean experience. The political and economic price that is paid if land reform becomes uncontrollable is not worth the possible 'benefits'. In the same way that disadvantaged persons know they cannot occupy a school, hospital or any public facility for the mere fact that the social reform process is slow, the same standard should apply in the protection of property and other constitutional rights. Any suggestion that property rights could suffer at the expediency of land reform would be a fatal blow to foreign support for land reform.

INTEGRATE POLICY

Arguably the most serious hurdle facing each of the countries covered in the case study is to develop and implement an integrated policy for land reform. South Africa's process is characterised by a high degree of segmentation whereby all relevant departments are not always involved from the early stages to the implementation of land claim outcomes. In many instances local

governments and/or provincial departments are only involved very late in the resettlement phase, or worse even, only at the implementation stage. This is too late as it affects their ability to take co-ownership of the process and also ignores the contribution they could make in developing a post-settlement support scheme.

It is therefore essential to define clearly what the role of the respective government departments and even NGOs such as farmers' unions is and at what stage they should become involved in policy development and implementation. Consideration should be given to the establishment in each province of an intergovernmental committee on land reform where all national, provincial and local governments with an interest in land reform could be brought together to oversee the process, make adjustments and consider post-settlement support.

SET UP SPECIALISED POLICY UNIT

Consideration could be given to the establishment of a single national land reform policy unit that could take over all responsibility to oversee the land claim and reform process. Such a unit should preferably be based in the Office of the President to ensure that it has the necessary status to direct policy and to enhance the importance of land reform as a national policy. The unit should not necessarily have executive powers but should rather be responsible for coordinating and facilitating the activities of national and provincial government departments to ensure that the objectives of land reform are met. The unit could also be responsible for monitoring and evaluating land claims to make timely amendments to policy rather than to risk the accumulation of failures. The unit would be able to take a long term as well as a wide-angle view by looking at land reform in general and land claims in particular on an interdisciplinary and interdepartmental basis while at the same time being removed from the day to day complexities of policy implementation.

ESTABLISH PARTNERSHIPS

An essential element of the land claims process is to ensure that viable partnerships are established between the new landowners, current landowners, the state and NGOs. The complexity of the process demands it. Consideration could therefore be given to 'reward' those claims where partnerships have been established with local NGOs, farmers' organisations, etc. by prioritising them

for settlement and post-settlement support. Financial and other incentives could also be given to partners in such schemes to encourage them to train and assist new landowners. In this way the settlement of land claims could become a win-win rather than a win-lose process.

MOVE AWAY FROM ADVERSARIAL TO COOPERATIVE APPROACH

An adversarial approach to land reform in general and land claims in particular will not lead to sustainable outcomes. Government cannot reasonably expect black farmers to settle successfully if their white neighbours are alienated in the process leading to the settlement of a claim. At the same time white farmers cannot expect the realistic land needs of black people to remain unresolved. Farming communities survive on the basis of mutual support. Bureaucrats in cities may not always be sensitive to the reality of interaction on farms but the fact is that no farmer can exist as an island. Existing farmers should therefore be made part of the solution rather than being seen as an obstacle to land reform. They should be shown that their own security—physical and tenure—can be enhanced by a successful land reform policy, while claimants should also be aware that their success in dealing with post-settlement issues will depend to a large extent on the goodwill and cooperation that is found in farming communities.

NATIVE TITLE

The land claims process could be seriously complicated if the recognition of native title outside the framework of the Restitution of Land Rights Act was added thereto. The Australian experience demonstrates not only how complicated a native title claims-driven process can be but also the disproportionality between expectations and eventual outcomes. The *Richtersveld* case does not necessarily provide a basis for general recognition of native title but rather places the customary rights of the Richtersveld community within the ambit of the Act. Should a general common law right to native title be recognised it has to be acknowledged, however, that managing two parallel land claims processes—in terms of native title and the Restitution of Land Rights Act—will be difficult if not impossible to accomplish. Even if native title is therefore found to exist, government would have to consider ways of dealing with it through existing legislation or amendments thereto to prevent

any uncertainty and to ensure that the integrity of the current land claims process is retained.

BUILD ON STRONG POINTS

Any strategically directed process entails identifying strong points and building on them while at the same time reducing weak points. There are many strong points that could serve as a basis on which land claims could be directed, for example:

- the availability of state land and the relative ease in which it can be made available for the purposes of restitution and restoration;
- the availability of communal land which could serve as a focal point to secure tenure rights of those living on the land and also to acquire adjacent land;
- identification of projects that have proved to be workable and sustainable in order to demonstrate what can and cannot succeed;
- the availability of foreign support for the land reform process and in particular linking foreign agencies up with medium- and long-term support and monitoring projects at a provincial level; and
- using the general good will that exists to encourage existing farmers to enter into partnership agreements with new farmers to assist in training, sharing of expertise and equipment, etc.

LAND RECONCILIATION COMMISSION?

One of the objectives of the land claims process is to assist with and contribute to the reconciliation process in South Africa. The question that arises is whether the way in which land claims are approached at present sufficiently contributes towards such an objective. One could argue that the current process does not facilitate sufficiently the opportunity for people to tell their stories out of court about how they were removed from their land, what they recall happened on the land prior to their removal and why the land is of such importance to them. The administrative settlement of claims does not require such an open public process, while on the other side of the spectrum the process in the Land Claims Court is of a legal, evidentiary nature. It may be that at least some of the aspirations for reconciliation and recognition of past injustices could be dealt with in a similar way to that of the Truth and Reconciliation Commission—that is, by creating opportunities for people to have their stories about their land recorded publically.

PROVINCIAL EXPERIMENTATION

Room should be allowed for a degree of experimentation at provincial and local level in dealing with land claims and post-restitution support. Without deviating from national legislation and policies, provinces may be useful testing grounds to attempt different solutions according to their own circumstances. The experience in Australia demonstrates how different state governments have come up with quite distinct ways of dealing with native title within the ambit of national legislation. A 'provincialisation' of aspects of land reform will contribute to provinces accepting ownership of the process and will involve community based organisations with a higher degree of influence and participation. Provinces could learn from one another both in terms of success and failure. It may also be attractive for foreign donors and agencies to become involved with the land reform process of a particular province in the medium and long term.

MONITORING

It should be acknowledged that the land claims process in South Africa is unique in scale and complexity. All involved are on a steep learning curve and it is obvious that mistakes will be made. The sooner the realism of complexity is understood and acknowledged, the less the demand for quick fix solutions will be. In order to improve the policy and to smooth its implementation, constant monitoring is required on the basis of set criteria. At present the main criterion is 'statistical', namely, the number of claims that have been settled. This is rather superficial and one-dimensional. What is required is first a clear set of criteria that could be used to evaluate the progress with land claims and in particular in dealing with post-restoration issues, and second, target areas within each province where evaluation can take place on an ongoing basis with the aim of identifying pitfalls, highlighting successes and proposing alterations to policy.

Chapter 5

AUSTRALIA: NATIVE TITLE—A QUIVER OF DISAPPOINTMENTS³⁵³

Land reform in Australia, and in particular the land aspirations of Aboriginal people, is arguably one of the most neglected topics of public policy. Although the recognition of 'native title' in 1992 gave some impetus to demands of Aboriginal people to have their land rights recognised and restored, the country does not yet have a coherent national policy to deal with the land aspirations of Aboriginal people. Land reform comprises three main elements, namely: the recognition of native title through a litigious and adversarial process; the acquisition of land by the Indigenous Land Corporation; and the transfer of Aboriginal reserves held by state governments to the Aboriginal people themselves. There is, however, no clear land reform policy in place and support programmes are ad hoc and without clear purpose or direction. The following chapter provides a brief overview of the main elements of native title, the limitations inherent in the current land reform programme and general comments concerning experiences in land reform.

BACKGROUND

Volumes have been written about Australia's treatment of Aborigines since the arrival of Captain Cook in 1770 and the declaration of British sovereignty in 1788 when Governor Phillips took possession of the continent. As in the other three case studies, the imposition of British sovereignty in Australia was accompanied by discriminatory policies towards Aboriginal people that are on par with what happened in South Africa, Namibia or Zimbabwe. The consequences of the policies are still visible today when the state of Aboriginal social, educational, health and welfare is compared with those of white Australians.

The philosophy underpinning the treatment of Aborigines after British sovereignty is well summarised in the following quote:

It may be doubted that whether the Australian aborigine would ever have

advanced beyond the status of the Neolithic races in which we found him. And we need not therefore lament his disappearance. All that can be expected of us is that we shall make his days as free of misery as we can.³⁵⁴

According to Havemann³⁵⁵ the chronology of Australian treatment of Aborigines can be categorised as follows:

- Pre–1860: coercion, genocide and dispossession
- 1860–1920: paternalism and coercion, segregation and protection
- 1920–1960: paternalism and assimilation
- 1960–1970: integration and segregation
- 1970–1990s: Aboriginal rights talk and confrontation

To these could, in the authors opinion, be added:

- 2000–: Native title, disillusionment and *quo vadis*

Until 1966, legislating for Aboriginal people was a competency of the state governments and therefore subject to very little national control or oversight. In 1967 the Australian constitution was amended to give the federal parliament the right to legislate over the affairs of Aborigines, and since then progress has been made towards eliminating discriminatory laws and practices and setting uniform national standards. It is, however, generally agreed that much is yet to be done to rectify historic and prevent continuing injustices being inflicted on Aboriginal people.

The notion of self-determination for Aboriginal people started to build momentum in the late 1960s and followed years of assimilation policies whereby it was hoped that the ‘problem’ facing Aborigines could best be addressed by integrating them as quickly as possible into white society.

In 1972 a policy of self-determination was adopted by the Labour government with the basic objective of “restor[ing] to the Aboriginal people of Australia their lost power of self-determination in economic, social and political affairs ...”.³⁵⁶

The first land rights legislation by the Commonwealth (federal government) was adopted in 1976 for the Northern Territory (which falls under control of the federal government)—the Aboriginal Land Rights (Northern Territory) Act, 1976.³⁵⁷ Some of the states³⁵⁸ also enacted legislation dealing with land rights but in general the enthusiasm for recognising Aboriginal land rights was low for various reasons—one being that to the majority of voters Aboriginal land rights were not at the top of, or even very relevant to, the political agenda. Furthermore, organised business and especially mining and pastoral industries generally opposed it for their own commercial reasons.

Even in the Northern Territory, land rights legislation enacted by the Commonwealth was opposed by the government of the territory. The legislation provided for a complex process of claiming land, but due to it being limited to the Northern Territory it is not the subject of this publication.

The commitment of the federal and state governments to “non-renewable utilisation of resources” that may be on land to which the Aborigines have title, has provided little motivation for expanding their potential land rights.³⁵⁹ Much of the areas claimed by Aboriginal people today under native title legislation are removed from the cities, located in desert-type areas where there is little if any farming activity, and in general of little interest to white society. However, due to the mining potential in many areas that are the subject of such claims, organised mining and pastoral industries—and as a consequence the state and commonwealth governments—have a direct interest in the outcome of the claims process. The difference between Aboriginal and mining interests’ approach to land is summarised as follows:

Whereas Australian governments, industry and agricultural interests generally tend to view the environment as a pool of resources to be mined, farmed or otherwise exploited for economic returns, indigenous peoples traditionally emphasise the integral nature of their relationship with the land, which is basic to their existence, and to their beliefs, customs and culture.³⁶⁰

The impact of land rights legislation at state and national level brought about major change in the land held by Aboriginal people. In 1966 no person owned land on the basis of being Aboriginal while in 1994 726,7000 ha were held by Aboriginal people under freehold title.³⁶¹ If freehold and other leasehold arrangements were added, the total area of land held by Aboriginal people comprised 14% of the Australian territory (although account should also be taken that virtually all of this land is in the desert and semi-desert regions and it is concentrated in certain parts of the country). A process aimed at transferring Aboriginal reserves from the state governments to Aboriginal people is continuing.

As far as the common law land rights of Aborigines are concerned, the conventional wisdom in Australia until 1992 was that all land at the time of colonisation in 1788 was *terra nullius*, or no-man’s land, and therefore belonged to the Crown.³⁶² This meant in essence that the area was regarded as “unoccupied or uninhabited for legal purposes and that full and beneficial ownership of all of the land of the Colony vested in the Crown, unaffected by any claims of the Aboriginal inhabitants ...”.³⁶³

This “legal fiction, patently absurd as a matter of fact”³⁶⁴ was overturned in 1992 in the now famous *Mabo* case³⁶⁵—one of the “most important decisions of the court in its 90-year history”.³⁶⁶ The six-member majority of the High Court rejected the *terra nullius* argument³⁶⁷ and held that native title did indeed exist and should therefore be recognised by common law.³⁶⁸ Note therefore that ‘native title’ was said in the court not to form part of common law, but is recognised by common law.

Native title was defined by the court as “indigenous inhabitants’ interests and rights in land, whether communal, group or individual, under their traditional laws and customs”. Native title, according to the court, “has its origins in, and gets its content from, the traditional laws and customs of indigenous inhabitants”.³⁶⁹

The Aboriginal concept of ‘land’ and ‘country’ and the relationship between land and a community is quite unique and different from that pertaining to the other three case studies. Although in Africa there is great spiritual and physical attachment to ancestral land, the way in which ancestral land forms part of the physical, spiritual, religious, and cultural mind frame of Australian Aboriginal people is indeed special.

In essence the totality of the Aboriginal legal system is integrated with land, the way in which features were created, and the interaction and response of humans to country. A complex system of laws and customs exists that deals with the creation of earth (Dreaming) and the kinship or social organisation of Aboriginal people.³⁷⁰

Land for Aboriginal people is therefore far more than a property right—it determines the very rationale for existing as a human being and forms part of a community of persons sharing the same laws and customs.

The land rights debate in Australia is therefore multi-tiered. At one level it refers to the recognition of rights to ancestral land and the right to practice law and customs in the widest sense. At another level it refers to the need to obtain freehold or leasehold title to land for the purposes of poverty relief, creating employment and regional development. Native title, as formulated by the Australian courts and the Native Title Act 1993 as a co-existing right to land, does not offer the wide range of management and control capabilities available from freehold or leasehold titles. As will be shown, native title is at the bottom of a pyramid of rights and therefore subject to extinguishment and/or limitations by the rights of others.

It should therefore be noted that irrespective of the outcome of native title

claims, Aboriginal people's quest for ownership of land will remain on the agenda. The land claim process for the recognition of native title, which is the subject of this research, deals primarily with the quest of Aboriginal people to have their native title determined.

THE ADVENT OF NATIVE TITLE

Aboriginal (native) title originated in the writings of Spanish jurists of the 15th and 16th centuries who argued that native communities retained certain rights that were not affected by colonial conquest.³⁷¹ Unlike uninhabited areas (*terra nullius*), inhabited territories could only be obtained by cession or conquest from which obligations to the indigenous inhabitants followed.³⁷² Since the early 1970s the notion of native title received increasing attention in the US and Canada although it was virtually ignored in Australia due to the belief that the country was *terra nullius* when British sovereignty was established.

However, with the advent of the land rights movement in Australia, international recognition of the rights of indigenous people, renewed emphasis on the right to self-determination,³⁷³ and increased mining activity in rural areas that formed the heart of Aboriginal spiritual life, the concept of native title and the validity of the *terra nullius* doctrine was revisited.

The recognition of native title by the High Court in the *Mabo* case³⁷⁴ was a "much-needed shot in the arm" for the restoration of land rights.³⁷⁵ The *Mabo* decision overturned the 1971 *Millurrrpum* decision³⁷⁶ in which it was held that since no legal rights to land of indigenous people existed in British law at the time of colonisation, no basis existed for its later recognition.³⁷⁷

The court in *Mabo* rejected the notion that at the time of colonisation the indigenous people were functioning "without laws, without a sovereign and were primitive in their social organisation".³⁷⁸ The court stressed that the "facts as we know them today" do not fit this "theory". It relied on the advisory opinion of the International Court of Justice in the *Western Sahara* case,³⁷⁹ in which that court also rejected the *terra nullius* concept.³⁸⁰ The Australian court stressed that international law recognised universal human rights, and that Australia should keep pace with such international human rights developments.

The following quote from Brennan J who delivered the leading judgment in *Mabo* best summarises the view of the majority:

Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of

settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.³⁸¹

On the basis of the *Mabo* and subsequent decisions such as *Ward* and *Yora Yorta* as discussed below, three key elements of proof can be identified as being required for a successful claim of native title, namely:

- A traditional connection with the land being claimed under the laws and customs of the group.
- An identifiable community or group with laws and customs regulating their access to and control of the land.
- A substantial maintenance of connection with land without having to ‘freeze’ their culture in time—therefore recognising that a culture may adapt over time to suit new circumstances.

In essence the decisions mean that Australian law has to recognise the legal systems that were in place before colonisation, provided that claimants/traditional owners can demonstrate continuing ‘traditional connection’—be it physical or spiritual³⁸²—with the land. Although a legal breakthrough in recognition of Aboriginal rights to land, the actual interpretation of the basis of those rights together with the legal situation concerning extinguishment of rights, probably means that no more than about 10% of indigenous people have “any chance” of establishing native title.³⁸³

Various reasons were offered at the time for the court’s *Mabo* decision. Some were that:³⁸⁴

- it presents a break with English law and asserts a sense of republicanism by defining a unique Australian law with regard to indigenous rights;
- it represents an intention to adhere and contribute to the development of international law and uniform norms and standards;³⁸⁵
- it was a conscious effort to broaden the protection offered to indigenous people under Australian law and to rid the country of its past transgressions towards those people. The court showed that past policies were based on the fiction of *terra nullius* and did not “mesh” with the “contemporary values” of the people of Australia;³⁸⁶ and
- the “moral presence” of the past forced the judges to “dramatically reconstruct the law” and declare that any other decision would have been “inappropriate”.³⁸⁷

The *Mabo* decision was received as a “shock” all over Australia and as a daily newspaper reported at the time, its “widespread ramifications are only now being realised and sending shivers across the mining and farming industries”.³⁸⁸

For all practical purposes the court rewrote the common law as it had stood since the time of colonisation on the rights of indigenous communities.

It was greeted with great excitement by Aboriginal groups as a new dawn in their land rights demands—although since then disappointment with the process has set in. This disappointment is caused by five main factors, namely:

- the slow pace of redress;
- the onus of proof to demonstrate the existence of native title and the complexity and litigious nature of the legal process;
- the vigorous way in which the states and Commonwealth as well as organised mining and pastoral industries oppose the determination of native title;
- the way in which the content of native title has been eroded by subsequent court rulings; and
- the disappointment that has followed a determination when native title holders realise that their title does not necessarily enable them to effectively manage and control their land.

The risk therefore is that even a successful determination of native title will leave a community severely disappointed as to what they had actually ‘won’.

For purposes of this study the main findings in *Mabo* can be summarised as follows:

- The concept of *terra nullius* was rejected. This means that in principle the legal systems that were in place before colonisation may be recognised, provided that the claimant can prove such title.³⁸⁹
- Indigenous people claiming recognition for their rights must be able to show that a system of law and customs existed before colonisation.³⁹⁰
- Although a wide definition of occupancy or title is used that may include nomadic groups, their presence on the land must be more than “coincidental or truly random”.³⁹¹
- Membership of the indigenous group is based on biological descent and mutual recognition of a person’s belonging to the community;³⁹²
- Traditional native property rights can be “extinguished”³⁹³ by the Crown, provided that such action is a “clear” and “unambiguous” executive or legislative action³⁹⁴ or that the continued existence of native title would be inconsistent with existing laws.
- The fact that the claimant’s customs and legal systems have changed over the years is immaterial—native title can be acknowledged irrespective of such change provided that the connection to the sovereignty laws and customs can be identified.³⁹⁵

- Native title continues to exist in national parks, forest reserves and other protected areas, however later case law development has determined that native title is extinguished over such areas where they have been vested in an entity such as a conservation authority.³⁹⁶

Full recognition of native title by common law is therefore subject to the application of laws by the federal government,³⁹⁷ and although legislation has been passed at these levels, it is arguable that the outcome, if not the purpose, of some of the legislative regime is to restrict native title rather than to recognise or expand it.³⁹⁸ The reason that this should be so is due to the fact that native title is not “an institution of the common law nor a form of common law tenure but it is recognised by the common law”.³⁹⁹ It is therefore subject to the general laws of the land.

Critics of Australia’s lack of a land reform policy argue that since the recognition of native title a decade ago, the full implications of *Mabo* have been “wound back” by “relentless” campaigns aimed at diluting its potential.⁴⁰⁰ To them there is little doubt that for the moment at least, the “pendulum has swung against Aborigines”⁴⁰¹ and that recent government policy announcements and judgments by the High Court further threaten to “erode” indigenous rights.⁴⁰² There are, however, critics of native title who argue that the concept has proved to be unworkable, that it has contributed to corruption and community conflict, that it has divided the Australian community, that it has stifled developments in especially the mining industry and that access to land could be dealt with far better through simplified land rights legislation and general principles of governance.

Since the handing down of the *Mabo* decision and the Native Title Act 1993, the development of native title has been the subject of various rulings by the Federal Court and High Court. Without discussing the respective cases in any detail, the status of key aspects of native title in Australian law⁴⁰³ can be summarised as follows:

NATIVE TITLE—CONTENT AND MEANING

RIGHTS AND INTERESTS

The common law of Australia recognises native title to land based on, and in accordance with, the traditional laws and customs of Aboriginal people. The Native Title Act, in an effort to codify the common law, defines ‘native title’ as follows:⁴⁰⁴

223(1) The expression ‘native title’ or ‘native title rights and interests’ means the communal group or individual rights of Aboriginal peoples or Torres Strait Islanders in relation to land or water where (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed by, the Aboriginal peoples or Torres Strait Islanders; and (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs have connection with the land or waters; and (c) the rights and interests are recognised by the common law of Australia.

In essence native title is a *sui generis* right⁴⁰⁵ which means it is unique, flexible and subject to adaptation but it includes rights such as hunting, fishing, camping, practicing of cultural and religious ceremonies, gathering of food and plants, utilisation of natural products and other rights and interests as determined on a case by case basis.⁴⁰⁶ Claimants have to be able to demonstrate which rights they have maintained and practiced,⁴⁰⁷ that they have maintained their connection with their land and that they continue to acknowledge, respect and practice traditional laws and customs.⁴⁰⁸ Native title can only be determined over areas where it has not been extinguished by any act of government—be it explicitly or due to the inconsistency of native title with such an act. Native title is not an individual title but is held by a community of people who share common traditional laws and customs.⁴⁰⁹

Native title is inalienable, which means it cannot be sold or transferred or subjected to any other encumbrance. Native title is a dynamic right that can be adapted over time and is therefore not frozen in time. However, “difficult questions” can arise in determining whether laws and customs have been “adapted” or in fact “abandoned”.⁴¹⁰ But it is at the same time possible that the customs of Aboriginal people were so altered, abandoned, interrupted,⁴¹¹ expired and disrupted by European settlement that they are no longer “in possession” of their traditional lands in accordance with their laws and customs.⁴¹² It is therefore expected that in many cases the court will find that in effect the ‘tide of history’ has washed away the adherence to traditional laws and customs.⁴¹³

Native title is regarded as a ‘bundle of rights’ (a combination of specific usage rights) and should therefore not be equated with a property right similar to an interest in land such as estate in fee simple.⁴¹⁴ Each right should therefore be established on a case by case basis and could thereby be extinguished on a case by case basis.⁴¹⁵ The court therefore has to identify the particular laws and customs that the specific claimant group holds over an area. Recent trends

suggest that the court is adopting a conservative stance in the development of native title with emphasis on ‘black letter law’ and a high degree of judicial restraint.

The quest of the court in the recent *Ward* case to determine which elements of the ‘bundle’ have been proven, is cynically described by Wootten as follows:

A solemn court of eminent judges in *Ward* sounded like children playing ‘he loves me, he loves me not’ with petals of flowers. Sometimes it was more like ‘this little piggy goes to market’—this little title goes back to the Federal Court to see how far it’s been extinguished ... Everything is done with respectable legal logic; the trouble is that it has no relation to justice, workability or commonsense outcomes.⁴¹⁶

The implication from the ‘bundle of rights’ approach is that under the Native Title Act, native title can be partially extinguished, that is, aspects of native title can be extinguished while other parts remain operative. The consequence is therefore that native title can become eroded over time with few rights in the ‘bundle’ remaining. Different Aboriginal groups may also have different rights in their ‘bundle’, which serves to complicate and confuse not only the traditional owners but also other interested parties that have to deal with traditional owners.

NATIVE TITLE EXISTS OVER LAND AND SEA

Native title exists over land and sea, but does not include subterranean rights such as rights to minerals.⁴¹⁷ Right to minerals belongs to the state although native title holders have rights to the surface under which minerals are deposited. In the case of native title over the sea, the right is non-exclusive in character which means that it co-exists with the rights of other persons seeking access to such coastal waters.⁴¹⁸ The court found that a right of exclusive possession over sea would be inconsistent with the right of innocent passage, as recognised by international law, as well as with the public rights of navigation and the right to fish as recognised by the common law.

EXTINGUISHMENT

Native title can only be extinguished in accordance with the provisions of the Native Title Act.⁴¹⁹ In common law (which is not necessarily the same as under the Native Title Act) native title can be extinguished when:

- persons lose or abandon their connection with their land and abandon traditional laws and customs;
- legislation or other executive acts by the Commonwealth (federal) or state or territory governments extinguish native title provided that the intention to extinguish native title is made clear and plain;⁴²⁰ or
- an irreconcilable inconsistency exists between native title and an act by the Commonwealth (federal) or state or territory governments.

Examples of some of the acts that extinguish native title are the granting of freehold,⁴²¹ roads, vested reserves, and other public works where the nature and extent is inconsistent with the continued existence of native title.

The existence of native title is therefore subject to acts by the state that may either explicitly or implicitly, due to inconsistency with an act by the state, cause native title to be extinguished.⁴²² The state can make grants that extinguish native title if such an act is irreconcilable with the continued existence of native title. There is no ‘degree’ of inconsistency: an act is either consistent or inconsistent with native title. In the case of inconsistency the native title right is extinguished to the extent of the inconsistency. Once extinguishment has occurred native title cannot be revived⁴²³ provided the state has complied with the provisions of the Native Title Act.

The connection of Aboriginal people to country has a physical and spiritual element.⁴²⁴ The mere fact that a community has for whatever reason not been able to access its country or practice its laws and customs not does in itself mean that the connection has been abandoned or discontinued. In the same vein, a right is not necessarily abandoned or lost if a community fails to exercise it for a period of time. However, the way in which a community uses and relates to land is important in determining the kind of connection and the type of rights it has in relation to others. If a historic community lost, discontinued or abandoned its laws and customs, such laws and customs cannot be ‘taken up’ by a contemporary community for purposes of proof of native title. In the recent *Yorta Yorta* appeal the High Court found that “the rights and interests in land to which the re-adopted laws and customs give rise are rights and interests which are not rooted in pre-sovereignty traditional law and custom but in the laws and customs of the new society”.⁴²⁵

In determining whether the extinguishment of native title may amount to discrimination, one has to revert to the Racial Discrimination Act, 1975 (Cth) which took effect on 31 October 1975. It is generally accepted that the Racial Discrimination Act gives native title holders, whose rights were extinguished

after the act took effect, the right to claim for compensation for such extinguishment. For example, a grant of a mining lease after the commencement of the Racial Discrimination Act could give rise to a claim for compensation for the loss of native title rights. However, the validity of an act (such as the grant of a mining lease) cannot be challenged on the basis that it breaches the Racial Discrimination Act.

The Native Title Act provides for a variation or even revocation of native title in light of events since the determination thereof.⁴²⁶ It is therefore possible to revisit a determination of native title after a period of time. It would seem as if such a review could not only include the diminution of native title rights but could also involve an expansion on the basis of cultural development.

NATIVE TITLE AND MINERAL RIGHTS

Native title does not include the right to minerals and even if it had included such rights, the legislation regulating the exploitation of minerals might have extinguished native title.⁴²⁷ A mining lease does not grant exclusive possession to land and therefore does not extinguish native title, although the type of activities that may occur on a mining lease may limit the exercise of some native title rights even though they are not extinguished.

The granting of a mining lease is for a specific purpose and therefore cannot exclude native title holders from all access and use of the land which is the subject of the lease.⁴²⁸ A distinction is therefore drawn by the court between inconsistency with statutory rights which extinguish native title and a competition of rights whereby the miner's rights under the tenement may prevail over native title but without extinguishing it.

INTERACTION WITH OTHER RIGHTS

It has already been explained above that native title is in effect at the lower end of the scale of a hierarchy of rights whereby native title can be extinguished or impaired by acts of state and by inconsistency with the rights and interests of others. Even in an instance where 'exclusive' native title is determined, the title remains subject to the limitations imposed by the rights and interests of others. The exclusive nature of native title can therefore be extinguished by an act that grants rights to others. For example, the granting of a pastoral lease may extinguish the right of native title holders to control access to their country, but

may not necessarily affect other rights of use and enjoyment on the pastoral station. In proving native title, claimants are therefore required to provide details of the exact nature of the rights that are claimed and the type of activities that are practiced.

From the above one could therefore conclude that native title, if determined, does not necessarily have a uniform content to all the land and sea that is the subject of the title. The 'content' of the bundle of rights can therefore vary between communities and even within an area where a community holds native title due to different tenure arrangements within the area. The right is in essence *sui generis* (flexible/dynamic) and depends on the facts and the law of each grouping. For example, certain rights may be included in one determination and not in another. To complicate matters further certain rights as determined may have application over certain parts of an area but not in another, depending on the nature of tenure and other acts, as well as the rights of other interest groups.

COMPENSATION

The question of compensation for extinguishment of native title under common law was left unresolved by the *Mabo* case.⁴²⁹ The issue is addressed by the Native Title Act which determines that compensation is payable for the loss or extinguishment of native title.⁴³⁰ The High Court has accepted that 'native title' is a 'property' for purposes of the Racial Discrimination Act.⁴³¹ However the way in which compensation is to be calculated and the criteria used for calculation are still open for further development.

The Native Title Act provides that native title may not be extinguished contrary to the act⁴³² and that native titleholders are entitled to compensation where native title is extinguished or affected.⁴³³ The basis upon which compensation is to be determined or calculated is expected to give rise to further litigation. Although native title does not include ownership of minerals, the loss in the use of land, access and spiritual loss that may be incurred due to mining activity, for example, could be factors that impact upon the development of a body of law guiding compensation.

There are two key criteria in the Native Title Act that determine the calculation of compensation. The first is that compensation should be 'on just terms' to compensate native title holders for any loss, diminution, impairment or other effect on native title rights and interests.⁴³⁴ However, the second

provision determines that in regard to a determination of total compensation the amount awarded “must not exceed the amount that would be payable if the act were instead a compulsory acquisition of a freehold estate in land or waters”.⁴³⁵

Given the rural, desert and semi-desert location of many areas that are the subject of native title, it is quite possible that the value attached to the land itself from the perspective of freehold is minimal, which in turns ignores the cultural and spiritual value of the land to the native titleholders.⁴³⁶

The High Court’s ruling in the *Ward* case brought some further clarity on the calculation of compensation by limiting the scope of native title and finding that it does not include cultural knowledge and rights to minerals and petroleum and the partial extinguishment of native title by pastoral and mining leases. However, the interpretation of the compensation provisions of the Native Title Act is yet to be determined.

The preferable way of dealing with compensation claims is arguably through negotiation but it can be expected that post-determination litigation will require the courts to develop criteria upon which calculation of compensation, be it through litigation or negotiation, can be based.⁴³⁷

FREEHOLD, LEASEHOLD AND NATIONAL PARKS

It has been mentioned earlier that the granting of freehold or exclusive possession leasehold extinguishes native title.⁴³⁸ Once native title is extinguished it cannot be revived.⁴³⁹

In the case of leasehold the situation is more complex and can differ from state to state where different legal regimes exist. In general it is acknowledged that a lease in principle does not confer an interest of exclusive possession. Native title is therefore not extinguished by the granting of a pastoral lease as there is no clear inconsistency between the rights granted under the pastoral lease and those held by the native title holders.⁴⁴⁰ The extent of native title rights over pastoral areas can, however, be limited due to the rights of the pastoralist in terms of the lease arrangement. For example, the native title right to control access to land is extinguished⁴⁴¹ but other rights, such as the right to hunt or camp, may continue to co-exist with the rights of the pastoralist.⁴⁴² However, a leaseholder would not be able to exclude native title holders from the pastoral station as the rights have to co-exist. The mere ‘conflict’ or ‘competition’ between native title rights and the interests of a lessee therefore

does not automatically mean that the lessee's rights prevail. Unless the very nature of the rights are inconsistent, they have to be harmonised.

Native title is not extinguished in common law regarding national parks,⁴⁴³ and the creation of a reserve for a public purpose is not necessarily inconsistent with native title.⁴⁴⁴ If, however, the management and control of a national park is vested in a manner that would be similar to fee simple (for example in a conservation authority) it could indeed extinguish native title.⁴⁴⁵

USE OF NATURAL RESOURCES

The leading case in determining the use of natural resources and how native title interfaces with modern conservation legislation is that of *Yanner v Eaton*.⁴⁴⁶ In the case a member of an Aborigine group used a traditional form of harpoon to hunt juvenile crocodiles in alleged contravention of the Fauna Conservation Act 1974 (Q), which by s 54(1)(a) provided that:

A person shall not take, keep or attempt to take or keep fauna of any kind unless he is the holder of a licence, permit, certificate or other authority granted and issued under this Act.

The offender was not in possession of a permit and relied on the provisions of the Native Title Act (s211(2)) which provided that:

... the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

(a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and

(b) in exercise or enjoyment of their native title rights and interests.

It was argued that the hunting of crocodiles in this manner fell within the ambit of the Native Title Act and that the person was therefore exercising his native title rights while hunting.⁴⁴⁷ The court was therefore called upon to determine whether native title rights were extinguished by the regulatory framework provided for in the conservation legislation.

The High Court held that:

- To determine what property interests are granted by a statute, broad generalisations would not suffice. A specific analysis has to be done to determine the scope of operation of a particular statute. The mere fact that a statute claims 'ownership' does not mean that all options under the category 'ownership' are included.

- The way in which the Fauna Act vests ‘property’ in the Crown is not exclusive from others having other forms of property rights over fauna. ‘Property’ refers not as much to an object (e.g. a crocodile) but rather to a relationship to an object.
- The Fauna Act vested *regulatory* powers in the Crown that cannot be equated with full beneficial ownership. The powers vested in the Crown were not specific enough to extinguish native title but rather to protect and manage natural resources. The regulatory power of the Crown and the exercise of native title rights can therefore co-exist.
- If the Crown intends to extinguish native title there has to be a ‘clear and plain intention’. It would seem as if the court would prefer a strict and narrow interpretation that requires the intention of the Crown to be clear and unequivocal. It would therefore seem that the regulatory power of the Crown may impact on the exercise of native title when a scarce resource is affected or even when hunting takes place on a commercial rather than sustenance basis.
- In any event, Section 211 of the Native Title Act provides that in certain circumstances native title holders do not require permits to enjoy their native title rights.

PROOF OF NATIVE TITLE

The Native Title Act defines native title as the communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters where:

- the rights are possessed under the traditionally acknowledged laws and traditionally observed customs;
- by those laws and customs the peoples have a connection to the land and waters; and
- the rights and interests are recognised by the common law of Australia.⁴⁴⁸

A determination of native title establishes whether native title exists and if it exists who the persons are that hold native title, the nature and extent of the rights and interests, and the relationship between native title and other interests.⁴⁴⁹

The ‘bundle of rights’ approach adopted by the court requires participation of each right that is claimed to “stifl(e) any larger claim to a more global or comprehensive right”.⁴⁵⁰ A very high ‘barrier of proof’ is therefore established, which in turn is in effect leading to a ‘frozen rights’ approach.

NATIVE TITLE ACT: INSTITUTIONS, POLICIES AND PROCEDURES

An important step in the development of a policy framework for the restitution of land rights was taken by the federal government with the adoption of the Native Title Act 1993, which in some respects can be compared to the South African Restitution of Land Rights Act. It put in place certain procedures for the management of land claims, including a mediation process and the regulation of activities that may impact on the rights of native title claimants. The Native Title Act recognises the ‘right to negotiate’ of Aboriginal owners. This means they must be consulted when certain developments on their land are planned, although they do not have the right to veto activities such as mining. The right to negotiate applies even before a successful determination of native title.

The Native Title Act is not only “extraordinary complex”,⁴⁵¹ it is perceived by many Aboriginal people to be discriminatory and limits their quest to have native title recognised rather than facilitating the process. The complexity of the Native Title Act makes it a feast for lawyers but conversely it enhances the feeling among many Aboriginal people of being disempowered and subject to different forms of domination. The Native Title Act has been criticised for not meeting “a number of international standards” pertaining to the rights of indigenous people and that it compares “poorly” with regional arrangements made in Canada.⁴⁵² In the 2001 Native Title Report, the Aboriginal and Torres Strait Islander Social Justice Commissioner commented as follows:

Australia has had almost a decade to establish a fair and just system to allow the benefits of inherent rights to be enjoyed by Indigenous peoples. This has not eventuated. In my view this is because inherent Indigenous rights are embodied in a system that is aimed at restricting rather than maximising these benefits.⁴⁵³

The key elements of the Native Title Act for the purposes of this publication are the following:

PREAMBLE

The Preamble of the Native Title Act sets the scene for the recognition of native title. The rationale for the act is the intention of the people of Australia to “rectify the consequences of past injustices” and to “ensure that Aboriginal People receive the full recognition and status within the Australian nation to which history, their prior rights and interests and their rich and diverse culture, fully entitle them to aspire”.⁴⁵⁴

OBJECTIVES

The main objectives of the act are to provide for the recognition and protection of native title, to establish ways of dealings with native title, to establish mechanisms and procedures for the determination of native title and to provide for the validation of past acts that may be impacted upon due to the existence of native title.⁴⁵⁵

INSTITUTIONS TO FACILITATE LAND CLAIMS

There are four main institutions that fulfill a key role in the operation of the Native Title Act, namely the:

- Federal Court;
- National Native Title Tribunal;
- Representative Bodies; and
- Prescribed Bodies Corporate.

Federal Court

A claim for native title is lodged with the Federal Court⁴⁵⁶ when persons who are authorised by the group to act on their behalf lodge an application (claim) for native title. A claim may not be made on land or waters where native title has been extinguished or where a determination of native title has already been made. Claims can therefore not include urban/freehold areas (in contrast to South Africa) irrespective of initial public fears that freehold property could be claimed.⁴⁵⁷ Upon receipt of an application the Registrar of the Federal Court provides a copy of the application to the Registrar of the National Native Title Tribunal (NNTT).⁴⁵⁸ The Registrar of the NNTT then applies the so-called 'registration test',⁴⁵⁹ which determines whether the claim qualifies for a wide range of pre-determination procedural rights, such as the right to negotiate, under the Native Title Act.

If more than one group of persons claims the same area, the claims are dealt with in the same proceedings⁴⁶⁰ and only one determination can be made for an area. The prospects for a negotiated or mediated outcome to native title claims can therefore be inhibited by the existence of overlapping claims as it may not be clear to respondent parties who of competing claimant groups the holders of native title rights and interests are. One of the aims of mediation is therefore to reduce or eradicate overlapping claims or at least to facilitate

agreement between the competing groups on sharing the area of overlap. In attempts to reduce the number of overlaps, account should, however, be taken of the cultural reality and landscape of Aboriginal people where country is not necessarily seen as rigidly demarcated areas, as in the western view, but rather as spheres of interest where in some instances a group had, and may still have, exclusive rights over certain areas but in other instances interaction between different groups has occurred due to the shared nature of culture and laws. The concept of rigid boundaries is therefore not only foreign to Aboriginal people but is perceived to be discriminatory as it adds a precondition to consent settlements that is not necessarily reflective of their laws and customs. In order to comply with the statutory requirements to prove native title, communities are often pressured to “reinvent themselves in artificial ways” by agreeing to do away with overlaps of claims which in turn opens up divisions within communities.⁴⁶¹

Similarly to South Africa’s Land Claims Court (LCC), the Federal Court may take into account the cultural and customary concerns of Aboriginal people when evidence is given, provided that the taking into account of such concerns is not prejudicial to other parties.⁴⁶² In contrast to South Africa, however, the Federal Court is not a specialised court dealing with land claims; it is therefore not, as the LCC in South Africa, generally perceived to be part of a new ‘social agenda’ by the state.

Criticism has been expressed at the perceived lack in some instances of individual judge’s sensitivity and understanding of cultural and customary concerns of Aboriginal people who are not used to the Federal Court’s litigious style and process.⁴⁶³ Claimants have also complained at the apparent reluctance by some judges to allow evidence ‘on country’ or the rigid application of rules in regard to admissibility of evidence.

Although the court has in general been willing to ‘go on site’ when restricted male or female evidence is given, evidence of a general nature is usually required to be given in towns and cities in rather formal circumstances. Hearings in regional town halls may already be novel to the Federal Court but to many witnesses the ideal way of talking about their country is to be physically on the country, being able to point out certain areas of importance and interacting with their family and/or community in the process of giving evidence.

The reluctance of the court to allow ‘on country’ evidence and the “highly legalistic and adversarial system together with the occasional inability to speak

fluent ‘court friendly’ English are significant hindrances” in the process of giving evidence.⁴⁶⁴ The litigious process is further exacerbated in that rather than attempting to work out a sustainable land distribution policy, the state and Commonwealth governments as well as mining and pastoral industry groups “sent their lawyers along, hugging their cards to their chests, in effect saying to claimants ‘if you cannot convince us that it is 100% certain that we will lose if we go to court, we will be prepared to settle’”.⁴⁶⁵

The Native Title Act requires that the Federal Court *must* refer every claim for mediation to the NNTT.⁴⁶⁶ If the court is, however, of the view that mediation will be unnecessary or if there is no likelihood of a mediated outcome, the court may order a claim not to be referred for mediation. The court may also during the hearing refer any matter for mediation.⁴⁶⁷ It may request the NNTT to report on the progress in mediation and matters related therewith.⁴⁶⁸ The court may at any time during proceedings adjourn to give parties an opportunity to reach a negotiated outcome.⁴⁶⁹

In the management of claims the Federal Court set a target of three years to dispose of all native title claims currently on the register.⁴⁷⁰ This target has proven to be unrealistic and to some it is an indication of the lack of sensitivity and/or understanding shown by the court towards the complexity of native title proceedings, the cultural and customary concerns of claimants and the lack of resources to properly prepare claims for trial. The rigid disposition target has also caused the court to be reluctant to adjourn cases and has put pressure on the mediation process by holding negotiations in parallel with hearings, which in turn is not conducive to an atmosphere of settlement.

The Social Justice Commissioner therefore summarises the situation aptly by concluding that “it is clear that representative bodies are not resourced to meet the three year disposition target set by the Federal Court for native title matters as well as carrying out their functions in relation to agreement-making and other functions”.⁴⁷¹

On 1 December 2002 there were 630 active native title determination applications across Australia. By state, the breakdown is as follows:

ACT	1	NSW	72
NT	182	Qld	187
SA	29	Tas	1
Vic	21	WA	137

Up to 1 December 2002 there had been 45 determinations of native title across Australia. By state, the breakdown is as follows:

ACT	0	NSW	10
NT	4	Qld	20
SA	1	Tas	0
Vic	1	WA	9

Of those 45 determinations, 31 were that native title exists in either whole or part of the determination area, while 14 were that native title does not exist.⁴⁷²

National Native Title Tribunal

The NNTT is established by the Native Title Act.⁴⁷³ The tribunal has a wide range of functions that includes the registration of native title claims, and mediation and arbitral functions related to future acts that may impact upon native title, mediation and research.⁴⁷⁴

The NNTT has 13 members who in turn are assisted by an administrative centre located in Perth with offices in other parts of Australia. In addition to mediation activities undertaken by the members, the NNTT may also appoint consultants to assist in mediation.⁴⁷⁵ The tribunal has not been active in making use of consultants for purposes of mediation. The NNTT members are therefore very hands-on with mediation, but at the same time their ability to undertake follow-up work and to mediate effectively in contrast to merely facilitating discussions, is limited.⁴⁷⁶

The NNTT may convene conferences between parties in an attempt to resolve matters in dispute. Statements made at such conferences are without prejudice and confidential.⁴⁷⁷ The NNTT may refer a question of law to the Federal Court for a decision.⁴⁷⁸ The Native Title Registrar⁴⁷⁹ is responsible to keep a register of all native title claims⁴⁸⁰ as well as all the successful determinations (successful claims).⁴⁸¹

Representative Bodies

The Native Title Act provides for the establishment of representative bodies—or land councils as they are also known—that have a wide range of functions under the Act to assist Aboriginal people in their native title claims and matters related thereto. The representative bodies are funded by the Commonwealth (federal government).⁴⁸²

The responsibilities of representative bodies include the research and preparation of claims; assisting in the mediation and resolution of disagreements

among claimants; assisting claimants in negotiations affecting their native title; certifying claims; and certifying land use agreements.⁴⁸³ In the case of overlapping claims the representative bodies must make “all reasonable efforts” to achieve agreement between claimants in order to minimise the number of claims over an area.⁴⁸⁴

The wide-ranging functions and responsibilities of representative bodies are not matched by their funding. It was noted in a 2001 report by the Parliamentary Joint Committee on Native Title that many representative bodies are unable to engage fully in the agreement-making process owing to insufficient financial resources.⁴⁸⁵ This conclusion is shared by the Social Justice Commissioner, who concludes in his 2001 report that “the allocation of funds in the Federal budgetary process has not ... apportioned sufficient funds to the representative bodies responsible for carrying out these functions”.⁴⁸⁶

The irony of the funding arrangement of representative bodies is that they are the “substantive protectors”⁴⁸⁷ of native title interests, with the state and Commonwealth governments generally opposing the determination of native title, but with the latter being responsible for the funding of representative bodies.

The ability of representative bodies to effectively prepare cases for hearing is therefore directly dependant on the grant they receive from what many Aboriginal people see as a hostile Commonwealth government. Manager of ATSIC’s land and development group, Brian Stacey, recently criticised the “refusal” of the Federal Court to accommodate the complexities facing representative bodies and the subsequent constraints on the capacity of representative bodies to “adequately” represent the interests of their clients.⁴⁸⁸

Prescribed Bodies Corporate

The Native Title Act provides for the establishment of prescribed bodies corporate (PBC) to hold the native title on behalf of successful claimants.⁴⁸⁹ The PBC holds native title as a trustee or an agent on behalf of the community. There is no rationale at common law why native title should be held by a body corporate but the drafters included such a provision in the Native Title Act in order to ensure a certainty as to the identity of the group, the membership thereof and procedures as to how matters affecting native title are dealt with.⁴⁹⁰ The PBC therefore “becomes the entity that speaks for and makes decisions on matters concerning native title in dealing with public authorities ...”.⁴⁹¹

A PBC has to be incorporated under the Aboriginal Councils and Associations Act, 1976 (Cth).⁴⁹² The Native Title Act does not make reference to where PBCs are to derive their income from. They are not, as is the case with representative bodies, necessarily financed by the Commonwealth. Several problems have arisen in areas of successful determination of native title due to the inability of PBCs to access funding for their activities.

A PBC has a wide range of functions, including:

- holding native title on behalf of the group (trustee corporation) or acting on behalf of the group (agent corporation);
- providing continuity to the group;
- acting on behalf of the native title holders in matters affecting their rights and interests—it gives the group a legal persona to enter into agreements, sue and be sued. but note that native title cannot be alienated unless the title is surrendered to the Crown;
- keeping a list of all members of the native title group;
- ensuring that decisions affecting the native title are made in a manner that complies with corporate and internal procedures;
- developing, recording and implementing policies and procedures adopted by the group;⁴⁹³ and
- becoming party to Indigenous Land Use Agreements.⁴⁹⁴

Although only a few PBCs have been established (owing to the limited number of determinations of native title) concerns have been expressed at the role and functioning of the bodies. Some of the concerns are:

- The very nature of an incorporated entity is foreign and culturally inappropriate to many native title holders. As a result they do not always accept ownership of the entity and the policies and procedures that arise from it. Hence the observation by Tony Lee, member of the NNTT: “I think we will see structures that are culturally inappropriate. And in the end it will be ‘easier’ for PBCs to employ non-Aboriginal ‘experts’ to run and administer them rather than Aboriginal people—history could repeat itself.”⁴⁹⁵
- It is perceived to be discriminatory that Aboriginal people are obliged to be incorporated in a specific way rather than them being able to choose the most appropriate mechanism (e.g. a company or unincorporated entity) for the native title to be held and managed.
- The capacity of PBCs to fulfill their obligations under the Native Title Act, the Aboriginal Corporations and Associations Act and general legal principles is severely limited. The funding of PBCs is uncertain and there is no strategy

in place to develop the capacity of those who are responsible for the daily running of PBCs.

- The imposition of a PBC is in some instances causing conflict and competition between traditional leadership/elders and those elected as office bearers of the PBC. In many instances the younger generation feels obliged to become more involved in the management of native title affairs, which in turn may cause conflict and confusion of roles with the older generation.
- The PBC structure does not necessarily allow the flexibility to reflect cultural and customary needs as far as group membership and hierarchy are concerned. The dynamics of a cultural community can be nuanced, while legal structures and membership lists of PBCs are generally rigid and inflexible.

FUTURE ACTS

The Native Title Act contains elaborate provisions to enable native title claimants to be consulted before the determination of native title, on matters that may impact on their native title rights and interests—so called ‘future acts’.

Although a veto is not given to claimants to bring to a halt proposed developments, they have certain procedural rights of which the so called ‘right to negotiate’ is the strongest. The right to negotiate enables claimants to be engaged by a person seeking access to land that is the subject of a claim, with the view of reaching agreement on the conditions under which a development such as mining may occur.⁴⁹⁶

Negotiations have to take place in ‘good faith’,⁴⁹⁷ which includes participating in negotiations with an open mind, a genuine desire to reach an agreement, the exchange of correspondence, commenting on proposals, and demonstrating a willingness to consider proposals and counter-proposals. The right to negotiate does not mandate a negotiated outcome but merely ensures that parties display a certain attitude and sincerity during negotiations.⁴⁹⁸ A period of six months is allowed for negotiations, whereafter a mediation and arbitration process begins under the auspices of the NNTT.

In the case of developments such as prospecting and exploration which have a lesser impact on native title rights and interests, an ‘expedited’ procedure applies whereby minimal procedural rights accrue to claimants.⁴⁹⁹ The management of the future act process on behalf of claimants forms part of the responsibilities of representative bodies, which in turn puts an additional drain on their resources.⁵⁰⁰

LAND USE AGREEMENTS

Owing to the nature of native title and the way it co-exists with other rights and interests, emphasis is placed in the Native Title Act on agreement-making regarding the use and sharing of land and resources associated therewith. Hence the reference in the Preamble to key words such as “friendly and cooperative relationships”, “interrelated issues” and “negotiation” of land use arrangements, and the recognition by the Federal Court that “... if the persons interested in the determination of those issues (land access) negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers”.⁵⁰¹

NNTT president Graeme Neate sets out the rationale for mediation and agreed outcomes as follows:

... it is arguable that a mediated outcome is the only way that the range of complex and interrelated issues facing a disparate set of parties can be addressed and settled ... The resolution of issues involves not only the identification and recognition of a range of rights and interests (including native title) but also the establishment (or reconfiguration) and maintenance of relationships between people in the region.⁵⁰²

The Native Title Act contains elaborate provisions dealing with Indigenous Land Use Agreements (ILUA). An ILUA is an agreement between a native title party and any other number of parties about any matter such as the use of land in an agreed way, regulating the relationship between the parties and other matters of common concern.⁵⁰³ An ILUA may include in the scope of the agreement a wide range of issues covering the whole claim area and a number of parties or it may be focused on a specific issue between a limited number of parties in an area of the claim.

An ILUA can be particularly useful in assisting parties to work out the details of the interaction of rights and interests after a determination of native title, although an ILUA can also be registered prior to a determination of native title. The determination of a successful claim may leave parties unclear as to how native title rights and interests will interact with other rights and interests. An ILUA could provide the basis whereby such post-determination issues are addressed.

As far as timing is concerned there are two stages when ILUA discussions can commence: the first is by awaiting the outcome of determination proceedings (by consent or through a trial) and then negotiating an ILUA to regulate access and related matters. Such a process is usually more litigious and could erode the

very association that parties require to build a stable relationship. The second is by linking consent determination⁵⁰⁴ and access arrangements as set out in an ILUA in a manner that would enable parties to agree to a consent determination of native title, while at the same time being fully informed of the impact that native title rights and interests may have on other right holders. The benefit of such a process is that parties attempt to resolve issues at grassroots level through agreement rather than litigation.⁵⁰⁵ However, deadlocks and delays in negotiating land access issues could in turn cause a consent determination to be derailed.

The Native Title Act provides for different types of ILUAs.⁵⁰⁶ An ILUA is in one sense similar to a normal contractual arrangement but due to the fact that it can be registered under the Native Title Act as a formal agreement, it provides parties with certainty that may not always be achieved through a standard contract. What makes an ILUA unique compared to a standard contractual arrangement is the elaborate process of consultation among the native title holders that has to precede its registration, the binding nature thereof on native title and third parties who are signatories to the ILUA, the registration thereof by the NNTT and the complexity of amending it.⁵⁰⁷

Examples of matters that could be regulated in an ILUA are:

- future acts and in particular conditions for mining, compensation, employment and contracting opportunities, etc.;
- alteration of native title claims and extinguishment of native title subject to the provisions of the Native Title Act;
- settlement of claims for compensation due to loss or diminishment of native title by past and future acts;
- the interrelationship with other rights, for example, access to pastoral stations, joint management of national parks and conservation reserves, etc.; and
- any other matter of common interest to the parties.

The time consuming and complex process of registering an ILUA is indicated by the fact that only 64 ILUAs—some on very small projects or areas—have been registered since 1993.⁵⁰⁸

LAND FUND

Similar to the land redistribution (acquisition) process in South Africa whereby land can be acquired for communities that may not have a valid land claim, a

Land Fund was established Australia in 1995 to facilitate the acquisition of land for Aboriginal people. The establishment of the Land Fund was, as is the case with the Native Title Act, in response to the *Mabo* decision.

The Preamble to the Native Title Act states the following regarding the acquisition of land:

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been disposed of their traditional lands, will be unable to assert native title rights and interest and that a special fund needs to be established to assist them to acquire land.⁵⁰⁹

The Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995 (Cth) was enacted to provide for a land fund to benefit Aboriginal people in general, and in particular those whose native title had been extinguished. The Indigenous Land Corporation (ILC) was hence established as an independent statutory authority to assist with the “acquisition and management of an indigenous land base”.⁵¹⁰ The ILC is accountable to the Commonwealth Parliament and its board is appointed by the Commonwealth government.⁵¹¹

The ILC therefore has a dual function—to assist in the acquisition of land on behalf of Aboriginal people and to assist Aboriginal people in certain land management functions.⁵¹² The ILC can either acquire land or make available grants or guarantee loans to enable Aboriginal people to acquire land.⁵¹³

The ILC is required to give priority to ensuring that Aboriginal people derive social and cultural benefits as a result of ILC activities. Its role is also to ensure that employment opportunities for Aboriginal people are maximised as well as maximising the use of goods and services by businesses owned and controlled by Aboriginal people.⁵¹⁴

The Land Fund receives a guaranteed \$121 million (indexed to 1994 values) for each financial year up to 2004, with the aim of becoming a self-sustaining fund that could consider applications for acquisition of land. Approximately 66% of the funds have to be invested to expand the capital base for future use. When the allocations end in 2004, the ILC will only receive the realised real return on its investments in the previous year, which will then be its only source to comply with statutory obligations.⁵¹⁵

In the execution of its functions the ILC has embarked on a process of consultation throughout Australia to identify land needs and availability of land as well as to assist in the development of land management proposals. Regional and sub-regional land needs plans have been drafted to serve as a guide for the acquisition of land.

Since its inception the focus of the ILC has shifted from “purely acquisition” of land to “long-term sustainable land use planning” with a new emphasis on economic development to ensure the sustainability of acquisitions and land management plans.⁵¹⁶ A total of 107 properties have been acquired and divested since the ILC began operating.

The activities of the ILC can be compared to the land acquisition programmes in the other three case studies whereby land is bought on a willing buyer–willing seller basis following submissions by the applicant group.

Some of concerns that have been expressed at the functioning and track-record of the ILC are the following:

- Frequent changes of policy which have left Aboriginal people unclear as to the criteria that are applied when land acquisition proposals are considered. Whereas the ILC started with an emphasis on cultural and social criteria and special considerations for those communities that are unsuccessful in their native title claims, the emphasis has shifted in recent years to a commercially driven imperative with the risk of the ‘haves’—those already in possession of land or having experience in land management—reaping the main benefits. Current criteria used by the ILC to evaluate acquisition proposals put strong emphasis on the demonstrated ability of proponents to manage land, to undertake commercial activities and to access additional funding. This is similar to the new acquisition policy in South Africa and may lead to continued neglect of the poor and marginalised communities.
- The application process is highly technical, bureaucratic and driven by ‘planning’ requirements that often cause proposals to be submitted in a form that suits the funding body rather than reflecting the real needs of Aboriginal people. Instead of building projects around the skills in the Aboriginal community, the emphasis on commercially sustainable projects has in some instances caused communities to agree with business plans that contain various enterprises which do not necessarily enjoy support from within the community.
- The slowness of the ILC bureaucracy and decision-making process is such that in many instances land is sold by the time the ILC is ready to make an offer. With each application having to go to the ILC board for approval, the process from application to making an offer is extraordinarily drawn-out and is not able to keep track with the dynamics of the market. In addition some landowners have added a premium to their asking price as soon as it becomes known that the ILC is interested in the acquisition thereof.

- There are concerns that the ILC is not taking proper account of the wide spectrum of land needs among Aboriginal people. In many instances Aboriginal people are seeking an opportunity to return to their country for cultural and social reasons without necessarily commencing large-scale commercial enterprises. There is little scope in the ILC processes for such acquisitions to be supported.
- Many Aboriginal people are concerned that the ILC process of acquiring pastoral stations is forcing them to continue with an industry that has already been shown to be on the decline. Across Australia the pastoral industry is in dire straits and many pastoral leaseholders often are too eager to dispose of their interests. Few Aboriginal people have training or experience in the running of pastoral stations although many of the older generation have worked on stations. As a result the ‘failure’ by Aboriginal people to ‘successfully’ manage pastoral stations is often highlighted by the media without taking into account the general state of despair of the industry.
- The post-acquisition support and training offered by the ILC is not sufficient to ensure the sustainability of programmes. This is similar to the lack of post-settlement support in the three other case studies. In a certain sense, however, Aboriginal people in Australia are worse-off due to the lack of well established NGOs and international donors to assist with their land management. Aboriginal people generally have to rely on government agencies such as the ILC, representative bodies and ATSIC to assist in post-acquisition support but none of those are equipped or funded to provide effective support and training. As a result there is a perception that Aboriginal people are set up to fail regardless of the sound objectives of the ILC.

OBSERVATIONS

For purposes of a comparative overview between the four case studies, the following observations can be made of the Australian experience with land claims:

- Australia has some way to go in order to develop an integrated, cohesive land reform policy and plan that would address the land needs of Aboriginal people. Native title is in essence a construct of the High Court and does not come close to addressing the practical needs and aspirations of Aboriginal people to have access to land. Native title does not offer Aboriginal people security of tenure, such as leasehold or freehold, that would enable viable

economic, commercial or even uninterrupted cultural practices on their land. As Tony Lee, member of the NNTT, remarks: “I believe the resolution of native title is 10% about the law and 90% about people’s compassion, goodwill and economics.”⁵¹⁷ While native title does address the historical legacy of *terra nullius*, land reform has not yet moved beyond the domain of litigation and adversarial relationships. The country became reluctantly involved in recognising native title and thereby, indirectly, the land aspirations of Aboriginal people. Although Australia is slowly coming to grips with the reality of native title and what it means, large-scale opposition from government, mining and pastoral industry as well as others remains to the determination of native title. Very few claims have been successful and the litigious nature of the determination process is eroding rather than constructing positive relationships. Overall the “... intended beneficiaries are, in fact, the most obvious victims” of a system not working properly.⁵¹⁸ The Federal attorney-general also remarked recently that the “litigation process has been identified as slow and not delivering outcomes for participants”.⁵¹⁹ The land acquisition programme through the ILC has had some success but due to a variety of factors the organisation has not been able to develop a clear focus to address the land needs of Aboriginal people.

- ‘Native title’ is inherently a relatively weak title when in conflict or competition with other rights and interests. The way in which the content of native title has been interpreted by the judiciary has eroded rather than enhanced what Aboriginal people see as their right to land. The core dilemma for Aboriginal people remains the fact that native title has to be proven through a litigious process due to the unwillingness of government to develop a sensible land reform policy that would recognise the cultural and commercial interests Aboriginal people have in land. Hence the criticism by Wootten that “overall the process has been a failure in almost every criterion”.⁵²⁰ Native title is exposed to extinguishment, limited application when inconsistent with other rights and a heavy and sometimes impossible burden is placed on claimants to demonstrate each of the elements of the ‘bundle of rights’ that make up their title. McIntyre SC describes native title’s ‘bundle of rights’ as “a bunch of rights with the quality of balloons”.⁵²¹ From a symbolic point of view the recognition of native title is indeed important and in instances where it has been determined the negotiation position of Aboriginal people to protect their land has improved. From a practical view, however, there is a risk that the outcome of benefits from native title and the

ability of Aboriginal people to effectively protect their land would not come close to what they expected native title would offer. The following observation by Justice Callinan in the *Ward* case cuts to the heart of the matter:

I do not disparage the importance to the Aboriginal people of their native title rights, including those that have symbolical significance. I fear, however, that in many cases because of the chasm between the common law and native title rights, the latter, when recognised, will amount to little more than symbols.⁵²²

- Only a small percentage of Aboriginal people stand to benefit from native title.⁵²³ The small number of cases determined thus far, the limited resources available to prepare native title claims, the onerous burden of proof and the passing away of key witnesses prior to giving evidence, weigh heavily against those claiming native title. Due to the *sui generis* nature of native title those who are successful in their claims, have different ‘rights’ in their respective ‘bundles’. The uncertainty this could bring to native title holders and other interest groups is self-evident. Irrespective of native title outcomes, Australia would therefore have to develop a more proactive and constructive approach to the land aspirations of Aboriginal people. The recognition of native title should therefore not be seen as substituting the granting of more secure tenure over land. Native title in itself does not represent ‘land reform’—in many instances it highlights the need for land reform.
- The process of preparing a case for trial, giving evidence, the litigious style of cross-examination, rigid court procedures and the atmosphere associated therewith makes the giving of evidence a painful and frightening experience to many Aboriginal and even expert witnesses. While there may be some consolation that the courts are the “least dangerous” branch of government,⁵²⁴ the litigation process is seen as a continuation of an unfair and insensitive system which is aimed at eroding rather than recognising, confirming or enhancing Aboriginal land rights.
- The process of determination of native title is dominated by consultants, researchers of different fields of specialisation, and lawyers. As NNTT member, Tony Lee, remarks: “It is time for the native title process to move away from the clutches of so-called experts, gate-keepers, bureaucrats, lawyers and the court system to where it should have been from the beginning, with Aboriginal people.”⁵²⁵ In many instances Aboriginal people feel alienated from the process, unsure of what is expected of them and

unclear of the potential outcome. The drawn-out nature of the legal process also contributes to a decline in enthusiasm and a sense of disillusionment. It will take many years before all native title claims are dealt with and in many cases the current generation of elders will not live to see the result of their claim. The frustration and disillusionment that are experienced by many Aboriginal people is summarised by Lee in the following way:

You may ask what it's been like as an Aboriginal person in this tribunal for the past eight years. To hear the lies, the prejudices, hate and ignorance about Aboriginal people—to have to put up with all of this? To see Aboriginal people manipulated by white people for their own gains? Turning brother against sister, aunties against uncles, family against family, because of this white system? And being powerless under the native title system to say to them—this is wrong! ... What I want to highlight is that Aboriginal people are at the whim of the dominant culture.⁵²⁶

- The nature and extent of native title has become such a complicated matter that from the perspective of native title holders as well as other interested parties it is not always clear which elements of the 'bundle of rights' have been proven, where such rights exist, where rights have been extinguished and where native title rights are inconsistent with other rights and interests. Needless to say, the whole process is culturally foreign to Aboriginal people who have an integrated and holistic approach to land and to whom the notion and demarcation of rights in 'bundles' is totally inappropriate. From a practical perspective it would seem as if the only realistic solution for all parties would be to reach an agreement as to the extent and application of native title rights and interests rather than to leave it to the courts to determine on a case by case basis.
- It should be recognised that native title is in the early stages of development and although 10 years have passed since *Mabo*, many issues require further clarification. At the same time, however, the judiciary has contributed to the clarification of important aspects of native title. This in turn will, it is hoped, enable parties to reach determinations through consent. According to NNTT deputy president Fred Chaney: "It is important to bear in mind that, although Australia is still in a period of transition towards a full understanding of the implications of native title, there is a workable scheme in place to deal with the range of native title issues."⁵²⁷
- It is an open question whether the land and cultural aspirations of Aboriginal

people could not have been dealt with more effectively, fairly and equitably by means of a land reform and cultural recognition policy supported by the necessary land rights legislation. The irony is that the current acrimonious process to determine native title will not address the general land needs of Aboriginal people and even in those instances where native title is extinguished, the needs of Aboriginal people to access land for cultural and customary purposes will remain. In a similar vein the determination of native title does not provide title holders with secure tenure to live and work on land. Whether native title is determined or not, the absence of a coherent land access and redistribution policy will continue to challenge state and Commonwealth governments. The following observation by Justice Callinan in the *Ward* case highlights the point:

It might have been better to redress the wrongs of dispossession by a true and unqualified settlement of lands or money than by an ultimately futile or unsatisfactory, in my respectful opinion, attempt to fold native title rights into the common law.⁵²⁸

NOTES

- 353 The author would like to express a special word of appreciation to Philip Vincent (Barrister: Wickham Chambers, Perth) for his comments and suggestions on the earlier draft of this chapter.
- 354 A Markus, *Australian race relations 1788-1993*, Allen and Unwin, 1994, p 48.
- 355 P Havemann, Indigenous rights in the political jurisprudence of Australia, Canada and New Zealand, in P Havemann, (ed) *Indigenous Peoples Rights*, Oxford UP, 1999, pp 25-62.
- 356 Quoted in H Reynolds, *Dispossession*, Allen and Unwin, 1989, p 211.
- 357 The Australian federation is made up of the Commonwealth government and parliament, five autonomous states, and two territories namely the Northern Territory and Australian Capitol Territory (Canberra). The Northern Territory falls under the jurisdiction of the federal government, although it has limited self governance, hence the ability of the federal parliament to enact a law for the territory dealing with the rights of Aboriginal people. Some 23% of the inhabitants of the Northern Territory are Aborigines. The Aboriginal Land Rights Act provides that the land is held in trust in the name of an Aboriginal Land Trust (s4).
- 358 Refer for example to the South Australia Aboriginal Lands Trust Act (1966), the Pitjantjara Land Rights Act (1981), the New South Wales Aboriginal Land Rights Act (1983), and the Victoria Aboriginal Lands Act (1970).
- 359 Richardson, Craig and Boer, Indigenous people and environmental management: A review of Canadian regional agreements and their potential application to Australia – Part 2, *Environmental and Planning Law Journal*, 1994, p 358.

- 360 Richardson et al, op cit, p 261. Also refer to Senior, The Yandicoogina process: A model for negotiating land use agreements, *Land, Rights, Laws: Issues of Native Title*, Native Titles Research Unit, 1998, Discussion paper No 6. In this article Senior not only discusses the type of arrangements but also the style of negotiation, problems experienced in interaction with members of the community, the way in which technology was used to inform persons of plans, and the importance of power relations in the process. He concludes that the process “demonstrates what can be achieved, given detailed planning and a willingness to negotiate in good faith on both sides.” But he also admits that “the process can be criticised as expensive and time consuming ...”, p15.
- 361 H Mcrae, G Nettheim, and L Beacroft, *Indigenous legal issues—commentary and materials*, LBC Information Services, 1997, p 163.
- 362 In *Cooper v Stuart* (1889) 14 App.Cas.286 the court held that Australia was a settled colony in which English law had been transplanted. In essence this meant that indigenous law and customs did not survive the colonisation process. Sharwood, Aboriginal land rights—the long shadow of the eighteenth century, in Graham and Heuston (eds) *Proceedings of the Medico-Legal Society of Victoria 1980-3*, p 103; Stephenson and Ratnapala, *Mabo: A Judicial Revolution*, 1993. The settled law was therefore that Australia had been settled ‘peacefully’ and not through conquest. Richardson et al, op cit, p 364.
- 363 *Mabo and Others v State of Queensland (No 2)* (1992) 108-109 ALR 1. (*Mabo(2)* case).
- 364 Keon-Cohen, From genocide to self-determination: The ‘good’ governance of Australia’s indigenous people: 1788-1996, in De Villiers (ed.), *The rights of indigenous groups—the quest for coexistence* 1997. The facts in the *Mabo* case were briefly as follows: The Meriam people had claimed that they had since time immemorial occupied certain islands in the Torres Strait. Although the islands came under British authority on 1 August 1879, it was argued that the rights of the people remained intact and were not extinguished. The court decided (six to one) that native title did indeed ‘survive’ colonisation.
- 365 *Mabo(2)* case 107 ALR 1.
- 366 Butt, Native land rights in Australia: The *Mabo* case, *The Conveyancer*, 1995, p 33. White and Mulvaney, *The destruction of Aboriginal society*, 1970.
- 367 For a critical analysis of the arguments of the Court regarding *terra nullius* refer to Ritter, The ‘rejection of *terra nullius*’ in *Mabo*: a critical analysis, *Sydney Law Review*, 1996, pp 3-33.
- 368 In the case the plaintiffs sought declarations that the Meriam indigenous people were entitled as owners, possessors or occupiers of the Murray Islands to use the land and that the State of Queensland had to respect their rights. The native inhabitants lived in native communities at the time of occupation and handed their property from father to son, generation after generation. In order to succeed they had to prove that they had rights that could be enforceable against the Crown and that these rights existed at the time of colonisation. The defendant argued that the land was peacefully annexed to British dominion as *terra nullius* because for all legal purposes it was not inhabited. The court held with a majority of six to one that the Meriam people did indeed have rights prior to colonisation and that those rights could still be enforced against third parties.
- 369 J Brennan, as quoted in Butt and Eagleson, *Mabo: What the High Court said and what the government did*, 1996, p 40.

- 370 Refer for example to K Muir, The earth has an Aboriginal culture inside—recognising the cultural value of country, in L Strelein, *Land, Rights, Laws: Issues of Native Title AIATSIS*, July, p 1998.
- 371 Bennett, 1993, p 446.
- 372 In ceded colonies or colonies conquered, existing laws were presumed to be continued with until changed by the new sovereign, while in settled colonies (*terra nullius* dispensations) it was assumed that there were either no people or that the people who were present did not have existing laws that were capable of being recognised. B Edgeworth, Tenure, allodialism, and indigenous rights at common law: English, United States and Australian land law compared after *Mabo v Queensland, Anglo-American Law Review*, 1997, pp 397-434. G Meyers, Incorporating indigenous land management traditions and values in resource allocation and management regimes, in G Meyers, (ed) *Implementing the Native Title Act National Native Title Tribunal*, 1997, p 122.
- 373 For an interesting overview of the debate at the time refer to C Fletcher, (ed) *Aboriginal Self-determination in Australia*, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1994.
- 374 *Mabo(2)* case 408.
- 375 R Choudree and G McIntyre, Restitution of land rights in two jurisdictions: Australia and South Africa, *The South African Law Journal*, 114, 1997, p 187.
- 376 *Millurpum v Nabalco Ltd* (1971) 17 F.L.R. 141. In this case it was held that indigenous land rights only exist insofar as they are created by statute. At 244, 262. The court nevertheless found that as far as an own legal system goes, the “evidence shows a subtle and elaborate system highly adapted to the country in which the people led their lives ...”. At 267.
- 377 Scott, The Australian High Court’s use of the *Western Sahara* case in *Mabo, International and Comparative Law Quarterly*, 1996, p 923.
- 378 *Mabo(2)* case 24.
- 379 Western Sahara Advisory Opinion I.C.J. Rep. 1975, 12, 14.
- 380 For reasons which cannot be discussed in detail in this chapter, the reliance on the *Western Sahara* case is rather weak according to some critics. Refer to Scott, op cit, p 924.
- 381 CLR 42-3.
- 382 S223(1)(b) of the Native Title Act. The Court in the *Ward* case found that a physical connection or continued use was not required for purposes of determination of native title, but that the nature of occupation and use could be indicative of the type of rights that forms part of the ‘bundle’.
- 383 McRae et al, op cit, p 253.
- 384 Edgeworth, Tenure, allodialism and indigenous rights in common law: English and Australian land law compared after *Mabo v Queensland, Anglo-American Law Review*, 1996, pp 397-434.
- 385 Justice Brennan commented as follows: “International law is a legitimate and important influence on the development of common law, especially when international law declares the existence of universal human rights.” At 28.
- 386 Meyer and Mugambwa, The *Mabo* decision: Australian aboriginal land rights in transition, *Environmental Law*, 1993, p 1213.
- 387 Webber, The jurisprudence of regret: The search for standards of justice in *Mabo, Sydney Law Review*, 1995, pp 26-28.

- 388 *Daily News*, 5 June 1993.
- 389 *Coe v Commonwealth* (1993) 68 A.L.J.R. 110.
- 390 The court ruled that one should not look only at Western concepts to determine whether sufficient 'title' to land existed. It was argued that "to superimpose European concepts of property on Aboriginal concepts of land would merely defeat the purpose of protection and recognition of native title." At 146. Put another way, it can be said that "occupation is relative depending on the circumstances, including the nature and custom on the land". Nomadic people may therefore also claim "occupation" of land under this approach. It would thus seem that "it is clearly not necessary for lands to be cultivated, fenced, built on or the like to be occupied". McNeil, A question of title: Has the common law been misapplied to dispossess the Aboriginals, *Monash University Law Review*, 1990, p 103. However refer to the approach of O'Laughlin J in the *De Rose Hill* case who required an actual physical occupation.
- 391 *Mabo(2)* 486.
- 392 *Mabo(2)* 69-70. These principles echo a decision of the High Court of British Columbia in *Hamlet of Baker Lake et al v Minister of Indian Affairs and Northern Development et al.* (1979) 107 DLR (3rd) 542, in which the following criteria were also identified: the claimants and their ancestors were part of an organised society; the society occupied a territory on which they asserted aboriginal title; the occupation was to the exclusion of other organised societies; and the occupation was an established fact at the time of colonisation.
- 393 There are four modes of 'extinguishing' native title: death, surrender, abandonment or legislative or executive action. At 107.
- 394 "Where the Crown lawfully creates an interest in land which is inconsistent with the continued enjoyment of native title, that title is extinguished to the extent of the inconsistency." Ladbury and Chin, Legislative responses to the *Mabo* decisions: Implications for the Australian resources industry, *Journal of Energy and Natural Resources Law*, 1994, p 208.
- 395 Cullen, Rights to offshore resources after *Mabo* 1992 and the Native Title Act 1993, *Sydney Law Review*, 1996, pp 129-130.
- 396 Refer to the *Ward* case (2002) where the court found that the vesting of a national park in the conservation authority does indeed extinguish native title.
- 397 "Each legislator has developed its own distinctive form of land rights ... The legislation is limited and flawed in many ways. In some jurisdictions, a minimal amount of land has been returned to indigenous ownership. Even in states where large areas are involved, the land is mostly arid desert unwanted for other purposes." McRae et al, op cit, p 171.
- 398 Richardson et al, op cit, p 366 remarks that all these 'schemes' do not generally provide indigenous people with the level of "entitlement to land that they would receive under the principles enunciated by the High Court in the *Mabo* case".
- 399 *Fejo v Northern Territory* (1998) HCA 58; 195 CLR 96 at 46.
- 400 For a general discussion on various aspects of the development of native title refer to L Strelein and K Muir (eds.), *Native title in perspective*, Aboriginal Studies Press, 2000.
- 401 Adv. Bryan Keon-Cohen during an interview with the author on 21 April 1998.
- 402 McRae et al, op cit, p 70.
- 403 It is not possible to provide in this overview a comprehensive analysis of native title at common law and native title in terms of the Native Title Act. Australian law operates on

- the basis of the Native Title Act and it is not clear whether outside the ambit of the Act, room remains for the operation of the common law in native title matters that are not regulated by the Act.
- 404 S223(1) Native Title Act.
- 405 *Mabo(2)* case at 89. Also refer to the Canadian case *Degamuikw v The Queen* (1991) 79 DLR (4th) 185 (BCSC) in which the court said “aboriginal rights are truly *sui generis*, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples”.
- 406 S223(2) Native Title Act.
- 407 Refer to *De Rose v South Australia* (2002) FCA 1342 in which the court held that mere knowledge of customs and ceremonies are insufficient to demonstrate continued connection—there has to be evidence of laws and customs being acknowledged and observed. That applies even in a case where Aboriginal people did not access land due to fear of being subject to ill treatment by the pastoral owner.
- 408 For a useful overview of case law since 1993 refer to G Hiley, Key legal developments in native title. Paper presented at the Native Title Forum, 1-3 August 2001, Brisbane. Note that since this paper important cases such as *De Rose Hill* and *Yorta Yorta* were handed down by the court.
- 409 Refer to *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (1999) 4(1) AILR 91. V Hughston, The *Yorta Yorta* decision: A case of the ‘tide of history’, *Native Title News*, 1999, p 2.
- 410 *Yorta Yorta* HC case par. 82. “It is not possible to offer any single bright line test” for deciding when changes in laws and culture may be interpreted as an abandonment rather than mere adaptation. Par 82.
- 411 “Interruption of use or enjoyment, however, presents more difficult questions.” *Yorta Yorta* HC case par 84.
- 412 Even if laws and customs are still known but not practiced by a community, one cannot speak of a “society which acknowledges and observes them ...” *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (2002) HCA 58 (12 December 2002) Par. 50 (*Yorta Yorta* HC case).
- 413 *Members of the Yorta Yorta Aboriginal Community v State of Victoria* (1999) 4(1) AILR Par. 121 citing Brennan in *Mabo(2)* at 60.
- 414 *Western Australia v Ward* (2002) HCA 28 (*Ward* case).
- 415 *Ward* case at 1122 (76), 1224 (616-618).
- 416 H Wootten, Native title in a long perspective: A view from the eighties. Paper read at the native title conference, ‘Outcomes and possibilities’, Geraldton, 3-5 September 2002, p 4.
- 417 *Ward* case at 1179 (382). This may differ between the respective states depending on the nature of legislation regulating minerals.
- 418 *Yarmirr v Northern Territory* (1998) 82 FCR 533; 156 ALR 370. *Commonwealth v Yarmirr* (2000) 168 ALR 426. G Hiley, Fishing in the seas off Croker Island. Paper presented at the Native Title Forum, 1-3 August 2001, Brisbane.
- 419 S11 Native Title Act.
- 420 *Mabo(2)* case 68-70, however refer to the approach of the High Court in the *Ward* case as discussed earlier.
- 421 *Mabo(2)*; *Western Australia v Commonwealth* (1995) 183 CLR 373; *Wik Peoples v*

Queensland (1996) 187 CLR 1 (*Wik* case) and *Fejo v Northern Territory* (1998) 156 ALR 721.

- 422 S227 Native Title Act.
- 423 *Mabo(2)* case at 60. “A native title which has ceased ... cannot be revived for contemporary recognition.” Brennan, J.
- 424 *Ward* case at 64.
- 425 *Yorta Yorta* HC case Par.53. The relationship between the laws and customs that are currently observed and those that were observed before sovereignty has to be considered to determine whether contemporary laws and customs can properly be described as “traditional law and customs”. Par.56.
- 426 S13 Native Title Act. The grounds for variation can be that (i) events have taken place since the determination that have caused the determination to be no longer correct or (ii) the interests of justice require a variation or even revocation of the determination.
- 427 *Ward* at 383.
- 428 *Ward* at 296.
- 429 Refer for example to the *Mabo* case at 126, 56, 61 and 110. Meyers, 1997, p 127.
- 430 Refer to sections 17, 20 and 23J of the Native Title Act.
- 431 *Ward* case 116.
- 432 S4(1) and S11(1) Native Title Act.
- 433 Refer for example to Native Title Act sections 23J and 48-51A.
- 434 S51(1) Native Title Act.
- 435 S51 and 51A(1) Native Title Act.
- 436 For an excellent overview of compensation issues refer to *Compensation for native title: issues and challenges*, National Native Title Tribunal (Perth), 1999.
- 437 For a discussion of some options refer to D Campbell, Economic issues in valuation of and compensation for loss of native title rights, in G Boeck, (ed.) *Land, Rights, Laws: Issues of Native Title*, IATSI, 8, October 2000.
- 438 S15 Native Title Act.
- 439 S237A Native Title Act.
- 440 *Wik* case at 279. For a discussion of the case refer to G Hiley, *The Wik Case: Issues and Implications*, 1997; Critique of government’s *Wik* 10-point plan, *ATSIC*, 1997; Co-existence—negotiation and certainty, *National Indigenous Working Group on Native Title*, 1997: Paper prepared in response to the *Wik* decision and the proposed amendments to the *Native Title Act*, 1993.
- 441 *Ward* case at 183.
- 442 *Ward* case at 194.
- 443 *Mabo(2)* case at 70. “Native title continues ... where the appropriation and use is consistent with the continuing concurrent enjoyment of native title over land (e.g. land set aside as a national park).” Brennan, J.
- 444 *Ward* case at 221-219.
- 445 Refer for example to the vesting of a reserve in terms of section 33 of the Land Act 1933 (WA).
- 446 *Yanner v Eaton* (1999) HCA 53.
- 447 For a discussion of the case refer to A Rorrison, *Yanner v Eaton*, *Native Title News*, 4, 1999, pp 40-43.
- 448 S223 of Native Title Act.

- 449 S225 of Native Title Act.
- 450 S Young and R Bartlett, From rights to relics, 'Outcomes and Possibilities', op cit, p 8.
- 451 Choudree and McIntyre, op cit, p 190.
- 452 Richardson et al, op cit, p 369.
- 453 *Native Title Report 2001* Aboriginal and Torres Strait Islander Commissioner 2 January 2002, Sydney, p 1.
- 454 Preamble Native Title Act.
- 455 S3 Native Title Act.
- 456 S61 and S81 Native Title Act.
- 457 Crown land within urban area can be claimed—for example recreation reserves, coastal strips, rivers.
- 458 S63 Native Title Act.
- 459 S190A-190C Native Title Act.
- 460 S67(1) Native Title Act.
- 461 Wootten, op cit, p 3.
- 462 S82 Native Title Act.
- 463 Refer for example to R Gray, Do the walls have ears? Indigenous title and courts in Australia, *Australian Indigenous Law Review*, 2000, pp 1-17.
- 464 M Boge, The emerging law of native title practice: Select issues and observations, in C Boge, (ed) *Justice for all? Native title in the Australian legal system*, Lawyers Books, 2001, p 112.
- 465 Wootten op cit, p 4.
- 466 S86B Native Title Act.
- 467 S86B(5) Native Title Act.
- 468 S86E Native Title Act.
- 469 S86F Native Title Act.
- 470 Australian Law Reform Commission, *ALRC 89: Managing justice: a review of the federal civil justice system*, (ALRC) Report 2000, par. 7.57.
- 471 *Native Title Report 2001*, op cit, p 62.
- 472 Refer to the NNTT website <www.nntt.gov.au>
- 473 S107 Native Title Act.
- 474 S108 Native Title Act.
- 475 S131A(1) Native Title Act.
- 476 In the experience of the author the members of the NNTT do not always have the capacity to become engaged effectively in mediation especially when work is required in between meetings. It often happens that issues are left for discussion at a future meeting rather than having a specialised person doing follow up work, meeting with parties and developing options for consideration by the parties.
- 477 S134A(4) Native Title Act.
- 478 S145(1) Native Title Act.
- 479 S129 Native Title Act.
- 480 S185 Native Title Act.
- 481 S193 Native Title Act.
- 482 S202 Native Title Act.
- 483 S202(4) Native Title Act.
- 484 S202(6) Native Title Act.

- 485 Parliament of the Commonwealth of Australia, September 2001.
- 486 *Native Title Report 2001*, op cit, p 55.
- 487 Ibid, p 59.
- 488 B Stacey, Notes: Who bears the costs of NTRB capacity building, ‘Outcomes and Possibilities’, op cit.
- 489 S56-57 Native Title Act.
- 490 For an excellent overview of the theoretical, anthropological and legal base of PBCs refer to C Mantziaris, and D Martin, *Native Title Corporations—a legal and anthropological analysis*, The Federation Press, 2000.
- 491 *Western Australia v Ward* (2000) FCA 191; 170 ALR 159 at 197.
- 492 For more information refer to C Mantziaris, Problems with Prescribed Bodies Corporate, *Indigenous Law Bulletin*, 4, 1999, p 21.
- 493 PBC Regulations 6, 7, 8, 9.
- 494 S24 BA-BI; 24CA-CL and 24 DA-DM Native Title Act.
- 495 T Lee, The natives are restless—a personal reflection on 10 years of native title, ‘Outcomes and Possibilities’, op cit, p 14.
- 496 Refer for example to *North Gaalananja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 and *Mitakoodi v State of Queensland* (2000) FCA 156.
- 497 S31(1) Native Title Act.
- 498 For a brief discussion refer to W Jenvey and S Lockie, The duty to negotiate in good faith, *Native Title News*, 4, 1999, pp 31-32.
- 499 S29(7) and 237 Native Title Act.
- 500 For a critical analysis of the application of the ‘future act’ regime refer to *Native Title Report 2001*, op cit, pp 11-53.
- 501 *North Gaalananja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 617.
- 502 G Neate, Meeting the challenges of native title mediation, *LEADR 2000: ADR International Conference*, 29 July 2000.
- 503 For a brief overview refer to D O’Dea, The Indigenous Land Use Agreement as a risk management tool: An Aboriginal perspective, *AMPLA Yearbook*, 1999, p 238.
- 504 P Sheiner, The beginning of certainty: Consent determinations of native title, in G Boeck, (ed), *Land, Rights, Laws: Issues of Native Title* AIATSIS, November 2001.
- 505 For a general discussion of some of these issues refer to G Neate, Indigenous Land Use Agreements. Paper presented at the Native Title Forum, 1-3 August 2001, Brisbane; and R Wade, and L Lombardi, Indigenous Land Use Agreements: Their role and scope. Paper presented at the Native Title Forum, 1-3 August 2001, Brisbane.
- 506 S 24DC, 24 DE and 24 DJ Native Title Act.
- 507 For a discussion refer to F Chaney, Understanding and addressing common perceptions about the role of the National Native Title Tribunal. Paper read at the conference entitled, Negotiating native title and cultural heritage, by the Institute for International Research, October 28-November 1, 2002, Perth.
- 508 Personal communication with the NNTT on 21 November 2002.
- 509 Preamble Native Title Act.
- 510 *ILC Annual Report 2001–2002* September 2002, Adelaide.
- 511 S191X(1) ATSIC Act.
- 512 S191B Aboriginal and Torres Strait Islander Commission Act 1989 (ATSIC Act).
- 513 S191D(1) ATSIC Act.

- 514 S191F(2) ATSIC Act.
- 515 *ILC Annual Report 2001-2002* Adelaide, September 2002: 14.
- 516 *Ibid*, pp 21-22.
- 517 T Lee, *op cit*, p 16.
- 518 Senator Johnston quoted in G Clark (ATSIC chairman), *Finding the way forward*, 'Outcomes and possibilities', *op cit*, p 2.
- 519 D Williams, *Native title: the next 10 years—moving by agreement*, 'Outcomes and Possibilities', *op cit*, p 3.
- 520 H Wootten, *Native title in a long perspective: A view from the eighties*, 'Outcomes and Possibilities', *op cit*, p 3.
- 521 He adds: "Once one of the balloons has been punctured by an inconsistent right, then it has no capacity to re-inflate, no matter how transitory the inconsistency may have been." G McIntyre, *Native title: a bundle of what?*, 'Outcomes and Possibilities', *op cit*, p 3.
- 522 *Ward case 970*.
- 523 "It is inevitable that some groups will not be able to establish native title ... The Native Title Act will not satisfy the land aspirations of all Aboriginal people." A De Soyza, (Office of Native Title Western Australia, executive director), *The Western Australian state government objectives and position on managing native title and cultural heritage negotiation*. Paper read at the conference, 'Negotiating native title and cultural heritage', by the Institute for International Research, October 28-November 1, 2002, Perth.
- 524 L Strelein, *The 'Courts of the Conqueror': The judicial system and the assertion of indigenous peoples' rights*, *Australian Indigenous Law Reporter*, 5, 2000, p 23.
- 525 Lee, *op cit*, p 11.
- 526 *Ibid*, p 8.
- 527 F Chaney, *op cit*, p 51.
- 528 *Ward case 970*.

Chapter 6

SOUTH AFRICAN—AUSTRALIAN COMPARISON

South Africa and Australia began more or less simultaneously with land reform in the early 1990s. Although the basis for the reform is quite different—recognition of native title compared to restitution and redistribution—insight can be gained into the complexities facing both countries by comparing the experiences of the two. The following are key areas in which the experiences of South Africa and Australia in land reform can be compared:

ORIGIN OF LAND RESTITUTION

The origins of land restitution in the two countries differ fundamentally. Australia became reluctantly involved in land reform in general and the recognition of native title in particular through the *Mabo* decision. *Mabo* gave rise to the Native Title Act (1993) as amended, but the absence of a clear political will and mandate supported on a bipartisan basis remains a serious hurdle in the determination of native title and in providing alternative means to land access. The Native Title Act is described cynically by some as an act more effective in limiting native title than in conferring it. Hence the conclusion by Wootten that the process to determine native title “has been inordinately expensive, extremely slow, only fortuitously related to sensible land use, stressful and divisive for Aboriginal participants, unresponsive to Aboriginal needs and wishes, and arbitrary, haphazard and minimal in its delivery of benefits to Aboriginal people”.⁵²⁹

In South Africa land restitution is part of the political and economic agenda of the majority as well as the main minority parties. There is general agreement and

support in South Africa for land reform that includes the restitution of freehold, provision of alternative land or the payment of compensation to persons whose rights to land have been affected through discriminatory legislation and practices. However, time will tell whether the strength of the national consensus is retained once the financial, legal and other resource implications of the settlement of 63,000 claims that have been lodged become clear. The recent decision by the Court of Appeal to recognise the rights of the Richtersveld community will add a dimension to an already complicated picture as other communities may also seek to have their customary rights recognised under the Restitution of Land Rights Act.

VARIATION OF RIGHT IN LAND

The Native Title Act provides for a variation or even revocation of native title in light of events since the determination thereof.⁵³⁰ It is therefore possible to revisit a determination of native title after a period of time. It would seem as if such a review could not only include the diminution of native title rights but could also involve an expansion on the basis of cultural development.⁵³¹ Aboriginal people would therefore have to show that their connection with their land remains and that the culture and customs are maintained. In South Africa restoration of the right in land is absolute and takes the form of freehold.

TIMEFRAME WITH RESPECT TO CLAIMS

In South Africa there are two timeframes that regulate the lodging of a land claim—the first deals with the period within which the dispossession took place. Rights to land that were infringed between 1913 and 1994 can be reclaimed. Dispossession that occurred prior to 1913 does not form a basis for a valid land claim although there may be arguments in future that pre-1913 claims should be dealt with on the basis of the common law non-extinguishment principle of native title. The second timeframe dealt with the deadline to lodge claims—31 December 1998. No claim lodged after this date is valid. These two dates provide all concerned with some certainty with respect to land that could possibly be claimed. In Australia the date of possible extinguishment essentially commenced with British sovereignty and no time limit is placed on the lodging of new claims (provided no determination, be it positive or negative, has been made). As a result the research process leading to a claim in Australia is more

complex, costly and time consuming than in South Africa. In Australia there is a perception that a substantial ‘industry’, dominated by non-Aborigines, has developed with native title research and litigation at the core. This is evident in the large number of lawyers, anthropologists, archeologists, linguist, historians and others involved in researching claims for purposes of registration, amalgamation and ultimately presentation of expert reports to the court. It could be argued that the costs are out of proportion to the ultimate benefit that title may confer, but to Aboriginal people it is the only viable option to pursue at present.

The possibility of new claims being lodged and splinter claims being registered by disaffected claimants, is also an inherent risk and increases uncertainty for all parties. Although the South African claim process is also impacted upon by experts, the research process is far simpler, the historical records going back to 1913 are readily accessible and the emphasis is not so much on the validity of claims as on the feasibility of restitution of rights in land.

THE NATURE OF THE RIGHTS CLAIMED DIFFERS IN MATERIAL RESPECTS

In South Africa any piece of land can be claimed including land under freehold. In Australia the land that can be claimed is limited as freehold and some other forms of tenure extinguish native title. In South Africa the nature of the title in a successful determination amounts to freehold whereas in Australia ‘native title’ is determined—a ‘bundle of rights’ that require detailed proof of each right that is claimed. Whereas ‘native title’ does not necessarily imply exclusive possession, freehold confers the right unto claimants to deal with their land in the way any owner of land is entitled to. Native title is at the proverbial bottom in a hierarchy of rights, with the rights of others seeking access to land the subject of native title having preferential rights if an inconsistency occurs. Claimants in Australia may therefore suffer severe deprivation if their ‘native title’ is either not determined or if it turns out to offer far less substantial rights than they had been hoping for.

RANGE OF OPTIONS TO EFFECT LAND REFORM

Both countries have policies in place to complement the claims-driven process. In Australia the hand-over of land held by state governments on behalf of Aboriginal people and the acquisition programme of the Indigenous Land Corporation (ILC)

are examples. Thus far, both these programmes have been slow in delivering results and the financial burden placed on the ILC resources is severe. It seems as if the ILC has thus far not been able to develop clear policy guidelines and objectives that could guide its acquisition programme. As a result the ILC is perceived to be shifting goalposts and to favour those who already have experience in land management rather than also tending to the needs of the very poor and destitute. In South Africa the claims process is supported by a wider array of options—the return of freehold title is but one. Other options are the provision of alternative state land, the acquisition of alternative freehold land, payment of monetary compensation and access to alternative housing schemes or a combination of these. South Africa has more than 22 different statutes forming part of the land transformation scheme regulating various aspects of land use and access. Criticism has, however, also been expressed at the South African land acquisition policy where focus has shifted to support commercially successful farmers rather than the very poor and rural communities.

LEGAL REQUIREMENTS TO PROVE A CLAIM

The legal requirements to prove a valid claim are probably where the two countries differ most. In South Africa claimants only have to show that they occupied land for a minimum of 10 years between 1913 and 1994, before they were forced to vacate it through discriminatory legislation or practices. No continued connection—physical or spiritual—to the land is required. However to prove the existence of a customary rights to land, as in the case of the Richtersveld community, claimants would have to demonstrate that their laws and customs have indeed survived sovereignty and continue to exist. In Australia claimants have to demonstrate that some form of continued connection in physical or spiritual form still exists with respect to the land. This strict requirement is further complicated by past policies and practices that made it difficult to maintain physical and/or spiritual connection to land. Refer for example to the *De Rose Hill* case in which it was held that physical connection is an essential element even where claimants had difficulty in accessing the relevant land. Many people were, for instance, prevented access to stations ('locked gate' approach) and some were forcibly removed from their families—the so called 'stolen generation'. The teaching of Aboriginal laws, language and customs was discouraged by public authorities, schools and missions and the effects of the displacement of Aboriginal people through the

high influx of foreigners for purposes of mining, agriculture and other activities has caused traditional hunting and foraging lands to become over-utilised. As a consequence the ability of claimants to show a continued connection is in many instances severely restricted or even impossible.

REQUIREMENTS OF PROOF

The requirements of proof that restoration of land rights should take place are easier to comply with in South Africa than in Australia. In Australia, extensive anthropological, archaeological, linguistic and historic expert reports are required to prove a claim. The research is hampered in many instances by a lack of historic information and documentation—especially with regard to the pre-colonial phase as well as the identity of claimant groups at the time prior to and following sovereignty. In many instances the only records are limited to police records since the turn of the 20th century.

The process of unravelling family history and genealogies is also proving to be destructive or at best disruptive in some Aboriginal communities. One often hears the remark that native title is only succeeding in ‘dividing’ Aboriginal people.

In South Africa the removals process was normally accompanied by formal legal processes, which makes it easier to follow the paper trail of when people were removed, why they were removed and whether any compensation was paid. Unlike Australia, little research is required from experts and the process is more of a legal nature. Many claims, especially in rural areas, are brought by tribal communities, which make it easier to identify lines of authority and hierarchy. There are exceptions to this—refer, for instance, to claims lodged by the San people who were hunter gatherers and as such never used a hierarchical system and were not exclusive occupiers of land.

The *Richtersveld* case also had ample examples of the existence and continuation of a system of customary law and customs that are still being adhered to. In both countries, land restitution legislation is not adequately adapted to accommodate the traditional rights, living patterns and cultures of nomadic claimant groups. The San in South Africa have experienced great difficulty in comprehending why their movements should be restricted to a certain portion of land, while in fact they are used to roaming with the seasons. The same can be said of many Aboriginal groupings where the Native Title Act presumes a territorially fixed or static occupation that is not necessarily reflective of Aboriginal customs and practices.

ROLE AND IMPACT OF INTERNATIONAL PRECEDENTS

The South African constitution determines that the courts, in their interpretation of the constitution, *must* take note of developments in international law and *may* take note of developments within other state legal systems.⁵³² While international developments are not binding on South African courts, they could provide some direction that South Africa might follow in order to keep track of international thinking on human rights protection. The Constitutional Court in its judgments since 1994 has made extensive use of international case law in its own arguments.⁵³³

In Australia a similar obligation is not placed on the judiciary. While the High Court and Federal Court may take note of international precedents, they are under no legal obligation to do so. These courts have, however, made several references to international case law in regard to native title. The increased emphasis placed by the High Court on the text of the Native Title Act rather than on common law, may cause references to international precedents to become less frequent and less important. The South African courts have shown a keen awareness of the requirements of international law and the obligations placed on the country.

COURT HEARING LAND CLAIMS

In South Africa provision is made for a specialised land claims court to deal with land claims. This can be attributed to two main reasons: first, it provides for a simpler, more understandable, accessible and culturally sensitive process that is not subject to the delays of the High Court and is not as legalistic in nature. Second, it was felt that the transformation process of the judiciary had not yet progressed far enough and that a specialised court was required which would be more sensitive to the plight of people who were removed from their land. In a nutshell: in South Africa black people feel comforted by the fact that their claims are heard by persons who not only have sound legal credentials but who also have an understanding of their culture, traditions and the impact that past injustices have had on their lives.

In Australia the Federal Court deals with native title claims. Complaints are often expressed by Aboriginal people that the native title claims process is driven and dictated by legalistic requirements of 'white man's law', that little understanding is shown to Aboriginal law and custom and that the process is complex, cumbersome and foreign. In both countries, however, provision is

made for the court to meet on location and for traditional rules of evidence to be relaxed in order to cope with traditional law and custom and the oral transfer of information from one generation to another.

COMMENCING LITIGATION

A major difference between the countries is the reference of a claim to the court for hearing. In Australia all claims are lodged with the Federal Court. Two consequences are: first, that a case can be referred to trial prior to settlement discussions having been progressed. In the course of normal civil disputes and litigation a matter would normally only be referred to trial once parties have exhausted all avenues for settlement. Native title cases are virtually immediately in a 'litigation stream' although the court has more recently shown greater willingness to allow parties time for mediation. Second, the unresolved cases impact on the management programme of the Federal Court. In normal circumstances the court has a turnaround programme of two years and in native title of three years. This has proved to be overly optimistic with cases taking far longer to determine, which in turn reflects on the court, with individual docket judges being placed under pressure to clear cases referred to them. In South Africa a claim is lodged with the Land Claims Commission and not with the court. A case can reach the Land Claims Court in two ways: by means of a direct application; or by reference from the Land Claims Commission. Generally, claims only reach the litigation stage if mediation has been exhausted and issues in contention have been identified.

FINANCIAL, ADMINISTRATIVE AND OTHER CONSTRAINTS

Both countries are experiencing severe constraints in implementing land reform programmes. In the six years since the inception of the land reform programme in South Africa, positive progress has been made. However, the complexity of land reform from a legal, administrative and financial perspective seems to have been underestimated. This is evident by the fact that many claims are yet to be validated, few rural claims have been settled and cash settlements in urban areas have inflated the 'success' rate of claim settlement. In Australia, representative bodies in general complain of a serious lack of resources. The irony is that representative bodies on the one hand have to rely on federal grants to support their actions, while on the other hand having to contend with organs of state,

such as state governments and federal government, opposing the determination of native title. The availability of funds by the federal government could therefore directly impact on the ability of claimants to prepare a claim for trial.

DIFFERENT ROLES OF THE LAND CLAIMS COMMISSION AND THE NNTT

South Africa's Land Claims Commission essentially represents the rights of claimants. Its personnel play an important role in assisting claimants to research and prove their claims. The commission also provides parties with the service of independent mediators to assist in negotiations and in reaching agreement. In general, the commission is therefore perceived as being 'on the side' of claimants. Many claimant groups in South Africa would prefer having their 'own' representative body as per the Australian experience. Having such a body is perceived as enabling claimants to take charge of their own claim/s, becoming involved in land management strategies and in general representing their land need interests more effectively.

In contrast with the Land Claims Commission, the National Native Title Tribunal (NNTT) is largely an administrative tribunal involved in future act processes and is at best perceived to be 'neutral' in the claims process. The ability of the NNTT to mediate effectively in claims is limited due to the litigious nature of the determination process and in general to the reluctance of some respondent parties to become actively involved in mediation. Once parties reach agreement that a claim can be settled, the NNTT can be more effective in offering its services. Although there are benefits in regional representative bodies, such institutions can only function effectively if they are properly resourced.

FUTURE ACT REGIME

The rights granted to claimants in Australia to have a say over the management and control of their land prior to determination, are far more extensive and elaborate than in South Africa. In South Africa a mere obligation of notification exists on a landowner seeking to undertake certain activities on his land with no formal consultation or negotiation process. In Australia the future act regime is one of the main elements of the Native Title Act and has enabled Aboriginal people to exercise, to some degree, influence over what happens on their land and to obtain some benefit from such developments, even prior to the

determination of native title. In South Africa, however, once freehold title is restored the rights of the new landowners are far stronger and elaborate than in post-determination native title claims.

POST-DETERMINATION SUPPORT

In Australia there is as yet no final clarity on the exact nature or definition of native title, on how different forms of land use would impact on each other and on the type of support to be offered to Aboriginal people once native title has been determined. In the determinations that have been made thus far, the rights of native title holders are subject to total extinguishment, or partial extinguishment limited to the rights of others in the event of an inconsistency.⁵³⁴ Determinations of native title should ideally be accompanied or followed by an ILUA (land use agreement). In such a way the harmonisation and co-existence of rights can be secured. In the case of land acquisition by the ILC, post-acquisition support is limited and the expertise to assist new landowners with training and land management not yet well developed.

In South Africa there are support programmes to assist claimants to settle on their acquired land, but criticism has been levelled where, for instance, people have been resettled on land without sufficient infrastructure or training. The Department of Land Affairs offers limited post-settlement support, but much has to be done to integrate different government departments in assisting the land reform programme. There is a risk in both countries that land acquired through the respective purchasing programmes may end up being underutilised or that vast amounts are absorbed through acquisition programmes, but with little wealth or employment being created in the process. Both case studies indicate that land restitution is a long-term process that requires vision and support over a wide spectrum, together with substantial financial and other support to ensure that it is sustainable.

NOTES

- 529 H Wootten, *Native title in a long term perspective: a view from the eighties*. Paper read at the native title conference, 'Outcomes and Possibilities', Geraldton, 3-5 September 2002, p 3.
- 530 S13 Native Title Act. The grounds for variation can be that (i) events have taken place since the determination that have caused the determination to no longer be correct or (ii) the interests of justice require a variation or even revocation of the determination.

- 531 It is unlikely that the 'bundle of rights' could be expanded, as a right once extinguished cannot be revived. It could be expected that native title holders may in future argue for an expanded interpretation of each of the elements of their 'bundle of rights'—hence continuing the litigious process.
- 532 s39(1)(b) and (c).
- 533 Refer for instance to *Azapo and others v Truth and Reconciliation Commission* 1996 (4) SA 562 and *Ferreira v Levin No and others*; *Vryenhoek and others v Powell No and others* 1996 (1) SA 984.
- 534 Refer for instance to Par. 5 of *Mualgal People v State of Queensland and Ors.* (1999) FCA 157: "The native title rights and interests in Order 3 are exercisable concurrently with other interests described in order 4, *but* in those circumstances where they cannot be so exercised, the rights of the holders of the other interests may regulate, control, curtail, restrict, suspend or postpone the exercise of those native title rights and interests."

Chapter 7

FINAL COMMENTS AND OBSERVATIONS

In conclusion the following general comments and observations could be made on the experiences of Zimbabwe, Namibia, South Africa and Australia in dealing with the process of land claims:

- The policy, legal, financial and administrative basis for land reform should be clear to all concerned. None of the four countries has a well developed vision or national policy for land reform. They also lack clearly identified objectives and/or outcomes that could serve as an effective guide for the management of land claims, land acquisition, securing of tenure and support programmes at a national, regional and local level. The basic question is: What is the objective of land reform? Is it poverty relief, employment creation, rectifying past injustices or a combination of these? In each case the question should be asked, as well as the extent to which land reform and particular land claims could effectively contribute towards reaching the objective. In the absence of such a strategic, managed process there is a real risk that land reform in general, and the land claims process in particular, could become unfocused with serious long-term implications.

Land reform is sometimes seen as a threat to vested interests, in some instances it is approached in a haphazard way and in many cases the beneficiaries are virtually left on their own without sufficient support once their rights are restored. Although a claims-driven process may have merit within the spectrum of options available to dispossessed people, land reform cannot be reduced to a mere claims-driven, litigious process. A wide range of policy initiatives and support programmes are required to assist the landless to gain access to, and to successfully manage, land.

In all four case studies, what is essentially needed is a balanced, integrated policy vision of land reform that will benefit the landless and/or dispossessed. Such a process does not necessarily require the litigious style typical of a claims-driven process, but rather one of cooperation and partnership. Such a vision would have to fit into the broader process of governance, offering new landowners the security of support from government departments and the different levels of government. Such support—which would have to be ongoing—should comprise a combination of welfare support, social services and rural infrastructural development and training. Land reform in rural areas cannot succeed without also addressing general development and the provision of governmental services within such areas. While the task may seem daunting, the mere hand-over of land without a proper vision, plan for implementation or government support will soon hit the wall of impracticality.

A claims-driven process is therefore difficult and even impractical to sustain as the sole basis for land reform. While restoration of rights is important, the emphasis should also be on development, social justice and alleviating poverty—in other words developmental issues.

- The serious lack of socio-economic data to cover all aspects of rural development in especially the three African case studies makes it virtually impossible to make firm recommendations on land reform in general. There are no simple solutions. The land needs of dispossessed communities differ. Differences may occur between people of the same community or between different regions or localities. The economic status of people may also determine what they see as the most pressing land issue to be dealt with. Land reform is therefore tied to other socio-economic reforms and should not be approached in isolation as it may increase a sense of deprivation and injustice.
- The role of government in the process of land claims and restitution of rights requires consideration. In the three African case studies the state is seen as a partner in the land claims process, while in Australia the government is seen as opposing native title. Aboriginal people experience government's opposition to native title as just another 'round' in a process of dispossession. It should be recognised, however, that in South Africa and Australia where claims-driven processes exist, government has an obligation to take the necessary precautions to ensure that a claim meets the minimum legal standard for settlement. Unfortunately, in Australia it would seem as if the level of evidence required by the government for a consent determination in

many instances exceeds the minimum threshold for settlement—hence the small number of consent determinations. The state’s role in assisting or opposing claimants, impacts not only on the psychological state of claimants but can also be indicative of the state’s possible post-settlement support. Successful claimants in Australia have experienced a lack of government support to get their body corporates under way as well as funding for expenses that arise from a determination of native title. The process of healing, nation building and acknowledging past wrongdoings is also influenced by the role the state plays in supporting or opposing claims.

- The nature of the land claim settlement and restoration of land rights programmes should not necessarily be determined by the same terms upon which land had been dispossessed. In other words, if current tenure entails large commercial operations and pastoral stations it is not necessarily appropriate to continue with such a system. New farmers may find it impossible to continue with large-scale commercial operations that took many years and huge subsidies to establish. The same applies to the acquisition of pastoral stations in Australia where Aboriginal people may have different needs than those of large-scale pastoral owners. A quantum leap is therefore required to analyse current land needs and to develop a policy that caters for such needs, rather than merely continuing with the status quo.
- Any successful land reform programme has to accommodate the need for a combination of large-scale commercial operations and family-based undertakings. Account should also be taken of customary and cultural concerns in this regard. Experience shows that land reform programmes may encourage and even require imaginative project proposals that involve all types of consultants but in many instances lacks ownership from local communities. Without a sincere and well grounded commitment or the culture to cooperate, large-scale corporations or undertakings can fail dismally. This is not limited to the African experience. Australia has also been witness to Aboriginal people being encouraged to submit detailed commercial business plans to demonstrate how they would develop commercial enterprises on pastoral stations, while in many instances their land needs are far more basic and aimed at family-based subsistence and cultural activities. In Zimbabwe, for example, research indicated that differences in land use needs were as follows: some youth (safari’s and tourism); war veterans (return of lost lands); farm workers (security of tenure and communal land and acquired land); urban males (pre-urban plots, residential land); urban females

(residential and business plots, rural croplands).⁵³⁴ It can be assumed that in Namibia, South Africa and Australia communities have similar differences in terms of their land needs.

- The aims and goals of land distribution should be made very clear and if possible receive support from across the political spectrum. Namibia opted for a unique process whereby a national conference on land made recommendations, which were then submitted to government for consideration. Although there were differences of opinion at the conference, the process of involving persons from across the political spectrum and different sectors of society was unique. There is also wide support for land reform in South Africa, although differences may exist on the practical application thereof. If the aims and goals of land reform and in particular land distribution are not clear, there is a high likelihood of people interpreting the outcomes in different ways and of implementation being approached in different ways. To some, the main aim of land distribution may be to rectify past injustices with an emphasis on the return of or access to ancestral land; to others the return of ancestral land may be of lesser importance with creation of employment being more important; others may see relief from rural poverty on the basis of self-sufficient agricultural activities being the main aim, while others may view the expansion of those who have already demonstrated themselves as being capable land managers as being the primary purpose. While each of these aims may have its own merit, the programmes that precede and lead to the distribution and support the implementation are quite different.
- The successful outcome of land reform, and in particular of restoration of land, requires beneficiaries to take ownership of the expected outcome. All four case studies demonstrate the inherent risk of low participation by beneficiaries in the planning leading to land restoration, or even if they participate, the lack of understanding of processes and the implications thereof. In South Africa, centralised planning and management by external ‘professionals’ and ‘consultants’ has been found to be lacking in community participation in many instances. The same has also happened in Australia where consultants acting for communities tend to draft proposals to suit the Indigenous Land Corporation (ILC) rather than to reflect the needs of the community.

There are also examples in South Africa where in order to increase the ‘kitty’ for redistribution, members of a community might have signed up or

pooled their money (R16,000 grant per household) without being fully aware of what would happen to the money allocated to them, or worse, what would be expected of them in terms of implementing a business plan. Bigger projects are not necessarily better and it is questionable whether poor people should not be given more assistance to farm for sustenance rather than large-scale projects that attract donor attention.

In order to pursue land redistribution effectively, a planning grant of up to nine per cent of the project value is available in South Africa to proponents for purposes of planning. While this has had the positive effect that proposals are worked out in detail, it has caused problems in terms of beneficiaries taking ownership of projects, projects being ‘inflated’ due to the involvement of a wide range of consultants and the sophistication of business plans not necessarily keeping track with the needs or experience of beneficiaries. In many cases the community perceives a plan to be that of the consultant’s and not necessarily their own. There have also been various cases where the actual project as implemented deviated substantially from the proposed business plan. As a result of these and other complexities the land redistribution programme is “mired in controversy”.⁵³⁵

- Failure to integrate land reform into the broader spectrum of governmental support services and actions has contributed—especially in the three African case studies—to slow progress, frustration and even failure. The same can be said, albeit on a smaller scale, of Australia where some acquisition programmes have failed dismally. The process leading to the acquisition of land can be as important as the actual resettlement of people on the land. While there is a risk of the pre-acquisition process becoming too cumbersome, the fact is that many failures have resulted from land being acquired without proper resources or planning to sustain development. This in turn causes its own instability and deprivation. The question is therefore when to involve the respective tiers of government and line-function departments in the land planning process. It could become problematic if departments are responsible for the implementation of a programme to which they did not form part. There are ample examples where, once land is transferred, new owners have approached line function departments as well as provincial (state) and local governments for assistance but with little or no practical outcome, mainly because of a lack of pre-acquisition involvement of lower-tier governments.
- A key factor in determining the outcome of land reform in the long term

relates to the legitimacy of the programme—both from the perspective of government, the public in general and the current land owners. There is a risk that governments in the three African case studies have tended to exploit the land issue for purposes of short-term political gain or to distract from other social and economic issues rather than developing a sustainable, long-term policy with the necessary support systems in place. The same applies in a converse way to Australia where the land needs of Aboriginal people have been ignored or used as a threat for the purposes of political expedience. The complexity of land reform requires long-term administrative, technical and financial support and if the programme is not supported by a deep-rooted legitimacy, it may falter without any real benefits flowing to the landless. Ideally, partnerships are also required with existing landowners as the very nature of farming requires neighbouring land owners to work together, to share information, to participate in joint training, etc.

- The move back on to ancestral land may not always bear the romantic fruit that it promises. In some instances where communities have retained a close connection to the land of their ancestors they have found it easier to resettle and to take up agricultural and other commercial practices. In other instances, however, communities have been moved back to land from which they had been removed two or even more generations ago. In some cases the sense of ‘community’ was absent and therefore complicated the resettlement. In other instances the skills required to work the land were absent or the agricultural practices of yesteryear were no longer applicable. All of these could culminate in a second sense of loss. The human dimension of restoration and the psychological dynamics associated with a return to land should therefore not be underestimated.
- It is crucial to determine with clarity which government department is ultimately responsible for the overseeing and implementation of (a) land reform and (b) support services following the restitution of rights in land. Both centralised and decentralised options carry risks. While the strategic objective is to get land reform under way, coordination between tiers of government and departments within the respective tiers is crucial to success. In all four case studies a fragmented approach has caused delays and poor focus, which in turn has led to failure. Zimbabwe and Kenya have ample examples where intra-departmental factions and conflicts impacted and contributed to the failure of projects. In South Africa, the initially overly centralised process stood guilty of the very problems it wanted to avoid. In

Australia there is no federal or state agency that has as a main focus land reform and there is no intergovernmental agency to oversee land reform. In South Africa, a decision was initially made to establish a national office with provincial branches to manage the process, and individual projects requiring sign-off by the Department of Land Affairs minister. Rather than speeding up the process, this led to a slowing down and even to a breakdown in post-acquisition support. Other national and provincial government departments did not take ownership of the process, which in turn left the department with sole responsibility to make the policy work. Efforts are under way to devise a more integrated approach whereby other line function departments as well as provincial and local governments are more actively involved in the pre-acquisition process, which in turn leads to improved support during the settlement phase.

- Land reform is required in urban and rural areas, but access is most urgently required in rural areas where poverty levels are highest. However, all four countries experience an outflow from rural areas and especially in the three African case studies, rural infrastructure is under severe pressure and in many places in decay and at risk of not being replaced. In the best of circumstances farmers in the previous dispensation have been moving away from rural to urban areas due to hardship and declining state subsidies.⁵³⁶ Settling new farmers—some with little farming experience—is therefore no easy feat. In Africa the large subsidies that were available in the past to support mainly white farmers have to be used now for social and economic objectives such as health, education and housing that were neglected by previous minority governments. It would be even more difficult to settle and retain rural populations on the scale required.
- There is an obvious stress in determining priorities for restoration of land between allocating land to those most in need, such as the rural poor, compared to those who stand the best chance of making a success and therefore ensuring a good return on investment. All four case studies are struggling to obtain a balance between these seemingly competing objectives. The choice that is made inevitably determines the nature of the projects that are initiated, the support and subsidies developed by the state, and the time-frame of expectations. In South Africa the appointments of a new minister for Agriculture and Land Affairs and new senior staff have led to a change of direction from ‘bottom-up’ empowerment of the poor to support programmes for those who have already demonstrated a capacity to be

successful. The minister redirected the redistribution policy to a grant-based programme aimed to assist 200,000 commercial farmers in obtaining 30% of agricultural land over the next 20 years.⁵³⁷ This is seen as a ‘major policy departure’ from the previous approach that focused on accessibility of land to the rural poor.⁵³⁸ The groups most likely to suffer are those already marginalised such as women, rural poor and the unemployed. The same has happened in Australia where the ILC is tending towards a system whereby the ‘haves’ stand a better chance of being successful in land applications than the ‘have nots’. This is due to a push in all four countries for commercial agriculture rather than peasant-based subsistence farming. In South Africa this comes in light of the government’s “increasingly conservative macroeconomic policy stance, the apparent downplaying of its social welfare goals, and the alleged centralisation of political power around its ruling elite”.⁵³⁹ In all three African case studies in particular a new class of ‘haves’ have come into being, which in itself may not be wrong but in many instances they seem to perpetuate the inequality that characterised the previous regime.

- ‘Many a slip ’twixt cup and lip’ is the way in which post-settlement policies can be described. The phase following a return of land requires far more resources, support and cross-government assistance than the mere returning of land. It also requires a long-term vision that is sustainable as, in its absence, new landowners may soon become disenchanted with land reform. Successful implementation therefore remains the key to an effective land policy. Of the four case studies, Australia is probably best placed from an economic perspective to provide sustainable post-acquisition support but a long-term vision and the political will to do so is lacking. In the three African case studies the resources to oversee implementation are severely under pressure. This is exacerbated by the fact that returns on investment are slow compared to other social and economic priorities such as health, housing and education where improvements can be visible in the short term. Even in South Africa—the economic powerhouse of Southern Africa—the institutional and economic capacity to deal with a land reform programme of the scale it has embarked upon is being hampered by a wide range of problems at national, provincial and local level with “everything pointing to these problems getting worse”.⁵⁴⁰
- Sight should not be lost of the general decline in living standards, Australia included, and the depopulation of rural areas. The cost to establish and maintain infrastructure in rural areas is high, urban areas in Africa are under

pressure due to rapid urbanisation and general conditions for the farming and pastoral industries are tougher than before. As a consequence the main problem in the respective case studies is not necessarily a shortage of available land on the market for acquisition for the landless, but rather the establishment of viable enterprises on such land. The obvious risk, however, to the landless is that they may be entering an industry that is virtually on its knees—and rather than addressing poverty and unemployment, it may exacerbate social problems.

- International political and economic support for land reform in especially African case studies is crucial to the success of the programmes. African countries simply do not have the resources to deal effectively with the land programmes they have embarked upon. When Kenya started with land reform shortly after independence it received so much foreign support that only five per cent of costs had to be financed by government from own resources. Those levels of support no longer exist and especially after the experiences of the past four years in Zimbabwe, foreign capital aimed at land reform has become ‘shy’. The irony, however, is that the very outcome that the international community would like to prevent—that is, a large taking of land without compensation—may be encouraged by the lack of donor support for a well directed market-based land acquisition policy. It is widely accepted that land reform is very expensive, that short-term outcomes are uncertain and that a long-term vision is required with short-term, realistic objectives.

The political and economic reality of Southern Africa is, however, such that time is not necessarily on the side of those who favour a careful and considered approach to land reform. The winds of change that were started by Mugabe are indeed blowing across South Africa and Namibia and fuelling the voices that call for a radical, non-market driven land reform process. The influence of the World Bank and international donors in setting the tone for market-based reform is apparent and their ongoing support will depend on the property rights of individuals being respected. Account should, however, be taken that the process may become so slow and inflexible that a rational approach to land reform may be the first casualty.

The following summary of an analysis of land reform in a variety of countries illustrates the dilemma:

Rarely has land reform occurred anywhere in the world without some form of force used to compel land owners to sell land or discount the

price of land compensations, quite apart from outright expropriation ... land reform using purely market processes has rarely occurred as the criteria of the market and social justice do not always tie-up.⁵⁴¹

NOTES

- 535 S Batterbury, Report read at workshop, 'Politics of land reform in the "new" South Africa', London School of Economics, 7 June 2000 <www.lse.ac.uk/depts/destin/simon/safrica>
- 536 For example, a 1984 survey undertaken by the South African Agricultural Union found that only 50% of all white-held farms were financially viable. Weiner, 1990, p 295.
- 537 Merten, Observers concerned about new land reform policy, *Mail and Guardian*, 18 February 2000.
- 538 Du Plessis, et al, 2000, p 233.
- 539 G Capps, Discussion Notes read at workshop, 'Politics of land reform in the "new" South Africa', op cit.
- 540 Capps, op cit, p 3.
- 541 Moyo, 2000, op cit, p 16.

Annexure I

EXAMPLES OF MAJOR LAND REFORM GRANTS AND PROGRAMMES IN SOUTH AFRICA

The purpose of this table is to provide readers with a brief overview of the main examples of land reform programmes and grants aimed at assisting previously disadvantaged persons to secure tenure rights in land, and to become involved in the management and control of land. No analysis or comment is offered of the implementation of these grants and/or the success thereof as it falls outside the brief of the publication. The detail conditions attached to the respective grants may differ from time to time depending on policy considerations and resource constraints.

Restitution discretionary grant:
Department of Land Affairs (DLA)

Assist successful land claimants to resettle on land.

- Maximum of R3,000 per household (core family).
- Contribution towards resettlement costs following the successful land claim.
- The grant can be used for negotiation of land claim settlement, as well as expenditure related to fencing, roads, boreholes, housing and a business plan for property.
- Individual grants may be pooled or allocated to individual families.
- This is a discretionary grant but in practice it is allocated without exception.
- The grant constitutes a one-off payment that cannot be repeated.

Section 42D-agreement: DLA

An agreement whereby a land claim is settled subject to certain conditions as agreed to between the Minister of Land Affairs and the successful claimants.

- Minister approves settlement of claim out of court.
- Minister has to be satisfied that basic elements of claim can be proven in the Land Claims Court.
- The agreement could provide

**Settlement
planning grant:
DLA**

Assistance to develop
business plan for land.

- for certain monetary assistance granted to successful claimants.
- Assistance could include basic contributions towards land planning and development.
- A R1,440 grant per household towards development of a business plan for land, surveying, fencing, etc.
- Grant can also be allocated to private land owners who, in partnership with a family, develop a land reform plan to involve the family in management of the land.
- A service provider (professional consultant/s) is appointed to assist the community in the development of a business plan and to oversee the implementation thereof.
- Payment of the grant is directly to the service provider who is responsible for developing the business plan and oversight for a limited period of time of implementation thereof.
- Families may pool funds to expand the scope of their activities.
- It is a discretionary grant which can be refused.
- The grant is a one-off payment which cannot be repeated.
- A larger amount can be allocated on the merit of an application.

<p>Transfer of funds —local government assistance: DLA</p>	<p>Funding for local governments to assist with approved projects undertaken by new land owners.</p>	<ul style="list-style-type: none"> • National and local government in partnership to assist new landowners to manage their land and implement their business plans. • Local government acts as agent for the national government in rendering certain services to the new landowners. • Specific programmes are developed at local level to assist new land owners in settlement and in the establishment of businesses. • Special assistance is given to community property associations (CPAs) in capacity building to enable them to execute their functions and represent the interests of their members.
<p>Settlement/land acquisition grant: DLA</p>	<p>Assistance to families to develop and implement business plans and for the acquisition of land.</p>	<ul style="list-style-type: none"> • Any previously disadvantaged person can qualify—not limited to successful land claimants. • A maximum of R16,000 available per household—individual grants may be pooled to enlarge the total amount available for acquisition of land. • Grant can be used for securing tenure rights, development of infrastructure, home improvements or other capital investments. • Own contribution has to be made by the landowner—for example labour in kind, other development assistance from other donors, cash or loans. • Activities should be in accordance with an approved business plan. A means test is

Land redistribution and agricultural development grant: DLA

Assistance to families to acquire and develop land for agricultural purposes, thereby extending ownership of and/or access to productive resources to previously disadvantaged persons and communities.

- applied to determine whether a family qualifies for the grant.
- Type of activities need not be limited to agriculture and could include other commercial undertakings such as tourism development, commercial enterprises and other non-agricultural activities.
- An offer on land can only be made after approval of the grant.
- Sliding scale of matching grants up to R100,000 depending on matching contributions by the new landowners.
- The matching contribution from the community could include cash, other loans, labour and stock.
- Grant covers expenses such as acquisition of land for agricultural purposes, development of infrastructure, acquisition of capital assets and other land improvements.
- Provision is also made for a **planning grant** to enable new owners to develop business plans for their enterprise. The planning grant is limited to a maximum of 15% of the total estimated project costs and payment takes place directly to the agent/consultant responsible for drafting the plan.
- A condition for funding approval could be attendance of training and development programmes by the new landowners to ensure that they gain the necessary experience

Land development objectives grant: DLA	Aimed to assist poor, under-resourced local authorities to establish land development objectives for their area.	and training for planned activities.
Standard settlement offer: DLA	Cash payment as settlement for land claim.	<ul style="list-style-type: none"> • Aimed particularly at rural, underdeveloped local authorities. • In essence the grant amounts to a strategic planning process for land development and setting of objectives and possible delivery targets. • Outcome of the grant is an integrated local plan for all sectors of governance. The plan is intended to guide all development activities in the local government area. • Participants in planning sessions involve all relevant local stakeholders—government, non-government and private. <ul style="list-style-type: none"> • Cash payment on individual or community basis for settlement of claim. • Minister has to be satisfied that the claim can succeed in court. • Compensation determined by land valuation and negotiation between the parties. • The payment constitutes full and final settlement of the claim. No further claims can be made. • It comprises a one-off payment which cannot be revisited or repeated. • Amount payable depends on area where land is situated.

Facilitation services: DLA	Retaining a facilitator to assist a community in identification of their needs for a land reform programme and to identify training and capacity requirements.	<ul style="list-style-type: none"> • Facilitator appointed by the DLA at request of and in consultation with a community following an application and motivation for the services of such a person. • The implementation and management of the programme takes place at provincial level. • No fixed sum is available. Grant depends on nature of the application and the discretion of the provincial director of Land Affairs.
Ancillary support: DLA	Grants for the purpose of training and dispute resolution.	<ul style="list-style-type: none"> • Grants for the use of training of officials and members of communities involved in land reform. • Particular provision for specialist mediation and conflict resolution support.
Joint management of national parks (South African National Parks)	Return of ownership of land to dispossessed communities and subsequent joint management of such land for conservation (national park) purposes.	<ul style="list-style-type: none"> • Only applicable in the case of successful land claims. In instances where land claim is not proven no joint management takes place. • Ownership is restored with different types of leaseback and contractual arrangements entered into between the community owners and South African National Parks. • Leaseback and contractual arrangements could include employment opportunities, outsourcing of certain services to the local community, joint management structures, tourism activities and other projects to benefit the new landowners. • Of the 19 national parks, three

Consultative committees for national parks: South African National Parks.

Establishment of national park committees/forums to involve local communities in park management.

have some form of joint management in place for the whole or part of the park.

- Decision making vests in joint authority but management objectives have to comply with the provisions of the National Parks Act. Executive functions are undertaken by South African National Parks.
- Examples of joint management arrangements are found in the Richtersveld National Park (whole park is based on joint management); Kruger National Park (a small part—25,000 ha of a total of more than one million hectares—of the park belonging to the Makuleke community is jointly managed); Kalahari-Gemsbok National Park (a part of the park—approximately one-quarter is jointly managed with the San community).
- Local communities of all population groups as well as local authorities and other stakeholders are involved in consultative forums to discuss matters affecting park management.
- The arrangement does not depend on a successful land claim process but is seen as the ‘democratisation’ of national park management by expanding the basis of consultation with all local communities and interest groups.
- Ownership of the land is not transferred to local communities and joint management of the park does not occur.

- Consultants are used to identify key stakeholders that have an interest in the affairs of the national park. Representatives of the community are appointed by South African National Parks for a term of office.
- The arrangement has no statutory base but depends on the discretion of South African National Parks.
- Consultation takes place on matters affecting local communities such as tourism, economic empowerment, employment, outsourcing, conservation objectives and park expansion and development.
- Administrative support and training of community members participating in the forums are offered by South African National Parks.
- Final decision making and executive authority remain fully with management of South African National Parks in terms of the National Parks Act.
- National Parks in turn also participate in Integrated Development Planning of local governments with regard to key development objectives for local government areas.

Land redistribution for agricultural purposes grant (LRAD): Agency agreement between Land Bank and DLA	Assists individuals/families to acquire property for farming purposes. Families who qualify for the restitution grant can approach the Land Bank directly for the grant and also apply for additional funding in the form of a loan.	<ul style="list-style-type: none"> • One-stop service is offered whereby a grant and additional funding can be obtained from the same institution—the Land Bank. • Land Bank requires the same type of business plan as the DLA to consider an application for a loan. • Applicants have to contribute to funding by means of other loans, labour, cash, livestock or equipment.
‘Bought-in-properties’ by the Land Bank	Land Bank obtains land on a willing buyer–willing seller basis or when a landowner fails his/her repayments, for the benefit of beneficiaries.	<ul style="list-style-type: none"> • Land is usually acquired when the current owners fail their obligations to the Land Bank or to other financial institutions. • Land Bank and DLA have concluded a memorandum of understanding to regulate the programme. • Land Bank obtains properties and holds it in trust until title is handed to a community/group that may qualify. • Individuals/groups may make submissions to the Land Bank as to why land should be allocated to them.
Special mortgage bond: Special financial products for land reform beneficiaries by Land Bank	Purpose is to make money available to beneficiaries at a subsidised rate on a temporary basis.	<ul style="list-style-type: none"> • Up to R500,000 is made available in the form of a loan from the Land Bank. • Mortgage rate is 5% below market rate. • Lower rate applies for two years where after normal commercial rates apply.
Social discount product: Special financial products for Land Reform beneficiaries by Land Bank	Purpose is to encourage established commercial farmers to enter into partnerships with new black farmers.	<ul style="list-style-type: none"> • Partnerships for training and cooperation between existing commercial farmers and new farmers are encouraged. • Existing farmers obtain discounted funding as a ‘reward’

Corporate social investment: Land Bank	Non-repayable grants towards development objectives.	<p>for joint projects with new farmers.</p> <ul style="list-style-type: none"> • Grants focus on training, skills development and capacity building. • Target audience is previously disadvantaged communities. • Requirement of direct involvement of local people in the utilisation of the grant.
Post-resettlement assistance: Various government departments.	Ongoing assistance for new land owners.	<ul style="list-style-type: none"> • Function of respective line function departments, for example, Education, Agriculture, local government.
Technical assistance: Development Bank of Southern Africa	Assistance to landowners for purposes of system and technical development.	<ul style="list-style-type: none"> • Grant up to a maximum of R200,000. • Earmarked for purposes of management system development, acquisition of services and development of financial systems.
Technical Support: Development Bank of Southern Africa	Making available experts to assist landowners.	<ul style="list-style-type: none"> • Technical experts are made available to landowners. • Assistance could include advice with regard to infrastructural development, management and financial practices and project evaluation and monitoring.
Development Fund: Development Bank of Southern Africa	Capacity building and training	<ul style="list-style-type: none"> • Separate fund established by the Development Bank for purposes of capacity development and training. • Especially applicable in pre-loan application phase to assist landowners or prospective landowners to develop capacity, draft a business plan and undertake training.

Annexure II

SUMMARY OF THE MAIN OUTCOMES OF RESTITUTION CLAIMS SETTLED UP TO 31 DECEMBER 2002

Restitution claims settled as at 31 December 2002

NATIONAL STATISTICS

Settled restitution claims

Number of claims settled	36,279
Households involved	85,005
Beneficiaries	437,145
Land restored: hectares	512,912

Financial details

Land cost	R430,824,707.39
Financial compensation	R1,237,088,361.90
Restitution Discretionary Grant	R133,578,000.00
Settlement and Planning Grant	R46,737,582.01
Solatium	R6,196,000.00
Total award cost	R1,854,424,651.30

EASTERN CAPE

Settled restitution claims

Number of claims settled	11,045
Households involved	21, 953
Beneficiaries	106,507
Land restored: Hectares	29,577

Financial details

Land cost	R97,587,594.50
Financial compensation	R405,300,961.38
Restitution Discretionary Grant	R38,688,000.00
Settlement and Planning Grant	R18,570,240.00
Solatium	0
Total award cost	R560,146,795.88

FREE STATE*Settled restitution claims*

Number of claims settled	1,150
Households involved	1,655
Beneficiaries	8,278
Land restored: hectares	6, 665

Financial details

Land cost	R7,549,367.22
Financial compensation	R11,568,269.31
Restitution Discretionary Grant	R978,000.00
Settlement and Planning Grant	R168,101.50
Solatium	0
Total award cost	R20,263,738.03

GAUTENG*Settled restitution claims*

Number of claims settled	7,373
Households involved	7,898
Beneficiaries	39,492
Land restored: hectares	3,453

Financial details

Land cost	R17,507,952.00
Financial compensation	R224,561,875.00
Restitution Discretionary Grant	R1,524,000.00
Settlement and Planning Grant	R777,000.00
Solatium	0
Total award cost	R244,370,827.00

KWAZULU NATAL*Settled restitution claims*

Number of claims settled	8,640
Households involved	17,485
Beneficiaries	87,427
Land restored: hectares	70,603

Financial details

Land cost	R69,087,086.36
Financial compensation	R378,105,554.32
Restitution Discretionary Grant	R18,474,000.00
Settlement and Planning Grant	R4,837,845.72
Solatium	R6,155,000.00
Total award cost	R476,659,486.40

MPUMALANGA*Settled restitution claims*

Number of claims settled	558
Households involved	5,997
Beneficiaries	29,988
Land restored: Hectares	21, 626

Financial details

Land Cost	R11,255,598.00
Financial Compensation	R23,540,120.00
Restitution Discretionary Grant	R5,850,000.00
Settlement and Planning Grant	R2,808,000.00
Solatium	0
Total award cost	R43,453,718.00

NORTH WEST*Settled restitution claims*

Number of claims settled	1,053
Households involved	8,245
Beneficiaries	49,474
Land restored: Hectares	61,470

Financial details

Land Cost	R66,132,035.00
Financial Compensation	R26,460,522.34
Restitution Discretionary Grant	R22,227,000.00
Settlement and Planning Grant	R10,576,162.79
Solatium	0
Total award cost	R125,395,720.13

NORTHERN CAPE*Settled restitution claims*

Number of claims settled	450
Households involved	4,187
Beneficiaries	20,938
Land restored: hectares	279,759

Financial details

Land cost	R56,944,011.29
Financial compensation	R4,742,606.00
Restitution Discretionary Grant	R8,518,000.00
Settlement and Planning Grant	R2,001,600.00
Solatium	0
Total award cost	R72,206,217.29

LIMPOPO PROVINCE*Settled restitution claims*

Number of claims settled	777
Households involved	10,472
Beneficiaries	52,360
Land restored: Hectares	34,504

Financial details

Land cost	R84,506,088.32
Financial compensation	R20,191,157.96
Restitution Discretionary Grant	R22,035,000.00
Settlement and Planning Grant	R6,470,860.00
Solatium	0
Total award cost	R133,203,106.28

WESTERN CAPE*Settled restitution claims*

Number of claims settled	5 233
Households involved	7 113
Beneficiaries	42 681
Land restored: Hectares	5 255

Financial details

Land Cost	R20,254,974.70
Financial Compensation	R142,617,295.59
Restitution Discretionary Grant	R15,284,000.00
Settlement and Planning Grant	R527,772.00
Solatium	41,000.00
Total award cost	R178,725,042.29

Source: <http://land.pwv.gov.za/restitution/updated%20stats.htm#FREE%20STATE>

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- Economic Policy Dialogue: Business Meets Politics, *Johannesburg, South Africa 1998/1999*
- South African Business and the European Union in the Context of the New Trade and Development Agreement, 18 June 1999, *Rand Afrikaans University, Johannesburg*
- Consolidating Democracy in South Africa, 18–20 August 1999, *Holiday Inn, Umtata*
- Politics and the Media in Southern Africa
 - Media and Politics: The Role of the Media in Promoting Democracy and Good Governance, 21–23 September 1999, *Safari Court Hotel, Windhoek, Namibia*
 - Konrad Adenauer Foundation Journalism Workshop: The Media in Southern Africa, 10–12 September 1999, *River Side Hotel, Durban, South Africa*
- Constitution and Law III, 29 October 1999, *Faculty of Law, PU for CHE*
- Business and Human Rights in South Africa, 30–31 October 1999, *HSRC, Pretoria*

2000

- Nuclear Disarmament and Non-Proliferation: the Role of the Nuclear Non-Proliferation Treaty, 29 March 2000, *Jan Smuts House, Wits University, Johannesburg*
- The Moral Renaissance: Government, Politics, Ethics and Spirituality, 3–4 May 2000, *The Parktonian Hotel, Braamfontein, Johannesburg*
- Bridging the Gap Between Rich and Poor in South Africa, 17–19 May 2000, *Sizanani Centre, Bronkhorstpruit*
- The Future of South Africa's Constituency System, 5 July 2000, *Saint George Hotel, Rietvleidam*
- Southern Africa and Mercosur/l: Reviewing the Relationship and Seeking Opportunities, 24–25 October 2000, *São Paulo, Brazil*

2001

- 1 Globalisation and International Relations: Challenges and Opportunities for Provinces, 31 August–1 September 2000, *Kromme Rhee, Stellenbosch*
- 2 Opposition in South Africa's New Democracy, 28–30 June 2000, *Kariega Game Reserve, Eastern Cape*
- 3 Democratic Transformation of Education in South Africa, 27–28 September 2000, *Stellenbosch Lodge Country Hotel, Stellenbosch*
- 4 Local Government Elections 2000: From Transition to Consolidation, 20–21 September 2000, *Cedar Park Convention Centre, Woodmead, Johannesburg*
- 5 The Constitutional Right of Access to Information, 4 September 2000, *St George Hotel, Old Pretoria Road, Rietvlei Dam*
- 6 Constitution and Law IV: Developments in the Contemporary Constitutional State, 2–3 November 2000, *Faculty of Law, Potchefstroom University for Christian Higher Education*
- 7 Provincial Government in South Africa, 16–18 August 2000, *Holiday Inn Garden Court, Umtata*
- 8 Crime and Policing in Transitional Societies, 30 August–1 September 2000, *Jan Smuts House, University of the Witwatersrand, Johannesburg*
- 9 Strengthening the Moral Fabric of the South African Workplace: Strategies, Resources and Research, 3–4 May 2001, *Sanlam Auditorium, Conference Centre, University of Pretoria*

2001

- 10 Defining a New Citizenship for South Africa and the Fundamental Values That Will Shape It, *14 June 2001, Sunnyside Park Hotel, Parktown, Johannesburg*
- 11 Politics of Identity and Exclusion in Africa: From Violent Confrontation to Peaceful Cooperation, *25–26 July 2001, Senate Hall, University of Pretoria*
- 12 South Africa's Local Government Elections 2000: Evaluation and Prospects, *19 April 2001, Johannesburg Country Club, Johannesburg*
- 13 The Empowerment of School Leaders Through Democratic Values, *5–6 September 2001, Stellenbosch Country Hotel, Stellenbosch*
- 14 Constitution and Law IV: Colloquium on Local Government Law, *26 October 2001, Faculty of Law, Potchefstroom University for Christian Higher Education*