



## VIEWPOINT

# Land for the dispossessed — A tale of two federations

BY BERTUS DE VILLIERS

*South Africa and Australia are both home to populations who were forced from their lands. Today both countries seek to redress the wrongs of the past. The author, who has experience in both countries, compares the two federations.*

**The** legacy of the Apartheid years in South Africa from 1948 to 1994 was the forcible removal of black South Africans from the land and the concentration of 87 per cent of the land in the hands of white South Africans, a minority of the population. The problem of this unjust distribution of land remained even after the transition to democracy in 1994, when all South Africans were able to vote.

In Australia, the belief that the continent was *terra nullius* — a land without owners — allowed settlers in Australia to appropriate nearly all the land by ignoring the relationship of Aboriginal Australians to their land. It was not until the Mabo decision in the Australian High Court in 1992 that the concept of *terra nullius* was overturned.

Land reform is probably one of the most complex challenges facing both South Africa and Australia today (see box 1). In both countries the process of land reform is unfinished. And this issue has become one of the most difficult to resolve in the domestic politics of both countries.

South Africa has the legal framework and policies to deal with land reform. But does the country have the resources, the patience and other practical prerequisites to implement reform effectively?

Australia was forced into the recognition of native title by the High Court in 1992, but the body politic and broad community are still struggling to come to grips with the concept and its practical implications. Popular resistance to native title is high. In the absence of a general policy of land reform, the focus is very much on native title as a make or break issue for Aboriginal people.

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### 1. What is land reform?

Land reform usually means restitution, redistribution or confirmation of rights to land to the benefit of the poor or dispossessed. Restitution is the restoration of rights in ancestral land that were dispossessed by previous regimes. Redistribution involves the acquisition of private land or distribution of state-owned land to the landless. Linked to land reform are policies to support the dispossessed when they return to or settle onto land. Land reform requires a long term vision, clear short and medium term objectives, sound strategies and resources. It also requires wide public support to ensure that any land reform is sustainable and protected against whims of changes in government.

Land reform can include a land claim process, securing rights to ancestral land that was lost due to discriminatory practices (which is arguably the most controversial of land reform measures). But the process of land reform also refers to the acquisition of land for distribution to the landless, changing and securing of tenure for those who occupy it, and involving traditional communities in the management and control of their ancestral land.

In its broadest sense, land reform encompasses land claims, acquisition and distribution of land, access to land for certain purposes, land-use planning, infrastructure development, farming and commercial support, resettlement programs, security of tenure and training.

### Land reform in a federal context

There are some similarities — and some differences — in the approach to land reform in the two countries. In both countries, land reform is handled by the federal system in different ways. Here is how they compare:

In both countries, land reform is a national (federal) policy measure with the states or provinces having an important implementation role.

In South Africa, complaints have been directed at the national Department of Land Affairs for driving land reform without involving provinces and local governments enough in the process leading to communities being returned to land. As a result, provincial authorities have in many instances been unable to deal with resettlement issues experienced by new land owners.



In South Africa, 64,000 dispossessed farmers filed land claims by 1998.

In Australia the states are the main respondents in native title claims and with exceptions of a few consent determinations, the states have been resisting native title. Few states have a land reform policy in place to assist Aboriginal people to gain access, control and management of land for cultural and/or commercial purposes. In South Africa, there are specifically dedicated intergovernmental ministerial meetings between national and provincial ministers and senior bureaucrats regarding land reform. Yet in Australia, the intergovernmental structures have not developed a cohesive policy base from which to direct federal and state activities.

### ***Different histories, unclear goals***

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 followed by the Native Title Act. In South Africa restitution is part of the political and economic agenda of the majority, as well as the main minority parties, but settlements in areas where claims are contested such as in rural and agricultural areas can become very complex. While land reform in Australia centres mainly on the recognition of native title as a coexisting right, the reform process in South Africa seeks to provide access to land in the form of freehold for millions of people. And the provincial governments must provide services to those who are resettled.

In both countries, there is insufficient clarity of the main objectives of land reform. In other words, is land reform aimed at settling of claims, creating employment, improving production, ensuring greater access to land, or all of the above?

Experience in South Africa shows that although many claims have been settled by cash payments (a “success” in terms of numbers), the return of communities to rural lands can be very resource intensive and may even lead to increased unemployment if support services are not in place.

## ***2. South Africa’s path to land reform***

### ***Legal framework***

In South Africa the main objectives of the land reform program begun in 1997 are to: redress the injustices of apartheid, to foster national reconciliation and stability, to underpin economic growth, and to improve household welfare and alleviate poverty.

In 1996, South Africa’s post-apartheid constitution set out the legal framework for land reform. The land reform policy is made up of three elements: tenure reform, redistribution, and restitution. This policy was further set out in more than 22 statutes. A special court, the Land Claims Court, was established to deal with claims that could not be settled by consent and to deal with other matters arising from tenure reform.

### ***Three elements of land reform in South Africa***

**Tenure reform** refers to improving the rights especially of farm workers and persons within communal and homeland areas. 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.

**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.

**Restitution** is specifically aimed at compensating people who were removed from their land under apartheid as part of the consolidation of the so-called “black homelands” or the so-called “black spot” removal program. The process is 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. In order to be successful in a land claim, a person or community has to show that they occupied the land for a beneficial purpose for at least ten years since 1913, that they were deprived of their rights without adequate compensation, and that the deprivation would be unconstitutional under the current constitution. Approximately 64 000 claims had been lodged by the deadline of December 31, 1998. Of these, roughly 55% have been settled – most by means of cash payments.

Both countries have policies in place to complement the claim-driven process.

In Australia the hand-over of land held by state governments on behalf of Aboriginal people and the acquisition program of the Indigenous Land Corporation are examples. Thus far, both these programs have been slow in turning out results. Policies are mainly state-based and there is little federal coordination to ensure that Aboriginal people across the country have their reasonable land needs attended to.

*Continued on p. 18*

In South Africa the claims process is supported by a wider array of options — the return or acquisition of freehold title is but one option. Other options are the provision of alternative state land, acquisition of alternative freehold land, payment of monetary compensation, assisting with resettlement costs, training programs and access to alternative housing schemes, joint management of national parks or a combination of these.

### **Final say to courts: provinces and states have different roles**

In both countries, a national or federal court is in charge of the land claims process as the final arbiter of unresolved claims. In South Africa provision is made for a specialized Land Claims Court to deal with land claims and tenure matters. In Australia the Federal Court deals with native title claims.

The approaches adopted by the respective constituent units (provinces or states) in South Africa and Australia differ significantly. In South Africa the provinces are basically administrative “arms” for implementing the land reform policies of the national government. The provinces are not as much involved in considering the legal merit of a claim. They are however responsible for delivery of support once communities return to land.

In Australia the state governments in general play a leading role in the litigation process as primary respondents to native title claims. The state and Commonwealth governments are very reluctant to consent to native title except in exceptional circumstances limited to the outback of Australia. Some state governments such as Queensland have been developing alternative models for determining native title that could replace native title claims. But these initiatives are still in an experimental phase.

### **Complex and adversarial legal process**

Both countries are experiencing severe constraints in implementing land reform programs. The complexity of land reform from a legal, administrative and financial perspective seems to have been underestimated in South Africa. In Australia, the main mechanism to deal with Aboriginal land claims is a very complicated litigation and adversarial process. The Indigenous Land Corporation has not had a good track record in providing post-settlement services for new landowners.

In South Africa there are support programs to assist claimants to settle on their acquired land. But in some cases, people have been resettled on land without sufficient infrastructure or training. There is a risk in both countries that land acquired through purchasing programs may end up being underutilized or that vast amounts are absorbed through acquisition programs but with little wealth or employment being created in the process.

### **3. Australia’s approach to land reform**

In Australia, the recognition of native title was imposed upon the country in 1992 by the High Court in the well known common-law-based Mabo-decision. The **Native Title Act** was passed to provide a statutory framework for claiming native title rights on ancestral land. On the basis of the *Mabo* and subsequent decisions such as *Wik*, *Ward* and *Yorta Yorta*, three key elements of proof are required for a successful claim of native title:

1. **A traditional connection with the land** being claimed under the laws and customs of the group – in other words the claimants must show a continued linkage with the Aboriginal people who occupied the land at sovereignty (time of British settlement);
2. **An identifiable community or group with laws and customs** regulating their access to and control of the land – this requires a coherent set of laws and customs that, albeit with some adaptation, is derived from the original occupiers of the land; and
3. **A substantial maintenance of connection with land** and observance of the laws and customs – this means continued abidance and application of traditional laws and customs.

It is not only very difficult to prove native title, but the title itself is also weak because it coexists with other rights and is limited by other rights if they are in conflict with it. Approximately 630 claims have been lodged since 1993, of which a mere 45 have been determined – with only 31 claims succeeding.

In addition to native title claims, the federal government also introduced the Indigenous Lands Corporation, which has responsibility to acquire land for Aboriginal people. The ILC has acquired approximately 150 properties that range from urban business to cattle and sheep stations.

### **Minimum standards needed**

Land reform is a complex and arduous process. In federal countries or countries with federal attributes, success of land reform can depend on having a clear national vision which is supported by federal and state governments. States or provinces can experiment in land reform initiatives, but these have to be balanced with the need to guarantee equal rights of citizens to a fair and equitable system of land reform regardless of where they live. A successful land reform system needs to set minimum standards for all those seeking access to land.

### **Further Reading**

Adams, Martin, *Breaking ground: Development aid for land reform*. London: Overseas Development Institute, 2000.  
De Villiers, Bertus, *Land reform: issues and challenges*. Johannesburg: Konrad Adenauer Foundation, Johannesburg, 2003. 