

## **Access to Property Rights:** Integrating Indigenous Communities into the Federal Scheme - *International Experiences*

Edited by Céline Auclair and Nawel Hamidi



**ACCESS TO PROPERTY RIGHTS:**  
**Integrating Indigenous**  
**Communities into the Federal Scheme –**  
*International Experiences*

EDITED BY: CÉLINE AUCLAIR AND NAWEL HAMIDI

Published by



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ISBN 978-0-9809150-5-1

September 15, 2010

A publication of

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## Acknowledgments

This publication is the culmination of many hours of discussions, meetings, readings and writings. My very first acknowledgement goes to the Forum of Federations and the First Nations Tax Commission for their steadfast commitment to this endeavour.

I would also like to thank those who, together with the international experts, actively participated in the working sessions that were held in 2007–2009 and who were key persons to this endeavour during and after the preparation of these sessions. Thus, in addition to the authors of the chapters, I would like to thank John McKennirey, Stuart (Bud) Smith, Sakej (Youngblood) Henderson, Diane Cragg, Gregory Richard, Tom Flanagan, Wayne Haimila, Ann Shaw, Sarah Smith, Ken Scopick and Brent Moreau. Without their commitment and dedication the international working sessions and this publication would not have been possible.

A special thank you goes to my co-editor, Ms. Nawel Hamidi, who has coordinated this project. Nawel has invested considerable time and effort to ensure the success of the international sessions and the quality of this publication. We have also been able to count on the unfailing support of David Parks and Rachida Chaillie who contributed significantly to the quality of this program, and whom I also thank.

Finally, I wish to express my sincere gratitude to Clarence (Manny) Jules and Hernando de Soto. During this process they have been a constant source of inspiration as they continue to be. Our hope is that their efforts at empowering indigenous leaders and brightening the economic situation of indigenous peoples can reach as many indigenous communities as possible.

Céline Auclair





## Foreword

The exclusion of Indigenous peoples from the market economy in both the developed and developing world has deep historical roots. This exclusion is, in large part, due to the fact that clear ownership of their land and other assets has been denied. This absence of right of ownership not only limits the prosperity, and freedom of these groups, but it also removes one of the most powerful instruments any government has to fully exercise its self-determination.

Throughout the world, this contemporary isolation constrains dispossessed peoples to enter into the sphere of extra legality. More than two thirds of the world population is not protected by standard legal norms and regulations, and is subsequently excluded from enjoying full participation in the national and global economy. In 12 Latin American countries, more than 76% of the rural properties and 65% of the houses are affected by some degree of extra legality.

As land is one of the most important resources that any government possesses, absence of inclusive legal property systems creates legal uncertainty, political instability and mistrust and can lead to the rise of national conflicts. This is even truer in the case of Indigenous peoples for whom the land is not only one of the most vital aspects of Indigenous culture and cosmogony, but constitutes the last anchor for a minimal protection of their whole identity.

In Canada, statistical inference suggests that the private investment rate on First Nations lands is between four to six times lower than that in the rest of the country, due in large part to ineffective land tenure regimes. Recently, some First Nations leaders and the federal government have initiated research processes to look at ways First Nation could be better integrated into the market economy. Together, they have been able to unite their common aspiration to concretely empower Indigenous peoples. Hopefully, these initiatives will allow First Nations to take advantage of the market economy and, more importantly, to clearly define First Nations' property ownership.

In Peru, regularizing the land titles in urban communities reduced the time and cost associated by 98 per cent. Access to capital improved significantly resulting in a 280 per cent increase of loans. Land title allowed the integration of

land title systems with many other systems, thus improving the ability of people to use government services.

It is urgent that governments work in partnership with Indigenous peoples to find solutions and ensure their effective integration into the global economy. Concurrently, it appears imperative that significant transformation occurs in order to bring these historically marginalized groups into federal frameworks. This will help to ensure that Indigenous peoples are able to truly govern their lands and contribute to the local, national and global economy.

It is our hope that other countries will follow these steps.



Clarence T. (Manny) Jules  
Chief Commissioner  
First Nations Tax Commission



Hernando De Soto  
President  
Institute for Liberty and Democracy

# Introduction

The great majority of Indigenous peoples in the world suffer from the most deplorable living conditions and most of them have lost faith in what economic programs can bring to their peoples. For a long time, the academic orthodoxy has presented a multi-factorial explanation for this, focusing on the lack of leadership, the lack of education and the lack of entrepreneurship. Some authors have invoked the incompatibility between the Indigenous peoples' cultures and the market based economy.

Today, there is not much evidence to support these assumptions. If these factors have had an impact in the past, experience demonstrates that First Nations' lands can generate economic activities similar to the activity produced on neighbouring non-First Nations lands. If so, why is the reality so different? What if the key to understanding the causality chain was hidden within some of the most basic principles of the economic cycle?

In Canada, studies<sup>1</sup> and recent empirical experiences<sup>2</sup> demonstrate that if actual market conditions in the neighboring jurisdictions were also applied on

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1. Fiscal Realities, "The Role of Land Title in Developing First Nations Economies and Governments", (2007) ; Fiscal Realities, "The Economic and Fiscal Impacts of Market Reforms and Land Titling for First Nations", (2007); Fiscal Realities, "Making Markets Work on First Nation Lands : The Role of the Land Title System in Reducing Transaction Costs", (2009) ; Diane Cragg, "Best Practices in First Nations Land Title Systems: Considerations for Improving Land Title Certainty on First Nations Lands", (2007); Lang Michener LLP, "Best Practices in First Nations' Land Administration Systems", (2007); Lang Michener LLP, "A Constitutional Analysis of the First Nations Land Title Recognition Act", (2009); Lang Michener LLP, "The British Columbia Land Title Legislative Framework as a Template for the First Nations Land Title Recognition Act", (2009).

2. These empirical experiences compared actual experiences with successful developments on First Nations sites versus similar projects in adjacent non-First

First Nations lands, the property value, and the economic growth which would result from it, could generate similar economic activity.

So far, the vast majority of First Nations in Canada have not been able to attract investors on their lands or to create conditions necessary to a market economy.

### WHY IS THIS?

In large part, the reason is that the land property on reserves does not, as a legal fact, *belong* to the First Nations.<sup>3</sup> Without land property title, First Nations are not able to access capital in the same manner that other citizens can. An additional reason is that until very recently there was no reliable legal and institutional framework or governance structure able to reduce uncertainty and attract investors. Without legal and fiscal certainty, and without confidence that the whole investment process will be managed by clear rules, most investors will look elsewhere for more familiar and stable opportunities.

Recently, the government of Canada and some Canadian First Nations decided to challenge this reality by instituting some of the pre-requisites required to facilitate private investments on reserve lands. With the goal of generating real economic activities, the federal government has transferred some jurisdictions to First Nations and an institutional architecture on taxation and finance management have been put into place.

This first step has been done through the *First Nations Land Management Act* and the *First Nations Fiscal and Statistical Management Act (FSMA)*. These legislative initiatives have also permitted a solution to the overlapping of responsibilities, since for some the field was already occupied by another order of government (federal, provincial or municipal government).

Beyond the re-allocation of jurisdiction, these new legislative measures have created a well-defined architecture, which led to the establishment of four new institutions:

1. **The First Nations Tax Commission**, which is working to create a national regulatory framework for First Nations tax systems to ensure that they meet or exceed the provincial standards.

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Nations sites. The most significant finding was that in each case study, a project typically took four to six times longer to advance from initial proposal through to final approval when that project was sited on First Nations Lands. This research has concluded that under investment on First Nations lands is not universally a result of poor location or lack of resources but rather, a sign of market failure. For more, refer to, Fiscal Realities, "Expanding Commercial Activity on First Nations Lands: Lowering the Costs of Doing Business on Reserve", (Paper prepared for the First Nations Tax Commission), on-line at [www.fntc.ca](http://www.fntc.ca).

3. In Canada, reserve lands belong to the Crown.

2. **The First Nations Financial Management Board** which is designed to provide First Nations with the practical tools for modern and rigorous fiscal management that are available to other orders of government.
3. **The First Nations Finance Authority**, a non-profit finance authority which is established to improve access to capital by pooling borrowing and investment.
4. **The First Nations Statistical Institute**, which is designed to build First Nations capacity to use statistics in community planning, notably by determining what type of investment First Nations communities are best able to attract or by providing information that supports First Nations in marketing their communities to investors.

Another important development was the creation several years ago of a First Nations Gazette, which complements the legal and institutional framework. Published semi-annually, the First Nations Gazette provides widespread notice of Aboriginal laws and is an indispensable tool for First Nations citizens and federal, provincial, territorial, municipal and First Nations governments.

However, although this legal framework has provided a solid foundation to support the initial development of a First Nations fiscal system, it rapidly became clear that the land tenure system on reserves was very poor and did not provide sufficient title certainty to allow for the development of a productive economy. As we know, in a market based economy, land tenure is the bedrock of fiscal power. It clarifies the revenue raising powers and service responsibilities of national and sub-national governments. Without a clear land tenure system, investors tend to shy away and move where the rules of investment are more certain.

In his best selling masterpiece, *The Mystery of Capital*<sup>4</sup>, the renowned economist Dr. Hernando De Soto has shown that formalizing land titles creates assets and unlocks the power of capital. His research demonstrates that the access to capital by newly titled holders improves significantly, resulting in an increase of loans by 280 per cent. Without land title certainty, communities suffer from significant economic disparities, higher costs of doing business, and losses of potential investments. A formal land tenure system allows communities to better integrate into the national economic matrix and become full-fledged parts of a highly competitive market economy.

Inspired by the findings of Dr. de Soto, Canadian researchers have recently conducted empirical research on Canadian First Nations reserves.<sup>5</sup> One of

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4. De Soto, Hernando "The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else", New York: Basic Books, 2000.

5. Fiscal Realities, "Making Markets Work on First Nation Lands: The Role of the

the most important findings of their work is that the net benefits of formalizing land tenure and harmonizing it with the other orders of government would be largely positive. For example, a study of 68 Indigenous reserves in Canada that collect property taxes found that at least 5 billion dollars in new investment would occur over the next 15 years if land title certainty were comparable to the rest of Canada<sup>6</sup>. On average, this means that by securing land titles, these reserves would each attract more than 4 million dollars in investments per year. For small communities, this additional revenue would be substantial and could contribute to better asserting economic independence.

Given the findings of the Canadian research, the Forum of Federations<sup>7</sup> and the First Nations Tax Commission<sup>8</sup>, supported by the Canadian Department of Indian and Northern Affairs and the Native Law Center<sup>9</sup> organized a series of international working sessions with experts facing similar challenges. The institute created by Dr. de Soto, *Instituto Libertad y Democracia*, took part, as did experts from South Africa, Australia and United States. This publication aims at presenting the state of the work accomplished by the expert working group.

Below are descriptions of the different members of the working group and of the countries examined.

### INSTITUTO LIBERTAD Y DEMOCRACIA (ILD).

ILD is the recognized world leader in the development of secure land tenure systems for integrating marginalized populations into the market based economy. Several years ago, the Peruvian government, in close collaboration with ILD, completed a large scale land title initiative which formalized the extraju-

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Land Title System in Reducing Transaction Costs," (2009). Paper prepared for The First Nations Tax Commission.

6. Fiscal Realities, "The Economic and Fiscal Impacts of Market Reforms and Land Titling for First Nations," (2007), p. 29-35. Paper prepared for the First Nations Tax Commission.

7. The Forum of Federations is an international organization devoted to the improvement of federal governance worldwide. Its headquarters is located in Ottawa, Canada.

8. The First Nation Tax Commission is one of the 4 institutions created to help First Nation governments build and maintain fair and efficient First Nation property tax regimes and to create a national regulatory framework for First Nation tax systems that meets or exceeds provincial standards.

9. The Native Law Centre at the University of Saskatchewan facilitates access to legal education for Aboriginal peoples and promotes the development of the law and the legal system in Canada in ways which better accommodate the advancement of Aboriginal peoples and communities.

dicial arrangements that had previously prevailed. The Peruvian initiative was not explicitly aimed at Indigenous peoples. However, it did have an impact on large numbers of Indigenous peoples in the Peruvian jungle where title was largely communal and where there was little reliable information. The key goal was to legally formalize title on land that was held by custom. The formalization of property rights and their incorporation into the Peruvian legal system provided the basis for people to access credit, for investment on land to proceed on a more secure basis, and for the cost and time associated with land related transactions to be greatly reduced. By most measures this has been a successful initiative.

## UNITED STATES

The terrible impact the Dawes Act had on the decline of Indian land holdings is well known. In this regard, the US example shows how important it is to protect the underlying jurisdiction in order to avoid the creation on Indian lands of a checkerboard pattern and to avoid, as well, the extreme fractionalization of Indian lands. However, the most interesting finding in the US case is related to which sphere or order of government assumes responsibility with regards to laws applicable on reservations. There is some evidence which demonstrates that access to credit for Native Americans who live on reserve is improved when states have the responsibility for debt contract. However, tribes are understandably reluctant to yield their sovereignty to states. Therefore, they have been pursuing alternatives that enable them to make their tribal codes, laws, and rulings more transparent and accessible. Some, for instance, are posting those codes, laws and rulings on tribal court clearinghouse websites. Tribes are also in the process of forming inter-tribal courts. All these efforts should decrease lender uncertainty about extending credit to borrowers under tribal jurisdiction.

## SOUTH AFRICA

Tenure reform in South Africa has three basic tracks and current efforts to restore and balance land tenure are a good source of inspiration for countries facing similar challenges.

The first track includes an element of land redistribution. Lands currently held by white farmers are being turned over to members of traditional groups.

The second track has an element of restitution. Lands unjustly taken in the past are being turned over to their rightful owners.

The third track is a titling project aimed at creating more secure individual title to lands within the former “homelands” that were set aside for traditional groups. In the vast program of restitution of lands and in the national program of redistribution of lands, the legal certainty of titles is crucial for reconciling competing interests. Since it affects over 10 million people, who currently

have poorly defined interests, the question of legal certainty is one of the most important factors in assuring a lasting peace. This process presents major challenges. It will require a comprehensive support strategy to deal with all issues that relate to an improvement in beneficiaries' quality of life and the sustainable development and effective utilization of the land.

## AUSTRALIA

In Australia land was reserved from alienation for public purposes, including the provision of land for Aborigines. The reserved lands did not, however, give security of occupation, much less title. In 1976, the Commonwealth Parliament enacted a law for the Northern Territory under which Aborigines with a traditional connection to non-alienated land could apply for a grant of an inalienable fee simple (or freehold title). This title allows Aborigines to use the land in accordance with Aboriginal tradition, except where a lease or license of a particular parcel of land is granted with the consent of the Aboriginal Land Council. However, a refusal of consent can be overridden by the Government, where a grant of a "mining tenement" is required in the national interest.

Some of the states, especially South Australia, subsequently enacted laws designed to allow Aborigines to acquire a secure title or comparatively secure right to possession of land. Then the two cases that bear the name of Eddie Mabo were decided by the High Court. The *Mabo* decisions gave rise to considerable controversy. After much public debate, in 1993 the Commonwealth Parliament enacted the *Native Title Act* which prescribed a system for dealing with native title. Since then, the creation of inalienable fee simple title for Aboriginal groups, which extinguished Aboriginal Title, has been the primary mechanism for tenure reform. The primary driving force has been to provide a land base to Aboriginal communities and to ensure that this land is not then subsequently alienated. However, the policy goal of ensuring that Aboriginal lands are not alienated and Aboriginal people are not exploited is in conflict with a desire to promote economic development.

The modern development of Australian law governing Aboriginal title to land is part of a new body of jurisprudence. Clearly, the relationship between the Indigenous populations and their traditional land is not only, or even chiefly, a problem for the courts. But the courts, sensitive to the demands of justice for minorities, are likely to remain a forum in which Indigenous peoples will seek to right what are now perceived to be historic wrongs.



## CANADA

In Canada, the reserve lands for First Nations are legally defined as Crown Lands held for Indians. There are various land holdings within reserves including: communally held lands, individual holdings that cannot be transferred out of the membership, and various types of leased lands usually held as subleases under a head lease.

The extent and quality of surveying on these lands is mixed. Considerable development has happened on First Nation lands, but the market development process has been less certain and more difficult than land transactions and development on off-reserve lands.

Recently, the Nisga'a First Nation, in British Columbia, on Canada's Pacific coast, created its own land title system based on the Torrens system. This was created as part of a treaty settlement. It allows the Nisga'a First Nation to create fee-simple title to land and avoid many problems. Now, Canada is looking at developing a First Nation land title system which would be open to any First Nation that wishes to join.

The primary motivation for First Nations land tenure reform is a desire by some First Nations to create a land titling system that would allow them to more easily develop their lands and provide individual landholders with access to credit. In Canada, the issue of restitution is more properly dealt within the Land Claim process, or through accommodation agreements or treaty settlements.<sup>10</sup>

In the Canadian case, the reform would not incorporate First Nations into an existing titling system; it would create a uniquely First Nations land title system. As described above, there are existing Canada-wide First Nation institutions to assist First Nations in developing tax systems, land management systems, financial management systems and other aspects of good governance. A national First Nations land title system would be able to interact with these national institutions. The First Nations land title system could ultimately be integrated with those national institutions in order to improve the efficiency of the legal system, of many government functions and of land transactions.

All these experiences were discussed during the various working sessions that took place between 2007 and 2009. This publication presents the essence of what was discussed and analyzed during these sessions.

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10. Accommodation agreements are essentially deals struck with private developers and/or government with a First Nation to allow development on lands over which they still hold aboriginal title. Treaties would also achieve this outcome although they could have the additional result of formally extinguishing Aboriginal title. Where Treaties have been signed and title no longer exists, there are often outstanding claims related to past infringements of the Treaty.

Chapter one presents an introductory overview of the salience of the land tenure system for Indigenous peoples in Canada. Then, each expert presents how this matter has been dealt with in his or her own country.

With the aim of making the country chapters comparable, each expert has used a common template. So each expert presents the constitutional and legal framework of the country, the institutional architecture currently in place, the division of powers among orders of government and the recognition or not of an underlying land title for these communities.

It is hoped that this publication can be of some use for other countries interested in the incorporation of indigenous peoples into the market based economy.

Céline Auclair, Ph.D

## **DEDICATION**

To the memory of Wayne Haimila: In tribute to his constant and significant involvement in the enhancement of First Nations' freedom and dignity.



# 1

## **The Role of Land Title Systems in Reducing Transaction Costs on First Nations Lands**

ANDRÉ LE DRESSAY AND GRAHAM MATTHEWS

### OVERVIEW

Recently in Canada, different orders of government and First Nations have been exploring various avenues to address the alleviation of First Nations socio-economic disparities, and their better integration into the market economy. Among these initiatives are projects to assert First Nations jurisdiction on First Nations lands and remove barriers that lead to under-investment.

Land is one of the most important natural resources that any country possesses. The way land is managed, utilized and ultimately sustained by any country can, over time, have a significant impact on the social and economic fabric of its citizenry. For this reason, there is a pressing need to manage land, effectively value it and consistently monitor its use, so that the value of this asset may be enhanced to the benefit of all members of Canadian society.<sup>1</sup>

Many First Nations have chosen to develop business activities on their lands. Most have discovered that property rights institutions that non-First Nations take for granted do not apply on their lands. This is because the reserve system managed by the Canadian Indian Act imposes statutory restrictions regarding mortgaging, transfer and seizure of lands on reserve. Moreover, in Canada, the Crown has ownership of the lands in trust for First Nations. As a result, the only manner to confer interest to non-First Nation persons is through the mechanisms of absolute surrenders and designations.

Nevertheless, the desire and determination to overcome economic and social disparities has led many First Nations to go to considerable expense and difficulty to develop a system of leasing arrangements in order to attract and

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1. United Nations, « Land Administration Guidelines with Special Reference to Countries in Transition » (1996) Economic Commission for Europe: New York and Geneva.

support investment, despite their system of property rights. These efforts have achieved some success; however they have also led First Nations' peoples to other important conclusions.

It is still considerably more difficult to invest and conduct business on First Nations lands than elsewhere in Canada. Both First Nations and investors have to spend considerably more time and professional and administrative resources to overcome their disadvantages. Thus, transaction costs<sup>2</sup> related to the completion of any investment on First Nation land are four to six times higher than off reserve lands. This is evidence of market failure.<sup>3</sup> Further, the same system of property rights that supports the investment market is also essential for good governance. It provides the foundation for sound laws related to the disposition of land and resolution of issues such as wills, estates and marital property that often paralyze First Nation administration.

Consequently, First Nations have been assessing some solutions that could provide them with the same benefits of property rights as non-First Nations and address the problem of under-investment on their lands. One of these solutions resides in the creation of a "Torrens First Nations Land Title System" that could help facilitate investment on First Nations lands and improve First Nations economies.

This paper aims to discuss the development of such a Torrens First Nations land title system. The first part of the paper will provide an understanding of the functioning of the First Nation land administration system prescribed by the Indian Act, presenting its main characteristics and deficiencies. The second part will discuss the correlation between under-investment on First Nations lands and ineffective land registries.

## THE INDIAN ACT AND LAND ADMINISTRATION SYSTEM

### a) Legislative Framework

One of the federal government's central focuses, with respect to the management of land under the Indian Act, is the reserve system. Section 18 of the Indian Act

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2. Transaction costs in this paper refer to: search costs, measurement costs, negotiation costs, and execution costs. Transactions are broken into four types (which together comprise an investment "deal"): purchasing the land, financing the development, providing infrastructures and vending the development to smaller investors.

3. Market failure happens when development processes on First Nations lands and outside First Nations lands are affected. These development processes can be defined as the following: project initiation, securing land tenure, financing, infrastructure development and services, local and legal framework for markets, construction and selling or leasing of the project itself.

stipulates that reserve lands are held by Her Majesty for the use and benefit of the First Nation bands for which they were set apart. In other words, a reserve is an actual area of land that has been specifically set aside for the use and benefit of a particular First Nation band. Reserve lands cannot be mortgaged, pledged or charged to any person other than a First Nation member or a First Nation band.<sup>4</sup>

A First Nations member is not permitted to own a freehold interest in reserve land under the Indian Act. However, the Canadian federal Minister of Indian Affairs and Northern Development is permitted to issue a Certificate of Possession to a First Nations member who is in lawful possession of a tract of reserve land.<sup>5</sup> The First Nation band council allots a parcel of land to the First Nation member (called a "locatee") who is to be granted the Certificate of Possession. The allotment must then be approved by the Minister. Before approving the Certificate of Possession, the Minister requires a land description, the signatures of a quorum of councillors and proof of the locatee's status as a member of the First Nation band. If the Minister is satisfied with the application and approves of the allotment, the Certificate of Possession is issued and the locatee is entitled to use and possess the parcel of land. The Certificate of Possession is then submitted to the Indian Lands Registry for registration. In this way, the Certificate of Possession acts as proof of the locatee's rights to the land.

If the Minister, at his discretion, withholds approval for a Certificate of Possession, he may instead issue a Certificate of Occupation, with conditions attached. This latter certificate gives a right to occupy a certain tract of land for two years while the Minister makes an ultimate determination as to whether or not to issue a Certificate of Possession.

Locatees (but not holders of Certificates of Occupation) are permitted to sell and transfer their rights to other members of the First Nation band. However, such transfers, although they do not require approval of a First Nation band council, do require approval of the Minister.

The provisions of the Indian Act protect reserve land from transfer to non-First Nations persons, in an attempt to prevent the erosion of the land base of First Nations. As such, a freehold interest in reserve land is not subject to seizure under legal process, nor may reserve land be expropriated by any authority without the consent of the Governor in Council.<sup>6</sup> In addition, any interest of a First Nation member in reserve land under a Certificate of Possession or a Certificate of Occupation cannot be seized under legal process.<sup>7</sup> The

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4. *Indian Act*, R.S. 1985 c. 1-5, section 89.

5. *ibid.*, at s. 20.

6. *Ibid.*, at s. 29 & 35.

7. *Ibid.*, at s. 29.

only interest in reserve land that is subject to seizure under legal process is a leasehold interest of a non-First Nation member.

Under section 28 of the Indian Act, a First Nation band, or member thereof, is prevented from selling, leasing, contracting or in any other way dealing reserve land to a person who is not a member of that First Nation band. However, there are four mechanisms by which the Minister may allow for land transactions that First Nations are prohibited from undertaking. They are: (1) by way of surrender and designation; (2) by issuing a permit; (3) by lease; and (4) by expropriation.

The Indian Act only permits freehold interests in reserve land to be sold to persons outside of the First Nation band if the land has first been absolutely surrendered to the Crown by the First Nation band for whose use and benefit the land was set apart. This act of absolute surrender can be conditional or unconditional. In any event, the act of surrender is void unless: (a) made to the Crown, (b) assented to by a majority of the electors of the First Nation band<sup>8</sup>, and (c) accepted by the Governor in Council.

In the case of an absolute surrender, the land loses its reserve status and the Crown is permitted to sell or otherwise deal with the land, provided such dealing is in accordance with the terms of the surrender. However, because an absolute surrender removes such lands from the reserve system, it has been exercised infrequently by First Nations, likely based on the desire by First Nations to retain their land base.

Non-First Nation members may also acquire other interests in reserve lands. On request of a First Nation, by way of First Nation band council resolution, the Minister may issue a non-First Nation person a permit to use certain parcels of reserve land for limited purposes. Permits are issued by the Crown and are generally granted in respect of agriculture, grazing, timber and resources.<sup>9</sup> In addition to permits, the Minister may lease uncultivated or unused reserve land in certain circumstances. Even if the land is in possession of a locatee, reserve lands may be leased for agricultural or grazing purposes with the consent of the First Nation band council.<sup>10</sup> In addition, on application of the locatee, the Minister may lease such lands for any other purpose without the consent of First Nation band council.<sup>11</sup> Proceeds of the leases go to the locatee, and in the case of a lease for grazing or agricultural purposes, proceeds in excess of "reasonable rent"

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8. Elector is a defined term under s. 2 of the Indian Act. It means a person who (a) is registered on a First Nation band list, (b) is of the full age of eighteen years, and (c) is not disqualified from voting at First Nation band election

9. *Supra*, note 4, at s. 58(4).

10. *Supra*, note 4, at s. 58 (1) (b).

11. *Supra*, note 4, at s. 58 (3).



are to be credited to the First Nation band.<sup>12</sup> For other purposes, the reserve land must be surrendered to the Crown by way of designation, which then leases it for the benefit of the First Nation band according to the terms of the designation.<sup>13</sup>

## **b) Deficiencies in the Indian Act System**

### **i. Land Registries**

The Indian Act creates two separate title registries: the Reserve Land Register, which contains entries respecting reserve land, including land subject to Certificates of Possession and Certificate of Occupation and the Surrendered and Designated Lands Register (SDLR), which contains entries respecting surrendered and designated land, except for conditional assignments. The legislation pertaining to the Reserve Land Register, only provides some assurance that all effective transfers of Certificates of Possession will be registered. The result is that one cannot rely to any great degree on the register to ascertain title to interests that are registered under the Reserve Land Register. This may not currently pose a problem as the market for these types of interests is limited to First Nations members. However, such a system is an ineffective way of regulating transfers of interests in land, and, should First Nations wish to create a more efficient market in these types of interests, this system would have to be replaced.<sup>14</sup>

In addition to creating barriers in the market for land, the failure to require that all interests under Certificates of Possession be registered impedes the overall administrative role that can be played by effective title registries. By requiring title registration, title registries ensure that governments know who is responsible for compliance with other regulatory regimes that are related to interests in land. For instance, it tells governments who to tax and who is responsible for compliance with environmental, planning and zoning regulations.

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12. *Supra*, note 4, at s. 58 (1) (b), 58 (2) and 58 (3).

13. *Supra*, note 4, at s. 38 (2) and 53.

14. Section 55 (4) of the Indian Act ensures a level of certainty in the SDLR. It provides that an assignment registered in the SDLR is valid against an unregistered assignment or an assignment subsequently registered. This priority scheme provides incentives for registration and allows persons with a registered interest in land to ascertain their rights against competing and unregistered interests in the land by reviewing the register and assuming no fraud or defect exists in a document registered in respect of the land. It is the possibility that defective or fraudulent documents have been registered that clouds the certainty provided by the SDLR. Any defective or fraudulent documents, even though they have been accepted for registration, are invalid to transfer or deal with an interest in surrendered and designated lands. Furthermore, all documents that affect a parcel of land that are registered after a defective or fraudulent document are subject to the same defect and a person could be deprived of his/her interest in land due to a defect in title that arose, or a fraud that occurred, years (and several transfers) earlier.

Without registration of all interests in land relevant to those regulations, it is difficult to ascertain who is responsible for compliance with those regulations.

In contrast to the Reserve Land Register, the SDLR is, essentially, a modified deeds registry system. As such, it also fails to provide certainty of title, a result common to all deeds registry systems. Although copies of all agreements creating, transferring and otherwise affecting the ownership and possession of rights in surrendered and designated lands are required to be registered at the SDLR, there is no guarantee that such documents are valid.

To try and protect against fraud and other defects, the Indian Act land system has safeguards to ensure the validity of all agreements registered in the registry. These safeguards include the requirement that registered documents be witnessed by an authorized officer, which provides some assurance that they are valid and free of defect. It does not, however, provide certainty.

As a result of the problem of fraud or title defects in a deeds registry, it is common practice in many deed registration jurisdictions to effectuate a detailed review of the register in order to check the root of the title. In addition, in cases where purchasers still have a concern about title certainty after review of the register – and often just as a part of standard conveyance practice – many purchasers will obtain title insurance to ensure good title. However, title insurance only compensates a person financially for the loss suffered from fraud or defect in title. It does not provide for rectification of the person's rights in the land.

## **ii. Freehold Interests and Restrictions**

By defining reserve land as land to which the Crown holds legal title, the Indian Act prevents First Nations from holding a freehold interest in their reserve lands, and prevents such land from being transferred to non-First Nations unless such land has been absolutely surrendered by a First Nation band, in which case it ceases to be reserve land.

The restriction on ownership and transfers of the freehold lands has significant impacts on both the market for land ownership and lenders' willingness to lend on the security of reserve lands. To the extent that interests in land are less than freehold interests, such interest will always be sold at a discount compared to what a freehold interest in such lands would attract. The interest of mortgage lenders in such lands is also reduced. Thus, restricting the transferability of the freehold interests effectively ties up the capital of First Nations and does not permit them the full access to capital that would be permitted by an otherwise free market.

### **iii. Splitting of the Legal and Beneficial Title and the Double Administrative Layer**

In requiring that freehold interests in reserve lands may only be held by the Crown for the use and benefit of respective First Nation bands for which they were set apart, the Indian Act not only restricts transfers of the freehold interests but divides the legal and beneficial ownership of the freehold interests between two parties: the Crown and the First Nation band. This separation of legal and beneficial title has its foundation in the laws of equity and trust originating in English law.

The practical effect of setting up this trust relationship is that it further restricts dealings in reserve lands. Dealings with reserve lands must be consistent with the terms of the trust relationship set up between the *legal* (the Crown) and the *beneficiary* (the First Nation band) owner in order to be valid. In addition, dealings must be consistent with the legislative framework in the Indian Act and related statutes as well as agreements between the Crown and First Nation bands. It is this legislative framework together with related agreements that provides the terms of the trust relationship between the Crown and the First Nation bands.

Splitting of the legal and beneficial interest between the Crown and the First Nation results in increased transaction costs by requiring that both parties consent to all dealings in reserve land. As a result, lessees of First Nations lands must have their leases approved by both the First Nation and the Crown, and all parties will likely require the assistance of advisors (lawyers, realtors and other business advisors) to ensure that they are protected under the leasing arrangement. Obviously, this results in increased delays and additional expenses in completing leasing transactions.

The splitting of legal and beneficiary ownership of lands is also done by private landholders outside the context of reserve lands. It is generally recognized that the division of legal and beneficiary title provides, in some circumstances, certain tax benefits – and potentially avoidance of certain liabilities. Most other transaction costs, however, are increased due to the complexity of the ownership structure created.

### **iv. Limited Tenures exploitation**

As noted above, the restriction on transfers of freehold interests in reserve lands essentially removes the freehold interest from the “free market”. The only interests in reserve lands available to the market are the other tenures provided for under the Indian Act. These tenure structures have significant drawbacks. With respect to interests held by First Nation members in reserve lands, First Nation members who hold a Certificate of Possession in reserve lands are able to sell and transfer their rights to the land under the Certificate of Possession.

As such transfers are subject to the approvals required under the Indian Act, the transaction costs are higher than if the transactions were not subject to such approvals. Although this structure might serve to protect the land base of First Nations, it comes with economic costs. In addition to the increased transaction costs, the market for Certificates of Possession is limited by the restrictions on ownership set out in the Indian Act. These market limitations effectively reduce the value of such interests.

The greatest interest that can be granted to a non-First Nation member in reserve lands (and the most common) is a leasehold interest, pursuant to the designation provision at section 38 of the Indian Act. As such, the market among non-First Nation members in reserve lands is affected by limitations on marketability of leasehold interests generally. If a non-First Nation member wishes to enter into a lease (as opposed to purchasing a freehold interest), the terms of the lease (i.e. the nature of the interest obtained under the lease) must be negotiated between the parties. In contrast, if the non-First Nation member were purchasing a freehold interest under a land administration system which provided for certainty as to title and tenure, as discussed more fully below, far fewer issues would require negotiation. In addition, the fact that both the First Nation band and the Crown must be involved in negotiations with the potential lessor means that greater transaction costs are incurred.

Transfers of existing leases also incur high transaction costs. Purchasers of existing leases must do a thorough review of the leases to determine the nature of the interest purchased. This thorough review naturally results in higher transaction costs. In addition, depending on the terms of the lease, a transfer may require the consent of both the First Nation band and the Crown. Obtaining these consents can increase the time required as well as expenses incurred in completing such a transaction.

## **v. Lack of Surveys**

Requirements for surveys and reliable survey systems are necessary components of any effective land administration or registry system. Land title is not of much value to either persons or governments unless the location and dimension of land parcels are defined. Two questions that must be answered in relation to land rights are: where is the parcel of land located and what are the boundaries of the parcel?<sup>15</sup>

A survey system is a set of principles, procedures and standards that are used in the production of surveys to define the physical extent and location of rights and interests in land – i.e., the boundaries. The ultimate goal of such a

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15. D. Palmer, « Making Land Registration more effective » (1999), online: <http://www.fao.org/docrep/x3720t/x3720t04.htm>.

system is to permit landholders to know the physical boundaries of their land. In a legal sense, having a clear boundary defines where one landowner's rights end and another's rights begin. Boundaries should be established by survey at the time title is registered and the location of a fixed or legal boundary should not be alterable without some document of transfer. The advantage of a system that outlines fixed boundaries is that landowners can be confident in what they own since the boundaries have been formally recognized and documented.<sup>16</sup>

Dr. Brian Ballantyne and James Dobbin note the four functions of a survey: "[1] definition, demarcation, determination and retracement of boundaries, [2] subdivision, assembly and re-allotment of parcels, [3] spatial organization of resources (political, administrative and land tenure boundaries), and [4] provision of land information."<sup>17</sup> These authors argue that without an effective survey system in conjunction with land registration, over time boundaries would become less certain and uncertain boundaries would have a negative impact on land development.

As the requirement for surveys set out in the Indian Land Registration Manual does not have the effect of law, there is little legislative certainty as to what the survey requirements are. For this reason, it would be advisable to give the regulations set out in the Indian Land Registration Manual the force of law. However, that would still not provide for a sufficient survey requirement. The Manual does not require surveys for all those interests in land that ought to be demarcated by surveyed boundaries in accordance with good land regulation practices. Holders of interest in which a survey is not required will not, in many cases, know with certainty the extent of their rights. Nor are First Nations able to properly keep inventory of these interests. For instance, lands subject to a Certificate of Possession are not required to be surveyed unless the First Nation band has passed a bylaw requiring that.<sup>18</sup> As the determination of boundaries in relation to these un-surveyed interests may prove difficult, it will result in an inefficient regulation of these lands and hinder fair and transparent taxation of such lands.

#### **vi. Does Not Permit Resolution of Matrimonial Disputes**

In Canada, "matrimonial property" is typically defined as property owned by one or both spouses and which is used for a family purpose. Matrimonial property includes the family home and the land on which it is situated. The provinces have the authority to enact laws relating to matrimonial property because they were granted jurisdiction over property and civil rights under

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16. Dr. Brian Ballantyne and James Dobbin, "Options for Land Registration and Surveys Systems on Aboriginal Lands in Canada" (2000) Geomatics Canada.

17. *Ibid.*

18. *Supra*, note 4, s. 81(1)(i).

the Constitution Act, 1867. The provinces and territories have the institutional framework required to clearly delineate property rights and resolve matrimonial property disputes.<sup>19</sup>

Provincial statutes generally provide that each spouse is entitled to an undivided half interest in each family asset, including the matrimonial home and the courts have authority to consider the value of a matrimonial home when ordering the distribution of assets between the spouses.<sup>20</sup>

Effective land title legislation interacts with and supports matrimonial property legislation. For example, some provincial land title legislation permits the registration of notices of marriage agreements and separation agreements against matrimonial property.<sup>21</sup> This notice effectively freezes any future dealings with the land – such as a transfer, mortgage, agreement for sale or conveyance – until allocation of the property is appropriately determined. Similarly, land title legislation allows a party to a divorce, separation or annulment proceeding to file a Certificate of Pending Litigation (“CPL”) against the property, which freezes future dealings with the land until it is cancelled. Under most provincial legislation the court can order the partition and sale of matrimonial property, including the matrimonial home.<sup>22</sup> Such orders can be registered against title, pending the sale of the property.

By contrast, the Indian Act is silent on the issue of matrimonial property. Because of the division of powers under the Constitution, provincial and territorial courts do not have the authority to make orders relating to matrimonial property on reserves. For example, provincial courts cannot order the spouse with a Certificate of Possession to leave the matrimonial home on a reserve so the other spouse may live there, nor can they order seizure and sale of the matrimonial home.

If two people are named on a Certificate of Possession, provincial courts have no authority to determine who should stay on the property with the children. The only order a provincial court can make is for one spouse to compensate the other with money if one spouse agrees to leave the property.

These orders, however, are difficult to enforce since provincial courts do not have jurisdiction over reserve land and have no ability to seize or garnish property on reserves. Even if this jurisdictional barrier did not exist, section 29 of the Indian Act prevents the seizure of reserve lands under legal process, creating a

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19. Nancy Karetak-Lindell, M. P., « Walking Arm-in-Arm to Resolve Issue On-Reserve Matrimonial Real Property » (June 2005), Report of the Standing Committee on Aboriginal Affairs and Northern Development.

20. See, for example, s. 56 of the *Family Relation Act* (British Columbia) R.S.B.C. 1996, c. 128.

21. See, for example, s. 63 of the *Family Relation Act* (British Columbia).

22. See, for example, s. 66(2)(d) of the *Family Relation Act* (British Columbia).

further barrier to the enforcement of matrimonial property laws. As a result of the absence of law in this area, and in light of housing shortages on reserves, individuals (mostly women) who live on reserves do not have the same legal rights, or access to the same legal remedies as individuals off-reserve.

The first part of this article provided an understanding of the functioning of the First Nation land administration system under the Indian Act. It has also presented its main characteristics and deficiencies. The second part will discuss how ineffective land registry systems result in under-investment on First Nations lands. To illustrate this, we will show how the four major components of a typical land development deal (land, financing, infrastructure and the selling of the development) evolve under a Torrens land title system (the British Columbia land title system) and a under deeds land title system (the First Nations land registry systems).

### c) Short overview of the Torrens System

The Torrens system of title registration was invented by Sir Robert Torrens of Australia. It provides a straightforward method for determining title to land and interests in land based on several elements which generate secure title including: (1) registration; (2) certainty of title in the registry; (3) system of priorities for ranking competing interests; (4) assurance that the registered owner is the true owner of the title.

The first element of secure title is the requirement of registration. Under the Torrens system, title is established when the documents that purport to transfer legal ownership or create an interest in land are filed and registered in the land registry office. Registering these documents has the effect of passing the estate or interest in land. Although registration is not mandatory, it is a crucial element of secure title because a person's failure to register means that his/her interest cannot be enforced against a third party.

The second element of secure title is certainty in the register. Under the Torrens system, an exhaustive historical inquiry into the validity of title is unnecessary. Instead, a person who is dealing with land is entitled to rely on the register. A common exception to this rule is that a person does not take title to lands free of an unregistered interest in a lease of less than three years if the person taking title has notice of the lease and the tenant was in actual occupation under the lease.<sup>23</sup>

The third element is a priority system for ranking competing interests in land. In a land administration system – that stresses the relativity of title and allows an unlimited number of interests to be created in the same parcel of land – it is necessary to have a system for ranking competing interests. Most Torrens

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23. See, for example, s. 29 of the *Land Title Act* (British Columbia).

land registries' priority systems are based on considerations of fairness, and such ideas as "first in time is first in right".<sup>24</sup> A beneficial by-product of the priority system is to "facilitate private dealings (in the name of economic efficiency), ...[which has the effect of] reduc[ing] the costs of property transactions."<sup>25</sup>

In combination, these first three elements serve two related functions: determining the ordering of rights, and assisting vendors of land or holders of interests in land to demonstrate a valid title. Generally speaking, a registered interest has priority over an unregistered interest. Priority between two persons claiming the same rights in land can be determined based on the date and time that each interest was received by the register, and not according to the respective dates of execution of the instruments.

The fourth element of secure title is assurance. Typical Torrens legislation establishes an assurance fund to compensate persons who are deprived of title or an interest in land (primarily by way of fraud) due to the operation of the Torrens system.

## TRANSACTION COSTS UNDER THE TORRENS AND DEEDS LAND TITLE SYSTEMS

This section of the paper compares the transaction costs in a land development deal associated with the Torrens system in British Columbia (B.C.) to the deeds system used in the Indian Lands Registry. For transaction cost analysis, land development deals are divided into land, financing, infrastructure and selling components. The transaction costs of each component are analyzed separately below and summarized in a table at the end of this section.

### a) The British Columbia Title System

#### i. The Land Component<sup>26</sup>

The British Columbia system supports a codification of how interests are represented within the system. It provides an accurate legal depiction of the property

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24. Bruce Ziff, *Principles of Property Law* 4<sup>th</sup> ed. (Toronto: Thomson Canada Limited 2006).

25. Bruce Ziff, *Principles of Property Law* 4<sup>th</sup> ed. (Toronto: Thomson Canada Limited 2006) at 431.

26. Our research found 578 registered instruments in a random sample of 30 parcel abstracts from the Tsawwassen reserve, and 152 registered charges, liens and interests in a random sample of 30 titles from the City of Abbotsford. It would take an estimated 1,158 minutes (19.3 hours) for the legal review of a typical residential title in the First Nation Land Title Register System (FNLTRS), and an estimated 25.5 minutes for the legal review of a typical residential title within the BC Land Title System (LTS). Assuming a rate of \$175 per hour, the estimated cost of legal review of title for the FNLTRS is \$3,372 and only \$74 for the BCLTS.



right and then presents this information in a readily understandable form. This allows a simple account of the rankings of the interests within the hierarchy of interests pertaining to the land in question, thereby offering an easy assessment of precisely what rights a buyer would be purchasing.

The system also provides a focal point for access to other types of information. It is often linked to other information systems, allowing access to matters such as tax information. Many local governments have created platforms that link directly to land title systems based on a street address. The system described above supports low search and measurement costs. Basic information is readily available, and requires little analysis to be understood. This clarity reduces negotiation costs since any lack of clarity would otherwise have to be addressed through negotiated agreement.

The British Columbia system also lowers negotiation costs by reducing the need for complex contracting. It supports the use of instruments that essentially increase the liquidity of the interests in land. It allows the relatively easy use of liens and options in order to support the use of contractual contingencies. The system also supports the creation and dissolution of partnerships. The relative ease with which issues surrounding matrimonial property can be resolved off-reserve versus on-reserve is a good example.

Finally, the execution of a land transaction is a relatively simple matter under the British Columbia Land Title System. The state of title certificate can be relied upon to be accurate, and the process by which a transfer occurs is defined by regulation. Therefore, documents are relatively simple to prepare, and a transfer of title is relatively quick and inexpensive.

Transfer of a title to a property in the British Columbia Land Title System is a simple matter from the point of view of the exchange parties. Usually, each party will be represented by a lawyer, who will ensure that the correct documents are filled out and registered. The lawyers will also hold any funds and disburse them in accordance with the terms of the transfer agreed upon by the parties. Once the forms are prepared for signature, the actual transaction takes only a few minutes. Forms are signed and witnessed by the parties, and then the application for transfer is submitted electronically to the Land Title Office for registration. It may take a day or two for the staff of the Land Title Office to register the transaction, but it will be effective as of the time that it is received in the Land Title Office.

The state of title certificate can be relied upon to be accurate, and the process by which a transfer occurs is defined by regulation, so documents are relatively simple to prepare. This is also reflected in the cost of a transfer in a Torrens system, which is relatively inexpensive, typically consisting of only a few hundred dollars in legal costs and land title transaction fees.

## **ii. Financing Component**

The British Columbia Land Title System (BCLTS) is well suited to support financing. It provides several key elements for allowing the use of land as collateral. Interests in the land are relatively liquid. The nature of land rights used as collateral is easily understandable by the vendor. It supports the use of fee-simple title, the value of which is more stable than leasehold, particularly a sub-lease the terms of which are subject to change. Should a lender need to sell this interest to recoup a loan, then this is relatively simple.

## **iii. Infrastructure Component**

The system of land title in B.C. supports land use planning and the development of comprehensive infrastructure over large areas. It has generally allowed governments to register interests in land before it is parcelled. This ensures that infrastructure can always be built, and providers can always access that infrastructure for maintenance and replacement.

Planning on this scale reduces the costs of infrastructure and reduces the scope of the negotiation which a proponent would have to undertake to ensure infrastructure for a project. The specific impact on the transaction costs of this component of the land deal is uncertain.

## **iv. Selling the Development**

It is a simple matter to obtain and register a mortgage under the British Columbia system. Mortgage issuers are generally very familiar with the security offered by title under a Torrens system. Once credit approval has been obtained, the process of registering a mortgage on a property in the British Columbia Land Title System is extremely simple. It takes the property owner only a few minutes.

Typically, the lending institution will look after all of the details. It will arrange with a lawyer or notary to witness the necessary documents and register the mortgage in the Land Title Office, charging a fee of about \$200 for the entire process. The mortgage document will usually be a standard form that is prescribed by regulation, further simplifying the process. All the property owner has to do is to provide proof of ownership of the property (by obtaining a current state of title certificate from the Land Title Office) and meet with the lawyer and the representative of the bank to sign the documents.

Again, it is the confidence in the system that makes the transaction so simple – there is no need to research the title beyond the state of title certificate to know if there are other mortgages, charges, or liens against the property that could affect the security of the funds being borrowed.

## **b) Deeds System – The Indian Land Registry Systems (ILRS)**

### **i. The Land Component**

It is much more difficult to conduct a land transaction under an ILRS deeds registry system than under the British Columbia Land Title system (BCLTS). The ILRS have several flaws relative to the BCLTS. The information contained within them is often incomplete. For example, it is sometimes difficult to determine who the rightful owner of a property is. There may be multiple competing claims. In many cases, there may be simply an occupant with no registered claim. The survey data is incomplete and often not reliable. In some cases the precise dimensions of a property are unknown and ownership is simply based on physical reference points. Finally, all the legal interests in the land may not be contained within these registries.

These problems are compounded when it is recognized that a deeds registry system requires a legal analysis of all relevant interests in the land. This is the only way to delineate precisely the rights of use contained within a specific interest in the land. First Nations systems are for the most part “stand alone” when compared to the BCLTS which has links to several relevant databases.

The characteristics of the Indian Land Registry Systems noted above would clearly raise search and measurement costs. It is often difficult to identify the rightful owner of an interest and this would ordinarily be the most basic and fundamental information required for a property transaction. This is compounded by the fact that new surveys may need to be undertaken, and overlapping claims may need to be resolved (the latter also contributing to higher negotiation costs).

These difficulties are compounded by the fact that the registries may not contain all the relevant legal claims. Finally, an extensive analysis is needed to understand the place of a given interest in a piece of land within the greater hierarchy of interests. This necessitates a search and analysis of all relevant documentation. Since all of the relevant documentation may not be registered within existing First Nations registry systems, and it may go back many years, it can be quite an expensive undertaking. Furthermore, the time and expense required for a full analysis increase over time as more instruments are registered on First Nation lands.<sup>27</sup> Finally, two risks are on the increase. The first is the risk of making an error because increasing analysis is required as more instruments are registered. The second is the risk of database stability as the number of registered interests rises.

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27. The term “instrument” is used in a First Nations context and is a rough equivalent of “charges and interests” used in the British Columbia context.

The difficulties outlined above raise negotiation costs. For example, the lack of clarity regarding specific property rights may need to be addressed through the negotiation of other contractual stipulations into the lease document. Another example is that if there are overlapping claims to a specific lot, it may be necessary to negotiate a deal with both parties to transfer interests.

Lack of clarity affects execution costs. Much of the analysis done in earlier stages must be repeated, particularly the legal review of all relevant documentation. Moreover, the standardized documentation that is used to transfer title in the BCLTS cannot be used in the other system. Instead, new documentation must be drafted which is often only relevant to the transaction in question rather than all First Nations. This adds significantly to costs.

The transaction costs associated with the transfer of ownership under First Nation Land Registry systems become much larger if a development also requires the actual creation of a leasehold interest on First Nations' land. The process for acquiring long-term leasehold on First Nation lands could be quite lengthy and involves several government departments.

The process for executing a transfer of ownership in the BCLTS, and the process for transferring leasehold ownership in the ILRS, (or, as it is called in the case of the Westbank First Nation: the Self-Government First Nation Land Registry, or SGFNLR) has been analysed to provide a clear example of costs and time involved for each process.

The estimated time to complete each element of the process was based on the experience and opinions of professionals, developers, and individuals who were very familiar with the transactions for each system. Time is considered a reasonable proxy for the transaction cost associated with executing these deals. It includes the time of the legal, notary and real estate professionals, and the actual registration time required to execute the land deal. Moreover, several steps in executing a transfer of ownership in the two registry systems are similar. For example, both processes are initiated by the purchaser, who generally hires a lawyer or notary to execute the deal. The time associated with the initial component of the deal is about the same.

The study leads us to conclude that transferring a title can take 1 to 3 days in the BCLTS and between 10 and 50 days in the Indian Lands Registry System or Self-Government First Nation Registry.

The time to transfer ownership in either the Indian Land Registry Systems or Self-Government First Nation Land Registry is longer because of two factors. First, the review of charges can take a lawyer or notary between 5 and 30 days depending on how many charges they have to review. Second, the actual registration of the transfer can take as few as 3 days or as many as 4 weeks.

## ii. Financing Component

First Nations land registry systems are not well suited to support financing. All the problems that were identified in the *Land Component* section concerning certainty also apply in this context. Potential lenders will want to know that the value of the land interests being held in collateral reside within the context of the hierarchy of interests. Only in this way can they begin to determine the real value of these interests as collateral. This determination may also require a great deal of other information. Many pieces of legislation that are relevant to this determination do not apply on First Nation lands.<sup>28</sup> Moreover, since First Nations registry systems are generally not integrated with other systems, obtaining the relevant information could entail substantial additional search costs.

Another significant issue related to financing projects is the extent to which First Nations registry systems permit the use of commonly used instruments, such as options, to purchase the land. The use of options often allows a significant reduction of the risk associated with projects. They ensure that proponents do not risk losing sites while they seek financing, or that they do not find themselves bound to deals if financing does not come through. Instruments also allow land owners to serve as partners in a deal or to facilitate agreements among multiple proponents. In this case, the instruments allow a relatively smooth transaction if one partner has to withdraw.

For the most part, it is more complex to develop such arrangements in a First Nation context using existing registry systems. Usually, arrangements must be negotiated and then written into lease terms, which then add to difficulties in seeking financing.

## iii. Infrastructure Component

The existing First Nations registry system has not historically supported the registering of interests for the development of infrastructure. Instead, infrastructure provision must be negotiated with each individual leaseholder. The result is that each project in a First Nation context incurs unique costs of negotiating and then developing infrastructure. Infrastructure is often developed in a piecemeal way rather than as part of comprehensive plan.

This is not a result of the use of a deeds registry system. However, it is an issue that should be addressed in the event of a migration of First Nations towards a new Torrens system.

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28. See James Reynolds LLP, « Acquiring Interest in Reserve Lands », (2207) for more complete analysis of this point.

#### **iv. Selling the Development**

It can be very difficult to get a mortgage for a house that is part of a First Nations housing project. A key problem is that the leasing arrangements must compensate for the absence of the security offered by transferable fee-simple title. Project proponents and First Nations often have to undergo considerable expense in designing an appropriate leasing document. A lending institution must then be convinced that the property will constitute quality transferable collateral. This requires that the institution examine the lease document and other related materials, which adds to transaction costs. Many institutions have been unwilling to provide mortgages for houses on First Nation projects. Consequently, the mortgage market for First Nation projects tends to be less competitive.

Homebuyers may also be aware that homeowners have sometimes faced difficulties when they have tried to renew mortgages. A change in the policy of the holder of the mortgage between its initial issuance and the renewal can force a borrower to seek a new lending institution or new lease terms from either the holder of the head lease or the First Nation.

In both registry systems, the process begins with the negotiation of a mortgage. Once credit approval has been obtained, the actual process of registering a mortgage on a property in the BCLTS is simple, and often can be completed in one day as long as surveying is not required.

By comparison, the time to execute a mortgage in the Indian Lands Registry System or Self-Government First Nation Land Registry is lengthened by five factors. First, if it is not a pre-approved lease, it can take up to a month for the lending institution to review and approve it. Second, the review of underlying charges in a deeds system can take 5 to 30 days depending on the particular parcel. Third, leasehold mortgage documents generally take longer to prepare. Fourth, the First Nation is involved in the document approval process. Finally the actual document registration process can take from 3 days to 6 months. As a result, the mortgage execution time in the BCLTS is from 1 to 5 days, and 12 days to six months in the Indian Land Registry Systems and Self-Government First Nation Land Registry.

SUMMARY TABLE

The table below summarizes the land development transaction cost differences between the BCLTS and the ILRS.

Component of the Deal	BCLTS	ILRS	Lowest Transaction Costs
Land	<ul style="list-style-type: none"><li>• Automated searches</li><li>• Linked to other data bases</li><li>• Title generally fungible</li><li>• Hierarchy of interests clear</li></ul>	<ul style="list-style-type: none"><li>• Somewhat automated</li><li>• Many registries</li><li>• Not linked to other databases</li><li>• Priorities seldom clear</li><li>• High search costs</li></ul>	BCLTS
Financing	<ul style="list-style-type: none"><li>• Guaranteed title clear</li><li>• High familiarity with title as security</li><li>• Straightforward to vend title into joint venture</li></ul>	<ul style="list-style-type: none"><li>• Property interest often unclear</li><li>• Little familiarity with lease as security</li><li>• Leasehold joint ventures rare</li></ul>	BCLTS
Infrastructure	<ul style="list-style-type: none"><li>• Infrastructure title integrated with local government</li><li>• Transparency for infrastructure age and costs</li></ul>	<ul style="list-style-type: none"><li>• Not integrated with local government system</li><li>• No transparency about existing infrastructure</li></ul>	Uncertain
Vending the Development	<ul style="list-style-type: none"><li>• Guaranteed title easier to sell</li><li>• Mortgages straight forward</li><li>• Quick execution of sales and mortgages</li></ul>	<ul style="list-style-type: none"><li>• Leaseholds harder to sell</li><li>• Mortgage unfamiliarity</li><li>• Potentially slow executions of sales and mortgages</li></ul>	BCLTS

Summary of transaction costs for BCLTS and ILRS systems

## CONCLUSION

This paper has analysed the causes of First Nations' socio-economic disadvantage from the perspective of transaction costs associated with land development. The paper has shown that the existing First Nation land registry system is a significant source of under-investment on First Nations' lands because it contributes significantly to high transaction costs.

These higher transaction costs are manifested in several different ways. First, they involve higher search and measurement costs. It is much easier for project proponents to find the information that they require by using the BCLTS and related electronic applications than by using any First Nation system.

Information contained in a Torrens title system is considerably easier to analyze than information in the different deeds systems that most First Nations use. In addition, First Nation systems do not support the simple electronic searches that are available in British Columbia. Information contained in First Nation systems is often incomplete and thus there is more risk associated with fully understanding interests. Even in cases where the information is complete, it requires considerably more analysis before the hierarchy of interests in the land can be understood.

Second, it implies higher negotiation costs. The BCLTS makes it easier to create, identify, and delineate interests in the land. When these rights are not clear, it is often necessary to negotiate additional contingencies, frequently with multiple parties. Finally, it increases execution costs. It is easier to execute economic transactions involving land using the BCLTS.

## KEY OBSERVATIONS

1. The BCLTS renders routine many functions that are essential for carrying out business. This includes the processing of credit, mortgages, and land transactions. First Nations systems have not been able to replicate this. The BCLTS has made possible greater efficiency in government. In particular, it has made the tasks of environmental management, heritage management, and infrastructure management easier. It has also supported the imposition of land use zoning. These processes are more cumbersome in a First Nations context.
2. The development of a Torrens title system for First Nations would correct some of these problems. Most notably, it would make interests in land more secure and more easily understood from the buyer's perspective. It would also allow existing professionals to more easily apply their expertise in a First Nations context. This would effectively address a large existing "capacity" issue that is currently inhibiting First Nations development. In a similar fashion, the development of such a system



would allow First Nations to more readily use expertise and procedures already developed in provinces in support of their Torrens title systems. The development of a Torrens title system for First Nations would create an impetus for all provinces to develop such a system. This would provide a significant reduction in internal trade barriers.

3. A new Torrens title system should become an option for First Nations. In order to promote the migration to such a system, a complementary effort should be made to legally specify the underlying jurisdiction of First Nations using this system. This specification would make migration to the new system more politically palatable. The specification and recognition of underlying jurisdiction would also create a better environment for converting existing communally held land, and it could provide a better environment for introducing other measures such as improved zoning and improved infrastructure rights of way.
4. Land is a significant component of many types of economic exchange. It is implicit in many functions of business, simply because businesses are located on land. For example, land is a significant source of equity used for accessing credit. Poor land registry systems result in a slowdown of credit which causes a generalized slowdown in economic activity.
5. Finally, higher transaction costs on First Nation lands are not entirely a result of existing land registry systems. They are also a result of a lack of understanding of First Nations, a perception of policy instability, incomplete regulation or a lack of regulatory clarity and poor quality statistics, to name just a few factors. Existing initiatives addressing these issues must continue. However, it is fair to say that the adoption of a First Nation title system would be very fundamental to reducing transaction costs. This initiative would specifically improve property rights over land. The nature of property rights are a core factor in the determination of the extent of transaction costs. In sum, an improved land registry would enhance the efficacy of many other initiatives that are aimed at improving First Nations governance and financial management.

Following these observations, some First Nations and the Canadian government have undertaken the elaboration of a legislative measure, the First Nations Property Ownership Act (FNPOA), currently under study which has the goal of creating a Torrens requirement for First Nations land title, land title registration and surveying. The legislation would also aim to elaborate a First Nations Torrens title registry and create an inalienable, reversionary right to First Nation title. Finally, the legislation would ensure First Nations could choose between existing First Nations registry systems and a Torrens system.

## 2

# **The Capitalization of Indigenous Communities’ Land Rights in Peru and Latin America: Main Institutional Obstacles and Proposed Reforms**

MARIA DEL CARMEN DELGADO

### OVERVIEW

The chief purpose of this article is to share the experiences of Peru and other Latin American countries in enacting reforms that enable indigenous communities to economically leverage their land rights. It is our hope that in sharing these experiences readers will gain an understanding of the main obstacles generally encountered when designing and implementing reforms of this kind. In addition, we will attempt to shed some light on the measures that would allow developing countries to foster inclusive market economies.

The high incidence of extra-legality throughout the developing world suggests that exclusion is a significant problem, and one that merits special attention. According to the Final Report of the Commission on Legal Empowerment of the Poor, “... at least four billion people (70 per cent of the world’s population) are excluded from the rule of law. It means that ... it is the minority of the world’s people who can take advantage of legal norms and regulations. The majority of humanity is on the outside looking in, unable to count on the law’s protection and unable to enter national, let alone global markets.”<sup>1</sup>

As denizens of the extralegal world, the majority of indigenous communities are victims of this exclusion, leading their everyday lives on the “fringes of the legal system and what protection it affords, and excluded from the benefits of a modern and inclusive economy.”<sup>2</sup>

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1. The Commission on Legal Empowerment of the Poor (CLEP), Final Report, Volume 1, p. 3. Copyright 2008, by CLEP and the United Nations Development Programme, 1 UN Plaza, New York, New York, 10017,

2. DELGADO, Maria del Carmen: Case Study of El Salvador’s Property Formalization Program, International Property Rights Index, 2009 Report, p. 39.

The absence of inclusive legal property systems can have deleterious effects on society as a whole. Lack of clear and enforceable property rights means that there is no security of tenure and no clear addresses, making it hard to locate people and for businesses to charge for utilities, and rendering it difficult to differentiate between local dwellers and visitors. As a result, police control and antiterrorism actions can be thwarted. It is very difficult to assure that the owners of real estate and businesses fulfill their obligations and it is problematic to implement environmental, security, and drug-substitution programs. In addition, information regarding businesses, real estate assets and their owners is neither accessible nor updated. This makes it harder to conduct urban planning programs, collect taxes and harmonize land rights, investments and natural resources management.

Unfortunately, "... despite the initiatives undertaken and the institutional reforms designed and implemented during the course of the last decades, in most developing countries the legal system has not yet managed to provide all the mechanisms needed to generate the main effects that all modern legal property systems should provide." <sup>3</sup> As a result, "...the property rights of most people ... are not protected, contracts are not enforced, and registries and other institutions required to protect property function poorly or not at all." <sup>4</sup>

This is, for example, the case of most countries in Latin America, where levels of "extra-legality" in the real estate sector are high. According to a recent study carried out by the Interamerican Development Bank and the ILD in 12 countries of Latin America and the Caribbean, more than 76 per cent of the rural properties and 65 per cent of the houses are affected by some degree of extra-legality.<sup>5</sup>

When we look at the land rights of indigenous communities we see that these groups are among the most excluded in the world. Among other things, what this demonstrates is that legal systems worldwide have failed to provide indigenous communities with efficient institutional mechanisms, of the kind that would guarantee their access to legal protection, as well as facilitate their transition towards a modern and inclusive market economy. Moreover, most Latin American countries have failed even to establish the foundations of an institutional bridge to connect the customary institutions and authorities of indigenous communities with existing governmental authorities and the "formal" legal framework.

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3. DELGADO (2009, p. 39)

4. CLEP (2008, p. 35), in DELGADO (2009, p. 39)

5. The countries involved in the 2006 IDB-ILD study were Argentina, Bolivia, Colombia, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Panama and Peru.

In the Peruvian case, indigenous people represent 30 to 40 per cent of the population and occupy at least 25 per cent of the national territory.<sup>6</sup> Most indigenous people are organized in indigenous communities. There are 7,563 indigenous communities officially recognized in Peru – 80 per cent of which are located on the Peruvian Coast and in the High Lands (The Peasant Communities), and 20 per cent of which are located in the Peruvian Amazon Basin (The Native Communities).<sup>7</sup>

Major Peruvian constitutional reforms designed to recognize the identity, customary laws and land property rights of indigenous communities were initiated in the early 1990s.<sup>8</sup> The Constitution of 1993 [articles 89 and 149] guarantees respect for the cultural identity of indigenous communities and acknowledges their right to exercise jurisdictional functions within their territory according to customary law – as long as the fundamental rights of individuals are not violated. In addition, it recognizes the legal existence of indigenous communities and provides them with “moral person” status [article 89].

Regarding the indigenous land tenure system, the Peruvian Constitution of 1993 [articles 88 and 89] acknowledges the land-property rights of indigenous communities, as well as their rights to transfer ownership rights to community and non-community members, allocate other interests, and decide on the economic use of their lands. Communities, for instance, are able to sell, rent, lease and mortgage their lands. Additionally, it rules that the land rights of indigenous communities are not subject to prescription (adverse possession) and that these rights may only be extinguished if the land is abandoned.

The land property rights of indigenous communities do not include natural resources located in their territory – such as minerals, hydrocarbons and forest resources – because, according to the Constitution, these resources belong to the Peruvian Nation and only the State is empowered to grant concessions for their use and economic exploitation [article 66].

According to official data, over 80 per cent of the legally recognized Peruvian indigenous communities have received land titles that have been duly recorded

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6. Indigenous peoples in Peru comprise some 72 ethnic groups who inhabited the country's present territory prior to its discovery by Europeans around 1500. Said ethnic groups form about 34.41 per cent of the total population. *I Foro de intelectuales e investigadores indígenas Lima-Peru*, 4 – 6 July, 2007

7. This information is contained in the Official Report No 012-2007-COFOPRII/DE. However, there are a huge number of communities – either new ones or extensions of existing communities – that are still waiting for their legal recognition. In some cases 15 years have passed already since the applications were filed, but they have not yet succeeded in obtaining legal recognition.

8. In 1994 Peru subscribed to the ILO Convention No. 169 on Indigenous and Tribal Peoples adopted in 1989, and recently the UN Declaration on the Rights of Indigenous People of 2007.

in the property registry.<sup>9</sup> Regarding Native Communities, two different types of titles have been awarded: ownership titles over agricultural lands (which represent some 60 per cent of their territory) and usufruct rights on forest lands (which represent the remaining 40 per cent).<sup>10</sup>

Legal recognition of their property rights allowed certain communities to capitalize on their lands as well as to improve the economic well-being of community-members. However, communities with success stories are still in the minority, while the vast majority still lack legal security and remain excluded from the benefits that a modern legal property system should afford. This is primarily due to the pervasiveness of non-demarcated lands and inaccurate maps, as well as circumstances such as:

- the existence of multiple registered owners with title over the same piece of land;
- registered properties with overlapping boundaries – which provoke numerous and frequent boundary disputes;
- unrecorded mandates of the communities' legal representatives and unregistered bylaws;
- deficiencies in the decision-making processes;
- the existence of numerous untitled community and non-community members holding agricultural land;
- unclear and unarticulated rules and procedures for the use and exploitation of community lands, particularly for the granting of forestry, mining and hydrocarbons concessions; and
- lack of adequate feedback mechanisms to continue improving on the reforms.

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9. 5,039 Peasant Communities – among a total of 6,066 communities legally recognized – and 1,260 Native Communities – among a total of 1,497 communities legally recognized – have received land titles. COFOPRI (2007).

10. It is important to remark that almost all property and usufruct land titles awarded to Native Communities have been granted from 1975 to 1999. Lamentably, formalization programs implemented during the last decade have been focused on urban and rural areas. Few titling efforts have included Peasant Communities' lands, and practically no attention has been paid to Native Communities' lands.

In addition, most legal reform processes concerning the principal rights of indigenous communities have been carried out without public awareness campaigns, or adequate consultation mechanisms and consensus-building strategies. The government has not designed tailor-made reforms nor has it effectively sought support to guarantee its reforms approval and effective implementation.

Unfortunately, this has been the case with most laws, legislative decrees and regulations enacted in recent years. This has provoked serious conflicts between the Peruvian Government and most Native Communities. The latter are currently calling for a number of these new laws to be repealed – particularly the new forest law<sup>11</sup>. They demand that their consultation and participation rights, as established in the International Labor Organization (ILO) Convention 169, be fulfilled.<sup>12</sup> As a result, most of the laws, decrees or regulations in question have already been either overturned or suspended.

#### A. MAIN INSTITUTIONAL OBSTACLES TO CAPITALIZING INDIGENOUS COMMUNITIES' LAND RIGHTS

Indigenous communities face a variety of obstacles that either delay or impede both the legal recognition and the capitalization of their real estate assets. On the one hand, they experience the same obstacles that most land owners in Latin American confront when they demand legal recognition and seek to convert their real estate assets into live capital. On the other hand, there are additional obstacles which are particular to indigenous communities. Below, we will attempt to outline some of the main institutional obstacles facing indigenous communities.

##### **1) Lack of legal mechanisms to recognize, regularize and register the different kinds of interests on lands located in urban, rural and forestry areas.**

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11. Forest lands are particularly important in Peru: it has the second-largest forest estate in Latin America and the eighth-largest globally. Forest land represents at least half of the Peruvian territory – which covers 129 million hectares. Estimates of Peru's forest area include 65.2 million hectares (FAO 2005a), 71.1 million hectares (UNEP-WCMC 2004), and 86.4 million hectares (Peruvian Government, 2000) [www.portofentry.com/site/root/market/company\\_news/3932/html](http://www.portofentry.com/site/root/market/company_news/3932/html), December 2005.

12. The Convention 169 – ratified by 14 Latin American countries – requires (art. 6 and 7) that indigenous peoples are consulted on issues that affect them. It also requires that these peoples are able to engage in free, prior and informed participation in policy and development processes affecting them.

It is common practice to delay the approval of appropriate laws designed to recognize and enforce the land rights of indigenous communities. For example, in most Latin American countries, there is a lack of legal mechanisms to regularize property and usufruct rights over the different kind of lands within the territory of indigenous communities including forest, agricultural and barren lands, and pastoral and village areas. Also lacking are appropriate mechanisms to formalize the individual property and usufruct rights of community and non-community members. Additionally, governments usually fail to set out the regulations, methodologies and procedures necessary to carry out large-scale formalization programs in urban, rural and forestry areas, which could be supported by and made affordable to State and beneficiaries alike.<sup>13</sup>

In the Peruvian case, for example, most laws and regulations enacted in recent years have been focused on facilitating property formalization in urban and rural areas, and on granting timber, mining and hydrocarbons concessions nation-wide.

Unfortunately, little attention has been paid to providing effective and efficient legal mechanisms to formalize, protect and enforce the land rights of indigenous communities. Indigenous organizations complain that forest laws and regulations enacted during the last decade have been overly focused on timber extraction, while their land rights have not yet been legally recognized due to administrative and legal obstacles.<sup>14</sup> This explains why these laws and regulations are a permanent source of controversy and tension between indigenous people and the government.

**2) Failure of most legal systems to incorporate customary norms and extralegal practices that the majority of indigenous communities identify with and respect, combined with cumbersome and costly procedures to prove existing rights on and transactions over land, and the absence of standards to document these operations.**

In every Latin American country there are a variety of customary rules and extralegal arrangements that are used and recognized by most citizens to assign, prove and protect land rights, identify property owners, make transactions and solve disputes over real estate assets. However, most legal frameworks

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13. As examples: before the property formalization reform took place at the end of the 1980's, it used to take 728 steps and 15 years in Peru to formalize and register property rights in urban areas. In the case of Guatemala, at the beginning of this century, it used to take 237 steps and 4.6 years to formalize property rights in rural areas and 175 steps and 13.3 years in Haiti.

14. Forest Peoples Programme, [http://www.forestpeoples.org/documents/s\\_c\\_america/peru\\_ips\\_wshps\\_forestry\\_October2006](http://www.forestpeoples.org/documents/s_c_america/peru_ips_wshps_forestry_October2006).

fail to provide institutional mechanisms to incorporate customary rules and extralegal arrangements into legal norms and to represent land rights and transactions over land in standardized documents that can be recognized and enforced beyond the community's territory. Such failure to incorporate efficient norms and practices can compromise any attempt to build an inclusive legal system.

### **3) Imposition of land tenure systems on indigenous communities and unjustified restrictions for the economic use of property.**

Governments commonly do not provide adequate legal mechanisms to recognize the property rights of indigenous communities over lands they have been holding for long periods of time. Unjustified restrictions to existing property titles are also quite frequent. On the one hand, most indigenous communities are not provided with legal mechanisms to choose the kind of tenure regime that most suits their needs and interests, be it collective, individual or mixed. On the other hand, property titles are usually encumbered with limitations and prohibitions. Holders of these titles, for instance, are not allowed to sell, rent, lease or mortgage their lands or grant any other interest on them – which prevents communities from optimizing the use-value of their lands.

All Latin American countries – excluding Brazil <sup>15</sup> – have granted land property rights to their indigenous communities. However, only a few of these countries have empowered their native communities to choose the kind of tenure regime that most suits their interests and needs. This has only been the case in Peru and Mexico. In the remaining Latin American countries, collective land rights are imposed on indigenous communities, which in turn are not allowed to grant individual property rights – nor other kind of interests over their lands – to either community members or third parties.

Additionally, in most Latin American countries governments have not provided their communities with simplified and low-cost procedures to obtain the required permits and licenses to exploit their lands. For example, indigenous organizations in Peru continuously complain of the highly technical and prohibitively expensive procedures that need to be fulfilled in order to comply with the forest norms –which norms need to be observed if the indigenous communities are to obtain the permits required to exploit their lands. As a result, most Native Communities have to rely on abusive timber companies in order to secure official permission to engage in timber extraction.<sup>16</sup>

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15. Brazil has granted collective land use rights and communities' lands remain federal property.

16. Forest Peoples Programme, 2006



#### **4) Excessive fragmentation of indigenous communities' land rights, which prevents them from exploiting the land in the most productive way.**

Land fragmentation can be motivated by various circumstances. Land fragmentation tends to occur where the population grows significantly and there is an absence of business organizational forms – such as partnerships and corporate bodies – that would otherwise allow for the improvement of land management and would help build reliable links with the existing private and public sector. Land fragmentation is also a common practice when communities face restrictions and prohibitions regarding the economic use of their lands. The latter usually leads to fragmentation of land rights over the course of successive generations of property owners.

The imposition of co-ownership systems of land tenure – such as more than one person owning the same property – on native community members also leads to extreme fragmentation of land rights. In these cases, land rights are distributed among all members of the community, each of whom holds an individual and proportional interest in the entire property. This means that any decision regarding such property has to be taken by unanimous agreement of the entire community. As long as joint ownership is imposed by law, none of the joint owners is empowered to demand the partition of the property. However, this fact has not prevented community members from informally parceling the land and transferring ownership rights over the resulting land parcels. The experience has demonstrated that imposed joint ownership has encouraged community members to continuously carry out informal land parceling.

For example, in Honduras it is common to find cases where the government, regardless of the extension of the land involved, has imposed joint ownership on indigenous community members – instead of extending ownership titles in the name of the communities. As a result, property rights on large extensions of land have been fragmented among numerous owners, making it harder – or even impossible – to reach decisions regarding the management of these lands, which in turn prevents their owners from optimizing their use-value.

#### **5) Complicated, costly and insecure mechanisms to identify land holders.**

The lack of valid identity documents (IDs) is a major obstacle for property adjudication and registration. Most land holders in Latin America, particularly indigenous community members, either lack IDs or hold invalid or defective identification documents – that is to say, IDs which are unregistered, mistaken or fake. Likewise, procedures to register births and obtain IDs are usually cumbersome and costly. Additionally, most identification and civil status registries fail to provide citizens with legal security. [See Figure 1]

**FIGURE 1: Main shortcomings for people's identification:** <sup>17</sup>

- Cumbersome and costly procedures to obtain IDs and register civil status. In most cases, they involve unnecessary judicial procedures.
- Lack of unified and standardized rules, procedures and techniques for registration.
- Lack of coordination between the different public entities responsible for providing identification and registering civil status of citizens.
- Too many identification documents for different purposes (birth certificates, electoral cards, social security cards, tax certificates, ID cards, etc) and too many public entities involved.
- Difficulty in having access to records at civil status registries – the information is not even public in some cases.
- Existing legal frameworks fail to incorporate extralegal practices that are used and recognized by most citizens to prove identity.
- Invalid or defective identification documents – they could be unregistered, mistaken or fake.
- Unsecure registration systems – most identification and civil status registries are unable to prevent forgery, duplicity of registration (same people registered twice, with the same or different names), and deterioration, lost or destruction of public records.
- Lack of relevant information in IDs. Most IDs lack information to facilitate identification of persons having the same name (homonymy); i.e. they lack pictures or information on physical characteristics and civil status (whether the person is single or married)

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17. As a consequence of the above-referred institutional obstacles, most people in the world still lack legal identification. UNICEF data in this regards reveals that one third of all newborns worldwide go unregistered (about 50 million people) – it is over 60 per cent in the case of Asia (UNICEF, 2006); under 30 per cent of the total member countries of the World Health Organization have a vital registration system that covers at least 90 per cent of the population (UNICEF, 2006); and 15 per cent of the children under 5 years old in Latin America and the Caribbean lack a birth certificate (UNICEF, 2001) – over 60 per cent in Haiti (The Insurance Association of Haiti, 2004)

**6) Cumbersome and expensive mechanisms to accredit the legal existence of indigenous communities, as well as long and costly procedures to provide the communities with moral status, accredit the legal mandate of their representatives and document their bylaws.**

For example, at the end of the 1980s, regularizing the land titles of indigenous communities in Peru could take between five to six decades. This situation owed considerably to difficulties in accrediting the legal mandate of community representatives.<sup>18</sup>

**7) Numerous and frequent conflicts among competing interests over lands and lack of low-cost and simplified mechanisms to solve disputes.**

As an example, nearly 60 per cent of the indigenous communities located in the Peruvian Coast and High Lands and 100 per cent of those located in the Amazonas Region are involved in boundary disputes with other communities or third parties. In addition, 36.2 per cent of the indigenous communities are experiencing boundary disputes between their own community members.<sup>19</sup>

**8) Deficiencies in the decision-making processes to grant rights over the lands of indigenous communities and make decisions on the economic use of these lands.**

Main deficiencies include: discriminatory practices directed mainly against women and non-community members holding interests over the community's land; outdated community members' records; complicated procedures to reach decisions (often requiring unnecessary approvals from governmental offices); costly procedures to document agreements and decisions; lack of legal and technical advice and up-to-date information prior to making decisions; and absence of norms written in the local language.

**9) Non-unified and non-standardized registration rules and techniques and cumbersome and expensive procedures for first registration and the recording of subsequent transactions over lands.**

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18. Some examples are the cases of the Indigenous Communities "San Juan de Tantarache" (from 1938 to 1991) and "San Pedro de Huancave" (from 1926 to 1991), both of them located in the Department of Lima.

19. Study "*Titulación individual dentro de las Comunidades Campesinas*", prepared by the Peruvian Graduate School of Business Administration (ESAN) in 2008, pp 10 and 14

In most cases, registering a simple transaction requires complying with long and costly registration procedures.<sup>20</sup> Frequently, property registries not only impose long and costly procedures on property owners, they also fail to provide them with full legal security.

In general, this is caused by deficiencies within the registration systems, such as: failure to provide certainty on registered rights; the absence of a geographical data base – which in turn prevents the registry from establishing links between the legal information and spatial data<sup>21</sup>; inability to prevent deterioration, loss or destruction of public records; absence of mechanisms to prevent fraudulent transactions, forgery of signatures and the use of fake identification documents; and lack of simplified mechanisms to access information and records. In some countries the information held by property registries is not even open to the public.<sup>22</sup>

### **10) Inaccurate, outdated and unreliable information on territorial limits, and difficulties estimating the total number of land parcels within the territory of indigenous communities.**

Frequently, this circumstance results from the existence of non-demarcated lands or outdated surveys. In addition, there is usually a lack of standards for surveying. The situation becomes more problematic when indigenous communities' land rights are contained in "historical property titles". This is the result of obsolete systems of measure used to define the location and boundaries of the land described in said titles, as well as the fact that most of the maps used to demarcate such lands lack **Universal Transversal Mercator (UTM)** geo-referencing. For example, several communities on the Peruvian Coast and in the High Lands still hold "historical property titles" granted during colonial times. Additionally, the lands of 86 per cent of the communities in the Peruvian Amazon Basin have not been properly surveyed and demarcated. Moreover, while these lands remain un-demarcated, the efforts of successive governments have been focused on surveying and demarcating land concessions

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20. For example, at the beginning of this century it could take 48 steps and 9 months to register a sale's contract in Mexico and 69 steps and 2 years to do the same in Haiti.

21. Said property registries are unable to avoid multiplicity of registered owners over the same properties and superposition of areas over registered real estate assets. For example, on 2001 these problems were affecting all kind of registered owners in Honduras (private owners, foreign investors owning beautiful beach resorts, public entities, local governments and native communities, among others).

22. Indigenous communities keep their own records on land rights and transactions, but most of said records are neither standardized nor recognized by the statutory law, hence they cannot be enforced beyond the territory of the community.

granted for oil and gas exploration, mining, bio-fuel production and logging, and each type of concession has been accompanied by its own cadastre and surveying system. As a result, many of these concessions are superimposed on towns, farms, natural parks and the lands of indigenous communities, creating a breeding-ground for conflict.

In addition, a major problem in Latin America, as in other developing regions, is that land surveying and the computerization of land records is often seen as a strategy in its own right that can make a quantum improvement on property regularization processes, independent of institutional reforms. Such a perception frequently results in extremely costly surveying activities, which still might not necessarily lead to the formalization and registering of a majority of land parcels.<sup>23</sup> Moreover, survey maps and land records rapidly become outdated, and thereby useless, when the subsequent physical and legal changes to surveyed and registered assets remain unrecorded.

It must be noted that while technology can be a useful tool for improving land administration systems, in many countries it has been pushed forward regardless of capacity and need. The lack of regard for these considerations has put whole projects at risk in the past, as was the case with the Peruvian Rural Property Formalization Project, in the mid-1990s, in which proposals were advanced to establish a 1-millimeter-accurate cadastral geographic information system (GIS) over the whole country. These proposals gained wide currency despite the fact that the network of public registries was full of documents setting out legal rights over very poorly described parcels of land, and despite the fact that the primary geodetic network in Peru would have had trouble supporting this kind of GIS for the whole country.

There are also many examples of technologies gathering dust because an agency lacks the budget for materials and maintenance.<sup>24</sup>

## **11) Lack of integral coherent strategy for the capitalization of land rights of indigenous communities and for the coordination of reform efforts.**

On the one hand, the legal framework is plagued with confusing – and even contradictory – norms, executed by multiple entities that do not have integral coherent vision of the process. Most governments fail to establish a coherent policy for allowing the harmonization of different kinds of programs and initia-

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23. In fact, the capture and maintenance of spatial data is a high-cost component of most projects to strengthen land administration systems in developing countries.

24. BURNS, Tony, GRANT Chris, NETTLE, Kevin, BRITS, Anne-Marie and DALRYMPLE, Kate, "Land Administration Reform: Indicators of Success, Future Challenges", November, 2006.

tives seeking to formalize and capitalize indigenous land rights, improve the management of natural resources and encourage private investments. This failure is in turn a consequence of a lack of transparent rules and procedures to acknowledge and grant rights over the land and natural resources within the community's territory.

On the other hand, the lack of regional planning instruments leads to centralized government decision-making. In the case of property formalization programs, there is usually a lack of coordination and overlapping of competencies among most of the public agencies involved.

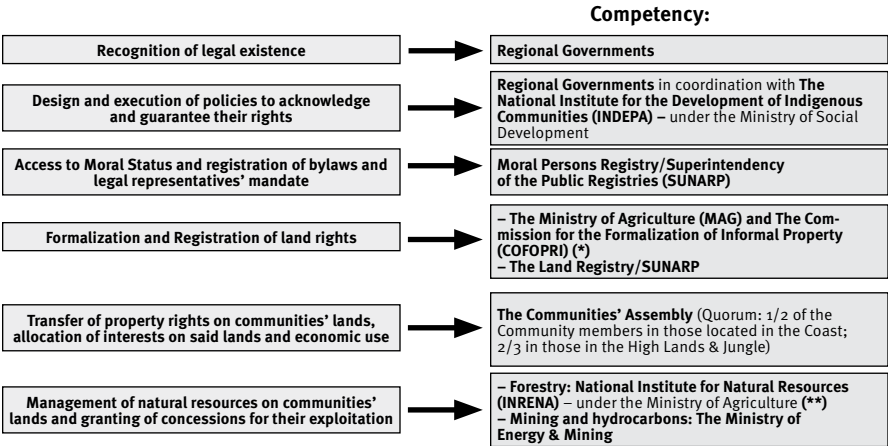
For example, while the transfer and allocation of property rights and other interests over community lands in Peru is the responsibility of the Community's Assembly, other important responsibilities regarding indigenous communities are distributed among different public agencies. We are referring to:

- responsibilities related to the recognition of the legal existence of indigenous communities,
- their access to moral status,
- the registration of the mandates of their legal representatives,
- the design and execution of policies for acknowledging and guaranteeing rights regarding their lands,
- the management of natural resources within their territory,
- the granting of concessions and licenses, and
- the formalization of property rights, among others. [See Figure 2]

## **12) Lack of appropriate consultation and compensation mechanisms regarding the use and exploitation of the lands of indigenous communities, and the absence of environmental impact assessment standards.**

Most Latin American countries have ratified the International Labour Organization's Convention 169, Indigenous and Tribal Peoples Convention, 1989, which requires (articles 6 and 7) that indigenous and tribal peoples be consulted on issues, policies and development processes that affect them. Convention 169 stipulates that fair compensation is required for the use of indigenous communities' lands and for any damage associated with the exploitation of such lands. It rules, in addition, that governments are responsible for developing coordinated and systematic actions to protect the rights of indigenous and tribal peoples (Article 3) and ensure that appropriate mechanisms and means are

**FIGURE 2: Public and private entities with competencies regarding indigenous communities**



(\*) MAG and COFOPRI’s competencies are temporary. MAG is responsible for formalizing Native Communities’ lands. Formalization of Peasant Communities’ lands is divided between COFOPRI and MAG. Regional Governments shall progressively assume said competencies during the next 4 years.

(\*\*) This is also a temporary competency, which shall be progressively transferred to Regional Governments.

available to guarantee that protection (Article 33). However, most countries have so far failed to set out the norms necessary to guarantee appropriate consultation and compensation mechanisms and to establish standards for assessing the environmental impact that activities such as mining may have on the communities’ lands.<sup>25</sup>

**13) Absence of consensus-building strategies and public awareness campaigns to garner support for required reforms, and the failure to set out adequate feedback mechanisms to continue improving on and adapting these reforms.**

For example, most processes to reform the chief rights of indigenous communities in Peru have been developed without carrying out public awareness

25. ILO’s supervisory bodies have noted that, although considerable progress has been made with regards to the implementation of the Convention 169 in the countries that have ratified it, there is still a number of implementation challenges, particularly with regards to the coordinated and systematic action required to ensure consultation and participation of indigenous peoples in decisions that affect them.

campaigns and consensus-building strategies involving stakeholders. As a result, governments have failed to reach a consensus regarding the approval of these reforms and have similarly failed to garner support for their implementation. Moreover, this circumstance has provoked serious conflicts among the government and most indigenous communities, particularly those located in the Amazonas Region in Northern Peru.

## B. MAIN PROPOSED REFORMS REQUIRED TO CAPITALIZE ON THE LAND RIGHTS OF INDIGENOUS COMMUNITIES

Reforms to facilitate titling and registration should not be seen as isolated events, but rather as an integral part of a larger process oriented towards providing indigenous communities with integrated, clear, secure and transferable property rights. Such rights would allow indigenous communities "... to use the representation of property not only to safeguard their rights but to generate multiple economic functions which go beyond possession, linking them with the financial and capital world."<sup>26</sup> In this light the main reforms should include the following:

- 1) **Efficient legal mechanisms to formalize all types of existing interests over the land of indigenous communities, as well as simplified and low-cost procedures for the systematic formalization and registration of property.** In addition, indigenous communities should be provided with incentives to register subsequent transactions over their lands such that they remain within legality.

The Peruvian experience in urban areas reveals that systematic land adjudication and registration systems can be very successful, sometimes managing to formalize a considerably large number of real-estate assets in a relatively short period of time.

The field based method used by the Urban Property Formalization Program allowed economies of scale to be achieved in most operations (e.g. publicity, community participation, adjudication of rights, survey and mapping, documentation production, declaration and appeals process and filing in land offices). By contrast, it has also been demonstrated that, spot adjudication systems prevent governments from achieving economies of scale, as these are associated with isolated and expensive surveys, long conversion periods measured

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26. CLEP, What does Legal Empowerment Mean?. October 13<sup>th</sup> 2005, in DELGADO (2009, p. 39)



in decades, minimum community participation, office-based processes, poor publicity and affordability problems for low-income earners.<sup>27</sup>

- 2) Institutional reforms should recognize cultural diversity and customary law, incorporating norms and extralegal practices that the majority of indigenous communities respect and with which they identify.** Major reforms to acknowledge the identity and customary laws of indigenous communities were initiated in the early 1990s, "...when Latin American constitutions began to formally recognize their public authority and legal jurisdiction as part of a larger effort to recognize ethnic diversity and collective rights for indigenous peoples. Bolivia, Colombia, Ecuador, Mexico, Nicaragua, Paraguay, Venezuela and Peru explicitly recognized the multicultural or multiethnic nature of societies in their revised constitutions. <sup>(28)</sup> This recognition provides the normative framework for the recognition of legal pluralism..." <sup>29</sup>

The main reasons for the formal recognition of indigenous rights and institutions have been

"... First, states responded to intense pressure from indigenous organizations to recognize their collective rights as peoples, following decades of activism and political organization by indigenous peoples' organizations... Second, international norms for the treatment of indigenous peoples devel-

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27. BURNS (2006).

28. **Article 89** of the 1993 Peruvian Constitution rules that the State guarantees respect for the cultural identity of the peasant and native communities. In addition, according to article **149**, the authorities of indigenous communities may, with the support of the *rondas campesinas*, exercise jurisdictional functions within their territory according to customary law as long as fundamental rights of individuals are not violated. Further legislation should be establishing forms of coordination between this special jurisdiction and the *jueces de paz* and other instances of the judiciary.

29. "... Bolivia (1967 Constitution, reformed in 1995, art. 171), Colombia (1991 Constitution, art. 246), Ecuador (1998 Constitution, art. 191), Peru (1993 Constitution, art. 149), and Venezuela (1999 Constitution, art. 260) have extended the most constitutional or statutory recognition to indigenous legal institutions, with Mexico (1917 Constitution, art. 2) extending at least formal recognition in the 1990 and 2001 constitutional reforms. In addition, the constitutions of Guatemala (1995), Nicaragua (1987, Constitution, art. 89), Panamá, Paraguay (1992 Constitution, art. 63) and Brazil (1967 Constitution, reformed in 1995, art. 171) make some reference to customary law". VAN COTT, Donna Lee: Dispensing Justice at the Margins of Formality. The Informal Rule of Law in Latin America, in *Informal Institutions and Democracy. Lessons Learned from Latin America*, 2006, p. 264, edited by Gretchen Helmke & Steven Levitsky.

oped in the 1980s require states to recognize indigenous laws...<sup>30</sup> Finally, states recognizing indigenous law sought to extend the presence of public law throughout their territories, particularly in rural areas... Many of the projects now underway to recognize indigenous law ... are part of a larger international effort to improve the administration of justice in Latin America, while conforming to contemporary standards for the treatment of disadvantaged groups..."<sup>31</sup>

Latin American countries, however, still lack adequate legislation to implement the above mentioned constitutional recognition. "In the absence of legislation specifying the relationship of indigenous to state law, states have developed other means of implementing (said)... recognition ... (such as) the development of: (1) jurisprudence, as cases are brought to courts, and (2) institutional relations between the state and indigenous systems..."<sup>32</sup>

For example, Colombia's Constitutional Court has been acting as a "de facto legislator." Decisions rendered by Colombia's Constitutional Court on matters pertaining to indigenous communities have become an interesting model for states seeking to implement legal pluralism.

Likewise, the establishment of Justices of the Peace (*Jueces de Paz* or "JPs") in Peru provides us with an example of institutional relations linking indigenous and state justice systems. JPs usually incorporate local indigenous customs and norms into their procedures and decisions or divide the work with native or *campesino* authorities.<sup>33</sup> Justices of the peace are lay magistrates elected by the community.<sup>34</sup> JPs act mainly as conciliators. They also have limited jurisdiction to adjudicate in matters such as debts, misdemeanors, alimony and certain cases of domestic violence.<sup>35</sup> "... Today, JPs play a leading role in

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30. "Most important among them is the ILO Convention 169 on the rights of indigenous and tribal peoples. Among the broad sets of rights that ILO Convention 169 codifies, it requires that states allow indigenous communities to conserve their legal customs and institutions, provided that they do not violate fundamental rights as defined by national or international law (articles 8 and 9)." VAN COTT, Donna Lee (2006, p. 266)

31. Seider 1998, 112; 2003, 142; Garcia Serrano 2000; Assies, 2003, in VAN COTT (2006, pp 265, 266)

32. VAN COTT (2006, p. 271)

33. VEGA, Ardito, 2001, 10, in VAN COTT (2006, p. 271)

34. JPs in rural areas are close to their communities and apply customary practices rather than formal law. In the relatively prosperous coastal areas where JPs are better educated, they are more formalistic and tend to apply state law. [ARDITO and LOVATON: Justicia de Paz Nuevas Tendencias y Tareas Pendientes, Lima: Instituto de Defensa Legal (IDL) June 2002 (Mimeo), p.17, in FAUNDEZ, Julio: Non-State Justice Systems in Latin America. Case Studies: Peru and Colombia, University of Warwick, January 2003, p. 35]

35. "... The most common disputes that come before JPs are misdemeanours (33 per

the administration of justice in the Peruvian countryside and, in sharp contrast to professional judges, enjoy widespread popular support..."<sup>36</sup>

- 3) Empowering indigenous communities to exercise ownership rights over their lands, allowing them to choose the kind of tenure regime that most suits their needs and interests.** This means that communities should be provided with legal mechanisms to allow them to choose tenure systems that they consider most appropriate for them, avoiding the imposition of any kind of fixed models, be they individual or collective.

It is also important to establish clear statutes on the nature, extent and characteristics of ownership rights and other interests on indigenous lands. In addition, communities should be able to sell and grant different kinds of rights over their territory and unjustified restrictions on their land rights should be uplifted. When the Commission on the Legal Empowerment of the Poor (CLEP) refers to the proposed reform agenda for legally empowering the poor<sup>37</sup>, it emphasizes that "...to be fully productive, assets need to be formally recognized by a system encompassing both individual and collective property rights. This includes recognition of customary rights; embodying them in standard records,

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cent) and disputes over property (27 per cent), followed by cases of domestic violence (14 per cent) and disputes over alimony (13 per cent) ..." [ARDITO and LOVATON, 2002, p. 19]. "... In practice, however, and as a result of demand by local communities, they often exceed their jurisdiction. JPs deal with matters informally and, under the Code of Civil Procedure, are expected to respect and to apply local culture and practices. Ironically, however, a dense network of laws and regulations regulates their functions. This complex, regulatory framework makes it difficult for JPs to know precisely the boundaries of their jurisdiction." [LOVATON, David: *La Justicia de Paz en el Perú: Aspectos Positivos y Límites*, in Galvez, 2000, p. 21 and in FAUNDEZ, 2003, pp 35, 36]

36. "...Given the demography of the country – 30 per cent rural and 20 per cent in small towns – the network of JPs provides justice services to nearly half the population. They are not salaried, but, in some areas, charge the parties for their services, based on the notion of reciprocity... In recent years, policy-makers and intellectuals in Perú have become aware of the importance and potential of JPs in improving the justice system. The experience of the Peruvian JPs has also had an impact on other countries in the Andean region. Thus, the Peruvian experience has been a model for the establishment of JPs in Colombia, Ecuador, Bolivia and Venezuela." FAUNDEZ (2003, pp 35, 38)

37. According to CLEP, one of the main building blocks of a fully functioning property system consists of a set "... of rules that defines the bundle of rights and obligations between people and assets reflecting the multiplicity and diversity of property systems around the world... (and recognizing) a variety of land tenure, including customary rights, indigenous peoples' rights, group rights, certificates, etc.... (which involves) the standardization and integration of these practices into the legal system ..." CLEP (2008, p. 6)

titles, and contracts, which in accordance with the law, protects households and businesses...”<sup>38</sup>

As it has already been mentioned, the Peruvian Constitution of 1993 introduced major reforms on the land rights of indigenous communities (articles 88 and 89). It acknowledges property rights – be they collective or individual – on indigenous communities’ lands and the communities’ right to transfer ownership rights to members and non-community members, allocate other interests on their lands, and make decisions on the economic use of these lands. [See Figure 3]

### **FIGURE 3: The Peruvian Legal Framework for Indigenous Communities**

#### **I. The Peruvian Constitution of 1993 [articles 88, 89 and 149] provides:**

- Recognition of the legal existence and the moral person status of indigenous communities.
- Recognition of the cultural identity of indigenous communities, their customary laws and their right to exercise jurisdictional functions within their territory.
- Acknowledgement of property rights on communities’ lands – whether collective or individual rights – and the communities’ right to transfer ownership rights (to members and non-community members), allocate other interests on their lands and decide on the economic use of said lands.
- Indigenous communities land rights are not subject to prescription (adverse possession), they can only be extinguished if abandoned.

#### **II. Main laws and regulations:**

- Recognition of the legal existence of indigenous communities. Rules on the rights and duties of community members, the internal organization of the communities, their territory and land rights, governmental entities with competencies regarding indigenous communities, etc [Law of Regional Governments, Law 27867, 2002, Law 28495, 2005].  
     -*Peasant communities* [Laws 24656 & 24657, 1987] and *Native communities* [Law 22175, 1978].

38. CLEP (2008, p. 60)

- Acknowledgement of the indigenous communities' right of access to any kind of business organization forms and the free disposition of their lands – being empowered to grant any kind of interest regarding their lands (sell, rent, lease, mortgage, etc) to community and non-community members. Decisions have to be taken by the Community's Assembly, and the quorum required is the following: ½ of the community members attending the Assembly for communities located in the Coast, and 2/3 of all community members for Communities in the High Lands and the Amazon Basin [Laws 26505, 1995 & 26845, 1997].
- Titling and registration of indigenous community lands. Procedures for titling and registering, entities responsible, etc [Law 24657, 1987; Regional Governments, Law, Law 27867, 2002; Law 27755, 2002; Law 28923, 2006; Law 28695, 2006; Supreme Decrees 005, 012 y 025-2007-Housing, Legislative Decree 1089, 2008].
- Recognizing the right of communities to be consulted prior to taking decisions on natural resources located in their territory, as well as the right to be compensated for using their lands (forestry, mining, hydrocarbons) [Environmental Law, Law 28611, 2005; Law on the National System of Environment Impact Evaluation, Law 27446; Supreme Decree 012-2008-MEM<sup>39</sup> ].

### **III. International Conventions and Declarations:**

- ILO Convention No.169 on indigenous and tribal peoples (1991): Indigenous and Tribal Peoples (ITPs) have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use and to exercise control over their own economic, social and cultural development.
- UN Declaration on the Rights of Indigenous Peoples (2007): Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and pursue their economic, social and cultural development. ITPS has right to the lands, territories, and resources (art.26).

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39. The new Forest Law and its regulations (Legislative Decree 1090, 2008 and Decree 002-2009-AG) – which were a source of conflict between Native Communities and the Peruvian Government – have just been overturned by the Peruvian Congress.

Thanks to the above mentioned reforms, some indigenous communities in Peru have been able not only to obtain legal title to their lands but also to improve the economic well-being of some of their members.<sup>40</sup>

However, as it has already been mentioned, indigenous communities with success stories are still in a minority. Even though over 80 per cent of the existing indigenous communities in Peru have received land titles that have been duly recorded in the property registry, the vast majority still lack full legal security, and most are involved in boundary disputes with other communities and third parties.

Additionally, despite the fact that over 90 per cent of the members of Peasant Communities hold land on an individual basis – and almost all of them call for individual property titles – fewer than 2 per cent of them have obtained legal titles over their land parcels, while the other 98 per cent only hold possession certificates which are neither recognized nor enforceable beyond the community's territory.<sup>41</sup>

**4) Legal mechanisms to facilitate indigenous communities' access to business organizational forms that would allow them to build reliable and productive links with the existing private and public sector.** This means that indigenous communities should be provided with legal mechanisms to create partnerships and corporate bodies that would allow them to improve their land management and that would enable them to participate in any kind of businesses with private national and international investors.

This new legislative structure should include quick and simple procedures to: form associations and distribute risk; determine risk factors and financial obligations; access formal credit; use economies of scale; be accountable for services, debts and taxes; and make transactions secure by closely following-up on the assets and business contracts of fellow citizens.

This kind of reform will not only discourage excessive fragmentation of communities' land rights, but it will also allow indigenous communities to improve their efficiency and competitiveness in land management and in a variety of business activities<sup>42</sup>

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40. This is, for example, the case of the Indigenous Community "Infierno", located in the Peruvian Jungle. The community property title was issued two decades ago, in 1974, but it was neither secure nor reliable. Two decades later, property formalization allowed the community not only to get legal security but also to carry out transactions with private tourist operators, which beneficial results contributed to improve the economic well-being of community members. One of the main outputs of said transactions was the construction of The Posada Amazonas Lodge, which is owned by the community and at present managed by the tourist operator Rainforest Expeditions.

41. ESAN (2008, p. 2).

42. According to CLEP, "... the poor are entitled to rights ... in developing their own

**5) Efficient legal mechanisms to deal with undocumented land holders.**

Regarding personal identification, institutional reforms should provide the population with simplified and low-cost procedures to register births and obtain identification cards. In addition, reforms should also provide secure and accessible personal registration systems. For this to happen, the new legal framework should incorporate some of the extralegal arrangements that most use in order to identify their members.

As an example, in the case of Peru, the 1993 Constitution (articles 177 and 183) introduced a crucial reform with the creation of the National Registry of Identification and Civil Status (RENIEC), an autonomous public body that unifies all existing identification and civil status registries in Peru.<sup>43</sup> The National Identification Card (DNI, by its acronyms in Spanish), which is to be provided by National Registry of Identification and Civil Status to all Peruvian citizens, has become the main identification document in the country and will eventually replace the birth certificate.<sup>44</sup> However, according to official data, despite the reforms mentioned above and the massive “identity restitution” campaigns implemented by National Registry during the last decade, at least half a million Peruvians over 18 years of age still lack a DNI and over a quarter million Peruvians lack a birth certificate.

Unfortunately, most of these undocumented individuals belong to indigenous groups. This fact is, in the main, a product of the fact that procedures to register births and obtain a DNI remain cumbersome and costly for the poorest Peruvians and that the reconstruction of civil status registries that were destroyed during the political violence period (1980-1995) has still not taken

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businesses. Access to basic financial services is indispensable for potential or emerging entrepreneurs. Just as important is access to protections and opportunities such as the ability to contract, to make deals, to raise investment capital through shares, bonds, or other means, to contain personal financial risk through asset shielding and limited liability, and to pass ownership from one generation to another. These rights may not be equally relevant to every entrepreneur but they are instrumental in poverty eradication and economic development. The success or failure of this economic sector will often spell the difference between economic progress versus stagnation, increased employment versus widespread joblessness, and creation of a broader society of stakeholders versus deeper inequality leading to a weakened social contract...” CLEP (2008, p. 20)

43. RENIEC is part of the National's Election Board and is ruled by Law 26497, 1995. Its main functions are: organizing and maintaining the records of births, marriages, divorces, deaths and other acts that modify the civil status of people nationwide; issuing the National Identification Card, and keeping and updating the registry of eligible voters. Currently, RENIEC is one of the most modern identification and civil status registry in Latin America.

44. It means that in the near future all new born children will be getting a DNI since their birth and will keep it during their whole lives.

place. Even though governmental authorities have not yet managed to identify the number of registries destroyed during the referred period of time, what all Peruvians certainly know is that over 60 per cent of the political violence victims have not managed to obtain a DNI.

- 6) Simplified and low-cost mechanisms to accredit the legal existence of indigenous communities, as well as efficient legal tools to grant the communities access to moral status and allow them to register their by-laws and the legal mandate of their representatives.** In the case of Peru, several norms were enacted during the 1990s to simplify and reduce the costs of the most important registration procedures. These norms have facilitated the registration of indigenous communities into the Moral Persons Registry, as well as the recording of the legal mandate of the representatives appointed by the Community's Assembly. At the same time, the new legal framework provided the communities with a set of mechanisms and procedures to legalize contracts and any other document signed by previous representatives whose mandates had been neither accredited nor registered.

Despite these reforms, registration procedures remain costly to most indigenous communities. As a result, designated representatives – who are appointed every two years by the Communities' Assemblies – usually remain unregistered. For this reason, decisions reached on behalf of the community are not enforceable against third parties. Only 20 per cent of the communities register the appointments of their legal representatives and only 60 per cent record their bylaws.<sup>45</sup>

- 7) Simplified and low-cost out-of-court mechanisms to solve boundary disputes and conflicts between competing interests over lands.** This might involve setting out administrative procedures and alternative dispute resolution mechanisms – such as conciliation, mediation and arbitration – to solve disputes. In order to succeed, the new legal framework should incorporate those customary practices and institutions that most communities resort to in order to settle conflicts within their own territory.
- 8) Simplified and democratic decision-making processes within indigenous communities to grant rights on their lands and make decisions on the economic use of said lands.** Main improvements should include the following:
- repealing discriminatory practices within communities, particularly those directed against women and non-community members holding interests over the communities' land;

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45. ESAN (2008, p. 9).



- updating community members records;
- establishing simplified, low-cost procedures and reasonable quorum to make decisions – which involves removing unnecessary approvals from governmental offices;
- setting out inexpensive procedures to document decisions;
- providing adequate technical advice and up-to-date information prior to making decisions; and
- promoting the translation of the most important norms into local languages.

9) **Unified and standardized registration rules and techniques and low-cost procedures for first registration and recording of subsequent transactions over lands.** In addition, **effective, secure, unified and accessible land registration systems** should be established. The Peruvian experience provides us with an example that can shine some light on the kind of reforms that should be conducted regarding systems, procedures and techniques for property registration. The end of the 1980s in Peru saw the creation, by law, of the New Real Estate Registry – the *Registro Predial* (RP) – which began operations in 1990. At the beginning, the RP had the responsibility to register ownership and other real rights regarding newly formalized properties in urban areas. This registry had to coexist with the traditional real estate registry created a century before (1888), which system was not secure and involved cumbersome and costly procedures.

The new system was equipped with a modern registry that guaranteed full legal security to owners of registered properties and facilitated not only first-time registration but also registration of subsequent transactions over land. [See Figure 4] The challenge, in the medium and long terms, was to build a unique land registration system – one which would be based on the RP system, gradually replacing the old registry system and linking all existing real estate registries.

To this end, additional laws were enacted in 1991 to extend the authority of the RP to rural areas. Unfortunately, in 1996 the Peruvian Government decided to create a third property registry exclusively for rural areas and the lands of indigenous communities: The Special Registry Section for Rural Areas. As a result, the RP lost its power to register land rights in rural areas. Unfortunately, this third registry became an appendix of the traditional registry.<sup>46</sup>

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46. Only rural land in the Department of Lima remained under the competency of *Registro Predial*., due to the fact that most lands parcels located therein had already been registered in said registry.

**FIGURE 4: Main features of The New Real Estate Registry System**

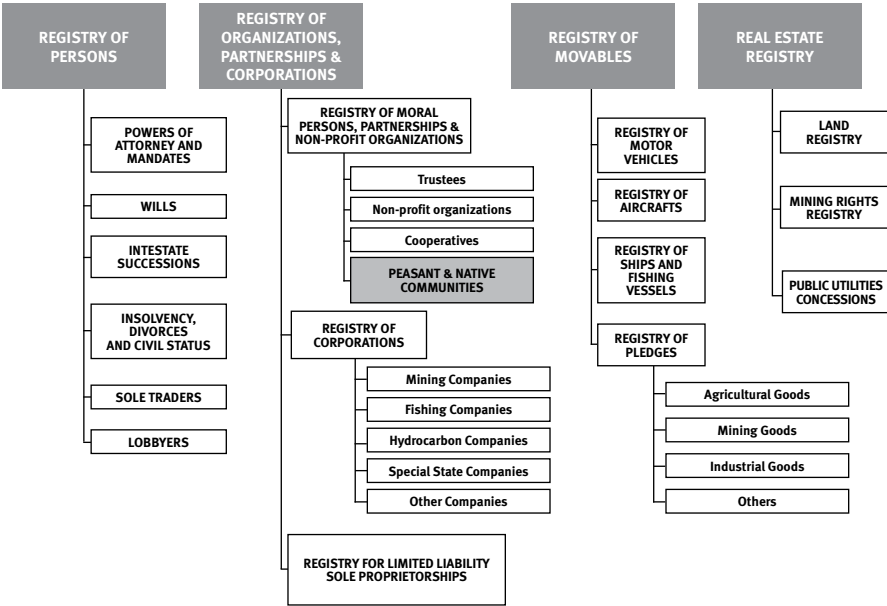
- It is competent to record land rights in newly formalized areas, coexisting with the traditional Real Estate Registry (created in 1888).
- It is vested with simplified, decentralized, standardized and low-cost procedures to facilitate and encourage not only first registration but also registration of transactions on formalized assets.
- It is also provided with a field operation strategy to carry out formalization activities with the support of stakeholders.
- Its registration system is governed by registration principles that offer legal security, certainty and protection of registered rights against third parties (legality, publicity, priority, liability or public faith, legitimacy, chain of titles, specialty).
- It is provided with leading information technology that guarantees easy and inexpensive access to registration entries and recorded information.
- It is provided with effective mechanisms to guarantee security of existing records, preventing deterioration, loss and destruction of public records.
- It has a geographical database. It provides a unique registration number for each parcel, linking legal information with spatial data and avoiding multiplicity of registered owners over the same property and superposition of areas regarding registered real estate assets.
- It uses relatively simple and low-cost survey methods, and
- It is able to establish links with other public entities (such as the National Registry of Identification and Civil Status, the Tax Authority, the Superintendency of Banks & Insurance; the National Superintendency of Public Registries, the National Office for Pensions, the Social Health Insurance System, among others)

Obviously, the co-existence of three property registries, each with its own norms, systems, authorities and priorities has generated many and very serious problems. Most notable of these are:

- the lack of coordination between these entities and the legal insecurity arising from a multiplicity of ownership titles being recorded in different registries,
- numerous land parcels registered in the name of different owners, and
- overlap of areas regarding registered properties.

In order to solve these problems and continue moving forward, the Peruvian Government decided to unify all three existing land registries, which were officially merged in 2004 under the unified Land Registry. However, such integration has not yet occurred in reality. Currently, the National Office of the Superintendent of Public Registries (SUNARP) – an autonomous entity of the Justice Sector whose objective is to dictate policies and regulations in registration techniques and the administration of public registries, including those related to the Land Registry [See Figure 5] – is responsible for designing a unique land registry system, as well as the required methodology and procedures to carry out the unification goals.

**FIGURE 5: Public Registries under SUNARP**



The three land registries that have co-existed in Peru during the last two decades have certain common features.

To start, they are neither Deeds Registry nor Title Registry Systems. In fact, they are modified versions of the Spanish Registry system, but share more similarities with a Title Registry System.

The purpose of the three systems is to provide legal security, certainty and protection to registered rights against third parties. Registration of titles is not mandatory but it is required to enforce rights against third parties. Registration entries and records are organized on the basis of the land parcel (real folio), however, only the *Registro Predial* system has a truly geographical database, which allows for legal information to be linked with spatial data.

This means that the other two registry systems, including the one used for recording indigenous communities' lands and land parcels in rural areas, lack a geographical database. This circumstance prevents these registries from providing registered owners with full legal security. As a result, there are many complaints concerning the registries originating from such complications as having a multiplicity of registered owners over the same land parcels or registered properties with overlapping boundaries.

**10) Simple and low-cost survey methods.** Land surveying and computerization of land records should not be seen as an isolated activity. Governments have to be conscious that without appropriate institutional reform programs and efficient property regularization processes, surveying and information technology systems might not necessarily lead to the formalization or registering of the vast majority of real estate assets. Moreover, surveying maps and land records might become rapidly outdated (and, as a result, useless) whenever physical and legal changes on surveyed assets remain unrecorded. In addition, special attention must be paid to technological decisions on land surveying and property registration. These decisions should be seen as means to an end, not as ends in themselves.

There are some interesting examples that illustrate how systematic adjudication and registration processes can be successful, without having recourse to costly and time-consuming surveying and mapping activities. Moreover, countries that have been successful in registering significant numbers of titles have concentrated on relatively simple, low-cost survey methods and have produced graphical standard cadastral index maps. This was the approach followed by the Urban Property Formalization Program in Peru. In fact, no project in the developing world has been able to implement and sustain high-accuracy surveys over extensive areas within its jurisdiction.<sup>47</sup>

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47. BURNS (2006).

Whenever governments decide to implement property formalization reforms they have to consider the social context of land boundaries in assessing the technical requirements for surveying and mapping. Where there is a simple, community-accepted system to define boundaries, or where there is a low social cost involved in arriving at an agreement over boundaries, there is less justification for accurate, but costly, surveys, and comprehensive mapping systems.<sup>48</sup>

**11) A strategy to capitalize the land rights of indigenous communities, as well as a coherent policy to harmonize reform programs seeking to legally empower indigenous communities, improve the management of natural resources and encourage private investments.** These reforms should include transparent rules and procedures to define and grant rights over lands and natural resources. Also needed are mechanisms that would allow for the decentralization of governmental decisions on questions concerning communities' lands, such as developing regional planning instruments. Regarding property formalization, efficient institutional mechanisms to coordinate all reform efforts and improve the legal framework need to be established. An important decision is whether the main tasks and activities are to be undertaken by public or private sector teams, or both.

In the case of Peru, one of the main property formalization reforms was the creation of the Commission for the Formalization of Informal Property (COFOPRI) in 1996. [See Figure 6] COFOPRI was initially responsible for property regularization in urban areas.<sup>49</sup> In 2007, its functions were temporarily extended to rural areas as well.<sup>50</sup> Regarding the lands of Indigenous Communities, property formalization responsibilities rest in the hands of two public entities: COFOPRI, which is responsible for regularizing Peasant communities' lands in half of the Peruvian Regions; and the Ministry of Agriculture (MAG), which is responsible for the formalization of peasant communities' lands in the other half of the regions, in addition to lands belonging to Native Communities.<sup>51</sup>

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48. BURNS (2006).

49. However, COFOPRI's competency in urban areas is temporary. It is supposed to be progressively transferred to Local Governments during the next three years (by December 2011).

50. From 1992 to 2007, property formalization in rural areas was under the responsibility of another public entity – a special project under the Ministry of Agriculture. In 2007, both entities were merged and COFOPRI assumed the formalization competency on a temporary basis. According to current norms, Regional Governments shall progressively assume said competency during the next four years.

51. COFOPRI's and MAG's formalization competencies on indigenous communities' lands are also temporary. According to current norms, Regional Governments shall

**FIGURE 6: Main features of COFOPRI**

- It is a public entity created by law and placed under the authority of the President of the Republic<sup>52</sup>. Its main mandate is to lead and manage property formalization activities in Peru.
- It is administratively, economically and financially autonomous.
- It has executive and regulatory powers for: implementing property formalization programs nation-wide in urban and rural areas; providing standards and improving methodologies and procedures to facilitate property formalization; carrying out surveying activities; supporting implementation of alternative dispute resolution mechanisms; providing technical support to implement decentralized registration offices nation-wide and simplify registration procedures; developing a strategy and providing mechanisms to encourage the maintenance of formalized assets within legality; establishing mechanisms to facilitate access to credit and public services; making an inventory of state-owned lands available for housing and other purposes; establishing mechanisms for fine-tuning the formalization and registration systems and procedures for adapting the reform to new circumstances; and providing the Local and Regional Governments with technical support and training so as to facilitate the transfer of property formalization competencies.

In addition, a new information system was designed to help the owners of newly formalized properties to access credit: COFOPRI's Positive Information Bureau (PIB). PIB was designed as an instrument for the promotion of small investment and credit programs and commercial and productive opportunity links, centered on specific financial products and services in formalized areas.

PIB manages information of 1.4 million formalized and registered real estate assets in urban areas, as well as information on the owners of those urban properties and their business activities. To this end, it uses information from

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progressively assume said competency during the next four years. Currently, COFOPRI has the mandate to draft new regulations for improving existing methodologies and procedures so as to facilitate formalization activities all over the country. It is also responsible for providing the Local and Regional Governments with technical support and training so as to facilitate the transfer of competencies.

52. Originally COFOPRI was under the authority of the President of the Republic (Legislative Decree 803). In 2006 COFOPRI was placed under the Ministry of Housing (Law 28923 and Supreme Decrees 019-2006-Vivienda and 025-2007-Vivienda).

the New Real Estate Property Registry (*Registro Predial Urbano*) and other public and private sources, such as:

- the National Registry of Identification and Civil Status,
- the Tax Authority,
- the Office of the Superintendent of Banks and Insurance,
- the Office of the National Superintendent of Public Records,
- the National Office for Pensions,
- the Social Health Insurance System,
- the Bank of Building Materials, and
- Electricity and water supply companies, among others.

**12) Appropriate institutional mechanisms to guarantee the rights of indigenous communities to consultation and compensation for the use and exploitation of their lands, and reasonable and realistic standards for environmental impact assessment.** Despite the fact that 14 Latin American countries have ratified the ILO Convention 169 – which requires that indigenous and tribal peoples be consulted on issues that may affect them and should be compensated for the use of their lands – most of these countries have failed to set out the necessary norms to guarantee appropriate consultation and compensation mechanisms.

In the case of Peru, besides subscribing to ILO Convention 169 (1989) and the UN Declaration on the Rights of Indigenous People (2007) the country has also enacted a number of internal norms recognizing indigenous communities' rights to consultation and compensation.<sup>53</sup> The government has recognized the

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53, The ILO Convention No. 169 on Indigenous and Tribal Peoples (1989) has incorporated some principles and guiding standards in this regard. According to said convention, indigenous people have the right to the natural resources pertaining to their land, including the right to participate in the use, management and conservation of these resources. It also rules that, whenever the State retains ownership of mineral or sub-surface resources, governments shall consult to ascertain whether and to what degree would be prejudiced. In addition, indigenous people shall participate, wherever possible, in benefits of such activities and receive compensation for damages.

The UN Declaration on the Rights of Indigenous People (2007) establishes (article 32) that “indigenous peoples have the right to determine and develop priorities and

indigenous communities' right to be consulted prior to granting any concession for the exploitation of natural resources found within their territory. In addition, Peru's own norms recognize their right to fair and equitable compensation, not only for the use of their lands but also for any eventual damage resulting from concessions granted to third parties. It is important to point out that according to current laws, arriving at an agreement with the community is not mandatory to grant a concession. Article 7 of Law 26505, stipulates that concessions for the exploitation of minerals and hydrocarbons located on the lands of indigenous communities can be granted either when an agreement with the community has been reached or else when the procedure for establishing a legal servitude over such lands has been concluded. Unfortunately, in practice, most decisions are taken without any kind of consultation or environmental impact study. Sometimes communities are not even informed about the plans to use their lands, and in most cases there is not any reliable plan, strategy or study to avoid or reduce eventual health and environmental damages. These circumstances have generated serious conflicts between and among indigenous communities, the State and the concession holders.

**13) Public awareness campaigns and legal mechanisms for building consensus regarding the main reforms, as well as adequate feedback mechanisms.** Consensus-building is not only indispensable to obtain the support necessary for the approval of the proposed reforms, but also for their successful implementation.<sup>54</sup> For this to happen, it is crucial to keep the reforms high on the political agenda. It is also necessary to set out adequate feedback mechanisms for identifying remaining obstacles and to

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strategies for the development or use of their lands or territories and other resources." Additionally, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources." Likewise, "States shall provide effective mechanisms for just and fair redress for any of such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact."

54 "Public and institutional awareness campaigns should be aimed at educating potential title holders and key institutional agencies, such as the financing sector. Public support and understanding are essential during initial title adjudication and registration. To be successful and sustainable, a land administration system also needs to foster a 'registration culture'—a culture where registration is undertaken as a matter of course, something that is taken for granted in the developed world... Education must involve information about benefits and obligations for registering subsequent title transactions and changes in title, and the risks associated with unregistered interests..." BURNS (2006)



design additional reforms to continue improving on existing laws, regulations and operational procedures.

The experience of the Urban Property Formalization Program in Peru shows that different methods of communication and interaction with potential beneficiaries and stakeholders are required.

During the mid-1980s and mid-1990s, a range of legal tools and techniques were developed to overcome resistance, facilitate the approval of the proposed reforms, and get beneficiaries and main stakeholders fully involved during the implementation phase. The government built consensus to support the principal property reforms by:

- publishing draft laws in the main newspapers and encouraging public feedback;
- organizing public hearings for discussions all over the country;
- carrying out meetings with land holders; and
- providing legal and technical advice, as well as explaining and disseminating the benefits of property formalization to the main groups of stakeholders.

To this end, television and radio spots and advertisements in the main newspapers were released. At the same time, the government established a special methodology and a set of legal tools to guarantee maximum community participation and the involvement of the main stakeholders when implementing the formalization programs.

### C. MAIN LESSONS LEARNED AND CHALLENGES

**First:** One of the main lessons learned by the ILD during two decades of designing and implementing institutional reforms is that "... building a new legal system to legally empower the poor... requires integral and definitive solutions to the problem of extra-legality..."<sup>55</sup> The great challenge legal systems face, worldwide, is establishing efficient institutional mechanisms that would allow for:

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55 DELGADO (2009, p. 47)

- Basing reforms on those customary norms and local practices that the majority of the population identifies with and respects.<sup>56</sup> In other words, the reform design requires a continuous “convergence analysis” between the existing legal framework and the customary norms and extralegal practices, based on both a “bottom-up” and a “top-down” approach.<sup>57</sup>
- “... Easing the regularization of the high percentage of real-estate assets whose owners cannot afford to register their rights because they lack a “registerable” title. This requires not only drawing up cadastral maps, but also clearing the title and formalizing property rights.”<sup>58</sup>
- Ensuring “...that all property recognized in each nation is legally enforceable by law and that all owners have access to the same rights and standards ...”<sup>59</sup>
- Providing the citizens with “... the necessary legal tools for choosing the system of property and land exploitation that best suits... (their) needs and interests..., whether individual, collective or mixed.”<sup>60</sup>
- “... Stimulating the permanence of real-estate within formality, which requires simplifying registry procedures and lowering transaction costs.”<sup>61</sup>
- Facilitating the economic use of formalized assets, including the development of financial mechanisms – such as credit and insurance.

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56 When Hernando de Soto analyses the main reasons behind why most governments fail to capitalize on the assets of the majority of their citizens, he emphasizes that the problem is that governments “...do not realize that most of their citizens have firmly established their own rules by social contracts...They behave as if they were travelling to a place where there is a property vacuum...They presume that all they have to do is fill this vacuum with mandatory law... In most cases, however... people already hold a huge amount of property through extralegal arrangements... And when the mandatory law does not square with these extralegal conventions, the parties to those conventions will resent and reject the intrusion”. DE SOTO, Hernando: *The Mystery of Capital*, Transworld Publishers, Great Britain, 2000, p. 155.

57. DELGADO (2009, p. 46)

58. DELGADO (2009, p. 46)

59. CLEP (2008, p. 68)

60. DELGADO (2009, p. 46)

61. DELGADO (2009, p. 46)

- Providing the poor majority with simplified and low-cost legal means to gain access to land and housing, as well as to inexpensive and affordable legal means for exploiting land and natural resources, so as to discourage them from resorting to extralegal means.
- Establishing "legal guidelines for forced relocation, including fair compensation."<sup>62</sup>
- Setting out appropriate consultation mechanisms for the utilization and exploitation of private lands, particularly indigenous communities' lands, and reasonable and realistic technical standards for assessing the environmental impact that activities such as mining may have on the communities' lands. This includes clear compensation rules for the use of communities' lands and for eventual damages.
- "... Setting up a consistent and integral strategy for coordinating all reform efforts, and ... implementing the whole set of reforms."<sup>63</sup>

**Second:** Another fundamental lesson learned is that public awareness campaigns, consensus-building strategies, maximum community participation and wide publicity are crucial in order to attain reform goals. It has been demonstrated that consensus-building strategies among beneficiaries and main stakeholders are indispensable for overcoming any resistance and to facilitating the approval of necessary legal reforms. It is also important to keep the beneficiaries of the reform program fully involved during the whole process. Beneficiaries should be empowered to monitor the results of reform programs during the implementation phase. As well, when implementing a reform, the government should disseminate its main achievements, highlight the participation of the main stakeholders and take an active political leadership role throughout the process.

**Third:** "... Institutional reforms should be sustainable over time and contain measures to ensure that the benefits are persistent and capable of adapting to the changing dynamics that affect all societies..."<sup>64</sup> Therefore, efficient feedback mechanisms to keep improving the reforms and adapting existing laws and regulations to new circumstances are also fundamental elements during the process of implementing the said reforms.

Building a new legal system for legally empowering indigenous communities is a major challenge.

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62. CLEP (2008, p. 68)

63. DELGADO (2009, p. 46)

64. DELGADO (2009, p. 47)

The reform agenda for any country seeking to provide indigenous communities with efficient legal mechanisms to facilitate their transition towards a modern and inclusive market economy should be comprehensive and innovative. That agenda "... should include a variety of institutional mechanisms to favor both formalization and capitalization of extralegal assets. While formalization mechanisms would be focused on reducing the costs of access and remain within legality, capitalization reforms should be concentrated on promoting the benefits that... can be derived from the economic use of assets ..." <sup>65</sup> When CLEP refers to the reform process towards the legal empowerment of the poor, it emphasizes that "... transforming a society to include the poor requires comprehensive legal, political, social, and economic reforms... in the short term, reform is unlikely to seem an easy option..." <sup>66</sup>

The reform goals may only be attained if governments devote special efforts to build the foundations – the legal and political structure – of the institutional bridge <sup>67</sup> that is required to connect customary norms and institutions and extralegal arrangements with governmental authorities and the "formal" legal framework.

Certainly, the credibility of governments, and thereby the legitimacy of the rule of law, will only be enhanced if they are able to provide the poor majority with appropriate institutional mechanisms to move towards a new and genuinely inclusive rule of law. <sup>68</sup>

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65. DELGADO (2009, p. 47)

66. CLEP (2008, p. 4)

67. "... a bridge so solid that it does not crack and send everyone stampeding back into extralegal arrangements; a bridge so wide that no one falls from it..." DE SOTO (2000, p. 156)

68. "... When the poor are able to find protection and opportunity in the legal system, practical benefits become evident. As the informal economy becomes documented the tax base is widened, increasing revenue for national development, economic gains expand local markets and increase financial activity at all levels. As the rule of law spreads, the predatory networks that exploit vulnerable participants in the informal economy begin to unravel, and more and more people develop a stake in the reduction of crime and the maintenance of a peaceful social order... As this transformation occurs reform gains momentum and governments that have embraced reformist ideas are accorded increasing credibility, especially among political constituencies whose voices had previously gone unheard. In this way, legal empowerment can embody and live out a compelling narrative for progress." CLEP (2008, pp 4, 5)

### 3

## **Land Tenure Systems for Traditional Communities in South Africa**

NICHOLAS OLIVIER

### 1. OVERVIEW

#### **1.1 Focus of paper**

This paper deals with the contents and administration of land tenure systems for traditional communities in South Africa.

Section 1 gives an overview of the background to, and contents of the three land reform programs which are mandated by the South African Constitution (Constitution of the Republic of South Africa 1996). One of the sub-programs of the tenure reform program, the communal tenure reform sub-program, still needs to be implemented.

Section 2 provides a brief overview of the constitutional and legal provisions relating to the contents of the current land tenure systems for traditional communities in South Africa. The chapter discusses: division of powers, existing forms of land tenure, recognition of underlying land title and customary law, and indigenous rights of access and land use.

The institutional framework for the administration of land tenure systems for communal systems in South Africa is discussed in Section 3, with reference to the institutional framework responsible for the administration of these systems and the role of traditional governance institutions and elected government structures.

A number of relevant operational considerations are discussed in Section 4, focusing on the type of land title registry system used; reform of land title systems; and financial, infrastructural, human and other resources available for land administration systems.

Section 5 deals with administrative considerations relating to communal tenure reform in South Africa. Within this context, reference is made to integration of indigenous peoples in federal schemes, anchoring economic growth by improving land titling and harmonization of jurisdictional areas.

The last section, Section 6, contains a brief overview of lessons learned with respect to the current South African situation and a number of observations regarding the draft Canadian Bill, and this with regard to both legislative objectives and legislative design. Finally, this concluding section identifies a number of key issues that flow from the overview of the South African systems and that might be relevant to Canada.

## **1.2 South Africa: addressing the need for land reform**

The colonization of South Africa started on April 6<sup>th</sup>, 1652, when the Netherlands East Indies Company (operating under a charter of the Netherlands Government) established a half-way replenishment outpost in the Cape. Significant settlement influx ensued, with a corresponding import of slaves, especially from Malaysia and other South-East Asian countries.

In 1806 the then Dutch-ruled Cape was ceded to the British crown, which renamed it the Colony of the Cape of Good Hope. After a number of border wars, and the eastward annexation of areas traditionally occupied by black communities, the colonization focus moved to the eastern part of the current South Africa, where the area (which was predominantly occupied by black communities) was annexed as a separate colony (subsequently called Natal).

In 1902 the remaining “independent” republics of Transvaal and the Free State were also annexed, following the conclusion of the second Anglo-Boer War (1899-1902).

In 1910, the four colonies were united as the Union of South Africa by means of both British legislation and the enactment of the 1910 Constitution of the Union of South Africa. By then the framework had already been laid for race-based differentiated (and discriminatory) policy. Along with that there were statutory and administrative structures and systems for the occupation and utilization, as well as the allocation, surveying and administration, of land in South Africa. In some parts, there was also the establishment of reserves for black traditional communities and the concomitant forced removal of communities and individuals.

The post-1910 South African governments (segregationist, apartheid and homeland) built on this race-based legacy, and further developed differentiated race-based policies and legislation that resulted in forced removals (mostly without any compensation), a prohibition on black people to acquire or occupy any land outside of the officially recognized traditional community areas (the reserves), and the continued implementation of a weak and skewed statutory form of communal land tenure.

The 1948 election victory of the National Party resulted in a major ideological shift, which included the consolidation of the reserve areas in ten black “homelands”, with the intention that they should evolve from a system of limited self-government to full independence.

With the dawn of non-racial democracy on April 27<sup>th</sup> 1994, South Africa was confronted by a very skewed and uneven land *status quo* with regard to land distribution patterns, access to land, tenure forms and land administration systems. In order to address this, South Africa has initiated a series of land reform programs, mandated by the 1996 Constitution of the Republic of South Africa. The three programs are:

- a) The Restitution Program. This program aims to restore land to the descendants of communities and individuals who had been removed from ancestral land in terms of Colonial and apartheid legislation. It involves the transfer of both urban land and rural (primarily commercial agricultural) land.<sup>1</sup> The vast majority of urban land claims have been dealt with. However, a significant number of complex rural claims must still be finalized. It is estimated that these rural claims might involve 2,000 to 4,000 commercially active farms. At present, there is no comprehensive support strategy nor any coordinating structure (as well as monitoring and evaluation systems) in place – at the national, provincial or project level.
- b) The Redistribution Program provides government-subsidized access to commercial agricultural land to emerging black farmers who in the past were excluded from acquiring such land on account of Colonial and apartheid legislation. This program aims at the transfer of commercial agricultural land to emerging black farmers which in some instances includes national and provincial state owned farms. It is intended that at least 30 per cent of remaining agricultural land, which has not been transferred under the Restitution Program, will be transferred between 2005 and 2014 to emerging black farmers. At present there is no comprehensive support strategy nor any coordinating structure (nor any monitoring and evaluation systems) in place – not at the national level, nor at provincial or project levels. The same need for the coordinated implementation (after transfer to the beneficiaries), monitoring and evaluation of a comprehensive and all encompassing post-settlement program exists in the case of the Redistribution Program.

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1. The detailed regulatory framework is found in the Restitution of Land Rights Act 22 of 1994, which provides for a detailed process for the submission, consideration, and recognition of claims, the validation and determination of the appropriate approach (restoration, alternative land and/or monetary compensation), and the legal and actual transfer of the land in question to beneficiaries (if applicable).

c) The Tenure Reform Program consists of four parts:

1. The conversion of Colonial and post-Colonial permits and less secure rights in urban areas to ownership and other forms of secure rights;
2. The improvement of security of title in respect of, as well as the regulation of access to and the management of, the so-called Coloured Rural Areas (in terms of the Transformation of Certain Rural Areas Act 94 of 1998);
3. The allocation and protection of tenure rights of different categories of farm workers; and
4. The transformation of communal tenure by the transfer of communal areas occupied by traditional communities to the communities concerned (currently registered in the name of the Republic of South Africa (RSA) government and held in trust by the RSA government for the said communities), and the conversion of individual community members' weak and insecure old order rights into registerable, secure and bankable new order rights.

The Communal Tenure Reform Sub-program (category 4 above) has the objective of transferring the communal areas in South Africa to the traditional communities concerned, in full ownership. In addition, the conversion of their weak and insecure rights will soon start as the Communal Land Rights Act 11 of 2004 (CLaRA) is to be promulgated in the near future. The Act is currently subject to a constitutional challenge.

At present there are approximately 800 officially recognized traditional communities in South Africa (of which approximately 296 are in the southeastern province of KwaZulu-Natal). Those communities are by and large located in the 10 former homelands. The following types of traditional leadership are recognized: 12 kingships (hereditary); senior traditional leaders (for each of the approximate 800 traditional communities – hereditary); and headmen and headwomen (generally hereditary, but, in a few instances, elected).<sup>2</sup>

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2. Each community has an officially recognized (and established by law) traditional council (previously referred to as tribal authority, and, subsequently, traditional authority): 60 per cent traditional/customary; 40 per cent elected (by commoners from commoners); 1/3 overarching female membership. The statutory structures for liaison with the three spheres of government can be described as follows: National House of Traditional Leaders (national sphere); Provincial Houses of Traditional Leaders (provincial sphere); and Local Houses of Traditional Leaders (local sphere). Traditional communities' governance is the responsibility of the national Department of Cooperative Government and Traditional Affairs. A new national Department of Traditional Affairs will be established in the course of 2009. Furthermore, traditional courts (applying customary law in civil cases, and having limited criminal jurisdiction (in respect of



Although these three land reform programs (restitution, redistribution and tenure reform) differ regarding their origin and focus, they do have a number of key aspects in common. One of the most important common aspects is the need for a comprehensive support program. At present, there is no generally applicable support program which focuses on the self-sustaining development of the land reform beneficiary communities and deals with cross-cutting issues related to the three pillars of land reform.

The Communal Land Rights Act 11 of 2004 (CLaRA) touches different aspects of governance and the relationship with traditional leaders and local governments (municipalities). It also provides for the termination of the trusteeship of the State. The State will have to divest itself of the trusteeship of the land so that land is transferred to the community in title. The outer boundary will be in the name of the community, but the individual community members will hold various types of new order rights.

As land is a national government responsibility (or functional domain), the national Department of Rural Development and Land Reform (previously the Department of Land Affairs) is responsible for policy formulation, drafting of legislation and implementation. In a limited number of instances, delegations have been put into effect to a combined national-provincial entity in KwaZulu-Natal, the Ingonyama Trust. Thus, in KwaZulu-Natal, the Ingonyama Trust Board (which will be renamed as the KwaZulu-Natal Land Rights Board) will be an important role player regarding the implementation of CLaRA. At present, there is no comprehensive support strategy nor any coordinating structure (nor monitoring and evaluation systems) in place.

A number of steps will have to be taken prior to the transfer of the ownership of the land in question by the RSA government to the communities concerned.<sup>3</sup> After transfer of ownership, the communities will have the choice of maintaining a system of (strengthened) communal tenure; transferring the total area concerned to individual community members by means of rights less than ownership (or part thereof, while maintaining the remainder in communal tenure); or subdividing the total area (or parts thereof) and transferring the subdivided areas to individual community members, by means of rights less than ownership. Any specific or individualized land parcel may thereafter, if the community concerned were to approve, be converted into full (western type) ownership (which may thereafter be transferred, without any community involvement or approval, to any third party – who could also be a non-community member).

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specifically determined common law and statutory law crimes)) continue to operate with the national Department of Justice and Constitutional Development (being the relevant government department).

3. These steps involve, amongst others, a rights enquiry and the surveying of the outer boundaries of each traditional community area. In addition, an investigation into current land use patterns and the determination of the development potential of each of these areas (which also includes the drafting of a land use and development plans) has to be undertaken.

The seven key implementation steps of CLaRA are:

1. Framework determination;<sup>4</sup>
2. Status Quo Report (including Land Rights Enquiry and Baseline Survey);<sup>5</sup>
3. Drafting of an integrated, co-ordinated and all encompassing Business Plan (Land Use and Development Plan – LUDP) for each individual community area;
4. Establishment of statutory structures (especially Land Administration Committees and drafting of their constitutions);
5. Transfer of ownership to communities;
6. Determination by communities of options of land rights or combinations thereof; and
7. Self-sustaining development of Traditional Community areas (including implementation, co-ordination, monitoring and evaluation, reporting and intervention).

Notwithstanding the positive elements contained in the enacted version of the Communal Land Rights Act 18 of 2004 (CLaRA), a number of key challenges have to be addressed. They include issues such as:

1. The need for subordinate legislation;
2. The implementation plan for the CLaRA Program;
3. Land use and development plans at project level;
4. The pre-transfer implementation manual;

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4. Determination of policy framework, legislative framework, regulatory framework, institutional framework, and status of land registers (if any);

5. With regard to categories of land parcels; current rights and interests; disputes and competing claims; types of rights and/or interests; community base line surveys; governance (internal and external) base line surveys; current land use(s); as well as future land uses (potential of land with regard to natural resources and their potential sustainable use in order to benefit communities in a sustained manner)

5. The post-transfer support manual;
6. Funding;
7. The availability of officials and service providers;
8. The training of officials and service providers;
9. The roles of, and relationships between the Department of Rural Development and Land Reform (previously the Department of Land Affairs), the national Department of Agriculture, Forestry and Fisheries, the provincial government departments, local government, the KwaZulu-Natal Ingonyama Trust (Chapter 9, ss 31-35), the new style traditional governance structures (Traditional Councils and Traditional leaders); the Land Rights Boards; and the Land Administration Committees;
10. Governance:
  - The need for coordination and coordinating structures (at the national, provincial, local and project levels);
  - The need for monitoring and evaluation (including impact assessment), reporting and intervention at programme level and project level;
11. Social facilitation (dispute resolution between communities and within communities);
12. The impact on, and relationship with, national, provincial and local development priorities;<sup>6</sup> and
13. The impact on local government:
  - Implications of the Local Government Property Rates Act 6 of 2004;

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6. The priorities are as follows:

- Poverty Alleviation, Sustainable Livelihoods and Food Security Programmes, etc ;
- LED (Local Economic Development) Programmes;
- Provincial Growth and Development Strategies;
- District Municipalities' IDPs (Integrated Development Programmes) and Local Municipalities' IDPs; and
- Related strategic government programmes, e.g. water rights and forestry management.

- Implications of section 37 CLaRA;
- Provision of municipal services and development infrastructure on communal land;
- Local and district municipalities' IDPs (Integrated Development Programs) to be aligned;
- All programs, projects and funding, as well as infrastructural and human resources, to be aligned;
- Status Quo Report (rights enquiry and baseline survey).<sup>7</sup>

In conclusion, the above overview of the Communal Land Rights Act 18 of 2004 (CLaRA) underscores the need for a comprehensive support strategy that would deal with all issues relating to both the sustainable improvement in quality of life of beneficiaries of the Tenure Reform Program, and the sustainable development and effective utilization of the land and natural resources concerned. This represents a major challenge that needs to be addressed urgently by:

- Key role players within the national sphere of government;<sup>8</sup>
- The provincial governments concerned (both as coordinating and implementation institutions);
- The relevant district and local municipalities;

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7. The Status Quo Report will serve as a management tool for:

- Communities, in order for them to better understand the Act and their role in the ownership of the land;
- LED (Local Economic Development) and IDP (Integrated Development Programme) offices within local and district municipalities, in order to determine where various projects should and could be located, as well as the social, economic and tenure implications the Act will have on the expansion of existing projects and the creation of new projects;
- Research to be done to determine the implications for the communities concerned; the implications for access to natural resources by individual community members; and the implications for any development projects focusing on the sustainable use of natural resources undertaken on the land that might be privatised; and
- The implications for the future development of the municipalities concerned and for the operations of their LED Departments.

.8 E.g. the regional offices of the Rural Development and Land Reform (previously the Department of Land Affairs) and the Department of Labour.

- Other land governance stakeholder institutions;<sup>9</sup>
- Internal community governance structures;<sup>10</sup> and
- Civil society entities.<sup>11</sup>

Government institutions – with the provincial government being the lead support institution – have to coordinate and implement (as well as monitor and evaluate) a comprehensive and all-encompassing pre- and post-ownership transfer support program which would have as its main objectives: the sustained security of tenure; the sustained improvement in quality of life; poverty reduction; food security; agricultural production; as well as the economic development of the community areas concerned.

The above framework shows that it is necessary to specify the roles and functions of the key players, including traditional councils.

At the provincial government level three departments are of crucial importance: the Premier's Office (regarding its constitutionally prescribed coordinating role); the provincial department responsible for Agriculture (taking into account its pivotal role as the initiator and driver of sustainable development within the agricultural, environmental, nature conservation and related fields); and the provincial department responsible for Local Government (which has a support and supervisory role with regard to local and district municipalities).

## 2. CONSTITUTIONAL AND LEGAL PROVISIONS

### 2.1 Division of powers

The 1996 Constitution of the Republic of South Africa is premised on the existence of three spheres or orders of government: the national, the provincial and the local. According to the Constitution's Chapter 3, the national, provincial and local spheres of government are distinctive, independent and interrelated. Section 40(2) obliges all spheres of government and organs of the state to observe and to adhere to the principles of cooperative government and inter-governmental relations. In addition, they must conduct all their activities within the parameters of Chapter 3. Chapter 3 of the Constitution contains a number

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9. E.g. the KwaZulu-Natal Land Rights Board.

10. Elected officials (e.g. ward councillors), recognized traditional institutions, as well as traditional institutions that are not officially recognized.

11. E.g. Organised agriculture.

of principles with regard to cooperative government and intergovernmental relations.<sup>12</sup>

In line with the Constitution,<sup>13</sup> the South African Parliament enacted the Intergovernmental Relations Framework Act 13 of 2005, which provides for structures and institutions that promote and facilitate intergovernmental relations, as well as the appropriate mechanisms and procedures to facilitate the settlement of intergovernmental disputes.

Section 41(3) of the Constitution indicates that an organ of state that is involved in an intergovernmental dispute must take every reasonable effort to settle the dispute by means of the established mechanisms and procedures (provided for in the Intergovernmental Relations Framework Act 13 of 2005). Moreover, all other remedies must first be exhausted before a court is approached to resolve the dispute. Organs of state, as defined in the Constitution, are established by means of statute and perform public functions.

Each of the three government spheres has distinct legislative and executive roles, powers and functions.

With regard to the national sphere of government, a distinction is made between the legislative authority and the executive authority:

- a) The legislative authority is vested in the Parliament of the Republic of South Africa (which consists of the National Assembly and National Council of Provinces). According to section 44 of the Constitution, the

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12. Section 41(1)(e) – (h) requires all spheres of government and all organs of state within its sphere to, amongst others:

- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;
- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional and institutional integrity of government in another sphere; and
- (h) co-operate with one another in mutual trust and good faith by –
  - (i) fostering friendly relations;
  - (ii) assisting and supporting one another;
  - (iii) informing one another of, and consulting one another on, matters of common interest;
  - (iv) coordinating their actions and legislation with one another;
  - (v) adhering to the grievance procedures; and
  - (vi) avoiding legal proceedings against one another.”

13 Section 41(2) provides that an Act of Parliament must:

- “(a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations and
- (b) provide for appropriate mechanisms and procedures to facilitate settlement of inter-governmental disputes.”

National Assembly can pass legislation, and assign any legislative powers (except the power to amend the Constitution), to any legislative body in another sphere of government. In addition, Parliament also has an oversight function with respect to the National Executive.

- b) The executive authority in the national sphere of government is vested in the President who exercises this authority together with other members of Cabinet.<sup>14</sup>

With respect to the provincial sphere of government a distinction is also made between legislative and executive authority.

- a) The legislative authority in the provincial sphere of government is vested in the Provincial Legislature. This authority includes the power to enact legislation with respect to:
- Schedule 4 (Part A) concurrent functional domains;
  - Schedule 5 (Part A) exclusive provincial functional domains;
  - Any matter outside of the Schedules 4 (Part A) and 5 (Part A) functional domains where a such a matter has been expressly assigned to the province by means of national legislation; and
  - Any matter where the Constitution envisages the enactment of provincial legislation.

The Constitution also provides that a Provincial Legislature may assign any of its legislative powers to a municipal council.

- b) The executive authority at the provincial level is vested in the Premier of that province. The Provincial Executive Council (PEC) consists of the Premier and other members of the Executive Council (hereafter referred to as MECs). They are responsible for the:

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14 In terms of section 85(2) of the Constitution, the national executive authority exercises its authority by:

“(a) implementing national legislation except where the Constitution or Act of Parliament provides otherwise;  
 (b) developing and implementing national policy;  
 (c) coordinating the function of state departments and administration;  
 (d) preparing and initiating legislation; and  
 (e) performing any other executive function provided for in the Constitution or in national legislation.”

- Implementation of provincial legislation;
- Implementation of all national legislation within the functional areas listed in Schedule 4 (Part A) or Schedule 5 (Part A);
- Development and implementation of provincial policy;
- Coordination of the functions of the provincial administration and its department;
- Preparation and initiation of provincial legislation; and
- Performance of any other functions assigned to the Provincial Executive by the Constitution or a national Act.

In addition, provincial legislatures must ensure that members of the Provincial Executive Council are accountable to the Legislature.

In respect of the local sphere of government the legislative and executive authority are vested in the municipal council. The national and provincial government may not impede a municipality's ability or right to exercise its powers or perform its functions.

Section 152(2) obliges a municipality to strive, within its financial and administrative capacity, to achieve the objects as set out in section 152(1).<sup>15</sup>

A provincial legislature may assign any of its legislative powers to a municipal council. In addition, national and provincial government must assign the performance of their functions to local governments, subject to capacity, financial and other resources (s 156(4)).

The developmental duties of municipalities are identified in section 153 of the Constitution, which states that all municipalities must prioritize the basic needs of the community and promote social and economic development. In addition, municipalities must participate in national and provincial development programs.<sup>16</sup>

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15. In terms of section 152 of the Constitution the following five objects of local government are defined:

"152. Objects of local government.

(1) The objects of local government are –

(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of service to communities in a sustainable manner;

(c) to promote social economic developments;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organizations in the matter of local government."

16. Within this context, section 153 states as follows:



In terms of the 1996 Constitution of the Republic of South Africa, a number of functional areas are classified to be in the concurrent legislative (and concomitantly, executive) authority of the national and provincial spheres of government.

The Constitution also provides for a number of functional areas that are within the exclusive legislative (and concomitantly, executive) authority of the provincial spheres of government.

All functional areas not specifically mentioned in Schedule 4 (Part A) (the concurrent national and provincial legislative competency)<sup>17</sup> or mentioned in Schedule 5 (Part A) (the exclusive provincial legislative competency)<sup>18</sup> are, by force of law, within the exclusive domain of the National Legislature.

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- “153. Developmental duties of municipalities. A municipality must –
- (a) Structure and manage its administration and budgeting and planning process to give priority to the basic needs of the community, and to promote the social economic development of the community; and
  - (b) participate in national and provincial development programmes.”

17. Schedule 4 (Part A) determines the following functional domains to be in the concurrent legislative authority of the national and provincial spheres of government: administration of indigenous forests; agriculture; airports other than international and national airports; animal control and diseases; casinos, racing, gambling and wagering, excluding lotteries and sports pools; consumer protection; cultural matters; disaster management; education at all levels, excluding tertiary education; environment; health services; housing; indigenous law and customary law, subject to Chapter 12 of the Constitution; industrial promotion; language policy and the regulation of official languages to the extent that the provisions of section 6 of the Constitution expressly confer upon the provincial legislatures’ legislative competence; media services directly controlled or provided by the provincial government, subject to section 192; nature conservation, excluding national parks, national botanical gardens and marine resources; police to the extent that the provisions of Chapter 11 of the Constitution confer upon the provincial legislatures legislative competence; pollution control; population development; property transfer fees; provincial public enterprises in respect of the functional areas in this Schedule and Schedule 5; public transport; public works only in respect of the needs of provincial government departments in the discharge of their responsibilities to administer functions specifically assigned to them in terms of the Constitution or any other law; regional planning and development; road traffic regulation; soil conservation; tourism; trade; traditional leadership, subject to Chapter 12 of the Constitution; urban and rural development; vehicle licensing; welfare services.

18. Regarding the functional domains allocated to the exclusive legislative authority of provincial legislatures (Schedule 5 (Part A)), the national Legislature (Parliament) may intervene with regard to such matters when it is necessary (section 44(2)):

- “(a) to maintain national security;
- (b) to maintain economic unity;
- (c) to maintain essential national standards;

With regard to functional domains that are in the concurrent legislative authority of national and provincial spheres of government, the National Legislature is responsible for national norms and standards, the formulation of national framework policies and the enactment of national framework legislation, as well as the supervision of the implementation of such national framework policy and framework legislation. Provinces are responsible for the formulation of province-specific policies and province-specific legislation.

With respect to local government, reference has already been made to the five objects of local government and the two development duties of local government. In addition, Schedules 4 (Part B) and 5 (Part B) of the Constitution contain a range of matters which must be dealt with by every municipality. In respect of Schedule 4 (Part B), both national and/or provincial government may adopt framework legislation in order to regulate the exercise of the powers related to the functional domains listed in Schedule 4 (Part B).<sup>19</sup>

In the case of Schedule 5 (Part B) only provincial governments may exercise the functions listed in this Schedule.<sup>20</sup>

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- (d) to establish minimum standards required for the rendering of services; or
  - (e) to prevent unreasonable action taken by a province which is prejudicial to the interest of another province or to the country as a whole".

The functional domains within the exclusive legislative authority of provinces are listed in Schedule 5 (Part A): Abattoirs; ambulance services; archives other than national archives; libraries other than national libraries; liquor licences; museums other than national museums; provincial planning; provincial cultural matters; provincial recreation and amenities; provincial sport; provincial roads and traffic; and veterinary services, excluding regulation of the profession.

19 Schedule 4 (Part B): air pollution; building regulations; child care facilities; electricity and gas reticulation; fire-fighting services; local tourism; municipal airports; municipal planning; municipal health services; municipal public transport; municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law; pontoons, ferries, jetties, piers and harbours, excluding the regulation of international and national shipping and matters related thereto; stormwater management systems in built-up areas; trading regulations; and water and sanitation services limited to potable water supply systems and domestic waste-water and sewage disposal systems.

20. Schedule 5 (Part B): beaches and amusement facilities, billboards and the display of advertisement in public places; cemeteries, funeral parlours and crematoria; cleansing; control of public nuisances; control of undertakings that sell liquor to the public; facilities for the accommodation, care and burial of animals; fencing and fences; licensing of dogs; licensing and control of undertakings that sell food to the public; local amenities; local sport facilities; markets; municipal abattoirs; municipal parks and recreation; municipal roads; noise pollution; pounds; public places; refuse removal; refuse dumps and solid waste disposal; street trading; street lighting; and traffic and parking.

Regarding the intervention by the national sphere of government in a particular province, section 100 provides for national intervention in provincial administration when a province cannot or does not fulfill an executive obligation in terms of the Constitution or legislation by taking appropriate steps to ensure fulfillment of that obligation (s 100). A similar provision (s 139) provides for provincial intervention in local government when a municipality cannot or does not fulfill an executive obligation in terms of the Constitution or legislation. The relevant provincial executive may intervene in such cases by taking any appropriate steps to ensure fulfillment of that obligation.

The constitutionally mandated roles of provincial government in respect of local government are fivefold: support (section 154(1)); capacity building (section 154(1)); monitoring and evaluation (section 155(6)); supervision and intervention (sections 139 and 155(7)); and regulation of municipal executive authority (section 155(7)).

## 2.2 Existing Forms of Land Tenure

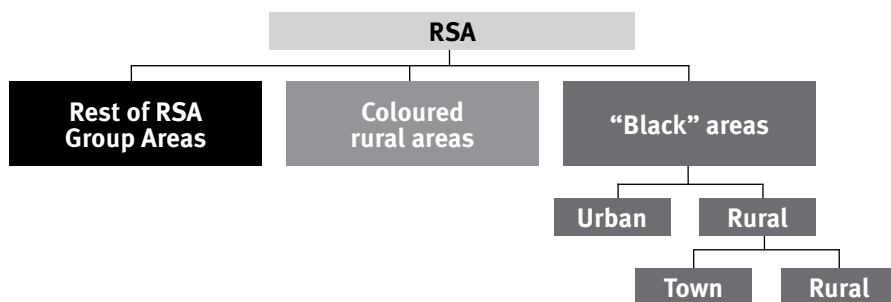
In order to have a proper understanding of the existing forms of land tenure, it is necessary to provide a brief background to land tenure and land administration in South Africa.<sup>21</sup> In many British-ruled colonies, the British colonial government introduced land tenure and land administration forms and systems which differed significantly from those applicable to the so-called Western model. These differentiated tenure forms and land administration systems were by and large race-based, and, from all perspectives, inferior to the survey and full ownership approach applied in respect of all other communities and land occupied by them.

In the case of South Africa, the following diagram gives an overview of the three main categories of land that were introduced by the British governments, and defined by successive South African governments: the segregationist government (1910-1948); the Apartheid government (1948-1991); and the governments of the former "TBVC" entities and the six so-called self-governing territories:

With regard to Black South Africans, four main Acts regulated their rights to access land, to occupy land, and to dispose of land. These were:

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21. This overview is based on research done since 1980 on the history and complexities of the multi-faceted land tenure and land administration system in South Africa, various articles on land matters published by Du Plessis W, Pienaar J and the author on an annual basis in the SA Public Law from 1991 onwards, and Du Plessis W 2008 Land Law Study Guide, North West University. A brief summary of this overview has been included in the Consultation Paper on legislation administered by the South African Department of Rural Development and Land Reform in October 2009 within the context of the South African Law Reform Commission's Project 25 on Statutory Law Revision.



1. The Black Land Act 27 of 1913;<sup>22</sup>
2. The Black Administration Act 38 of 1927;<sup>23</sup>
3. The Development Trust and Land Act 18 of 1936;<sup>24</sup> and
4. The Blacks (Urban Areas) Consolidation Act 25 of 1945<sup>25</sup> which was replaced in 1984 by the Black Communities Development Act 4 of 1984.

Regarding the remainder of South Africa, the Group Areas Act 41 of 1950 was based on legislation passed before 1910 by the then Colonial government, the purpose of which was to limit freedom of movement, and freedom of access to land rights and occupation (residential use and residential and commercial use) for Indians in the then Natal Colony.

This legislation was eventually expanded to cover all of South Africa, with the exception of the above-mentioned scheduled areas, the released areas, and

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22. Which provided for the allocating of 6 per cent of the surface area of South Africa – the so called scheduled areas set aside for exclusive black occupation. These areas were, at that point in time (1913), already densely occupied.

23. Which consolidated a special system of administration of all Black South Africans; it provided for an own court structure, the recognition of traditional communities and traditional leadership systems, the power to issue proclamations and regulations dealing with every aspect of the lives of black people, etc.

24. Which provided for the removal of Black South Africans from the remainder of South Africa outside the urban areas, and added another 7 per cent of South Africa surface area to the 6 per cent “scheduled areas” (see above). The 1936 “released areas” were to be acquired by a special purpose vehicle, the South African Development Trust, for eventual transfer to black people.

25. Which provided for special tenure forms and special forms of land administration in the so-called urban areas of South Africa. It also provided that all Black South Africans could only be legally present in those urban areas if in possession of the necessary authorisation.

urban areas which were earmarked for black occupation and/or acquisition of rights by black people. This land area comprised 87 per cent of the surface area of South Africa. The Group Areas Act 41 of 1950 (subsequently renamed as the Community Development Act 3 of 1966) provided for segregation between so-called “Coloureds,” Indians and White, regarding residential areas, commercial areas and business areas.

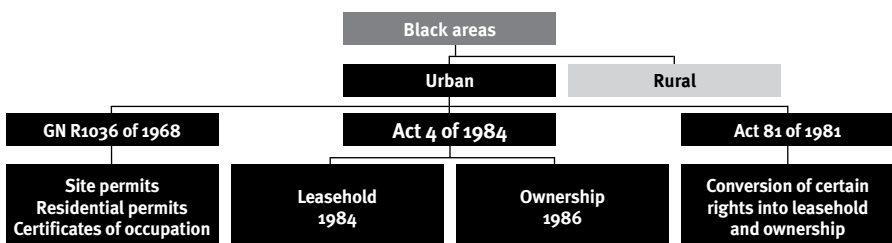
These four “pillars of apartheid” were repealed in 1991 (by means of the Abolition of Racially Based Land Measures Act 108 of 1991). However, the majority of subordinate statutory instruments in terms of these four statutes were not repealed in 1991. (Some of the other so-called “pillars of apartheid” were already removed from 1986 onwards.)

In the former group areas the forms of land tenure were by and large similar to those which are found in most civil law countries, namely ownership, leasehold, sectional title, limited real rights, and time share.

Regarding surveying and registration, the normal rules and processes applicable in most deeds registry-based systems were applied.

Special tenure arrangements applied in the former mission reserves. Land matters in these reserves which were established for rural Coloured people in two of South Africa’s provinces (Western Cape and Northern Cape) were regulated by means of a special land administration system and tenure forms. In 1997 consolidating legislation, the Rural Areas Act (House of Representatives) 9 of 1987, was enacted to establish a uniform set of forms of tenure. However, this differed in many respects from the tenure forms recognized in the Group Areas Act 41 of 1950 (see discussion above). In 1998 the Transformation of Certain Rural Areas Act 94 of 1998 (TRANCRAA) was enacted to provide for the conversion of the weak tenure rights of the individual holders within these areas.

Compared to the tenure forms and land administration system that used to apply in areas regulated by the Group Areas Act 41 of 1950, a totally different system applied to Black South Africans. Surveying (which was done only into a very limited extent) was significantly inferior to that implemented in the remainder of South Africa, and tenure forms applicable to Black South Africans were weak, insecure, and subject to discretionary administrative intervention (with recourse to courts excluded). Within this category, the distinction was made between (a) the former black urban areas and (b) the so-called homelands and SADT (South African Development Trust) areas. The following diagram gives an overview of these former black urban areas:

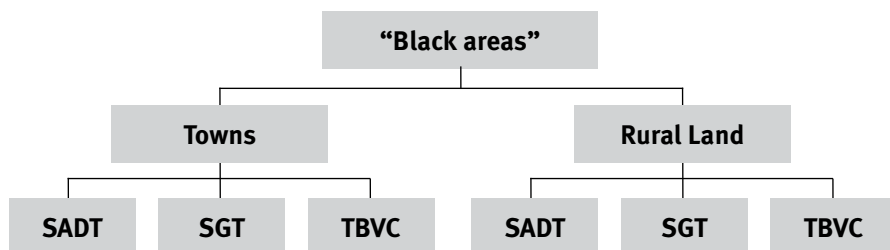


Regarding the urban areas (previously referred to, in Colonial Africa as “locations”; subsequently, black urban areas or townships) special arrangements used to apply. In principle, no black person could obtain full ownership and the actual presence of black persons in these areas was regulated by the implementation of a reference book (or pass book) system. In terms of the colonial legislation which continued post-1910 in South Africa until at least the late 1970s, ownership was not possible, and only weak personal rights could be acquired, namely site permits, residential permits, and certificates of occupation.

These rights were subject to discretionary administrative control (without recourse to any court). In 1979, provision was made for the acquisition of leasehold (a registerable limited real right) in a limited number of cases. In 1984, the Blacks (Urban Areas) Consolidation Act 25 of 1945 was replaced by the Black Communities Development Act 4 of 1984 which provided for the wide-scale registration of leasehold (but not full ownership). This necessitated the resurveying of each land parcel that was to be upgraded to leasehold.

In 1986 the then prevailing political context in South Africa resulted in an amendment to the Black Communities Development Act 4 of 1984, which provided for full registerable western-type ownership. This process has now nearly been completed.

The 1913 scheduled and 1936 released areas set aside for exclusive occupation and acquisition of rights and interests by black persons. Among the areas in question were those that were consolidated into ten homelands, which eventually became the four so-called independent “TBVC” states and the six self-governing territories. Those areas that could not be consolidated remained as a separate category, referred to as the “SADT areas.” The following diagram provides an overview of all of areas covered by the 1913 and 1936 measures:



As previously indicated, the Black Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936 provided, respectively, for scheduled areas and released areas. The South African Development Trust had to acquire the released areas, manage and develop the land concerned, and eventually transfer them to black persons. Prior to transfer of such land, the term “SADT areas” was used.

When the National Party became the government of South Africa (from 1948-1994) an ideological shift took place. The National Party government decided that the scheduled and released areas should be consolidated in what was referred to as “Bantustans”, subsequently renamed as homelands, and finally as self-governing territories. With the exception of a number of “SADT areas” that could not be consolidated into these dual-political areas, ten homelands were created. The declared intention of the South African government was that they should attain full independence. However, only four of these territories (Transkei, Ciskei, Venda and Bophuthatswana) opted for so-called full independence. The other six self-governing territories acquired an extensive degree of nominal self-governing power with respect to a number of listed functional domains (which included land).

Eventually, ownership of the land in the self-governing territories was transferred by the South African government to the governments concerned. This meant that those governments became responsible for both the allocation of rights and interests in, and the management of, such land.

Prior to the transfer of the functional domain of land to the governments of the ten homelands (including transfer of responsibility for administration and the right of allocation), the South African government, by means of an intricate system of subordinate legislation, provided a differentiated set of tenure forms, including surveying, registration and administration. This regulatory framework was, in the course of time, transferred to the individual governments of the various homelands. Some of these governments amended their inherited land tenure, surveying and administration regulatory frameworks. Others replaced it with their own legislation. And still others continued with the implementation of inherited legislation as such.

By the early 1990s it was clear that there were ten distinct systems of land tenure and land administration in operation in the so-called homelands. In addition, another regulatory framework was in place in respect of the “SADT areas” (this subordinate legislation was issued by the central RSA government).

A further distinction in respect of every homeland (the so-called independent TBVC countries, the other six self-governing territories and the “SADT areas”) must be made between towns and rural land. For towns, the individual homeland legislative statutory framework (whether inherited, amended or replaced) provided for site permits, residential permits, in a very limited number of cases a deed of grant (which is equal to ownership), and, in some of the TBVC countries, (also to very limited extent) ownership. In the “SADT areas” the tenure forms were trading permits, leasehold, certificates of occupation and, in a limited number of cases, deeds of grant and ownership units.

In the rural areas outside the towns located in the former TBVC countries, the other six self-governing territories and the “SADT areas”, the then existing national legislation was taken over, and, in some instances, amended or replaced. The main land tenure forms in the rural areas were communal tenure, quitrent and permission to occupy (PTO).

Regarding communal land tenure (which was, and still is, in place in many rural areas in South Africa), the senior traditional leader, assisted by the headmen/headwomen concerned, *de facto* administers land on a *de facto* basis and allocates rights of occupation. Such traditional leaders do not own the land nor do they have exclusive use thereof. Once the land has been allocated to a traditional community member, the control/management of the traditional leader terminates. The person to whom the land has been allocated then has the exclusive use thereof.

The system of distribution and inheritance of land is governed by customary law. However, the Constitutional Court has recently ruled that the customary rule of primogeniture is unconstitutional and that, in the absence of a written will, the normal South African common law of intestate succession applies. In principle, in terms of customary law, land is to be distributed equally to all members of the traditional community according to their needs. Although, initially, only married men could obtain land that was governed by communal tenure, the customary communal tenure system in the past few years have seen an increase in the number of female-headed households to whom land was allocated by traditional leaders.

In terms of customary law (reinforced by subordinate legislation), widows and divorcees retain the right of occupation and use of land. This is sometimes referred to as the "widow's servitude".

*Quitrent* was implemented in very few instances. The level of surveying used was significantly inferior to that used for surveying of land for purposes of registration of ownership.

*Quitrent* is a registerable right on surveyed land entitling the holder of *quitrent* to occupy the land in question against the payment of a fixed amount as rental. It is a limited real right in respect of which the State is still the owner of the land. However, notwithstanding its classification as a limited real right, it could only be transferred with the permission of the relevant government official. With regard to inheritance, the statutory tables of inheritance, as contained in Proclamation R188 of 1969, applied. (This was in part changed by the impact of the Constitutional Court judgment which invalidated the customary system of primogeniture).

*Quitrent* may be cancelled or suspended. In addition, it can be used to obtain security (for example in order to obtain a loan) with the permission of the government official concerned. Registration takes place in a dedicated registration office of the Chief Administration Commissioner (previously referred to as the Chief Native Affairs Commissioner or, subsequently, the Chief Bantu Affairs Commissioner). Special registration arrangements are determined by means of subordinate legislation, resulting in not all the detailed provisions of the Deeds Registries Act 47 of 1937 being applicable.

The third form of land rights in the communal areas of South Africa is the permission to occupy. To a large extent, this is the statutory form of communal



tenure, but with a number of important differences, e.g. the absolute discretion vested in officials. A permission to occupy (PTO) is the personal right to the use of un-surveyed land against the payment of an annual rent, subject to any conditions that might be imposed by government. It provides the right to occupy and use a residential, arable or business site. Until 1996 PTOs were issued by the magistrate concerned (who had extensive discretionary powers). In most cases, such allocations were in the past effected by the magistrates together with the senior traditional leader and/or traditional council concerned. Regarding transferability, the approval of the functionary is required. This also applies to leases, subleases, etc. As for the legal effect of a PTO: although certificates were issued in the past, there was no central register and such certificates were not registered against any plan or detailed description of the property concerned. PTO's are by their very nature personal rights. In the past very extensive discretionary powers were vested in officials as regarding the issuing, cancellation or transfer of PTOs. Prior to 1994, when the 1993 Constitution came into effect, the rule of *audi alteram partem* was explicitly excluded by means of legislation.

Notwithstanding the repeal in 1991 of the four pillars of the segregationist and apartheid approach to the establishment of differentiated (and inferior) systems of land tenure and land administration, the subordinate legislation issued in terms of these four principal Acts have remained in place. The four pillars were: the Black Land Laws 27 of 1913; the Black Administration Act 38 of 1927; the Development and Trust Act 18 of 1936; and the Urban Areas (Consolidation) Act 25 of 1945, which was replaced in 1984 by the Black Communities Development Act 4 of 1984.

The 1993 Constitution explicitly provided for the continuation of the old order legislation. That Constitution also provided a framework for the assignment of pre-1994 legislation to provincial governments, to the extent that parts of the pre-1994 legislation fell within the provincial legislative and administrative domain. This resulted in the transfer of a number of pre-1994 national, provincial and homeland statutory instruments to the provinces concerned (which would from then on be responsible for the administration of such legislation).

It follows that significant parts of the racially-based pre-1994 land tenure systems legislation were assigned for the provinces to implement post-1994. The 1996 Constitution (Schedule 6 Items 1-2) specifically provides for the continued application of all old order legislation, as well as interim (transitional) legislation (enacted during the interim phase from April 1994 to February 1997, that is, from the commencement date of the Constitution of the Republic of South Africa of 1993, to that of the (final) Constitution of the Republic of South Africa, 1996. The 1996 Constitution also reconfirmed that all assigned legislation would become provincial legislation, which only provincial legislatures could then repeal, amend or replace.

The current land tenure system in South Africa consists of various (predominantly old order, race-based) systems.

The “normal” system applies to all of South Africa, excluding the traditional community areas (predominantly the ten former homelands) and the Coloured rural areas (see above). The so-called black urban areas (townships) have been integrated with regard to tenure forms and land administration. Surveying in all these areas (i.e. excluding the former homelands and SADT areas) is of a high quality and the normal deeds registration procedure is followed, as prescribed by the Deeds Registries Act 47 of 1937. The “normal” system does not, as yet, apply fully to the Coloured rural areas (where the implementation of the Transformation of Certain Rural Areas Act 94 of 1998 has not been completed). In addition, pre-1994 legislation (from both the Republic of South Africa and the homelands) still determines the rights and interests within towns and rural areas in the former homelands and “SADT areas”.

In light of the fact that both the interim 1993 Constitution and the final 1996 Constitution stipulated that land is a national function, the ownership, in principle, of all land situated in the former homelands and “SADT areas,” is vested in the central government. The administration of such land rights and interests, as well as questions concerning compliance with the Deeds Registries Act 47 of 1937 have, since April 1994, been vested in the national Department of Land Affairs, recently renamed the Department of Rural Development and Land Reform.

To this general rule there is one exception, i.e. the Ingonyama Trust, which was established a few days before the dawn of democracy, with the coming into effect of the 1993 Constitution, in 1994. The KwaZulu Ingonyama Trust Act 3 of 1994 (enacted by the KwaZulu Legislative Assembly) provided for the vesting of ownership of communal land in the former KwaZulu in the Ingonyama Trust. In 1996 the Republic of South Africa National Parliament amended the KwaZulu Ingonyama Trust Act 3 of 1994. This amended Act is referred to as the Ingonyama Trust Act 3 of 1994 (RSA). This legislation provides that the administration of all traditional community land in the former self-governing territory of KwaZulu be transferred to the Ingonyama Trust.

It follows that the current reality of municipalities issuing PTOs, and, in some instances renewing *quitrent*, are null and void, as neither the allocation of traditional community land nor the administration thereof has been assigned to any provincial government or local government with the exception of the Ingonyama Trust.

### 2.3 Recognition of Underlying Land Title

In the (final) 1996 Constitution, provision is made in section 25 for the protection of ownership and for expropriation.<sup>26</sup> Reference has already been made to the three South African land reform programs. Each of these has its enabling legal framework in the Constitution.<sup>27</sup>

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

Expropriation may only take place in terms of a law that is of general application (s 25(2)):

- "(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."

Taking into account the history of false removals and expropriation of property without sufficient, and in many cases, any, compensation, section 25(3) of the Constitution provides that the history of the acquisition of land to be expropriated should, amongst others, be taken into account. In this regard section 25(3) determines as follows:

"(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."

The important role of land reform as one of the key programmes of South African society, is set out in section 25(4) which declares that:

- "(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."

27. The three land reform programmes:

- Tenure Reform (s 25(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"
- Redistribution (s 25(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."
- Restitution (s 25(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."

The Constitution also determines (s 25(8)) that nothing contained in section 25 may limit the State in its obligation to take the necessary legislative and other measures in order to achieve land, water and related reform with the view to redressing the results of past racial discrimination. Importantly, the Constitution states explicitly (s 25(9)) that Parliament must enact legislation relating to tenure reform.

As indicated above, the upgrading of weak and insecure rights in (former) urban townships has been completed. As for areas occupied by traditional communities (by and large the former homelands), ownership there had been vested in the South African government, even before 1910. The transfer of the ownership of such communal land to the governments of the respective homelands did not change the principle that the State remained owner of the land concerned. In April 1994 (with the coming into effect of the interim 1993 Constitution) the ownership of all such homeland land was vested in the national government, with the exception of land managed by the Ingonyama Trust (see discussion above).

Mention has been made of the constitutional obligation on the State to bring about security of tenure (see discussion of section 25(6) above) as well as the obligation on the South African national government to enact legislation to provide for such security of tenure. Within this context two significant statutes were passed by the South African Parliament, namely the Interim Protection of Informal Land Rights Act 31 of 1996. It has been renewed on an annual basis as a holding operation to ensure that weak and insecure rights and interests in land be protected until a new policy and statutory framework is established. It would bring about the conversion of such rights and interests into registerable new order rights. The second statute, the Communal Land Rights Act 11 of 2004 (CLaRA) provides for a structured process to convert the weak and insecure rights and interests (whether communal tenure or the statutory form thereof – PTOs) into new order rights that are registerable in the normal manner (by complying with both the Land Survey Act 8 of 1997 and the Deeds Registries Act 47 of 1937).

These new order rights, when registered, will also provide security for loans, etc. However, the constitutional validity of this Act is disputed, and the High Court of South Africa has reserved judgment on this. As well, the Communal Land Rights Act 11 of 2004 (CLaRA), although enacted in 2004, has not been promulgated (i.e. the commencement date of the Act has not been determined by the South African President).

## **2.4 Customary Law and Indigenous Rights of Access and Land Use**

When it comes to land rights to and interests in communally occupied land (primarily the former homelands and SADT areas), current land use reflects, to varying degrees, the customary communal tenure system. With the termination

of the role of magistrates in the allocation and (informal) registration of permissions to occupy, the customary communal tenure system has, to a large extent, become the norm in many of the traditional community areas of South Africa.

Legislation (which is enforced by the South African courts) provides for the right of access for relatives to burial places and cemeteries in the case of land which was previously occupied by a particular traditional community. The “*notion of aboriginal title*” has not yet been fully discussed and analyzed in the South African courts. In a recent Constitutional Court case<sup>28</sup> it was decided that the long term use and control of land by a specific indigenous group according to their customary law system provided sufficient ground to enable the return of that land (after dispossession by the successive South African governments) under the restitution program.

A typical example of the recent South African approach to what is sometimes referred to as “indigenous rights of access and land use” is the agreement with the occupiers of land which was proclaimed as a national park (the Richtersveld National Park). The community members concerned have the right of access to these lands and their use for grazing their goats. Similar arrangements are currently being put in place for other national and provincial parks and nature reserves previously occupied as communal land.

### 3. INSTITUTIONAL FRAMEWORK

#### 3.1 Institutional Framework Responsible For Administration

As indicated above, parts of the un-codified customary law of communal tenure have continued to be applied in some of the communal areas of South Africa. The statutory framework for the issuing and administration of permissions to occupy (PTOs) provides for the allocation of grazing rights and residential rights to individuals. This legislation stipulates that magistrates are responsible for the actual issuing of such PTOs and for their registration (containing a description of the land and the holder of the PTO) in his or her office. The magistrate’s decisions were based on the (non-binding) advice of the traditional leader of the community concerned. However, in 1996 the South African Department of Justice and Constitutional Development decided that all agency functions provided by magistrates on behalf of other government departments would terminate.

No legislation is currently in force to transfer the functions previously performed by magistrates with regard to the allocation and registration of PTOs to another functionary. That power is consequently vested in the national depart-

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28. *Ilexkor Ltd and Another v Richtersveld Community and Others* 2004 (5) SA 460 (CC).

ment responsible for the administration of communal land: the Department of Rural Development and Land Reform (previously, until April 2009, known as the Department of Land Affairs). The only exception to this is the delegation that is in place that enables the Ingonyama Trust to administer land that prior to 27 April 1994 formed the jurisdictional area of the self-governing territory of KwaZulu.

The Communal Land Rights Act 18 of 2004 (CLaRA) provides for a new system for the registration of communal land rights once the conversion of the old order rights into new order rights has been completed for a specific traditional community.

The national government department responsible for the administration of communal land (the Department of Land Affairs (since April 2009 renamed as the Department of Rural Development and Land Reform) has not delegated any of its land allocation and land administration functions to any provincial government nor to any municipality, with the exception of the Ingonyama Trust

### **3.2 Role of Traditional Governance Institutions and Elected Government Structures**

Until 1996, legislation and state practice involved both traditional leaders and magistrates in the issuing of PTO's and in their administration. In 1996, the role of magistrates was terminated, and currently (with the exception of land situated in the jurisdictional area of the former KwaZulu self-governing territory) all allocations by any other entity outside of the Department of Rural Development and Land Reform have been informal and without a legal basis.

The White Paper Program on Traditional Leadership and Institutions (which started in 1998 and was finalized by the enactment of the relevant national and provincial legislation) provides a framework for cooperation between elected governments and traditional governance institutions. Section 19 of the Traditional Leadership and Governance Framework Act 41 of 2003 determines that traditional leaders retain the customary powers and functions prescribed by the system of the community concerned, as well as any other functions that may be allocated to them by national or provincial legislation (s 19).

Sections 19 and 20 of the Traditional Leadership and Governance Framework Act 41 of 2003 provides a framework within which national and provincial government may, by means of legislative or other measures, delegate roles and functions to traditional leaders and traditional councils. The policy process for the steps to be taken in order to bring about such an assignment or delegation to traditional leaders and/or traditional councils by national and provincial government departments has only recently been completed, in April 2009, and regulations which will provide for a structured process for the allocation/delegations of such powers and functions, are currently being drafted.

Section 5 of the Traditional Leadership and Governance Framework Act 41 of 2003 also provides for the establishment of partnerships between municipalities and traditional councils. A similar process will soon be undertaken by the Department of Cooperative Government and Traditional Affairs. The Department will draft a policy and regulatory frameworks for the establishment and implementation of partnerships between municipalities and traditional councils.

The Land Administration Committees (LACs) of traditional communities will decide (subject to certain guidelines) on the content of the new order land rights that would be available in the traditional community areas. Provision is made in the Communal Land Rights Act 18 of 2004 (CLaRA) that a community may decide, by a majority vote, to designate its traditional council as its Land Administration Committee. Every traditional council must, according to the provisions of the Traditional Leadership and Governance Framework Act 41 of 2003, consist of 60 per cent traditional governance representatives, 40 per cent representing commoners, and overarchingly, at least 33.3 per cent female.

Oversight at a regional level on the implementation of Act 11 of 2004 (CLaRA), as well as on the content and use of new order tenure rights, will be effected by the Lands Rights Boards of the regions. Each Land Rights Board will consist of, amongst others, a senior traditional leader nominated by the Provincial House of Traditional Leaders.

## 4. OPERATIONAL CONSIDERATIONS

### 4.1 Type of Land Title Registry System

The main difference between the system of deeds registration (negative registration system) and the Torrens system (positive registration system or registration of title) is that deeds registration is based on the registration of instruments, while the Torrens system is based on the registration of title, including the compliance with three principles: the “mirror” principle, the “curtain” principle and the “insurance” principle.

South Africa uses the negative registration or registration of deeds system. This system was introduced by the Colonial government and subsequently expanded to form the basis of deeds registration all over South Africa. The system provides more security to the true owner than to a *bona fide* third party. The registered facts are not guaranteed as being correct. In South Africa, however, the registration of deeds system goes further than mere recordal. By setting norms and standards for, and regulating the survey and conveyance industries, the South African government plays an assertive role. All important instruments related to the land parcel concerned must be registered; however, the facts contained in the documents are not guaranteed as being correct. This is

evident from section 99 of the Registration of Deeds Act 47 of 1937 which excludes liability on the part of the State and officials, if the incorrect description, recordal or *omissio* was not done in a *mala fide* manner and if reasonable care was taken. For example, there is no guarantee that the deeds register reflects the true position in the case of acquisition of ownership through prescription. However, the fact that the South African transfer of ownership doctrine is based on the abstract system of transfer of ownership implies that a significant degree of protection is provided to the *bona fide* acquirer of ownership. According to the abstract system of transfer of ownership, the invalidity of the agreement creating the obligation does not affect the transfer of ownership if the following two requirements are met:

- The existence of a valid real agreement which requires that one person has the intention to transfer ownership to another person, and that other person has the intention to acquire ownership; and
- Registration of the transfer (in the case of immovables) or delivery (in the case of movables).

## 4.2 Reform of Land Title System

As indicated above, the most important outstanding relic of Colonial segregationist, apartheid and homeland land tenure and land administration (including registration) that still has to be dealt with is the communal tenure system and its statutory form in the former homelands. Approximately 15 to 18 million people still occupy land within the context of communal land tenure and the statutory forms thereof. The Communal Land Rights Act 18 of 2004 (CLaRA) provides for a phased approach regarding the conversion of the weak and insecure older order rights into secure and registerable new order rights. The following seven steps (if implemented fully) will result in the registration of the new order rights:

1. Framework determination;
2. Status quo report (including land rights enquiry and baseline survey)
3. Drafting of an integrated, coordinated and all-encompassing business plan (Land Use and Development Plan – LUDP) for each individual community area;
4. Establishment of statutory structures (especially Land Administration Committees (LAC) and the drafting of their constitutions);



5. Transfer of ownership of the land to the community concerned;
6. Determination by communities of options of land rights or combinations thereof;
7. Self-sustaining development of traditional community areas (including implementation, coordination, monitoring and evaluation, reporting and intervention).

#### **4.3 Financial, Infrastructural, Human And Other Resources Available For Land Administration Systems**

At a structural level, the Department of Rural Development and Land Reform (previously the Department of Land Affairs) was responsible for the surveying and the registration of deeds. For this purpose it manages the Office of the Surveyor-General and the Office of the Registrar of Deeds. Both these offices were established in the Cape Colony before 1910, and, on formation of the Union of South Africa, 1910, became national offices. These offices are responsible, respectively, for surveying and the registration of deeds. In both instances legislation determines minimal norms and standards, prescribes procedures and formats, and enables the levying of fees payable by users of the two systems. Regarding communal tenure reform, the first phase of the implementation of CLaRA will include:

- land rights enquiry,
- determination of current holders of rights and interests,
- award of comparable redress in cases of disputes, and
- the transfer of ownership of the land concerned to the community after the outer boundaries of their community land have been surveyed

This first phase will cost approximately R65 billion (approximately CAD \$9 billion).

## **5. ADMINISTRATIVE CONSIDERATIONS**

### **5.1 Integration of Indigenous Peoples in Federal Schemes**

The Land Use and Development Plan (LUDP) is an integral key component of the economic development of the community and of the land concerned. The

LUDP must be drafted after completion of a thorough feasibility study and the land rights enquiry. The LUDP focuses on the economic potential of the land concerned, taking into account human resources, capacity, natural resources and other relevant factors. The intention is that within the context of the April 2009+ emphasis on integrated rural development, the necessary infrastructure (such as water, roads, and transport) will be provided to enable economic development of these areas.

## **5.2 Anchoring Economic Growth by Improving Land Titling**

With the implementation of the Communal Land Rights Act 18 of 2004 (CLaRA) and the drafting of a Land Use and Development Plan (LUDP), the current policy of government (as of 2009) is to focus on an integrated approach to development. This implies that there will be an alignment between the LUDP and the municipal Integrated Development Plan (IDP) and Local Economic Development Plan (LEDP). This integrated approach – if coordinated appropriately – will be the driver for integrated socio-economic development of communities and their lands.

## **5.3 Harmonisation of Jurisdictional Areas**

Once the commencement date of the Communal Land Rights Act 18 of 2004 (CLaRA) has been promulgated, preparatory steps for the implementation of CLaRA on a pilot bases should be taken. Those steps include:

- the alignment of existing land reform,
- integrated rural development and
- agricultural transformation policies and strategies.

The regulatory frameworks underpinning land reform, integrated rural development and agricultural transformation must also be aligned.

At the implementation level, new structures need to be established within the context of the Communal Land Rights Act 18 of 2004 (CLaRA), especially the Land Administration Committees (LACs) and the Land Rights Board (LRBs). In addition, a prerequisite for the success of the implementation of the Communal Land Rights Act 18 of 2004 (CLaRA) is the establishment of appropriately structured intergovernmental mechanisms that would ensure that programs, projects, budgets and human resources were sufficiently coordinated. This should be linked to an autonomous monitoring and evaluation system, which would provide reports on a regular basis and enable senior government

officials to intervene in cases where the projects concerned become inefficient and/or dysfunctional.

## 6. LESSONS LEARNED

### 6.1 Comments About Legislative Objectives

The Canadian initiative regarding the First Nations Property Ownership Act (FNPOA) discussed the following structural and administrative aspects:

1. The drafting of a core federal legislative framework
2. Provision of certainty of title by way of a modified Torrens system
3. Each community would have the choice to participate in the legislation
4. If a community decided to opt in, it would have to do the following:
  - Designate its land to be subject to FNPOA
  - Conduct a survey of all land parcels/lands which the community desires to place within the jurisdiction of FNPOA
  - Pass a number of regulations by the community relating to the lands which have been designated to be within the FNPOA context (e.g. matrimonial property regulations, etc.)
  - Determine who holds what interests in the First Nation land concerned and the physical boundaries of those interests
  - Determine what types of interests should be granted to (a) holders of certificates of possession, (b) certificates of occupation and (c) custom allotments
  - If these three categories of interests were to be registered (decision to be made by the First Nation concerned), each individual land parcel in respect of which such an interest exists, must first be surveyed in order to delineate the boundaries of such interest
  - In respect of existing leasehold interests, they may also be registered on their current terms (subject to surveying, if not already surveyed)

- Dispute resolution, e.g. where property boundaries have not been surveyed and, duplicate and incompatible claims to the existence of a particular interest in a specific land parcel (this may require the establishment of an administrative system).

## 6.2 South African Experiences Potentially Relevant to Canada

The success of the implementation of the South African communal tenure reform program is dependent on the coordinated implementation of a number of steps. The same considerations apply to Canada's investigation into a new approach to indigenous land title systems.

Within this context, it is proposed that consideration should be given to the execution of the following seven phased programme by Canada (this proposal is based on the South African CLaRA approach as set out above):

1. Framework determination: determination of policy framework, legislative framework, regulatory framework, institutional framework, status of land registers (if any);
2. *Status Quo* Report (including Land Rights Enquiry and Baseline Survey): categories of land parcels; current rights and interests; disputes and competing claims; types of rights and/or interests; community base line surveys; governance (internal and external) base line surveys; current land use(s); as well as future land uses (potential of land with regard to natural resources and their potential sustainable use in order to benefit communities in a sustained manner)
3. Drafting of an integrated, co-ordinated and all encompassing Business Plan (Land Use and Development Plan – LUDP) for each individual community area;
4. Establishment of statutory structures (especially Land Administration Committees and drafting of their constitutions);
5. Transfer of ownership to communities;
6. Determination by communities of options of land rights or combinations thereof;
7. Self-sustaining development of Traditional Community areas (including implementation, co-ordination, monitoring and evaluation, reporting and intervention).

There remain a number of challenges for South Africa as it implements a new titling system designed to afford rights-based security of tenure for indigenous communities. Some of the key challenges are:

1. Need for final subordinate legislation;
2. Implementation plan for Canada's land titling programme;
3. At project (Reserve) level: Land use and development plans;
4. Implementation manual for the pre-vesting of new order (secure) tenure rights;
5. Support manual to be used after the vesting of new order (secure) tenure rights;
6. Funding institutions and arrangements;
7. Availability of implementing officials and service providers;
8. Appropriate training of implementing officials and service providers;
9. Roles of, and relationships between, the federal Government, provincial governments and adjacent municipalities, other line functionary departments, public entities providing services on behalf of government, recognized elected governance structures within the Reserves and traditional (indigenous) leadership in the Reserves;
10. Governance: the need for coordination:
  - Coordinating structures (at federal, provincial, local and project (Reserve) level);
  - Need for monitoring and evaluation (including impact assessment), reporting and intervention at programme level and project level;
11. Social facilitation (dispute resolution between communities and within communities);
12. Impact on, and relationship with federal, provincial and local development priorities, programmes and projects;

13. Implications for the delivery of municipal services and development infrastructure on communal land;
14. Alignment and coordination of all programmes, projects and funding as well as infrastructural and human resources;
15. A *status quo* report per community, consisting of a rights enquiry and three baseline surveys (community, government (Federal, provincial and local) and land use (current and future potential land use)).

In addition, the above overview underscores the need for the sustainable development and effective utilization of the land and related natural resources concerned. This represents a major challenge that needs to be addressed urgently by key role players within the federal and provincial levels of government, as well as by municipalities adjacent to the areas concerned; internal community governance structures (elected officials, recognized traditional institutions, as well as traditional institutions that are not officially recognized); and civil society entities.

In conclusion, these government institutions (with either a Special Purpose Vehicle (SPV) or the federal government as the lead coordinating entity) have to coordinate and implement (as well as monitor and evaluate) a comprehensive and all encompassing pre- and post-transfer (of ownership) support programme which would have as its main objectives:

- the sustained security of tenure;
- the sustained improvement in quality of life;
- poverty reduction;
- food security;
- agricultural or other forms of production; as well as
- the economic development of the community area concerned.

## **Land Tenure, Judicial Sovereignty, and Economic Development On American Indian Reservations**

DOMINIC P. PARKER AND TERRY L. ANDERSON

### **A. OVERVIEW**

Despite recent economic growth (partly due to casino gaming), per-capita income for American Indians living on reservations in 1999 was US\$ 7,846 compared to US\$ 14,267 for Indians living off reservations and US\$ 21,587 for all U.S. citizens.<sup>1</sup> Other measures of human welfare, including infant mortality rates, life expectancy, and single-parent families are generally consistent with this pattern. The welfare of Native Americans living off reservations lags behind that of non-Indians, but remains higher than that of Native Americans living on reservations.

Explanations for this poverty focus on several possible factors which Cornell and Kalt (1992) categorize as: 1) powerlessness, dependency, and expropriation; 2) lack of physical capital and natural resource endowments and poor land quality; 3) “intrinsic cultural aspects” of Native American communities that are “inimical to the market trade” that feeds economic development; and 4) the absence of effective institutions.

Growing interest in institutional economics has shifted attention towards the fourth explanation – the absence of effective institutions - which is the focus of this report. Studies of institutions in a cross-country setting consistently find that a stable rule-of-law and strong property rights to land correlate positively with economic growth (see, e.g., Acemoglu and Robinson 2005; Acemoglu et al. 2001, Hall and Jones 1999, Barro 1997, and Keefer and Knack 1997). As we will see, these same factors are also important drivers of economic growth on Native American lands.

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1. Updated data are not available until the completion of the next decennial U.S. census.

This report discusses the major institutional systems relevant to reservation development. It begins with a discussion of tribal sovereignty and with a description of how the strength of sovereignty varies across reservations. Next we explain how land tenure across the 327 federally recognized reservations differs from tenure on non-reservation land. The report describes the peer-reviewed empirical literature on this subject and the estimated effects of land tenure and sovereignty on economic development. It includes a discussion of different reforms that have been promoted as potential remedies to institutional failure. Finally, we summarize some of the important lessons we have learned from policies towards American Indian reservations. We do not promote any specific policy prescription, however, as our goal is to provide a positive rather than a normative analysis of institutions.

## B. LEGAL PROVISIONS AND INSTITUTIONAL FRAMEWORK

In the U.S., governmental authority is divided among the federal government, the 50 U.S. states, local counties and municipalities within states, and American Indian tribal governments. These levels or orders of governments exercise simultaneous and overlapping authority over people within their territory. One might say that a kind of dual, or even multiple, citizenship exists under the U.S. federal system which enables individuals to claim a wide range of rights and privileges from the various levels of government.

The states and tribal governments are clearly subordinate to the federal government in some areas, including managing foreign affairs and the regulation of commerce across state and Indian reservation borders. In other areas the delineation of authority is less clear. When the delineation of authority is not clear, the U.S. Supreme Court acts as the legal arbiter of conflicting claims between governments.

American Indian reservations are “domestic sovereign states” within the U.S. federation. There are currently over 500,000 Native Americans living on the over 300 reservations within the 48 continental U.S. states. Most of the reservations were established by treaty between tribes and the U.S. government during the 19<sup>th</sup> century.

The main doctrine governing tribal sovereignty is articulated in *Cherokee Nation v. Georgia* (30 U.S. 1 [1831]). In that case, the U.S. Supreme Court ruled that a tribe is “a distinct political society separated from others, capable of managing its own affairs and governing itself.” However, that decision also stated that reservations are “domestic dependent nations,” rather than independent, foreign states. Under this doctrine, tribal authority to create and enforce laws governing reservations is exclusive unless the federal government exercises its “guardian” power by extending federal or state jurisdiction to reservations. In fact, U.S. congressional actions have attenuated tribal sovereignty throughout



history in ways that have reshaped both property rights to land and the legal and political institutional environment on reservations.

### 1. Tribal Sovereignty and Judicial Jurisdiction on Reservations

The tribal sovereignty defined in *Cherokee Nation v. Georgia* eroded with the passing of two major Acts of the U.S. Congress. The first was The Indian Major Crimes Act of 1885. The Act was in response to the trial of a Lakota Indian who killed another Lakota man on a reservation in South Dakota. In that case, the Lakota tribal court, using traditional methods of dispute resolution, required the perpetrator to compensate the family of the victim with goods and property but allowed him to go free. Non-Indian observers argued that tribal decisions such as this encouraged lawlessness on reservations. They successfully lobbied Congress to pass the Indian Major Crimes Act. The Act gave the federal government jurisdiction to prosecute serious criminal offenses (such as murder and rape) committed on reservations regardless of the ethnicity of the perpetrator or victim (Harring 1994).

The other major Act of Congress, Public Law 280, also had a pronounced and lasting impact on judicial jurisdiction over reservations. P.L. 280 was passed in 1953 during the height of the 'termination era' of federal policy towards American Indians, which extended roughly from 1945 to 1961. During this period the explicit goal of the U.S. government was to place reservation Indians under the same laws as other U.S. citizens, as rapidly as possible (Getches et. al. 1998).

Public Law (P.L.) 280 can be viewed as a first step towards achieving that goal. It requires that jurisdiction over all criminal offenses (major and minor) and over civil disputes on some reservations be turned over to the U.S. state surrounding those reservations. These states are known as the 'mandatory' P.L. 280 states because their legislatures did not choose to assume jurisdiction through state-level legislation. P.L. 280 also gave additional states the option to assume jurisdiction over reservations by passing state-level legislation. In either case, the transfers of jurisdiction were initiated without explicit tribal consent (Goldberg-Ambrose 1997). Today, more than half of the 327 federally recognized reservations are in states that assumed most, or all, of the jurisdiction available under P.L. 280 which added a layer of complexity to reservation jurisdictional authority that is summarized in Table 1.

With respect to the assumption of civil jurisdiction, it is important to note that P.L. 280 did not give states authority to impose taxes on reservations; nor did it give states the authority to regulate reservation land use (Goldberg-Ambrose 1997). Regardless of whether or not a reservation is subject to P.L. 280 legislation, tribes retained their authority to impose taxes on tribal members, and to regulate land use within reservations.

A tribe's flexibility to regulate land use, however, may be restricted by U.S. federal trust constraints on land as described in the following section.

**TABLE 1**  
**Judicial Jurisdiction on U.S. Indian Reservations**

Criminal Jurisdiction		
Entity	non-P.L. 280 States	P.L. 280 States
Tribal	Over American Indians; subject to a few limitations	Over American Indians; subject to a few limitations
Federal	Over major crimes committed by Indians; over interracial crimes	Same as off reservation
State	Only over crimes committed by non-Indians against other non-Indians	Over Indians and non-Indians; subject to a few limitations
Civil Jurisdiction		
Tribal	Over American Indians and non-Indians	Over American Indians
Federal	Same as Off-Reservation	Same as Off-Reservation
State	None, except some suits between non-Indians on fee-simple lands	Over suits involving non-Indians generally; subject to a few limitations

Source: Melton and Gardner (2000).

## 2. Land Tenure on Reservations

With the passage of the Allotment Act of 1887, the U.S. federal government made its first major attempt at bureaucratic control over how reservation land would be allocated. Prior to the Act, informal property rights to reservation land varied tremendously across the different reservations. There is evidence that land tenure systems that spontaneously evolved fit well with the cultures of the tribes and with the geographic and resource constraints of the reservations.

Carlson (1992, 73)<sup>2</sup> provides a concise summary.

“Once a tribe was confined to a reservation, it needed to find a land tenure system suitable to the new environment. On the closed

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2. Carlson, Leonard, 1992, “Learning to Farm: Indian Land Tenure and Farming before the Dawes Act”. In Terry Anderson ed., *Property Rights and Indian Economies*. Lanham, MD: Rowman and Littlefield Publishers.

reservations, the system that evolved was one of use rights. Typically, the [U.S. Bureau of Indian Affairs] agent and members of a tribe recognized an individual's title to animals and, where farming was practiced, a family's claim to the land it worked. . . . What is remarkable is how similar this system of land tenure was to that which existed among agricultural tribes before being confined to reservations."

Under the Allotment Act, however, Congress intervened and began to shape property rights from Washington D.C. Under the Act, reservation land was to be allotted to individual Indians, but held in trust until the Secretary of the Interior deemed the individual Indian "competent" to hold the land in fee-simple, that is, outright ownership. Surplus land, which is reservation land in excess of what is necessary to give individuals the minimum parcel (usually 160 acres), was opened to homesteading by non-Indians. When allotted land was freed from trust, it could be alienated in any way the Indian owner saw fit, including sale to non-Indians.

As a result of the Allotment Act and its amendments, over 40 million acres were allotted and over 23 million acres were removed from trust between 1887 and 1933, much of it acquired by non-Indians (Stuart 1987). To halt this precipitous decline in Indian land holdings, Congress passed the Indian Reorganization Act (IRA) in 1934. Under that law, lands that had not been privatized by trust removal were locked into trust status, some held by individual Indians to whom they had been allotted but not released from trusteeship and some by tribes.

Trust status means that the legal title to the land is held by the United States but the "beneficial title" – the right to use or benefit from the land – is held by either individuals or tribes. Studies of how trusteeship affects land use suggest that this extra layer of bureaucracy may help keep land in Indian ownership, but that it reduces productivity. As Carlson (1981, 174) concludes, "no student of property-rights literature or, indeed, economic theory will be surprised that the complicated and heavily supervised property rights that emerged from allotment led to inefficiencies, corruption, and losses for both Indians and society."

The combination of the Allotment Act, the IRA, and related land policies created a mosaic of land tenure on many reservations.

The most familiar form of tenure is outright ownership, or fee-simple. Under this tenure the legal and beneficial title are held by the same entity. Fee-simple lands can be alienated and sold to Indians and non-Indians, and liens can be placed against the land title to collateralize loans.

Tribally owned trust land generally cannot be acquired by non-tribal members and there are legal restrictions against the use of liens and other encumbrances. In order to offer lender collateral, the tribe can sometimes offer a long-term leasehold interest with approval from the U.S. Bureau of Indian Affairs (BIA). The same restrictions on alienation and encumbrances

apply to individually owned trust land. There is, however, a program that allows mortgages on this type of land to be foreclosed and converted to fee-simple, with the consent of the Secretary of the U.S. Department of the Interior.

The individual trust lands have often been inherited several times leaving multiple landowners who must collectively agree on land-use decisions. The website for the Indian Land Tenure Foundation explains how extreme fractionation can arise:

“... imagine that an Indian allottee dies and passes on the ownership of the allotment to her spouse and three children. Divided interest in the land is now split between four people. Now imagine those children becoming adults and raising families of their own, each consisting of three children. When the second generation dies, and if all the grandchildren survive, then ownership is divided between all of the grandchildren. The ownership of the original allotment is now split between nine different people or possibly more depending on whether the spouses of the second generation are still alive. As each generation passes on, the number of owners of a piece of land grows exponentially. Today, it is not uncommon to have more than 100 owners involved with an allotment parcel.<sup>3</sup>”

When there are so many owners, each individual owner has weak economic incentives to coordinate investments in the land that could increase the value of the property.

Table 2 summarizes the land tenure types just described. In terms of relative importance, tribal trust is the most common tenure on the 82 ‘large’ reservations (that is, those with American Indian populations that exceeded 1,000 in 1999). The mean percentage of reservation land held in tribal trust for these reservations is 58.3 percent. The mean percentage of reservation land held in fee-simple is 29.3 percent and the mean percentage held in individual trust is 13.9 percent.<sup>4</sup>

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3. [www.indianlandtenure.org/ILTFallotment/introduction/fractionation.htm](http://www.indianlandtenure.org/ILTFallotment/introduction/fractionation.htm). Last visited on July 14, 2009.

4. The source is Anderson and Parker (2008) and the authors’ data.

**Table 2**  
**Land Tenure Categories on U.S. Reservations**

	Land Tenure Status		
	Fee-simple Land	Trust Land	
Characteristics		Tribally Owned	Individually Owned
Legal title	Individual owner or Tribal govt. owner	U.S. government	U.S. government
Beneficial title	Same as legal	Tribe	Individual
Alienation	Can be sold to non-tribal members	Cannot be sold to non-tribal members except under unusual circumstances	Cannot be sold to non-tribal members except under unusual circumstances
Collateral options	Can be used as lien and mortgaged in standard way	Loans secured by a leasehold interest are permissible	Can be used as a lien and mortgaged with approval of U.S. govt. Foreclosed land is converted to fee-simple if it cannot be transferred within the tribe
Other issues	Land use may be subject to tribal law	A tribe may develop programs through which it executes a land lease as a lessor. The lessee can then offer up a leasehold interest as collateral, subject to U.S. govt. approval.	Beneficial title is conveyed to all descendants, often resulting in a large number of fractional owners

Source: Listokin (2006, p. 98-99)

## C. ECONOMIC IMPACTS OF INSTITUTIONAL FRAMEWORK

Evidence from studies by economists indicates that land tenure systems on American Indian reservations have suppressed development and investment. Evidence also suggests that tribal judicial sovereignty can sometimes discourage economic growth on reservations. This section briefly describes these studies.

### 1. Economic Effects of Land Tenure

Trosper (1978) was one of the first economists to formally identify the importance of reservation land tenure to agricultural productivity after the allotment era had ended and when reservation lands were effectively frozen in trust status. He observed that ranches operated by Indians on Montana's Northern Cheyenne reservation generated less output per acre than ranches operated by non-Indians adjacent to the reservation. Two possible explanations for the productivity difference were that Indians lacked technical and managerial knowledge of ranching and that Indians had ranching goals other than profit maximization. A third explanation is that land tenure on reservations constrained Indians from operating their ranches as efficiently as possible and from using the optimal mix of land, labor, and capital.

Like many reservations, much of the land on the Northern Cheyenne Reservation is held in trust by the United States Bureau of Indian Affairs (BIA). Some of this trust land is owned by the tribe, while other trust lands are owned by individual Indians or families. As described above, constraints of the trust-ownership system raise the costs of land-based resource production and impede the use of land as collateral for loans. Under these conditions, it is costly for Indian owners to combine lands into optimal sized ranches under single ownership. This is a significant problem because the original allotments were generally too small for profitable ranching in Western states. Thus, Indian operators are more likely than non-Indians to lease their lands. However, that practice discourages investment in ranching capital.

Considering these BIA constraints on land use, Trosper argues that the lower output of Indian ranchers on the Northern Cheyenne Reservation is actually profit-maximizing. According to his estimates, Indian ranchers are as productive as non-Indians operating nearby ranches when accounting for the different – in a sense exogenously determined – input ratios used. Because the implication is that Indian ranch managers are at least as technically competent as non-Indians, Trosper concludes by noting that it is necessary to further examine the effects of land tenure.<sup>5</sup>

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5. Trosper also dismisses the claim that Indians on the Northern Cheyenne do not seek to maximize profits. His data suggest that Indian ranchers used inputs efficiently.

Anderson and Lueck (1992) take up this challenge by estimating the impact of land tenure on the productivity of agricultural land using a cross-section of large reservations. They benchmark the productivity of tribal and individual trust lands against those of fee-simple lands on reservations. When controlling for factors such as the percentage of trust lands managed by Indian operators and whether the tribe was indigenous to the reservation area, Anderson and Lueck estimate the per-acre value of agriculture to be 85-90 percent lower on tribal trust land and 30-40 percent lower on individual trust land. They attribute the larger negative effect of tribal trust land to “collective action” problems related to communally managed land. In addition to having to overcome BIA trust constraints, agricultural land held by the tribe is subject to common-pool resource management incentives that can lead to exploitation and neglect.

These findings suggest that trust constraints on land impede economic development in a broader sense. This implication is consistent with the comparisons reported in Table 3. Here we see that the mean 1969-1999 per-capita income growth of Indians across reservations progressively increases with the percentage of land held in fee-simple.<sup>6</sup> Neither this comparison nor a more sophisticated analysis of the data allow for a clean test of the impact of land tenure on Indian incomes, however, because the data do not distinguish between the fee-simple land on reservations that is owned by Indians and the fee-simple land owned to non-Indians.

**Table 3**

**Reservation Income Comparisons Based on Fee-Simple Land Tenure**

	Means for Per-Capita Income Growth		
	Reservations with < 10% fee-simple land	Reservations with 10% to 50% fee-simple land	Reservations with > 50% fee-simple land
Am. Indian per-capita income growth (1969-1999)	65.3 %	75.3 %	91.1 %
Number of reservations	36	20	15

Notes: The calculations employ U.S. Census data and Anderson and Parker’s (2008) estimates of the percent of reservation land held in fee-simple. The data are for American Indian reservations with populations exceeding 1,000 for which per-capita income data are reported for the relevant years.

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6. This is the longest time period for which comprehensive Census data are available.

## 2. Economic Effects of Tribal Governance and Jurisdiction

Aside from land tenure, a key determinant of economic development is how an American Indian tribe wields its sovereignty and governs. Cornell and Kalt (2000) try to assess which forms of tribal government generate the most economic benefits for tribal members. The most successful governments, they hypothesize, meet two conditions. First, these governments credibly separate powers between executive, legislative, and judicial branches. Second, the most successful governments operate in a way that “matches” the culture of the tribe. A cultural match means that collective decision-making today resembles the way decisions were made prior to European colonization. According to Cornell and Kalt, such a match gives legitimacy to formal governance today.<sup>7</sup>

To measure differences in tribal governance, Cornell and Kalt use variables that indicate whether tribal governments have strong executive and legislative branches as opposed to a general council form of government where virtually all tribal members have effective legislative power. In a 1989 study, Cornell and Kalt find that strong executive and legislative forms of government are positively associated with reservation employment levels. As well, based on data from 1977 to 1989 they found a positive association between strong executive and legislative tribal government income growth rates. These results, they argue, are consistent with their hypothesis. They point out that general councils “lack even rudimentary separation of power” (p. 458).

Cornell and Kalt tested the second part of the hypothesis – that a cultural match is important – with what is essentially a detailed case study analysis. Here they argue that, for cultural reasons, strong chief-executive governments, for example, work better for Apache tribes than for Oglala Sioux. Historically, the Oglala organized themselves around decentralized, sub-tribal and kin-based political units. In contrast, Apache political allegiance centered around one individual leader.

Public Law 280, described earlier, provides an experimental setting for assessing the impact of legal institutions on reservation development. This is because one set of reservations – the ‘treated group’ – was forced into the civil and criminal jurisdiction of the surrounding U.S. states. The other set of reservations – the ‘control group’ – retained tribal jurisdiction over civil disputes and over criminal cases not covered in the Major Crimes Act.

The legal and sociology literature argues that the imposition of state jurisdiction disadvantaged the affected tribes, but the economics literature suggests that tribal sovereignty can be both an asset and a liability.<sup>8</sup> North (1981) and

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7. Mismatches occur because the BIA imposed constitutions on some tribes during the 1930s as part of the Indian Reorganization Act.

8. Goldberg-Ambrose (1997, ix-x) refers to the federal legislation as a “calamitous event” and argues that tribes put under state jurisdiction had to “struggle even harder to sustain their governing structures, economies, and cultures.”



Alesina and Spolaore (2003) point out that sovereignty is an asset because it allows laws and compliance procedures befitting local culture to evolve without the intrusion of outsiders who have different ideologies. These researchers also note that sovereignty can be a liability if native governments cannot effectively provide public goods including a predictable legal infrastructure. In the context of Indian reservations, sovereignty is a liability when it threatens “those who might most aid impoverished Indians, namely, potential investors” (Haddock and Miller 2006, 194).

Empirical studies by Anderson and Parker (2008) and Parker (2009) find evidence suggesting that being subject to state jurisdiction improved reservation economies. Using data for the period 1969 to 1999, Anderson and Parker find that per-capita income for American Indians on reservations subjected to state jurisdiction grew about 30 percentage points more than on reservations not subjected to such jurisdiction. Parker shows that shortly after states assumed jurisdiction for some reservations, aggregate credit from private lenders to Native Americans in the affected areas increased by an average of over 80 percent during the 1950s and 1960s. Using contemporary data of home loan applications on reservations, Parker estimates that the probability that an American Indian’s loan application will be denied falls by over 40 percent on reservations under state jurisdiction. All of these findings are consistent with the hypothesis that when reservation institutions increase the predictability and stability of the legal environment, as perceived by non-Indians, economic opportunities for Indians improve.

#### D. MAIN REFORMS AND OPERATIONAL CONSIDERATIONS

The U.S. Congress has authorized some noteworthy land reforms but, for the most part, their impacts have not been rigorously studied by economists. An exception is the Indian Long-Term Leasing Act of 1955, which increased the length of allowable leases of trust land for some tribes. Akee (2009) finds evidence that the increase in allowable lease tenure caused a significant increase in land values and in commercial and residential development on tribally owned trust land.

Other noteworthy reforms that have not been studied include Public Law (P.L.) 450 of 1956 and the Indian Land Consolidation Act of 1983. P.L. 450 is intended to help Indians who own the beneficial title to land held in trust to acquire mortgages. Subject to permission from the BIA, P.L. 450 allows creditors to execute a foreclosure on land that is otherwise inalienable. The Land Consolidation Act and its subsequent amendments seek to prevent further fractionalization of trust allotments made to Indians. As well, the Act and its amendments consolidate fractional interests into usable parcels, which are often then acquired by tribes. This legislation works by giving majority owners (or a majority of owners) the right to sell the tract to tribes without consent from

every owner. The Secretary of the Interior's approval is needed. *Note that all of these reforms fall well short of releasing land from federal trust status, which would likely maximize its full potential but could also result in more reservation land being sold to non-Indians.*

If reservation land were to be privatized and released from trust status, a well-functioning land title system would be essential for the efficient operation of land markets. In the U.S., title assurance has been based primarily on a recording system that relies on the maintenance of a public record for all transactions of privately owned land. With each transaction, would-be buyers of land can look at this record to determine if a seller has good title and to determine whether competing claims exist. The record, however, does not guarantee title. Because of this, most buyers purchase title insurance to provide compensation against the loss of land. U.S. mortgage companies typically require this insurance (Miceli and Kieyah 2003).

Some U.S. states have experimented with the use of a land registration system based on what is called the "Torrens" system. The purported benefits of the Torrens system is that it eliminates the need for repeated searches of land records, and that it establishes legal title against most competing claims. In spite of these benefits, the Torrens system has only been used in a few isolated cases. For example, Torrens was enacted in Cook County, Illinois, shortly after a Chicago fire destroyed nearly all land records. In this case, land registrations were considered to be a good way to clear title in the rebuilding of the city. Miceli et. al. (2002) describe this event as a natural social experiment – one that allows researchers to determine how land values respond to the different title systems. They hypothesize that land values will be higher under Torrens, and that the magnitude of the difference will increase with increases in the probability that there will be competing claims on the land. Their empirical evidence is consistent with this hypothesis, in that it suggests that the Torrens system increases land value relative to the recording system.

The Miceli et. al. research suggests that the value of privatized land on reservations would be higher under Torrens; but there are other considerations. Most prominently, if we assume that a *registration system* is more costly to set up and maintain than a *recording system*, then the most economical choice depends on the inherent value of the land. *When the inherent value of land is low, a recording system may be more economical* (see Arruñada and Garoupa 2005).

Determination of which land titling system is optimal should also depend on the financial, infrastructural, and human resources available to support land tenure reform. In the U.S., title searches on reservation lands often take months or even years because of the "fractionalization problem," and also because the Bureau of Indian Affairs and the tribes have limited resources to conduct searches.

If land on reservations were to be privatized, then financial and human resources for record searches or title registries would have to be augmented. In

addition, there would be added pressure on tribal courts to provide predictable rules for arbitrating disputes and for dealing with the additional litigation that would likely result from widespread privatization.

Some tribes are enacting new tribal commercial laws intended to give lenders more security when doing business on reservations (Woessner 2006). Others are creating and joining inter-tribal courts.<sup>9</sup> These systems allow tribal courts to bring cases before a panel of experienced judges. They provide a resource for improving both the tribal court systems and outsiders' and non-Indians' perceptions of their quality. Legal reforms of this nature are likely to better position the tribes to deal with land privatization if it were to happen on American Indian reservations.

### E. LESSONS LEARNED

Barriers to economic development on American Indian reservations include federal trust constraints on land and the perception among non-Indians that reservations do not have predictable adjudication of laws. Reforms that focus on improving the institutional environment are therefore critical to unlocking the economic potential of reservations. These lessons from American Indian reservations suggest that the First Nations Property Ownership Act (FNPOA) is a promising way to improve economic development on First Nations.

There are three striking and laudable aspects of the FNPOA that are particularly relevant to the U.S. experience. First, the legislation will establish a legal framework for converting some land on some First Nations into fee-simple. This will combine the legal and beneficial title in land and will reduce the need for complicated and heavily supervised property rights.

Basic economic theory indicates that converting land into fee-simple will give landowners stronger incentives to invest in land, and it will open up credit markets to Native landowners. As a consequence, land on reserves would be used more productively and economic development would likely ensue. As we have described in this report, in cases where land on American Indian reservations has been freed from federal trust constraints, economic development has dramatically improved (Anderson and Lueck 1992, Akee 2009).

Second, participation in the legislation would be optional and First Nations could determine which lands to place in the proposed system. This provision would allow each First Nation to choose how to balance economic development against assurances that reserve lands remain in tribal ownership.

This means that institutional change will come from Native American people themselves who are best able to capitalize on time- and place-specific information about the value of their resource endowments and cultural heritage.

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9. See <http://lawschool.unm.edu/AILC/switca>), ([www.nics.ws](http://www.nics.ws)), and (<http://itcnca.org>).

Empowering aboriginal people to decide what is best for them is in sharp contrast to many U.S. policies towards American Indians, including the Allotment Act and Public Law 280, which imposed institutional changes upon reservations without the consent of the affected tribes.

Third, First Nations would have jurisdiction over FNPOA lands in the sense that they would be able to tax the lands and regulate their use regardless of who owned the lands, whether aboriginal or non-aboriginal.

This provision would create some regulatory consistency across adjacent lands and prevent confusing jurisdictional conflicts from arising if aboriginal and non-aboriginal landownership were to take a checkerboard pattern. However, the provision underscores the importance of creating regulatory and taxation processes that non-aboriginal landowners will clearly understand and perceive to be impartial and fair. If First Nations fail to create transparent and impartial processes, then the value of fee-simple land under FNPOA will be reduced. For this reason, First Nations should at least consider adopting the regulatory rules that govern nearby off-reserve lands when regulating FNPOA lands.

Our research shows that American Indian tribes have benefited from having commercial disputes settled in state courts. We suspect that these types of benefits from legal conformity also exist in the context of FNPOA land regulation.

## 5

## Indigenous Land Title Systems: Land Tenure in Australia

MAUREEN F. TEHAN

### OVERVIEW

This paper presents an overview of the legal frameworks for indigenous<sup>1</sup> land titling and related institutional arrangements in Australia including recent reform processes.

There is a myriad of indigenous land tenure forms affecting indigenous land interests in Australia. All are the product of Australia's colonial legal history. Prior to colonisation, there were multiple and varied land title systems across the Australian continent and its islands. These systems were not recognized or protected under the colonising legal system. No formal treaties were entered into and the process of settlement and the grant of land to settlers – without regard to indigenous land holding systems – began the process of dispossession and disregard by law.<sup>2</sup>

Australia's east, with the name of New South Wales, was formally colonized by the British on 26 January 1788 with other areas of the continent following<sup>3</sup>. These six colonies came together to form the Australian Federation on 1 January 1901.<sup>4</sup> Under the Constitution, the States had exclusive powers in relation

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1. In this paper, the term indigenous includes both mainland aboriginal people as well as Torres Strait Islanders and is used throughout this paper unless the context requires the use of other terms.

2. *Mabo v. Queensland* (1992), 175 CLR 1, 62, Brennan J

3. Tasmania in 1803, Western Australia in 1829 and South Australia in 1836 and the Torres Strait Islands as late as 1879. The colonies of Victoria and Queensland became colonies independent of New South Wales in 1851 and 1859 respectively.

4. Commonwealth of Australia Constitution Act 1900 (UK); Proclamation uniting the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a Federal Commonwealth: 1900 No. 722.

to indigenous peoples and retained this power until 1967<sup>5</sup>. This constitutional framework remains crucial to systems of indigenous land tenure now recognized in various forms by Australian law, and, to the financial and institutional arrangements that impact it.

Each colony developed its own land administration system, ultimately involving executive grants of rights and interests in land pursuant to authorising legislation passed by each colonial Parliament.<sup>6</sup> Progressively, from the 1860's, all colonies adopted the Torrens system of land title registration.<sup>7</sup> Each colony also developed its own responses to indigenous peoples' land occupation and continued to do so post Federation. The Commonwealth (Federal) Parliament developed policies and legal frameworks after assuming responsibility for the Northern Territory in 1912.

While the specifics of indigenous land titling schemes varied in each jurisdiction, there is sufficient similarity in these approaches to enable us to summarily describe the broad landscape. Four major legal intersections of customary<sup>8</sup> and settler land holding systems can be identified:

- the creation of Crown reserves,
- indigenous heritage protection schemes,
- statutory land rights schemes and
- native title.

In addition, through historic grants and purchases by the Indigenous Land Corporation<sup>9</sup> there are also pockets of conventional freehold or pastoral lease land held by indigenous groups throughout Australia.

All these lands, known as the 'indigenous estate,' comprise approximately 20 per cent of the Australian continent<sup>10</sup>. Native title, a set of rights and interests in land that survived the acquisition of sovereignty, was not recognized until 1992

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5. Details of this constitutional relationship are examined in further detail below.

6. See Andrew Lang, *Crown Lands In New South Wales* (Sydney: Butterworths, 1973)

7. Adrian Bradbrook, Susan MacCallum & Anthony Moore, *Australian Real Property Law* 2007, 115-122

8. The term customary is used throughout this chapter to describe system based on tradition unless the context otherwise requires.

9. Aboriginal and Torres Strait Islander Act 2005 (Cth).

10. J. Altman & M. Dillon, 'A Profit-Related Investment Scheme for the Indigenous Estate,' *CAEPR Discussion Paper* No. 270/2004

in the *Mabo* decision<sup>11</sup> and has subsequently been largely regulated by statute, namely, the Native Title Act 1993 (Cth). Statutory land rights emerged from the 1960's onwards. Consequently, indigenous land holding offers a diverse patchwork, with statutory land rights regimes and native title land coexisting with older style reserves and trust land and overlain by other forms, particularly heritage protection schemes, as well as schemes and agreements regulating access to land and waters.<sup>12</sup>

Many forms of land holding are also subject to other regulatory mechanisms, for example, regulatory schemes for environmental management or management plans for National Parks<sup>13</sup>. Further, and in addition to heritage protection laws, each land holding scheme has its own attendant mechanism for management of access for resources and other developments.

Thus, indigenous land interests, particularly in native title and statutory schemes, are recognized by formal land titling arrangements and have some 'property' characteristics. Title arrangements internal to title holding groups are most commonly communal in nature and informal *vis à vis* the property management system. In effect, there is an umbrella title allowing for complex customary systems of land tenure to operate: recognizing "that Indigenous societies in Australia are governed by their own systems of law, including customary land tenure systems, and strives to create space for these within the Australian legal system ..... This is done, not by giving legal protection to the interests under traditional laws ... but instead by the grant of property titles familiar to the legal system based on traditional ownership. Land rights statutes in the Northern Territory and South Australia base the grant, and subsequent management, of land on notions of 'traditional ownership'".<sup>14</sup> Such formal titles have limitations on tradability (see below). However, some have suggested that rights to negotiate access to lands, which are pendant on these titles, are themselves *proprietary rights*, albeit weak property rights.<sup>15</sup>

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11. *Mabo v. Queensland* (1992) 175 CLR, 1.

12. M. Langton, M. Tehan & L. Palmer, "Introduction," in *Honour Among Nations: Treaties and Agreements with Indigenous Peoples* (Melbourne: University Melbourne Press, 2004) pp1-26

13. Maureen Tehan, "Indigenous Peoples and Negotiated Agreements: Experiences and Post Mabo Possibilities for Environmental Management" (1997), 14 *Environmental and Planning Law Journal* 114-134; Lee Godden 'World Heritage: People or Places? Partnerships for the Integration of Natural and Cultural Heritage in Australia and South Africa' (forthcoming); *Growing up strong: The first 10 years of Indigenous Protected Areas in Australia*, Australian Government Department of the Environment and Water Resources, May 2007.

14. Social Justice Commissioner 2005, 16

15. Jon Altman, Native Title and the Petroleum Industry, CAEPR Discussion Paper 125/1996; Jon Altman, 'Amended Land Rights Law will be Bad Law', Submission to the Senate Community Affairs Committee Inquiry into the Aboriginal Land Rights

Mechanisms for governance and land administration under these schemes vary, depending upon both jurisdiction and the landholding scheme. Similar considerations, related to capacity and legal enforceability, characterize most, if not all, of these arrangements. They have an impact on administration for both effective land management and economic empowerment.

Against this complex backdrop of multiple land holding systems, jurisdictions and constitutional provisions, the Commonwealth (or federal order of government) has assumed a much greater policy and program delivery significance, because of both its constitutional and its fiscal power. This is the case despite of the states' powers in relation to land administration and management, including mineral resources development.

Policy development and service delivery have been beset by inefficient and dysfunctional Commonwealth/State relations<sup>16</sup>. This, together with appalling key indicators of indigenous well-being,<sup>17</sup> the resurgence of a property rights discourse<sup>18</sup>, and some questioning of the orthodoxies in indigenous policy<sup>19</sup> have driven a reassessment of approaches to indigenous disadvantage and poverty. Health, education, employment, housing and community well-being are central to these developments.

A major response by the Commonwealth (federal) government to this landscape, in 2007, was the Northern Territory Emergency Response,<sup>20</sup> colloquially called 'the Intervention'. The Intervention' was a response to a report about the incidence of child sexual assault in Northern Territory indigenous communities<sup>21</sup> and involved a dramatic takeover of all indigenous communities in the

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(Northern Territory) Amendment Bill 2006, [http://www.aph.gov.au/senate/committee/clac\\_ctte/aborig\\_land\\_rights/submissions/sub03a.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub03a.pdf), 25 October 2006; David Ritter, *The Native Title Market* (2009), 48.

16. Marcia Langton and Odette Mazel 'Poverty in the Midst of Plenty' (2008) 26(1) *Journal of Energy and Resources Law* 31; Michael Dillon & Neil Westbury *Beyond Humbug: Transforming government engagement with indigenous Australians* 2008

17. Productivity Commission *Overcoming Indigenous Disadvantage: Key Indicators 2009* <http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2009> (August 2000)

18. Hughes, H & Warin, J, *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, 2005.

19. Marcia Langton "Trapped in the Aboriginal Reality Show," 2008, Vol. 19, *Griffith Review*; Pearson, Noel *Our right to take responsibility*, 2000; Noel Pearson "The Light on the Hill; Ben Chifley Memorial Lecture, 12 August, 2000 <http://www.capeyorkpartnerships.com/team/noelpearson/lightonhill-12-8-00.htm> (14 December 2006); Peter Sutton *The Politics of Suffering: Indigenous Australia and the End of Liberal Consensus* (2009).

20. Northern Territory National Emergency Response Act 2007 (Cth)

21. *Ampe Akelyernemane Meke Mekarle "Little Children Are Sacred"*, Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007.



Northern Territory. This entailed moving in managers, police and the army to manage administration, increase policing in communities and impose income management schemes – among other measures.

The Intervention has been contentious, with views divided about its effectiveness.<sup>22</sup> Its relevance here is to provide some background for the policy debate that it produced and to note the compulsory acquisition of communal land in the form of five-year leases over one hundred indigenous communities.<sup>23</sup> These leases operate regardless of any other land tenure provisions. The former Rudd government substantially maintained the Intervention since it took office in November 2007.

It is in this context that land title arrangements have been revisited and revised.

## A. CONSTITUTIONAL AND LEGAL PROVISIONS

### 1. Division of Powers

The Australian Constitution<sup>24</sup> distributes power between the parliaments of the States and the Commonwealth (federal government) by the enumeration of Commonwealth powers,<sup>25</sup> giving the states residual powers<sup>26</sup> but permitting the states to exercise power concurrently with the Commonwealth parliament, provided there is no conflict,<sup>27</sup> or that the Constitution does not vest the powers exclusively in the Commonwealth parliament<sup>28</sup>. Power in relation to Australia's

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22. See: Altman, J & Hinkson, M (eds) 2007, *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia*, Arena, North Carlton; Marcia Langton "Trapped in the Aboriginal Reality Show," 2008, Vol. 19, *Griffith Review*, Closing the Gap in the Northern Territory: Overview of Measures and Progress of Measures, October 2009, [http://www.fahcsia.gov.au/sa/indigenous/pubs/nter\\_reports/Pages/closing\\_the\\_gap\\_nter.aspx](http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Pages/closing_the_gap_nter.aspx), 1 November 2009.

23. The validity of these leases was unsuccessfully challenged: *Wurridjal v The Commonwealth of Australia* (2009) 252 ALR 232

24. Commonwealth of Australia Constitution Act 1900 (UK); Proclamation uniting the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a Federal Commonwealth: 1900 No. 722.

25. Commonwealth of Australia Constitution Act 1900, s51

26. This is the effect of Commonwealth of Australia Constitution Act 1900, ss106-108.

27. Commonwealth of Australia Constitution Act 1900, s109: if there was a conflict the Commonwealth law prevails.

28. Commonwealth of Australia Constitution Act 1900. These matters include exclusive powers in relation to the seat of government and Commonwealth land and places, the public service (s52), raising forces (s114) and coining money (s115).

indigenous peoples was originally in the exclusive jurisdiction of the states<sup>29</sup>. The Commonwealth (federal government) acquired power in relation to indigenous people in 1967 when clause s51(xxvi) was amended<sup>30</sup>, creating a concurrent jurisdiction, subject to s109 of the Constitution.<sup>31</sup>

In addition, the Commonwealth had jurisdiction in relation to indigenous peoples in Territories.<sup>32</sup> The Northern Territory is now self-governing under the Northern Territory (Self-government) Act 1978. The Territory's powers are subject to the Commonwealth parliament.<sup>33</sup> For example, the Commonwealth parliament retains the power to disallow legislation<sup>34</sup> and certain Commonwealth legislation operates in the Territory beyond the jurisdiction of the Territory parliament, most significantly the Aboriginal Land Rights (Northern Territory) Act 1975 (Cth) ("ALRA"), discussed in detail below.

Local governments are established under state (and in some instances territory) legislation. Local government powers are those state (subnational unit) powers that have been bestowed upon local government via state legislation. There are no constitutionally entrenched powers protecting local government.

From time to time states and territories have created specific forms of indigenous local governments to carry out municipal functions.<sup>35</sup> In some instances there are mainstream local governments that are dominated by indigenous land holders because of demographic and geographic factors.<sup>36</sup> Recent changes in the Northern Territory have replaced local government style community councils in indigenous communities with larger, regional shire councils, crossing cultural and land holding boundaries.<sup>37</sup>

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29. Commonwealth of Australia Constitution Act 1900, s51(xxvi) specifically excluded the Commonwealth from making special laws in respect of 'the aboriginal race'.

30. By referendum, the prohibition on the Commonwealth making special laws in respect of 'the aboriginal race' was removed.

31. Peter Hanks, *Constitutional Law in Australia* (2<sup>nd</sup> Ed), 1996, pp 247-251; see: *Western Australia v. The Commonwealth* (1995) 183 CLR, 373

32. The Northern Territory was carved out of South Australia and taken over by the Commonwealth on 1 January 1912.

33. s122

34. S.9. This has been effectively done only once when the Commonwealth parliament amended the Self-Government Act to deprive the Northern Territory parliament of the power to make laws in relation to euthanasia: *Euthanasia Laws Act 1997*

35. for example: Local Government Act 1993 (NT); Local Government (Community Government Areas) Act 2004 (Qld)

36. For example Shire of Ngaanyatjaraku in Western Australia: <http://www.ngaanyatjaraku.wa.gov.au/Shire-Information.107.0.html>

37. Local Government Act 2008 (Northern Territory)

The Commonwealth, aided by expansive interpretations of its powers by the High Court, has used other powers, such as its external affairs power (the treaty making power)<sup>38</sup> to assert its policy influence in relation to indigenous issues over the states. Reliance on its obligations under the Convention for the Elimination of Racial Discrimination and the consequential Racial Discrimination Act 1975 (Cth), has been crucial in this regard,<sup>39</sup> notwithstanding that such protections are not constitutionally enshrined and have frequently been suspended by the Commonwealth parliament.<sup>40</sup> The Commonwealth used this power to bind the states under the Native Title Act 1993 (Cth), notwithstanding that the states retain power to make laws in relation to land management and administration and resources development.<sup>41</sup> This latter state power has operated as an impediment to the Commonwealth taking a more direct role in relation to indigenous land issues, particularly as the Commonwealth Parliament can only acquire property, including that of states, on just terms.<sup>42</sup>

The fiscal relationship between the Commonwealth (federal government) and the states has a major impact on the development and implementation of indigenous policy with consequential impacts on land tenure. Commonwealth taxing powers include: income tax, company tax, goods and services tax, customs and excise duties.<sup>43</sup> The states retain some taxing powers such as payroll, land and some banking taxes. The territories are treated as states for these purposes. Funds are distributed in a variety of ways. The Commonwealth and states may agree on payments to states which the states are free to use at their discretion. Some grants to the states are tied and must be spent in conformity with conditions imposed by the Commonwealth.<sup>44</sup> Further funds are distributed according to recommendations by the Grants Commission based on

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38. s51(xxix); for example see: *The Commonwealth v Tasmania* (1983) 158 CLR 1

39. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.; Native Title Act 1993 (Cth); *Western Australia v The Commonwealth* (1995) 183 CLR, 373

40. For example see: Native Title Act 1994 (Cth) s7; Northern Territory Emergency Response Act 2007 (Cth) s132

41. *Western Australia v The Commonwealth* (1995) 183 CLR 373. The power has also been used to enhance Commonwealth power in relation to land management through reliance on environmental treaties. For example see: *The Commonwealth v Tasmania* (1983) 158 CLR 1.

42. S51 (xxxi).

43. Sarah Joseph & Melissa Casten *Federal Constitutional Law* (2<sup>nd</sup> Ed) 2006 Chapter 10.

44. Australian Constitution s96. In the past, this provision has been given a wide interpretation by the High Court but a recent Court decision suggests that the Court may be reigning in the power: *Pape v. Commissioner of Taxation* (2009) 257 ALR 1; (2009) 83 ALJR 765.

needs based formula.<sup>45</sup> The calculation of payments to the states and territories are based on a range of factors including disadvantage and indigenous populations but there is no requirement to spend payments on indigenous peoples as a result of those calculations and grants.<sup>46</sup>

One consequence of these complex and layered fiscal arrangements has been intergovernmental dysfunction in relation to program delivery in indigenous communities directed at overcoming disadvantages such as housing, health and education.<sup>47</sup>

Across Australia, programs and policies for indigenous people are the responsibility of a range of state and Commonwealth government agencies. In the recent past these programs and policies have been managed in a whole-of-government way.<sup>48</sup> The whole-of-government arrangements are based on:

- coordinated policy development;
- efficient, flexible and strategic use of funds across the Commonwealth government agencies (administering both indigenous-specific and mainstream programs);
- active engagement and consultation with Indigenous people and finally on partnerships with indigenous people, state and territory governments and the private and non-government sectors to produce benefits for indigenous communities.<sup>49</sup>

The network of Indigenous Coordination Centres<sup>50</sup> across Australia is responsible for local engagement with indigenous Australians and the co-ordination of programs at the local and regional levels. These arrangements

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45. Commonwealth Grants Commission Act 1973 (Cth); Commonwealth Grants Commission Annual Report 2007-2008, [http://www.cgc.gov.au/\\_\\_data/assets/file/0020/12881/2007-08\\_Annual\\_Report.pdf](http://www.cgc.gov.au/__data/assets/file/0020/12881/2007-08_Annual_Report.pdf)

46. Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty', (2008) 26(1) *Journal of Energy and Resources Law* 31

47. Marcia Langton and Odette Mazel, 'Poverty in the Midst of Plenty', (2008) 26(1) *Journal of Energy and Resources Law* 31; Michael Dillon & Neil Westbury, *Beyond Humbug: Transforming government engagement with indigenous Australians*, 2008

48. See *Memorandum of Understanding on Indigenous Employment and Enterprise Development between the Australian Government and the Minerals Council of Australia*, <http://www.fahcsia.gov.au/sa/indigenous/progserv/wog/Pages/MoUMineralsCouncil.aspx>, (15 August 2009)

49. *ibid*

50. For more information about these Centres, see: [www.fahcsia.gov.au/internet/fahcsinterne.nsf/about/fahcs/contactus\\_network.htm](http://www.fahcsia.gov.au/internet/fahcsinterne.nsf/about/fahcs/contactus_network.htm), (15 August 2009)

attempt to meet the problem of disparate and uncoordinated policy and service delivery. Their capacity to do so remains to be tested.

The centrepiece for overcoming the dysfunction referred to above is the Council of Australian Governments (COAG) Working Group on Indigenous Reform. This brings together the Commonwealth Government and all state and territory governments. The Working Group's objective is to plan and implement the Close the Gap on Indigenous Disadvantage policy, focusing on these targets:

- to close the life-expectancy gap between Aboriginal and Torres Strait Islander people and other Australians within a generation;
- to halve the mortality gap between Aboriginal and Torres Strait Islander children and other children under age five within a decade;
- to halve the gap in literacy and numeracy achievement between Aboriginal and Torres Strait Islander students and other students within a decade;
- to halve the gap in employment outcomes for Aboriginal and Torres Strait Islander people within a decade; to at least halve the gap in attainment at Year 12 schooling (or equivalent level) by 2020; to provide all Aboriginal and Torres Strait Islander four-year-olds in remote communities with access to a quality preschool program within five years.<sup>51</sup>

Bilateral agreements between the Commonwealth and state and territory Governments are used as instruments for the implementation and delivery of government policy under the National Framework of Principles for Government Service Delivery to Indigenous Australians.<sup>52</sup>

In this constitutional, policy and fiscal environment, all governments have adopted policies and approaches for changes to indigenous land tenure. The provision of adequate housing is a central element of Close the Gap<sup>53</sup> and has

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51. COAG Working Group on Indigenous Reform, [http://www.fahcsia.gov.au/sa/indigenous/progserv/wog/Pages/coag\\_working\\_grp\\_reform.aspx](http://www.fahcsia.gov.au/sa/indigenous/progserv/wog/Pages/coag_working_grp_reform.aspx) (15 August 2009)

52. [http://www.fahcsia.gov.au/sa/indigenous/pubs/general/bilateralagreements/Pages/national\\_framework\\_principles.aspx](http://www.fahcsia.gov.au/sa/indigenous/pubs/general/bilateralagreements/Pages/national_framework_principles.aspx) (15 August 2009); National Partnership Agreement on Remote Indigenous Housing <http://www.fahcsia.gov.au/sa/indigenous/progserv/housing/Pages/RemoteIndigenousHousing.aspx>

53. *Closing the Gap between Indigenous and non-Indigenous Australians*, Statement by the Honourable Jenny Macklin MP Minister for Families, Housing, Community

become the focal point for discourses and policy on land tenure changes in all jurisdictions and under all forms of indigenous land title.

## 2. Different Forms of Land Tenure

There are multiple legal arrangements establishing different legal forms for recognizing/granting indigenous land tenure across the various jurisdictions in Australia. It is not possible to adequately deal with all of them here. What follows is a description of the main types of tenure with examples such as the Aboriginal Land Rights Act (ALRA) used to exemplify the principles and developments.

### Reserves

From a very early stage Crown Reserves became and remain the primary instrument for land management outside the allocation of private freeholds and Crown leases.<sup>54</sup> From the mid 1830s, the colonies began to reserve land for the “use and benefit” of Aboriginal peoples.<sup>55</sup> Reservations did not involve recognition of customary land titles. Most jurisdictions had schemes for management, including trust arrangements.

Unlike reserves in Canada, which largely result from treaty negotiations in the 19<sup>th</sup> and early 20<sup>th</sup> century,<sup>56</sup> there were no treaties in Australia. Rather, these forms of land regulation were associated with particular policy agendas about the preferred models of aboriginal social and cultural life.<sup>57</sup> They varyingly emphasized ‘coercion, segregation and protection’<sup>58</sup> and various protec-

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Services and Indigenous Affairs, 13 May 2008, <http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget2008-09/Documents/Ministerial%20Statement/default.htm> (12 August 2009)

54. Andrew Lang, *Crown Lands In New South Wales* 1973

55. Heather Goodall, *Invasion To Embassy: Land In Aboriginal Politics In New South Wales, 1770–1972*, 1996; Paul Havemann, (ed) *Indigenous Peoples’ Rights in Australia, Canada & New Zealand*, 1999, 28

56. Morse, B, ‘Indigenous–Settler Treaty Making in Canada’ in M Langton et al (eds), *Honour Among Nations: Treaties and Agreements with Indigenous Peoples*, 2004; Margaret Stephenson, “Economic Development on Individual and Collective Indigenous Land Tenures in North America,” in Lee Godden, & Maureen Tehan, (eds) *Sustainable Futures: Comparative Perspectives on Communal Lands and Individual Ownership*, 2009 (forthcoming)

57. Heather Goodall, *Invasion To Embassy: Land In Aboriginal Politics In New South Wales, 1770–1972*,

58. Paul Havemann, (ed) *Indigenous Peoples’ Rights in Australia, Canada & New*

torates including missions or state (subnational unit) control were established, regulating residence and movement, employment, and the care and custody of children.<sup>59</sup>

Policies involving forcible removal of people onto reserves resulted in populations of both customary title holders and other indigenous people residing together in communities. Paradoxically, much of this land has ultimately found its way into indigenous hands through direct grants of freehold title, through leases, through management arrangements, through the native title system,<sup>60</sup> and through statutory land rights schemes.<sup>61</sup>

During the 1970s and 80s there was also a handover of control of communities and reserves from both missions and governments to indigenous people, although there was often some residual control retained under State legislative schemes.<sup>62</sup> Communities established as part of this system remain as contemporary indigenous communities.

These tenure arrangements are now often overlain by native title which not only has an impact on management and governance of land tenure but also has implications for any proposals to change land tenure systems (*see below*).

### Statutory Indigenous Land Title Schemes

The failure of a claim for aboriginal (native) title by the Yolgnu in *Milirrpum v. Northern Territory* (1971) 17 FLR 141 and agitation for the recognition of indigenous civil, political and social rights provided the impetus for a political resolution of claims to land based on customary titles.

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*Zealand*, 1999, 28

59. Heather Goodall, *Invasion To Embassy: Land In Aboriginal Politics In New South Wales, 1770–1972*, 1996

60. where the reserves had permitted continued indigenous occupation in accordance with traditional laws and customs

61. For example, Schedule 1 lands in the Aboriginal Land Rights (Northern Territory) Act 1976 converted most Reserves in the Northern Territory to aboriginal land under the Act.

62. Examples of these include 99 year leases of Reserves to the Ngaanyatjarra customary indigenous land holders in Western Australia: see Maureen Tehan, "Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia," *Australian Quarterly* 65(4) (1993/4), pp 34–54 and the Deed of Grant in Trust scheme in Queensland: see Nettheim, G, Meyers, GD & Craig, D, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, 2002, 272ff

The result was the establishment of a Commission of Inquiry<sup>63</sup> and then the passage of the Aboriginal Land Rights Act (ALRA), based largely (although not entirely) on the Commission's recommendations.<sup>64</sup> Most states over time also passed legislation to facilitate claims to or the direct grant of land to indigenous peoples.<sup>65</sup> The purpose of these schemes, as Calma points out, were multiple and included: "compensation for dispossession, recognition of indigenous law, the spiritual importance of land, and the continuing connection of Indigenous peoples to country, social and economic development, and indigenous self-determination".<sup>66</sup>

In addition to customary titles, historical associations with land can also provide a basis for a land grant. Grants may be made because land is available, regardless of direct customary or historical associations.<sup>67</sup> These lands are the major site of change in land titling arrangements from communal and customary titles to individual titling.

The land rights act provides an example of some of the features of these schemes, although all vary in a number of ways.

The ALRA presents an integrated scheme for land title and land and resource management and regulation by the 'traditional owners' (customary title holders). Title is granted by the Commonwealth Minister upon the recommendation of a Land Commissioner,<sup>68</sup> following a claims process in which the traditional owners must establish their association with the land (and parties who may suffer detriment have been heard).

Claimable land is limited to various forms of Crown land. 'Traditional owners' under the Act are members of 'a local descent group who: a) have a common spiritual affiliation to a site on the land, being affiliations that place the

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63. Aboriginal Land Commission 1973, 1974

64. Neate, G, *Aboriginal Land Rights Law in the Northern Territory*, 1989; Nettheim, G, Meyers, GD & Craig, D, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, 2002; Toohey, J, *Seven Years On: Report on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters*, 1984.

65. Aboriginal Land Act 1991 (Qld); Aboriginal Landrights Act 1983 (NSW); Pitjantjatjara Land Rights Act 1981 (SA); Maralinga Tjarutja Land Rights Act 1984 (SA); Torres Strait Islander Land Act 1991 (Qld).

66. Social Justice Commissioner 2005, 16

67. See Nettheim et al 2002 chapter 4; Social Justice Commissioner 2005 chapter 2; The Pitjantjatjara Land Rights Act 1981 (South Australia); Aboriginal Landrights Act 1983 (New South Wales), Aboriginal Land Act 1991 (Queensland); Torres Strait Islander Land Act 1991 (Queensland)

68. Aboriginal Land Rights (Northern Territory) Act 1976 s12. No further claims can be made but there are still a large number of claims to be heard.



group under a primary spiritual responsibility for that site and for the land; and b) are entitled by Aboriginal tradition to forage as of right over the land”<sup>69</sup>

The title is an inalienable freehold title<sup>70</sup> which is registered in the Torrens land registry of the Northern Territory and may cover a large area of land.

Allocation of internal title/rights is not covered by the Torrens system and is usually left to the group to determine according to its laws or according to some other agreed scheme. The form of the title under the ALRA (Aboriginal Land Rights Act) has a communal character but the extent to which rights are communal or individual among the group will depend upon the customs of the land holding group. The title is held by a Land Trust comprising traditional owners for the area of land; but the trust’s powers are limited to holding the title and to exercising its powers for the benefit of traditional owners at the direction of the relevant Land Council, a statutory body governed by elected traditional owners from across various traditional country.

While there is no power of sale (or mortgage) of the freehold, land may be leased (and the lease may be mortgaged) to any person for any purpose for a period of 40 years or, with Ministerial consent, for a term beyond 40 years.<sup>71</sup> In addition, a new scheme for leasing whole communities has been introduced.<sup>72</sup> This is considered in detail below.

## Native Title

“Native title” recognition by Australian courts is very recent.<sup>73</sup> The title is based on traditional laws and customs in relation to land at the time sovereignty was acquired and which are recognized by the common law. Title is integrally linked with customary titles as its contemporary recognition is based upon the continued acknowledgement of “traditional laws acknowledged and customs observed” in relation to land at the time sovereignty was acquired. Its recognition has had a major legal impact on land title, management and access arrangements – with its communal character central to its recognition.

Following *Mabo*, the Commonwealth Parliament passed the Native Title Act (Cth) 1993 which required State and Territory compliance in any dealings with land in which native title may exist.<sup>74</sup> The 1993 Act now largely governs all aspects of native title and dealings with native title. The combination of the legis-

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69. Aboriginal Land Rights (Northern Territory) Act 1976 s3

70. Aboriginal Land Rights (Northern Territory) Act 1976 s19(1)

71. Aboriginal Land Rights (Northern Territory) Act 1976 s19.

72. Aboriginal Land Rights (Northern Territory) Amendment Act 2006

73. *Mabo v. Queensland* (1992) 175 CLR 1

74. *Western Australia v. The Commonwealth* (1995) 183 CLR, 373

lation and a series of High Court decisions<sup>75</sup> has resulted in a strict and difficult to meet test for recognition of a contemporary native title, requiring proof of the existence of a normative society bound by the practice of laws and customs at the time sovereignty was acquired, and the continuation of that normative society, as well as continuity in the practice of laws and customs (possibly by each successive generation) since sovereignty.<sup>76</sup>

Native title is vulnerable to extinguishment by (subnational unit) actions such as granting or creating any rights or titles that are partially or wholly inconsistent with some or all native title rights.<sup>77</sup> As a matter of law, such grants will extinguish native title rights to the extent that they are inconsistent with Crown-created rights.<sup>78</sup>

Although native title exists from the date sovereignty was acquired, applications for determinations that native title exists need to be made if ancillary rights such as access to the future act regime are to be enjoyed. Applications are made under the Native Title Act 1993 (Cth) and are heard by the Federal Court. The major respondent party in all claims is the relevant State, notwithstanding that the claims are made under Commonwealth (federal government) legislation. The majority of cases have been resolved by consent, with around 25 per cent completely litigated.<sup>79</sup>

Determinations of native title result in the identification of title holders, enumeration of rights and interests associated with the title and relate to a particular defined area of land.<sup>80</sup> Rights and interests vary from rights of exclusive possession in land to minimal rights of access for limited purposes.<sup>81</sup> In this sense native title might be described as an amalgam of the Canadian concepts

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75. Yorta Yorta (2002) 214 CLR 422; *Western Australia v. Ward* (2002) 213 CLR 1.

76. Yorta Yorta v. Victoria (2002) 214 CLR 422; Simon Young, S, *The Trouble with Tradition*, 2008

77. *Fejo v Northern Territory* (1998) 195 CLR 96;

78. Maureen Tehan, 'A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act', (2003) 27(2) *Melbourne University Law Review*, pp 523–71, *Western Australia v Ward* (2002) 213 CLR 1.

79. Statistics about Native Title Determinations National Native Title Tribunal, <http://www.nntt.gov.au/Applications-And-Determinations/Search-Determinations/Pages/Search.aspx> (20 August 2009).

80. There have been 88 determinations that native title exists in some form. For details see: <http://www.nntt.gov.au/Applications-And-Determinations/Search-Determinations/Pages/Search.aspx> (24 August 2009)

81. For example see: James on behalf of the *Martu People v Western Australia* [2002] FCA 1208 (27 September 2002) and cf *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795 (13 December 2005)

of aboriginal title and the notion of aboriginal rights, as understood internationally. Further, the range of rights and interests may co-exist with other rights and interests in land (although not freehold titles), as well as other forms of indigenous land title, such as reserve lands including Queensland Deed of Grant in Trust land. This co-existence creates a complex set of land title arrangements with implications for land management and administration and indigenous governance (*see below*). Determinations are recorded in the National Native Title Tribunal.<sup>82</sup> The State land title registry is advised of any determination as soon as practicable following registration<sup>83</sup> but the determination does not thereby become a Torrens interest in land.

### Cultural Heritage

From an early focus on archaeological sites or artefacts,<sup>84</sup> indigenous heritage laws have increasingly protected land forms and land-based heritage, such as identifiable physical features of the land, as *tangible expressions of complex customary relationships, dreaming tracks or burial sites, reflecting contemporary and lived culture*.<sup>85</sup> These schemes provide customary title holders with procedural rights<sup>86</sup> unless the legislation accords property in heritage.<sup>87</sup>

The most recent iterations of heritage legislation have attempted to integrate the heritage protection measures with the native title system.<sup>88</sup> In all schemes, protection provided is subject to decisions by a political decision maker. Access, management and control of land on which heritage is located is regulated by the terms of each statute in each jurisdiction<sup>89</sup> with an overarching,

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82. Native title Act 1993 (Cth) s193.

83. s199.

84. For example: Aboriginal and Historic Relics Preservation Act 1965 (South Australia); The Aboriginal Relics Preservation Act 1967 (Queensland); Archaeological and Aboriginal Relics Preservation Act 1972 (Vic); Native and Historical Objects and Areas Preservation Ordinance 1976 (Northern Territory)

85. For example: Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s4; Aboriginal Heritage Act 2003 (Qld) s9

86. *Chapman v Minister for Aboriginal and Torres Strait Islander Affairs* (1995) 55 FCR 316; Maureen Tehan, 'To Be or Not To Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage', (1996) 15(2) *University of Tasmania Law Review*, pp 267–305

87. This is rarely the case but see for example Aboriginal Heritage Act 2003 (Qld) s20

88. Aboriginal Heritage Act 2003 (Qld); Aboriginal Heritage Act 2006 (Vic)

89. for example Aboriginal Heritage Act 1988 SA s23; Maureen Tehan, 'To Be or Not To Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage', (1996) 15(2) *University of Tasmania Law Review*, pp 267–305

last resort Commonwealth scheme.<sup>90</sup> The assertion of procedural rights under heritage legislation becomes the site for expression of customary rights to land, notwithstanding that they are unrecorded as a title to land.<sup>91</sup>

### 3. Underlying Title, Constitutional Recognition, Legislative Implementation

Until the decision of the High Court in *Mabo v. Queensland* there was a general view that no indigenous land titles survived the acquisition of sovereignty. As a result, there was no underlying indigenous or allodial title.

In developing its concept of native title, the Court said that surviving native title rights were a 'burden' on the Crown's radical title, by which it meant that the Crown must act lawfully if its actions were to impair native title.<sup>92</sup> However, this idea has never been articulated in a way that suggests there is a resulting, ongoing, underlying indigenous title. Nothing in subsequent cases, legislation or government action indicates that there is such an underlying title. Further, the restatement, in the *Mabo v. Queensland* decision, of the doctrine of tenure as a skeletal principal of Australian land law also reaffirmed the view that the Crown has underlying title rather than native title holders.<sup>93</sup>

The Native Title Act 1993 (Cth) establishes a code, the future act regime, for all dealings on land in which native title may exist.<sup>94</sup> This regime binds the States and Territories as well as the Commonwealth (federal government). The Act also contains a regime for determining whether past government actions have resulted in extinguishment of native title that largely supplants the common law doctrine of extinguishment of native title.<sup>95</sup> The Act provides a framework for the allocation of rights and a system for resolving disputes about land access and use, but does not identify any underlying title.<sup>96</sup>

There is no constitutional recognition or entrenchment of indigenous land title nor are there any indigenous rights. Relying on the Convention for the

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90. Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

91. Maureen Tehan, 'To Be or Not To Be (Property): Anglo-Australian Law and the Search for Protection of Indigenous Cultural Heritage', (1996) 15(2) *University of Tasmania Law Review*, pp 267–305; Steven Hawke, Steve and Michael Gallagher, *Noonkanbah, Whose Land, Whose Law* 1989

92. *Mabo v. Queensland* (1992) 175 CLR 1, 53

93. That native title is said to be subject to laws of the federal and state governments confirms this view: see *Western Australia v. Ward* (2002) 213 CLR 1 and Samantha Hepburn "Disinterested Truth: Legitimation of the Doctrine of Tenure Post-*Mabo*" (2005) 25 *Melb U L Rev* 1.

94. Native Title Act 1993 (Cth) Division 3

95. Native Title Act 1993 (Cth) Division 2, 2A, 2AA, 2B

96. Native Title Act 1993 (Cth) Preamble, s3

Elimination of Racial Discrimination and its municipal implementation, the Racial Discrimination Act 1975,<sup>97</sup> the Commonwealth (federal government) can bind the States and thereby prevent arbitrary infringement of indigenous rights and title.<sup>98</sup> However, there is no impediment to the Commonwealth parliament suspending or amending the operation of the Racial Discrimination Act to achieve particular policy goals.<sup>99</sup>

To date, the Courts have not found that the Crown has any fiduciary obligation to indigenous peoples whether as a result of the creation of reserves or as a consequence of the acquisition of sovereignty and the survival of indigenous land titles.<sup>100</sup>

#### 4. Impact Of Customary Law and Indigenous Rights of Access and Land Use On Land Title

Each jurisdiction and each land titling system has its own legal regime for access to and use of indigenous land, of whatever character. Thus there can be multiple systems for access and use. In most circumstances, government approvals are subject to compliance with these specific regimes in land titling legislation.

Each system is overlain by heritage protection legislation, which requires compliance, but is subject to executive override in most circumstances. Partly as a result of the pervasiveness of native title negotiations, there is now a well-established culture of negotiation and agreement-making that operates across all indigenous land tenure schemes, even though the processes of the schemes vary.<sup>101</sup>

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97. Under the external affairs power: Australian Constitution s51(xxix)

98. The Native Title Act 1993 (Cth) is an example of this. There is some authority to suggest that if the Commonwealth relies upon the external affairs power and any international instrument to ground its jurisdiction, the actions taken must be in furtherance of the objectives of the international instrument: *Tasmania v. The Commonwealth*.

99. This was done in order to achieve amendments to the Native Title Act in 1998: Native Title Act 1993 (Cth) s 7; and in relation to certain aspects of the Northern Territory intervention Northern Territory Emergency Response Act 2007 s132.

100. See *Wik v. Queensland* (1996) 187 CLR 1; *Mabo v. Queensland* (1992) 175 CLR 1, per Toohey J, *Thorpe v. The Commonwealth* (1997) 144 ALR 677

101. See Maureen Tehan A Hope Disillusioned, An Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act, (2003) 27(2) *Melbourne University Law Review*, pp 523–71; Marcia Langton, Maureen Tehan, Odette Mazel, Lisa Palmer, and Kathryn Shain, (eds) *Settling With Indigenous Peoples* 2006; see generally *Agreements, Treaties and Negotiated Settlements Database* <http://www.atns.net.au/> (23 August 2009)

The statutory land rights schemes include provisions for the regulation of resource development and other uses on granted land. Each scheme establishes a detailed regime for the consideration of applications by mineral and petroleum developers. Some, such as the Pitjantjatjara Land Rights Act and some reserves, rely on “permit for entry” provisions as the basis for negotiations and consent.<sup>102</sup> The ALRA allows a veto of such proposals by Indigenous landowners, subject to Commonwealth ministerial override in the national interest.<sup>103</sup> Under the Pitjantjatjara Land Rights Act there is provision for negotiations with arbitration available in the event of non-agreement.<sup>104</sup> There is no prescription as to the nature of negotiations that might occur or the outcomes of those negotiations. The practice, however, has been to negotiate agreements that include such matters as:

- access for exploration and development;
- heritage and environmental protection;
- employment and training;
- education and business opportunities for the Indigenous land owners; as well as
- payments of compensation for disruption.<sup>105</sup>

Negotiations over environmental management have also been a feature of these land regimes, with conservation areas often the focus of land settlements and joint management national parks an outcome.<sup>106</sup>

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102. Maureen Tehan, *Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia* (1993/4) 65(4) *Australian Quarterly* 34

103. See Part IV.

104. See Maureen Tehan *Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia*, (1993/4) 65(4) *Australian Quarterly* 34 for a general discussion of the regimes under these two statutory schemes as well as the regime governing resource development in Reserves in Western Australia prior to native title legislation.

105. The detail of agreements is unavailable because of confidentiality provisions but see Ciaron O’Faircheallaigh, “Native Title Agreement Making In The Mining Industry: Focusing On Outcomes For Indigenous People,” *Land, Rights, Laws: Issues of Native Title*, 2004

106. Lee Godden ‘World Heritage: People or Places? Partnerships for the Integration of Natural and Cultural Heritage in Australia and South Africa’ (forthcoming); *Growing up strong: The first 10 years of Indigenous Protected Areas in Australia*, Australian Government Department of the Environment and Water Resources, May 2007

Under the Native Title Act, there is an elaborate legislative scheme governing 'future acts' that affect native title.<sup>107</sup> The requirements depend upon the nature of the act to be done, but generally involve procedural rights including notice and consultation or a right to negotiate.

Compensation may be payable for any impairment of native title. The 'right to negotiate' applies to proposed grants of mining rights or certain compulsory acquisitions of native title by the Crown.<sup>108</sup> Parties are required to negotiate in good faith.<sup>109</sup> If agreement is reached it will usually take the form of an Indigenous Land Use Agreement which is registered and binds native title successors in title.<sup>110</sup> Arbitration is available where the parties do not reach agreement.<sup>111</sup> Matters included in agreements include those referred to above: access for exploration and development, heritage and environmental protection, employment and training, education and business opportunities and ancillary agreements such as plans for management of on-going relationships.<sup>112</sup>

While this process has resulted in the proliferation of agreed settlements and has established negotiated agreements as the preferred and common outcome, the outcomes for indigenous parties are not always satisfactory in terms of control or financial returns.<sup>113</sup> It is these negotiation rights that Altman and Ritter have described as proprietary rights, albeit weak rights.<sup>114</sup>

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107. Division 3

108. Native Title Act 1993 (Cth) Division 3 sub-division P

109. See Native Title Act 1993 (Cth) s31; see *FMG Pilbara Pty Ltd v Cox* [2009], FCAFC 49, and Sarah Burnside 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' *Land, Rights, Laws: Issues of Native Title* 2009 Volume 4 Issue Paper No. 3; for the limitations of good faith negotiations.

110. Native Title Act 1993 (Cth) Division 3 sub-divisions B, C & D

111. Native Title Act 1993 (Cth) s35; only one arbitration has resulted in a project not proceeding.

112. An example of one publicly available agreement is the set of agreements relating to the Argyle diamond mine available at: <http://www.atns.net.au/>

113. Ciaran O'Faircheallaigh, "Native Title and Mining Negotiations: A Seat at the Table but no Guarantee of Success" (2007) 6(26) *Indigenous Law Bulletin* 18; Department Of Families, Housing, Community Services And Indigenous Affairs on Discussion Paper, *Optimising Benefits From Native Title Agreements* (2008); David Ritter *The Native Title Market* (2009)

114. Jon Altman Native title and the Petroleum Industry CAEPR Discussion Paper 125/1996; Jon Altman 'Amended Land Rights Law will be Bad Law', Submission to the Senate Community Affairs Committee Inquiry into the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, [http://www.aph.gov.au/senate/committee/clac\\_ctte/aborig\\_land\\_rights/submissions/sub03a.pdf](http://www.aph.gov.au/senate/committee/clac_ctte/aborig_land_rights/submissions/sub03a.pdf), 25 October 2006; David Ritter *The Native Title Market* (2009), 48

## B. INSTITUTIONAL FRAMEWORK

### 1. Institutional Framework for Administration of Communal Tenure System; Framework for Administration/Provision of Individual Interests

The institutional arrangements for management of these systems vary according to jurisdiction.

Under the ALRA, the title is held by a land trust but the trust has a formal function only and acts in accordance with directions from the relevant Land Council.<sup>115</sup> Land Councils are bodies corporate established under the Act and cover particular geographic locations.

There are now five Councils in the Northern Territory. Two of them, Central and Northern, each cover around half the territory. Their wide ranging functions include:

- assisting in land claims;
- land management including leasing;
- protection of sacred sites;
- commercial activities including resources development and tourism;
- land access and conservation.<sup>116</sup>

The land council may compile and keep a register of traditional owners in the Land Council area.<sup>117</sup> Customary titleholder control is managed through requiring the Land Council to be satisfied that: 'a) the traditional owners ...understand the nature and purpose of the proposed action and as a group consent to it and b) any other Aboriginal group or community that may be affected has had an opportunity to express its views.'<sup>118</sup> The two large Land Councils are large organizations with significant professional staff and resources and capacity directed to the discharging their statutory obligations. Controversy and disputes have led to the establishment of some smaller Councils covering smaller traditional geographic locations.<sup>119</sup>

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115. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) Part III

116. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s23

117. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s24

118. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s23(3)

119. Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) s21A; Reeves, J



Under the Native Title Act, the title is held by the native title holders usually through a Prescribed Body Corporate (PBC).<sup>120</sup> As with the ALRA (Aboriginal Land Rights Act), a PBC is required to ensure that native title holders understand proposals that affect their native title and consent to them.<sup>121</sup> There are no specific provisions for managing individual interests but rather, these will be determined by the internal workings of the PBC. Some PBCs include in their constitutions provisions that acknowledge sub-groups or family groups within the broader land holding group for the purposes of decision-making, but not for individual interests.<sup>122</sup>

Thus, land and associated interests are managed communally while frameworks for the administration and provision of individual interests will normally be a result of internal decisions. However, these decisions will be subject to the provisions requiring that the traditional owners understand and consent to a proposal. For example, this requirement for understanding and consent could be in relation to a lease of land to a particular traditional owner or to the distribution of funds received under agreements to traditional owners directly, or to other entities.

## **2. Relationship Between Traditional Governance Institutions and Elected Government Structures, With Respect to Communal Tenure**

These relationships operate at a number of different levels. Various statutes require specific corporate and governance structures to be established and the challenge has been to ensure that within those constraints, traditional governance institutions are retained and are functional.<sup>123</sup>

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*Building on Land Rights for the Next Generation: Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976, 1998; House of Representatives and Senate Standing Committee on Aboriginal and Torres Strait Islanders, Unlocking the Future: the Report of the Inquiry into the Reeves Review of the Aboriginal Land Rights (Northern Territory) Act 1976, 1999.*

120. Native Title Act 1993 (Cth) s57. Prescribed Bodies Corporate comprises the relevant native title holders and must be incorporated under the Corporations (Aboriginal and Torres Strait Islanders) Act 2006 which prescribes rules for membership and governance. See Christos Mantziaris, David Martin *Native title corporations : a legal and anthropological analysis* 2000

121. Native Title (Prescribed Body Corporate) Regulations 1999, r8

122. For example see: *Martu Idja Niyaparli Aboriginal Corporation Rule Book*

123. Frith, A, 'A World in a Grain of Sand: Indigenous and Australian Law in Prescribed Bodies Corporate,' in Langton et al (eds), *Poverty in the Midst of Plenty: Indigenous People and Economic Development After the Global Mining Boom* (forthcoming).

The rules of a PBC will set out how governing bodies are to be constituted, what various group or family representation should happen and the processes for transparent and accountable decision-making.<sup>124</sup> Land Council members are chosen by and from among those traditional owners listed under s24 of the ALRA. Dispute and dysfunction in governance and administration of land often arises internally within these entities, or with other governance entities, such as community or local governments which operate within areas of native title or other indigenous land.<sup>125</sup>

At a macro level, there are no formal relationships between indigenous land holding entities and Commonwealth, state or territory governments. While some activities have elements of self-government, there is no sense in which these land holding entities are seen as government entities and the primary relationship with Commonwealth, state or territory governments is a funding and service delivery relationship or as part of negotiations for access to land and attendant settlements.

Between 1989 and 2005 the Aboriginal and Torres Strait Islander Commission<sup>126</sup> operated as an elected body with policy and some service delivery obligations. The Commission was abolished in 2005.<sup>127</sup> A report has just been presented to government proposing the establishment of a new representative body.<sup>128</sup> The proposed body is not specific to land and while its establishment may influence government policy it is unlikely to have direct impact on land management and administration.

## C. OPERATIONAL CONSIDERATIONS/MAIN REFORMS

### 1. What Type of Land Registry System? Why?

All states and Territories in Australia have had Torrens systems of land registration since the middle of the nineteenth century. Some states still have rem-

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124. For example, see: *Martu Idja Nyiyaparli Aboriginal Corporation Rule Book*

125. For an examination of the complexity of these overlayed entities see: Paul Memmott and Peter Blackwood, "Holding Title and Managing Land in Cape York – Two Case Studies," (2008) Number 21 *AIATSIS Research Discussion Paper*; see also Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders (eds), 'Contested Governance: Culture, power and institutions in Indigenous Australia' *CAEPR Monograph No. 29*, 2008.

126. Aboriginal and Torres Strait Islander Commission Act 1989 (Cth)

127. Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth)

128. Tom Caalma, *Our future in our hands – Creating a sustainable National Representative body for Aboriginal and Torres Strait Islanders*, 2009, [http://www.fahcsia.gov.au/about/news/2009/Pages/release\\_report\\_nirb.aspx](http://www.fahcsia.gov.au/about/news/2009/Pages/release_report_nirb.aspx)

nants of general law land but all are moving to convert these to Torrens land.<sup>129</sup> The Torrens system was created in Australia and while its initial adoption in the colonies was not without controversy, its efficiencies were attractive to new and expanding colonies where new land titles were being constantly created. The main reforms of the system at large currently involve computerisation and harmonisation across the various states<sup>130</sup> although there is some concern with how registries should deal with native title determinations or indigenous land use agreements on Crown land.<sup>131</sup>

As indicated above, communal titles under statutory schemes are part of the land registration system and native title determinations are sent to registrars but not actually registered. The internal distribution of rights in both systems do not form part of the land title registration system although leases and other dealings with land under the ALRA (Aboriginal Land Rights Act) may be registered.

## 2. Is Land Title System Being Reformed? Where Are Main Reforms, Why and How?

Current reform activities in relation to indigenous land are focused on converting some communal titles to individual titles. This is occurring by changing existing legal frameworks or through changes in practices so that existing mechanisms are used to deal with land parcels on an individual rather than a communal basis. There appear to be a number of reasons for this changed approach. Although this changed approach was framed in the ideology of the market and property rights discourses,<sup>132</sup> the use of individual title for capital raising,<sup>133</sup> the transaction costs under existing leasing regimes,<sup>134</sup> especially for small areas of land and residential blocks within communities and the desire to

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129. Adrian Bradbrook, Susan MacCallum & Anthony Moore, *Australian Real Property Law* 2007 216

130. NECS National Steering Committee, [http://www.necs.gov.au/Steering\\_committee/default.aspx](http://www.necs.gov.au/Steering_committee/default.aspx) (5 August 2009)

131. Personal communication, Deputy Registrar of Titles (Victoria), August 2009

132. Hughes, H & Warin, J, *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, 2005.; in introducing the amending bill it was said: 'the days of the failed collective are over,' Mal Brough, 'Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Second Reading Speech,' in *House of Representatives Official Hansard*, 31 May, 2006 p5

133. Noel Pearson, & Linda Kostakidis-Lianos, 2004, 'Building Indigenous Capital: Removing Obstacles to Participation in the Real Economy' *Australian Prospect*, vol 2, <http://www.australianprospect.com.au> (14 December 2006)

134. Michael Dillon & Neil Westbury, *Beyond Humbug: Transforming government engagement with indigenous Australians*, 2008

encourage home ownership and building housing stock<sup>135</sup> were all important. Further, governments indicated that they required secure title for their buildings (having not done so hitherto). Both economic development and housing are integrally bound up with 'Close the Gap'. The first set of changes occurred with the 2006 amendment of the ALRA in order to expand the existing leasing powers under the Act. More importantly the amendments established an elaborate system for leasing whole communities for 99 years.<sup>136</sup> The former Rudd government, elected at the end of 2007, has retained this scheme but also amended the ALRA to allow for more varied leasing arrangements including allowing a term of between 40 and 99 years and housing area leases.<sup>137</sup>

The 2006 amendments provided that Land Trusts may lease 'townships' (or indigenous communities) to a Commonwealth government entity<sup>138</sup> for a term of 99 years.<sup>139</sup> The government entity was then empowered to sublease blocks in the township for periods up to the term of the head lease. This effectively passed all control of land within the 'township' to the Government entity.

There is no requirement to consult with indigenous title holders in relation to the subleases including its terms, purpose, rental or the identity of the sub-lessee or in relation to any other matters in relation to the township such as planning and development and inclusion of such matters in the head lease were prohibited.<sup>140</sup> Groups can choose whether to negotiate such a head lease. The head lease may contain consultation mechanisms but these cannot bind the head lessee.<sup>141</sup> Rent for the head lease may be negotiated and, since the 2008 amendments, so may the term of the head lease.<sup>142</sup> Rent for the head lease is paid into the trust account of the relevant Land Council for management in accordance with its general obligations. Rent from the subleases is paid to the Commonwealth (federal government) entity and it is anticipated that this will

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135. Mal Brough, 'Aboriginal Land Rights (Northern Territory) Amendment Bill 2006, Second Reading Speech', in *House of Representatives Official Hansard*, 31 May, 2006 pp5-7

136. Aboriginal Land Rights (Northern Territory) Amendment Act 2006 (Cth)

137. Indigenous Affairs Legislation Amendment Act 2008 (Cth).

138. The entity is the Executive director of Township Leasing: Aboriginal Land Rights (Northern Territory Act 1976 (Cth) s20B

139. Aboriginal Land Rights (Northern Territory Act 1976 (Cth) s19A

140. Aboriginal Land Rights (Northern Territory Act 1976 (Cth) s19A (14) & (15)

141. Interestingly the Ngui lease contains a provision that subleasing must not result in the number of non-Tiwi residents exceeding 15% of the population. It is unclear whether provision is enforceable or inconsistent with s19A(14).

142. Between 40 and 99 years.

ultimately fund the administration of the scheme, including rental payments for the head lease.

In the meantime, rental payments for the head lease are to be paid from Aboriginal Benefits Account, a body established to receive royalty equivalent payments from the Commonwealth (federal government) and Northern Territory governments – payment which the governments receive from mining on ALRA land.<sup>143</sup> Two township leases have been completed to date: the Ngui lease covering the township of Ngui on the Tiwi Islands and the Anindilyakwa lease covers three communities in and around Groote Eylandt in the Gulf of Carpentaria. Both leases are registered in the Northern Territory Land Registry,<sup>144</sup> and both provide for one-off payments at the commencement of the leases, \$5 million and \$4.5 million respectively. These payments cover the first fifteen years of the lease, with additional payments to be made if rent received exceeds the stipulated amount.<sup>145</sup>

Other benefits, such as additional housing and health services, accompanied the lease negotiations for the Ngui lease, but are not mentioned in the lease.<sup>146</sup>

The Anindilyakwa lease also had accompanying benefits and these are referred to in the Regional Partnership Agreement entered into prior to the completion of the lease, but annexed to it. The agreement commits to twenty-six additional houses, subject to the township lease being completed.<sup>147</sup>

The major criticism of this scheme is its impact on indigenous governance and control. The leases transfer control from customary land owners to a government entity and thereby effectively remove indigenous owners from any management and control over their land. Although there is an underlying “reversionary title”, the transfer of all control over land from the indigenous title holders, with a ninety-nine year term, renders this of little effect. There have also been concerns that the provisions of additional benefits operate as inducement – meaning that the leases are not freely entered into.

Alternative forms of land title reform have also been pursued and these are directly linked to the Commonwealth government’s \$5.5 billion project for im-

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143. Aboriginal Land Rights (Northern Territory Act 1976 (Cth) Part VI

144. No 662214 and No 692818 respectively.

145. *ibid*

146. Mal Brough MP ‘Breakthrough agreement on Aboriginal land in the NT’ (Press Release, 9 May 2007).

147. The Agreement is annexed to the Lease and referred to in the body of the lease in clause 2.5

proving housing in remote indigenous communities.<sup>148</sup> Funding for housing will now only be provided if there are appropriate leasing arrangements in place.

The Commonwealth (federal government) is not requiring township leases under s19A of the ALRA (but will require a s19 lease (housing area lease) covering all current and prospective housing. This approach retains effective indigenous management and control of community land, with the relevant Land Trust as lessor. Thus, the end goal is achieved without the negative consequences of the s19A township leases.

Similar changes are occurring in other jurisdictions. Queensland has amended its Aboriginal Land Act to permit individual leases and mortgages over leased land.<sup>149</sup> These changes have been accompanied by community agreements designed to attract funds to improve housing.<sup>150</sup> The land tenure picture is further complicated in Queensland by overlapping forms of tenure including Deed of Grant in Trust land, native title land and other forms of tenure that overlap or are adjacent. There is a State Land Dealings Project in Cape York addressing these issues.<sup>151</sup>

In other jurisdictions, such as South Australia, legislative change has not been required to facilitate leasing. However, the government will require leases to be entered into as part of its housing program. These changes now enable individuals to obtain low interest loans from Indigenous Business Australia in order to purchase housing.<sup>152</sup>

Housing in communities has generally been managed by community organizations, with government funding. While the details vary among jurisdictions and communities, formal tenure arrangements have not been the norm and movement from house to house has been common, particularly following deaths. Maintenance of housing stock has also been an ongoing issue. There has been little work undertaken on whether the changes to land tenure will alleviate these challenges or provide benefits from the creation of a housing market. In fact, there remains a question as to whether there will actually be a market in these remote communities. Such a market is an integral element of

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148. Jenny Macklin, 'Remote Indigenous housing investment' (Press Release 23 March 2009)

149. Aboriginal and Torres Strait Islander Land Amendment Act 2008

150. Jim McNamara, *99 Year Leases on Aboriginal Land: 'Not the Northern Territory Model'* Native Title Conference 2008; *The Yarrabah Agreement*, 1 October 2007;

151. Cape York Land Council (2006) Vol 1, No 1 *Newsletter*

152. Indigenous Business Australia, *Fact Sheet: Home Ownership on Indigenous Land (HOIL)* (2009) [http://www.iba.gov.au/images/stories/files/Home\\_Ownership\\_on\\_Indigenous\\_Land.pdf](http://www.iba.gov.au/images/stories/files/Home_Ownership_on_Indigenous_Land.pdf) (23 August 2009); IBA Homes <http://www.iba.gov.au/ibahomes/> (23 August 2009)

the program, if it is to achieve goals other than a fiscal transfer of housing costs from the government to individual indigenous people.<sup>153</sup>

Native title is a diffuse concept which to date has not lent itself to individual titling.<sup>154</sup> Negotiations between native title holders and governments, such as those being undertaken in Cape York, could result in arrangements that permit individual titling, whether on exclusive possession land or as a result of land swaps effected through Indigenous Land Use Agreements under the Native Title Act 1993 (Cth).<sup>155</sup>

Amendments currently before Parliament will vary the level of decision-making of native holders under the future act regime in relation to land for housing.<sup>156</sup>

All these changes are too recent to permit any useful evaluation.

### **3. Financial, Infrastructural, Human and Other Resources Made Available to Support Current Land Administration Systems and to Implement Current and Envisaged Tenure Reforms**

Land management and administration resourcing varies according to jurisdiction and land tenure scheme. The Land Councils in the Northern Territory are funded by means of the Aboriginal Benefits Account. The extent of operations, capacity and funding can be seen from the Central Land Council's Annual Report which shows revenue of \$19.5 million.<sup>157</sup> The Councils have large professional staffs, with significant capacity to meet the management need of their constituents.

Other land tenure schemes rely upon program funding from governments, primarily the Commonwealth Government, to manage their land administration. In relation to native title land and organization in particular, there is a significant lack of resources for the management of native title land. Native Title

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153. Altman, J, Linkhorn, C & Clarke, J, 2005, *Land rights and Development Reform in Remote Australia*, CAEPR Discussion Paper No. 276/2005; Paul Memmot, Christina Birdsall-Jones, Mark Moran and Stephen Long, *Indigenous Home ownership on Communal Title Lands* 2009; Sara Hudson, *From Rhetoric to Reality: Can 99-year Leases Lead to Homeownership for Indigenous Communities?*, Centre for Independent Studies Policy Monograph 92, (2009); Altman 2006

154. See Lee Godden & Maureen Tehan, "Translating Native Title to Individual 'Title' in Australia: Are Real Property Forms and Indigenous Interests Reconcilable?" in Cooke, Elizabeth (ed), *Modern Studies in Property Law Volume 4* 2007 pp263 -294

155. Division 3, Sub-division B.

156. Native Title Amendment Bill (No. 2) 2009.

157. Central Land Council *Annual Report 2007-2008*, [http://www.clc.org.au/Media/annualrepts/eCLC\\_annual\\_report2007\\_2008.pdf](http://www.clc.org.au/Media/annualrepts/eCLC_annual_report2007_2008.pdf) (24 August 2009)

Representative Bodies are established under the Native Title Act 1993 (Cth)<sup>158</sup> but there are limitations on the manner in which they can provide services and assistance for native title PBCs and there are constant issues in relation to their inadequate resourcing. The government is currently considering better resourcing of these institutions, but the issue of governance capacity remains crucial in the management and control of land.<sup>159</sup>

The cost of operating the township leasing scheme for 2007-8 financial year was minimal (\$457,000).<sup>160</sup> The early estimate for administration, including surveying and rent, was put at \$15 million over five years, but this estimate was made when rental payments were to be capped. In any event, this scheme is intended to be self-funding but is funded through the Aboriginal Benefits account in the short term. Little attention has been given to calculating the cost of managing these new land tenure schemes.

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158. Part 11

159. See Commonwealth Attorney-General, [http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle\\_NativeTitle\\_2007NativeTitlereforms](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_NativeTitle_2007NativeTitlereforms)

160. Executive Director of Township Leasing, *Annual Report 2007-2008*



## D. LESSONS LEARNED

Recent experiences in Australia in relation to indigenous land tenure and constitutional arrangements provide some useful insights into possible land tenure reforms.

### 1. Comments about legislative objects

The legislative objects should be clear about the range of objectives for the proposed change. The case for the change to a land registration system that facilitates the operation of an efficient land market has been made and it is clear that this is a primary objective.

Other objectives need to be clearly stated. These include:

- retention of the underlying title;
- reservation of some lands from the market system;
- arrangements for government;
- taxation;
- planning and environmental management functions;
- treatment of existing interests;
- adaptability for different scales and locations of land holding;
- the relationship with existing provincial laws;
- the mechanisms for application of these or similar laws;
- resolution of jurisdictional conflicts between federal and provincial laws;
- transitional provisions;
- the ongoing fiduciary relationship with the Crown;
- the relationship of the legislation with the Charter; and
- other more general objectives.

## 2. Comments On Legislative Design

When attempting to establish a codified land titling system there is a danger that ‘gaps’ in the legislation will occur. The legislative design needs to ensure that there are simple mechanisms to meet this difficulty. Whether this is by including provisions for adopting relevant provincial legislation or some other mechanism, the legislation should be clear about the operation of this aspect of the system. Thus the legislation should be enabling rather than prescriptive.

The legislation should be sufficiently flexible to enable easy adoption/opt-in by First Nations of varying sizes and capacity. The variable status of current First Nations’ land creates challenges for the legislative design. The key goal, however, should be flexibility in order to ensure that the legislation does not operate as a disincentive to First Nations’ opting in.

Further, care needs to be taken *not* to replicate provincial Torrens systems, where inadequacies in those systems have been identified.

## 3. Experiences From My Country that May Be Relevant to Enhance Proposal

Experiences in Australia are relevant in a number of ways and the similarities and differences between Australia and Canada provide a useful framework for relevant comparison and comment upon the legislative objects and design.

### Underpinning Legal Principles

- Constitutional entrenchment and protection
- Fiduciary duties

These underpinning and entrenching legal principles are a significant difference between Australia and Canada. The lack of such provisions in Australia has had a negative impact in relation to government activity where unilateral changes that adversely affect legal entitlements to land can be made. This suggests that a legislative scheme that is drafted to ensure the retention of these core principles or some other entrenching tools is essential.

### More Than A Market

The creation of an efficiently operating market is central to the proposal and therefore the legislative design. However, for some groups, there may be other cultural imperatives that are also important. The legislative design should ensure that it is possible to harmonize these goals so that more groups can take advantage of the proposal. One of the major problems with the ninety-nine year lease scheme in Australia is that it creates an all or nothing arrangement

rather than the flexible scheme that can be moulded to each group's needs and interests.

Further, the legislative design (or related instruments) should ensure that the benefits operate on two levels: a) enhances the capacity of individual First Nation members; and b) also has flow on economic benefits for the Band. This meets in part the issue of inter-generational equity, wealth creation and the preservation of rights in land for successive generations.

### **Self-government – underlying and negotiated**

The recognition of the right to self-government is a major difference between Australia and Canada. The importance of this right is crucial to ensuring that control and management of land and resources is held by the First Nation and need not or cannot be lost.

Therefore the legislative design should ensure that as part of control and management of land, it is possible to impose limitations on use, to effectively develop and implement planning and environmental controls and carry out all other self-government and land management related activities including taxation.

### **Taxation and funding**

The ability to raise income from taxation is a key aspect of self-government rights. *The legislative design should ensure that this right remains.* The absence of such powers in Australia creates an environment of dependence and power imbalance between indigenous land holders and government, such that inducements may be effective to produce land title outcomes that transfer power away from indigenous land owners.

### **Capacity for governance and management**

This is a crucial aspect in both enhancing self-government and ensuring that land management systems operate effectively and efficiently. The legislative design and the implementation of the changes need to ensure that First Nations with limited governance capacity, because of size or other factors, are able to opt in, in order to enjoy the advantages of the scheme if they wish. This might be achieved through flexibility in design that permits for less complex arrangements and greater involvement with provincial laws, if desired. In Australia, the capacity deficit, regardless of the cause, can be used as a basis for unreasonable intrusion and control.

### **Demographic change and potential transfer of power**

Where land is near high density population areas it is possible that the intrusion of a large non-First Nation population might ultimately produce changes in governance with a consequential transfer of power from First Nation land owners. Care needs to be taken in the legislative design to ensure that First Nations have a range of tools for dealing with this issue. The design already includes the flexibility to quarantine certain areas of land from the scheme or at least to create some areas of inalienable land. It may be necessary to include the possibility of adopting other strategies such as limitations on non-first nation owners. This would allow for control of population, while still opening land to some of the benefits of a market based scheme, albeit in a limited form. The retention of the escheatment right, as included in the design, will assist here. The lack of some of these tools in the Australian schemes to date is likely to have an impact on the uptake of the schemes or it might result in significant transfer of land to non-indigenous owners.

### **Recognition of existing rights and interests**

This has been referred to in the legislative design. It is a crucial element in ensuring a smooth transition to the scheme.

### **Conflict and complex overlapping laws**

The legislative design documents present a picture of complex and overlapping legal provisions. It is important to find the balance between ensuring that other design features are met while reducing the complexity and overlap. The Australian experience suggests that overlapping and complexity adds to transaction costs, increases delays and may have the impact of defeating some of the key objectives of the scheme.

### **Flexibility**

*This must be key goal of the legislative design.* It is essential to provide for variations in the model so that it can adapt to different environments, including location (close to or distant from population centres), small and large First Nations or land areas, and areas where there are already large individual title interests whether held by Band members or others. *The Australian experience suggests that a one size fits all model will not work.*

## BIOGRAPHIES

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TERRY ANDERSON has been director of the Property and Environment Research Center since 1995. He was a Professor of Economics at Montana State University from 1972 to 1998 and is now Professor. Since 1998, Professor Anderson has been a senior fellow at the Hoover Institution, Stanford University. Mr. Anderson's research helped launch the idea of free market environmentalism and prompted public debate over the role of government in managing resources. He has published widely in both professional journals and the popular press. Professor Anderson has been a visiting scholar at Oxford University, the University of Basel, Clemson University, and Cornell University Law School. He received his Ph.D. in economics from the University of Washington in 1972 and was awarded a Fulbright Research Fellowship to Canterbury University in 1988.

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First Nations amendment to the Indian Act in 1988 which provided that First Nations could exercise jurisdiction to levy property taxes on-reserve. The Indian Taxation Advisory Board (ITAB) and the current First Nation property tax system were created as a result of his vision and efforts. Mr. Jules served as Chair of ITAB from 1989 to 2003 and 2005 to 2007. He is a member of the Kamloops Indian Band and served as Chief from 1984 to 2000. Mr. Jules has devoted over 30 years of his life to public service in support of Aboriginal issues. He received an honorary Doctorate of Law from the University of British Columbia in 1997 and another from Thompson Rivers University in 2006. In September 2009, Mr. Jules was presented with the Order of British Columbia, which is the province's highest honour for outstanding achievement.

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## **Access to Property Rights:** Integrating Indigenous Communities into the Federal Scheme - *International Experiences*

A large number of the world's indigenous peoples live in sub-standard conditions and many have lost hope that economic reform programs can bring improvement to their lives. The academic world has long offered a multi-faceted explanation for this phenomenon including such elements as lack of leadership, lack of education and lack of entrepreneurship. Some authors have attributed this state of affairs to an incompatibility between cultures and the market based economy.

Today, there is not much evidence to support these assumptions. Recent experience has shown that First Nations' lands can generate economic activity similar to that generated on non-First Nations lands. In light of this, why is there such a gap? What if the key to understanding the causality chain was hidden within some of the most basic principles of the economic cycle?



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ISBN: 978-0-9809150-5-1

