



**Urban LandMark**

making urban land markets work for the poor

IMPROVING LAND SECTOR GOVERNANCE IN SOUTH AFRICA  
IMPLEMENTATION OF THE LAND GOVERNANCE ASSESSMENT FRAMEWORK

Wendy Ovens

[www.urbanlandmark.org.za](http://www.urbanlandmark.org.za)

[info@urbanlandmark.org.za](mailto:info@urbanlandmark.org.za)

Tel: +27 12 342 7636/8,

Fax: +27 12 342 7639.

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## **1. INTRODUCTION**

Land governance and administration are critical for achieving economic growth and development in any country. It is within this context that the World Bank introduced the Land Governance Assessment Framework (LGAF) for identifying specific areas for land reform while also providing a means for monitoring. A standard assessment tool was developed by the Bank and implemented in a number of countries around the world. The methodology sets out 5 thematic areas linked to 21 indicators which in turn, are associated with 80 dimensions for measuring land governance.

The implementation process of the land governance assessment framework commences with expert reports being prepared on each of the 5 thematic areas. Thereafter expert panel discussions are held to evaluate a set of dimensions and, based on a scoring system, provide an individual ranking and thereafter a consensus ranking for each dimension. Panel reports are drafted and the findings consolidated into an overall country report. A national verification workshop is also held to confirm the findings of the panel discussion and the overall contents of the national report.

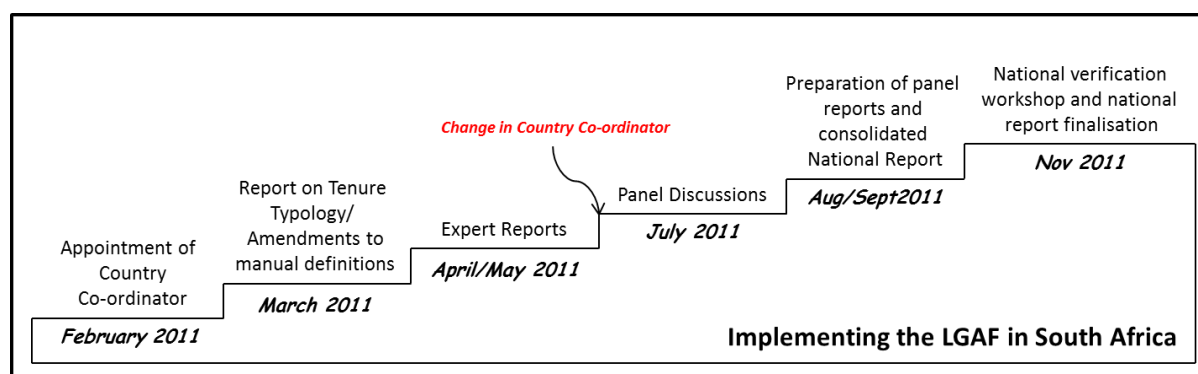
This report serves as the country report for South Africa. It provides an outline of the process, background information on the country, an assessment of land governance and the concomitant policy analysis, recommendations and conclusions. The report is intended to be a resource document for government and other land practitioners within the non-governmental and private sectors to guide policy development and interventions within the land sector.

## **2. PROCESS FOR IMPLEMENTATION OF THE LGAF**

### **2.1 GENERAL DESCRIPTION OF PROCESS**

Within South Africa, the implementation of the LGAF has been undertaken as a joint initiative between the World Bank and Urban LandMark. The project was managed by two country coordinators. The first co-ordinator, Mr Jean du Plessis, resigned midway to take up an appointment with UN Habitat, Nairobi. This role was then filled by Ms Wendy Ovens, an urban and regional planner with experience in the land sector.

As far as possible, the manual which outlines the tool application requirements was followed diligently. The project commenced in South Africa in February 2011 with the report being finalised in November 2011. In the initial phase, a report was prepared on the tenure typology within the country and the manual definitions adapted for the South African context. Thereafter, expert reports were drafted during the months of April and May 2011 with the panels being hosted in July and August 2011. The consolidated report was drafted in September and presented at the national verification workshop in early November 2011.

**Figure 1: LGAF Implementation Process in South Africa**

## 2.2 EXPERT WORK

Experts were appointed to undertake the preparation of the investigation reports. The appointment of the service providers was based on their knowledge, skills and years of experience relating to the specific topic to be addressed. The following people/organisations were appointed to do the work:

- Land Tenure – Peter Rutsch
- Land Use Planning – NM & Associates, Planning and designers. The team comprised of six experts
- Land Administration – was split into two core areas, Surveys and Mapping undertaken by Mr Apie van den Berg and the Deeds Registry addressed by Ms Rosalie Kingwill
- Large-Scale Land Acquisition (LSLA) – Mr Louis Smith

The expert reports were completed within a short timeframe making it difficult at times to obtain sufficient data to augment the findings. Notwithstanding this limitation, the expert findings were verified and accepted at the National Verification Workshop.

## 2.3 PANELS

Based on the requirements in the Land Governance Assessment Framework Manual, eight panels were established for the assessment of the dimensions in South Africa, and these were as follows:

- Panel 1 – Land Tenure
- Panel 2 – Urban Land Use Planning and Development
- Panel 3 – Rural Land Use and Land Policy
- Panel 4 – Land Valuation and Taxation
- Panel 5 – Public Land Management
- Panel 6 – Public Provision of Land Information
- Panel 7 – Dispute Resolution
- Panel 8 – Large Scale Land Acquisition.

The panellists were selected from the private sector, non-governmental organisations, local government, national government and academic institutions. Efforts were made to identify

participants who were experts in their field and or held a senior position within government, working on a related land governance aspect. A combination of internet searching and professional networking was used to identify the key people to be selected for the panels.

Each panel was established with a minimum of three panellists and a maximum of five. An attempt was made to ensure that there were a range of sectors represented. Five panels were attended by the expert investigators who presented key emerging themes in relation to the dimensions being considered. Due to the late cancellation by two panellists, two panels were required to proceed with only two representatives each. The decision to proceed was based on the travel costs incurred and the fact that the remaining panellists were already present and had made their time available at their organisation's expense. While this presented a challenge during the panel discussions, the overall findings were verified at the National Verification Workshop at which government representatives were in attendance.

It was only possible to secure half day workshops. The shortened time was compensated by ensuring the participants were, as far as possible, experts in their fields with at least 10 – 15 years' relevant experience. The composition of the panels is outlined in the table below.

**Table 1: Lists of Panellists**

Name	Organisation	Sector	Position	Panel
Dr Felicity Kitchin	CASE	NPO	Senior Researcher	1 and 7
Dr Ruth Hall	PLAAS	Academic institution		1
Mark Misselhorn	Project Preparation Trust of KwaZulu-Natal	NPO		1
Ronald Eglin	AFESIS CORPLAN	NPO	Senior projects Co-ordinator	1
Gemey Abrahams	Gemey Abrahams Consultancy	Private sector	Director	1
Dr Tanya Zack	Tanya Zack	Private	Consultant	2
Herman Pienaar	City of Johannesburg	Local Government	Acting Executive Director: Planning	2
Nomfundo Gobodo	Legal Resources Centre	NPO	Senior Researcher	2
Ms S Moonsammy	eThekweni Metropolitan Municipality	Local Government	Head: Development Planning, Environment and Management Unit	2
Rick de Sagte	Phuhlisani Solutions	Private	Director	3 and 8
Siyabu Manona	Phuhlisani Solutions	Private	Director	3
Piet Eloff	City of Johannesburg	Public	Director: Valuation Services	4
Christopher Lourens	Buffalo City Metropolitan Municipality	Public		4
Janet Channing	MetGovis (Pty) Ltd	Private	Managing Director	4
Willy Govender	eValuations	Private	CEO	4
Christopher Gavor	National Municipal Valuers Forum	Public	Chairperson	4

Name	Organisation	Sector	Position	Panel
Marias Pieters	Johannesburg Property Company	Municipal Entity		5 and 6
Calvyn CS. Sihwili	Housing Development Agency	Government agency	Public Sector Land Legal Official	5 and 6
Thiathu Manenzhe	Housing Development Agency	Government agency	Planner	5 and 6
Nick Sandenbergh	Self employed	Private	Professional Land Surveyor – Previous Deputy Surveyor General for South Africa	5 and 6
Kate Tissington	SERI	NPO	Research and Advocacy Officer	7
Hermine Engel	Planact	NPO	Acting Director and Programme Manager	7
Dr Gaynor Paradza	PLAAS	Academic Institution	Researcher	8

A standard approach was used for the management of the workshops which included:

- Briefing presentation outlining the objectives of the land governance assessment framework, workshop process and expectations
- If an expert investigator was present, a high level presentation was made. In the absence of an investigator, a group discussion on the land governance topic was held. This proved to be useful in orientating the panellists to the discussion requirements and the content of the dimensions.
- Individual scoring of the each of the dimensions
- Capturing of the results and projecting the collective results for discussion
- Discussion on each of the dimensions including the determination of policy recommendations

Panels 1, 3, 7 and 8 had no representatives from government on the panels. Panel 3 on rural land use and land policy had two members from the same organisation. While both work in different areas within the country, there was a high degree of consensus between the two which included after the independent scoring. There was no challenge to their on-the-ground experience in the panel discussion. However, there was a correlation between the findings of panel 3 and panel 1 on the dimensions relating to rural development. In addition, there was general agreement with the overall panel findings at the national verification workshop.

In all cases, the panels were able to reach a consensus position. In some instances, it was necessary to reflect more than one statement ranking as the answer fell between the two possible responses. Some of the dimensions required a clear definition to be provided and agreed upon before the consensus scoring could take place. The suggestion made to the panellists was that they score independently, applying their definition of the dimension, which was then discussed in plenary. The method often enhanced the debate, ensuring that a cross section of views was heard. In all panels, there was an even participation by the panellists and an active discussion.

All panellists were provided with a briefing report prior to the workshop. If information had been obtained from an Expert Investigator for the dimension being examined by the panel, it was inserted into the report but without an indication of the experts ranking. The briefing reports were used as a reference during the panel discussion with the members seldom disputing the findings of the Expert Investigators.

No expert report was prepared on rural land use and land policy. The Country Co-ordinator regards this as being a possible oversight in the LGAF methodology. Rural land issues tend to be complex not only in South Africa but within the wider African sub region. Without a substantial report, it was not possible to easily confirm the panel 3 discussion. It is suggested that other topics such as land valuation and taxation which were also not subjected to prior investigation, can remain as such. As was the case in Panel 4, the experience of the panellists was sufficient to adequately address the content of each of the dimensions presented.

## 2.5 ASSESSMENT

There were a number of dimensions which the panellists opted not to respond to often due to a lack of information. For example, Panel 3 took the decision not to answer LGI 8 Dimension (v) which relates to use plans for specific rural land classes being in line with the use. The panellist argued that they had insufficient knowledge to answer the question with certainty. Rather, the dimension required detailed research which went beyond the scope of the terms of reference set for the panel. Panel 7<sup>1</sup> opted not to return a score for LGI 21 Dimension (i) which required information relating to conflict resolution in the formal legal system. The panellists confirmed the expert investigator's findings that there is no coherent recording of formal land disputes within the South African legal system. It was thus not possible to formulate a response based on percentages as required in the dimension.

The role of the Country Co-ordinator is merely to facilitate the implementation of the LGAF and as such should remain objective and neutral in the process. The methodology is fairly simple in that it draws on the knowledge commonly held by a number of experts into a single report which is as far as possible, augmented by data and analysis. While this approach manages to capture the majority of the land governance issues in South Africa, these tend to be at a high level with little exposure of the underlying causes or nuances. Notwithstanding, the report remains a useful resource for land practitioners connecting the often fragmented aspects required for the management of land administration.

The mining sector emerged as a key stakeholder in the panel on large scale land acquisition. No representative for this sector participated in either the panel or within the verification workshop. While this may be deemed a shortcoming in the implementation process, it is only one aspect of a very complicated sector and as such does not detract from the overall integrity of the report.

**The expert panel on rural land use and land policy was poorly attended and as such some of the complexities relating to this topic remain underdeveloped in this report.**

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<sup>1</sup> Matters relating to dispute resolution and conflict management are contained in section 3.4 in this report.



Land in South Africa has a history of disposition and restricted access. It was the cornerstone of the apartheid government's attempts to create a racially based society which was socially, economically and spatially divided. The land dynamics are therefore complex in South Africa, with a vast policy environment and legal framework. Given the short duration of the post-apartheid period, the policy environment is an active one with extensive changes occurring post 1994. Much of this focus has been on redressing the inequalities and inequities in the land systems and for this reason, much of the practitioner efforts both in and outside of government have supported a pro poor agenda. The historical consequences of the land practices in South Africa and the current discourse have been reflected in the results of the LGAF implementation.

As already noted, the findings of this report were presented and discussed at a national verifications workshop. It was well attended by representatives from government, the private and non-governmental sectors and World Bank representatives. Presentations were made by the expert investigators on the following topics:

- Tenure typology in South Africa
- Urban land use planning
- Land administration
- Valuation and taxation.

Thereafter small group discussions were held to confirm the findings of the panel discussions. This was followed by a plenary session in which the small group findings were subjected to further discussion and the policy proposal presented and agreed. There was a high degree of consensus with the panel findings. It is therefore proposed this report then is a fair and adequate reflection of land governance and administration in South Africa.

### **3. BACKGROUND DATA AND INFORMATION**

#### **3.1 GENERAL DATA AND INFORMATION**

##### **3.1.1 *Historical context of land in South Africa***

Land in South Africa has a bitter and deeply divisive history. "From the 17<sup>th</sup> century onwards, dispossession by white settlers of the land occupied by indigenous black societies was centrally important in creating a racially polarised and highly unequal society<sup>2</sup>". Legislative frameworks were established to facilitate the segregation of racial groups to specific geographic locations. The 1913 Natives Land Act was definitive in the establishment of the so called "reserves" which over time comprised of only 13% of the land surface of South Africa. All land purchases or rent tenancy by black indigenous South African's outside of the reserves was regarded as illegal<sup>3</sup>.

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<sup>2</sup> Ben Cousins <http://www.lalr.org.za/news/land-reform-in-post-apartheid-south-africa-2013-a-disappointing-harvest-by-ben-cousins>

<sup>3</sup> IBID

During the apartheid years (1948 to 1994), racial segregation intensified. The pass law system was implemented during the 1950's restricting Africans from accessing the urban areas unless they had employment. During this period, the Group Areas Act was passed which further demarcated South Africa into areas based on race. The pass laws and Group Areas Act were strictly enforced resulting in massive forced removals. Later, the apartheid government transformed the reserves into ethnically determined "independent" homelands. Again, this was accompanied by waves for forced removals and land disposition. "Productive land was lost and small-scale farming that helped rural households to survive was undermined. In contrast, white commercial farmers were given massive financial support and subsidies, and overtime became highly productive".<sup>4</sup> In 1994, 40% or approximately 16 million people were living in extreme poverty in the former homeland areas.

As a result of the history in South Africa, land remains highly contested and politically charged. There is an increasing urgency to address the racial imbalances in land allocation and ownership.

### **3.1.2 South African Geography**

South Africa comprises a total land area of 1229338 km<sup>2</sup> <sup>(5)</sup>. The country has vast internal plains which are rimmed by rugged hills and a narrow coastal plain. Approximately, 12% of the land surface is arable land of which 0.79% is under permanent crops.<sup>6</sup> The communal land areas are largely located within areas which have hilly topography (KwaZulu-Natal, Eastern Cape, parts of Limpopo and Mpumalanga) or areas with low agricultural potential.

### **3.1.3 Administration**

Critical in the dismantling of apartheid was the reorganisation of the different levels of government, the de racialisation of local government and the reorganisation of the public service to meet the constitutional obligations of government. During apartheid, the then South African government established so called self- governing or homeland territories. These areas predominately comprised the communal lands. In 1994, all such areas were once again incorporated into South Africa and all administrations amalgamated.

The deracialisation of the local government system took place in two phases, the transitional phase from 1995 until 2000, and the second, the establishment of democratically elected "wall to wall" municipalities. During the interim phase, there were a total of 843 transitional municipalities nationally. Post 2000, this number was reduced to 284 with most municipalities now containing both urban and rural areas.

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<sup>4</sup> IBID

<sup>5</sup> Municipal Demarcation Board spatial data set

<sup>6</sup> <https://www.cia.gov/library/publications/the-world-factbook/geos/sf.html>

South Africa is a constitutional democracy with an independent judiciary and three independent spheres of government, namely, national provincial and local government. The latter sphere comprises three categories of municipalities:

- Category A - Metropolitan municipalities
- Category B – Local municipalities
- Category C – District municipalities which contain two or more local municipalities.

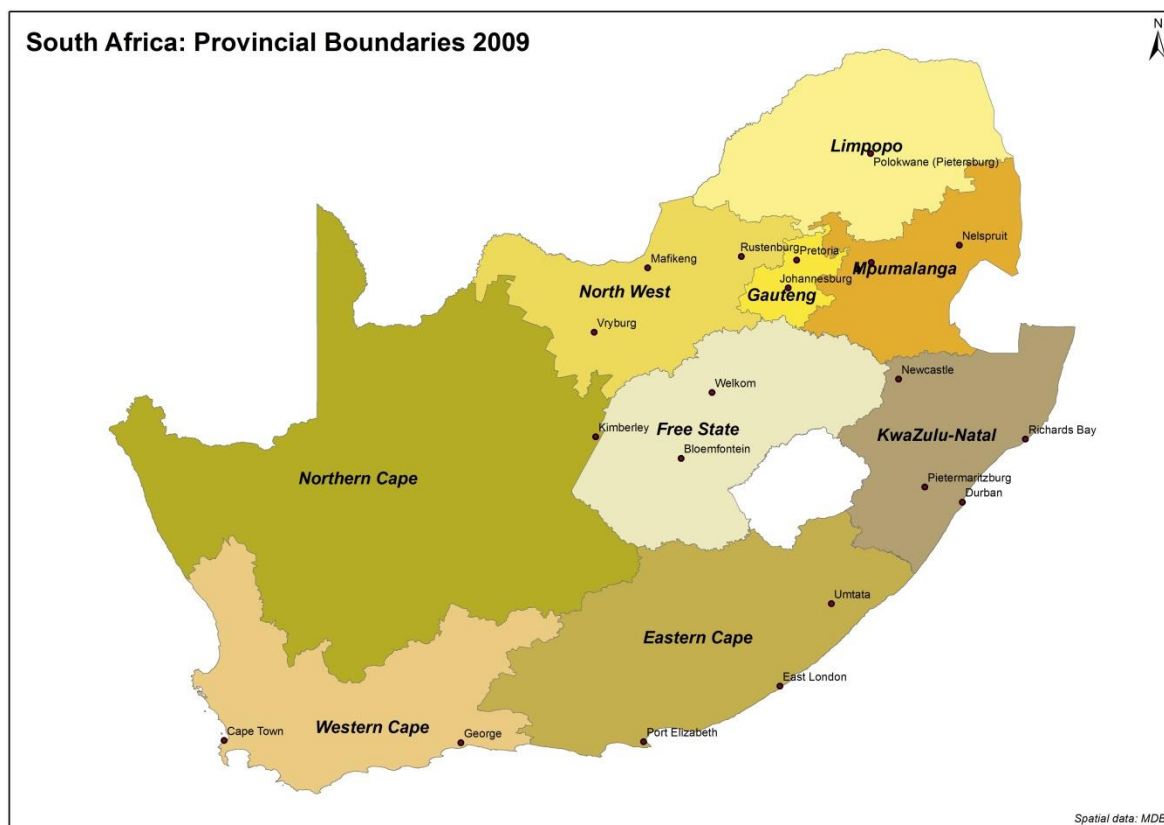
“The national, provincial and local levels of government all have legislative and executive authority in their own spheres, and are defined in the Constitution as ‘distinctive, interdependent and interrelated’.”<sup>7</sup> South Africa is divided into the following 9 provinces:

**Table 2: Provinces and Geographic Extent**

Province	Km <sup>2</sup>
Eastern Cape	169309
Free State	130011
Gauteng	18182
KwaZulu-Natal	94451
Limpopo	125806
Mpumalanga	76544
North West	105238
Northern Cape	378276
Western Cape	131521

<sup>7</sup> Source: <http://www.southafrica.info/about/government/gov.htm>

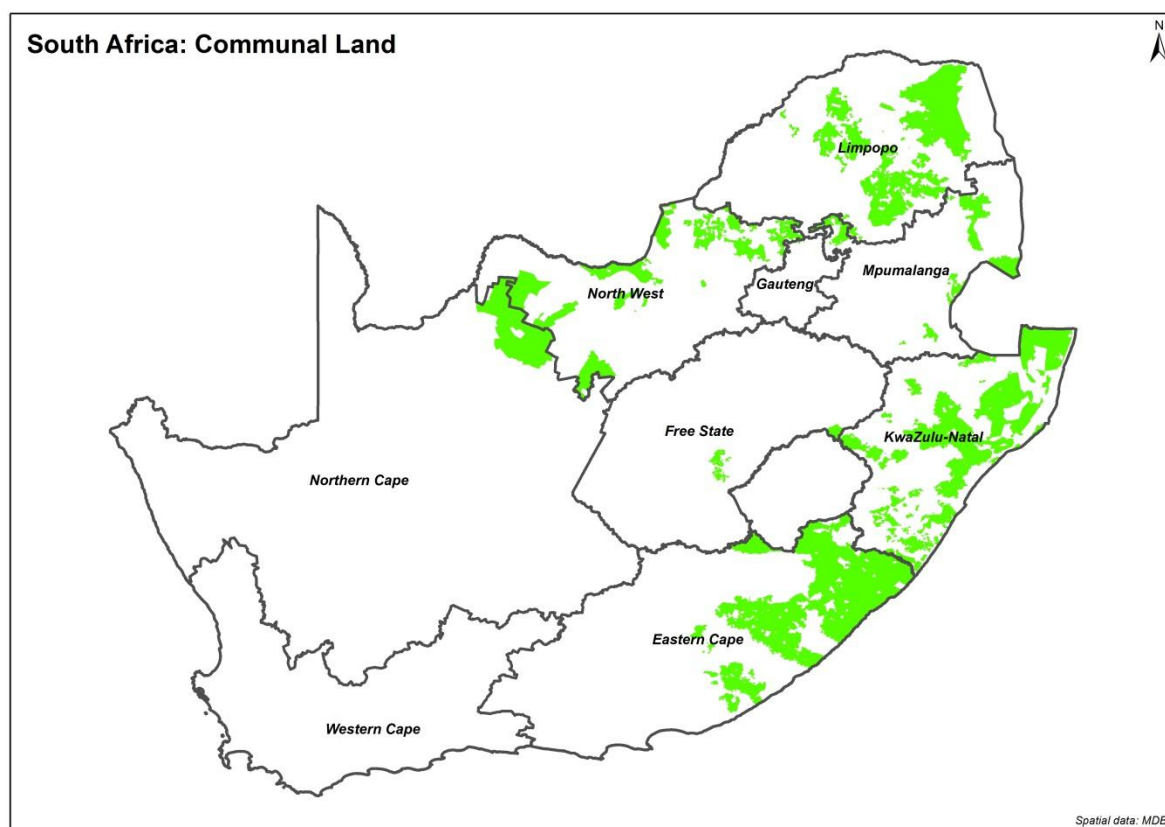
Figure 2: Provinces



In terms of the Constitution, the three spheres of government are required to practice cooperative governance. This becomes imperative for powers and functions shared by more than one sphere of government and for the effective and efficient implementation of policies and programmes.

Communal land is found within all provinces with the exception of the Western Cape. Very small portions are included in the Gauteng Province and are restricted to the Tshwane Metropolitan area only. Traditional leaders form advisory bodies at both national and provincial levels. In addition, the Municipal Structures Act No 117 of 1998 makes provision for traditional leadership representation on the municipal council within the jurisdiction in which they fall.

**Figure 3: Location of Communal Land in South Africa**



The Statistics South Africa mid-year population estimates indicate that South Africa has a population of 50 586 757 persons. Approximately 80% of the population are regarded as African, with the so called “coloured” and white population each contributing only 9%<sup>8</sup>. There are approximately 1.5% more females in the country than men.

**Table 3: Broad Population Figures for South Africa by Gender and Race, 2011<sup>9</sup>**

Population Group	Male		Female		Total	
	Number	% of male population	Number	% of female population	Number	% of total population
African	19472038	79.4	20734237	79.5	40206275	79.5
Coloured	2188782	8.9	2351008	9	4539790	9
Indian/Asian	626690	2.6	648177	2.5	1274867	2.5
White	2227526	9.1	2338299	9	4565825	9
<b>Total</b>	<b>24515036</b>	<b>100</b>	<b>26071721</b>	<b>100</b>	<b>50586757</b>	<b>100</b>

Approximately 43% of the population reside in only two provinces in South Africa, that is Gauteng (22.3%) and KwaZulu-Natal (21.3%). The Eastern Cape is resident to approximately 13.5% of the population while Limpopo and Western Cape each account for

<sup>8</sup> It is important to provide a population breakdown by racial groups given the apartheid history of South Africa and its long lasting legacy.

<sup>9</sup> Statistics South Africa: Mid-year population estimates 2011

11%. The smallest province is the Northern Cape which is home to only 2.1% of the population.

**Table 4: Mid Population estimates by province, 2011<sup>10</sup>**

	Population estimate	% of Total Population
Eastern Cape	6829958	13.5
Free State	2759644	5.46
Gauteng	11328203	22.39
KwaZulu-Natal	10819130	21.39
Limpopo	5554657	10.98
Mpumalanga	3657181	7.23
Northern Cape	1096731	2.17
North West	3253390	6.43
Western Cape	5287863	10.45
<b>Total</b>	<b>50586757</b>	<b>100</b>

While Gauteng (the smallest province geographically) and KwaZulu-Natal have populations which are similar in size, the former has a population density of approximately 623 persons per km<sup>2</sup> while the latter demonstrates a density of only approximately 115 persons per km<sup>2</sup>. Mpumalanga has the third highest density that is 48 persons per km<sup>2</sup> which is followed by Limpopo with 44 persons per km<sup>2</sup>. The Western Cape and the Eastern Cape demonstrate densities of approximately 40 persons per km<sup>2</sup>. The Northern Cape, which is geographically the largest province, has the smallest population density that is approximately 9 persons per km<sup>2</sup>.

**Table 5: Population density per province**

Province	Density per Km <sup>2</sup>
Eastern Cape	40.3
Free State	21.2
Gauteng	623.0
KwaZulu-Natal	114.5
Limpopo	44.2
Mpumalanga	47.8
North West	10.4
Northern Cape	8.6
Western Cape	40.2

<sup>10</sup> Statistics South Africa: Mid-year population estimates 2011

Based on the estimated Statistics South Africa's migration stream results, Gauteng (440 562) and the Western Cape (149 538) were the only two provinces which were receiving migrants during the 2001 – 2006 assessment period. This pattern remained largely unchanged in the 2006 – 2011 assessment period with the exception of the inclusion of KwaZulu-Natal which received 1422 migrants during this period. These provinces contain five of the eight metropolitan areas in South Africa<sup>11</sup> which would tend indicate that there is an increasing tendency toward urbanisation. However, the results do demonstrate a slight decline in the rate of migration when the two assessment periods are compared.

The highest rate of out migration<sup>12</sup> is occurring from of the two provinces which contain large numbers of poor rural households living within the communal land areas. Urbanisation occurs through a system of networks with the informal settlements being the key reception areas within the metros.

In addition, while out migration may be occurring, land within the communal land area would be retained by the migrant through household or family structures. Hence, the increase in pressure in the urban areas is not mediated by a decrease in land pressure in the rural areas.

**Table 6: Estimated provincial migration streams, 2001 - 2006<sup>13</sup>**

	Provinces in 2006										Out-migration	In-migration	Net migration
	EC	FS	GP	KZN	LP	MP	NC	NW	WC				
EC		19329	110583	69996	7695	11421	7933	20946	135071		379974	137298	-242676
FS	12054		69822	10857	5411	7846	7793	20370	13176		147329	101589	-45740
GP	46774	32118		73869	54810	44267	9161	56676	58288		375963	816525	440562
KZN	21541	9518	121040		7953	20292	2480	7822	24219		214865	204691	-10174
LP	3387	4859	211279	6262		36862	2081	18690	4865		288285	120848	-167437
MP	4762	7152	107996	21611	26157		1846	9383	5664		184571	132689	-51882
NC	4541	9951	15651	2554	2500	1926		14365	23877		75365	54075	-21290
NW	5710	12064	139097	6850	12909	6120	12582		7915		203247	152346	-50901
WC	38529	6598	41057	12692	3413	3955	13199	4094			123537	273075	149538

**Table 7: Estimated provincial migration streams, 2006 -2011<sup>14</sup>**

	Provinces in 2011										Out-migration	In-migration	Net migration
	EC	FS	GP	KZN	LP	MP	NC	NW	WC				
EC		14178	83012	76056	9221	11535	3358	28139	104215		329714	114899	-214815
FS	7178		54098	5574	9230	6021	4900	22541	9098		118640	92748	-25892
GP	32925	32325		58943	34742	42729	7904	49544	48951		308063	675139	367076
KZN	18791	8678	118568		6364	17340	1835	7941	17416		196933	198355	1422
LP	3462	5295	166621	5512		26462	821	25596	4776		238545	96117	-142428
MP	6433	3931	99764	15327	16938		5214	11521	5777		164905	120746	-44159
NC	11375	6795	11549	1917	2826	2479		10703	12941		60585	42993	-17592
NW	4836	15623	101430	21830	12306	10716	9402		3319		179462	160294	-19168
WC	29899	5923	40097	13196	4490	3464	9559	4309			110937	206493	95556

Based on the 2009 World Bank indicator results, the average life expectancy was 52 years which is only marginally lower than the Statistics South Africa estimate of 55 years. The

<sup>11</sup> Gauteng contains the Johannesburg, Tshwane and Ekurhuleni metros, the Western Cape, the Cape Town Metro and the KwaZulu-Natal, the eThekweni Metro.

<sup>12</sup> Out migration refers to those people living the province to take up residence elsewhere

<sup>13</sup> Statistics South Africa: Mid-year population estimates 2011

<sup>14</sup> Statistics South Africa: Mid-year population estimates 2011

latter result has improved to approximately 57 years in 2011. In 2009, the estimated HIV prevalence rate ranges from 16.4% to 18% for the age cohort 15-49. In 2011, there are an estimated 2 million AIDS orphans. The University of Cape Town's Childrens Institute noted in a recent report that "an analysis of the General Household Survey 2008 indicates that there were 100,000 children living in a total of 56,000 child-only households across South Africa at the time of the survey. This is equal to 0.5% of all children (0 – 17-year olds) and to 0.4% of all households in the country. The proportion of children living in child-only households relative to those living in households where adults are resident is therefore small<sup>15</sup>". These matters must be considered when revising the tenure system.

Based on the Statistics SA Community Survey results in 2007, approximately 12 million persons received a social grant from National Government.

**Table 8: Key social indicators**

Social Indicator	World Bank Development Indicators <sup>16</sup>	Statistics South Africa
Life expectancy at birth, total (years) (2009)	52	55.5 <sup>17</sup>
Literacy rate, youth female (% of females ages 15-24) (2007)	98%	
Prevalence of HIV, total (% of population ages 15-49) (2009)	18%	16.4%
Aids orphans		2.01 million <sup>18</sup>
Number of persons receiving social grants		11.8 million <sup>19</sup>

In 2009, South Africa had a Gross Domestic Product of USD285 billion with a Gross National Income of USD284 billion. As is demonstrated in Figure 3, wide variations are found between the provinces for the contribution to the national gross value add (GVA) results. Approximately, 37% of the GVA is generated in the Gauteng province followed the Western Cape with a 16% contribution. The Eastern Cape and Limpopo provinces which contain high concentrations of poor rural communities contribute 6.5% and 4.3% respectively to the national GVA.

**Table 9: Key economic indicators<sup>20</sup>**

Economic Indicators	
GDP (current US\$) (billions) (2009)	285.37
GNI (current US\$) (billions) (2009)	284.27
GNI per capita, Atlas method (current US\$) (2009)	5760
Foreign direct investment, net inflows (% of GDP) (2009)	2
Time required to start a business (days) (2010)	22

<sup>15</sup> Source: [http://www.childrencount.ci.org.za/uploads/factsheet\\_17.pdf](http://www.childrencount.ci.org.za/uploads/factsheet_17.pdf)

<sup>16</sup> Source: <http://data.worldbank.org>

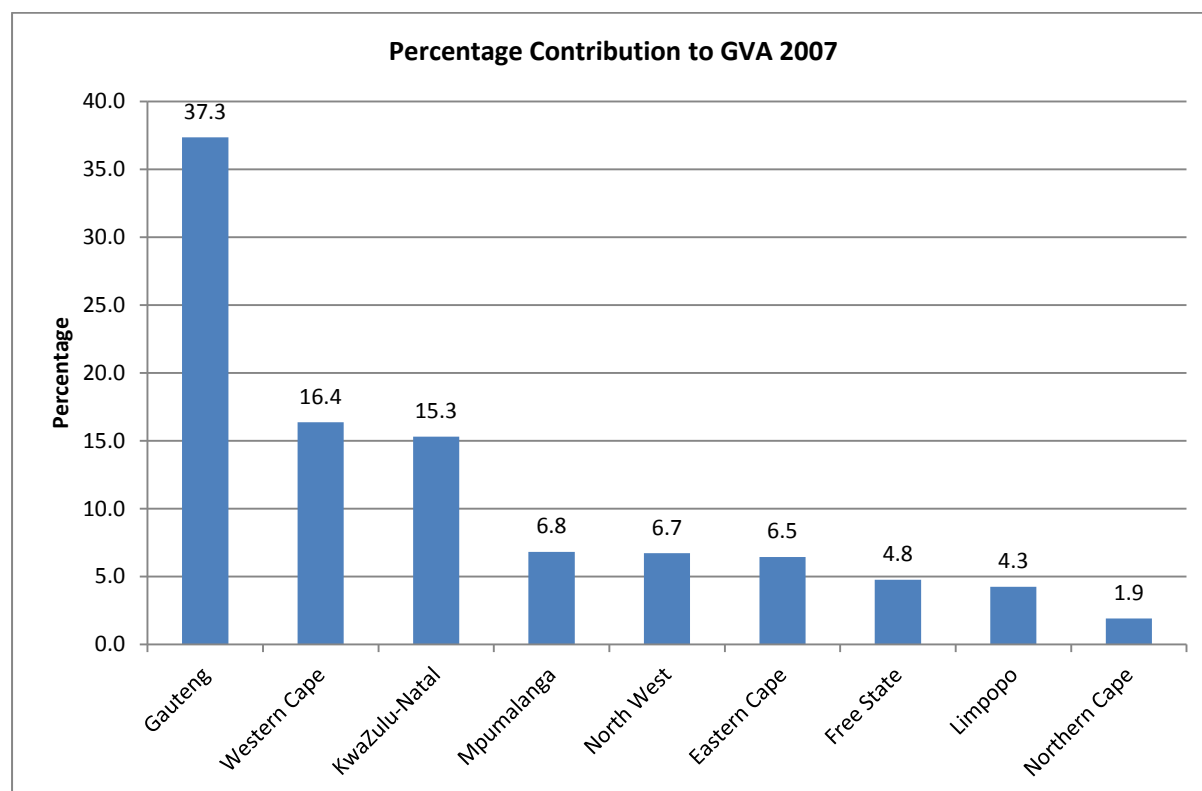
<sup>17</sup> Statistics South Africa: Mid-year population estimates 2011

<sup>18</sup> Statistics South Africa: Mid-year population estimates 2011

<sup>19</sup> Source: Statistics South Africa, Community Survey 2007

<sup>20</sup> Source: <http://data.worldbank.org>



**Figure 4: Percentage contribution to National GVA by province<sup>21</sup>**

## 2.2 LAND ISSUES

Historically, land use and occupation in South Africa is skewed due to 300 years of colonial and apartheid land segregation. Indigenous South Africans (Africans) were substantially denied tenure rights. Many resided on land set aside and held by parastatal trusts, commonly referred to as communal or tribal land. This legacy has persisted into the democratic (post 1994) era in South Africa, with government yet to adopt appropriate tenure reform legislation. Despite this shortfall, communal land is managed and administered by **traditional leaders** in accordance with the tenets of customary law.

There are, however, limitations to the usefulness of the statistics in Table 1 above. Registered ownership rights still reflect the skewed ownership of land in South African in favour of the white population. This phenomenon is a result of the systematic recognition of white-owned immovable property via the Registry historically, amounting to compulsory registration of ownership; as opposed to black South Africans who only acquired access to the registry<sup>22</sup> as of right in the past two decades. These latter are therefore sporadic processes, such as title on demand by new middle class home-owners, or project/community-wide titling of subsidized housing projects.

<sup>21</sup> Source: CSIR Built Environment 2007

<sup>22</sup> A very small minority of black South Africans had titles dating back to the nineteenth century, and these remained registered through the apartheid era, though most of the Deeds for properties that fell within homeland boundaries had been moved to the 'native registries'; and some communities with title outside of the reserves were forcibly removed or threatened with removal to reserves.

In the past South Africa was segmented by political boundaries that coincided with racial distinctions, the areas delineated for black Africans known as homelands or bantustans.

In urban areas similar political segmentation resulted from the Group Areas Act, No 41 of 1950 where White, Coloured and Indian areas were delineated, as well as black townships (called ‘locations’), which were, however, regarded as impermanent during apartheid, with resulting insecure tenure. The legacies of this extreme spatial and social engineering are proving difficult to turn around despite the repeal of racially discriminatory land legislation.

Rural land falling within former homeland boundaries is administratively zoned under ‘traditional councils’ and most of this land is unsurveyed and off-register, i.e. individual property falls outside the formal cadastre, under various forms of so-called communal tenure — in reality various legacies of administratively dictated tenure — with allocated plots and common rangelands registered in the name of the state. Rural areas formerly outside of the homelands consisted of over three quarters of the surface area of the country. The land was mostly owned by whites, was surveyed into farms and titled under freehold. Land redistribution of former white-owned rural land has been remarkably slow, where it is happening it is following the route of title under mainly corporate tenures.

Urban areas consisted of surveyed properties under freehold title in white suburbs; surveyed plots in coloured and Indian areas under various titles; and black townships unsurveyed, much of which was informal settlement called ‘squatter areas’.

Black townships that straddled homelands and ‘white’ South African towns were politically incorporated into homelands, much of which was surveyed under various titles (such as ‘Deeds of Grant’) and much of which was informally settled. Though these spatial-political distinctions no longer exist, urban areas remain highly segmented by race and class, with slow formalisation on the edges of the formal suburbs. Informal areas are regarded as ‘pending formalisation’ areas. That means land and housing falling under subsidised housing projects must be incorporated into the cadastre — full survey and title under freehold. The challenge associated with this objective has meant that large numbers of the urban poor remain in a ‘pending’ state with no positive tenure status, though rights are minimally protected by anti-eviction legislation (Interim Protection of Land Rights Act, No 31 of 1996 Prevention of Illegal Eviction from and Unlawful Occupation of Land, Act no 108 of 1996, and others).

As outlined in the Expert Investigator’s report on LGAF Land Tenure Typology Background Paper, South Africa is characterised by three forms of land tenure, namely

- Established tenure
- Evolving tenure
- Emerging tenure

Established tenure is registered and secure whereas emerging tenure is not registered and is insecure. The broad characteristics of each form of tenure are outlined in the table below.

The commentary on evolving tenure and emerging tenure points to the need for South Africa to revise its entire land tenure system to reflect the real changes emerging since 1994 which are becoming increasingly apparent.

**Table 10: Summary Tenure Typology<sup>23</sup>**

Tenure Sub-Categories	Legal Recognition	Registered or Recorded	Comments
<b>ESTABLISHED TENURE PUBLIC AND PRIVATE OWNERSHIP/USE</b>			
Unsurveyed state land	Common law recognition	Not recorded – identified by omission or gap in cadastre.	All land not shown on a diagram and not registered in the Deeds Registry under the common law vest in the state.
Freehold (full ownership)	Section 25(1) of the Constitution of the Republic of South Africa protects right to property, which includes land. Land Survey Act 8 of 1997 and Deeds Registries Act No 47 of 1937. Also common law rules.	Registered in Deeds registry and identified by diagram approved by Surveyor General	Full real rights with full range of entitlements. These can be allocated to others with the right at all times to ‘right of reversion’. Under land tenure reform legislation, certain categories of occupiers of another’s land are given rights to the land adverse to the registered owner. This intervention diminishes the ownership rights of a registered owner in favour of the occupier who acquires rights to the land adverse to the registered owner. To that extent, freehold ownership is not held to the exclusion of all others.
Lease	Common law, with provision, introduced by statute, to register long leases to protect successor in title or creditors of the lessor without knowledge of the lease.	Formalities in respect of Leases of Land Act 18 of 1969 to register leases or 10 years or longer.	Well-developed legal framework
Servitude <sup>24</sup>	Common law, Land Survey Act 8 of 1997 and Deeds Registries Act No 47 of 1937.	Contract between parties. Real rights where servitude is registered against title to land in favour of other land without reference to ownership.  Personal right if in favour of an individual.	Used extensively to secure right to lay services, e.g. water, electricity, rights of way etc, and generally to exercise rights over another’s land. Useful where access to land required without conferring full ownership. Also usufruct, habitatio and usus – right to use land and enjoy benefits (fruits)
Sectional Title <sup>25</sup>	Sectional Titles Act No 95 of 1986	Registration of sectional unit (within a building or complex) and share in common property	Used extensively for urban residential purposes, managed by body corporate representative of sectional unit owners.
<b>EVOLVING TENURE COMMUNAL TENURE AND OTHER PEOPLE’S LAND</b>			
Rights to land under	Section 211 of the National Constitution;	Land on which this form of tenure is exercised usually registered in the name of the Minister of Rural Development and Land Reform, the	This tenure arrangement is applied by traditional communities throughout South Africa on land generally vested in the Minister of Rural Development and Land Reform or, in KwaZulu-Natal, in the

<sup>23</sup> Modified from the Land Tenure Typology, LGAF South Africa prepared by Peter Rutsch

<sup>24</sup> See Definitions attached

<sup>25</sup> Share Blocks do still exist in South Africa and are governed by the Share Blocks Control Act 1980. However, it does not provide tenure as the building is owned by the company and the shareholders have rights vis a viz the company.

Tenure Sub-Categories	Legal Recognition	Registered or Recorded	Comments
<p>customary (indigenous) law</p>	<p>Contractual / statutory relationship between registered landowner and holder of rights; Interim Protection of Informal Land Rights Act No 31 of 1996 (IPLRA).</p>	<p>Ingonyama Trust (in KwaZulu-Natal) or some other organ of state. Occupiers on such land have no registered rights but hold multifaceted vested rights based in customary law and practice enforceable against the registered owner which are usually recorded in the collective mind of the community where the land is situated, according to the current customary law tenets of that community. A person who holds an informal right to land as defined in IPLRA may not be deprived of that right save with his or her consent or by expropriation if required in the public interest or for a public purpose (in which compensation is payable). If deprivation is consequent on a community decision that decision must be supported by a majority of those who hold such rights in the area concerned, subject to payment also of compensation.</p>	<p>Ingonyama Trust. Since commencement of the colonial era, the land was annexed to the state or quasi state entity and the indigenous tenure system has been applied on such land under legal circumstances requiring the registered owner to permit such occupation. This may be a statutory trust or condition providing that the land must be used for the benefit of the people occupying it. The indigenous tenure system was distorted and to an extent suspended during the colonial and apartheid era but under the 1996 Constitution is deemed to be part of the common law and fully enforceable. It is an evolving, dynamic system. Note must be taken that the indigenous law must be interpreted without insidious influence of received common law or foreign legal systems. Note must also be taken of the social dimension which confers multi-layered rights to the use and occupation of land on various members of a household depending on their status and social position within the family as well as between such households as components of a community, traditional or otherwise.</p> <p>Non-members obtain leases or Permissions to Occupy (PTO) from the land owner with the consent of the traditional leadership. (PTOs however are becoming obsolete but existing PTOs may be upgraded to freehold tenure in terms of the Upgrading of Land Tenure Rights Act No 112 of 1991). Section 25(6) of the National Constitution entitles all to tenure which is legally secure, Parliament must adopt legislation to do just that.</p>
<p>Occupation Rights adverse to the Registered Owner</p>	<p>Extension of Security of Tenure Act No 62 of 1997, Land Reform (Labour Tenants) Act No 3 of 1996 and Interim Protection of Informal Land Rights Act No 31 of 1996</p>	<p>These Acts confer rights on persons occupying land registered in the name of another person with consent, express or tacit. These rights are personal but can be converted to real rights in certain circumstances, i.e. by formalizing occupation rights.</p>	<p>These Acts are part of land tenure reform in response to section 25(6) of the National Constitution stating right of all South Africans to tenure to land which is legally secure. South Africa does not have any policy, let alone a clear cut policy, on the place of occupiers of land owned by others, including, critically, farm workers. Historically, people, particularly black people, are scattered over the myriad of farms and other land parcels all over the country. Should they be herded into agri- villages, should they be co-owners of the land they occupy, should they migrate to urban centres? How will municipal services such as water electricity, transport etc be extended to them? Current generations of these occupiers are often unsophisticated farm occupiers but their descendants will have acquired education, been exposed to new ideas and will have developed expectations that must be met. The obvious tension that will inform such policy is the need for food security, i.e. that agriculturally productive land must produce agricultural surpluses to feed the population. But within that requirement, is it necessary to have large discreet land holdings or can one have smaller units, locally recorded and registered without the complexity of freehold tenure but managed crop-wise collectively</p>

Tenure Sub-Categories	Legal Recognition	Registered or Recorded	Comments
Communal land	Communal Property Association Act No 28 of 1996, common law linked to Trust Property Control Act No 57 of 1988	Land registered in the name of an entity owned by the members of a 'community', e.g. a Communal Property Association (CPA) or a trust established under the common law but regulated by the Trust Property Control Act, [Note that it is also possible for land to be registered in the name of a company, be it a public company with a large number of shareholders, a private company with a limited number of shareholders or non-profit company, as well as a close corporation, a co-operative or a partnership. In most cases where these entities are used, there is an underlying commercial purpose or a closely related family purpose. That is not to say that they cannot be used for a land reform related purpose, or a purpose for the benefit of the poor. But that is not common.]	under state managed circumstances?  'Communities', other than communities bound together by clan affiliation, are defined under various laws mainly related to land reform programmes. 'Communities' are also created where land is transferred to a community of farm workers who happen to be residing on a farm at a given point in time. Experience appears to indicate that the level of success where land is transferred to such communities through either a CPA or trust is minimal, depending on how one defines 'success'. Used solely for residential and subsistence farming purposes, reasonable success may be expected. That places minimal strain on the collective decision making requirements of the entity. However, if used for income generating commercial purposes, success is dependent on the degree to which the members of the community are able to muster or buy in the sophistication, the knowledge, the experience and the commitment to engage in such activity. It is also dependent on the extent to which the members are a community bound by a commitment to work together for a common aim. Such bonding is, experience indicates, in short supply. South Africa's land tenure system and its laws are designed for a first world reasonable income user. It is not designed to cope with the emerging low to middle income individual and does not provide ready devices to house such persons, community or otherwise, in affordable, understandable and acceptable format. There is a need for debate on adequate land tenure models, not necessarily predicated on ownership as described elsewhere in this matrix, which are affordable, understandable and above all acceptable to the majority of people in this country. A proper investigation, backed by empirical research is also needed to decide to what extent South Africans are, indeed, married to the notion of communal occupation of land, particularly in the rural context, and precisely what is meant by communal occupation of land.

#### EMERGING TENURE INFORMAL URBAN SETTLEMENTS

Usually located in urban or peri-urban settings, initially totally insecure informal settlements leading by administrative action along a continuum to freehold tenure or a	Sections 25 (Land Rights) and 26 (Right to Housing) of the Bill of Rights contained in the National Constitution; Constitutional Court judgments (e.g. Grootboom, Modderklip); Administrative law; common law (esp contract); Land Survey Act; Deeds Registries Act; provincial and municipal planning	Initially – administrative recognition by municipality concerned.  Subsequently (1) – contractual right awarded to informal occupiers to occupy identified portion of unsurveyed land. Subsequently (2) – informal survey of sites allocated to informal occupiers with some services.  Subsequently (3) – formal national housing programme development with freehold rights.	South Africa has a massive backlog in housing and many citizens live in informal settlements. In general, the location of such informal settlements, from the perspective of the ownership of the occupied land, geotechnical aspects, municipal service provision, proximity to amenities and the like determine whether the settlements are upgraded in situ or at another location. The Bill of Rights contained in the Constitution gives everyone a right to housing which the Constitutional Court has interpreted to say that a municipality must in good faith adopt plans and programmes to house all persons in its area, especially the poor residing in informal settlements. That imperative imposes on municipalities the duty to seek innovative ways and means to respond to such informal settlements and they do so in various ways. Studies by, for example, Urban LandMark
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Tenure Sub-Categories	Legal Recognition	Registered or Recorded	Comments
suitable stop on that continuum.	and development legislation and zonings; municipal service laws; Prevention of Illegal Evictions from and Unlawful Occupation of Land Act No 19 of 1998.		(Incrementally Securing Tenure (2010)) indicate an evolutionary process whereby such settlements develop on a continuum which can, but need not necessarily, culminate in freehold tenure but provide adequate shelter, basic services and a form of tenure security. Such studies suggest an incremental process of securing tenure rights, utilizing special use zones, administrative processes to record rights, manage and identify individual household sites. Depending on need, demand or circumstances such a process can be stalled at any stage, temporarily or permanently, or lead to ultimate township establishment and individual freehold tenure. Empirical evidence suggests that holders of formal land tenure rights in low income housing projects ignore land survey and deeds registration requirements when transacting land in an emerging market and do so informally, witnessed by prominent community members, in accordance with traditional or acceptable practice. Systems and processes need to be adopted which recognize that phenomenon and adapt the laws to include such persons. Transferable rights to a particular informal site, demarcated by GPS or similar device, locally administered by accessible administrators without undue formality and bureaucracy should be introduced. Critical criteria could include the ability to transfer rights by inheritance or sale, to defend rights to the site against others, to identify locations to which services can be provided and where municipal land taxes can be recovered (if any).

## 4. LAND GOVERNANCE ASSESSMENT

### 4.1 LEGAL AND INSTITUTIONAL FRAMEWORK

#### 4.1.1 Recognition and enforcement of rights<sup>26</sup>

##### *Rural Land Rights*

Approximately 16 to 19 million South Africans live within the rural areas of which more than 90% are located on communal land. While the Constitution of South Africa recognises traditional rights and traditional tenure, in South Africa there is as yet no legal mechanism to register communal or indigenous land. Rather this land is held by the State in trust for the communities. In 2004 Parliament passed the Communal Land Rights Act, Act No.11 of 2004 (CLRA), in response to a constitutional requirement that a new law be passed to secure the

<sup>26</sup> This sub section is based on LGI-1, LGI-2 and LGI-3

land tenure rights of black South Africans<sup>27</sup>. The purpose of this legislation was “to provide for legal security of tenure by transferring communal land, including KwaZulu-Natal Ingonyama land, to communities, or by awarding comparable redress; to provide for the conduct of a land rights enquiry to determine the transition from old order rights to new order rights; to provide for the democratic administration of communal land by communities; to provide for Land Rights Boards; to provide for the co-operative performance of municipal functions on communal land” (CLRA). However, after a legal challenge the Constitutional Court declared the Act unconstitutional and it so was never implemented. The aborted attempt in the form of the Communal Land Rights Act No 11 of 2004 is an example of the difficulties inherent in codifying the unwritten customary law.

There are temporary laws in place for providing rural tenure rights within the communal land areas. The key legislation is the Interim Protection of Informal Land Rights Act, No 31 of 1996 (IPILRA) which ensures that people may not be removed from their land without their consent. In the absence of the Communal Land Rights Act, the provisions of IPILRA are renewed annually by the Minister of Rural Development and Land Reform.

Currently the South African legal framework recognises procedural rights such as the guarantee against dispossession, eviction and also makes provision for compensation. Historically, a system of “Permission to Occupy (PTO) permits” was issued as claims registered but this system is in most instances, no longer functional. Within the restitution process and in relation to the undocumented land rights, oral evidence is often sufficient to guarantee “tenure security” within many rural communities. The Constitution does offer protection to women headed households within the communal land system. Practices to eliminate gender discrimination on the ground are changing slowly. More recent, improvements have been more noticeable. Notwithstanding the local practices, a coherent legal framework is urgently required to protect the rights of vulnerable groups within the rural areas.

The Department of Rural Development and Land Reform (DRDLR) has launched a programme to survey all the *outer* boundaries of the Communal or tribal authority areas, in preparation for eventual transfer to the communities. The surveying is approximately 75% completed but no transfers can take place until the necessary legal provisions have been established.

In the so called commercial farming areas or the previous “white owned rural areas”, the percentage of individual properties which are surveyed but not registered is less than 1% of the total. However, the key concern in such areas is the plight of the farm dwellers. Laws to extend rights to such persons and to protect them against arbitrary eviction and deprivation of rights are ineffective and under review. Consequently, farm evictions are common.

### ***Urban Land Rights***

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<sup>27</sup> Cousins, Ben: “Potentials and pitfalls of ‘communal’ land tenure reform: experience in Africa and Implications for South Africa”. Paper for World Bank conference on ‘Land Governance in support of the MDGs responding to new challenges’ Washington DC, USA, 9-10 March 2009 (available on PLAAS website).

Within the formal urban areas, residential properties in South Africa can be divided into the following five categories:

- Low income housing: less than 80 m<sup>2</sup> (less than R600 000 (USD89418)<sup>28</sup>)<sup>29</sup>
- Small housing: 80 -140 m<sup>2</sup> (average price around R766,300 (USD114 202) in April 2011)
- Medium-sized housing: 141 - 220 m<sup>2</sup> (average price around R972,900 (USD144 992) in April 2011)
- Large housing: 221 – 400 m<sup>2</sup> (average price around R1,489,700(USD222 011) in April 2011)<sup>30</sup>
- Luxury (value more than R2 million (USD298 062)).

A typical subsidised or RDP house<sup>31</sup> is a simple two or three-roomed free-standing 30-45 m<sup>2</sup> cement house on a 200-250 m<sup>2</sup> plot. (See Annex 3 for the calculation of property value and costs)

Traditionally in urban areas, tenure is secured through a title deed, lease or deed of grant. Most of the urban poor fall outside the conventional property market, and many continue to remain outside of the subsidised land and housing developments being designed for the low-income population, despite the high rates of delivery by the State.

In the South African context, the registration status of all the properties does not necessarily reflect the rights of the people residing on them. Large tracts of registered land are for example occupied by informal settlements. Such settlements proliferate in or around most urban centres and in particular, within the major metropolitan areas of Johannesburg, Cape Town and eThekweni. In 2010 there were approximately 26 800 000 million people living in urban areas of which 4 900 000 (18% of the urban population) were thought to be residing in informal settlements. In such settlements, there is no access to formal title. In many cases individuals, families and communities have been residing on the land in question for extended periods and enjoy rights in terms of the Constitution and laws of South Africa, in spite of the fact that those rights are *not formally registered or noted*. Notwithstanding the legal framework, security of occupation is often tenuous. Access and retention of these informal or undocumented rights will in many instances require the paying of an informal fee. It was suggested by one of the panels that South Africa has indeed a long history of informal tenure and the associated transaction fees.

Urban Landmark has been advocating for an incremental tenure approach. This would commence with the application of benign zoning provisions recognizing the existence of informal settlers and incrementally extending tenure rights to them, initially by administrative decision progressing to legally secure tenure, including ultimately freehold tenure.

<sup>28</sup> Average Rand/USD exchange rate for April 2011 was R6.71 to 1USD

<sup>29</sup> The current threshold for waiving of Transfer Duty is property values R600,000 and below, to lower the cost of property purchase by low-income earners.

<sup>30</sup> [www.realestateweb.co.za](http://www.realestateweb.co.za)

<sup>31</sup> RDP house, acronym for Reconstruction and Development Programme, no longer in place but the acronym has stuck



The 1996 Constitution entitles all persons to adequate shelter and the Constitutional Court has interpreted that to require municipalities to progressively ensure compliance. The Housing Act No 107 of 1997 vests direct responsibility for this on this sphere of government. Municipalities are responsible for development and the provision of services at the local level including the addressing of basic needs within the informal settlements.

An emerging challenge within in the urban areas is the poor rate at which the formal registration of the government subsidised housing is taking place. This is a widely acknowledged problem in South Africa. In some instances, households in housing schemes completed more than 3 to 5 years ago are yet to receive proof of formal registration. The following are some of the common reasons:

- **Delays along the route of opening of a township register, which is a prerequisite to formalisation and registration.** The township establishment process can involve onerous administrative and bureaucratic processes, with delays at every turn. Various provincial land use planning laws allow for township establishment, as well as the Less Formal Township Establishment Act, 113 of 1991. The Development Facilitation Act, No 67 of 1995 (DFA) involves Tribunals to determine land use changes, and allows for fast-track development applications for land use changes and township establishment, rezonings, subdivision, etc. This Act is not used uniformly in all provinces (it was never adopted in the Western Cape), but is currently reported by a leading planning firm<sup>32</sup> (who work also in land reform) to be the most effective vehicle for land development in the Eastern Cape where it is reportedly facilitating speedier land and housing delivery, with blockages and hold-ups less frequent than a decade ago.

Where the conventional land use planning processes are used (approvals by land use planning boards in terms of land use planning legislation), the main blockages encountered are delays in getting approvals from the numerous line functions in local government that must each approve the relevant section of the application. These delays are more easily avoided if the DFA is used.

Reports of lapsing of township establishment approvals due to failure on part of a line function to implement or pay for the lay-out planning, in which case registration of owners cannot take place. Unless the application has been approved in terms of the Less Formal Township Establishment Act, the registration of titles must take place within 5 years of township approval.

- **Delays encountered in upgrading of land rights in terms of the Upgrading of Land Tenure Rights Act, No 112 of 1991.** The Upgrading of Title involves the issuing of title in terms of a ‘Triple D’ (Form DDD) application, which results in a ‘Deed of Transfer’ without a purchase price, the property recognized as under the de facto ownership of the new registered owners. Extensive delays are encountered in

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<sup>32</sup> Umhlaba Group, East London.

upgrading existing settlements to new standards in order to upgrade the rights. In the less formal townships, less stringent building, land use and lay-out standards prevailed in addition to the presence of so-called ‘lesser rights’. The new formal standards related to: (a) Land Use Planning legislation and by-laws including zoning schemes; (b) the requirements of the Surveyor General in terms of the spatial requirements; (c) the requirements of freehold under the Deeds Registries Act. The lay-out planning and land tenure has to be reconciled with each other, and with the new system. The upgrade process in its entirety is costly and takes a great deal of time, and involves a professional learning curve. It requires close co-operation of a number of government officials or line functions, as well as between surveyors, planners and conveyancers. Surveyors and conveyancers, for example have had to work together to identify underlying land parcels and to consolidate new urban land parcels. There were significant challenges in reconciling present occupants with the official land registers, which had been administered by apartheid-created black township urban authorities; and to identify the owners to be registered from amongst extended family members. Under apartheid, townships commonly known as R293 towns<sup>33</sup> were incorporated in neighbouring bantustans and were therefore subject to different sets of legislation and regulation. The conversions of the rights within such settlements could take anything up to, and beyond, ten years given the stringent standards associated with formalising both land use and land tenure in South Africa.

- **Delays resulting from the cross-linkages of property transfers to payment of tax to the state in the form of Transfer duty.** Section 12 of the Transfer Duty Act No 40 of 1949 forbids the Deeds Office from registering immovable property unless he receives proof that transfer duty has been paid. Practically, conveyancers lodge a Transfer Duty receipt with the transfer documents in the Deeds Office to prove that the fee has been paid. The general principle of ‘No transfer duty, no transfer’ applies in South Africa. According to a senior conveyancer, B. Strauss, the South African Revenue Service “is increasingly using the transfer duty process to enforce compliance in respect of other taxes. This is causing significant delays in the registration of transfers”.

It should be noted that in South Africa is one of very few countries, if not the only one, where properties can be subdivided, but not immediately registered. One of the reasons for this is that an owner has his or her property subdivided for eventual transfer to heirs, but the registration then only takes place once the owner is deceased. These are very few and definitely less than 1% of the total number of properties.

### ***Group rights***

Rural groups are either culturally defined, as in the case of traditional communities, or voluntarily constituted. Traditional communities obtain recognition under the Traditional Leadership and Governance Framework Act No 41 of 2003 along with the complimentary

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<sup>33</sup> R293 towns should not be confused with townships such as Soweto, Alexandra and many many more which were part of the Apartheid city structure and were retained within the pre1994 Republic of South Africa

provincial legislation. The rules, practices and procedures are recorded in the collective mind of the community concerned and gain recognition under the 1996 Constitution. The Constitutional Court recognizes such rules etc as part of South Africa's common law and identifies the specific law by oral evidence on current implementation compatible with the provisions of the Bill of Rights in the 1996 Constitution.

Non-traditional communities, especially land reform beneficiaries to whom land is transferred, must establish legal entities, often Common Law Trusts or Communal Property Associations under the Communal Property Associations Act No 28 of 1996.

Several laws contain definitions of groups or communities to whom the legislation applies. Groups that do not conform to such definitions will not be recognized for the purposes of the applicable legislation.

In South Africa, the formal recognition of group rights is not the key concern but rather that the State is in default of the Communal Property Associations Act No 28 of 1996, having failed to undertake the registration process. In addition, the recognition of rights through the Interim Protection of Informal Land Rights Act is also not being implemented due to the lack of regulations. However, more recently, the registration of group rights have taken place on Ingonyama Trust Land which is located in KwaZulu-Natal.

Communal Property Associations Act No 28 of 1996 may be applied in urban informal settlement areas in order to gain group rights. However, groups in an urban area are not the same as those found in the rural areas located on communal land. There is a tendency for "groups" in urban areas to fight for individual tenure rights and not group rights.

Persons occupying land comprising an informal settlement will either be evicted by the land owner or be recognized by the municipality responsible for its administration and development. Municipalities have undertaken a process of acknowledging informal settlements through a number of mechanisms such as enumeration of dwellings and the provision of basic water and sanitation services. In such cases, there is administrative rather than legal recognition of such communities or "groups". Regardless of who owns the land, once the recognition has taken place by the municipality, while there is no formal tenure right, there is a "perceived" group right to the land by the community.

If the land occupied is suitable for upgrading, that process may begin in situ. If it is not for any good reason such as the informal settlement is within a flood plain or located on dolomitic land, alternative land is found by the municipality and the community moved. There may be a number of years between the municipality acknowledging the settlement and its inappropriate location and the relocation to an alternative site. In some cases, households are relocated into RDP houses for which individual title is obtained and in others, simply moved to a more suitable portion of land with no title given. In such instances, the municipality would continue to administer the community as a "group".

The panellists noted that some of the more sophisticated legislation in South Africa pertains to the management of condominiums such as the Sectional Titles Act, No 95 of 1986, the Sectional Titles Amendment Act, No. 6 of 2006 and the Co-operatives Act, No 14 of 2005.

### *Women and Land Rights*

The table below figures demonstrate that more women than men ‘own’ property according to the legal definition of ‘ownership’ within the common law paradigm denoting property formally registered in an owner’s name. Women owners represent 52,21% of the registered owners of land in South Africa.

**Table 11: Land Ownership patterns by Gender**

Gender	Number of Properties	%
Female	2914357	52.21
Male	2667676	47.79
TOTAL	5582033	100.00
Statistics provided by Lightstone <sup>34</sup>		

The figures in the table above represent mainly white registered ownership and emerging black (coloured, Indian and African) middle class registered ownership. In this social category, legal barriers to female ownership are negligible. The statistics do not, however, reflect *de facto* social barriers to ownership nor distribution of land ownership if one includes customary and protective land rights.

Women married in community of property (ICP) are automatically registered as joint owners, the number increasing due to recent removal of barriers under customary law and intestate succession. The following laws and judgements, among others, have impacted on the marriage regime and property: Recognition of Customary Marriages Act, No 120 of 1998; *Gumede v President of the Republic of South Africa and Others* (CCT 50/08) [2008] ZACC 23 (8 December 2008); *Bhe and Others v The Magistrate, Khayelitsha and Others*; *Shibi v Sithole and others*; *South African Human Rights Commission and Another v President of the Republic of South Africa*, 2005 (1) SA 563 (CC); 2005 (1) BCLR 1 (CC). At the time of writing it has not been possible to verify what percentage of women are married under ICP arrangements.

It is common practice among higher income families that own more than one property for the husband and wife to divide the ownership of properties between them, particularly as there are income tax implications on rental and tax implications on disposal of property. South Africa has a capital gains tax on property, but it is not clear whether this tax affects the

<sup>34</sup> Lightstone is a private company operating a live interface with the Deeds Registry. <http://www.Lightstone.co.za/> Hayley Ivins of Lightstone arranged for the analysis, and for the information to be made available to this study. The method of computation used by Lightstone was to capture male and female private ownership represented in Deeds records in the Deeds Registry electronic database. The electronic database does not yet contain historic information<sup>34</sup>, but information on transactions since the introduction of the electronic system in 1993. Lightstone was able to disaggregate the data on the basis of gender on account of the different codes attributed to men and women on South African Identity numbers (IDs). Lightstone operates a live interface with the South African Deeds Registry. The electronic system the company operates enables subscribers to retrieve the latest Deeds Office property information.

gender distribution of ownership within families.<sup>35</sup> In addition, intestate succession rules favour inheritance by the spouse and all siblings, rather than primogeniture, now increasingly being enforced in customary litigation.

An emerging trend in South Africa is that women with capital are actively engaging in the property market.

Women's land rights are recognized in law, viz. the Constitution, statute, common law and increasingly, the 'living customary law'. With regard to title registration specifically, therefore, there are no legal obstacles to registering title in the name of women in South Africa. Policies in both the land and housing sectors explicitly discourage gender discrimination in land ownership. In practice, the situation is extremely complex, for a range of reasons. The practical complexity results from a number of historical legacies of gender discrimination, which carry over into current practices in both customary contexts and new formal housing projects. Consequently, it could be said that 'registered rights' are a weak (or misleading) indicator of land governance in South Africa at this stage in our history.

In general, there would be higher rates of female ownership in urban areas. Black female ownership is likely to rank much higher for urban than rural areas for the simple reason that most rural black land rights are off-register rights. Dissecting rural and urban land by gender is enormously complicated in South Africa where there is great social and political variation, not only between rural and urban areas, but within rural and urban areas, and gender distribution of land ownership would be reflected in these differences. However a recent survey conducted by the Community Agency for Social Change (CASE) in three rural localities in South Africa, Msinga (Kwazulu-Natal), Keiskammahoek (Eastern Cape, former Ciskei) and Ramatlabama (North West Province, former Bophuthatswana) demonstrated an increase in customary land allocations to single women, in spite of 'traditional' barriers based on official customary law.<sup>36</sup>

#### **4.1.2 Restrictions on rights<sup>37</sup>**

##### ***Urban Areas***

Within the formal areas in South Africa's urban areas, the restrictions regarding land use, ownership and transferability are highly regulated. The key challenge lies with the enforcement of these regulations. In some instances, the regulators are choosing not to

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<sup>35</sup> Capital Gains Tax is a tax on the profit or gain you make when you sell or 'dispose of' an asset.

<sup>36</sup> Budlender, D. et al, Survey Report on 'Women, Land and Customary Law'. Community Agency for Social Enquiry (CASE). February 2011. <http://www.case.org.za/>. Case is continuing the 'Women and Land Rights' project to generate research findings through literature reviews, a survey and participatory research with rural women's organisations. This research will then be used to support litigation and advocacy, in particular around "living" customary law. This will be done through policy discussions and other engagements with policy makers, submissions and litigation to support women's claims for their rights, in terms of individual claims, struggles in particular areas, and in more national contestations, for example around the ongoing development of national legislation.

<sup>37</sup> This subsection is based on LGI 4

undertake enforcement and or the municipalities have insufficient capacity to undertake the extent of the responsibility required.

Large areas within our cities such as the informal settlements are not regulated with no formal mechanisms in place for facilitating the land markets. Currently, socially dominated markets and informally developed systems for managing land use and related aspects in informal settlements are not recognised by authorities. This would include the management and trading of backyard shacks in township areas.

**Table 12: Restrictions on land ownership - urban**

Restrictions on land ownership	Exists, but not enforced	Exist & enforced	Brief description of restriction and comments
Land transactions		✓	This would apply to the formal market only. Socially dominated markets <sup>38</sup> are not recognised
Land ownership		✓	
Owner type		✓	Formal market only
Use	✓		Most metropolitan areas are not able to cope with the level of enforcement required
Size of holding		✓	This would apply to the formal areas only. Size of plots within informal settlements would be agreed at the community level.
Price			Price is market related
Rent			Market related

### ***Rural areas***

It is difficult to adequately comment on the restrictions of land rights in rural areas due to the wide variations found within the rural settings in South Africa. While there are limited to no restrictions on owner type and price, there is an array of restrictions on land use relating to a vast range of legislation such as:

- Communal Land Rights Act, 11 of 1998
- National Water Act, No 36 of 1998
- National Environmental Management: Biodiversity Act, No 10 of 2004
- National Veld and Forest Fires Act, No 101 of 1998
- National Forest Act, No 30 of 1998
- National Environmental Management: Protected Areas Act, No 57 of 2003

The extent to which the above legislation is enforced depends on the again on the setting. While legislation does not distinguish between underlying systems of tenure it is very unlikely that enforcement takes place in communal areas. It should also be noted that the enforcement capacity within the rural areas is diminishing across all government spheres and sector departments.

<sup>38</sup> Socially dominated markets is increasingly being recognised as a term used in South Africa to reflect the market operations in all areas outside of the formal areas.

**Table 13: Restrictions on land ownership - rural**

Restrictions on land ownership	Non-existent	Exists, but not enforced	Exist & enforced	Brief description of restriction and comments
Land transactions	✓	✓		In commercial farms in the former RSA, land is held in freehold title and there are no restrictions. In the communal areas, there are restrictions in that people are not legally allowed to sell their Permission to Occupy certificates. However, in practice there is an informal market in which the PTOs are traded.
Land ownership		✓		Green Paper <sup>39</sup> proposes that the state will retain ownership of land. Current policy proposed in the Green Paper proposes restrictions on land ownership by foreigners. This is not enforced yet because it is not yet adopted government policy.
Owner type	✓			There are no restrictions imposed on South Africans. The Green Paper is likely to propose restrictions on foreign ownership.
Use	✓	✓		In the former RSA there are zoning schemes which are generally enforced. In commercial farming areas in the former homelands, there are restrictions (zoning), but not always enforced. In most communal areas in former homelands, there are no zoning schemes in place.
Size of holding			✓	In former RSA the subdivision of Agricultural Land Act is applicable and largely enforced. In communal areas, the size of holdings is controlled (predetermined and enforced) and administered by provincial Departments of Agriculture and in some cases by traditional leaders.
Price	✓			In all different situations, price is largely determined by market forces (between a willing buyer and willing seller). The land market is stunted in communal areas as sales are not permitted, although this does occur informally.
Rent	✓			Rental market regulated by market forces. The “informal” rental market in informal settlements are not regulated

#### 4.1.4 Participation and equity in land policies<sup>40</sup>

There is currently an acute policy vacuum with regard to rural land policy. Redistribution, restitution and tenure reform on private land have all suffered from problems in design, implementation, capacity and the shortage of funding. The South African land reform programme is widely seen as failing (Cousins 2010).

Tenure reform on communal land has been particularly controversial and politically sensitive. Despite tenure security being a constitutional imperative in the Bill of Rights, it is still without a law or programme following the striking down of the Communal Land Rights Act

<sup>39</sup> National Government is currently undertaken an extensive policy review process with the overall intention of changing legislation pertaining to rural land use and land policy. The Green Paper will be approved by Parliament and as such becomes the official policy statement by government.

<sup>40</sup> This subsection is based on LGI-6

(CLRA) in 2010<sup>41</sup>. The judgement of the Constitutional Court found that the powers given to Traditional Councils which included “the control over the occupation, use and administration of communal land,” were in fundamental breach of the South African Constitution.

Practitioners argue that there was greater transparency in the policy making process immediately post the first democratic elections in 1994 which has declined overtime. For example, the Department of Rural Development and Land Reform is currently preparing a “Green Paper” on rural development but the document and supporting processes are embargoed. Project experience is also demonstrating that increasingly, “lip service” is being made toward public participation rather than undertaking a meaningful and comprehensive process.

In relation to monitoring, the National Department of Rural Development and Land Reform mainly focuses on assessments linked to their existing strategic objectives which are reported upon in its Annual Report submitted to parliament for approval. There appears to be a disjuncture between strategic planning and the related reporting with the possible misrepresentation or overstating of results to improve the outcome being projected. In some cases, this has resulted in the reporting lacking the necessary credibility amongst communities and practitioners. However, the lack of reporting in some instances can be attributed to the current policy vacuum in rural development. It was suggested that in South Africa we are yet to find agreement on key issues such as a coherent vision in relation to agrarian reform. Too much of the public debate has been about the ‘speed’ of land reform and the meeting of unrealistic targets. There is no government policy statement which links poverty reduction to the type and value of land based livelihoods.

The current outcomes based approach adopted has resulted in the Department not adequately identifying for example, the failures within the land reform process. The monitoring of this programme has largely been through the use of narrow quantitative indicators such as the number of claims settled and hectares transferred. PLAAS estimates that the cumulative cost of land reform to date has been in excess of 30 Billion rand, but the related benefits remain uncertain. Key questions need to be asked about the failure of the reform process and the upstream and downstream impacts on employment, the rural economy, rural infrastructure and assets.

The Department of Rural Development and Land Reform is undertaking extensive field based research in wards associated with the Comprehensive Rural Development Plan. The results are largely based on gaining an understanding of the household structure, associated support mechanisms and service requirements. In the long term, the surveys may assist in providing insight into the changing nature of rural households and the impact of the current tenure situation.

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<sup>41</sup> CLRA, which was passed in 2004, was designed to complement the TGLFA which had rebadged the tribal authorities created by apartheid legislation as new generation traditional councils.



**Table 14: Status of policy and monitoring**

Rights of ...	Considered in policy	Meaningfully monitored	Impact compared to other policy instruments
Indigenous	2	2 or 3	2
Migrants	3	3	2
Landless	2	2 or 3	2
Women	1 or 2	2	2
<b>Codes:</b>	1 = Well considered; 2 = Considered but could be improved; 3 = Not considered; N/A = Not applicable.	1 = Well monitored; 2 = Monitored but could be improved; 3 = Not monitored; N/A = Not applicable	1 = Impact compared; 2 = Impact not compared; N/A = Not applicable.

## 4.2 LAND USE PLANNING, MANAGEMENT, AND TAXATION

### 4.2.1 Land use planning and exemptions from land use restrictions<sup>42</sup>

#### *Public Participation*

Section 152 of the Constitution requires local government to structure its administration, budgeting and planning processes in relation to the basic needs of the community. Chapter 5 of the Municipal Systems Act no. 32 of 2000 (the Systems Act) requires municipalities to adopt an *integrated development plan* (IDP) which is intended to facilitate this alignment. Plans are prepared for a 5 year period but reviewed annually. A number of plans are prepared in support of the IDP such as a spatial development framework, infrastructure investment plan, housing strategy, transportation plan and a disaster management plan.

The public participation processes for changes in land use through a town planning applications such as a rezoning or consent use is well legislated and regulated. The same is true for the preparation of integrated development plans and spatial development frameworks. In relation to the latter plans, written inputs are often limited and the placing of plans for comment is not always accessible to all residents within a municipal area. A common criticism of the participation process is that the “right” people are not always included in the consultation initiatives thereby limiting the impact of the public engagement.

Comprehensive participation is time intensive and is often costly. Municipalities are required to document the participatory processes followed which often leads to a situation of “going through the motions” rather than communities engaging with the plans resulting in tangible amendments. There is also the tendency for the municipality to receive objections to plans from affluent communities rather than the urban poor.

Extensive public participation can in some instances also be limiting. Government has a responsibility to govern and to implement plans which may have a local impact but which are for the greater good of the city. An example may be the implementation of a bus rapid transport system and the planned increase of densities along the line which may not receive the approval of the affected communities.

<sup>42</sup> This subsection is based on LGI-7, LGI-8 and LGI-9

As within the urban areas, rural municipalities equally mandated to undertake a public consultation processes. Traditional leaders are represented and are allowed to participate in Municipal Councils in terms of the Municipal Structures Act. However, the capacity levels in many municipalities, especially those which contain a high percentage of communal land, tend to have limited capacity. Consequently, IDPs are often little more than a “wish list” of development projects and programmes. In addition, the spatial development plans tend to focus on the so called “town” areas rather than providing comprehensive spatial plans for the municipal area as a whole. In addition, at the national verification workshop it was noted that land use plans are not a key feature in rural areas with less than 10% are rural space forming part of Spatial Development Frameworks.

### ***Benefits from changes in land use***

A change in land use for example from residential to commercial will result in increased rates in terms of the Municipal Property Rates Act No 6 of 2004. Municipalities in South Africa are required to be self-funded with the majority of the revenue generated through rates and service charges<sup>43</sup>. Efficient and effective management of the process for a change in land use is essential for improving a municipality’s revenue base.

Application fees are also payable when a town planning application is made by an applicant. These fees are payable whether an application has been granted or not. The larger the quantum of development proposed with any land use change application, the higher the application fee payable. Planning application fees are included as part of the overall income generated by a municipality in any year. All funds accrued within the municipal area are spent within its area of jurisdiction. Significant internal cross subsidisation occurs with many indigent households being exempt from municipal rates and service charges. Certainly, the general mechanisms for property tax are in place in South Africa and generally well executed by the municipalities.

An interesting point raised in the panel discussions was that there is currently limited opportunity for the municipality to capture the benefits arising from public investment. The example used was the steep increase in property values in close proximity to the recently opened rapid rail system, the Gautrain. The rates policy does provide some scope for this but the valuation roll is only updated every five years and the municipality is generally slow to respond.

### ***Managing the planning application process***

Notwithstanding the size and location of a municipality in South Africa, more than 70% of all town planning applications would be approved within a 3 year period. Typically, land use applications including Township Establishment are finalized within an average of 3 to 13 months after receipt

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<sup>43</sup> Metropolitan municipalities and those which contain large urban areas, receive no or very little national grant funding. Many rural municipalities in South Africa are wholly reliant on grant funding from the national fiscus.

by approving / recommending authorities. While there are legislated timeframes for processing planning applications, there is not always full compliance for a number of reasons.

Delays are commonly experienced for example, as a result of incomplete applications being submitted, administrative lags and appeals lodged on an application. Another factor which influences timeframes is the lack of alignment between various policies. Firstly, there is lack of alignment between land use policies at national, provincial and local levels, resulting in confusion. An example is the relationship between the Provincial Ordinances, the DFA and the Municipal Systems Act, in terms of understanding where land use decision powers lie between the three spheres of government and where applicants could choose to submit an application. This confusion was evident in the 2010 judgement by the constitutional court in *City of Johannesburg v Gauteng Development Tribunal*. Secondly, land use policy and its application are affected by non-land use policies. An example is the environmental legislation which has requirements for environmental assessments where necessary. Such laws precede land use regulatory decisions and have major impact in terms of time and cost, among others.

The take up of the change of use also requires consideration. In some instances, change of physical use occurs prior to approval whilst in others it may take longer than a 3 year period.

### ***Hierarchy of Land Use Plans***

The largest and most complex city in South Africa is Johannesburg located in the Gauteng Province. Due to the integrated-megacity / poly-nodal structure of Gauteng and the relative proximity of development / economic nodes, heavy emphasis is placed on Provincial plans and strategies to coordinate land use management and development within the region. The Gauteng Spatial Development Perspective (GSDP) 2007 forms the basis of this coordination and the Gauteng Spatial Development Framework (GSDF) 2010 builds on the GSDP and ensures integration within the larger urban conglomeration. While these plans provide high-level development guidance, local level plans take precedence when it comes to detailed planning. It is interesting to note that while there is a high level of consistency between local plans (Development Frameworks) and the regional plans there are some discrepancies and disagreements between the different spheres of government specifically with regards to the delineation of the urban edge<sup>44</sup>.

For the City of Johannesburg, the most important development policy document is the Regional Spatial Development Framework (RSDF). This document provides a guideline as to what land use and development change is acceptable and supports the Integrated Development Plan (IDP), which allocates resources accordingly and is required under the Municipal Systems Act, No 32 of 2000. The document has been drawn up with the involvement of the various communities and stakeholders. The city is divided into 11 regions and each region has a RSDF document, which applies specifically to it.

The City of Johannesburg is in the process of producing a consolidated zoning scheme, which will bring together the 14 different zoning schemes which apply historically within the city

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<sup>44</sup> Expert report – Urban Land Use

and which were inherited from previous planning regimes. This process is currently being hampered by perceptions that this process will involve a loss of rights or additional rates or service charges.

Prior to 2005 integration between development planning frameworks and infrastructure Master Plans was poor. In 2005 the City of Johannesburg adopted the Growth and Development Strategy 2005 (GDS) which helped to align these two realms of development planning. As a result the City of Johannesburg has been successful in coordinating the planning and infrastructure delivery of new areas but the reinforcement and renewal of services in established / older townships (where consolidation is proposed) remains challenging due to resource and system capacity constraints.

The City of Johannesburg through the GDS and RSDF has become disciplined in regulating development and enforcing these plans through its approvals process. It has established a clear set of priorities and has not approved any development which is not in line with its current policy. The City of Johannesburg has also refused to deliver services to developments which are not within a priority area. These measures however have not been able to deal effectively with informal development and processes which bypass the formal planning system.

Notwithstanding the complex hierarchy of plans, their mere existence does not always result in implementation. This is often impeded by limited specialist capacity and financial resources within the Metro. Risks posed to the implementation of the plans can also be associated with changes in institutional arrangements and the ability of the political structures to ensure implementation takes place.

Outside of Johannesburg, other metropolitan municipalities are also required to prepare a hierarchy of plans which align to Provincial Growth and Development Strategies and other national and provincial plans. Even where these policies do exist it is apparent that they do not shape urban development through effective land use management control. Cities in South Africa are still sprawling (Swilling, 2010) and development is still happening on the periphery frequently outside of the urban edge (Swilling, 2010). Densification is not being facilitated in relation to an accessibility network and associated opportunities but happens by default on the periphery where one finds the informal settlements and new subsidised housing developments. The panel on urban land use planning and development noted that the largest driver of change in most cities in South Africa is the implementation of the RDP housing subsidy programme. This 'reverse mode densification' (Ewing and Mammon, 2010) is typical of many cities and towns in the country. By implication the policies that support spatial frameworks do not find coherent expression on the ground.

eThekweni metropolitan municipality has an innovative approach making use of a package of plans and service models. This tends to work well in areas covered by schemes. The challenge mainly occurs within the traditional authority areas (communal land) and the servicing of such areas. Within these communities, there is often a conflictual relationship between the traditional authority and the municipality with regard to actual and perceived

roles and responsibilities in relation to planning and development. Currently, the traditional authority land within the metro and indeed elsewhere in the country is not covered by planning and building control legislation as would be applicable outside of such areas.

### ***Management of urban growth – City of Johannesburg***

The “regularisation” or formalisation of informal areas and the proactive absorption of the poor into the city is one of the City of Johannesburg’s top and most challenging priorities. There are currently 180 informal settlements within the municipal boundaries of the City comprising approximately 200000 households. The “Regularisation of Informal Settlements” programme is seeking to address this in a clear and systematic manner. Progress on the ground is hampered by service delivery / infrastructure capacity and funding issues resulting in growing backlogs and a concentration of poverty in the most deprived parts of the city. This situation has been compounded by a lack of private investment within the lower income areas, located in the south of the city. Conversely, new private sector led, employment related development continues to be developed in the north of the city. This trend is perpetuating the segregated land use patterns introduced through apartheid spatial planning.

The emerging implications of these trends is that the coping mechanisms and forms of informality adopted by the urban poor have become increasingly fluid, complex and layered as they respond to their environments and the challenges which they confront on a daily basis. Due to the “illegal” nature of much of this informal activity the extent of the “problem” is difficult to measure or quantify.

On the one hand due to Johannesburg’s low density and sprawled urban form there has been limited spatial expansion and growth of existing informal settlements located on the periphery of the city as these are places which offer limited opportunities for informal livelihood creation. There is striking evidence of increased informal growth and densification within established formal urban areas or townships, particularly within those which are well located. This has resulted in:

- the proliferation of backyard shacks and illegal structures
- building hi-jacking particularly in inner city neighbourhoods
- illegal subdivision and subletting of residential units (houses and flats).

Severe overcrowding is the direct consequence of these patterns. In addition, this has in part led to a phenomenon referred to as ‘bad buildings’. The City of Johannesburg is in the process of developing a strategy to deal with proactively<sup>45</sup>.

Interestingly, the panel on urban planning and development commented that the informal housing sector tends to be more efficient in providing a rapid response to housing needs than the formal sector.

### ***Urban areas and plot size***

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<sup>45</sup> Above three paragraphs are edited extracts from the expert report on Land Use Planning drafted by NM&Associates

The panel argued that the adherence to plot size should not be the measure of success but rather aspects such as:

- The extent of overcrowding
- health and safety factors
- the holding capacity of the site
- site coverage, street frontage, house location and implications for future densification.

It was noted that the plot size is not the problem but rather the use thereof such as one formal house with multiple backyard dwellings.

### ***Obtaining a building permit***

There are two levels of costs associated with land use applications, namely application fees and advertisement fees.

In relation to the application costs, these vary across the country in the form of:

- i. a fixed standard fee for all land use applications
- ii. a fee determined by a land area of a particular site that is subject of a land use application
- iii. a fee depending on the type of a land use application such as rezoning, consent use, departures and so on.

In some cases such as Cape Town there are complexity fees added when EIA's etc are involved. Fees for subdivision applications in eThekweni have increased significantly in the recent past and have made even small subdivisions unaffordable.

The advertisement costs vary across the country in the form of:

- i. a fixed standard fee
- ii. case-by-case basis, such as the actual quotation from a publication depending on the size of advertisement<sup>46</sup>.

The panel noted that the norm for obtaining building plan approval is a three month process. However, there is a public perception that it takes far longer than it actually does. As a result, there is also the tendency to commence with the building and to regularise later. The panellists commented that significant building occurs within low income areas for which no building plan approval is obtained, once again reinforcing the notion of dual systems operating within the city.

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<sup>46</sup> Above paragraphs are edited extracts from the expert report on Land Use Planning drafted by NM&Associates

### *Delays in obtaining building permits*

The larger Metropolitan areas have tracking systems some of which provide an online service. The information retrieved from the systems assist in setting of performance targets.

Delays in the system are perceived by the officials to be as a result of poor quality submissions which contain inadequate information. Conversely, applicants tend to cite the limited administrative capacity, which results in the delayed finalisation of applications.

According to municipal officials, informal or ‘speed’ payments were not a common feature. This was attributed to the fact that the building plan approval process incorporates several ‘handovers’ amongst large teams of officials. There was agreement that there was more potential for speed payments to the Building Inspectors who operate alone and within the more rural settings where municipalities are small and officials more likely to act unwatched.<sup>47</sup>

At the National Verification Workshop, it was noted that the majority of residents within the low income residential areas do not access the formal processes to obtain formal building permissions. This is evidenced by number of self-built backyard dwellings or house extensions.

#### **4.2.2 Transparency and efficiency in the collection of land/property taxes<sup>48</sup>**

In South Africa, the core legislation for the management of property valuations is the Local Government: Municipal Property Rates Act, No 6 of 2004 (MPRA). The provisions of the Act include:

- regulating the power of a municipality to impose rates on property
- a transparent and fair system of exemptions, reductions and rebates through rating policies for implementation by municipalities
- the exclusion of certain properties from rating in the national interest
- a fair and equitable valuation methods
- an objections and appeals process.

Municipalities are required to determine a rates policy which is subjected to a public participation process in terms of Section 4 of the Municipal Systems Act and the Municipal Finance Management Act. Once adopted, the municipal property rates are calculated by multiplying the market value of the immovable assets<sup>49</sup>. Section 32(1) of the MPRA states that a municipality’s valuation role remains valid for a period of four municipal financial years.

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<sup>47</sup> Above paragraphs are edited extracts from the expert report on Land Use Planning drafted by NM&Associates

<sup>48</sup> This subsection is based on LGI-10 and LGI-11

<sup>49</sup> Immovable assets include land and buildings

The implementation of the provisions of the MPRA outside the metropolitan areas<sup>50</sup> and large local municipalities where the capacity for implementation is diminished remains a challenge. In such areas, municipalities have been required to appoint external service providers to undertake the preparation of the valuations roll. Examples have been found within some provinces that the appointed valuers have made use of a “facturizing” approach as opposed to the application of “market related” value as stipulated in the Act.

Section 81.(1) of the MPRA makes provision for the Provincial Departments of Local Government to monitor whether municipalities are complying with the provisions of the Act. Section 81.(2) then states that if a municipality fails to comply, “the MEC<sup>51</sup> may take any appropriate steps to ensure compliance<sup>52</sup>”. No provinces have effectively developed their monitoring capabilities to date. As a result, some smaller municipalities with limited capacity, which are failing in terms the Act, are yet to be supported or sanctioned by the Province.

Section 82 of the MPRA indicates that the Minister for Local Government may “from time to time investigate and issue public reports on, the effectiveness, consistency, uniformity and application of municipal valuations for rates purposes”. Such an investigation may include inter alia “studies of the ratio of valuations to sales price”. The Department has undertaken some research into the implementation of the MPRA. The findings have contributed toward the drafting of a Municipal Property Rates Amendment Bill.

The current provisions in the MPRA are sufficient for ensuring public accessibility. A common challenge is that municipalities often do not have the postal address for the owner of the property. This has implications for compliance with the Act while also reducing the owner’s ability to object or appeal the valuation.

Again the provisions of the Act are sufficiently wide for a municipality to prepare a rates policy which addresses local conditions and requirements. A municipality is not compelled to adopt exemptions and rebates and there are no prescribed categories and rebate limits for application. Consequently, rates policies vary significantly across the country, even between the three major metropolitan municipalities. While the variances between the municipalities makes monitoring and evaluation at a national level difficult, the current legislative approach does allow for the financial status and capabilities of a municipality, within different contexts, to be accommodated.

The MPRA makes provision for ensuring that all property holders who are liable for rates are listed on the tax roll. There is an amendment bill for the MPRA which is currently under

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<sup>50</sup> In terms of Section 155 of the Constitution of the Republic of South Africa, 1996, there are three categories of municipalities, Category A, metropolitan municipalities, Category B, local municipalities and Category C, district municipalities. The latter comprises two or more local municipalities. Category A and B municipalities are responsible for preparing and implementing municipal valuations.

<sup>51</sup> The Members of the Executive Council (MEC) is the elected or political head of the sector department

<sup>52</sup> Local Government: Municipal Property Rates Act, No 6 of 2004.



discussion<sup>53</sup>. New provisions are likely to be enacted that requires a municipality to list all properties including those subjected to exemptions, reductions and rebates.

Currently, the municipality assesses a 100% of its properties. However, the application of the municipality's indigency policy tends to result in property rates of between 70 – 80% of the assessed properties being collected. In most cases, the collection rate of those households billed by municipalities is in excess of 90%.

Mechanisms are in place for those property owners liable for rates but who fail to pay. In such cases, the municipality along with other remedial action is able to attach the owner's property. In South Africa, those municipalities with established structures and a history of managing a valuation roll and the associated collection of rates are better placed to recover the cost of administration thereof. In the metropolitan municipalities and the large and well established local municipalities, the rates collected is far in excess of a factor of more than 5 when compared with the cost of staff in charge of the collection. However, in low capacity municipalities, it is seemingly difficult to recoup the cost of the general valuations roll. An attempt was made in KwaZulu-Natal to establish shared service centres<sup>54</sup> for improving the cost effectiveness of collections. According to the panel, this was not successful.

## **4.2 MANAGEMENT OF PUBLIC LAND**

### **4.2.1 Justification of public land ownership and management clarity<sup>55</sup>**

Public land is owned by all three spheres of government, specifically national, provincial and local government. Considerable tracts of land are also owned by State Owned Enterprises such as Transnet and its subsidiaries, Eskom, Airports Company of South Africa (ACSA) and Denel.

The panel on Public Land Management noted that the challenge in South Africa is not who owns the land but rather how the land is being managed. The challenge tends to lie in the owner and the developer of the land being different entities. For example, local government may have the responsibility for implementing a housing project that is located on provincially owned land. The coordination of efforts requires solid intergovernmental relations and cooperation for the project to be implemented effectively and efficiently. This is not always the case, resulting in unnecessary project implementation delays.

In South Africa, more than 50% of the public land is clearly identified on the ground and mapped. However, this is not the case for approximately 30% of the land on which traditional or rural households reside. It was estimated that there are approximately 20 million land parcels in the communal lands areas, informal settlements and indeed some of the low income housing developments which are yet to be surveyed. However, as already

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<sup>53</sup> The panellist anticipate that the amendment Bill will be enacted in 2012

<sup>54</sup> A shared service centre is an entity which renders services for more than one local municipality. Such centres tend to be established in areas in which low capacity municipalities are found.

<sup>55</sup> This subsection is based on LGI 12

noted in the report, the outer boundary of the communal land has been surveyed, mapped and can be identified on the ground.

Public land management has both strong administrative and political imperatives. In relation to the latter, land is often used as a political tool or “bargaining chip” in managing the relationships between the different spheres of government.

While all government spheres are required to contribute to common development goals, in some instances there is a lack of alignment of strategic plans and different development emphasis. Land earmarked as strategic at local level is not identified as such by provincial or national government. Constitutionally, local government is mandated to contribute to national and provincial development programmes. Conversely, National Government departments have limited obligation to contribute to the local government strategic planning initiatives. There are cases of land has been released by national government for housing but then used by the developing entity for other purposes<sup>56</sup>. This has contributed to the breakdown in trust between the different spheres of government.

The Departments of Public Works in National and Provincial Governments appear to have sufficient capacity for the management of land assets. However, implementation and the timely release of land and buildings seem to be the key challenges. This is partly linked to the length of the processes and procedures to be followed. In addition, it should be noted that South Africa only has approximately 500 registered land surveyors. The task of physically surveying the estimated 20 million informal sites is unrealistic given the current capacity levels. A digital approach will therefore need to be adopted for the management of this process.

#### **4.2.2 Justification and fairness of expropriation procedures<sup>57</sup>**

In South Africa, there is no single inventory of public land. Rather, this is managed by each of the individual landowners. Access to the information on expropriations largely depends on who is requesting it, who the custodian is, and the level of security risk attached to the land.

The wording of the dimensions and the associated underlying assumption in the management of expropriated land is that it should remain a state asset. However, in South Africa, where historical redress is required, land is expropriated and or public land developed for housing purposes with ownership being transferred to an individual owner. The land restitution process also requires the expropriation of land, which is then transferred to individual or group owners. As may be the case in other African countries, expropriations are not taking place in South Africa to facilitate unscrupulous private gain. Rather, it is occurring overwhelmingly within the public interest and within a unique context. This is

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<sup>56</sup> This has occurred in an in Soweto where land was released for housing but the municipality constructed a shopping centre

<sup>57</sup> This subsection is based on LGI-13 and LGI-14

notwithstanding the major challenges being experienced in the land restitution programme such as delays in implementation, project failure and corruption.

There are delays in converting the expropriated land to its destined use, which are commonly linked to the expropriation process itself. However, there is a difference experienced between rural and urban areas with the land use conversion occurring more speedily in the latter areas.

In South Africa, expropriation is a hard option for the acquisition of land. Often there is the public perception that compensation offered by the State is insufficient. The rate of compensation may vary depending on the location, such as between urban and rural and indeed within varying locations within the city. In addition, the efficiency and effectiveness of different authorities may also impact price. There are cases where land price fixing or inflation has been experienced so that property owners are able to benefit unfairly from the expropriation process.

If payment did not occur within the agreed period, this would be regarded as a breach of contract. In such cases, the person would be able to obtain relief from the courts. The legal system for appealing expropriations is well developed in South Africa. There are obstacles to the system which relate to the ability of the poor and vulnerable to gain the necessary access and the resources required for doing so.

The panel on public land management commented that the management of concessions is tricky in South Africa, which is open to corruption and abuse. The process for obtaining and managing concessions needs to be more transparent and open to public scrutiny. Specific mention was made in relation to mining concessions and the implications for communities directly impacted by the awarding of thereof. Environmental and social impact studies often lack credibility. Many households have been required to relocate without adequate compensation.

#### **4.2.3 Justification and transparency of public land transfers<sup>58</sup>**

The sale of municipal land is open and transparent and is concluded in terms of the Municipal Finance Management Act. Public land owned by Provincial and National Government and the parastatals is subjected extensive regulations outlined in the Public Finance Management Act No 1 of 1999. The panel on public land management noted that there maybe a lack of transparency within these two spheres of government in relation to the disposal of land. Further research would be required to verify the observation.

### **4.4 PUBLIC PROVISION OF LAND INFORMATION**

#### **4.4.1 Reliability of land registries<sup>59</sup>**

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<sup>58</sup> This subsection is based on LGI-15

<sup>59</sup> This subsection is based on LGI-16 and LGI-17

In South Africa, more than 90% of ownership information in the registry is accurate, up to date and readily identifiable on maps. The records in the registry are public available at a small cost and can be searched by both the right holder name and land parcel description. Generally, the systems and procedures are effective and efficient in the country. An extensive project was recently undertaken to clean up the digital cadastral set for the country. The participants of the National Verification Workshop noted that the Deeds Office is up to date but the challenge remains within the Surveyor General's office.

The latest schedule of fees was published in August 2011 in the Government Gazette with the average cost of transferring land being approximately 2.6%.

The Surveyor General and the Deeds Office have internally published standards to facilitate optimal service delivery. In addition, all public officials are required to adhere to the Batho Pele principles, which are meant to guide and improve customer relations within the public sector generally.

In South Africa, there is no requirement to pay an informal fee for first time registration. However, corruption may occur anywhere along the value chain. The extent to which this may occur is unknown and is not documented.

Public restrictions on land may be included in title deeds, town planning schemes and related legislation and regulations. The Deeds Office is the custodian of the title deeds whereas municipalities have authority over the management of the scheme provisions. There are no set national standards for the quality and the contents of the town planning schemes in South Africa. Consequently, wide variations are found between municipalities. A number of municipalities are yet to develop a single scheme for their area of jurisdiction with some operating with more than 10 schemes in place due to the disestablishment of the apartheid local structures.

The expert investigator present at the panel discussion on land information systems commented that African freehold title is not adequately captured. In many instances, transfers are not registered for customary reasons. Families rely on oral traditions and are commonly reluctant to have their rights recorded in a single person's name as it is regarded as a family property.

## **4.5 DISPUTE RESOLUTION AND CONFLICT MANAGEMENT**

### **4.5.1 Accessibility of conflict resolution mechanisms<sup>60</sup>**

In South Africa, there are parallel avenues for conflict resolution ranging from the formal to the informal and subsets thereof. A household or person from a community may be able to access one or a range of systems for dispute resolution purposes. In poor and vulnerable

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<sup>60</sup> This subsection is based on LGI 20

communities, there is often no common first point for resolving disputes. However, in formal and advantaged communities, recourse will often follow the legally established routes, which also have parallel options.

The vast number of people living within informal settlements and on communal land have no or limited access to formal institutions for conflict resolutions in South Africa. Such communities make use of locally established systems and local leaders such as ward councillors, the traditional leader or Headman and in some urban areas, civic structures. The use of informal systems vary from area to area, with some being well structured, long standing and active and in others being inconstant and barely functioning. It does not always correlate that all groups in communities are empowered within those systems, especially women and other vulnerable groups.

A key challenge within the informal settlements in the urban areas is that municipalities often do not recognise the informal dispute resolution mechanisms or are even aware of the community-based processes. In some cases, municipalities establish new structures ignoring those, which are long standing and or have community-based legitimacy. In addition, in the law “informal” tends often to equate to being illegal or criminal. This has the consequence of delegitimising community based dispute resolution mechanisms and processes.

Locally recognised systems are yet to be adequately acknowledged and accepted by the formal systems in South Africa. Informal or community-based decisions do have some recognition within the formal judicial system. For example, the communities “word” within a formal court hearing may be sufficient to influence the outcome of the case. However, poor legal representation and limited resources leads to poor legal outcomes and the possible further disempowerment of the community. In cases where the courts do rule in favour of the community, often the institutions then ordered to provide a remedy, fail to do so. During the panel discussion on dispute resolution, an example was given of the recent “Protea South”<sup>61</sup> case which was won by the community for the municipality to provide basic services and engage in a meaningful participation process. The City of Johannesburg has taken very little subsequent action thus largely ignoring the court action. Poor communities have limited resources and often lack the ability to continue returning to court to ensure the enforcement of the court ruling.

Mechanisms are in place in South Africa for appealing rulings on land cases but the costs are high and not easily accessible to the poor and vulnerable groups. The appeals systems are not always well understood by such communities and are often not used.

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<sup>61</sup> Protea South is a neighbourhood within Soweto, Johannesburg

### 3.4.2 Efficiency of conflict resolution<sup>62</sup>

While in South Africa, there is no consistent recording of formal land disputes, anecdotal evidence suggests that the resolution of land claims takes excessively long to resolve. The Department of Rural Development and Land Reform is known to have a poor track record in this regard. For example, the experiences of organisations such as Association for Rural Advancement (AFRA) demonstrate cases, which have taken in excess of 12 years to resolve.

## 4.6 LARGE SCALE LAND ACQUISITION<sup>63</sup>

A key point made at the outset of the panel discussion on large scale land acquisition was the need to understand the assumptions behind “large scale land acquisition” such as that which has emerged through land reform and for the extension of mining rights. It is necessary to have a clear understanding of what land is being acquired and for what purpose in order to engage adequately with the content of the dimensions as outlined in the Implementation Manual for the Land Governance Assessment Framework. It would appear that there is the underlying assumption the large scale land acquisition for agricultural purposes is a positive initiative as long as the systems are transparent, socially responsible and environmentally sensitive.

### *Forest Land*

There is between 1.2 – 1.3 million hectare of commercial forest in South Africa. All forest land rights are registered, varying from private ownership, long terms notarial lease agreement, management agreements and community forest agreement. It was not possible to establish the different percentages of these rights. The ownership pattern is outlined in the table below. It should be noted that 50% of all forests are part of the land claims process as outlined in the Restitution of Land Rights Act No 22 of 1994.

**Table 15: Ownership Patterns**

Institution	Percentage	Sector
Corporate organisations	59%	Private
Commercial farmers	20%	Private
SAFCOL	10%	State Entity
State & municipality	7%	Government

<sup>62</sup> This subsection is based on LGI 21

<sup>63</sup> The section on large scale land acquisition is largely an edited version of the expert report with some information gleaned from the panel discussion.



- environmental degradation of the land, and or
- inefficient compensation.

### ***Management of investors***

In South Africa, there are no specific laws or regulations providing incentives for investors in relation to large scale land acquisition and the development thereof. Commercial farming, forestry and related industries receive no economic assistance from the State. However, the Forest Sector Charter Council has drafted a proposal for the establishment of the Forest Grant which calls for State funded grants for investment purposes.

Two South African asset management firms launched a 3 billion rand farmland investment fund in March 2010 which is expected promote agricultural development in Africa's biggest economy. The Futuregrowth Agri-Fund, launched by Old Mutual South Africa unit Futuregrowth Asset Management and UFF Asset Management, plans to tap institutional investors for the cash, which will be invested in farms in South Africa.

Broad Based Black Economic Empowerment could be considered an incentive scheme in which various government departments give preference and assistance (financially or otherwise) to previously disadvantaged people through programs, such as:

- The Department of Agriculture's AgriBEE program
- Land Bank's BBBEE programme:
  - Easy access to loans - Access to loans has been made easier for historically disadvantaged business people - to help with putting a farming business together
  - Equity Finance - we have developed an equity finance product specifically to support black economic empowerment in agriculture and agri-business
  - Loans for land reform beneficiaries - these help with the government's land redistribution efforts.

When purchasing land owned by the State Owned Enterprises, investors must comply with the Broad Based Black Economic Empowerment guidelines for Non-Core Property Assets and the Code of Good Practice as prescribed by the BBBEE Act by providing the required information. Investment on land awarded to communities in terms of the Restitution of Land Right Act is based on settlement models in terms of which investors must furnish sufficient information, relating to financial capacity, benefit sharing models and social investment in the community. In both instances, information would be available to the public through the Promotion of Access to Information Act, No. 2 of 2000. However, this could until recently only be enforced via the South African High Court system.

The expert investigator noted that in relation to mining is there is a public perception that the process for supplying sufficient information to obtain prospecting permits is flawed with inefficiency and corruption.



### ***Negotiations between Right Holders and Investors***

In South Africa, the willing seller willing buyer principle applies with no restrictions on the size and/or extent of investment permissible on private land. Persons with registered property rights are protected by law.

Within the communal land context, as the land is owned by the State, communities do not have formal or documented rights. In such cases, negotiations between the land holders<sup>65</sup> and investors are often not direct or transparent. The Panel on large scale land acquisition cited examples of communities having little say in their removal from the land for mining purposes.

While the Minerals and Petroleum Resources Development Act makes provision for public participation, the owners of the land, holders of rights or communities have no say in negotiations. Government plays an active role in receiving, processing (excluding the public participation process and the drafting of the application) and granting of the prospecting and mining licences.

### ***Social Requirements and Large Scale Land Acquisition***

Broadly in South Africa there is a legal framework that investors would need to comply with when implementing a large scale agricultural project such as adherence to the Labour Relations Act. In relation to the general agricultural sector there are limited requirements relating to social assessment or social impact assessment studies. However, the National Forest Act makes provision for the implementation of social and economic benefits and safeguards for local communities, i.e. community forestry agreements and access to the forest for cultural and religious purposes.

A point raised by the panel on large scale land acquisition was that in South Africa there are no mechanisms in place to prevent projects from proceeding based on the projected social impacts and as such the economic advantages outweigh the social consequences. The creation of “jobs” tends to overshadow all other considerations. This is well demonstrated in the current proposal to introduce fracking for natural gas in the Eastern Cape’s Karoo area. Economic imperatives must be better balanced with social outcomes.

### ***Environmental Requirements and Large Scale Land Acquisition***

In South Africa, there is extensive legislation and policies in place for the management of the environmental aspects in relation to the agricultural sector such as:

- Conservation of Agricultural Resources Act – to provide for control over the utilization of the natural agricultural resources of SA in order to promote the conservation of soil, the water sources and the vegetation and the combating of weeds and invader plant; and for matter connected thereto

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<sup>65</sup> People living on the land

- National Forest Act – to provide for matters relating to protection of the environment, protection and sustainable development of natural forests and woodland, the impact of plantation forest on the environment and the proper management thereof;
- National Water Act – to ensure the protection, use, development, conservation, management and control of the nation’s water resources;
- Agricultural Pests Act – to provide for measures by which agricultural pests may be prevented and combated;
- National Environmental Management Act – to provide for co-operative environmental governance by establishing principles for decision making on matters affecting the environment, institutions that will promote co-operative governance and procedure for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of administration and enforcement of other environmental management laws;
- Legislation relating to waste management and pollution control; and hazardous and toxic substances.

The expert investigator noted in his report that the provisions of the Mineral and Petroleum Resources Development Act tend to favour the mining industry often to the detriment of the environment.

## **5. POLICY ANALYSIS AND POLICY RECOMMENDATIONS**

### **5.1 POLICY ANALYSIS**

Internationally, the South African Constitution is known for being one of the most progressive and far reaching in its protection of rights. Post 1994, policy development and the associated implementation has been extensive. Wide ranging legislation has been passed to facilitate both rural and urban development. While not always transparent, the South African Government has certainly attempted to be both proactive and reactive to the development needs of communities. In addition, the Academic and Non-Governmental Organisations are robust in both researching and lobbying government. Certainly, the policy making machinery is well developed with the key challenges well known both in and out of government. This may be one of the contributing reasons for the poor attendance and lack of commitment demonstrated by National Government Departments to the implementation of the Land Governance Assessment Framework within South Africa.

Notwithstanding the extensive work undertaken after the establishment of the democratic government, a number of land governance challenges remain in South Africa, the most notable being the continued existence of the parallel or dual systems of formality and informality. This section attempts to address the key policy issues within the rural and urban sectors.

## ***Rural Areas***

While there are rural land rights, the content and the enforcement of those rights require attention. Currently the legal framework recognises procedural rights such as the guarantee against dispossession, eviction and also makes provision for compensation. Yet, the vast majority of rural residents do not have registered land rights.

A key concern in relation to communal land rights is the lack of appropriate legislation for providing individual or communal rights to people in such areas. The ruling on the constitutionality of the Communal Land Rights Act No 11 of 2004 has left a legal vacuum which is currently being filled by the Interim Protection of Informal Land Rights Act No 36 of 1996. This Act requires annual renewing by the Minister for Rural Development and Land Reform and as such does not offer stability within the system.

The provisions within the Constitution are clear. Section 25(6) of the Constitution states “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” with Section 25(9) requiring that Parliament enact the legislation to address these matters.

The policy response to the complexities of communal land system to date has slow. The task of translating oral tradition into written law in a manner which is fair and equitable is difficult.

In the short term, regulations need to be developed in support of the Interim Protection of Informal Land Rights Act. In the medium term, a more appropriate legislative response to communal land rights must be negotiated and finalised.

The State does it have sufficient capacity to provide individual or group tenure within the communal land areas. While the outer boundaries of the traditional authorities have been surveyed and verified, the process for surveying the internal boundaries is yet to take place. South Africa only has 500 registered surveyors which is insufficient for the task at hand. A strategy will need to be developed which identifies an alternative method for land parcel identification. The level or what should constitute a land parcel would need to be determined.

It could be argued that one of the weakest points in the land rights in South Africa is that of the farm workers. While this group has some protection in law, it falls short of providing adequate measures for preventing extensive and on-going farm evictions. Urgent and adequate relief must be found within the land reform, redistribution and restitution policies and strategies.

When examining the complexities of rural land use and policies in South Africa, there is an urgent need to undertake an in-depth investigation into the development of a comprehensive land use system. Currently, there is a vast range of legislation for restricting rural land use in the country. Consideration needs to be given to the rationalisation of the fragmented legislation into a possible omnibus. In addition, there is the need to improve and strengthen rural enforcement capabilities.

Greater levels of accountability are required in relation to the land reform, restitution and redistribution process in South Africa. The current monitoring and evaluation of rural development appears to be falling short in providing a comprehensive understanding of the rural conditions and the associated community needs. The Department of Rural Development and Land Reform needs to give attention to the development of appropriate baseline indicators and the reporting thereof. Importantly, mechanisms need to be developed to facilitate the use of the results into the policy cycle for the reframing of the short, medium and long term goals and objectives.

### *Urban Areas*

Within the urban areas, the key response for addressing the housing and tenure needs of the poor has been the State's "RDP" housing strategy. This programme's implementation has been rapid with almost 3 million units being provided post 1994. However, it is land extensive and as such projects have been located on cheap peripheral land. This has contributed to the entrenchment of the apartheid spatial structure of many towns and cities in South Africa.

There is a need for the State to develop a more robust housing policy which at least considers the delivery of rental stock and a multipronged approach to the use of the current housing subsidy. This would require a critical evaluation of the existing subsidy scheme and amendments thereto. Increasing pressure should be placed on the State Owned Enterprises for the release of well-located non-core land for development purposes. The Housing Development Agency has been established in South Africa for the fast tracking of housing delivery and assisting processes such as the rapid release of well-located land. Additional resources and capacity should be made available for supporting the agency in its work.

Planning legislation needs to be reviewed and simplified in South Africa. This would include the introduction of mechanisms for improving spatial planning, ensuring greater community access to planning processes and the ring fencing of development contributions. Clearer roles and responsibilities need to be defined in relation to land management especially to address the intergovernmental coordination. Major municipalities also need to strengthen their land use enforcement and planning capacities.

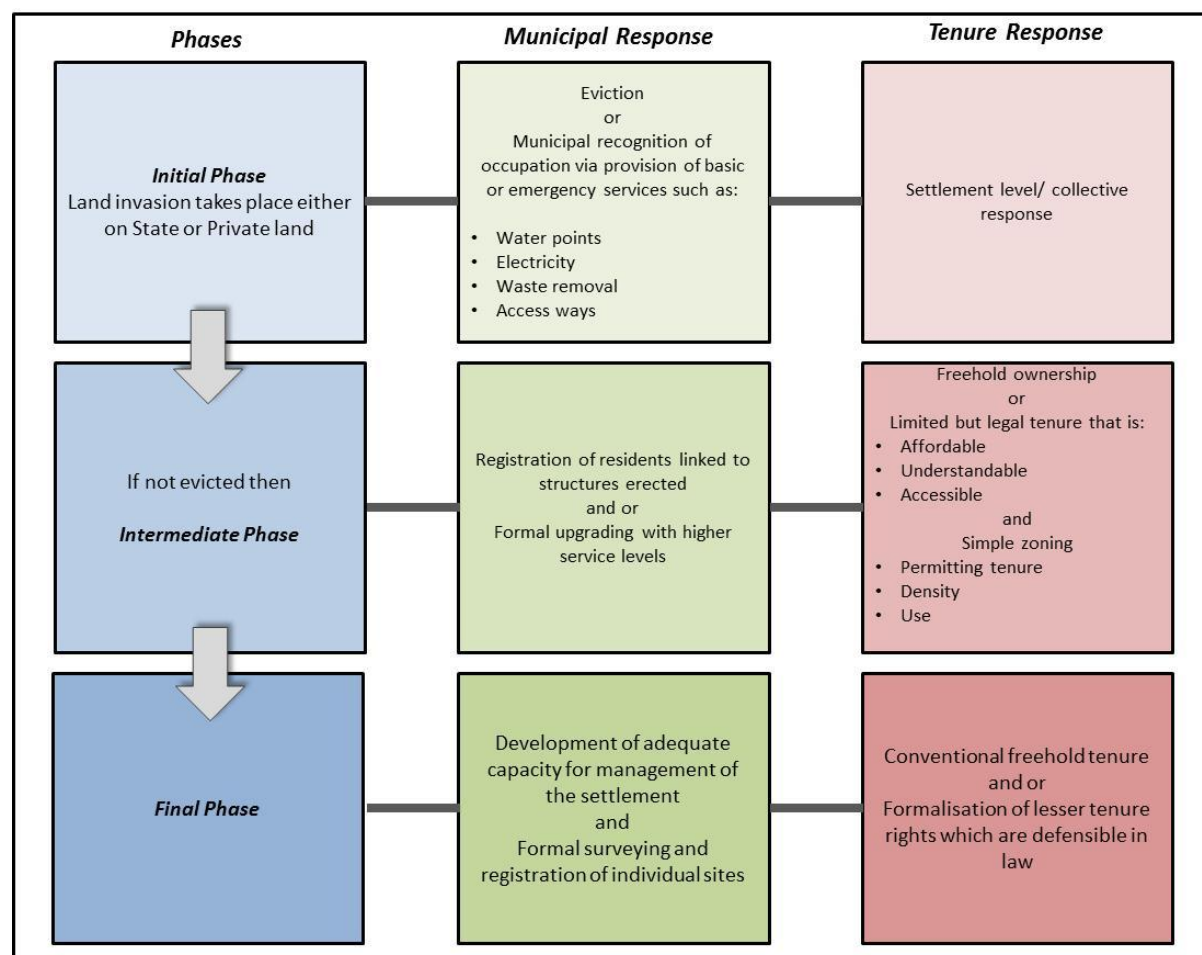
Little attention has been given to the so called socially dominated markets which includes the systems of acquiring and trading of land within the informal settlements. An extensive number of urban poor live within such settlements, and to date, municipalities have lacked innovation and the political will to determine an appropriate response. As noted in the Expert Investigator report on land tenure, a recent Urban LandMark publication titled "Incrementally Securing Tenure: An Approach for Informal Settlement Upgrading in South Africa" outlined an incremental approach to tenure allocation as being "a way that connects to the ultimate delivery of individual ownership, but provides for increasing levels of security during the period before this goal is achieved"<sup>66</sup>. This approach may be implemented in three phases,

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<sup>66</sup> Urban LandMark: "Incrementally Securing Tenure: An Approach for Informal Settlement Upgrading in South Africa" April 2010 Dan Smit and Gemey Abrahams with contributions by Atelier von Riesen, Development Interface, Peter Rutsch, Mark Misselhorn and Clive Foster quoted in the Expert Investigator report on "LGAF, Land Tenure Typology Background Paper" drafted by Peter Rutsch

namely, the initial phase which may result in settlement or group recognition, the intermediate phase in which a limited but legal form of tenure is obtained and the final phase whereby freehold tenure is achieved. A National Government policy needs to be formulated which addresses such an approach toward obtaining tenure security in urban areas.

**Figure 5: Incremental Tenure<sup>67</sup>**



The legal provisions for Land Valuation and Taxation are sufficient in South Africa. However, National and Provincial government should give consideration to providing implementation support for improving collection rates in the countries smaller municipalities.

***Cross cutting considerations***

A number of key considerations emerged in relation to the management of conflict resolution in South Africa which pertain to both urban and rural areas. For example, comprehensive research needs to be undertaken to develop a greater understanding of what the informal institutions are, how they perform their functions and the links, if any, to the formal systems for conflict resolution. There is also a need to formally recognise the role played by the informal systems and structures in dispute resolution for ensuring a fully participatory

<sup>67</sup> Diagram based on the description of incremental tenure as outlined in the Expert Investigator Report on on “LGAF, Land Tenure Typology Background Paper” drafted by Peter Rutsch

democracy. Recognition could be at the municipal level and or incorporated into the state legal systems.

Mechanisms need to be investigated to improve community access to the appeals process in addition to systems for speeding up the appeals rulings. Municipalities also need to consider integrating pro poor approaches in the rendering of services and the management of land.

National Government should also set norms and standards which must be adhered to legally and improve government accountability. Information on the processes and procedures for engaging in land disputes must also be readily available. The Department of Rural Development and Land Reform should be responsible for assembling data which is then used as a means of holding the department accountable by the communities.

## 5.2 POLICY RECOMMENDATIONS

The table below outlines the short and long term policy proposals emerging from the expert reports, panel discussions and the national verification workshop.

**Table 16: Summary Policy Recommendations**

Thematic area	Proposed short term policy interventions	Proposed medium term policy recommendations
Legal and institutional framework	<p><b>Rural:</b></p> <ul style="list-style-type: none"> <li>i. Regulations need to be developed in support of the Interim Protection of Informal Land Rights Act – to greater process clarity</li> <li>ii. A strategy will need to be developed which identifies an alternative method for land parcel identification</li> <li>iii. A programme should be initiated to rationalise the legislation guiding rural land use into a possible omnibus</li> <li>iv. The Department should development appropriate baseline indicators for monitoring the implementation of the land reform, redistribution and restitution process</li> <li>v. Improved levels of reporting</li> </ul>	<p><b>Rural:</b></p> <ul style="list-style-type: none"> <li>i. Appropriate legislative response to communal land rights must be negotiated and finalised must be developed</li> <li>ii. The preparation of appropriate policies and legislation for ensuring greater protection of farm dweller rights to tenure security</li> </ul>

	should be identified	
	<p><b>Urban:</b></p> <ul style="list-style-type: none"> <li>i. A methodology and tools for supporting municipalities in the implementation of an incremental tenure approach should be prepared</li> <li>ii. Systems and procedures should be developed to address the backlog in RDP registration and transfer<sup>68</sup></li> </ul>	<p><b>Urban:</b></p> <ul style="list-style-type: none"> <li>i. The determination of a possible legal framework for supporting the implementation of an incremental tenure approach</li> <li>ii. A research project should be initiated which examines the social value of land , taxation, public investment related to the changes in land use and the benefits thereof</li> </ul>
Land Use Planning, Management and Taxation	<ul style="list-style-type: none"> <li>i. A comprehensive review of planning legislation should be undertaken</li> <li>ii. Planning capabilities and capacity requirements of all municipalities should be assessed</li> <li>iii. A research project should be initiated which examines the institutional arrangements for facilitating the streamlining of the institutional arrangements for land use planning and management</li> </ul>	<ul style="list-style-type: none"> <li>i. While in an advanced stage of development, a National Planning Act should be legislated</li> <li>ii. Effective land use management tools should be developed for the rural and urban areas</li> <li>iii. The implementation of the strategies developed for addressing any gaps or weaknesses in land use planning, management and taxation as identified in the related policies</li> </ul>
Management of Public Land	<ul style="list-style-type: none"> <li>i. The capacity requirements of the HDA should be assessed with the intention of making additional capacity and resources available to the agency</li> <li>ii. The capacity requirements need to be examined for the management of public land. This should include an assessment of different types of public land and the</li> </ul>	

<sup>68</sup> The Western Cape have recently released a tender calling for proposals for addressing this matter

	<p>possible decentralisation of management thereof.</p> <p>iii. Strategies need to be developed which facilitate the elimination of the duplications in the management of public land</p>	
Public Provision of Land Information	<p>i. Strategies need to be developed which allow the poor to have greater levels of accessibility to the land information systems.</p>	

## 6. CONCLUSIONS

The application of the Land Governance Assessment Framework has been challenging in South Africa. The country has a well-developed economy including a well-functioning formal land market. Informal systems especially within the communal land areas are steeped in oral tradition and practice. While not officially recorded, these systems are efficient and effective. A similar argument could be suggested for practices relating to access to the city and the functioning of the socially dominated land markets.

The introduction of democratic government in South Africa has led to the active preparation of policy and legislation to address the legacy of apartheid. In addition, the country has innovative and demonstrated active use of digital solutions for rapid delivery such as the use of GIS and digital boundaries for the determination of municipal boundaries and the use of “e valuation” solutions for rapid land appraisal. Within the formal sector, land governance systems are accurate, reliable and highly sophisticated easily comparable to developed countries.

As mentioned in the section above, Government itself is well aware of the gaps within the land governance system in South Africa. The application of the Land Governance Assessment Framework within the South African context was useful in providing a “snap shot” of the state of land governance in the country. It managed to expose the obvious successes and failures and the sophistication and the lack thereof within the current system. Certainly the duality of land governance that is the formal in juxtaposition to the informal was well demonstrated through the use of the methodology.

The summary findings of the Land Governance Assessment Framework are contained in the table outlined below.



**Table 17: Summary Findings of the Land Governance Assessment**

<i>Theme</i>	<i>Formal</i>	<i>Informal/Communal Land</i>
Land tenure	<ul style="list-style-type: none"> <li>• Tenure secure</li> <li>• Systems well developed, accurate and reliable</li> </ul>	<p>Urban areas –</p> <ul style="list-style-type: none"> <li>• Insecure and dependent on the approach adopted by the municipality;</li> <li>• Currently no mechanisms for managing or implementing incremental tenure rights</li> <li>• The transition from informal to formal needs careful consideration to ensure adequate access by the poor financially, geographically and practically</li> </ul> <p>Rural areas</p> <ul style="list-style-type: none"> <li>• No individual title but is protection against dispossession</li> <li>• The legal framework for the management of the Communal land requires urgent attention</li> <li>• Farm dwellers tenure rights are the most vulnerable and require urgent attention</li> </ul>
Urban land use planning and development	<ul style="list-style-type: none"> <li>• Well developed however there is the need for improved planning legislation</li> <li>• Enforcement is linked to the capacity and political will of the municipality</li> <li>• Need for improved intergovernmental arrangements for the implementation of housing programmes</li> </ul>	<ul style="list-style-type: none"> <li>• No formal planning</li> <li>• Some in situ upgrading but dependent upon the suitability of the land and the resources of the municipality</li> </ul>
Rural land use and land policy	<ul style="list-style-type: none"> <li>• Commercial farm land well regulated legislation and relation guidelines</li> </ul>	
Land valuation and taxation	<ul style="list-style-type: none"> <li>• Legislation well developed and widely implemented by municipalities</li> <li>• Smaller municipalities require support in terms of implementation and cost recovery</li> </ul>	<ul style="list-style-type: none"> <li>• Service charges not applied within informal areas due the application of indigency policies</li> <li>• Communal land not yet subjected to land valuation and taxation</li> </ul>

<i>Theme</i>	<i>Formal</i>	<i>Informal/Communal Land</i>
Public land management	<ul style="list-style-type: none"> <li>• Non-core land developed within the BBEEE framework leading to the economic empowerment of the previously disenfranchised groups</li> <li>• Non-core land traded at market related prices preventing the use of well located land for development of the urban poor</li> </ul>	<ul style="list-style-type: none"> <li>• Large tracts of peripheral land used for RDP housing developments perpetuating the apartheid spatial structure.</li> </ul>
Public provision of land information	<ul style="list-style-type: none"> <li>• Sophisticated, accurate and reliable</li> </ul>	<ul style="list-style-type: none"> <li>• Tends to be based on oral traditions</li> </ul>
Dispute resolution	<ul style="list-style-type: none"> <li>• Legal system well developed and entrenched</li> </ul>	<ul style="list-style-type: none"> <li>• Locally based mechanisms used with no common entry point for resolution</li> </ul>
Large scale land acquisition	<ul style="list-style-type: none"> <li>• Sale of SOE land well regulated and monitored</li> </ul>	<ul style="list-style-type: none"> <li>• Driven by economic imperatives and not social impact</li> </ul>

Emerging from the implementation of the study, the key areas for further examination may be the following:

- Time based on large scale land acquisition within the African sub region
- The preparation of a methodology and tools for supporting municipalities in the implementation of an incremental tenure approach
- The determination of a possible legal framework for supporting the implementation of an incremental tenure approach
- Support with the drafting of suitable legislation for enforcing communal land rights

The National Department of Rural Development and Land Reform is in the process of preparing policy which will lead to legislative change in relation to land reform. The findings from the LGAF process could be used to the green paper process.

Finally, organisations which are actively engaging in research on land governance matters such as Urban Land Mark, PLAAS and academic institutions should be supported in their programmes to ensure the continuation of robust debate and advocacy in South Africa.

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#### OTHER DATA SOURCES

Statistics South Africa: Mid-year population estimates 2011

Statistics South Africa, Community Survey 2007

CSIR Built Environment 2007

Lightstone

#### SPATIAL DATA

Municipal Demarcation Board spatial data set

## ANNEXES

## Land Governance Scorecard

### Country Scorecard for South Africa

#### LEGAL AND INSTITUTIONAL FRAMEWORKS

			Score – Panel Consensus Position				Score - Verification Workshop Result				
LGI-Dim	Topic		A	B	C	D	A	B	C	D	Comment
<b>Recognition of Rights</b>							Verification Workshop Result				
1	i	Land tenure rights recognition (rural)		✓							
1	ii	Land tenure rights recognition (urban)		✓							
1	iii	Rural group rights recognition		✓							
1	iv	Urban group rights recognition in informal areas			✓						
1	v	Opportunities for tenure individualization			✓						
<b>Enforcement of Rights</b>											
2	i	Surveying/mapping and registration of claims on communal or indigenous land				✓					
2	ii	Registration of individually held properties in rural areas	✓								
2	iii	Registration of individually held properties in urban areas	✓								
2	iv	Women's rights are recognized in practice by the formal system (urban/rural)	✓								
2	v	Condominium regime that provides for appropriate management of common property	✓								
2	vi	Compensation due to land use changes				✓	✓				Are able to claim compensation due to a change in land use - such as rezoning
<b>Mechanisms for Recognition</b>											
3	i	Use of non-documentary forms of evidence to recognize rights			✓						
3	ii	Formal recognition of long-term, unchallenged possession			✓						

		Score – Panel Consensus Position				Score - Verification Workshop Result				
LGI-Dim	Topic	A	B	C	D	A	B	C	D	Comment
3	iii				✓					
3	iv	✓	✓				✓			
3	v			✓						
3	vi									
<b>Restrictions on Rights</b>										
4	i		✓							But question about the urban edge and limitations - example used was the exclusion of Orange Farm
4	ii		✓							
<b>Equity and Non-Discrimination</b>										
6	i			✓						
6	ii			✓						
6	iii			✓						
6	iv			✓						

**LAND USE PLANNING, MANAGEMENT AND TAXATION**

			Score – Panel Consensus Position				Score - Verification Workshop Result				
LGI-Dim		Topic	A	B	C	D	A	B	C	D	Comments
7	i	In urban areas, land use plans and changes to these are based on public input		✓							
7	ii	In rural areas, land use plans and changes to these are based on public input			✓			✓			Land use plans are not a feature in rural areas and less than 10% are rural space forms part of SDFs
7	iii	Public capture of benefits arising from changes in permitted land use		✓							
7	iv	Speed of land use change	✓								
<b>Efficiency of Land Use Planning</b>											
8	i	Process for planned urban development in the largest city		✓			✓				Expect the wording of the dimension but remove the word effectively - and add "which does not always more effectively deal with cases of informal settlements"
8	ii	Process for planned urban development in the 4 largest cities (exc. largest)		✓	✓		✓				But qualified as above
8	iii	Ability of urban planning to cope with urban growth			✓						
8	iv	Plot size adherence	✓								
8	v	Use plans for specific land classes (forest, pastures etc) are in line with use									
<b>Speed and Predictability</b>											
9	i	Applications for building permits for residential dwellings are affordable and processed in a non-discretionary manner.		✓				✓			Majority do not go through formal processes to obtain formal building permissions
9	ii	Time required to obtain a building permit for a residential dwelling	✓								
<b>Transparency of Valuation</b>											
10	i	Clear process of property valuation	✓								
10	ii	Public availability of valuation rolls	✓								
<b>Tax Collection Efficiency</b>											
11	i	Exemptions from property taxes are justified	✓								
11	ii	Property holders liable to pay property tax are listed on the tax roll	✓								
11	iii	Assessed property taxes are collected		✓							
11	iv	Property taxes correspondence to costs of collection	✓								



**MANAGEMENT OF PUBLIC LAND**

		Score – Panel Consensus Position				Score -Verification Workshop Result					
LGI-Dim		Topic	A	B	C	D	A	B	C	D	Comments
12	i	Public land ownership is justified and implemented at the appropriate level of government		✓							
12	ii	Complete recording of publicly held land	✓								
12	iii	Assignment of management responsibility for public land			✓			✓	✓	<input type="checkbox"/>	Group argued that it could be a "B" or a "C"
12	iv	Resources available to comply with responsibilities			✓						
12	v	Inventory of public land is accessible to the public		✓							
12	vi	Key information on land concessions is accessible to the public.			✓						
<b>Incidence of Expropriation</b>											
13	i	Transfer of expropriated land to private interests	✓	✓			✓				
13	ii	Speed of use of expropriated land	✓								
<b>Transparency of Procedures</b>											
14	i	Compensation for expropriation of ownership			✓		✓				Strongly disagree with the panel finding
14	ii	Compensation for expropriation of all rights			✓						Agree with the finding of a "C" but concerned re the wording relating to grazing etc
14	iii	Promptness of compensation		✓							
14	iv	Independent and accessible avenues for appeal against expropriation		✓							
14	v	Appealing expropriation is time-bounded				✓					Group could not comment as there was insufficient information
<b>Transparent Processes</b>											
15	i	Openness of public land transactions				✓					
15	ii	Collection of payments for public leases			✓						
15	iii	Modalities of lease or sale of public land			✓						

**LAND INFORMATION**

			Score – Panel Consensus Position				Score - Verification Workshop Result				
LGI-Dim		Topic	A	B	C	D	A	B	C	D	Comments
<b>Completeness of Registry</b>											
16	i	Mapping of registry records	✓								
16	ii	Economically relevant private encumbrances	✓								
16	iii	Economically relevant public restrictions or charges			✓						
16	iv	Searchability of the registry (or organization with information on land rights)	✓								
16	v	Accessibility of records in the registry (or organization with information on land rights)	✓								
16	vi	Timely response to a request for access to records in the registry (or organization with information on land rights)	✓								But there are exceptions
<b>Reliability of Records</b>											
17	i	Focus on customer satisfaction in the registry			✓						
17	ii	Registry/ cadastre information is up-to-date	✓				✓	✓			Argued that the SG is out of date but the registry is not
<b>Cost Effective and Sustainable</b>											
18	i	Cost of registering a property transfer			✓						One participant felt it was an "A"
18	ii	Financial sustainability of the registry	✓				✓				
18	iii	Capital investment			✓		✓				Two issues were joined into a single dimension - argued that there is sufficient capital investment
<b>Transparency</b>											
19	i	Schedule of fees is available publicly	✓								
19	ii	Informal payments discouraged		✓			✓				Argued that corruption has been addressed in the system – This was suggest by one government official

**DISPUTE RESOLUTION AND CONFLICT MANAGEMENT**

LGI-Dim	Topic	Score – Panel Consensus Position				Score - Verification Workshop Result				Comment
		A	B	C	D	A	B	C	D	
<b>Assignment of Responsibility</b>										
20	i		✓				✓	✓		Group argued that it could be a "B" or a "C"
20	ii			✓						
20	iii			✓						
20	iv			✓						
<b>Low Level of Pending Conflicts</b>										
21	i					✓				
21	ii				✓					
21	iii				✓					

**LARGE SCALE LAND ACQUISITION**

LGI	Dimension Description	Score – Panel Consensus Position				Score -Verification Workshop Result				Comment
		A	B	C	D	A	B	C	D	
LSLA-1	Most forest land is mapped and rights are registered	✓								
LSLA-2	Land acquisition generates few conflicts and these are addressed expeditiously and transparently.			✓						Although "C" is correct, its not always expeditious
LSLA-3	Land use restrictions on rural land parcels can generally be identified			✓						
LSLA-4	Public institutions involved in land acquisition operate in a clear and consistent manner			✓						
LSLA-5	Incentives for investors are clear, transparent and consistent			✓						
LSLA-6	Benefit sharing mechanisms regarding investments in agriculture (food crops, biofuels, forestry, livestock, game farm/conservation) are regularly used and transparently applied			✓						
LSLA-7	There are direct and transparent negotiations between right holders and investors				✓					
LSLA-8	Sufficient information is required from investors to assess the desirability of projects on public/communal land				✓					This is hypothetical as the answer is based on what is happening in the mining sector
LSLA-9	For cases of land acquisition on public/community land, investors provide the required information and this information is publicly available			✓						
LSLA-10	Contractual provisions regarding acquisition of land from communities or the public are required by law to explicitly mention the way in which benefits and risks will be shared.				✓					
LSLA-11	The procedure to obtain approval for a project where it is required is reasonably short			✓						
LSLA-12	Social requirements for large scale investments in agriculture are clearly defined and implemented			✓						
LSLA-13	Environmental requirements for large scale investments in agriculture are clearly defined and implemented			✓						
LSLA-14	For transfers of public/community lands, public institutions have procedures in place to identify and select economically, environmentally, and socially beneficial investments and implement these effectively.			✓						
LSLA-15	Compliance with safeguards related to investment in agriculture is checked			✓						
LSLA-16	There are avenues to lodge complaints if agricultural investors do not comply with requirements			✓						

## Annex 2: Glossary of Terms

TERM	DEFINITION (COMMENT / ALTERNATIVE DEFINITION)
<i>Acquisition</i>	Assumption or attainment of rights in property.
COMMENT	<p>'Property' has many meanings, depending on the context in which it is used.<sup>69</sup> Section 25(4)(b) of the South African Constitution states that property as used in that section is not limited to land, and thus includes movable property.<sup>70</sup> The major division in the meaning of property under South African law is between immovable property and movable property, each with specific legal rules applicable them.<sup>71</sup> Rights to property are either real rights or personal rights.<sup>72</sup> If one is to consider property as land, then it is suggested that this definition should substitute the word 'land' for 'property'. That would make it clear that the acquisition considered is the acquisition of land and not other property. It would also reduce chance of confusion and keep the focus of the LGAF to be firmly on assessment of the governance of land. It is therefore proposed that the word 'property' should be replaced by 'land' throughout this document, unless it is specifically intended to describe the wider meaning ascribed to 'property'.</p> <p>----</p> <p>** It is also noted that in South Africa the emphasis (and challenge) in land use planning is far more on attainment than on assumption (of rights).</p>
<b>AMENDED DEFINITION</b>  <i>Acquisition</i>	<i>Acquisition or attainment of rights to land. Includes the acquisition or attainment of functional use of land under customary law and practice and the administrative recognition of functional use of land in informal settlements. Also includes acquisition or attainment of a putative tenure to land.</i>
<i>Ad valorem</i>	Latin term meaning 'based on value'.
<i>Adjudication</i>	Process of final and authoritative determination of the existing rights and claims of people to land.
<i>Adverse possession</i>	Possession of land through long term peaceful occupation as a trespasser or squatter. The right to possession after a statutorily prescribed period of limitation can be gained if there is no legally defensible claim.
COMMENT	<p>The question 'adverse to whom?' is relevant. It seems the obvious answer is to an owner or a person with a prior title or right to the land. This aspect should be incorporated into the definition by the addition of the words 'to which another has a prior legal right' after 'Possession of land'.</p> <p>Under South African land reform legislation it may be argued that an occupier under the Extension of Land Tenure Rights Act 62 of 1997, a labour tenant under the Land Reform (Labour Tenants) Act 3 of 1996, the holder of an informal right to land under the Interim Protection of Informal Rights to Land Act 31 of 1996 all possess land adversely to the owner of the land, such possession being, to an extent, protected by those statutes].</p>
<b>AMENDED DEFINITION</b>  <i>Adverse possession</i>	<i>Possession of land or a right to land to which another person has a prior or better legal right, which may or may not be legal, as in long term possession culminating in a right to acquisitive prescription or the invasion and occupation of land by informal settlers.</i>

<sup>69</sup> See for example IIED *Land Tenure Lexicon* (<http://pubs.iied.org/pdfs/7411IIED.pdf>), p.46.

<sup>70</sup> Constitution of the Republic of South Africa, 1996.

<sup>71</sup> See for example a leading South African legal textbook Badenhorst, Pienaar and Mostert "Silberberg and Schoeman's THE LAW OF PROPERTY" Fourth Ed 2003 Butterworths at page 1.

<sup>72</sup> Badenhorst etc (above), p.31.

<i>Assessed tax</i>	Taxation based on an assessment of the value of the property.
<b>AMENDED DEFINITION</b>	
<i>Assessed tax</i>	<i>Taxation based on an assessment of the value of the land.</i>
<i>Assessed value</i>	A value recorded by a public body on the market price of the property.
<b>AMENDED DEFINITION</b>	
<i>Assessed value</i>	A value recorded by a public body on the market price of the land.
<i>Building permit</i>	An approval by the local governing body on land use and planning for construction or renovation to a property.
<b>COMMENT</b>	<p>Change ‘property’ to ‘land’. Under SA law, a building permit is required to effect the construction, erection, renovation, subdivision of any improvement on land. The wording in this definition implies that the construction or renovation is made to the land (property) which is, it seems, an absurdity unless by property the wider meaning of the word is implied.</p> <p>-----</p> <p>The approval that must be obtained under national or local regulations. Drawings and specifications must be filed with the legal authorities in control of building operations (<a href="http://ciprops.com/terms.html">http://ciprops.com/terms.html</a>)</p> <p>Building Permit The approval that must be obtained under national or local regulations. Drawings and specifications must be filed with the legal authorities in control of building operations. (<a href="http://capetownproperty.blaauwberg.net/articles/glossary_dictionary_real_estate_terminology.php">http://capetownproperty.blaauwberg.net/articles/glossary_dictionary_real_estate_terminology.php</a>)</p> <p>Building permit (permission) Permit required for new buildings, extensions and certain more important alterations to buildings. (<a href="http://www.nodig.co.za/glossary/glossaryb.htm">http://www.nodig.co.za/glossary/glossaryb.htm</a>)</p>
<b>AMENDED DEFINITION</b>	
<i>Building permit</i>	<i>An approval by the relevant governing body on land use and planning to construct, erect, renovate, subdivide an improvement on land</i>
<i>Building standards</i>	See new definition below
<b>REPLACEMENT TERM:</b>	
<i>Zoning Scheme regulations</i>	Regulations or bylaws that set out standards one must conform to when constructing or renovating buildings or immovable objects. Examples include building heights, setbacks from roads or neighbors etc. Where standards are not met the local authority can impose fines or instruct on construction changes.
<b>COMMENT AND ALTERNATIVE DEFINITION</b>	‘Building standards’ are referred to in South Africa as ‘Zoning Scheme regulations’. In South Africa the term building standard can be defined as given below.:

<p><b>REPLACEMENT DEFINITION FOR BUILDING STANDARD</b> (as used in SA context)</p> <p><i>Building standard</i></p>	<p>The standard required by national or municipal legislation for all improvements erected on land. Also, depending on context, specific construction standards that have been established by a developer or architect to achieve a uniform element of design throughout the buildings in a development which may only be changed with the approval of the developer or the development management.</p>
<p><i>Cadastre</i></p>	<p>A cadastre is normally a parcel based and up-to-date land information system containing a record of interests in land (i.e. rights, restrictions and responsibilities). (FIG 1995)<sup>73</sup></p>
<p><b>COMMENT</b></p>	<p>The FIG definition given above is a very general statement, mentioning all interests in land. In South Africa, however, the cadastre only shows rights in land. For instance, in some countries the cadastre contains building lines, property valuations, building positions, etc. In RSA it only shows surveyed properties and registered (in the Deeds Offices) rights, like ownership, bonds (mortgages) and servitudes (easements). A South Africa-specific definition for “cadastre” could therefore read as follows: “A parcel based and up to date land information system containing a record of real rights in land.”</p> <p>----</p> <p>The term ‘cadastre’ is used in the conventional sense to mean a land information system that has two key components or subsystems: a spatial component, the geometric description of the land parcels linked to the textual component, the records or registers, describing the nature of interests and ownership of the land parcels. (<a href="http://www.leap.org.za/DictionaryB3.htm#Cadastre">http://www.leap.org.za/DictionaryB3.htm#Cadastre</a>)</p>
<p><b>AMENDED DEFINITION</b></p> <p><i>Cadastre</i></p>	<p>A cadastre is an up-to-date land information system that has two key components or subsystems: a spatial component, the geometric description of the land parcels linked to the textual component, the records or registers recording the real rights in land parcels such as ownership, bonds (mortgages) and servitudes (easements)</p>
<p><i>Classification</i></p>	<p>Classification is a land use and management mechanism to assist decision making. Classification is based on the use of the land, not on the type of ownership or necessarily the rights associated with the land/property.</p>
<p><b>QUERY</b></p>	<p>It is not very clear what this means. Is it correct to assume that it refers to what land is used for at present, notwithstanding its ‘zonation’? WB to clarify</p>
<p><i>Collective rights</i></p>	<p>Rights held as a result of the collective ownership of a natural resource is where the holders of rights to a given natural resource are clearly defined as a collective group, and where they have the right to exclude third parties from the enjoyment of those rights.</p>
<p><i>Common property</i></p>	<p>Common property is typically land and other resources in which entitled beneficiaries, whether individual or community defined, have specific common rights to common areas. The community controls the use of the common property and can exclude non-members from using it.</p>
<p><i>Concession</i></p>	<p>A concession is a restricted use right granted to a private party for a large parcel of <del>public</del> land that is granted for a specific purpose (for example forestry, bio-fuel, cultural/tourism etc).</p>
<p><b>COMMENT</b></p>	<p>This is not strictly accurate in the South African context. In terms of SA practice a concession can <u>also be granted over private or communal land</u>. The definition may need to be more inclusive (see deletion of ‘public’ above as possible solution).</p>

<sup>73</sup> FIG, 1995. *The FIG Statement on the Cadastre*, Federation of International Surveyors.

<b>Communal land</b>	<p>Land over which a community has rights or access to. The community may or may not have legally recognized ownership over the land. In some cases for instance the State may be considered the owner.</p> <p><i>Land to which a community has use and/or occupation rights or access to. Such land may be owned by a community based entity or it may be held in trust by the State or an organ of state, seldom a private owner.</i></p>
<b>Condominiums</b>	<p><del>A condominium is a collection of individual home units along with the land upon which they sit, also known as strata. Individuals have private rights within the complex/building, but they also have use and access to common facilities, including hallways, stairwells, and exterior areas etc. There are typically common property areas included in the property that require management by the commons.</del></p>
<b>COMMENT</b>	We do not really use this term in South Africa. See alternative term and definition below.
<b>PROPOSED REPLACEMENT TERM AND DEFINITION</b>	Individual ownership of a unit (section) in a building combined with rights to an undivided share of the common property of the scheme of which the individual unit forms a part.
<b>Sectional title</b>	
<b>COMMENT ON SECTIONAL TITLE</b>	South Africa is one of very few countries which provides for ownership of parts of buildings. Restrictions and rules of use apply to sectional title ownership.
<b>Conveyance</b>	The conveyance of land is the actual process of transfer of that land.
<b>Customary tenure</b>	<p>The holding of land in accordance with customary [or indigenous] law. Customary land law regulates rights to enjoy some use of land that arises through customary, unwritten practice, rather than through written or codified law. Customs are a set of agreed, stipulated or generally accepted standards, social norms and practices.</p> <p><i>The holding of land in accordance with customary [or indigenous] law based on the historical but evolving rules, standards, norms and practices of individuals or communities considered to be indigenous to the region.</i></p>
<b>COMMENT</b>	<p>In many ways it would be preferable to use the phrase ‘indigenous law’ rather than ‘customary law’ to describe the law that applied in South African prior to the introduction of Roman Dutch law by the colonial settlers. <u>However</u>, as section 211 of the Constitution of the Republic of South Africa, 1996, in recognizing such law refers to it as ‘customary law’ and the legislature is following that practice, we have to settle for that phrase. (The SA Constitution not only recognizes customary law, but places it on parity with the common law and requires development to bring it in line with constitutional injunctions.)</p> <p>** Note: The term ‘indigenous’ could be inserted, as shown above, to accommodate the concern.</p>
<b>Decentralization</b>	Decentralization is the principle of delegating policy-making and authority responsibility to local levels of public authority.
<b>Deed</b>	Written or printed instrument that effects a legal action such as a contract for sale
<b>COMMENT</b>	It is not common in South Africa to refer to a contract for sale to be called a Deed, although it is not wrong to do so. In SA context Deed has a more formal meaning, usually consequent but not necessarily following registration. Hence Title Deed, Notarial Deed and so on.
<b>AMENDED DEFINITION</b>	Written or printed instrument recording a legal fact, particularly in relation to land or rights in land and usually registered in a deeds registry.
<b>Deed</b>	
<b>Disposition</b>	Arrangement for relinquishment, disposal, assignment or conveyance of rights in property.



<i>Dispute resolution</i>	There are typically a range of dispute resolution mechanisms available in a country. These could be grouped into two broad classes: formal dispute resolution mechanisms; and informal dispute resolution mechanisms. The formal dispute resolution mechanisms include the formal court system as well as a range of other options that may include administrative dispute resolution and state administered or sanctioned alternative dispute resolution (ADR) mechanisms. The informal systems typically involve community leaders, village elders, village assemblies or committees in resolving disputes. They may or may not have formal recognition by the state or under the law.
<i>Easement</i>	Easements are rights exercisable by owners of one parcel of land over other land.
<b>COMMENT</b>	This is not a term used in South African law – see replacement definition of ‘servitude’ below.
<b>PROPOSED REPLACEMENT TERM AND DEFINITION</b>	<i>Servitudes are rights exercisable by owners of one parcel of land over other land. Servitudes may be real, if exercisable by the dominant land over the servient land irrespective of the identity of the owner, or personal, if exercisable over the servient land only by an identifiable individual.</i>
<i>Servitude</i>	
<i>Eminent Domain</i>	Process of the exercise of rights by the State as the sovereign owner of all the land when in the act of compulsory acquiring land or property by the State.
<b>COMMENT</b>	Found more often in foreign jurisdictions, not a term commonly used in South African law, it nevertheless underpins the right vested in the state to expropriate land – see Section 25 of the Constitution of the Republic of South Africa, 1996. “The power to expropriate is derived from various statutes dealing with the expropriation of property by governmental institutions, for specific purposes. The right to expropriate, granted under statute, for example, the Expropriation Act 63 of 1975, which is sometimes referred to as the right of eminent domain, empowers the expropriator to expropriate the property for a public purpose, against payment of compensation”. - <i>Harvey v Umhlatuze Municipality and Others 2011 (1) SA 601 (KZP)</i>
<b>AMENDED DEFINITION</b>	The underlying right of the government to take property from a private owner for public purpose or in the public interest, against payment of compensation, by virtue of the superior dominion of its sovereignty over all land within its jurisdiction
<i>Eminent domain</i>	
<i>Emerging tenure</i>	<i>Rights to land accorded to persons typically constituting an, often illegal, informal settlement located usually on public, sometimes private, land, such rights being informal initially but progressively formalized by administrative decision extended by a competent authority through agreement, land use zoning and legislative intervention, culminating in the vesting of transferable real rights to the land in such persons, including but not necessarily freehold tenure.</i>
<i>Encroachment</i>	Occupation of land, typically unclassified or under utilized State land.
<b>COMMENT</b>	In South Africa encroachment is a term normally used to refer to structures or buildings that are unlawfully built across the boundary of a land parcel onto that of another. E.g.: A building or some portion of it, or a wall or fence that extends beyond the land of the owner and illegally intrudes upon land of an adjoining owner, a street or an alley. ( <a href="http://ciprops.com/terms.html">http://ciprops.com/terms.html</a> ). Encroachment thus defined can occur on private or state owned land.
<b>AMENDED DEFINITION</b>	A structure, building or other improvement that illegally extends beyond the boundary of one land parcel onto another.
<i>Encroachment</i>	
<i>Encumbrance</i>	A right that adversely affects the land. Many are registerable in formal real estate registration systems; such as restrictive covenants, easements, mortgages and registered leases.
<b>COMMENT</b>	See earlier comments on easements.

<p><b>AMENDED DEFINITION</b></p> <p><i>Encumbrance</i></p>	<p>A right that adversely affects the land. Many are registerable in formal real estate registration systems; such as restrictive covenants, servitudes, mortgages and registered leases.</p>
<p><i>Eviction</i></p>	<p>Eviction is the removal of someone against their will from their occupation of land or property. The term is very commonly used in connection with the eviction of squatters, but may also be used in the context of unlawful eviction.</p> <p><i>Eviction is the removal of someone against their will from their occupation of a building or structure, or the land on which such building or structure is built. The term is applicable to both lawful and unlawful evictions.</i></p>
<p><b>COMMENT</b></p>	<p>“‘Evict’ means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and ‘eviction’ has a corresponding meaning.” (<i>Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 1998 (Act 19 of 1998)</i>).</p> <p>Note: The term squatter has derogatory and historical connotations that have made it unacceptable in the South African context.</p>
<p><b>AMENDED DEFINITION</b></p> <p><i>Eviction</i></p>	<p>Eviction is the removal of someone against their will from their occupation of a building or structure, or the land on which such building or structure is built. The term is applicable to both lawful and unlawful evictions.</p>
<p><i>Evolving Tenure</i></p>	<p><i>Conferring legal recognition to claims of putative tenure to land, such evolving tenure often being less than freehold tenure, but with the possibility to vest freehold tenure. Includes land held under customary tenure.</i></p>
<p><i>Exemption (tax)</i></p>	<p>Release from the obligation to pay tax. Property tax exemption is typically based on criteria such as the particular use of the property (such as use as a place of primary residence, public use, agricultural production, etc), ownership (with exemptions for particular types of owners such as investors, government etc.), or other factors (such as the status of improvements on the land, location or size of the holding etc.).</p>
<p><i>Expropriation</i></p>	<p>Expropriation is the act of taking away individuals' land by the state due to public interest but prior to respect of procedures provided for by law and prior to payment of fair compensation.</p>
<p><b>COMMENT</b></p>	<p>Under section 25(1) of the Constitution of the Republic of South Africa, 1996, expropriation of land and rights to land may be effected for a public purpose or in the public interest. Only the state has such authority.</p> <p>Also note, the use of the term ‘prior to’ appears contradictory and should be replaced with ‘subject to’.</p>
<p><b>AMENDED DEFINITION</b></p> <p><i>Expropriation</i></p>	<p>Expropriation is the act of taking away individuals' land or rights to land by the state for a public purpose or in the public interest but subject to respect of procedures provided for by law and subject to payment of fair compensation.</p>
<p><b>COMMENT ON AMENDED DEFINITION</b></p>	<p>It is not clear what the meaning of ‘prior to’ is above. Should it not read ‘subsequent to’ or ‘on condition of’?</p>

<b>First instance (Basic tribunal)</b>	This is the first judicial instance (court) which serves as the place of a first hearing of a dispute in the judicial system. Decisions served in such courts can be appealed and raised to a higher level of the judicial court system.
<b>Forests</b>	There are typically many different forest classifications, designated for different uses, management authority levels and with various effective bi-laws. Management regulations typically outline user rights, production rights, extraction rights, hunting and gathering rights etc. Community forests and community land care groups use and manage designated areas by an identifiable community, but in many cases they must gain governmental approval of their management plan. In a more general sense, forest classifications can extend to a wide range of natural resource management areas including wetlands, grasslands, deserts, and cleared areas.
<b>Freehold</b>	Freehold, equivalent to the legal term fee simple absolute, is full ownership of land in English law providing the owner with the largest ‘bundle of rights’ of ownership.
<b>COMMENT</b>	Applicable also in South African law, hence change “English for “South African” in context of LGAF SA
<b>AMENDED DEFINITION</b>	Freehold (equivalent to the legal term ‘fee simple absolute’), is full ownership of land in South African law providing the owner with the largest ‘bundle of rights’ of ownership.
<b>Freehold</b>	
<b>Functional Use</b>	<i>Practical and functional rules governing use of land applied or exercised by a group occupying land under emerging tenure developed and applied according to their needs and circumstances, not necessarily legal.</i>
<b>Governance</b>	We define governance as the traditions and institutions by which authority in a country is exercised. This includes (i) the process by which governments are selected, monitored and replaced; (ii) the capacity of the government to effectively formulate and implement sound policies; and (iii) the respect of citizens and the state for the institutions that govern economic and social interactions among them (Kaufmann et al., 2002 <sup>74</sup> )
<b>Governance (land)</b>	Concerns the process by which decisions are made regarding access to and use of land, the manner in which those decisions are implemented and the way that conflicting interests in land are reconciled. Key elements of the definition include decision making, implementation and conflict resolution, with dual emphasis on process and outcomes. (GLTN, 2008 <sup>75</sup> )
<b>COMMENT</b>	This definition should be represented / reflected in the prescribed indicators and dimensions under each theme. Experts (and panels) should be reflecting on the extent to which this is the case in their analysis of particular indicators.
<b>Group</b>	A group is a collection of households residing in a locality and operating under some common organization or set of rules and norms, with or without formal recognition of the state. In rural areas these groups include indigenous, nomadic and pastoral communities. In the urban context these groups include organized informal settlements, collectively organized migrants who cluster in a particular locality and clusters of traditional communities.

<sup>74</sup> Kaufmann, D., et al., 2002. *Assessing Governance: Diagnostic Tools and Applied Methods for Capacity Building and Action Learning*. Discussion Draft 1. Washington, D.C., World Bank Institute.

<sup>75</sup> 2008, GLTN, *Common Definitions of the Global Land Tools Network*, UNHabitat, <http://www.glt.net/en/finding-common-definitions.html>.

<b>COMMENT ON 'informal fees'</b>	The term “informal fees” is used 35 times in the LGAF Implementation Manual, yet is not defined anywhere. We assume this means fees that are not authorised by the state, but which are expected at a local or personal level of obligation to facilitate an informal or formal transfer of land, often referred to as a 'gift' or a 'consideration' or a 'thank you'. This is a modern version of a customary practice that is regarded as illegal but is at the same time sufficiently widespread to be regarded as inevitable and even acceptable (if not necessarily moral) local practice. It is most commonly associated with people living under forms of 'customary', 'communal' or 'informal' tenure, the transfer most commonly occurring between a person wanting a right to land in these situations, and local leadership structure that has assumed command over land allocation that may or may not be a recognized by the state, e.g., a traditional authority; a non-traditional local authority; a government official; a civic body; a locally recognized leader... (other?).
<b>PROPOSED DEFINITION</b>	<i>An informal fee is an unofficial amount that is charged and/or paid in exchange for access to land. It may be illegal yet is often expected and at times commonly accepted at a local or personal level of obligation to facilitate an informal or formal transfer of land rights. (In the South African context it is often referred to as a 'gift' or a 'consideration' or a 'thank you'.)</i>
<b>Informal fees</b>  <b>Informal settlements</b>	Occupation of an area by a group of individuals (households) that is not legally registered in the name of the occupiers. There is great variety in the form of informal settlements ranging from well established, well-built communities that simply lack formal recognition to very heterogeneous groupings of houses that are poorly planned and lack access to infrastructure such as roads, utilities etc. <i>The nature, purpose and quality of top structures, often self constructed, vary significantly from simple shacks to structures that comply with minimum standards or regulations determined by the State. Typically associated with emerging tenure.</i>
<b>Indigenous</b>	The term ‘indigenous’ refers to communities that are native to the locality and frequently have specific cultural identities and practices, including practices related to land, that differ from the mainstream society and as a result are often marginalized and vulnerable. The status of “indigenous communities” may be defined by law.
<b>COMMENT</b>	The recognition of traditional (indigenous) communities and customary (indigenous) law by the Constitution of the Republic of South Africa, 1996 has changed the place of indigenous people in SA. As a consequence of the constitutional changes, South Africa’s indigenous people are no longer marginalized and vulnerable and are, with the law, part of ‘mainstream society’. The interpretation of the customary law by the Constitutional Court gives it parity with the country’s common law. The critical thing is how the courts will develop and incorporate indigenous notions of land related law, e.g. rights to land by family members, layered rights to land and so. See::  “[51] While in the past indigenous law was seen through the common-law lens, it must now be seen as an integral part of our law. Like all law it depends for its ultimate force and validity on the Constitution. Its validity must now be determined by reference not to common law, but to the Constitution. The courts are obliged by s 211(3) of the Constitution to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law. In doing so the courts must have regard to the spirit, purport and objects of the Bill of Rights. Our Constitution  ‘. . . does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill (of Rights)’.  It is clear, therefore, that the Constitution acknowledges the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, makes it clear that such law is subject to the Constitution and has to be interpreted in the light of its values. Furthermore, like the common law, indigenous law is subject to any legislation, consistent with the Constitution, which specifically deals with it. In the result, indigenous law feeds into, nourishes, fuses with and becomes part of the amalgam of South African law.”
<b>AMENDED DEFINITION</b>  <b>Indigenous</b>	The term ‘indigenous’ refers to communities that are native to the locality and frequently have specific cultural identities and practices, including practices related to land. These are now, with customary law, constitutionally recognized in South Africa. In South Africa the term typically applies to descendants of the people who occupied the territory now constituting South Africa at the time of its original colonization by the Dutch in 1652.

<b>Land administration</b>	The processes of determining, recording and disseminating information about tenure, value and use of land when implementing land management policies (UNECE 1996 <sup>76</sup> ).
<b>Land dispute / conflict</b>	A land dispute is a disagreement over land. A land dispute occurs where specific individual or collective interests relating to land are in conflict. Land disputes can operate at any scale from the international to those between individual neighbors.
<b>Land management</b>	The activities associated with the management of land.
<b>COMMENT</b>	This definition appears to be circular – the question inevitably arises, what activities count as ‘the management’ of land.
<b>ALTERNATIVE DEFINITION</b>	<i>The rules, norms, standards and practices devised and applied by the person or authority with the power to enforce them to govern the use or change in use of land or its form or function and includes land development.</i>
<b>Land management</b>	
<b>Land tenure system</b>	Land tenure refers to the legal regime in which rights in land are exclusively assigned to an individual or entity, who is said to "hold" the land.  A land tenure system refers to the regulation for the allocation and security of rights in land, transactions of property, the management and adjudication of disputes regarding rights and property boundaries.
<b>COMMENT</b>	The definition given defines both “land tenure” and “land tenure system”. These should be given separately. Also, by using the term ‘exclusively’ the definition given does not sufficiently allow for overlapping and different levels or of right on the same land. In addition, “to an individual or entity” could be seen to exclude two or more natural persons (e.g. spouses, or a community of individuals) holding the land together. In addition the use of the term ‘property’ in this context is confusing, for reasons indicated earlier.
<b>ALTERNATIVE DEFINITIONS</b>	Land tenure is a legal term that means the right to hold land rather than the simple fact of holding land. <sup>77</sup> In social terms land tenure is defined as the way in which individuals, groups and societal interests relate to land and its resources. It is about the relationships among individuals and their behaviour relative to one another, in relation to their interest in land, to spatial units and to the resources they contain. <sup>78</sup>
<b>Land tenure</b>	Or  Describes the invented rules governing the relationship between a person or persons, including groups, and land and the resources inherent in the land and includes intersecting rights and interests to land which may be legally or functionally determined. Usually formulated and defined by law but not necessarily so where groups do so in informal settlements or on communal land.
<b>Land tenure system</b>	A land tenure system comprises a set of formal or informal rules that govern the allocation and security of rights in land, land transactions, and the management and adjudication of disputes regarding land rights boundaries. “A land tenure system does not have to be formal and/or contain registered titles or be written.” <sup>79</sup>

<sup>76</sup> UNECE, 1996. *Land Administration Guidelines*, United Nations Economic Commission for Europe, Geneva.

<sup>77</sup> John Bruce, *Tenure Brief*, Land Tenure Centre 1998; IIED *Land Tenure Lexicon* p.34.

<sup>78</sup> UN-HABITAT and Global Land Tool Network, *Count me in: Surveying for tenure security and urban land management*, p.151.

<sup>79</sup> UN-HABITAT and Global Land Tool Network, *Count me in: Surveying for tenure security and urban land management*, p.151.

<b>Land use plan / [Structure Plan]</b>	A plan that identifies areas for a designated use for the purpose of land management. Used for classification, resource management planning, identification of areas for future development uses, including road widening. In South Africa referred to as a structure plan.
<b>COMMENT</b>	In South Africa this is referred to as a 'Structure Plan'.
<b>Lease</b>	A lease is a contractual agreement between a landlord and a tenant for the tenancy of land.
<b>Legal framework</b>	Judicial, statutory and administrative systems such as court decisions, laws, regulations, bylaws, directions and instructions that regulate society and set enforcement processes.  <i>The body of law, comprising the common law, customary law, statutory law, judicial pronouncements which regulate society and set enforcement processes.</i>
<b>Mortgage</b>	A transfer in the interest of land for the security of a debt.
<b>COMMENT</b>	This definition is not entirely appropriate to SA context. Alternative provided below.
<b>ALTERNATIVE DEFINITION</b>	
<b>Mortgage</b>	A security interest registered over land by the owner in favour of a lender for the security of a debt.  <i>The hypothecation of land by registration in the Deeds Registry to secure a debt or obligation.</i>
<b>Municipal land</b>	Land or property where the municipal government or local authority has custodianship.
<b>Notary</b>	Legal attester of documents.
<b>Operating costs (of the registry)</b>	For the purposes of the LGAF, total operating costs include all non-capital investment costs (i.e. salaries and wages, materials, transportation, etc.) associated with registry operation. Registry operating costs do not include long-term capital investment or associated depreciation expense.
<b>Parcel (of land)</b>	A parcel is a defined area of land with a unique record of ownership, use, or other characteristics
<b>Potential (property) tax</b>	Tax that could be collected based on existing tax policies.
<b>Public approval</b>	Approval of a decision or instrument such as a land use plan through some participatory process that involves public display and consultation.
<b>Public good</b>	An asset, facility, resource or infrastructure provided for the benefit of the public.
<b>Public information</b>	Public access to information is a feature of public policy by which each society defines what information, particularly about private citizens and corporate entities, should be available to the public.
<b>COMMENT</b>	In the South African context there are often issues of public access to information about the operations of government, also in relation to land issues.
<b>AMENDED DEFINITION</b>	
<b>Public information</b>	<i>Information accessible by the public in regard to private citizens, corporate entities or government available as a right under the law.</i>
<b>Public land</b>	Public land is the land in the custodianship of the State, municipality, or local authority, as opposed to private land.

<b>COMMENT</b>	Land owned by parastatal institutions is often also perceived and referred to as ‘public land’ in the South African context
<b>Publicly accessible</b>	Referring to information that can be obtained by the public without any special requirements or certifications placed on the person/body making the enquiry.
<b>Putative tenure to land<sup>80</sup></b>	Seriously held belief to a tenure right to land registered in the name of another person, the state or an organ of state although such tenure right is not necessarily recognized in law.
<b>Registry</b>	The term ‘registry’ or ‘register’ is used to denote the organization where the information on registered land rights is held. Information on registered land is typically textual and spatial, with the former typically maintained in a registry and the later in a cadastre office. In some countries there is a combined organization that has both sets of data and in some countries this office is called the cadastral office (in the Balkans, for example). In others there are separate registry and cadastre offices. For the purpose of the LGAF, unless clearly specified otherwise, we use the term ‘registry’ to cover both the registry and the cadastre (if one exists).
<b>Registered</b>	In applying the LGAF, the term ‘registered’ means that the rights are recorded unambiguously in the land administration system and there are generally few disputes over the recorded information. The term ‘registered’ does not necessarily mean that the final certificate or title has been issued.
<b>Regularization / formalization / normalisation</b>	Regularization of tenure is where informal or illegal occupation of land is legalized by statute, giving occupiers the legal right to ownership, occupation or use of the land.  <i>A process whereby informal or illegal settlements are brought within a legally recognized land tenure system, usually by state action.</i>

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<sup>80</sup> Cambridge Online Dictionaries: Definition ‘putative’: generally thought to be or to exist, whether or not this is really true as in “The putative leader of the terrorist organization was arrested by police in Birmingham yesterday”.

<b>COMMENT</b>	<p>In the South African context, the State usually plays a key role in acquiring and investing in the land being regularized or formalized. Often the term ‘normalization’ is also used to denote regularization / formalization.</p> <p>** In general the State refrains from formally acquiring the land, but rather facilitates its acquisition. Also note that the State’s approach to the question of regularization has not been without controversy. For example it has been criticized for avoiding regularization through in-situ upgrading, instead opting for displacement of people to alternative development sites located far away from existing livelihood opportunities.</p>
<b>Resolution - formal</b>	Resolving a dispute through an administrative or judicial process where the outcome is legally binding.
<b>Resolution - informal</b>	Resolving a dispute through a process where the outcome is not legally binding.
<b>Restrictions</b>	These are limitations on one’s rights.
<b>Schemes</b>	<i>Previously commonly called town planning schemes, now applicable in both urban and rural areas, provide rules to regulate land use and development of land by zoning for defined uses, including informal or interim uses, with procedures to adapt with changing circumstances.</i>
<b>Secondary rights</b>	Rights that are beyond the primary rights to transfer property through sale, gift, exchange or inheritance or encumber property through mortgage, lien or other charge. Secondary rights are typically associated with use rights that may or may not be eligible for registration.
<b>Sectional title</b>	<i>Individual ownership of a unit (section) in a building combined with rights to an undivided share of the common property of the scheme of which the individual unit forms a part.</i>
<b>Sporadic registration</b>	The process of registering rights over land on a case-by-case basis.
<b>State land</b>	Property in the custodianship of the Central/National Government.
<b>COMMENT</b>	South Africa’s constitution describes three spheres of government that are independent but interdependent. They are national, provincial and local (municipal) and are bound together by the principles of co-operative governance. Each sphere has power to own and deal with land and rights to land.
<b>AMENDED DEFINITION</b>	
<b>State land</b>	<i>State land is land owned or controlled by an organ of state including the national, provincial or municipal governments. See also public land.</i>
<b>Systematic registration</b>	The registration of rights over contiguous parcels on an area-by-area basis, involving adjudication, surveying, and registration.
<b>Transaction cost</b>	Costs associated with an agreement over property rights and the costs of enforcing those rights. For example, purchase of land may require not only payment of the negotiation asking price but also legal land transfer fees to establish who is the rightful owner, survey and valuation costs, arrangement of credit and drafting the legal transfer document. Taxes and duties are not considered part of a transaction cost.
<b>Transfer tax</b>	Taxes associated with the transfer of properties payable to the State. The most common is in the form of a stamp duty or capital gains tax.
<b>COMMENT</b>	Under the Transfer Duty Act No 40 of 1949, transfer duty is payable on the acquisition of land or certain rights in land. Stamp duty has been abolished.
<b>AMENDED DEFINITION</b>	
<b>Transfer tax</b>	<i>Taxes associated with the transfer of properties payable to the State. The most common in South Africa are transfer duty, capital gains tax or value added tax.</i>



<b><i>Typology of tenure situations</i></b>	A country-specific typology of land tenure is established during the implementation of the LGAF. It distinguishes Public ownership/use, Private ownership/use and Indigenous and non-indigenous community tenure.
<b><i>Tenure Upgrading</i></b>	A mechanism for increasing tenure security by formalizing interests in property in an incremental process. All or some rights may be registered with varying degrees of restrictions placed on the property.
<b><i>Urban group rights</i></b>	Refers to identifiable groups in an urban setting. Those which people can be easily classified as members or non-members for the purpose of benefitting from specific rights to an area.
<b><i>Usufruct, use rights</i></b>	Usufruct is the legal right to use and derive profit or benefit from property that belongs to another person or entity.
<b><i>Valuation roll</i></b>	A list of taxable properties and associated property values used in assessing property tax within a jurisdiction (typically a local government authority).

### Annex 3: Method for the calculation of property values and costs

Cost item	Calculation
Property purchase price	<p>The average property values for the small-medium-large categories above were estimated by property branch of investment company Moneyweb, see <a href="http://www.realestateweb.co.za">http://www.realestateweb.co.za</a></p> <p>The value R600,000 associated with 'low' property price bracket above is chosen on account of that value being the threshold for exemption from property tax (Transfer Duty), i.e. this value, and below, is regarded as the market for low-income earners.</p> <p>Property value is generally determined by the market, including properties falling within housing estates and sectional title apartments.</p> <p>In the case of low-cost housing schemes value is determined by development costs or overall project cost (land, engineering, professional services for surveying, planning, registration, etc). The developer bears the costs of the overall development and passes them on to the consumer, in this case the state which pays over subsidies in terms of housing subsidy programmes.</p>
Fees for land use planning - lay out plans and General Plans	Private service in most cases. The industry is regulated by statute, with professional standards and conduct overseen by the South African Planning Institute. Developer pays planners for housing estates or subsidised housing schemes and passes costs on to the consumer (state or private buyer). The state pays subsidies according to a prescribed quantum of fees.
Fees for land surveying	Private service in most cases. The industry is regulated by statute, with professional standards and conduct overseen by the South African Geomatics Institute (SAGI). Developer pays land surveyors (or quantity surveyors in case of sectional schemes) and costs are passed on to the consumer. The state pays subsidies according to a prescribed quantum of fees.
Estate Agents' Commission	Estate agents introduce buyers to sellers in return for a commission, conventionally a percentage of the property value. Standards and conduct of the industry is overseen by the Institute of Estate Agents. This service is a voluntary contract between the seller and estate agent. The seller pays the agent, the costs being an invisible added cost to purchase price. Estate agents are not present in first registration low-cost housing schemes, but are active in speculative suburban housing estate developments and sectional title schemes.
Transfer Duty/VAT	All property transactions are taxed by the state, except in the case of low-income earners, properties valued at R600,000 and below are exempt from Transfer Duty. Developers/sellers/buyers who are registered as vendors for Value-added Tax (VAT) can claim back VAT on certain items, and in this case VAT is usually added to the purchase price, in which case no Transfer Duty <sup>81</sup> is payable.
Deeds office fees - fees for the services performed by the Deeds Registry for registration	Mandatory statutory pricing schedule determines the fee structure. Registration fees are statutorily determined, and annual increases are published each year in terms of amendments to the Regulations of the Deeds Registries Act. The 2010 fees are published as Government Notice No R659, 2 August 2010, issued in terms of the Deeds Registries Act, 47 of 1937, Amendment of Regulations. The fees are calculated according to a sliding scale based on 'fair value', which, in the case of first registration, is usually the municipal valuation. The Deeds Office registration fees are evaluated by the Deeds Registries Regulation Board, which determines matters flowing from the Deeds Registries Act (which regulates the whole industry), including the registration fees. The Deeds Registries Regulation Board can recommend amendments on any aspect of the Act. The Law Society of South Africa (which oversees the standards and conduct of attorneys including conveyancing attorneys) has a seat on the Deeds Registries Regulation Board.
Conveyancing fees	Conveyancing fees are charged according to a sliding scale based also on property value. Previously the fees were statutorily determined (prior to 1984), but removed from the Deeds Registries Act when the Competition Board found this regulation to be 'unfair competition'. From then on, the Law Society of South Africa produced an annually recalibrated proposed fee structure, known as 'guidelines', but this was recently found by the Competition Commission to constitute 'unfair competition'. Hence fees are now deregulated, or fully privatized and 'market-related': conveyancers can charge any fees they wish, like medical doctors, attorneys and other professionals. In the case of subsidies for land and housing, the state pays subsidies according to a prescribed quantum of fees

<sup>81</sup> In terms of the amendments to the Transfer Duty Act, No 40 of 1949, effected in terms of Vat Act, No 89 of 1991, s 79 and 80. See <http://propertysouthafrica.wordpress.com/2007/08/09/vat-or-transfer-duty/>

<b>Cost item</b>	<b>Calculation</b>
Property valuation	<p>Valuations are conducted by professional property valuers, and can be privately contracted. Valuation is usually mandatory for a bond application. The lending agency, such as banks, contract valuers to determine or confirm the value of property to be supported by a bond. Municipal valuations are conducted periodically for determining local property values for levying of rates. Municipal valuations are based on square meterage and sewerage connections mainly.</p> <p>Professional standards and conduct of the property valuers industry are overseen by the South African Institute of Property Valuers. The Deeds office records cannot be used for valuation. The price of land in a Deed reflects the price at the time of registration and do not necessarily reflect current values. Data capturing and recording in the Deeds Office takes place at the point when a transaction is presented for registration. In other words, the system is designed to represent land transactions, not to facilitate analysis.</p>