Scoping Report On Communal Property Institutions in Land Reform

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Contents

Executive summary

Land reform offers groups of people the option of buying a single piece of land through the creation of a legal entity to own the common property. Several types of legal entities are available but the most commonly used are trusts and communal property associations (CPAs). A number of acute problems have been experienced by these common property institutions (cpis), which cannot be ignored if land reform objectives are to be met. Over 500 CPAs have been registered as well as an unknown number of trusts, and cpis are continuing to be set up in land reform programmes at a rapid rate.

In 2001 DLA set up the CPI Task Team to review land reform legal entities. The purpose of the review and this report is to improve the situation and functioning of cpis in order to move towards, rather than away from, achieving the objectives of land reform. To do this, the report covers:

- Methods of assessing and analysing cpi performance
- Cpi assessment and analysis
- Offering explanations for causes of cpi problems
- Proposing immediate remedies
- Noting implications for law and policy
- Proposals for further investigation by the cpi audit

Methods of assessment depend on what the purpose of cpis is. The CPI Task Team agreed that the primary purpose of cpis is to secure the tenure of the group and its members. The reasons for the primacy of this purpose include:

- Secure tenure reduces risk of vulnerable people and is a basic need for all members of the group.
- A secure tenure platform creates the foundations for improved livelihoods, economic development, service delivery and sustainable natural resource management.
- Equity, democracy and accountability are important because they operate to ensure that the tenure rights of all members are certain and secure.

The following indicators can be used to assess the tenure security of groups and members of groups in common property situations:

Indicator 1	People's rights are becoming clearer; people know better what their rights are and they are more able to defend these rights.
Indicator 2	Land administration processes such as application, recording, adjudication, transfer, land use regulation and distribution of benefits are becoming clearer, better known and more used.
Indicator 3	Authority in these processes is becoming clearer, better known and more used.

Indicator 4	There are more and increasingly accessible places to go to for recourse in terms of these processes, and these are becoming better known and more used.
Indicator 5	Land administration processes are becoming less unfairly discriminatory against any person or group.
Indicator 6	Bridges are being built that span the gaps between actual practice and legal requirements.
Indicator 7	Benefits and services are becoming as available to people living under cpis as they are to people living under other tenure systems.

Making rights work in practice is the function of land administration processes. The above indicators are therefore used to look at the land administration processes of cpis.

In terms of these indicators, rights in cpis are assessed using the following categories of rights holders:

- The property rights of the group as an entity.
- The members' experience of their internal substantive and procedural rights.
- The rights outsiders have to a community's property.

The assessment shows that rights are clearer around group tenure because ownership is a formal, state supported tenure form.

However, there is mixed experience about how clear the rights of members are. In some places, people are moving towards greater clarity and knowledge while in others people are dealing with increasing confusion and uncertainty. Land reform interventions appear to have muddied issues in some cases, leading to gaps between practice and law and confusion about who is entitled to what. In other cases, there is increasing clarification that suggests that some issues are human and not easily susceptible to policy interventions.

There is also little recognition of the rights of outsiders, such as banks, municipalities, private sector partners, and how these relate to development although there is growing awareness of the risks of mortgaging land. Community members, DLA officials and consultants often seem unaware that development initiatives involve ceding rights to the common property to outsiders. This cession can be formalised as a lease, a bond, a servitude, the establishment of a township or an excision and transfer of a portion of the land, and thus involves very clear substantive group rights. Where formal tenure arrangements are necessary but have not been made, there is a real risk of rights being unclear legally and in practice and may later be subject to dispute or result in the refusal of development providers to supply services.

The indicators used for assessing institutional arrangements for administering rights are the clarity and use of land administration processes, which carries authority in these processes and the availability of recourse for members.

The key issue here is that there is no official focus on establishing and supporting land administration processes in cpis. For instance, community constitutions seldom give clear guidelines for the administrative processes of application, adjudication, transfer, recording, land use regulation and distribution of benefits. Most constitutions have tended instead to focus on organisational functioning and thus on issues concerning quorums, annual general meetings, voting and election of committees. These issues relate much more to administration of procedural rights than to the administration of substantive rights. Substantive rights are left to communities to work out for themselves because the land reform project cycle makes provision only for the establishment of a community structure, a constitution and, in some cases, some preliminary allocation of sites. The systems and procedures for future allocation of rights and for changing land rights holders, the nature of the rights held or land use regulation are institutionally isolated by not being supported once land is transferred to the cpi.

There is, however, some experience now in approaches to communal land administration that link administration of substantive rights to land use. These may provide useful material for creating greater focus on substantive rights in cpis.

The reasons for these indications of insecurity are categorised as institutional, rights and human responses.

In terms of institutional issues, it is noted that communal tenure has received very little institutional or financial support from the state, resulting in tenure systems that are closed to outside observation. Greater transparency, equity and due process require that there are clear linkages between local juridical functions and external judicial and administrative structures so that individual members can seek recourse in defence of rights.

For instance, there is little sign of formal documents (policies, laws, constitutions, business plans) that seek to build bridges across indigenous communal tenure practices and formal law. Poor constitutions are the norm, much use is still made of fast and cheap consultants and the use of questionable precedents in which the cutting and pasting is done inappropriately. Poor constitutions become “paper laws”. In many communities that are already settled on the land to which they receive ownership, well known and used practices and structures result in fairly clear criteria for who qualifies for what land rights, how allocations work, demarcated residential and arable boundaries and processes for resolving property disputes. *De facto* rights are therefore often clear but are not reflected in badly put together constitutions that affect *de jure* rights.

The type of tenure and the institutional arrangements that underlie it should be determined by how the land will be (or is being) used. In common property situations, this means determining the various uses planned for a particular property and then

determining the most appropriate tenure form and the institutional arrangements needed to operate it. This is seldom the approach taken to establishing cpis for land reform.

The issues relating to rights and rights holders are also causes of insecurity. A major source of uncertainty and strife, for example, is who is eligible for rights - who is in and who is out, who are members, who are beneficiaries. The stakes are high because membership is an important basis for asserting rights to land in common property situations. The matter is complicated by who defines membership. That is, who is "in" and who is "out" is defined partly by internal dynamics and partly by external factors, including how DLA defines its own programmes and beneficiaries of those.

Related to this is the official practice that asks for a quota of women on structures set up to manage cpis. Groups seeking to expedite land transfers often accept this requirement as necessary in order to "jump through the hoops". However, this does not have much impact on the land rights of women. The real issue for women's rights is the allocation of substantive rights.

Finally, in terms of human issues, land reform projects are frequently associated with contestation and struggle. This is not in itself a sign of failure and it should not surprise us. Tenure scholars assert that land rights in African communal tenure systems are the outcome of negotiated processes mediated by institutions. *De facto* rights are embedded in multiple interests, the centrality of social identity and status and ongoing social processes (including conflicts, litigation and negotiation). Land reform brings a change to people's rights in land and offers opportunities for re-negotiating what these are. In fact, it is an overt objective of land reform that such re-negotiation takes place, for example, the strengthening of women's rights in land.

It is recommended that practitioners and policy makers move away from the position that cpis are failing and recognize that this attitude comes from unrealistic expectations of what cpis can achieve. This requires that DLA accept certain principles, namely, that cpis are viewed as communal tenure institutions that require a supportive institutional framework. The institutional framework should focus on land administration systems developed from existing or planned land uses and that are based on recognition of cultural and legal pluralism and the need to build adaptively from current practice. Minimal institutional support includes DLA completing and extending its information system for registering cpis and the rights of members, as well as options for decentralising these functions. These principles are translated into detailed recommendations for changes to official practice, procedure and facilitation around the establishment of cpis, how to deal with gender issues and the language, structure and availability of constitutions.

A further set of recommendations refer to work that should be undertaken in the audit, as well as matters that might be included in the terms of reference for the audit. For instance, the audit would need to explore the scope and feasibility of:

- Replacing highly problematic constitutions and turn them into real agreements and tools for solving problems and guiding decision making and action

- Creating new institutional arrangements e.g. where there are competing institutions to resolve this through creating a working hybrid; to create substructures for specific tasks with clear linkages; to create different entities for managing business enterprises
- Changing the land holding arrangements to be more appropriate: in some cases transfer to a municipality of the land, or parts of the land such as residential sections, should be transferred to a municipality.
- Investigating what a more supportive and coherent institutional framework for the administration of rights in common property systems would entail. This should include a review of the strengths and weaknesses of existing land administration pilots being carried out by ngos and private sector agencies, especially in the areas of records and recourse for members of cpis.

1. Background

The programmes of land reform, namely redistribution, restitution and tenure reform, all offer groups of people the option of buying a single piece of land through the creation of a legal entity to own the common property. Several types of legal entities are available to these groups but the most commonly used are trusts and communal property associations (CPAs). Common property institutions (cpis) have experienced a number of acute problems. These cannot be ignored if there is a commitment to land reform objectives. Over 500 CPAs have been registered as well as an unknown number of trusts, and cpis are continuing to be set up in land reform programmes at a rapid rate. Even with a shift in land reform focus to supporting individual emerging farmers, communal land tenure remains the most viable option for many land reform beneficiaries, as well as their choice. Having functioning cpis is critical to the success of land reform projects in improving the tenure and lives of the people who are intended to benefit from them.

There have been regular, if disparate, reflections by ngos and by government on land reform cpis, on both the problems they face and the deficiencies in how they are being worked with or not worked with. In preparing this report the authors have drawn on the various analyses of how land reform cpis are faring. These comprise research reports, papers, workshop reports, case studies and evaluations – produced variously by ngos, lawyers, officials and sometimes combinations of these. These materials are listed with a brief description of their content in Appendix One, rather than littering this report with references or footnotes.

It is interesting to follow the threads of the developing analysis, for the picture is still emerging, and not all the pieces of the puzzle are in place. Some factors identified early are still seen as valid, while in other cases the perspective or emphasis has shifted significantly.

The early analyses (1996-1999) describe problems of malfunctioning structures, which do not act democratically and equitably and are ineffective – both internally regarding membership and towards external actors. The inaccessibility of often poor and inappropriate constitutions is noted, as is the lack of follow-through or taking of responsibility by government for supporting institutions once they are established. The calls here are for more time and care to be given to legal entity establishment, taking cognisance of the social and institutional environment of the particular group and finding appropriate roles for fieldworkers and lawyers. Proposals are for more follow-up and support work for the structures, and a well thought through capacity building programme for new structures as well as for those working with communities to facilitate better processes.

In 2000 there was some hard re-looking at these early analyses, moving into less comfortable ground. The Legal Entity Assessment Project (LEAP) raised questions about what measures of success were being used, and found these to be vague, unrealistic and thus unhelpful in enabling a meaningful statement of how well or badly cpis were doing. In confirming the large gap between practice on the ground and what was prescribed in

cpi constitutions, it questioned the conclusion that the problems lay solely in the community conceptions, practices and capacities. LEAP started the work of developing an agreed set of primary purposes of and meaningful and usable indicators for assessment, suggesting the focus be on tenure security, and that more cognisance be taken of existing customary practices and structures.

At the same time, the Legal Resources Centre (LRC) reflected on work where there had been intensive, careful processes of cpi establishment and considerable follow up support by ngos. They asserted that a similar range of internal problems and weak external relationships are found despite great differences between groupings. The conclusion here was that process and poor constitutions were not the real problem, but that the cpis had inappropriate objectives and institutional arrangements. Suggestions were made to reconsider where ownership and authority should lie, and that the configuring of institutional relationships is opened up to include local government in a more central role. The other emphasis was that more attention should be given to land allocation.

Thus objectives, indicators for measuring progress towards these, and institutional arrangements looking within and beyond the community, were taking the place of concerns about capacity building.

In 2001 DLA set up the CPA Task Team, which later became known as the CPI Task Team, to review land reform legal entities and a range of voices had a forum in which to be heard. Agreement was reached that organisational performance in administration of tenure should be a central focus for assessment, and indicators for tenure security were developed and agreed to. Furthermore it was agreed that institutional arrangements that go beyond just the community level are critical, as traditional authorities, local government and other state structures all need to be considered in this context. Increasingly the questions have revolved around the role of the state over time and just what functions it needs to serve within the set of institutional arrangements, given the needs of participants and its own objectives. The emphasis has also shifted from requiring more general democratic, equitable etc organisational practice to focusing on concrete tenure administration based on existing community concepts and practices and working towards greater tenure security for the group and its members.

2. The approach to this report

The overall purpose of the review and this report is to improve the situation and functioning of cpis in order to move towards, rather than away from, achieving the objectives of land reform. While the review process has already resulted in the identification of many problems and a framework for further assessments, the problems have not been collated and analysed in a way that enables recommendations and remedies because the underlying causes are not always understood. There is no shortage of problem identification. Nor is there much controversy about the types of problems being experienced. The challenge is to agree on the underlying causes of the problems and from these to formulate meaningful remedial interventions. Our approach therefore is to capture the current understanding of those problems and record possible solutions that members of cpis and those that work with them are presently attempting. This involves:

- Methods of assessing and analysing cpi performance
- Cpi assessment and analysis
- Offering explanations for causes of cpi problems
- Proposing immediate remedies
- Noting implications for law and policy
- Proposals for further investigation by the cpi audit

3. Methods of assessment and analysis

If asked how land reform cpis are doing, most people will say that they are not doing well. What is less easy to answer is the basis on which such an assessment is made. What is being measured and where does the measure come from? These have become key questions in trying to assess how cpis are doing. The issue is that to measure cpis using criteria that cpis were never designed to achieve results in incorrect judgements. These judgements then result in muddled and unsuccessful attempts at interventions to improve cpi performance.

This section begins with a brief overview of how the purposes of cpis have been understood. The resolution of these dilemmas resulted in clear definition of purpose and indicators for assessment against that purpose, which has come to constitute a way of analysing the issues cpis are confronting. This framework is used later in this report to describe the current understanding of the problems cpis are dealing with, which are categorised into two broad sections: rights and institutional arrangements.

The analysis is derived from fieldwork, assessments and reflections undertaken since 1996 by people and organisations that have been actively involved in establishing, amending and working with land reform cpis. The methods used in this work have focussed largely on documentary review and interviews with particular people involved in specific cpi work. These interviews were written up as brief independent case studies.

CPI task team members were also approached with requests for both specific and general comments in order to verify and confirm analysis and interpretation.

3.1 Purposes of cpis

Options for new cpis were created in 1996 with the enactment of the Communal Property Associations (CPA) Act no 28 to enable self-constituted groups of people a choice about how they wished to acquire, hold and manage land. This form of cpi used constitution making as the mechanism to construct the group and create a legal person that can own land. The primary purpose of this new cpi was to provide rural people with a relatively simple alternative to individual freehold, tribal administration and other legal group ownership options. An assumption behind the CPA Act drafting was that available legal forms (companies, voluntary associations, share-block schemes, sectional titles and trusts) were generally not appropriate due to complex administrative requirements or, as in trusts, because they placed the property in the hands of some on behalf of others.

In addition to this primary legal purpose of providing a simple mechanism for transferring land to groups of people, a set of broader purposes developed during and after the establishment of cpis. These included:

- providing security of tenure for the members of the group;
- democratic, accountable, equitable governance;
- sustainable management of natural resources sustainably;
- managing development;
- ensuring gender equity.

What was evident was that cpis were expected to perform many functions associated with governance, meet utopian value-based objectives of equity, democracy and non-discrimination, exhibit "viability" and "sustainability" and do all this with very little extended support from the state. The simplicity of purpose that the drafters had set out with had become overburdened community institutions with little chance of succeeding when measured against the weight of expectation placed on them. Neither was it clear what interventions were needed to improve the situation of cpis so that they could better contribute to the achievement of land reform objectives.

This resulted in the need to re-evaluate the purposes for which cpis were being established. Consensus gradually emerged around tenure security of the group and the members as the primary purpose of land reform cpis. The reasons for the primacy of this purpose include:

- Secure tenure is the main mechanism for reducing the risk of vulnerable people and is the one basic need that all members of the group have all the time.
- A secure tenure platform creates the foundations for improved livelihoods, economic development, service delivery and sustainable natural resource management. This doesn't mean that secure tenure will on its own automatically result in these things but that without secure tenure such outcomes are unlikely.
- Equity, democracy and accountability are important because they operate to ensure that the tenure rights of all members are certain and secure. These Constitutional values are not simply models of an ideal society but mechanisms to achieve land reform objectives.

3.2 Framework: indicators for assessment

Clarity about the purpose of cpis created an objective focus for measuring performance. LEAP and the CPI Task Team have developed a framework for analysis that is proving useful to set out what to focus on when seeking to assess cpis and their performance. This framework provides a map through the maze of complexity so that wandering into fascinating byways of analysis does not sidetrack nor befuddle us, but which also does not oversimplify the realities we have to work with in the field. This framework consists of setting out the important aspects to consider and then applying indicators for assessing tenure security to these aspects**.** The factors or explanations of these findings is critical

both in seeking a specific intervention for a group, and in identifying what needs to be understood and perhaps changed in practice, policy or law if land reform objectives are to be better met.

If the purpose of cpis is to secure the tenure of the group and its members, then assessments of cpis must measure the extent to which they are succeeding in achieving this. To do this, indicators of tenure security are required.

Tenure security is composed of a set of connected processes and concepts. Secure tenure is about:

- Defendable rights and enforceable duties to property and benefits flowing from it
- Procedures, rules and systems for managing these property rights and duties
- Clarity about where authority in relation to these rights, duties and procedures resides
- The absence of contradiction between laws and practices governing rights, duties and the tenure system

Constitutional imperatives in terms of tenure security also dictate that tenure systems must not discriminate arbitrarily against particular groups of people while fairness can only be ensured if people subject to authority can appeal decisions that affect them.

The following indicators have therefore been developed to assess the tenure security of groups and members of groups in common property situations[1]:

Indicator 1	People's rights are becoming clearer; people know better what their rights are and they are more able to defend these rights.
Indicator 2	Land administration processes such as application, recording, adjudication, transfer, land use regulation and distribution of benefits are becoming clearer, better known and more used.
Indicator 3	Authority in these processes is becoming clearer, better known and more used.
Indicator 4	There are more and increasingly accessible places to go to for recourse in terms of these processes, and these are becoming better known and more used.
Indicator 5	Land administration processes are becoming less unfairly discriminatory against any person or group.
Indicator 6	Bridges are being built that span the gaps between actual practice and legal requirements.

[1] These indicators were used to make assessments in two cpi reviews undertaken by the KZN CPA task team in 2002. The cpis involved were Msikazi and Gwebu.

Indicator 7 Benefits and services are becoming as available to people living under cpis as they are to people living under other tenure systems.

3.3 Land administration processes

Making rights work in practice is the function of land administration processes. The above indicators are therefore used to look at the land administration processes of cpis. Moments in these processes, which appear to be common to both indigenous and formal/legal systems, include:

- Application, defined as a formal request to get or give land, change land use or get help to resolve a land dispute.
- Recording, defined as creating evidence about the extent of a right (demarcation), the owner of the right (registration) and the nature of the right as a basis for adjudication.
- Adjudication, defined as resolving doubts about the rights held, which can involve dispute resolution.
- Transfer[2], defined as the moment rights in land move from one holder to another. The previous holder's rights are extinguished and the new holder's rights are created.
- Land use regulation, defined as the rules/practices about how members/individuals can use different portions of land and the mechanisms for enforcing this.
- Distribution of benefits, which relates to the rules and systems for distributing movable common property such as profits.

3.4 Institutional arrangements for securing tenure

Land administration is the "operational arm" of tenure. Community members secure their tenure through processes of asserting their interests and rights in land. The basis on which they do so is what is discussed above, and the means by which they do so is through institutional mechanisms that implement these processes, which is discussed below.

[2] The common sense meaning of the terms 'transfer' and 'registration' are used rather than their technical legal definitions.

The definition of land rights - their nature, content and who is entitled to them – is a relatively static moment in a tenure system, although changes to these do take place over time. In terms of CPAs, for example, this moment should happen during the making of the community constitution with reference to the national Constitution and CPA Act. Equally fundamental to a tenure system, however, is the movement and use of rights and the system and structure that is put in place to manage this. Member's rights can be sold, donated, bequeathed. They can be used for residence, farming, business and livelihood resources (such thatching and firewood). New members can join the group and be allocated land. Joint ventures and partnerships can be entered into. Registers of rights holders may be kept. Land may be subdivided and boundaries demarcated. Community rules or constitutions may be amended and records of these changes may be required. The processes, procedures – the systems - and structures involved in all these changes to the land rights of a community and its members, the support for these institutional arrangements and how the functions are carried out are crucial for tenure stability.

3.4.1 What institutions are

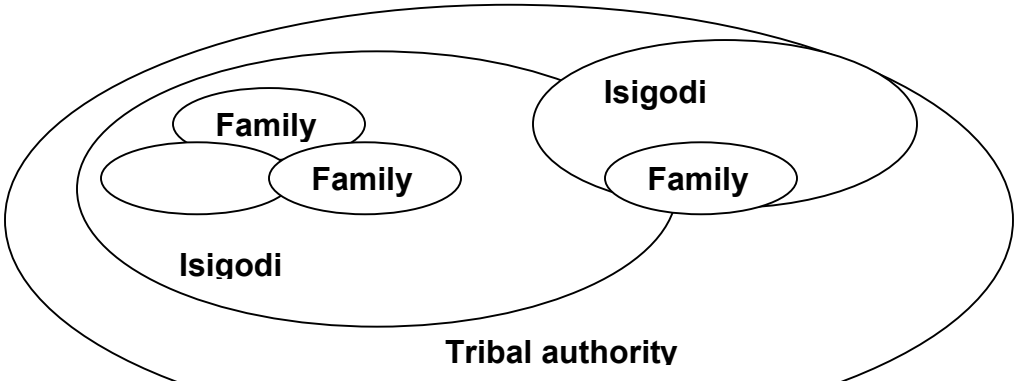
Institutions are made up of structures and systems.

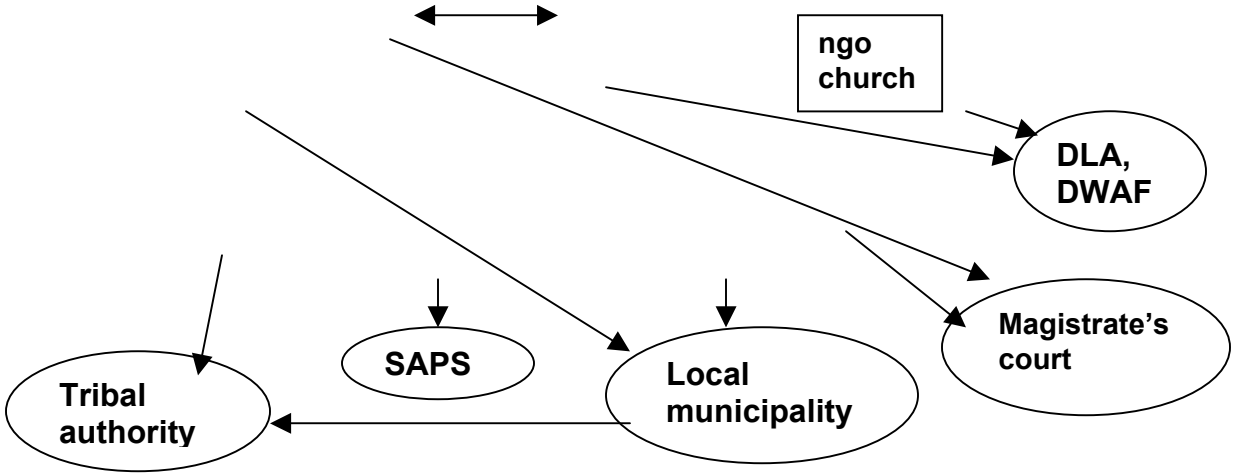
Structures are a group of people whose activities are geared towards the same specific aims or objectives and who meet regularly in pursuit of those aims. The method of pursuing aims and the relations between members of structures and between members and outsiders are determined by the systems governing the structure.

Systems include rules (explicit and tacit), culture or norms and practices. The rules can operate at multiple levels, which include rules governing the set up of the structure, rules governing the operational requirements of the structure, rules governing the specific activities of the structure and rules governing other aspects of relations between people within and outside of the structure.

3.4.2. Where institutions are found

Any one institution is nested within a range of other institutions. For example, a rural person lives in a family resident in an isigodi (ward), which in turn is located within a tribal authority, which is part of a traditional authority within a municipal area or province.





This array of structural relationships constitutes institutional arrangements. The systems governing any one structure will condition / determine how that structure relates to others. That conditioning will also have an impact on the actions of the structure at the receiving end of the relationship.

4. Cpi assessment and analysis

Securing tenure of individual members of cpis rests upon the clarity and accessibility of procedures for the assertion and justification of property rights and institutional mechanisms for realising and enforcing these rights. This section categorizes information derived from experience with cpis into rights, which includes the nature and content of rights and who holds them, and rights administration processes, which looks at institutional arrangements, authority and recourse.

4.1 Rights in cpis

Rights in cpis refer to a range of issues that need to be clearly identified. At one level, rights refer simply to the ownership of a surveyed parcel of land through the transfer of title to a legal entity representing a group of people. At more complex levels, the reference to rights raises questions about who can access what land for which purpose, when, and on what authority. Answers here vary according to community history and practice and the interventions of outsiders in terms of how government policies and laws are interpreted and implemented.

A useful recent distinction between substantive property rights and procedural rights has brought some clarity to this complexity. Substantive property rights include:

- Sanctioned access to and use of different areas of land (such as arable, residential, grazing, forest etc)
- Sanctioned access to and use of different resources on the same land (such as grazing, thatch, firewood, building mud, medicinal plants etc)

- Different types of access and use of land for different rights holders (such as women versus men, tenants versus owners)
- Variable powers to transact rights (such as mortgaging, selling, leasing, bequeathing, donating)
- Variations in the strength, security and exclusivity of rights (such as exclusive use of arable land in the growing season and shared grazing use in the fallow season)
- Group mineral rights
- Other benefits that flow from property ownership e.g. profit sharing, donations of seeds, agricultural implements etc

In addition to substantive property rights, the CPA Act provides for important procedural rights that relate to the governance of the common property. These include:

- The right to attend, speak and vote at meetings
- The right to be elected to an official cpi position
- The right to information about the management of the common property
- The right to seek recourse
- The right to fair and equal treatment

The recognition that procedural and substantive rights are distinct and should be dealt with differently is useful although not yet widely recognised. It has enabled clarity in constitutions about membership rights and draws distinctions between the types of rights that individuals have as members and those individuals, households or groups might have as the substantive holders of land.

Box 1: Grange

In Grange, KwaZulu-Natal, the separation of substantive and procedural rights was the key to moving forward from the confusing contradictions expressed in its constitution about membership as regards individuals and households (which is very common, almost the rule). It was decided that all adult residents are considered members with equal procedural rights, and that this differs from the practice that households are eligible to receive certain substantive use rights.

The content of rights and how they are managed should depend to a large extent on how the land is or will be used. Thus, for example, the rules, practice and systems for administering grazing rights should be very different from the rules, practice and systems for administering residential, business or public purpose uses.

4.2 Indicator 1: Are rights in cpis clearer and more easily defended?

This question is important to those groups and members who hold rights and those outsiders who may wish to engage with the rights holders around their rights. It impacts

directly on security of tenure and on what tenure rights can be used for. There are three key areas of cpi experience to date:

- The first concerns the property rights of the group as an entity.
- The second concerns members' experience of their internal substantive and procedural rights.
- The third concerns those rights to a community's property that outsiders may have.

4.2.1 Group rights

Groups that have taken transfer of land through land reform have a very clear form of tenure, namely ownership reflected by a title deed. Ownership implies publicly held and legally determined evidence about the who (the legal entity), the what (ownership) and the where (surveyed boundaries) of the rights. This means that the group's rights are clearer and more formally defendable than they were before transfer took place. The group is therefore less vulnerable to arbitrary deprivation of its land from outsiders such as government, the previous owners of the land or any other person. The group would have recourse to the Deeds Registry and Surveyor General's Offices as well as to the surveyor and/or conveyancer involved for evidence of rights, and to the courts for adjudication, in the event of attempts to arbitrarily deprive it of land. Many groups are therefore much more secure than they were before the land reform intervention and they experience themselves as such.

Some groups, however, have lost their land after taking transfer of it. The key cause of the loss is the use of land as collateral to access credit and inability to repay the loans, which is considered further below under the rights outsiders may have to a community's land.

4.2.2 Rights of members

The tenure and security of members of groups is complex and there is wide variation amongst cpis. In some places, people are moving towards greater clarity and knowledge while in others people are dealing with increasing confusion and uncertainty. Case study work shows groups where:

Most people have the same understanding of what their rights and land administration procedures are. This is true in many cases where previous practices have continued with minimal changes despite the constitutions of these groups suggesting changes of a larger scale. Examples are **Nkaseni** and **Ekuthuleni**, described in Cousins, T & Hornby, D (2000).

Most people are uncertain who has what rights or what the land administration procedures are. The familiar patterns here are a group of people without strong prior connections to each other. In one example, the members comprised a mix of farm

residents, former residents returning to the farm**,** former residents who were supposed to return but didn't and new members, only some of whom resettled on the farm. A farmer had previously undertaken the land administration with a limited tribal authority role. The constitution and new community institution were not accessible or familiar to people. Examples are the **Muden groups**, described in Cousins, T & Hornby, D (2000).

Rights are contested and many people are unclear and uncertain about their rights and about administration structures. The situations in communities vary around this. In some, new community institutions were set up in situations where older, traditional institutions already existed, creating a split and active contestation between the two authorities. This impacts on allocation and adjudication, which affects who has access to land and its use. The constitution in one of these communities is ambiguous resulting in local structures seeking to legitimise their authority from external organisations, such as government and ngos. In another community, the farmer previously managed the land and its use. Since transfer, the prior rights of use continue to determine who has access, resulting in contested rights. People did not have their own practice nor did the land reform intervention set out what the rights and practices should be. The formal, community document is inaccessible and in any case does not provide clarity on how to resolve these issues. Examples are the **AmaHlubi** and **Ntabeni** described in Cousins, T & Hornby, D (2000).

Some people are certain and others are not. In one example of this, the land reform and legal entity process defined a section of the resident group as beneficiaries of neighbouring farms. The CPA set up to take transfer of these farms might also take transfer of the state land that all people currently reside on. The new CPA structure is recognised widely as legitimate and is carrying out land administration on both the land it owns and the state land where members and non-members reside. However the structures are becoming increasingly dysfunctional and rights and procedures are becoming less clear over time as demands and complexity increase. With the formation of the CPA, the concepts of group identity and membership are undergoing transformation in multiple directions, as people assert different bases for group identity and the right to benefits. At the level of day-to-day working relationships, informants described a community divided into factions as the result of bitter struggles within the CPA, fuelled by the lack of clarity over rights to complex property, particularly the distribution of income from the use of grants and assets. An example is **Gwebu**, described in *Assessment of the Thobelani CPA at Gwebu*, KZN Provincial Team of the Common Property Institutions Review, August 2002.

There are the first signs of uncertainty developing. This group did not know the land was not tribal land until it was sold and the buyer tried to evict them. The group and their land administrative practices had been stable. Now there is a new structure and a proposed joint venture most people know little of and uncertainty about rights and procedures are starting to show. The constitution is neither accessible nor clear on these issues. An example is **Msikazi**, described in KZN Provincial Team of the Common Property Institutions Review, May 2002).

People were uncertain about their rights and there has been struggle and contestation but they are clarifying. In a restitution community, people previously dispersed spent years struggling to define who qualified as having rights and what the procedures for allocation and administration on the claimed land should be. These disputes are now gradually being resolved. In a newly formed labour tenant community, there have been two distinct groupings. One group felt forced into agreeing to move to the land the other group resided on already. Many men also objected to women claiming independent land allocations on the basis of their having been approved as beneficiaries of grants. As transfer approached, divisions and conflicts increased. Subsequent processes of redrafting a poorly conceived constitution to reflect real agreements and practices are clarifying rights and procedures, which land reform planning processes will take further. Examples are **Elandskloof**, described in Appendix 1, and **Grange**, described in Cousins, 2002.)

4.2.3 Rights of outsiders

These rights tend to emerge around the communities' development plans and initiatives. Examples show three types of rights. The first is the rights partners in joint ventures or other partnerships have to community land in order to secure their investments. The second is the rights credit institutions such as banks have to the community land in return for credit for entrepreneurial activities. The third is the rights government departments or parastatals may have to community land in order to facilitate the delivery of certain services, such as roads, electricity or schools.

As a general pattern, community members and possibly DLA officials and consultants often seem unaware that development initiatives implied by the above activities involve ceding rights to the property to outsiders. Where this cession is formalised, it may be as a lease, a bond, a servitude, the establishment of a township or an excision and transfer of a portion of the land, and thus involves very clear substantive group rights. Issues here relate to the degree to which the community members understand and have participated in decisions resulting in outsiders holding these formal rights. In some situations, however, formal tenure arrangements are necessary but have not been made. In these cases, where arrangements are fuzzy, there is a real risk of rights being unclear legally and in practice and may later be subject to dispute or result in the refusal of development providers to supply services.

Joint ventures and share equities

Box 2: Msikazi joint venture

In Msikazi, an agreement reached by DLA officials, planning consultants, neighbouring farmer (previous land owner) and possibly some CPA committee member representation,

resulted in a large portion of arable land being allocated for a joint sugar cane project between the community and the farmer. Officials and consultants involved remained unclear about the exact tenure arrangements underlying the venture or how benefits would be dealt with even after transfer to a CPA had taken place. What is clear is that the catalyst for the venture is DLA's project approval criterion of income generation and that most community members are unaware of the project or the implications that a considerable portion of land will be removed from the common grazing area.

Credit institutions

There has been mixed experience of the rights of credit institutions to repossess land in land reform projects where owners have been unable to service bonds. In some cases, the access to a loan has enabled groups to undertake commercial ventures. However, there is also a growing experience of the risks involved in using land as collateral for credit as a number of communities have lost their land.

Box 3: Khomani San

Government has stepped in to prevent the sale of land given to the Khomani San in the Kalahari, which was to be auctioned this week because of unsettled debt. The Land Claims Commission reached an out-of-court settlement with the creditor, Attie Avenant, on Monday to prevent the auction of one of the six farms alongside the Kalagadi Transfrontier Park, which was handed over to the San community in 1999 in one of the first successful land restitution cases. In March, the Upington Magistrates Court agreed that Erin farm be sold as repayment of R150000 owed to Avenant by the Communal Property Association, which administered the redistributed land.

"The practical implication of the court action, if it was not appealed against, would have been the loss of land to the community," said regional land claims commissioner, Tshepiso Ramakarane. He would not comment on the detail of the settlement, which is bound by a confidentiality agreement.

The commission will launch an application in the Kimberley High Court on Friday, which could see the association placed under administration. If the application is successful, the commission will then launch an investigation to determine if the debts incurred were "for the personal benefit of the individuals of the management committee or the broader community," said Ramakarane.

The case has raised a number of questions, not only of the association's management committee that incurred the debt, but also of Avenant, who sold three of the farms to the

community, including the farm meant for auctioning. Avenant was paid R3m for Erin farm. Ramakarane said there were "too many coincidences" in the deals that led to the bad debt. It was the commission's responsibility to prevent the auction of the farm, to "ensure the interests of the broader community," Ramakarane said. "The auction of the farm would have undermined the land reform process in the country. "

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A policy question that must be asked is whether options to mortgage communal land for mixed uses, including settlement, should be allowed. If so, what processes must be followed in order to ensure that all members are fully aware of the risks involved? If not, communal property associations should not be established as legal entities for commercial land use. Legal options for commercial use would include companies, CCs or co-operatives.

Services

The third type of outsider rights relates to options for state or parastatal service delivery. In some situations, this connects directly to the spending of the remainder of the land reform settlement grant on development and the maintenance of those developments (such as community water systems and roads). In other cases it relates to constraints on municipalities to providing services on privately owned land and to the development of key infrastructure such as roads, schools or clinics.

It needs to be noted that different government departments are likely to have varying requirements concerning the tenure arrangements necessary for the implementation of their policies. (This is an issue that requires further exploration in the audit in order to build the awareness of those establishing land reform cpis.) However, some options that have been tried in relation to municipal services include:

- Attempts to build the capacity of a cpi to negotiate with the municipality and to develop systems for local revenue collection to pay for services, such as water and sewerage disposal. Experience suggests that this is a long-term approach, which may or may not succeed and that municipalities find the complexity of accommodating such needs difficult.
- Sections of the common property are declared a township with a transfer of ownership to the municipality and parcels transferred to individual members (households) in ownership with the cpi continuing to own the grazing land. This places legal obligations on the municipality to bring services to the boundaries of the individual properties and to take responsibility for revenue collection from households. Experience suggests this works well for some groups, although it is not likely to work for rural people already living in dispersed settlements where boundaries are irregular and difficult to survey and plots too large to make household service access affordable.

Box 4: Ekuthuleni

Members of the Ekuthuleni community were already resident on the land when the minister approved the application for a transfer of the state land to a CPA. Some of the plots are large, up to ten hectares or more, and used for supplementary commercial agriculture. People were unanimous in the decision not to resettle into a township situation in order to reduce the costs of services and opted rather for more limited servicing, such as shared boreholes and basic electrical infrastructure that left the costs and choice of household connection up to individual households.

Municipalities (and other service providers, such as Eskom, Telkom and possibly Department of Transport) in these latter situations may be prepared to provide services where they can be given servitudes to guarantee their access for maintenance purposes. This would require that the community rights holders are easily identifiable and are willing to be expropriated. However, this would need to be further explored in the audit. For example, in Blaaubosch in KZN, the municipality had to delay budgeted expenditure on a house-to-house water system because adjudication of the underlying rights was a lengthy and extremely expensive process. Without this adjudication, the municipality was not able to negotiate expropriation for servitudes with correct rights holders.

4.3 Indicators 2 – 5: Institutional arrangements for administration of land rights in cpis

The indicators used for assessing institutional arrangements for administering rights are the clarity and use of land administration processes, who carries authority in these processes and the availability of recourse for members.

The key issue here is that there is no official focus on establishing and supporting land administration processes in cpis. For instance, community constitutions seldom give clear guidelines for the administrative processes of application, adjudication, transfer, recording, land use regulation and distribution of benefits. Most constitutions have tended instead to focus on organisational functioning and thus on issues concerning quorums, annual general meetings, voting and election of committees. These issues relate much more to administration of procedural rights than to the administration of substantive rights. Substantive rights are left to communities to work out for themselves because the land reform project cycle makes provision only for the establishment of a community structure, a constitution and, in some cases, some preliminary allocation of sites. The systems and procedures for future allocation of rights and for changing land rights holders, the nature of the rights held or land use regulation are institutionally isolated by not supported once land is transferred to the cpi.

There is, however, some experience now in approaches to communal land administration that link administration of substantive rights to land use. In the following cases, the

various land uses were looked at together with land administration processes in some detail.

Box 5: Northern Cape - TRANCRAA

The Transformation of Certain Rural Areas Act 94 of 1998 (TRANCRAA) has created a process of reforming communal land governance in "coloured rural reserves". These are home and partial resource base to the majority of the rural population in the Northern Cape. There are six such reserves in Namaqualand, where more than 1,2 million hectares and over 2 000 households are involved in the transformation process, which will result in the land now used in common by the community and held in trust by the state being transferred to communal property associations or municipalities. Both formal and informal rights to the commonage are to be recognised, with the exception of land situated in the town area, which vests in the municipality. People with residential plots in these towns are encouraged to register private title. Implementation of the Act was delayed pending municipal demarcation, and an 18-month transition period stipulated during which people could decide what ownership and management option they prefer. Sub-committees have been set up to consider different land uses: saailande, grazing, irrigation land, mining and tourism. This step begins the process of peoples' debating and striving to make an informed and democratic decision about how to own and govern their common land. An ngo, Surplus People's Project (SPP), which was contracted to implement this process, has expressed concern that once rights have been properly identified, described, allocated and recorded, there will be no further state support in administration of the rights. This may well result in gradual erosion of the rights.

Box 6: Eastern Cape - Gasela

Gasela is made up of some 58 households who had IPILRA rights on 142 ha of land. An ngo, Border Rural Committee (BRC,) has worked with them intensively for a number of years. Their method was to understand and set out the existing tenure rights and an administrative system for each land use: residential, cropping, animal production and grazing. From this basis improved usages were developed while building institutional capacity to implement the changes. The approach was to build from what existed into manageable systems that can be incrementally improved as the community becomes more experienced in performing the various functions of land administration. The systems developed to allocate, record and administer land rights were explicitly focussed on ensuring productive land use and economic viability for the community. Rights to arable land are linked to the productive use of the land, and to the maintenance of proper records. In this way a successful local system of land allocation and land administration was developed and has been sustained.

A similar system was attempted in Chata and in Thornhill, but it has not been successful. Various factors are put forward as contributing to Gasela's success. It is a small community and thus direct representation in community meetings is possible. It is a "greenfields" project and so did not have to grapple with the complexity of previous underlying land rights in the area. The leadership is uncontested and representative. People derive direct financial benefit from the land administration system: the system

was developed to enhance livelihoods not only to secure tenure. There has been intensive "hands on" support from BRC, which is maintaining the register of land rights.

Box 7: KwaZulu-Natal - Grange

In Grange LEAP facilitators worked with nine households over eight days. Each land use was identified and dealt with separately in terms of the various land administration steps required. A foundation was laid but could not be completed until transfer took place. However this foundation legal entity work is informing the task of the planner. All too often detailed planning does not see tenure and land administration as its business (see also *Assessment of the Msikazi CPA* KZN Provincial Team of the Common Property Institutions Review, May 2002) and then not only are opportunities for enhanced competence lost but disjunctures occur that move community focus away from tenure security instead of towards greater clarity on land administration procedures.

Box 8: KwaZulu-Natal - Ekuthuleni

Ekuthuleni is a 1 160-hectare farm outside Melmoth inland from the KwaZulu-Natal north coast. It is currently state owned, falls under a tribal authority and is occupied by about 230 families, most of whom have allocations of residential and arable land with access to commonage for grazing and natural resource harvesting. In 1997, the headman approached DLA requesting PTOs. The community wanted records of their rights for three main reasons: to secure their tenure against the state, to secure their tenure against their neighbours and to improve their access to credit in order to develop their agricultural enterprises, which required improving road access.

A few years later, the DLA agreed to transfer the land to a CPA. The community had opted for this choice after weighing up the short and long-term costs of individual titling against community ownership. A factor that influenced the decision was the desire to retain some control over community membership in order to maintain social stability and to continue respecting the role of the traditional leadership. Of concern, however, was the fact that the current legal mechanisms of communal ownership do not facilitate formal, public recognition of the individual (household) rights that the community recognises as ownership. Such formalisation would need to include boundary demarcation, clarity about who has rights to various portions of land and rules for allocation and transfer (or alienation) of property, all of which are causes of various unresolved disputes around property at Ekuthuleni. Public recognition would enable people's original objectives to be better met - namely, securing tenure of members and improving access to credit and development.

AFRA has been working with Ekuthuleni since 1999 providing assistance in developing processes and records for formalising the rights that exist. The goal of the work is to provide legal, affordable, accessible and sustainable records of the rights households have

inside the Ekuthuleni boundaries. This involves recording rights, but more importantly setting up sustainable land administration systems that will continue recording rights and transactions into the future. Some interesting points have arisen in this regard:

* Current legal mechanisms are costly because they are reliant on professional input that is determined by highly technical requirements (surveying, conveyancing, planning) while systems and rituals exist locally that achieve similar outcomes quickly and at very low costs.
* Local systems include demarcation, clarification about who holds rights to particular pieces of land and mechanisms for dispute resolution and yet have no legal standing.
* Local systems are effective much of the time but when they don't work, there is no recourse or state support. Serious conflict results in abandonment of land as a last resort.
* Local systems are not recognised by outsiders, which constrains development and access to credit resources (although this is not the only constraint to credit access).
* There is a fundamental clash between official notions of land use and those operating at Ekuthuleni - e.g. land holders sub-divide land for sons and sometimes daughters, while official regulations do not allow any more families on the land.

Because the CPA Act and the community constitution do not provide solutions to these internal land rights issues, AFRA and Ekuthuleni had hoped that the Communal Land Rights Bill would provide support for local definition and recording of rights and affordable systems for the sustainable administration of these rights. The current bill does not appear to do this.

Box 9: The effects of lack of recourse – Doornkop

The Legal Resources Centre (LRC) clients are in a minority in a CPA. The majority of the CPA decided to evict the LRC's clients. Because the CPA constitution does not provide clear substantive rights for members, the minority group did not have adequate legal means to protect themselves from the proposed eviction. The CPA constitution provides only for procedural rights for members and supports majority decision-making processes. Thus the CPA constitution did not provide adequate recourse for the Doornkop minority group. They applied to the Department of Land Affairs to appoint a mediator in terms of the CPA act. However the mediator was physically threatened and had to flee the area under police protection. Thus the provisions of the CPA act also did not provide effective recourse for the Doornkop minority. The LRC has now applied to court to have the CPA liquidated.

The fundamental problem is considered to be that the CPA constitution did not provide for clear, defined, substantive land rights for members. Nor has the mediation mechanism in the CPA act been effective.

(Du Plessis, 2002)

5. Causes of tenure insecurity

What follows is the identification and summary of key factors that explain some of the reasons for the indications of tenure insecurity described above. These are grouped under three headings. The first concerns institutions: how they are understood, their importance in securing tenure and how to bridge conceptual differences. The second concerns rights holders and their rights, how these are defined in law and practice and what mismatching means for implementable constitutions and community institutions generally. The third is a single factor concerning human responses, namely the inevitable struggles that ensue as a result of change and uncertainty.

5.1 Institutions and their arrangements for securing tenure

5.1.1 The Role of the State

Reflections on the limited impact of tenure reform in Africa echo the conclusions of legal academics on the tenacious nature of indigenous cultural and legal systems and institutions. "... secure land rights are the outcome of negotiated processes, mediated by strong and legitimate institutions backed by central government, which provides an enabling framework of law as well as institutional support for local level processes." (Cousins, 1999).

Communal tenure has to date received very little institutional or financial support from the state. This absence has created tenure systems that are virtually closed to outside observation. In order to move towards greater transparency, equity and due process, there need to be clear linkages between local juridical functions and external judicial and administrative structures so that individual members can seek recourse in defence of rights.

The need for the state to oversee local level land administration is partly a concern about the capacity of elites to capture resources and dominate decision-making. However, linkages to the state are also needed to build bridges across colonial and indigenous systems. These bridges should facilitate the provision of public records of rights in cpis and the availability of adjudication and recourse. These changes would be possible through the support of the large institutions currently serving only private property rights such as the Deeds Office.

5.1.2 Legal Pluralism[3]

Legal pluralism exists as a corollary of cultural pluralism. The relationship between imposed Western law and official indigenous law is not based on equality, as indigenous law is the subservient law. Imposed state law and western values are regarded as a tool to modernise and reshape indigenous legal and social orders. Official recognition of cultural diversity has no effect on the factual existence of legal pluralism: it merely determines status. Indigenous culture, law and institutions have shown a remarkable resilience to imposed western influences. Western laws have been in practice either ignored or obeyed out of fear, but indigenous laws and institutions have never been wholly displaced – and are still widely observed. State regulations have often caused distortions in but could not suppress the natural development and adaptations to changing circumstances of indigenous law and its institutions without losing their essential character.

Van Niekerk (2002) argues that different law systems should not be unified but harmonised. Harmonisation aims at removing overt discord. This does not mean manipulation to make indigenous law compatible to western values, for if it results in laws discordant with the values of the communities they are to serve they become "paper" laws and will not be heeded. We should be seeking to achieve the articulation of constitutional values in all laws, but within the framework of people's own cultural values. If the challenge of such a bridging is taken seriously, there must be recognition that cultural norms and paradigms have deep wide roots that are difficult to fully grasp. This requires careful listening and the facilitation of dialogue to build across what can be wide chasms. A crudely built or imposed bridge (threat of no grants or imposition of a CPA) will be unstable and not result in greater tenure security for all members of the group.

5.1.3 Cpi constitutions

There is little sign of formal documents (policies, laws, constitutions, business plans) that seek to build bridges across customary communal tenure practices and formal law. The very first written analysis of land reform legal entities identifies problems with the unconsidered approach of lawyers and others, and in the production of constitutions for cpis. The problem has been consistently named throughout the past eight years and while some practitioners have responded little has changed in practice on the ground. Poor constitutions are the norm, much use is still made of fast and cheap consultants and the use of questionable precedents in which the cutting and pasting is done inappropriately. Poor constitutions become "paper laws". However, there are debates amongst those working more seriously and outside the constraints of DLA budgets about what needs to change and in what direction.

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[3] This draws strongly from van Niekerk G (2002*).*

LEAP suggests the following indicators for effective constitutions:

- The gap between what the document says and actual practice is small
- The document is clear
- The document reflects people's agreements
- The document is suitable and appropriate to people's situation
- The document is available to members
- The document clarifies who rights holders are and what their rights are

There are two major sources of problems relating to the constitutions. The first is simply poor or sloppy practice, where cheap and easy routes are sought and bad use of precedents is made. Such practice has been rife and DLA's awarding of contracts on the basis of the cheapest price without having a set of standards to use for measuring quality has encouraged this. Some early problems of contradictory definitions of membership and clauses that bear no relation to people's realities have been reproduced because they have in practice, even if not in policy, become accepted as precedents. The second relates to a paradigm that drafts constitutions with the assumption that if things are set out as they should be, practice will follow. This approach is combined with an eye to the document being an instrument for formal legal recourse. This approach does not give sufficient recognition to the fact that formal law (which the constitution is) will only ever partially regulate society, and that it needs to interact pragmatically with people's lives, practices, paradigms and institutions if it is to have any meaning to them.

It is here that LEAP asserts that the constitution and its drafting should firstly recognise known practices regarding land administration. A set of agreements and institutions that lead the group in the direction of increasing tenure security for all its members is then adapted from this base. There should be nothing that contradicts the CPA Act and our Constitution but too close a reference to the Act is leading to documents that meet formal requirements but are not tools for protection and guidance for members of the groups concerned.

The debates about constitution drafting relate to:

- Language - the use of plain or legalese language; the languages our courts are familiar with (English or Afrikaans) or the language of the group.
- Whether to use the CPA Act or agreements people make around tenure and community organisation as the primary base upon which the constitution is crafted.
- Long, detailed documents that try to cover every eventuality or simple constitutions that set out major principles along with "by-laws" that are detailed and develop as people need them to.

There are lawyers who advocate plain language and yet legalese remains the norm. Why? It has been argued that lawyers write in legalese because they are expected to and in the mistaken belief that it ensures that words, which may have to be interpreted by a court, will be given the meaning intended by the draughtsman. It is possible to be clear and unambiguous to both lay readers and a court. LEAP has demonstrated that the use of legalese along with poor layout can obscure the fact that documents are badly crafted and

full of legal contradictions and could be considered “void” for vagueness by a court. Cant (1991) goes on to say that the major reason for faulty legal documents is the inappropriate use of precedents. He suggests that lawyers take careful instruction, keep documents simple and short, and use a logical sequence, short sentences and annexures for detail.

It is especially worrying that the definitions of rights holders is so often contradictory in cpi constitutions, and that definitions of rights are so weakly dealt with.

5.2 Rights holders and their rights

5.2.1 The gap between de facto and de jure rights

Assessments of whether or not rights in a cpi are clear confront the question of 'clear from whose perspective?' In many communities that are already settled on the land to which they receive ownership, well known and used practices and structures result in fairly clear criteria for who qualifies for what land rights, how allocations work, demarcated residential and arable boundaries and processes for resolving property disputes. De facto rights are therefore often clear. However, there are also de jure rights in terms of formal laws. These laws include the legal basis for making a claim to ownership (for instance, the restitution act, labour tenants act, ESTA, IPILRA and Act 126) as well as the rights, rules and regulations established by the community constitution or trust deed. What is significant in many cpis is that there is a wide gap between the de jure and de facto rights and systems of land regulation.

This gap becomes evident in cpis when exploring:

- Whether member's views about their rights and the rules and practices that regulate them are divergent, and in what ways and to what degree they vary.
- How consistent and clear the legal definition of people's rights is.

This gap underlies a central challenge in setting up legal entities. The challenge is to meet the policy and legal requirements that are situated in legal western capitalist frameworks while providing a useful regulatory framework which members of communities can use. It is not at all clear how consistent these two systems of defining and upholding rights are. The process of creating legal institutional arrangements at local level that are reflected in a constitution requires interacting with understandings and practices embedded in cultural institutions. These are varied ones and frequently have fundamental differences that shape people’s relationships and practices regarding land. Moreover formal law has little reach into such spheres as poor or remote communities let alone inside the households contained within them.

It is not that these two systems are completely isolated from each other. There are changes taking place in both communal and traditional societies as well as in western-

oriented society that are shaped by the larger social, political and economic context. The point is that these divergent ways of sorting and regulating social life can sit uneasily together, as for example in the unresolved issues around the role of traditional leaders in this country.

5.2.2 Procedural and substantive rights

The CPA Act and most constitutions of cpis focus on procedural rights with too little attention given to substantive rights (for noted on the distinction see paragraph 4.1). Thus we see pages of detail on meeting procedures and committee functioning and almost nothing that describes the content of substantive rights, who can receive them, on what basis, through what procedures and how these are administered.

This distinction between procedural and substantive rights has also helped clarify why cpis have had limited success in achieving gender equity. The expectation that a quota of women on committees would help to transform women's substantive land rights has obvious flaws. Constitutions that have pages of detail on meeting quotas and committee member roles and almost nothing on land administration are clearly weak in resolving substantial issues around the allocation and transaction of property rights.

Less clear is the degree to which substantive rights can be defined at the point of constitution making. It would appear that it is critical that the land administration procedures determining which members can apply for what rights, are well defined early in the land reform project cycle and are included in the constitution. However, greater definition, formal allocation and records of these substantive rights may belong more appropriately to later processes in the project cycle and may not require detailed regulation in the constitution. This issue, however, needs further exploration in the audit.

5.2.3 Rights facilitating development

The type of tenure and the institutional arrangements that underlie it should be determined by how the land will be (or is being) used. In common property situations, this means determining the various uses planned for a particular property and then determining the most appropriate tenure form and the institutional arrangements needed to operate it. For example, a group may plan to establish a residential settlement with some services (such as roads, water and electricity) on one part of the land, a commercial agricultural enterprise on another part and to use the remainder of the land for communal grazing and natural resource harvesting. This will require three distinct tenure arrangements to be set up. Decisions relating to institutional arrangements will depend on members' resources and capacities but could include establishing a township and registering individual residential holdings in the Deeds Office with the remainder of the land being owned by a CPA. The commercial enterprise may require a company to be set

up and a lease agreement with the CPA, while the communal area may be regulated through community land use rules.

Land reform options, however, tend to focus only on who the owning entity should be not on what the land will be used for. Even where this is a focus of detailed planning, the tenure arrangements that should underpin this use is often not explored or planned for. This simplistic approach often results in tenure arrangements that are not appropriate for the community or DLA's developmental objectives for the project. The cause of the problem is then attributed to the cpi rather than to the appropriateness of the cpi for the particular land use planned.

5.2.4 Membership

A major source of uncertainty and strife is who is eligible for rights - who is in and who is out, who are members, who are beneficiaries. The stakes are high because membership is an important basis for asserting rights to land in common property situations. The matter is complicated by who defines membership. That is, who is "in" and who is "out" is defined partly by internal dynamics and partly by external factors.

There is no doubt that in practice membership of a group includes the concept of both household and individual. What is confusing is that membership has become conflated with beneficiaries as defined in lists attached to constitutions. Grants are awarded to households, which are ticked off against an individual applicant (and possibly co-applicant) who represents the household. The resulting list of applicants is then used as the official list of members, which creates ambiguity about whether the members of the cpi are the individuals on the list or all members of the household that the individual represents. The concern is the security of individual rights when land rights are allocated and exercised through households. This is of particular concern when it comes to the securing of women's tenure rights, as households are sites of "co-operative conflict" in which women are structurally disadvantaged. A key issue is therefore which rights are linked to individuals, which to households and how these relate to one another.

Households, communities and officials have also used the official definition of household strategically to maximise the size of the grant for the group although this does not match with the way people define themselves as households. Thus, anyone who could be described as "eligible" is listed whether they live separately from other grant claimants or not. For instance, each wife in a polygamous marriage was listed separately, except one, where the man's name was used. These lists do not necessarily create a perception in the group that the different wives have a different status as members although there are signs that being named a beneficiary can be a basis that people will use to assert rights.

Box 10: Grange
In Grange people did not know who was included on the beneficiary list – the official took information about community members and compiled a list of 43 "members", while

the practical reality of households (or "muzis") is also reflected in the constitution as being nine. LEAP suggested, and people accepted the concept, that all residents over 18 are members, with the procedural rights to attend meetings, to vote, to stand for office and to access information. Land use rights are however allocated to households. Thus a key issue to decide on is when and how a new household is declared and recognised, and thus becomes eligible to apply for its own residential site, fields and grazing allocation. In the LEAP facilitated workshops this became a standoff between the men and the women – the former saying married men who could support an independent household could apply for recognition, while the women argued that women with children should be able to apply too. The need, they argued, is that internal relations can become very strained between such a woman and her sister-in-law. The basis for asserting their right was that "our names have been used to get grants, and we cannot get another housing grant, so our options are closed". The men expressed fear at such households bringing other men from outside onto the property, and thus the community losing land out of their families, and that they do not want to become "like a township". The women argued there were rules around this that could be enforced. There was no immediate resolution, but two weeks later the men accepted that women who are beneficiaries can apply for recognition as a new household, that can then apply for use rights.

If the definition of membership meets the bureaucratic requirements for eligible beneficiaries but does not reflect the practices of the social entity, we see varying outcomes of actual membership.

One is that where the social entity is strong, it does what it must to meet official requirements and optimise the number of grants and then effectively ignores the official determinations and carries on as it did before. (e.g. Nkaseni). Another is that there is a new basis for asserting rights that people begin to use, and this is done in conflict with previous practices, setting up social conflict. Some of these social struggles tend to undermine tenure security where assertions exclude certain people or people exercise perceived rights without reference to the allocatory authority (e.g. Gwebu, AmaHlubi). In other social struggles, the tenure of vulnerable categories of people (such as women who head households) can be improved if appropriate intervention and support is provided.

Where the social entity is not strong and the legal entity bears little relation to people's lives, an administrative paralysis can occur. The result is either that members muddle along without much clarity and order (e.g. Muden) or that legitimate beneficiaries do not move onto the land, which is then liable to invasion.

5.2.5 The household and land rights

The Household Study (see Appendix 1) asserts that the use of the terms "household" and "household head" results in officials and community members assuming that the head (usually male) is the recipient of the grant and the rights that come from that. (See Gwebu.)

The rural reality in parts of the country is that "households" are units that utilise and manage land and land resources. The practice in many communal systems is that a household head applies for an allocation of land for residence and agriculture on behalf of his (and less often, her) household. The household then allocates use rights to its members.

> "Traditionally customary law accorded rights, including rights to property, to family or agnatic groups with members sharing in the group's rights to property. Customary law protected, and still protects, the rights of individuals through families to which they belong. The emphasis in African traditional communities always falls on the family group as an individual person has a status and functions within this group context. The property of the family home was not owned outright by the family head but was held in communal ownership by the family as a unit, under his administration and control." (Bekker, Labuschagne and Vorster, 2002: 54).

A single man will not be given a site, neither will a single woman, as they do not have responsibilities to meet.
Added to this practice is the reality that we live in a patriarchal society. The national Constitution seeks to move us towards equality but that reality is not changed by legislation alone and then, not quickly. The tension here is that households are deeply embedded in social structures that are patriarchal. However, these social structures also perform many organisational functions, which need to be understood and worked with, as they cannot be eradicated. On the other side the Constitution calls for gender equity and the government programme of land reform must work towards this goal. The real question is how to work towards this type of transformation effectively so that changes in gender relationships occur in particular communities. Community constitutions and national legislation on their own seldom translate into such changes. Furthermore, changes to local arrangements of responsibility and obligation can have the unintended consequence of increasing risk rather than adding to tenure security for women (Cousins, 1996).

5.2.6 The rights of the vulnerable

Standard official practice has been to ask for a quota of women on structures set up to manage cpis. Groups seeking to expedite land transfers seem to accept this requirement as necessary in order to "jump through the hoops". It has been observed that this does not have much impact on the land rights of women. Women do not automatically "represent women's interests", land administration and authority often default to existing practice resulting in situations where women either sit on structures without real roles or in structures rapidly becoming male dominated. Procedural rights that specifically protect women may not mean much if there is no discussion of their substantive rights or use rights in land. And here is where the real difficulty lies, for land reform cannot penetrate far into the internal affairs of households. Proposals to put "both names" on the

beneficiary/membership list may have little fit with reality and thus become fairly meaningless. Issues that require close regulation relate to women's vulnerabilities, which often occur around a husband's death, divorce, a decision to alienate or otherwise transact rights in land or when she has children outside of marriage.

5.3 Power struggles

What we see frequently in land reform projects is contestation and struggle. This is not in itself a sign of failure and it should not surprise us. Tenure scholars assert that land rights in African communal tenure systems are the outcome of negotiated processes mediated by institutions. De facto rights are embedded in multiple interests, the centrality of social identity and status and ongoing social processes (including conflicts, litigation and negotiation). Land reform brings a change to people's rights in land and offers opportunities for re-negotiating what these are. In fact, it is an overt objective of land reform that such re-negotiation takes place, for example, the strengthening of women's rights in land.

It would seem that where land reform simply makes legal the de facto status of the group's ownership and there are already established patterns of land use allocation and regulation, the change and thus contestation is less dramatic. A clear exception is cases where a new group or authority makes a claim to the land (e.g. Thembalihle). Where groups are reconstituted (as in restitution), created (as in many redistribution cases) or a significant new resource accessed (e.g. Gwebu, Maluleke, AmaHlubi) there is much more active negotiation and power struggle as people position themselves to assert their rights through formal or informal means.

Struggle, then, may be expected and is normal. However, outcomes are not predictable and struggle can escalate to the point of group disfunctionality (signs in Gwebu) or it can work itself out over time (Elandskloof, Richtersveld), sometimes but not always to the detriment of the less powerful. Thus in Elandskloof, people battled for years over definitions of rights and rights holders. Clarity is now finally emerging using a pragmatic criterion, namely, who is and is not taking up residence. Short project timeframes (which are becoming ever shorter) and legal requirements for clarity do not work well with this more messy, fluid and negotiated reality, nor do expectations that things must and will be clear and stable quickly.

These struggles over land are no different in nature to any other power dynamic. Where a new resource becomes available to a group, contestation over who has what benefit from it is common. There will always be a prior situation that this resource comes into, which will be the base from which the dynamics spring. Land reform processes should be taking all this into account, making space for it in processes and expecting this as a norm and not automatically assuming conflict means failure.

6. Immediate changes that can be made at the interface between land reform projects, government and providers of services to cpis

At the cutting edge, there is sufficient understanding of factors that lead to uneven and relatively poor organizational performance of cpis in land reform projects to apply lessons from experience in making some immediate changes to policy and practice. There are also a number of areas that need more work. However, officials and service providers involved in the establishment and support of cpis have widely different understandings of the purposes of such institutions, of how their performance should be measured and of how they actually function on the ground. Crude or out-of-date conceptual frameworks are being used because of the real difficulty of keeping abreast of shifting paradigms and the continual development of workshop methods and materials.

Practitioners and policy makers need to move away from the position that cpis are failing, and recognize that this attitude comes from unrealistic expectations of what cpis can achieve. "....The shaping of systems and relations, and the formalisation of these, is a continuous process as the struggles within communities unfold." (Mayson and Engelbrecht, 1999). Such shaping is also influenced deeply by forces beyond the control of cpis. If we look at other institutions around us - local government, government departments, businesses, ngos, cbos and the political field of struggle, none are beacons of virtue, and yet our society functions. We may be dissatisfied with it, and we may wish for an ideal world, but this is not reality. In working with the issues of cpi establishment and maintenance we need to be fair to practitioners and to cpi leadership and members, and seek a movement towards something better rather than delivery of inadequate interventions followed by despair at failure.

Key in making shifts towards cpis that function better are:

- placing proposals for changes in the context of existing systems and procedures, especially those in DLA;
- accepting that those implementing changes will have to work within existing legal frameworks and with the best theoretical and practical materials currently available;
- putting in place mechanisms for improving understanding and resource materials for use by those implementing shifts in practice around cpis.

6.1 Principles

There are some principles that should underlie the setting up of legal entities for land reform, which will lead to better organisational performance:

- Cpis should be viewed as institutions that enable groups to acquire, manage and hold property on a communal basis as tenure-providing instruments that offer

communities a platform from which to undertake development initiatives. They cannot do this on their own but require an institutional framework that supports them in this role.

- Land administration systems provide the framework for tenure security and land management, and this must be recognised as the focus of attention and support in setting up new institutions or adapting existing ones in land reform programmes. Consider different land uses, which frequently require different systems and institutions. (See appendix 2 for a description of a working land administration system.)

- It is critical to recognise cultural and legal pluralism and diversity in land tenure and administration, and the challenge and priority is to seek to build bridges between any traditional or informal system currently or previously used and known within the group and formal law.

This means that work with cpis needs to start by understanding people's current or past institutions, practices and rights with regard to land administration and tenure systems. Work should proceed from this understanding and from the group's (possibly varied and even conflicting) objectives, evaluating and making changes to the existing or previous systems and institutions towards indicators of increasing tenure security for the group and its members. Institutional arrangements are then crafted in each case, drawing on a range of possible public and private arrangements that can be made to ensure viable land administration and development.

Immediate changes that can be made - principles

DLA sends out clear messages to all DLA staff and contracted service providers on what needs to change in practice.

- DLA adopts the above principles to guide cpi establishment.
- DLA officials write terms of references for legal entity establishment that express these principles and where they are doing the establishment themselves, they work on the basis of these principles.

DLA simultaneously starts or supports the start of processes with officials and service providers in which they can update their understanding of conceptual frameworks and discuss the practicalities of better practice around cpis.

DLA simultaneously supports the development of resource materials for use in field processes.

6.2 Integrating the development of functioning cpis into the project cycle

Many practitioners currently attempt to deliver functioning cpis as a one-off step at legal entity establishment in the land reform project timeline, instead of recognizing that a functioning cpi is dynamic – it has a history before land reform and must reflect shifts in land uses in future time. Quick, cheap and unconnected processes do not support developing effective organizational performance in cpis.

There is currently a wide range of practices regarding how the legal entity establishment is situated in the project cycle. Sometimes officials do this work, at others it is contracted out - sometimes as part of a broader planning mandate, although frequently it is a separate step carried out by a separate service provider. The quality of the work is frequently poor, and this is in part due to very short time frames and tight budgets. There are examples of ngos doing this work on their own budgets, or supplementing the work by the contracted party. Despite there being considerable material written and available to improve practices these have not been widely adopted by DLA officials and service providers.

Immediate changes that can be made – land reform project timeline

DLA officials ensure connections between interventions throughout the land reform project timeline; at legal entity establishment as well as during subsequent land use planning and "capacity building" processes.

6.3. Keeping clear distinctions between the notions of beneficiaries of grants, members of groups holding land and rights holders

In practice the concepts of who is a beneficiary of a state grant, who is a member of a legal entity holding land and who is a rights holder are not the same thing. While some women have used their status as grant beneficiaries to assert their rights, conflating these concepts has also created many problems: internal conflicts, the undermining of some member's rights, creation of a wide gap between actual practice and understanding and formal law. The application for grants has become opportunistic, in order to create the largest possible amount of grant funding for the group. At the policy making level there has been a move away from very large projects that lack coherence and tend to fragment. The final beneficiary list is the result of how these pressures towards larger grants and away from unmanageably large projects balance out – and this often cuts across the realities of social organisation and rights and is frequently a decision made in the office by officials and not in the field with people. Beneficiary listing for grants is a conscious

decision of the group, with its implications spelled out, while notions of membership may exist already, and need to be worked with in a different way.

Immediate changes that can be made – grant beneficiaries, members and rights holders

Facilitators keep separate the conceptual understanding and the processes for listing beneficiaries for grants and developing definitions of member of group and rights holder.

6.4 Implications of projected land uses including municipal service provision for land administration and for rights

Tenure security should enable, not hamper, active land use and development of infrastructure by municipalities, but different options for land use such as joint ventures and different options for service provision have different implications for land administration and rights. In most cases tenure arrangements and implications are not consciously discussed amongst future members of cpis and with municipal officials.

Immediate changes that can be made – tenure implications of options for land use and municipal service provision

During legal entity establishment and during land reform planning, groups consciously discuss the land administration and rights implications of different options for land use, including the management of these land uses with other state agencies, such as municipalities or parastatals.

6.5 Capacity building

Contrary to earlier assumptions and wide current practice, it is not a priority to focus "capacity building" on running workshops with committees on democratic leadership, how to run meetings, keep minutes and do simple bookkeeping. It is more effective to work with committees and beyond them on how they will administer their land, and what the structures, procedures and records for this will be. Communication and meetings, keeping minutes and records may well be a part of this, but need to be grounded in the content of the tasks of land administration. Leaders are not trained in how to be democratic through workshops; transparency and accountability will come through procedures that all understand, and then demand from their leaders.

Immediate changes that can be made – capacity building

When DLA officials develop TOR for capacity building they focus on the practicalities of land administration and the structures, procedures and records to enable this.

6.6 Field practices when working with communities/ groups in establishing a legal entity/ cpi.

It is common practice to work with a "representative" group in drafting constitutions. If it is understood that it is critical to ensure that agreements are real, and that people know what these agreements entail, it becomes clear that it is necessary that there are broader interactions in processes of constitution making.

There will be different opportunities and priorities for different groups, so a blueprint approach is not recommended. It is possible to identify different elements for field practice.

Immediate changes that can be made – field practice in establishing legal entities or cpis

The facilitator pays attention to who is part of what processes of constitution making, aiming for a balance between what is convenient and possible, and the need for wide acceptance and understanding.

The facilitator makes sure that the following elements are covered

- Clarify the group's objectives and priorities, including for differing interest groups. This is a foundation. They may be conflicting, contradictory or in tension – the agreements and systems and institutional arrangements need to account for these tensions (e.g. the desire to strengthen individualised rights along with desired aspects of communal systems.)
- Establish and set out what the past or current land administration system was: rights holders, their rights, administered how and by whom. Using the tenure security indicators as a guide, work on each land use and how the current or past system should be adapted (e.g. to increase gender equity), given the new situation/ opportunities land reform is creating and offering.
- Consider the substantive and the procedural rights separately. These are distinct in nature, and while procedural rights are often easily agreed as belonging all community members, substantive rights may be more contested. Substantive rights will relate to different land uses – and here it is common that many of them are allocated and held by households. Separating out these two spheres of rights out offers a way to prevent the common contradictions found on membership definition. In constitutions deal with individuals within households' rights on each land use, or distribution of benefits derived from commonly held assets. This will take the group into meaningful engagement with gender rights, and one can

further into children's rights, given that HIV Aids makes this an important issue looming. The group may or may not be able to define certain substantive rights at this point – but principles and procedures around substantive rights can be defined.

- Consider the issue of recording of land rights – where are they wanted, what are the practical mechanisms, what recording means for individual household member's rights.
- Consider what institutional linkages are important for which land use administration. A municipality, e.g., may better undertake housing and related services than the CPA. Propose institutional arrangement options, with implications, from which the group selects what it wants
- Draw up the constitution, community rules and other documents of agreement and contract, ensuring these are in understandable plain language.
- Establish linkages and processes with relevant institutions.
- Take forward into planning and/or capacity building needs for more work

6.7 Working meaningfully towards gender equity in land

The current emphasis on women participating on structures is not necessarily meaningful, especially if "gender equity" stops there. It is when engaging on procedural and substantive rights that the current or past practices can be laid out and evaluated with gender equity as one aspect to consider.

Communal systems can provide various types of value for women - access to a range of resources and localized decision-making processes. This needs to be understood and worked from, or our crude interventions towards individualization can increase women's insecurity rather than their security. In laying down with people how land systems currently work, and work for women, the key aspects of insecurity can be identified and then improvements sought that are acceptable and workable. In advocating rights for women one is challenging some aspects of traditional systems. It is common that women become vulnerable when relationships change and transfers occur. e.g. the land rights of divorced women are frequently vulnerable under the customary system, and this is critical as instability in the institution of marriage increases.

The key shifts involve looking at substantive rights of women as well as their procedural rights and identifying specific points of engagement. Specific points of engagement are more meaningful than only including general provisions for gender equality, or staying within the realm of their participation in structures. To find the "bridge" it is more meaningful to accept moves "towards" that people agree to, than insisting on what is not workable. It has been found that it is important to allow time for these interactions – they will not be resolved in one workshop session.

Discussions of the notions of beneficiary of state grants and membership provide the opportunity to take up and further the issue of gender equity in land rights. They may

well bring to light tensions of history and power within the group – and separating them into two distinct discussions can allow for different ways of dealing with these issues.

Immediate changes that can be made – gender equity and land

DLA officials and service providers pay attention to

- whose names go onto records and on lists when defining who is a beneficiary of state grants and when defining who is a member
- setting out principles for internal household decision-making in the event of decisions to sell or leave, or the death of a household head
- working with groups around how to make adaptations that the social system can incorporate.

6.8 Constitution drafting practices

Resource material on constitution drafting has been around for years but is not being widely used in practice.

Immediate changes that can be made – constitution drafting and assessment

DLA affirms and disseminates a code of practice around constitutions to its officials and to service providers. Such a code goes out with resource materials by LEAP on tips for drafting appropriate constitutions, and on the use of plain language. The code of practice requires that

- A constitution expresses group agreements, is a working tool for the group and is also a sound legal document that can help to deal with problems when they arise.
- There are great variations in groups' situations, objectives and needs, and therefore use should not be made of proforma constitutions, and cutting and pasting should not be used in drawing up the documents.
- Constitutions must be written in plain language and be available in the vernacular and (except perhaps for Afrikaans) also in English.
- Copies should be widely available to group members.
- Better use needs to be made of separating what goes into a constitution (that should not be easy to change) and what goes into community rules, which can more easily grow and adapt over time.

Officials assess constitutions in terms of the following criteria for process and content:

- Does the document reflect people's agreements?
- Is the document is suitable or appropriate to people's situation? This is assessed in terms of the objectives and nature of the group. There should not be glaringly inappropriate provisions, for example, setting up a committee to manage the affairs

of a legal entity consisting of two families. Also inappropriate percentages for quorums (e.g. 75% for a group of seven members).
- Do constitutions look different from each other? Is the document a standard constitution read out to people which they simply agree to, or clearly the outcome of real discussions on the issues of membership, rights, land administration procedures, structures and their functioning?
- Have officials or service providers changed the constitution in an office in order to meet requirements without reference to the community?

Officials assess constitutions in terms of the following criteria for form and language:
- Clarity and transparent meaning. The document should not require considerable re reading before its meaning becomes clear.
- The logic of the document should be clear – i.e. headings should be organized in a way that helps understanding. Important points should come before the less important. Connected ideas should be grouped together.
- The document should not contain internal contradictions. Watch out for use of different terms for the same concept and cross-references that undermine each other. Membership is a crucial area needing clarity and an area where there are frequently internal contradictions. Watch out also for internal contradictions about powers and quorums. If the document is organized in a logical way, and the person drafting it is careful about using the same term to mean the same idea and avoids cross-referencing, it is less likely that these contradictions will occur so frequently.

6.9 DLA's records of registered constitutions

DLA has embarked on a process of establishing an information system to file and hold information relating to registered constitutions. This system does not accommodate records reflecting changes to individual members' rights.

Immediate changes that can be made – DLA records of registered constitutions

The information system must be completed as a matter of urgency and errors in constitution registration corrected. In addition, the information system must include mechanisms for recording changes to individual members' rights as well as systems for ongoing communication with CPAs in order to update records. These functions should be decentralised to provincial and regional offices. Further options that could be explored are new institutional arrangements created with municipalities since they are key users of the land use and rights information.

7. Changes implied for law and policy

This scoping report makes it possible to see areas in which law and policy will probably need changing, and indicate the directions in which change will need to happen. However, implement-able recommendations need more systematic and deeper research, which is proposed in section eight for work in the CPI Review.

Bringing the legal notions of beneficiaries of grants, members of groups holding and managing land and rights holders into line with how these are understood on the ground will require unbundling of links between land acquisition and housing grants.

Law and policy need to move towards land administration systems that support cpis with a wide variety of land uses and situations with respect to tenure security, which will change over time – the notion of support to a continuum and to movement along this. This includes ensuring that rights granted in law are not contradictory on the ground. Mixed rights that are very similar in content in a specific community cause extremely complex local responses. For instance, people who have IPILRA rights live alongside on the same land as people with membership rights to a CPA and others who have ESTA rights. In terms of land administration, systems need to provide for

- local access to external records of members' land rights, and structures and mechanisms for updating these
- authority to offer recourse for members of cpis, for example as part of the function of land rights offices or officers.

8. Proposals for more detailed investigation by the CPI Review

8.1 Existing cpis in trouble

In 1996, when there were only a few trusts and CPAs registered, Sephton argued that the poor constitutions should be re-drafted, and noted that it was not clear who should do this, or pay for it. Now there are hundreds of such documents and they are being rapidly generated by the concern to speed up the land reform process. Issues of quality are on the back burner. However, if DLA takes seriously that they may need to go back and re-do faulty legal documents, perhaps the urgency of putting some immediate measures in place will be heeded. Moreover the principles cited above derive from experience and should be applied to the proposals for large-scale tenure reform, for example in the Communal Land Rights Bill (CRLB). These proposals entail setting up cpis for land administration to secure tenure on a large scale and will inevitably confront some of the same issues on perhaps a magnified and on more complex terrain.

We do not currently know what the scale of the problem is – how many cpis are truly in crisis or non-functional and in need intervention, how many are struggling along and in need of some support? The CPI Review provides the means to carry out an audit of the state of cpis in each region, with the input of officials and ngos and using a common set of measures. This review should assess where interventions are needed and make concrete proposals about how this be done and by whom. Lessons to date are that it takes either a crisis inside a cpi to generate the will to undertake a review of the institutions and constitutions, or a powerful outside authoritative imperative. Unfortunately by the time there is a crisis it can be difficult to work, as very polarised groups will boycott meetings. On the other hand if there is no felt need there is apathy and it is also difficult to get people working on the issues.

The following are possible types of interventions that the review needs to explore in more depth:

- To replace highly problematic constitutions and turn them into real agreements and tools for solving problems and guiding decision making and action.
- To create new institutional arrangements e.g. where there are competing institutions to resolve this through creating a working hybrid; to create substructures for specific tasks with clear linkages; to create different entities for managing business enterprises.
- Change the land holding arrangements to be more appropriate: in some cases transfer to a municipality of the land, or parts of the land such as residential sections, should be transferred to a municipality.

TOR for the CPI Review

- Assess the scope and scale of problems in cpis in trouble, and identify which of the above interventions might be needed to put cpis on a more stable footing;
- Assess the number of constitutions that are fatally flawed as legal documents;

- Assess the priority and capacity of DLA to carry out interventions to put those established cpis in trouble on a more stable footing.

8.2 External support for land administration and recourse

There have long been calls for a more supportive and coherent institutional framework for common property systems. What this framework should be and what that will entail also needs to be part of the review. The DLA needs to assess whether the CLRB offers a potential solution to these needs particularly in terms of the need for institutional support for communal tenure land administration.

TOR for the CPI Review

- Review the land rights people have under existing legislation, including the CLRB, looking at the legislation itself and how this is playing out in terms of court decisions and outcomes on the ground, with a view to making recommendations towards greater coherence and support.
- Review the choice of legal forms available to cpis for different common land use situations, assess the degree to which they are meeting these needs, and identify gaps for attention in legislation. Pay particular attention to current arrangements for provision of infrastructure by municipalities.
- Review the existing land administration pilots being carried out by ngos and private sector agencies, and assess strengths and weaknesses, especially in the areas of records and recourse for members of cpis.

8.3 Better integration of current thinking on cpis into the land reform project timeline

TOR for the CPI Review

- More explicit definition of how land reform project timeline existing systems and processes can be adapted to support cpis which perform better in securing tenure and enabling development.
- Collation or creation and provision of resource materials to assist officials and service providers in doing this

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Scoping report Appendix One

Tessa Cousins 2002

Materials drawn on in compiling this report

In order of date of writing/publication

1. Review of legal entities in the Free State. LAPC/DLA study by Brian Sephton, November 1996

The brief was to explore the merits and limitations of a number of legal entities established in the Free State, looking at tenure, management and financial issues. This review by a lawyer found that a great many entities had inappropriate trust deeds, due to problems in the processes used to develop and draft constitutions. (Poor use of cutting and pasting and use of an inappropriate standard trust deed.) The review makes suggestions about processes and roles of communities, fieldworkers and attorneys, and about the drafting of constitutions. It raises some legal questions about the intentions of CPAs with regard to making profit. It proposes that poor trust deeds be extensively amended or redrafted, though noting it is not clear who could act on this or would pay for it. Sephton also suggests that it may be desirable for DLA to seek greater control over the content of constitutions through insisting on CPAs.

2. Communal Property Associations in the Field. TRAC, July 1997.

This research draws on TRAC's field experience and workshops and interviews with a range of government and non-government actors. The report identifies the issues and challenges facing CPAs, and highlights what they see as practical strategies which can be pursued as well as policy interventions required to support CPAs and communal land-holdings more broadly. It suggests that more attention be given to the social and institutional environment within which CPAs are being created, and that understanding of this inform policy and capacity building within government and ngos. External support services should be set up for CPAs, including for building their capacity as institutions. Attention should be given to policies in respect of basic services and infrastructure provision, as well as finance for operating and investment capital. Some practical strategies are proposed to strengthen land rights of women and youth in CPAs.

3. Lessons from Riemvasmaak. Vols one and two. School of Government UWC. Francie Lund (Vol 2), Ben Cousins, Deborah Cousins (Vol 1). January 1998.

Two reports seek to analyse the lessons form Riemvasmaak for land reform policies and programmes in general. A study was carried out and then a workshop held on the outcomes, with a range of government and non-government participants, in order to better generalise the lessons. While this covers a range of topics sections did focus on the character, legal status and effective functioning of the legal entities that are formed to represent beneficiaries of land reform. Problems in the legal entities include relations with chiefs, the conflicting desires of some members for individual title, inadequate participation of women and poor communication between community representatives and ordinary members. These are not helped by a low level of facilitation support in setting up legal entities, constitutions that are not understandable to community members, the lack of administrative support and of systematic capacity building programmes. Suggestions are made that there should be a focus on solving conflicts in leadership, that capacity building be re-thought, that administrative support should be provided to new cpis, that constitutions should be in simple language and widely circulated, that the role of non-resident trustees should be limited, and that sub-committees are important to build. Furthermore extra facilitation to ensure women's participation in decisions around resource allocation and programmes for young people on citizenship is needed.

4. Household Study. An investigation of the use of "the household" as the unit of subsidy allocation and the basis for beneficiary identification in land reform policy SPP and CRLS, August 1998.

A study that highlights the problems with the use of the households in land reform, with a strong focus on the impacts of this on the status of women in these projects. It asserts that the household paradigm carries the assumption that men are breadwinners and 'heads of household" which in practice excludes women from being registered as beneficiaries and in seeing themselves as having a claim on the asset. It makes a number of recommendations in this regard. A section of the study focuses on cpis. It notes problems in the process of establishment, where legal entities are established before they are ready for it, organic leadership is not reflected in the new cpi, and more marginalised people cannot take up leadership positions and are thus excluded form decision making. It suggests that a thorough feasibility study be done on management needs and capacities, and transfer to a municipality be considered. It also proposes that where a legal entity holds the land all grant applicants should receive individual membership certificates identifying their individual share in the community owned asset. It calls for capacity building around the critical areas the cpi will have to manage. Committee members require training in implementing democracy, finance and conflict resolution. All cpi members should receive training in consumer education, settlement planning and housing options, and their rights and obligations within an association. There should be much

closer relationships with local authorities who should be supported to become much more involved in projects from an early stage.

5. A study of women's participation in three land reform legal entities in KwaZuluNatal by Robyn Pharoah, Centre for Social Development Studies, University of Natal, 1999.

This study finds that while women do have the opportunity to participate in the structures they do so within the dictates of the status quo of the patriarchal system. Women are elected to committees primarily because of DLA policies in this regard. While strong women exist in communities women are not in a position to overtly influence decision making. Women are elected but are unable to participate in a way that substantially impacts on the situation of women in these communities. The fulfillment of women's practical and strategic interests is not likely to occur as envisaged in the land reform White Paper through the present approach.

6. Apartheid's hangover! The complexity of management and tenure at Elandskloof, by David Mayson and Elsbeth Engelbrecht, SPP, 1999.

A case study looks in some detail at the development of tenure systems in this restitution community. It notes that there are very low levels of trust, that this is exacerbated by the years of delay from government's side in meeting their promises and this leads to low trust amongst themselves and the undermining of respect for the local authority structures. The development of tenure systems is a dynamic interrelation between the formal system and its continual modification through struggles in the community. All who assist communities to acquire land and do the critical work of establishing a base of a tenure system need to recognise that the shaping of systems and relations, and the formalisation of these, is a continuous process as the struggles within the community unfold.

7. Gasela Land Administration Case Study. Dylan Rawlins for Border Rural Committee, July 1999

Gasela is situated in the Eastern Cape, and the Border Rural Committee worked with this community to improve their livelihoods and to secure formal rights to the farm. No formal rights to the land existed and in this vacuum BRC worked with the community to establish a land administration system to provide a framework for management of land use rights. BRC sees land administration as the operational component of land tenure. The basis of the approach is that the type of land use should be matched to the form of land tenure and vice versa, which then determines the design of a land administration system. Land capability and community land needs are assessed, leading to planning for allocation of land to use. Land tenure was then defined for each land use, noting the differing administration needs for differing tenure types. Rules were then established for

each tenure type. After this structures were set up to administer each tenure type. The lessons form Gasela indicate that success in rural development can be achieved if land use, land tenure and administration are integrated rather than the focus remaining on land ownership; that options need to be considered and choices made along the way – and that considerable external support to this process is required.

8. Towards communal property associations that work in the context of land reform. LEAP, April 2000. (*CALS conference)*

A paper that outlines the work-in-progress of LEAP at the time, and to describe the key findings of the project. A central point is that it is too soon to write cpis off as "not working", for while there is a substantial gap between reality on the ground and what is in constitutions, these are such poor documents that not working by them is not a suitable measure of failure. The assertion is that the associations and founding documents are overloaded with purposes; and concrete suggestions are made to improve practice in this regard. Noting that legal entity establishment is regarded as a milestone it is proposed that it become differently regarded, given more time and integration into the various phases in the project cycle. Furthermore rather than assuming that an inherent lack of capacity is a major problem there needs to be greater flexibility working with people "where they are". This also implies accepting constitutions that reflect people's actual practices, rather than having an eye to the law and courts primarily.

9. A second bite: Published in At the Crossroads. Land and agrarian reform in South Africa into the 21st centaury. Kobus Pienaar. 2000

A paper looks at 5 legal entities established during 1994 – 1996. It concludes that similar problems abound despite thorough processes for establishment and support, the absence of some of the factors thought to create problem cpis, the diversity of the groups and legal forms used. Internal problems are identified as being: strife and communication breakdown after land is acquired; frequent turnover in leadership and increased factionalism; avoidance of decision making due to tensions; either no land allocation or inequitable allocation based on self-help; mismanagement and deterioration of land and infrastructure; a disregard for internal rules; buck passing and refusal to take responsibility. Relationships to the outside have been weak, unstructured and strained with both private and public institutions. The paper goes on to suggest that the reasons for the problems lie in cpis having inappropriate objectives and institutional arrangements, and the lack of planning for management of social conflict when the land resource is secured. The proposals then are to reconsider where ownership is vested and exploration of vesting in local government; that careful thought must be given to allocation of land, and that stronger institutional links should be forged with local government and their IDPs.

10. Leaping the Fissures. Bridging the gap between paper and real practice in setting up common property institutions in land reform in South Africa. LEAP and PILAR, October 2000. Published as a PLAAS occasional paper.

This paper considers the concerns about CPAs failing and argues that there are no agreed indicators to measure this with. It draws strongly on the fieldwork of LEAP and PILAR and the work of developing indicators for tenure security LEAP was doing. The paper looks at the gap between the formal legal and informal actual practices, focusing on membership definition. An argument is made for the importance of legal, institutional and technical coherence and the effects on cpis of the lack of this and of state support. Recommendations are made to unburden cpis of unrealistic and utopian expectations and focus on the tenure security of the group and its members. Processes for constitutional development with groups need to understand and build upon previous practices and institutions, especially regarding membership and community land administration processes for asserting, justifying and realising land rights of members. Constitutions should be meaningful to the group and useable by them, reflecting real agreements and practices, and also enable adaptation towards greater equity, transparency and so on. Tenure policy is needed that provides the coherence that is lacking, and that provides for systems for the production, maintenance and updating of land records for cpis and their members.

11. Draft Report on: "Communal" Property Institutional Arrangements. Reviewing Common Property Institutions, notes on DLA/LRC workshop. LRC, August 2001.

The draft report was prepared as part of LRC's review of its work with land reform cpis, and was used as the basis of a workshop with DLA and other practitioners, with the specific aim of contributing to the planned CPA Review of the DLA Tenure Directorate and the CPA Task Team. In this report the key problem areas that can be addressed by structuring relationships and remedies are identified as being: lack of ongoing support and assistance; that there has been too much focus on organisational form rather than its content; the failure to allocate land; problems in administration of rights; problems with freeriding; various problems related to membership. There is another set of institutional related problems set out, and these are: municipal service provision; CPAs and profit making; security against debt; administration, liquidation and deregistration; purchase of shares and problems with majority consent. The report takes a brief look at what can be done, the focus being on starting with land use as a key determinant and then crafting institutional arrangements keeping open a range of public and private arrangements that could be made to ensure viable management.

The workshop report notes participants' interaction with the above analysis. While there was a lot of agreement that institutional arrangements are a very important place to focus some felt other aspects were also important. As workshops often do more questions than

answers were raised. The workshop then reflected the input and discussion of the then draft Communal Land Rights Bill.

12. Looking before you leap. An analysis of some consequences of state devolution in land and resource tenure. LEAP, October 2001

The state has an important role to play in creating and maintaining a coherent institutional environment. This is particularly important where many institutions are involved in a community in the processes for asserting, justifying and realising tenure rights, which can lead to overlapping and competing rights to land and resources. The strategies communities adopt to deal with such situations may be to adopt risk minimising decisions at the cost of democratic entitlements. To prevent this the state should devolve authority responsibly through developing and supporting coherent institutional strategies that widen choices for decisions at local level. The paper looks at what this means for CPAs, where land reform has frequently created parallel structures without reference to existing institutions and practices. The argument is that cpis need to be developed from existing local institutions regulating tenure because these are known and their use will avoid the creation of multiple institutions. The paper goes on to suggest three types of role the state should be playing with regard to setting up new cpis. The first is to investigate and assess people's use of local practices and institutions for tenure administration and then on this basis to negotiate and facilitate a process of institutional adaptation. The third role is to ensure processes are used and outcomes are enforced. Thus the state should neither do a blanket transfer of land to tribal authorities nor neglect the fact that many have well established tenure processes and institutions which are embedded in people’s language and understanding of how tenure works.

13. Using local practices and records to secure individual tenure rights in common property situations. Lessons from the case studies on what might work on the ground. PILAR and LEAP. November 2001.

This paper was prepared for the DLA's Tenure Conference. It suggests that it is helpful to think of tenure rights as being secured through processes in which people assert, justify and realise their land rights. These processes make up a set of practices, which are linked into a set of institutions. This paper focuses on the role records of internal land holdings and rights can play in negotiation and adjudication. The nature of the divide in the current dual system is set out, and the need for bridges across this is spelled out. The paper asserts that in order to be effective it is important to work with and from existing systems. The role of the state is explored and some proposals are made at the technical, institutional and legal levels. Technically less costly survey options are needed, registration systems should incorporate local adjudication processes, and registration must be decentralised and accessible. Institutionally there need to be clear linkages between local juridical functions and external judicial structures to enable people to access effective recourse, and where authority lies for what should be made clear. Legally

instruments are needed to give effect to commonhold as a tenure form and enable the technical aspects to be implemented.

14. Dead or Alive? Human Rights and land reform in Namaqualand commons, South Africa. Poul Wisbourg, March 2002.

Based on fieldwork in two communal areas the paper examines the processes, perceptions and dynamics in a process of reforming communal land governance in Namaqualand i.e. where the *Transformation of Certain Rural Areas Act 94 of 98 (*TRANCRAA) is being implemented. While the paper is exploring tenure reform with a broader interest in human rights, it describes the interaction between tenure legal reform and local dynamics. The process, which is taking place over about two years, is about how communities debate and strive to make informed and democratic decisions about how to own and govern their land. The process is not about what will be needed to implement the choices that they make. The varied perceptions of rights and ownership, and the internal politics and its interactions with party politics at local government level are described, and how this is playing out differently in two different communities. The demands of such a process on fieldworkers and local unpaid community members is high. The limits in terms of support for follow-up have implications for levels of trust now and for implementation of agreements in the future. Agricultural policy contributes to uncertainty over the equality of rights and equity of resource benefits.

15. An Assessment Framework Document. DLA CPI Task Team. May 2002.

After two workshops held by the DLA Tenure Directorate on CPAs, a task team was established (that later became the CPI Task Team) and a first draft document, "An Assessment Framework for CPAs" was drawn up. The task team continuously developed this document over the next year, finalising it in May 2002. The document sets out the land reform background and the need for legal entities for groups. It explains that many problems have been identified but that the exact nature and extent of these is not agreed, and thus it was decided that a comprehensive review be undertaken in order to inform changes to policy and practice to rectify problems. It sets out the reasons for and objectives of the review – that there are two levels of the more indirect improvement to people's quality of life, and the more immediate level of organisational performance in providing tenure security to the group and its members. The document also explains the approach, namely a first phase which is a diagnostic audit, which will set the basis for a second phase, which will assess a significant sample of cpis, as defined by the first phase. The indicators for assessment are described: people have clear rights, they know what their rights are and they can defend them; the processes of application, recording, adjudication, transfer, land use regulation and distribution of benefits are clear, known and used; authority in these processes is clear, known and used; These processes do not discriminate unfairly against any group or person; the actual practices and legal requirements are the same; there are places to go to for recourse, and these are known and

used. The core issues relating to the assessment are set out in detailed lists, which are to be used as a checklist – being neither exhaustive nor always applicable.

16. Assessment of the Msikazi CPA. KZN Provincial Team. May 2002.

The assessment was a pilot of methodology for assessing cpis for the national CPI Task Team, undertaken by LEAP and provincial DLA planners. In using the framework being developed by this Task Team the assessment further refined the indicators making them into practical tools for assessment and analysis. The methodology for assessment is described. The framework for analysis defines four conceptual blocks:

- an understanding of who rights holders are;
- what issues to look at in assessing tenure security (and tenure concepts are concretised into key events of tenure administration);
- what to look for (the indicators of tenure security, as set out in the Assessment Framework Document)
- the institutional arrangements for securing tenure.

The report applies this framework to Msikazi and concludes that tenure of the group and households is more secure that is was prior to land reform, and the tenure of individuals remains much the same. A key threat is the non-alignment of old and new ways of managing rights, which is starting to lead to uncertainty. The constitution is not reflecting actual practices. Steps to facilitate integration are required. These conclusions lead to specific recommendations for work with this community.