

# Communal Land Support (CLS) Sub-activity

## Policy Review

A review of policies concerning tenure in  
Communal Areas of Namibia

**November 2011**



*Fenced in private land and overgrazed commonage area*

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In addition, the review drew on the views and discussions of dozens of people who attended the training programmes on communal land management in Kavango and the central northern regions. Their enthusiastic participation during these programmes is acknowledged.

## **Abbreviations**

CLB – Communal Land Board

CLRA – Communal Land Reform Act 2 of 2002

CLS – Communal Land Support project

MCA-N – Millennium Challenge Account Namibia

MLR – Ministry of Lands & Resettlement

RMLA – Rural Land Management Area

TA – Traditional Authority

## Executive Summary

The report describes the main features of tenure systems in Namibia's communal areas as well the major difficulties faced by residents as a result of present tenure arrangements. The most important constraints are:

- Incentives for economic investment in communal areas are extremely limited.
- Most people are unable to use their land rights as financial investments and instruments to realise the economic value of those rights.
- The type of land use is limited by the kind of tenure allocated.
- Land rights over commonages are seldom managed, and resources in commonages are thus heavily overexploited and easily lost.
- Most local residents are unable to benefit from commercial uses of commonage rights.
- Present tenure conditions and legislation perpetuates economic segregation between freehold and communal societies.

Recommendations made to stimulate economic growth by giving land value and making it easier for investments to be made in communal areas include:

- Allowing properties to be used for residential, farming and commercial purposes
- Tenure type should not limit the commercial purpose for which land may be used.
- Land occupants should be allowed full user rights over their land for 99 years.
- Land holders should be able to trade and assign their land rights as security.
- Tenure conditions for commercial enterprises should be adjusted to encourage investment in communal areas.
- Dispensing with most leaseholds and giving commercial enterprises 99 year title

Recommendations made to secure the rights and economic opportunities for poorer, vulnerable local residents and poverty alleviation include:

- *De facto* land rights over the commonages of local residents should be accorded *de jure* recognition
- Communities should be allowed to register full user rights over designated common-property land areas, perhaps known as Rural Land Management Areas, and then manage these areas through elected representative councils, perhaps called Rural Land Councils.
- Rural Land Management Areas will enable local residents to protect and earn revenue from commonages while also providing incentives for the sustainable management of these areas.
- Using locally determined norms and criteria, local residents through village/area committees and local village heads should assess applications for new land allocations and those deemed inappropriately large.
- Ensuring that registered land is inherited according to civil law and in accordance with legislation that provides protection against prejudice.

Many of the problems concerning procedures and processing of land tenure applications stem from a lack of public information and awareness, particularly on issues concerned with rights and responsibilities. It is recommended that these deficits be addressed by the provision of information through substantial nationwide campaigns. An operations and procedures manual to guide the processing of applications for land registration and tenure changes is also required.

Other important recommendations are:

- Guidelines and training on land management and accountability should be provided to all traditional authorities
- Communal Land Boards should be strengthened through training, ensuring that members have appropriate levels of education and knowledge of local socio-economic conditions, and by staggering the appointments of Board members so that each Board retains institutional experience and memory.
- Steps should be taken to investigate and strengthen the tenure security and rights of homesteads and farmsteads of a rural character that are now included in declared urban areas.

Each recommendation should not be viewed in isolation, but rather as part of an inter-connected set of proposals to develop a system of tenure arrangements to allow flexibility according to local socio-economic circumstances and the aspirations of people and communities. Implementation of the recommendations should furthermore provide greater security for vulnerable people, lead to the protection and management of commonage resources, and create incentives and options for economic growth in Namibia's communal areas. The Communal Land Support project is committed to supporting the implementation of the recommendations in collaboration with the Ministry of Lands & Resettlement and other partners.

## Chapter 1. Introduction

A major goal of the Millennium Challenge Account Namibia (MCA-N) Compact is to reduce poverty through economic growth by increasing productivity of agricultural and non-agricultural enterprises in communal areas. Several of the MCA-N projects accordingly focus on the economic development of such resources as wildlife and tourism through conservancies, pastures and water for livestock through community-based rangeland management, and indigenous natural plant products.

Developing the value of these and other resources is, however, hampered by insecure tenure over land rights, particularly in commonage areas which are where most resources are available. In recognition of this problem, MCA-N is implementing the Communal Land Support (CLS) project to provide residents in communal areas with more secure tenure.

One purpose of the CLS project is to assist with the development of improved policies and procedures regarding land tenure. In this respect, the terms of reference for the CLS project stipulate the following:

In order to achieve the objective of establishing an appropriate policy framework, the contractor will develop a set of recommendations to address the policy issues listed below, along with any additional issues that the contractor believes need to be resolved in order to facilitate the smooth implementation of the verification, registration and investigation activities to be undertaken by the CLS project.

The terms of reference list seven consequences of current policy as requiring review: (a) group tenure; (b) properties larger than 20 hectares; (c) properties larger than 50 hectares and/or to be leased for more than 10 years; (d) the rights of vulnerable people; (e) processing of leaseholds in conservancies; (f) rentals on leaseholds and (g) transfers and assignments for properties. These issues are addressed below within chapters that consider the broader circumstances to which they relate.

The Communal Land Reform Act 5 (2002) regulates tenure in communal areas. Much of the Act focuses on the provision of individual rights, either as customary land rights or leaseholds. Conditions in the Act stipulate how applications for these rights should be made and what the rights might be used for. In so doing, the regulations unwittingly limit economic incentives and opportunities, as will be described below.

No explicit provision is made in the Act for the allocation of land rights over commonages to communities, or to families. On a more general level, the Act does not adequately accommodate complications due to changing aspirations, different patterns of land use and occupation, and social tensions in communal areas. Many conditions are changing or in transition: from traditional to state authority, between land being used for subsistence and commercial agriculture, and from land having no commercial value but now being increasingly traded. Other aspects regarding tenure are unclear: the uses to which land may be put, whether land should be reserved for local residents or also be available to people from elsewhere, and the degree to which modern economic practices are acceptable in communal areas, for example. Not surprisingly, many people are confused and unsure about how best to secure their land. This is even true amongst officials within the Ministry of Land & Resettlement, members of the Communal Land Boards and senior traditional leaders, all of whom are expected to be familiar with tenure systems, legislation and regulations.

It is against this background, and with the aim to create a land tenure framework that encourages economic development and poverty alleviation in communal areas, that this review of policies has been conducted. In spirit, the review draws on the intentions regarding property stipulated in the Constitution of the Republic of Namibia: Article 16, which states "All persons shall have the right in *any* (our emphasis) part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their

heirs or legatees.” A critical analysis of Articles 16, 100 and Schedule 5 of the Constitution dealing with property and communal land in particular suggests that the state has ‘a duty to administer the communal lands for the benefit of the native population that lives there’. More specifically,

even if the government ‘controls’ or even ‘owns’ communal lands, the people who live there have common law or natural law property rights to that land that the government must protect. The government has a kind of trust relationship with those lands. In this analysis actual ownership of the land, while never irrelevant, is not of great importance since the government cannot dispose of those lands without carrying out its *trust* obligation to the people who live there.<sup>1</sup>

It is against this light that most recommendations in the review seek to strengthen the uses of land rights in communal areas and to reduce differences in economic opportunities between those available in freehold and communal areas. The recommendations seek to balance the growing demand for secure tenure to generate wealth and economic development on communal land protecting while also protecting the rights of ordinary customary land rights holders.

#### *A way forward*

The final version of this Policy Review was prepared in early November 2011. This followed workshops to discuss its contents and scope held in Ondangwa on 7 September 2011 and in Windhoek on 19 October 2011. An earlier draft was also submitted to the Millennium Challenge Account Namibia, the Ministry of Lands & Resettlement and various knowledgeable people. Comments received were taken into account during this revision.

It is recognised that most of the policy recommendations do not provide immediate solutions to problems concerned with tenure and relevant legislation in communal areas. This is a disappointment to some people. However, it is believed that the implementation of interim, rapid solutions would complicate the clear and urgent need to address fundamental problems of tenure and land rights. It is hoped that the Ministry of Lands & Resettlement embarks on a programme to introduce the necessary reforms, including new legislative measures.

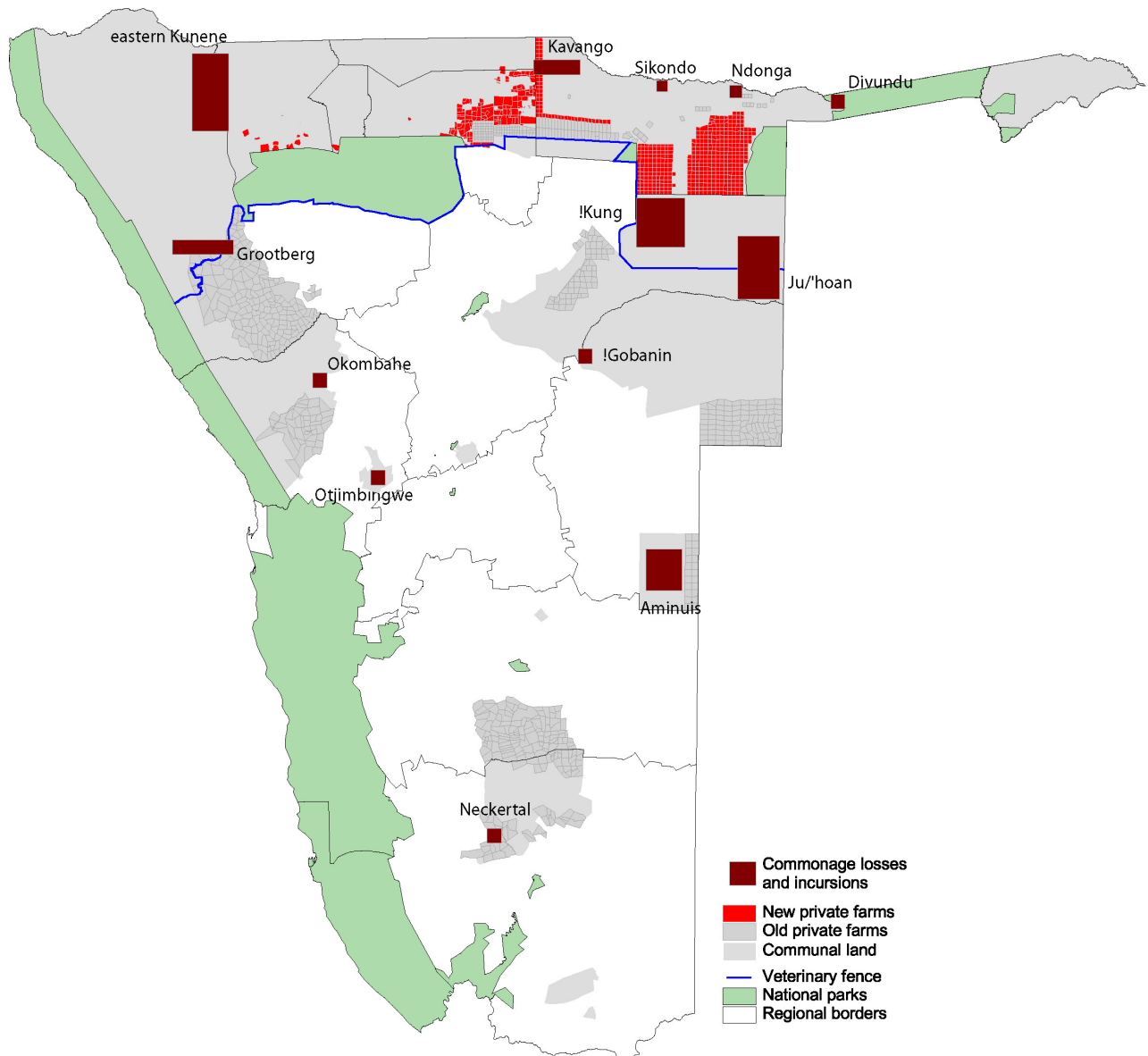
Once the Ministry of Lands & Resettlement evaluates the recommendations in this Review, the Communal Land Support project will embark on a programme of policy support to help implement those aspects agreed by the Ministry and that are within the scope and potential of the Communal Land Support project.

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<sup>1</sup> Harring, S.L. 1996 ‘The Constitution of Namibia and the ‘rights and freedoms’ guaranteed communal land holders: resolving the inconsistency between Article 16, Article 100, and Schedule 5’. *South African Journal of Human Rights* 12: 469.

## Chapter 2. A background to communal land and tenure

Approximately 38% of Namibia is designated communal land. Of all Namibians, 50% or about 1.2 million people live on communal land, and the remaining half are in urban areas (45%) and freehold farms (5%). The uses of communal land across the country vary enormously as a result of differences in soil fertility, vegetation types, aridity and access to markets. Most communal land is in northern Namibia where agro-pastoralism is the predominant use of land, especially in the somewhat semi-tropical climates in the central and eastern zones. Homes with nearby fields usually have a single, clearly defined property while households with fields further away often have several widely separated properties.



*Map: Communal areas in Namibia. New Private Farms are those planned and allocated by traditional authorities (in Kavango) and those acquired less formally in Oshikoto and southern Omusati. There are also many informally acquired farms in Otjozondjupa and Omaheke, most of which have never been mapped. The Old Private Farms are the so-called Odendaal, Mangetti, Okamatapati, Rietfontein and Korridor farms. Places where large areas of commonage have been lost or threatened are described in the text.*



By contrast, arid conditions prevail in the south, the central eastern and western areas, as well as in north-west Namibia where the predominant uses of land are for pastoral livestock farming and conservancy-based tourism and wildlife. In all these arid areas almost everyone lives in small villages and derives their livelihoods from the commonages and/or off-farm incomes (remittances, wages and pensions, predominantly). Within the central and eastern area of northern Namibia there are also large areas of commonage which are used for grazing, hunting and the harvesting of plant products, including timber, fruit, firewood and thatch.

Residential or farm land is held by individual household heads in most areas, but in some areas properties belong more loosely to families.

### **Resource losses, perspectives and power relations**

All communal land is held in trust by the state, as stipulated in Article 17 (1) of the Communal Land Reform Act of 2002: "Subject to the provisions of this Act, all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the *purpose of promoting the economic and social development* (our emphasis) of the people of Namibia, in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities."

However, the Communal Land Reform Act of 2002 does not provide mechanisms for local users to hold *de jure* land use rights over commonage land. As a result, it is assumed that users can not protect their resources. With the exception of certain resources in conservancies and community forests, they are also unable to gain revenue benefits if their commonages are allocated to non-residents to use commercially, for example for large-scale agriculture.

In principle, communal land is to be allocated free for the poor who lack the means to buy land elsewhere. But communal land is also free for people who are not poor, and many wealthy people have used their means and influence to acquire large farms. The extent of individualisation or privatisation of communal land into large farms is significant, as shown in the map above. Broadly, most farms were acquired in one of three ways:<sup>2</sup> (a) from the South African administration or second tier authorities before independence, (b) through allocation by traditional authorities and later ratification by the Ministry of Lands & Resettlement and Communal Land Boards, and (c) by informal fencing off by private individuals.

While privatisation has significantly reduced areas of commonage, it also had several effects on perspectives on communal land. Firstly, it created the recognition that large farms could be acquired by appropriating commonage. Second, the creation of clearly defined boundaries within which livestock are herded, and from which other livestock are excluded, reinforced the perceived value of having exclusive management units for farming. This is rather like the idea that 'fences make good neighbours'. But this has also eroded the traditional value of commonage being a free-range resource available to local residents. Consequently, the interests of private owners of large farms differ from those of local residents that rely on, or relied on, commonage. Third, the assumption that communal land is a 'safety net for the poor' is no longer true in the large areas of the country that have been privatised. For example, about one-third of the surface area of Kavango is no longer available as a safety net because it has been privatised into large farms. This includes large areas set aside by government for emergency grazing during drought.

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<sup>2</sup> (a) This category comprises mainly of the so-called Odendaal, Mangetti, Okamatapati, Rietfontein and Korridor farms. While most of the farms were originally allocated to individuals, the majority are now occupied by several families, (b) Most of the new farms in Kavango are in this category; (c) farms in Oshikoto, southern Omusati, Otjozondjupa and Omaheke. Most of those in Otjozondjupa and Omaheke have never been mapped are not shown in the accompanying map.

There are also major differences in the viewpoints of residents within communal areas. Many individuals have definite wishes to have secure, tradable title and to be able to use their land for economic gain. Other properties are regarded as belonging to the families which may not normally be transferred to individuals who are not relatives. In some areas, there is a resistance to the idea of spatially defined properties because those imply limits to the future expansion of their fields. And for many people, their main wish is to have a small area to live in retirement and on which to grow some food for domestic consumption.

Differences of opinion on land rights between officials of the state, traditional authorities, wealthy land users, and local residents are more substantial. The state is seen as the formal owner of all land and the ultimate decision-maker and arbitrator, even though it actually only holds the land in trust and generally plays no role in the day-to-day management of communal land. People living in freehold urban and farm areas frequently assume they know what is best for communal residents, or believe that communal residents are not ready to own land rights over individual and commonage properties, for example.

Traditional authorities explicitly or implicitly claim that they actually own the land, giving them authority to allocate (and often sell) land. This perception is supported in the Communal Land Reform Act. Other than according residents places to live, most traditional authorities also play little role in the daily *management* of communal land, particularly commonage. With very few exceptions, traditional leaders do not manage stocking rates or the harvesting and use of timber, thatch, fish, firewood, wildlife, water or wild fruit, for example.<sup>3</sup> But the use of these resources and pastures are fundamental to the value of commonage for local residents.

Within this management vacuum, wealthy land and livestock owners, and local residents are unequal users of communal land. For example, the majority of livestock are owned by the former who usually live elsewhere and earn their income from salaries and businesses. In the central and eastern northern communal areas, more than half of all local residents have no cattle and only about half own goats.<sup>4</sup> Dual grazing occurs commonly when the owners of large farms move their animals on to commonage pastures and water sources until these resources are depleted. The livestock are then moved back to feed on the pastures that have remained protected within the private enclosures.

Resources on which local residents rely for their livelihoods are thus used by people who have lucrative incomes from other sources. And uncontrolled, open access to commonage means that it is in everyone's interest to exploit resources as much as possible. If one person does not use the grazing, timber or firewood, another person will. This has two obvious effects: the poor get poorer and environmental degradation accelerates. It might be argued that the commonage is not so important for poor people who have few head of livestock and therefore do not depend so much on the availability of grazing. However, many communal area residents rely on a variety of resources provided by the commonage, such as for building materials, fuel and water. These resources are of particular value to poorer people who lack incomes and other resources from elsewhere.

A major consequence of these different perspectives and levels of authority is the substantial imbalance in power relations between people and institutions within communal areas, which has effectively led to the formation of clear classes. The absence of secure tenure over commonage leaves ordinary holders of customary land use rights with no legal powers to defend their land rights against alliances between influence (from traditional authorities) and wealth (from the non-resident owners of farms and large numbers of livestock). It is in the interests of these influential and wealthy people that management and rights over commonages remain unregulated, and it due to these influences that no action has been taken against people who informally appropriated large farms,

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<sup>3</sup> Mendelsohn JM. 2008. Customary and legislative aspects of land registration and management on communal land in Namibia. Report for Ministry of Lands & Resettlement.

<sup>4</sup> Mendelsohn, J.M. 2006. *Farming systems in Namibia*. RAISON, Windhoek.

even though they are prohibited by the Communal Land Reform Act of 2002.<sup>5</sup> Even water points established by the state have been appropriated into private farms. In the face of such spheres of influence, local poor residents have little sway.

Power imbalances and the lack of defined rights over commonages have also led to numerous cases of grazing being appropriated without fencing. Examples are those that occurred when farmers from Gam moved into the Ju/'hoan area, from Omatjette into Okambahe, from western Omusati into eastern Kunene, and from Ohangwena/Oshikoto into Kavango. Other incursions have occurred or been threatened around Otjinene (!Gobanin), Omatako !Kung), Otjimbingwe, Aminuis, Divundu and Grootberg. All these cases involved encroachment by one tribal grouping onto the grazing grounds of another.

Local customary land rights holders also do not have any legal protection of their commonage rights against the state. As the formal 'owner' of communal land, the state claims the right to expropriate commonages for economic development projects regardless of existing customary land use rights to such land. This is borne out by the government's compensation guidelines (of 2009) which make provision for compensation for land, buildings and trees that lie within individual properties. But no compensation is available for grazing and other commonage resources that are lost when land is allocated for agricultural or other development projects. Such losses have occurred at Green Schemes (Ndonga Linena and Sikondo, for example), the Neckertal Dam, and on several hundred thousand hectares allocated to small-scale commercial farms in Kavango.

Conservancies and community forests are telling exceptions. Here, communities have legal rights over certain resources and therefore obtain incomes (for example from rentals and jobs) when their commonages are used commercially by non-residents for tourism and trophy hunting enterprises.

Finally, smaller commonage resources have frequently been lost when senior traditional authorities have allocated and leased land for business enterprises without consulting and compensating local users of the commonage. There are many examples of such losses in Kavango.

### **Economic conditions and options**

Although about 50% of Namibia's population live and farm in communal areas, various surveys indicate that the majority of their income is derived from off-farm or non-agricultural activities, such as pensions, business earnings, wages and remittances. Of course, there is enormous variation between families. Many, especially poor households, are almost entirely reliant on farm and commonage resources, while others live on rural farms but figuratively and literally live off non-rural enterprises and jobs.

In short, making a living in rural communal areas is not easy, mainly because cash revenue from local resources is seldom available. While livestock and social relations provide security, capital based on land for commercial applications is also not available. Arguably, 50% of the population can therefore not use their land rights as security to obtain collateral funds,<sup>6</sup> and this also means that the 38% of the country's land surface that is communal also has no capital value. This land is 'dead capital'.<sup>7</sup>

These are general environmental and tenure conditions that constrain economic development. Directly and indirectly, several provisions in the Communal Land Reform Act of 2002 further inhibit the use of land rights for commerce and provide little room for the kind of flexibility that produces economic growth. For example, residents (and others) assume that land rights may not be traded (as

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<sup>5</sup> Werner W. 2011. "What has happened has happened". *The complexity of fencing in Namibia's communal areas*. Legal Assistance Centre, Windhoek.

<sup>6</sup> To this can be added another 10% of the population who live in informal urban settlements where they, too, do not have land in which to invest and use as collateral security.

<sup>7</sup> Shiimi I. *Enhancing Access to Finance in Namibia through an improved Land Tenure System*. Annual Address of the Governor of the Bank of Namibia, Windhoek, 27 October 2011.

a result of Section 42) and also because communal land is vested in the state (Section 17),<sup>8</sup> even though Section 38 allows for the transfer of customary land rights and leaseholds. These transfers are also subject to the permission of traditional authorities, which further reinforce the perception that land rights are owned by these authorities and are therefore not to be traded. The same happens when an occupant dies and his/her land has to be returned to traditional authorities, even if it is then re-allocated to the heirs.

An important distinction made here, and to be borne in mind elsewhere in this report, is the difference between actually owning and trading *land rights* and owning and trading *land*. It seems unlikely that the state and traditional authorities will entertain any proposal for communal land to be privately owned (in the freehold sense), and so this report discusses and proposes ways in which land rights can be held by individuals and by groups.

The apparent prohibition on land rights being tradable is a substantial deterrent to investment and development in land; put simply, there is little reason to invest savings or capital in land if there is no prospect of being able to sell or liquidate the investment in the future. (One way to understand this constraint is to consider the reaction of freehold land owners in towns if they were suddenly prohibited from ever selling their properties, even though they retained secure tenure. This would be unthinkable, but that is exactly the condition that holds in communal areas). In the same way, secure tenure over the land and its natural resources provides the necessary incentives for land holders to invest time, effort and money in actively managing the land sustainably. In the long term, that is what underpins economic development.

For people who wish to invest in formal business enterprises, such as intensive agriculture, tourism and fish production, the Act and its Regulations effectively discourage investment by providing stringent, lengthy and what have proved to be complex procedures for investors to gain secure tenure over land that can be used commercially. The general impression created by these provisions is that it is hard to invest in communal areas, and that the terms of leaseholds are too restrictive. Examples are the number of permissions that investors have to negotiate and/or obtain the variety of formal and informal rentals that need to be made, and the generally short duration of lease agreements. Investors not only find it difficult to abide to these conditions, but banking institutions are reluctant to advance capital for investments under these circumstances. Most capital investments are thus made elsewhere in Namibia or other countries.<sup>9</sup>

Since allocations of customary land rights are interpreted as being only for residential and domestic food production, some farmers wryly observe that while agricultural policy promotes the production of surplus food, those that have customary land titles are apparently not allowed to operate businesses. Strictly speaking, they may not sell their produce, and so one policy promotes the production of wealth while another seems to limit commercial activity. Notwithstanding these observations, customary land right holders frequently use their properties for commercial gain, most usually through small retail shops. And arguably, the production of food for domestic consumption is actually commercial because the food substitutes for the use of income to buy food.

Although the extent to which land rights are being sold in communal areas has not been documented, it is widely agreed that trading already happens to a substantial degree.

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<sup>8</sup> Section 17(2) of the Act reads 'No right conferring freehold ownership is capable of being granted by any person in respect of any portion of communal land'.

<sup>9</sup> One set of estimates indicate that if tourism establishments could be developed normally in communal areas, about 40,000 new jobs could be created between now and 2022 within communal areas. These would generate incomes of about N\$900 million per year, again within communal areas. About N\$2,400 million would be spent in these areas on infrastructure and equipment over this period. These figures are in 2011 values, and they all assume a modest annual growth rate of 6% in the tourism industry (CJ Brown, personal communication).

## **Roles of Traditional Authorities and Communal Land Boards**

Reflecting the transition from traditional, unwritten tenure systems to ones documented in a more statutory fashion, differences of opinion often surface on the roles of Traditional Authorities and Communal Land Boards. Members of the former frequently reject the idea of the Boards having the final say on applications for registered tenure. The competence of Board members with little knowledge of custom and/or local socio-economic conditions is likewise often doubted. Contentious issues, such as 'illegal fencing' are often passed between the institutions, each claiming that the other has not performed its duties, for example. Many of these comments stem from an underlying power tussle between customary authorities and statutory boards, the former reinforcing its 'ownership' of communal land, while the latter attempts to establish its 'control' over the same land.

Ordinary local residents are often caught in the cross-fire. For example, senior traditional leaders in Kavango have refused to process applications for customary land rights, which generally go to poorer, smaller farmers. Paradoxically, the same authorities keenly support applications from wealthy people for leaseholds over large farms acquired in commonage areas.

One practical problem to arise from the uncertain roles of traditional authorities concerns the apparently simple matter of who should confirm applications for land registration, as stipulated by the Communal Land Reform Act of 2002. For both customary land rights (Article 22) and rights of leasehold (Article 30) the Chief or Traditional Authority must give written consent to applications before they are considered by land boards.

What is problematical is the requirement that consent must come from senior authority which is either the Chief or the Council of the Traditional Authority.<sup>10</sup> However, the Chief and members of the Council seldom know the location, size and background to most applications for registered tenure. Instead, consent should actually be given at the lowest level of the tribal administration, namely the local village head. It is the village head who knows the applicant and land area best and can thus comment on its validity before either endorsing or refuting the application. However, delegating the giving of consent to applications to junior members of a traditional authority would undermine the influence of senior leaders. They would also lose income from land registration applications.

All these problems are compounded in areas where traditional leaders are not recognised in terms of the Traditional Authorities Act, and where the Communal Land Reform Act 5 of 2002 therefore does not apply.

### **In summary**

Communal land in Namibia is characterised by:

- Enormous variation in the use of land, as well as the structure, size and distribution of individual and family properties. Levels of wealth and influence are also extremely variable.
- Substantial power imbalances between voiceless local residents, wealthy influential individuals, traditional authorities and the state. The perspectives of these institutions and people vary greatly, many of whom have quite different aspirations for ownership over land rights.

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<sup>10</sup> The Traditional Authorities Act 25 of 2000, Section 2 and 10 is explicit in defining who constitutes a Traditional Authority as consisting of: "the chief or head of that traditional community, designated and recognized in accordance with this Act; and senior traditional councillors and traditional councillors appointed or elected in accordance with this Act." For purposes of providing for communal land tenure as determined by the Communal Land Reform Act of 2002, village heads, senior headmen and women are therefore not part of the traditional Authorities, since provisions of this Act may only be exercised by recognised traditional authorities.

- There are no systematic provisions for the protection, management and ownership of commonage resources. As a result, the commons and their resources are abused in a variety of ways which is usually at the expense of poorer local residents and the sustainability of resources. Moreover, local residents are not compensated and usually unable to benefit economically when their commonages are assigned by traditional or central authority to other users.
- Tenure conditions that broadly inhibit economic development and do little to facilitate the use of land for commercial purposes, as investments and financial instruments.

Against that background, recommendations are made to adopt policies, rules and procedures which should provide tenure systems that are simpler, securer and fairer, and that promote economic development and the reduction of poverty in Namibia's communal areas. The recommendations are made within the context of four areas:

1. The broadening of land rights on properties occupied by individuals.
2. Making the land use rights of local residents over commonages more secure.
3. Safeguards to protect the poor and other vulnerable people.
4. Improving governance and public awareness to protect the land rights of those who occupy and use communal land, and to enhance the economic value of communal land.

The recommendations are inter-connected to ensure congruency of principle and purpose so that tenure systems can develop in accordance with these four areas. Before making recommendations, however, the next chapter presents several principles on which the recommendations are based.

### Chapter 3. Key principles

The following concepts, assumptions and values are fundamental to achieving the goals of an improved policy for tenure in communal areas:

1. Individual land holders in Namibia should have equal *options* to use their land rights for economic purposes irrespective of where they happen to live.
2. The type of tenure should not determine how land is used. Currently, it is widely perceived that rights over leasehold are needed for any commercial uses of land while customary land rights can only be used for residences and farming for domestic consumption. These divisions are unnecessary, cause confusion and hamper initiatives when a land holder decides to use his or her land for a different purpose. In freehold areas, subject to land zoning and other applicable limits in urban areas, land holders are free to use their land as they wish. Residents in communal areas should have the same rights. The Ministry of Lands & Resettlement should not involve itself with land uses, only land rights. Other institutions, in particular the Ministry of Environment & Tourism, should ensure that land uses are compliant with measures that promote environmental sustainability.
3. Local residents who use and partially depend on commonages for their livelihoods should have *de jure* rights to commonage resources and should be compensated when their rights are lost. Likewise, they should obtain rentals if their commonages are allocated to other users for commercial gain.
4. Provisions for individual tenure should accommodate the wide spectrum of spatial and social arrangements in which people live in communal areas.
5. Likewise, individual tenure should allow for the different and changing wishes of people to have security but also to potentially use their land as investments and financial instruments.
6. Individuals, families and other groups of people as self-defined and designated communities should be allowed to hold registered land rights, while the land is still held in trust by the state.
7. Although rights over communal land should be safeguarded for local residents, protections should not overly discriminate against outsiders, particularly those wishing to invest in communal areas.
8. The greatest opportunities for economic development lie in the use of individual properties as investments and financial instruments, while the protection of commonages provides the best opportunities to safeguard the rights and livelihoods of the poor.
9. Traditional authorities should endorse applications for tenure when they are first registered, i.e. when tenure moves from the traditional, unwritten system to one that is documented and more statutory nature. Thereafter, transfers of land rights should go directly from holders to buyers or heirs, for example. The land rights should be registered again but should not require confirmation or any other kind of approval from traditional authorities.<sup>11</sup>
10. Improved accountability and transparency in the allocation, cancellation and registration of all forms of tenure and at all levels of governance is necessary to guarantee the robustness of different forms of tenure.

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<sup>11</sup> Customary law and practice has provided traditional authorities with incomes from land through payments for the allocation of land and taxation. As land tenure progressively changes from a customary to statutory system, government might consider providing traditional authorities (at all levels of the hierarchy) with alternative sources of income to compensate them for their roles in maintaining local justice and social order.

11. Secure tenure provides a solid foundation which leads to social stability and economic development, rather like a road which opens opportunities for all kinds of trade, movement and services.

Many of these principles are already rooted in existing government policy. For example, the National Land Policy of 1998 states that 'all citizens have equal rights, opportunities and *security across a range of tenure and management systems*' (our emphasis) and that 'several forms of land rights' will be accorded equal status before the law. It also makes provision for different categories of holders of land rights including 'legally constituted bodies and institutions' and 'duly constituted co-operatives'. This definition makes it possible for groups of communal area residents to become holders of land rights. Such groups could, for example, include such bodies as conservancies, community forest management bodies, and water point associations.

Further, the draft National Land Tenure Policy makes provision for residents of villages to demarcate and register their village land and legally constitute themselves as a group which holds rights over land and resources within the village boundary. In addition, Cabinet took the following decision on 11 April 2006:

"With regard to the policy framework on land reform, Cabinet approved that:

- In the medium term, sectoral policies on natural resources management, water, *land*, forestry and agriculture must be revised to give decision-making and management authority to resource-users at a local level;

On the acquisition and redistribution of land, Cabinet endorsed the following:

- That community-based policies on resource management are expanded beyond wildlife and tourism to incorporate other natural resources like water, *land and land-based economic activities*;"

Finally, the Flexible Land Tenure System developed by the Ministry of Lands & Resettlement provides a system to upgrade tenure.<sup>12</sup> While the system has been designed to improve urban tenure in informal settlements, the same principles are applicable in rural areas to allow customary land rights holders to upgrade their tenure rights from 'starter' rights to more secure 'landhold' rights.

These policy provisions clearly indicate that government recognises the need for strengthened rights and authority to be provided over land to communal area residents. Proposals made in this review build strongly on these objectives.

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<sup>12</sup> Although a Bill on Flexible Urban Tenure was drafted in 1999 on the basis of substantial research and preparation, it has not been passed as an Act. Its status at present is not clear. See Christensen SF. 2004. *The Flexible Land Tenure System – The Namibian solution bringing the informal settlers under the register*. Expert Group Meeting on secure land tenure: 'new legal frameworks and tools'. UN-Gigiri in Nairobi, Kenya.



## Chapter 4. Group tenure<sup>13</sup>

There are three compelling reasons for communities to have legal rights over their commonages:

1. So that the remaining commonage resources can be protected and managed for the benefit of local residents who rely on these for their livelihoods.
2. For communities to have opportunities to be compensated and also to benefit from rentals when their commonages are leased for commercial uses.
3. To provide incentives for users of the commonage to manage it and its resources since secure tenure and authority to take management decisions are crucial conditions for the sustainable management of land and resources.

The concept of group rights is not new. Land rights have been allocated to communities in dozens of developing countries in South America, south-east Asia and Africa (see Appendix 1).<sup>14</sup> Likewise, strong support or precedents for group land rights within Namibia are to be found in:

- Government providing legal rights and responsibilities to communities over resources through water point associations,<sup>15</sup> community forests, and conservancies.
- The government's desire to develop the economic value of commonage resources with MCA-N support for community-based pasture management, conservancies and indigenous plant products.
- The need for group tenure as described in the National Land Policy (1998) and National Land Tenure Policy (2008).
- The emergence of village committees to help administer community affairs, including land allocations, in the central northern communal areas.
- The fencing-off of community areas to protect grazing around half or more of all villages in the communal area previously known as Hereroland.

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<sup>13</sup> One of the seven topics in the terms of reference reads as follows: The review shall include consideration of mechanisms under the Communal Land Reform Act for granting secure land tenure rights to groups, such as local communities or conservancies, in order to allow them to manage the use of defined areas for grazing or tourism purposes. Conservancies created under the Nature Conservation Amendment Act of 1996 have management rights over wildlife but not over land. As a result, they have limited ability to control how land use is allocated within their conservancy boundaries. If a TA or CLB authorises someone to use land for grazing purposes but that has been designated by a conservancy for tourism purposes, it is unclear how the conservancy would enforce the tourism designation. Similarly, for many people, their community's commonage represents their only grazing land, as their residential plots are usually smaller than 20 hectares and, are thus of little consequence for grazing purposes. Yet, these people currently have no way of formalizing and registering their rights to the commonage pastures or of controlling how rights to the commonage might be allocated. The Consultant shall make recommendations for possible policy or legal measures that could be used to grant formal group tenure rights or exclusive use rights to community or conservancy members, to enable them to make final land-use decisions regarding their commonage or conservancy lands.

<sup>14</sup> Significantly, many civil wars have started in various countries because rights over community-based land holdings were not firmly in place. See Alden Wily L. 2010. *Fodder for War: Getting to the Crux of the National Resources Crisis*. Washington: Rights and Resources Initiative; and Alden Wily L. 2008. *Whose Land Is It? Commons and Conflict States. Why the Ownership of the Commons Matters in Making and Keeping Peace*. Rights and Resources Initiative, Washington DC.

<sup>15</sup> For example, Section 19 of the Water Resources Management Act of 2004 states that Water Point User Associations have the power 'to plan and control the use of communal land in the immediate vicinity of a water point in cooperation with the Communal Land Board and the traditional authority concerned' (Section 19).

- The Cabinet decision (on 11 April 2006) that community-based policies on resource management be expanded beyond wildlife and tourism to incorporate other natural resources like water, *land* (our italics) and land-based economic activities.
- The use of declared Settlement Areas as units of local governance and land management (while these are urban zones, the intentions and principles behind their establishment are the same as those recommended here for rural areas).
- The intentions expressed in Section 17 (1) of the Communal Land Reform Act of 2002 which states: “...all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, *in particular the landless and those with insufficient access to land who are not in formal employment or engaged in non-agriculture business activities* (our italics).”

It is proposed that land rights over commonages be established in two stages. The first would entail the provision of *de jure* land rights over all commonages to the local residents who now hold those rights *de facto*. A second step would provide mechanisms for communities wishing to become land rights holders over commonages covering designated areas which might be called Rural Land Management Areas.<sup>16</sup>

### **De jure rights**

These rights would cover all communal land not held as individual or family customary land rights, and would immediately provide levels of protection that are not currently available over commonages. Following the example of Mozambique, *de facto* customary land rights over commonages would be effectively turned into *de jure* tenure, regardless of whether such rights were documented in writing or not<sup>17</sup>. This has the advantage that rights can be secured even if people are illiterate or do not have easy access to legal support.

*De jure* rights are *private rights*, which empower holders to exclude third parties, and the registration of these rights is not a prerequisite for them to be legally enforceable. The rights can be inherited and transferred with the agreement of the affected community of land users.

The provision of *de jure* rights would be in the spirit of the National Land Policy of 1998 which states that ‘all citizens have equal rights, opportunities and *security across a range of tenure and management systems*’ (our emphasis) and that ‘several forms of land rights’ will be accorded equal status before the law. In Mozambique and South Africa the protection of tenure rights is a constitutional requirement. Suggestions on aspects to be included in policy and regulations regarding *de jure* rights are provided in Appendix 2.

The elevation of *de facto* customary land rights to *de jure* or full legal rights means that people could participate in any subsequent options to hold land and resource rights as stakeholders with guaranteed rights. This will also ensure that commonages are protected during the period it may take for communities to set themselves up as group owners of land rights which is the proposed second step.

It is recommended that these *de jure* rights be provided as soon as possible to start the process towards local residents having group tenure, as described below, and to protect local residents against ‘land grabbing’ that may result from land becoming tradable, as recommended on page 24.

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<sup>16</sup> Although the term Rural Land Management Area is proposed here, alternatives might be considered, such as: Community Land Area, Community-based Land Holding, or Rural Land Management Authority or Community Land Authority.

<sup>17</sup> What follows is based on Knight R. 2010. *Statutory recognition of customary land rights in Africa. An investigation into best practices for lawmaking and implementation*. FAO Legislative Study 105. Rome FAO.

## Rural Land Management Areas

It is recommended that local communities be provided with mechanisms to establish designated and registered Rural Land Management Areas (RLMA) if they so choose. These would be areas within boundaries that are defined with the agreement of neighbouring communities. All local residents could automatically be members of a designated community which would be the holder of land rights over commonages within each RLMA. Comments on legal provisions and other matters related to these management areas are given in Appendix 3.

Geographically, each RLMA would consist of commonage and properties allocated to individuals who would hold their land rights over those properties for 99 years, as described in the next chapter. Through the institution of the RLMA, local residents would legally hold land rights over commonage areas as undivided shares, while the RLMA would manage land rights and affairs within the designated area. An elected Rural Land Council would represent the community of residents and manage the day-to-day affairs of the RLMA in the same way that village and settlement area councils run the affairs of those urban areas. This could include providing approval for transfers, sub-divisions and changes in tenure type.<sup>18</sup> In view of the sensitivity of establishing new institutions with powers over land, the implementation of the proposed systems will need to be done in close co-operation with all tiers of traditional authorities. Traditional leaders, for example village heads, could be important members of the land councils.

The nature of these self-defined communities would vary from one area to another according to local circumstances of demography, traditional leadership and village committees, land uses, economy and the presence of established groups with rights over particular resources, such as water point associations, community forests, and conservancies. It is conceivable that existing village land areas – known as *omikunda* in central northern Namibia, for example - will be the most logical basis for formalising group rights.

In addition, it is expected that existing conservancies and/or community forests may apply to become registered as RLMAs. In places where the proposed boundaries of RLMAs differ from those of existing conservancies and/or community forests, local solutions will have to be worked out to make clear the rights and obligations of the different management institutions. It is now premature to speculate what solutions will be decided upon in different areas of the country and circumstances of overlap between the institutions.

To establish RMLAs, boundaries should be defined and mapped, and applications for registration would be accompanied by diagrams showing the proposed boundaries, letters of support from the local traditional authority and regional council. Appendix 4 provides details on steps towards the formation of RLMAs.

Once established, the RLMA would function according to an agreed constitution. Land use and management plans would be developed to guide decisions on commonage resource use, including stocking rates and new land allocations. RLMAs through their elected councils would provide local checks and balances on land transactions to guard against inappropriate uses and enclosure of land. The councils would also enter into lease agreements with non-residents who use commonage resources for commercial purposes, such as tourism ventures or agricultural projects.<sup>19</sup> The councils would negotiate on behalf of residents with the state when land is expropriated, thus helping to ensure that fair compensation is obtained. The procedures for expropriation and rules for

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<sup>18</sup> The ratification of transfers, sub-divisions etc by RLMAs may be seen as cumbersome and bureaucratic. However, the community of residents may indeed wish to ensure (through their Land Councils) that land transactions and uses are in their interests, for example in considering whether or not individual land owner may sell the land to a chemical company that produces insecticides.

<sup>19</sup> The Draft Land Bill likewise recommends that conservancies and other groups be permitted to sub-lease properties over which the groups have head leases (Section 32(7)).

compensation should be the same as for the expropriation of freehold land. The use of funds collected by the councils would be determined by local residents.

The RLMAs and their elected councils would help solve several of the problems requiring consideration in the terms of reference for this policy review: ways of dealing with applications for large areas of land or lease periods (the so-called 20 hectare and 10 year/50 hectare issues), and lease terms since these terms would be set for each by RLMAs and the lessees. It is expected that RLMAs would provide safeguards to protect the rights of poor and vulnerable residents, especially in cases where the communities consist largely of so-called marginalised people. RLMAs will be guided in their management of land use rights by a set of principles on basic human rights and good governance as found in the Constitution and other legislation

Several other benefits would stem from these group land holdings. They would:

- Enable all community members to participate in, and benefit from commonage ownership;
- Help to ease the burden and responsibilities of traditional authorities by providing a democratic structure to improve management and accountability;
- Devolve land administration to an appropriate local level;
- Be congruent with what people are doing with respect to their land and the commons by allowing communities flexibility to administer land rights in accordance with local custom and practices;
- Provide for local management of commonage resources;
- Help prevent conflicts, such as those that occur when the commonages and grazing of weaker communities are taken by stronger groups, and which have caused many civil wars and local conflicts in Africa and Asia (see page 18). The potential for such conflicts, of which many minor ones have occurred already (see page 11), will escalate substantially when Namibia next experiences a significant drought.
- Free the state from the burden of having to be the trustee of communal land because of the absence of better tenure arrangements;
- Solve the many structural difficulties that arise from the present multi-level and multi-dimensional arrangements for tenure in communal areas;
- Formally acknowledge communities and their boundaries, and raises the status of communities as legal persons;
- Enable regional and central government to better focus their services to defined areas and communities;
- Free the granting of tenure from limitations imposed by traditional authorities having to be recognised by government, thus allowing the granting of tenure to be a matter decided locally by elected members of the local community.

The implementation of community land holdings and community land councils will not be without challenges, however. Considerable work and commitment will be needed to develop the RLMAs and particularly their councils into effective and accountable bodies to manage community land. This will require sensitivity to local circumstances, and it is likely to be most difficult in pastoral areas and other places that lack well-established customary authorities. In most areas the community units should probably be quite small to allow for greater common interest and accountability.

RLMAs should not be seen as undermining the authority of the state and traditional leadership. Rather, RLMAs will assist traditional authorities in being more accountable and in making more transparent decisions. The RMLA approach should lead to a more streamlined system where the roles and responsibilities of the traditional authorities are clearly defined. For example, the

traditional authority should approve the formation of an RLMA and should be represented on the Rural Land Council, and should help monitor the activities of the Council to ensure it is acting in the interests of residents. The state should also have a clear monitoring role in line with its status of holding land in trust for the benefit of the communities. Satisfactory balances of influence and authority will have to be achieved between the different institutions.

RLMAs should be private bodies which act in terms of legislation that defines their functions and rights. A process might also be devised to allow for the evolution of legal stature, autonomy and authority. In addition, internal checks and balances will be needed to guard against the formation of power alliances that are not in the interests of local residents. It is certain that some RLMAs will not function as they should, and that funds will be misappropriated, as is now often the case with Local Authorities. There will also be fears that the councils may sell off commonage to private commercial interests.

Measures will be needed to deal with such instances, and it can be expected that some RLMAs may need to be dissolved, at least until such time as local residents can once again reconstruct the institutions as functional legal bodies. The state should thus be able to withdraw registration of an RLMA if it is persistently acting against community interests according to well-defined criteria. However, these concerns should not deter government from promoting the concept of group tenure. A long term view is needed to recognise that communities will need time to learn and experiment with the new approach. Mistakes will be made, but government will need to be supportive to help communities learn from their mistakes.

The formation of RLMAs appears to be a daunting task and many people consulted during this policy review have correctly commented on how much commitment will be needed to carry the process forward. However, experience can be drawn upon from Namibia's conservancy and community forest programmes which, respectively, have led to the registration of 68 conservancies and 13 community forests, to date. The process of establishing and registering RLMAs will be very similar to that used for these community-based resource institutions (see Appendix 4).

The role of the Communal Land Boards would need to change somewhat under the RLMA system. For example, the Boards will need to monitor the RLMAs and their performance, supervise council elections, and provide technical support with respect to the registering of deeds and leases, land-use planning, and financial management. These roles and functions will grow and evolve as the RLMA approach expands.

To accommodate the principles and intentions described above, the following recommendations are made:

1. *De jure* land rights should be declared over all commonage on behalf of communities that now use the commonages and are the holders of *de facto* rights.
2. Options to hold group tenure rights through Rural Land Management Areas should be made available to communities throughout communal areas, with the exception of small-scale commercial farming areas.
3. As much authority as possible should be given to RLMAs (as private legal entities or public law bodies) and their elected Rural Land Councils to manage the land and affairs of local residents.
4. Until legislation allows for RLMAs, the Ministry of Lands & Resettlement and its partners should begin to develop community areas, institutional structures, and methods of doing local land-use planning as pilots to test implementation methodologies and identify

potential bottlenecks.<sup>20</sup> It is also possible that pieces of existing legislation could be used to create the first legally-defined community land holdings.<sup>21</sup>

5. Relationships and divisions of responsibilities and authority between traditional authorities and local management committees should be established in each RLMA according to the wishes of the local community involved.<sup>22</sup>
6. Where possible, it is desirable that the boundaries of RLMAs be congruent with those of constituencies so that each RLMA fits entirely within one constituency.

During consultations while preparing these recommendations, several people commented on the possibility of traditional authorities or communal land boards being appointed to administer RLMAs. By using these existing institutions the need to establish new management bodies would be avoided.

These options are probably not viable however, mainly because the interests of traditional authorities and communal land boards would differ significantly from those of local residents. Both traditional authorities and communal land boards would have few, if any incentives to manage RLMAs effectively if the benefits that accrue from RLMAs go to local residents. This, indeed, is the fundamental purpose of RLMAs.

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<sup>20</sup> The development of the conservancy legislation was, for example, informed by field-based experiences in community organization and decision making before being finalised.

<sup>21</sup> Legal options need further investigation. While local residents could form associations which might be given *de jure* rights over commonage, legislation would almost certainly not allow these associations to function with the powers and responsibilities that are recommended for RLMAs. This is because most of these powers are now accorded to Communal Land Boards, Traditional Authorities and/or the Minister of Lands & Resettlement. Several commentators on this review also mentioned the possibility of forming RLMAs using existing legislation, in particular by registering undivided shares in terms of the Rehoboth Act 93 of 1976, or by adopting aspects of the Sectional Titles Act 2 of 2009. While there are indeed appropriate elements in these pieces of legislation, legal opinion is that RLMAs could not be formed using either of the Acts. Likewise, elements of the Flexible Land Tenure Bill are appropriate to the formation of RLMAs, notably in providing for a group to hold tenure over an area of land in which individual properties are allocated (as starter titles) and then later registered (as landhold title). The Bill was written in 1997 but apparently not developed further.

<sup>22</sup> In areas where the boundaries between adjacent traditional authorities are unclear or disputed, agreed borders for proposed RLMAs will have to be negotiated with both authorities. It is, of course, desirable that all local residents belong to a single authority to minimise the chances of disputes.

## Chapter 5. Individual land rights

The Communal Land Reform Act of 2002 now provides for two kinds of individual tenure: customary land rights and rights of leaseholds. Customary rights are given for the lifetime of the landholder and can, by law, be passed on to his or her heirs. For customary rights, Section 21 of the Act stipulates that the rights are to be used for residential and farming purposes.

The provision for size limitations on customary rights (given in Section 23 of the Act and Section 3 of the Regulations of 2003) and the implication that all other land uses are covered by leaseholds has created the widespread impression that customary rights only provide individuals with places to live and grow food for domestic consumption.

Improving policy and procedure for individual properties and those of a commercial nature that are now usually treated as leaseholds is critical if economic conditions and investments are to develop.

### Individual land rights

The Communal Land Reform Act 5 of 2002 requires that all residents are legally obliged to register their residential and arable land as a customary land right under the conditions stipulated. This obligation has caused considerable confusion and resentment in many areas of the country, as a result of:

- The limitation that each property should cover less than 20 hectares. Section 3 of the Regulations of 2003 is seen as arbitrary and/or irrational, especially among pastoralist farmers.
- The interpretation that only a single property may be registered because each residential or farming unit is described in the singular. This is a particular problem in Kavango and Caprivi where the majority of households have two or more field areas.
- The fact or assumption that land cannot be registered jointly by husband and wife or widow and children.
- The requirement that customary land rights be registered in the name of one person, which is unacceptable in areas where land is held by, and for family lineages.<sup>23</sup>
- The implication that it will become hard, if not impossible, for people to expand their land holdings once they have registered - and thus declared - their existing property.
- The fear that once all individual properties have been registered within any one area, unoccupied or unclaimed land will be allocated to people from other communities.

Many holders of registered customary rights are disappointed that the documentation offers no new rights which could add value to their land. Since the content of land rights is not spelled out in the law, it is not clear, for example, whether households may subdivide their land and donate or lease a part to someone else. The certificates also do not enable holders to trade their land rights, and the certificates can not be used as collateral security since the lender would be unable to sell the land rights if that became necessary, all for reasons explained earlier on page 12. In addition, resentment arises from the perception that business activities are not allowed on land held as a customary land

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<sup>23</sup> Many people argue that properties may be jointly registered with spouses and/or other family members. However, other legal opinion is that the Communal Land Reform Act of 2002 clearly provides for customary land rights to be held by single people as, for example, made clear in Sections 26 and 27. The land might well be registered in the names of more than one person, but the rights of the spouse and other named land holders would probably mean little when it comes to implementing the provisions of those sections.

right. Furthermore, the practical difficulties of changing a customary land right to a right of leasehold, or subdividing a property so that one part can be used for business are considerable.

To solve these kinds of problems and allow the potential use of land rights as investments and financial instruments, the following recommendations are made:

1. It should be made clear that individuals may use their customary land rights as they wish, which would ensure that commercial uses of the land are permissible.<sup>24</sup> Land uses would however be subject to conditions laid down by national legislation on natural resources and the authority of Rural Land Management Areas for properties that fall within such areas. Land uses would also be subject to applicable zoning, environmental and other land use legislation.
2. Individual land rights should be fully tradable on the terms and conditions agreed by the seller and buyer.<sup>25</sup> Section 38 of the Communal Land Reform Act 5 of 2002 provides for the transfers of customary land rights. The Bank of Namibia strongly endorses the need for tradable land rights in communal areas.<sup>26</sup>
3. Individual rights may be assigned as collateral security under terms and conditions agreed between the creditor and land holder.<sup>27</sup>
4. Procedures and Regulations should be implemented to make it easy for land holders to transfer, assign and sub-divide land, as well as to apply for new portions.
5. Consideration should be given to according individual land rights for 99 years, instead of for life.
6. An 'individual land right' should include land rights for individuals and private legal persons (entities such as churches, commercial enterprises, and government and its agencies for schools, health facilities etc) as well as families. These are different from the rights proposed for groups or communities, as described in the previous chapter.
7. Measures should ensure that while the rights of local residents over communal land are safeguarded, tenure conditions should do not discriminate unfairly against outsiders wishing to invest in communal areas.
8. Consideration should be given to the discontinuation of the term customary once properties have been registered. A new name for individual land rights could be adopted, since it is probably inappropriate and confusing for registered, documented land rights which can be used in the modern economy to be called *customary*. A name change will also help to free properties from the constraints of customary law and practice. For present purposes and in the absence of a better alternative, the term *Registered Land Right* is proposed.

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<sup>24</sup> In practical terms, this would entail a Notice in the Government Gazette in which the Minister announces a new category of right under Section 21(c) of the Communal Land Reform Act, namely the use of a customary land right for 'any other purpose'.

<sup>25</sup> These recommendations relate to the requirement in the terms of reference for this review to consider the following: *Assignments and other transfers of leaseholds*: As leaseholds become more prevalent, CLBs are increasingly likely to face requests for approval of assignments and other transfers of leasehold interests, including the mortgaging of leaseholds as security for credit. The Contractor shall assist the Ministry of Lands & Resettlement in developing policies and procedures for the processing of such requests, including criteria upon which requests are to be reviewed and approved, as well as procedures for recording approved transfers.

<sup>26</sup> Shiimi I. *Enhancing Access to Finance in Namibia through an improved Land Tenure System*. Annual Address of the Governor of the Bank of Namibia, Windhoek, 27 October 2011

<sup>27</sup> The potential for land to be used as collateral is often exaggerated and misunderstood. Banks and other lending institutions nowadays prefer not to rely on land as security, and thus often demand other guarantees, such as life insurance policies being ceded to them as lenders. One reason for this is that lenders prefer to avoid the many complications that arise from seizing land if the borrower defaults on his/her payments, irrespective if the land is freehold or leased from state or any other lessor.



9. The possibility of customary land registration being voluntary should be considered. This would avoid any perception that land holders are being forced into a system of tenure with which they disagree and which they do not find appropriate or useful. It is also expected that demands for registration will increase greatly once land rights have financial value.
10. The recommendation for land rights being tradable and used as financial instruments implies that deeds over the land rights should be properly registered in terms of the Deeds Registries Act 47 of 1937, and that the land should be accurately surveyed following the Land Survey Act 33 of 1993. The requirements of both Acts are stringent and require the payment of considerable costs for conveyancers and land surveys. Ways should be found to ease these strict requirements, for example by changing these Acts, deregulating the costs of conveyancing, creating a separate Deeds Registry for communal land and/or introducing cheaper and quicker ways of surveying properties.

Section 38 of the Communal Land Reform Act of 2002 makes provision for transfers subject to the permission of traditional authorities and Communal Land Boards. It is suggested here that the need for approval from traditional leadership will no longer be needed once land rights become fully tradable. However, safeguards are required to help protect vulnerable people such as the poor and female headed households from exploitation, for example in being persuaded to sell their land rights for unfair prices. Suggestions regarding these safeguards are provided on page 29. Once properties fall within Rural Land Management Areas (RLMA) all sales should be vetted by the RLMA Councils, but until this happens Communal Land Boards should continue to approve transfers.

Further measures may be needed to guard against a potential rush to register as much land as possible if land rights become tradable. Again, Rural Land Councils of RLMAs would be well placed to guard against excessive land claims, but in the meantime the following proposals are made:

- A temporary moratorium on the registration of new land allocations be considered to protect against the injudicious appropriation of large areas of land by people who recognise their potential value once land rights may be traded.
- The provision as soon as possible of *de jure* rights to local residents over commonage to which they now have *de facto* rights, as proposed on page 18, again to protect their rights against people wishing to appropriate large areas of commonage land.
- Instead of applying the 20 hectare threshold in all areas, each traditional authority should establish maximum areas which can be considered as normal within local socio-economic contexts. In some areas, this may be half a hectare, elsewhere the maximum may be much larger.
- Traditional authorities ensure that local headmen together with village/area committees assess all applications for new land rights using criteria and processes described on page 30.<sup>28</sup>
- Before a land right over an area that exceeds a local norm is formally recorded in the name of the holder, the intended registration must be publicised for a period of one month so that any objections can be lodged. The intended registration of large areas should be brought to the attention everyone who might be affected by the allocation of the land right. For example, radio announcements could be made and notices could be displayed or sent to local offices of the traditional authority, conservancy and/or farmers' union.

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<sup>28</sup> Village committees have been established in many parts of central northern Namibia and elsewhere. In sparsely populated areas, it would be desirable to form committees for larger areas to vet applications for land allocations in collaboration with traditional authorities.

- The validity of the application must be confirmed in writing by the village/area committee, local village head and Chief of the traditional authority, and this documentation should accompany the application for registration to the Communal Land Board.

In summary, the real challenge is to create conditions for land rights to have financial value while guarding against excessive land appropriation and exploitation of the poor.

### **Rights of leasehold**

The terms of reference for this review require consideration of rentals for leaseholds of state land, conditions for leaseholds in conservancies, and the processing of leasehold applications for more than 50 hectares and/or 10 years. The relevant details are provided in Appendix 5 while Appendix 6 presents additional information on approaches to rentals.

It is clear that the authors of the terms of reference were largely concerned with applications by non-resident investors for rights of leasehold for tourism establishments. However, these can not be evaluated in isolation from the many other kinds of businesses and circumstances when rights of leasehold seem to be required. In addition, there is a need to consider the very purpose of rights of leasehold, and thus to distinguish between the merits of the state obtaining income for the use of its land through rents or taxes. Likewise, should conditions for the use of land be established through lease conditions or stipulations attached to commercial licences?

There are many other questions. What kinds of properties and/or enterprises should be required to have rights of leasehold? For example, the great majority of business properties in communal areas have not thus far had to apply for rights of leasehold. Most of these are small retail outlets. Curiously, however, most enterprises established by people from outside communal areas have had to apply for rights of leasehold, for example for tourism and agricultural businesses.

What rights of leasehold should be long-term (for example 99 years) without need for annual rental payments, and which should require regular renewal of lease agreements and conditions? Should enterprises that occupy areas greater than a predetermined maximum size be required to have rights of leasehold? What institutions should receive rental payments? Can traditional authorities receive rentals, and under what conditions?

Given these complexities, the benefits of group tenure recommended in Chapter 4 and the need to encourage economic investment in communal areas, the following principles and options might guide the development of policy and procedure for leases over communal land rights.

1. Commercial enterprises should not have rights of leasehold but rather land rights equivalent to those proposed earlier for individuals. This would be possible by the inclusion of commerce and any other purposes on customary land rights as an amendment to Section 21(c) of the Communal Land Reform Act. (One exception that could be regulated from the beginning is the requirement that international companies only be permitted to lease land rights.)
2. Except for leases for international companies, Communal Land Boards or, in due course, Rural Land Councils be required to identify and justify individual cases in which leaseholds are desirable as and when these cases arise.
3. In such instances options should be provided for leasehold rights to be for as long as possible, preferably for 99 years, be subject to single initial rental payments and not be encumbered by provisions that stringently limit uses. This will increase the potential value and attractiveness of investments.
4. Rentals should not be levied if the costs of rentals may threaten the economic and financial sustainability of businesses or where the costs of collecting rentals exceed the monetary benefits.

5. If renewable leases are required, rental conditions (which include lease periods, conditions of renewal, sums to be paid and conditions for land rights) should be determined case-by-case.
6. Rental conditions (lease periods, conditions of renewal, sums to be paid and conditions for land rights) should benefit communities as far as possible, be congruent with the value of resources lost to local residents and the need for economic development. Following the establishment of Rural Land Management Areas, rental and lease agreements should be made by, and between the lessee and the Rural Land Council which would receive the rental on behalf of local residents.
7. Rental payments should not be made to traditional authorities.
8. In the longer term and when not registering transfers in the Deeds Office, the Ministry of Lands & Resettlement should involve itself in leases to the minimum, leaving these agreements to Rural Land Management Areas and transactions between the land holders, banks and conveyancers. Controls over businesses should be left as far as possible to the licensing offices of the Ministry of Trade & Industry, while the state should collect revenue from the use of its land through taxes, which is the responsibility of the Receiver of Revenue.

Regarding leaseholds in conservancies and until Rural Land Management Areas and Councils are established, problems faced by conservancies in attracting investors may be solved by the adoption of the following procedures:

- a) Communal Land Boards should apply the principle that lodge development within a conservancy should only take place if the investor has a contract with the conservancy.
- b) If an investor applies directly to the Communal Land Board for a lease for a lodge, the board must refer this application to the conservancy to confirm whether the investor has a preliminary contract with the conservancy.
- c) Even if an application from an investor made directly to the Communal Land Board has been approved by a headman, the Board should check whether there is a preliminary contract with the conservancy. The Board should not approve this application if there is no preliminary contract with the conservancy.
- d) It is not the role of Communal Land Boards to concern themselves with the nature and terms of a contract between the conservancy and the investor.
- e) If the Board receives a lease application for lodge development within an emerging conservancy (i.e. where a community is going through the process of meeting the legal conditions for forming a conservancy) the Board should refer this application to the community task force which is leading the conservancy formation. The task force will notify the Board whether the investor has any agreement with the emerging conservancy.
- f) When the Communal Land Board refers to a conservancy management and utilisation plan in terms of Section 31(4) of the Communal Land Reform Act to see if a lease application would defeat the objectives of such a plan, it should also request the conservancy to explain the management plan to the Board. This will remove any confusion or uncertainty regarding the provisions of the plan and make it easier for the Board to come to a decision.
- g) Conservancies should update their management and utilisation plans and lodge them with the Communal Land Boards.

Tourism enterprises in conservancies and community forests should only pay lease fees to these management institutions, and thus not to the central, regional or traditional government. This recommendation adopts the logic of the Land Bill, which makes provision for conservancies to obtain head leases over their conservancy and the right to sub-lease parts of conservancies to commercial operators. This could be done in terms of a (head) lease over areas designated for wildlife and tourism subject to the existing provisions of the Communal Land Reform Act that no customary rights be affected by the lease. There appears to be no current legal impediment to this approach. In

order to deal with the issues raised in the terms of reference for this policy review, conservancies should therefore be allowed to gain leasehold rights over their designated wildlife and tourism areas, and then to enter into independent agreements with investors.

Tourism ventures outside conservancies should be required to pay a monthly or annual rental fee to the state, but not to traditional authorities. Appendix 7 presents additional information on leases in conservancies.

## Chapter 6. Safeguards, governance and public awareness

Given the ambiguities in procedures, poor accountability, informal opportunities to obtain land and resources, and power or class differences in communal areas, there is considerable need for measures to protect the interests of the weak and voiceless. Checks and balances are required to guard against land and resource grabbing, especially since communal land can be obtained for free. Circumstances are also changing rapidly, which requires that up-to-date information be made available so that those concerned are aware of their rights. Tenure governance is moving from customary practice where land was allocated entirely at the discretion of traditional leaders to a system of documented records in computerised deeds offices. Practices regarding inheritance are in transition as the rights of women are balanced against the concept of property being in the domain of husbands and their blood relatives. These are some of the many challenges faced by residents in communal areas that need to be addressed by implementing measures to safeguard their interests. This chapter also draws attention to several aspects of governance to improve the management of tenure and communal land. A range of problems could be solved – at least partially so – by much greater levels of public awareness and debate, and several suggestions are made on aspects that require raising awareness.

### Safeguards<sup>29</sup>

Several categories of people are often more vulnerable than others with respect to land rights: widows, orphans, people living with disabilities, female-headed households, and members of so-called marginalised groups (Ovahimba and San people). These are people who are defined and labelled because of their gender, parentage or ethnicity. However, the greatest number of vulnerable people are simply the severely poor who are often harder to define and recognise, and whose needs are thus often harder to address. The poor are particularly vulnerable in communal areas because they lack influence, and are usually more dependent on resources within their properties (which are normally very small) and commonages than wealthier neighbours who largely live on incomes from wages, business earnings and remittances.

Protecting the interests of the poor will become increasingly necessary as communal land gains commercial value and more people seek to privatise as much land as possible. The rate at which the ‘safety net for the poor’ (as communal land was intended to be) closes may therefore accelerate. However, the following recommendations are offered, which apply both to poor and other vulnerable people:

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<sup>29</sup>The terms of reference for this policy review read: “*Women and other vulnerable groups*: The Communal Land Reform Act is gender neutral in terms of registration of land rights. Under customary law, however, men tend to apply for customary rights upon marriage and to be considered as the rights holders. Moreover, the Act does not explicitly provide for the registration of rights jointly in the name of both the husband and wife, so the husband’s name tends to appear on the registration application form. The Regulations supporting implementation of the Act, however, require that the name of the applicant’s spouse also appear on the form, although this does not always occur in practice. Also in practice, some TAs believe that applications can only be signed by male heads of household; if husbands are not present, their wives cannot sign. Where land is registered in the name of a married woman, she needs the consent of her husband to sign the application form, whereas single women can sign the forms on their own. In addition to these difficulties related to application of the Act, studies have shown that women tend to be unaware of their rights under the Act.

While addressing all gender inequalities in the land sector is not the primary objective, the Consultant shall analyze current application of the Act and shall recommend measures to be incorporated in its verification and registration procedures, as well as in the Operations Manual and forms described in 2.2.2 below to ensure that women and other vulnerable groups are not disadvantaged by the verification and registration work under these Terms of Reference.”

1. The protection of land rights for vulnerable people would be improved significantly by the provision of *de jure* land rights for communities.
2. Traditional authorities, village committees, Communal Land Boards and community-based institutions such as conservancies, community forests and water point associations should be encouraged to be particularly sensitive to the needs of the vulnerable, especially in checking against practices that exploit the commonages. Programmes to build awareness and sensitivity regarding the poor are recommended.
3. Similar programmes should be directed at the general public through public media.
4. Rural Land Councils should have particular responsibilities to safeguard the interests and well-being of the poor, as well as other vulnerable people by checking and approving all land allocations, registrations and transfers. Clear procedures should be developed that help guide decision-making
5. Where possible, vulnerable people should be given preference in the allocation of larger parcels than may be normal, land with soils suited to cultivation, and access to water and services.
6. As suggested in the chapter dealing with individual properties (see page 25), measures are needed to check that applications for properties that are inappropriately large in size do not result in local residents being unfairly disadvantaged.
7. In the absence of Rural Land Councils, all land allocations should be approved by village heads and village committees before processing for registration.<sup>30</sup>

Existing legislative measures also need to be better employed to protect the rights of vulnerable people. For example, provisions in the Child Protection Act should be used to protect the rights of children, including orphans. This includes the appointment of trustees to safeguard land rights (and other assets, including livestock) that belong to orphans.

With respect to marginalised groups, provisions of the Racial Discrimination Prohibition Act 26 of 1991 should be observed. Section 4 regarding immovable property is quoted here verbatim:

*“No person who, whether as principal or agent-*

*(a) intends to sell or otherwise dispose of any immovable property or any right therein, shall-*

*(i) refuse or fail to sell or so dispose of such property or right to any other person; or*

*(ii) sell or so dispose of, or offer to sell or so dispose of, such property or right to any other person on less favourable terms and conditions than have been or are or would be offered to other persons,*

*because such other person is a member of a particular racial group;*

*(b) intends to let or in any other manner grant any right to occupy any immovable property or any part thereof, shall-*

*(i) refuse or fail to let or grant such right to any other person; or*

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<sup>30</sup> Village committees have already been established in many areas of the country and their formation elsewhere is to be encouraged. These committees were established in the absence of any legislation. An alternative is to ensure that each application for land allocation and/or registration is approved by the immediate neighbours to the piece of land in question.

*(ii) let or grant such right, or offer to let or grant such right, to any other person on less favourable terms and conditions than have been or are or would be offered to other persons,*

*because such other person is a member of a particular racial group;*

*(c) has entered into an agreement with any other person for the sale or disposal otherwise of immovable property or any right therein, or for the lease or grant of any other right of occupation of such property or any part thereof, shall terminate such agreement because such other person is a member of a particular racial group.”*

Traditional and other authorities must ensure that they adhere strictly to the spirit and letter of this Act which prohibits any form of discrimination.

The improved use of these existing statutory and civil law measures to protect the rights of vulnerable people should not detract from the need for legislation on land to provide safeguards. Every protection is indeed required, while also recognising that certain aspects fall outside the realm of the Ministry of Lands & Resettlement.

Widows are often at a disadvantage as a result of customary practices that regulate inheritance. In most areas of the country, widows do not have rights to automatically inherit the land and other property of their deceased husbands because (a) their husbands acquired their property from their parents, in particular through their paternal kinship, and (b) wives generally move from elsewhere to live with their husbands. Thus, many people contend that wives have rights to live in, and use property only while they live there with their husbands, and that property must be returned to the husband's relatives when he dies.

Changing these views and customary practices is not easy, even though they contradict most modern perceptions and values concerning the rights of women. The following recommendations should, however, help improve the chances for widows to be treated fairly:

1. Once properties have been registered, inheritance should proceed according to statutory and civil law in terms of the deceased's will or the laws of intestate succession (without a will). Land rights therefore remain the property of the estate, and should not be returned to traditional authorities (as is currently provided in Section 26 of the Communal Land Reform Act 5 of 2002). (Note that this recommendation also gives land rights greater potential for use as collateral since a creditor could not advance credit on a property that automatically reverts to a traditional authority upon the death of the land holder.)
2. Procedures should provide for the right to register customary land rights in the name of spouses jointly, unless one or both spouses request a different arrangement and provide information which demonstrates the fairness of registering land in the name of one spouse only. Provision should be made to include only spouses with legal interests in the land rights, since some spouses may have no immediate rights to the land in question, for example because they reside elsewhere. (Joint registration will ensure that in the event of death, the rights of the surviving spouse would not be affected in the land register.)
3. Section 14 of the Traditional Authorities Act 25 of 2000 limits the powers of traditional authorities by stating: “In the exercise of the powers or the performance of the duties and functions referred to in section 3 by a traditional authority or a member thereof:  
(a) any custom, tradition, practice, or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed by the Namibian Constitution or any other statutory law, or which prejudices the national interest, *shall cease to apply*;

These recommendations attempt to tackle the plight of widows, but they do not address difficulties that women and other vulnerable people encounter in simply being able to hold land in their own right and in the same way as is custom for men. However, many women do at least register

customary land rights in their names as indicated by women submitting between 45% and 50% of all applications in parts of the central northern regions.<sup>31</sup>

These percentages are somewhat lower than might be expected since about 60% of all homes are headed by women in these regions, and women may well be registering household land as *de facto* heads of households because their husbands are working away from home. It has also been documented that although single women are entitled to apply for customary land rights social pressures discourage this practice and may preclude women from signing as *de facto* heads of households.<sup>32</sup> Traditional authorities believe that application forms to register land rights can only be signed by male heads of household; thus, if husbands are not present, their wives cannot sign. Moreover, where land is registered in the name of a married woman, she may need the consent of her husband to sign the application form, whereas single women can sign on their own. It should be noted, though, that women are afforded similar customary rights over land as men in some parts of the country.

Several legal provisions protect the rights of women with respect to land rights:

- Article 23 of the Constitution which deals with Affirmative Action explicitly acknowledges that women 'have traditionally suffered special discrimination' and should be encouraged to 'play a full, equal and effective role' in society.
- Article 95(a) of the Constitution commits the state 'to ensure equality of opportunity for women'.
- Section 3(1)(g) of the Traditional Authorities Act 25 of 2000 requires that traditional authorities 'promote affirmative action amongst the members of (traditional) communit(ies)...in particular by promoting gender equality with regard to positions of leadership'. (However, these principles were not incorporated in the Communal Land Reform Act which refers to women only once in Section 4, which deals with the composition of Communal Land Boards.)

Against this background, recommendations put forward by Hubbard & Coomer (2010) are to be supported, namely that land legislation should incorporate provisions that explicitly prohibit discrimination against women and provide for affirmative action with regard to women:<sup>33</sup>

1. Non-discrimination clauses should spell out that men and women, regardless of their marital status, shall be entitled to the same legally secure tenure, rights in or to land and benefits from land, and no law, regulation, practice or usage may discriminate against any person on the ground of the sex or marital status, including discrimination in respect of the quality or quantity of land allocated to such person.
2. Land legislation should stipulate that traditional authorities and Communal Land Boards should apply affirmative action for women to ensure that women and men have comparable access to communal land.
3. The draft National Land Tenure Policy should be revised to strengthen its proposal that legal rights over land continue to be held by the head of the family in trust for the rest of the family but with provisions to ensure that heads of household may not dispose of or

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<sup>31</sup> Kapitango D, Meijs M, Saers P & Witmer R. 2008. *Olukonda. Registration of customary land rights with aerial photos in communal areas of Namibia*. Windhoek: Rural Poverty Reduction Programme; and Lendelvo, S. 2008 *Women's Access to Land: A Case Study of the area under the jurisdiction of the Ondonga Traditional Authority, Oshikoto Region*. Windhoek: GTZ

<sup>32</sup> Werner W. 2008. *Protection for women in Namibia's Communal Land Reform Act: is it working?* Windhoek: Legal Assistance Centre.

<sup>33</sup> Hubbard D. & Coomer R. 2010. *Gender issues in the Draft Land Bill*. Report for Legal Assistance Centre, Windhoek.



subdivide land rights without the consent of the spouses, irrespective of whether the rights belong to each spouse individually or as common property.

### **Inappropriate areas of land and tenure applications<sup>34</sup>**

The Communal Land Reform Act 5 of 2002 and its Regulations of 2003 has several sections that deal with land areas that may be considered beyond or above the norms of customary land rights and rights over leasehold. These are:

- Applications for *new* customary rights over areas that exceed 20 hectares. (This means that all the confusion over 20 hectare limits for *existing* rights has been unnecessary.)
- Applications for leaseholds over areas that exceed 50 hectares or rental periods of 10 years, and
- Fenced areas that exceed those normally required for residential and cultivation purposes.

People applying to register these properties first have to obtain endorsement from local traditional authority and Communal Land Boards, and then higher authority from the Minister is required to provide final approval. This sequence implies that endorsement by traditional leaders and Communal Land Boards is insufficient. Several problems result from this process:

1. The assumption that the same thresholds of 20 or 50 hectares and 10 years can be applied throughout the country is unreasonable. For example, 1 hectare may be an appropriate size for a customary land right for residential and domestic food production in some areas, but not in others. Likewise, a lease over 50 hectares in a densely populated part of the country would probably be out of place, but perhaps more acceptable elsewhere.
2. Measures to deal with these applications which require special ministerial permission do not address what should be the central and vital question, namely: Are these applications fair and, if approved, would local residents be disadvantaged in any substantial way?
3. Published criteria are not available to guide assessments which also do not seek the views of existing users of commonage which would be lost if the applications are approved.
4. No provision is made to consider or document what commonage resources would be lost, and to what degree. For example, information is not provided on the effects on commonage

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<sup>34</sup> The terms of reference for the policy review describe aspects of these issues as follows:

*Processing of applications for leaseholds of over 10 years or for over 50 hectares:* The Communal Land Reform Act currently requires Ministerial approval of any leasehold that is for longer than 10 years, or for an area larger than 50 hectares. The requirement for Ministerial approval is likely to create a significant bottleneck in the CLS Sub-activity, which is focusing on long term land rights for large tracts of land. In addition, the requirement for Ministerial approval is perceived by some investors (in all sectors, including agriculture and tourism) to require too much time and to impose unnecessary layering of approvals considering that all leaseholds already require approval of both the CLB and TA. The result of the requirement for Ministerial approval has been a preponderance of leaseholds of just under 10 years or just under 50 hectares. The review will include consideration of the elimination of the requirement for Ministerial approval, or the delegation of Ministerial authority to the CLBs, in cases in which leasehold applications have been approved by CLBs and TAs in compliance with published procedures that include opportunities for public review and comment, as well as other safeguards against land grabs at the expense of local communities.

*The 20 hectare limit:* Recent studies have indicated that although most people are aware of their obligation to register their customary and leasehold rights in the NCAs, there is considerable confusion regarding the 20 hectare limit on customary rights, the type and definition of farmland that may be registered, and the number of plots that can be registered as one property (by one person). The Consultant's policy review shall include an analysis of the 20-hectare limit and recommendations regarding how the objectives of the 20-hectare limit might be achieved in other ways so as to permit the elimination of the 20-hectare threshold.

pasture, roads and other thoroughfares, water, wood supplies for building and fuel, fish, and fruit trees etc.

5. With the exception of applications for tourism enterprises in conservancies, there is little assessment of benefits if an application is approved, for example for a lodge or fish farm.
6. The stipulation that investors need special and additional permission to lease land for longer than 10 years or if it exceeds 50 hectares is a disincentive to investment. Delays in the application process have ended up with potential investors withdrawing and communities missing out on income for several years. (While it is often claimed that delays in the processing of applications are due to the need for the Minister's consideration and approval, this is probably not the case.)

Perspectives on the sensitive issue of fencing are often confused, not least because the term 'fencing' is a euphemism for the appropriation of excessively large areas of land. Procedures to approve 'fences' that were erected prior to the promulgation in 2003 of the Communal Land Reform Act also do not require that people affected by the enclosures be consulted, and there are also no investigations on the loss of commonage resources as a result of 'fencing'.

Debates on fencing almost always focus on very large properties, such as those enclosed in eastern Oshikoto, southern Omusati and eastern Otjozondjupa and Omaheke (see page 9). Typically, these farms each cover thousands of hectares, and most debates conclude that they are excessively large. There are hundreds of these farms, but the debates usually ignore the thousands of other large farms that happen to be smaller but that are also abnormally large in relation to average or local farm sizes. Arguably, these farms are also excessive in size, particularly those in areas that are densely populated. For example, a relatively small farm of 30 hectares could accommodate four poor families in the central areas of the former Owambo area, where severely poor households typically each have only a few hectares which are often located on low-lying ground which is easily flooded and where the soils are often too saline and clayey for crop production. Elsewhere in former Owambo and other parts of Namibia, farms of 50 to 100 hectares may not be excessive in size, by contrast.

All these comments suggest the need for improved and explicit checks and balances. These might slow the processing of applications and dampen the enthusiasm of potential investors in communal areas. However, it is also possible that processing may be faster if authority is delegated downwards rather than upwards to the Minister's office, as is currently required. In the light of this, the following recommendations are suggested:

1. In areas where Rural Land Management Areas are in place, their Councils will be appropriate institutions to check applications and to make rapid and final decisions on all land applications.
2. In the meantime or in areas where Rural Land Management Councils are not established, each traditional authority, or group of authorities with similar socio-economic conditions and land uses within a region, should set threshold land areas, criteria and time limits to be used for the assessment of all applications irrespective of the intended land uses. These criteria should also be used to assess whether existing 'fences' may be retained or not.
3. Applications for new properties and the confirmation of existing enclosures should be assessed in relation to the set criteria to check if substantial areas of commonage water, fruit trees, timber, fishing grounds, rights of way, grazing, hunting grounds, firewood etc will be lost and the approximate number of households of local residents affected by the appropriation. In cases of intended investment, applications should also be assessed in terms of their benefits for local communities and national interests.
4. The assessment should be done by the village/area committee, and its endorsement should be passed on to the village/area head, Chief and Communal Land Board which would give

final approval. Before doing so, applications for land rights that go beyond local norms should be subjected to additional assessment by notifying neighbours and other people who might be affected by the allocations. For example, radio announcements could be made and notices could be displayed or sent to local offices of the traditional authority, conservancy and/or farmers' union.

5. Village/area committees should be established where necessary and they should be encouraged to assume further roles regarding the management of land in their villages. Eventually, these roles and responsibilities should be taken over by Rural Land Management Area Councils when and where they are established.
6. The Ministry of Lands & Resettlement and/or Communal Land Boards should provide village/area committees with maps and registers which show current land allocations. The maps and registers would greatly facilitate decision-making on land allocations and endorsements.
7. In the light of the above, it is recommended that provisions be scrapped in the Regulations of 2003 and the Communal Land Reform Act 5 of 2002 that regulate the maximum sizes of land that may be held under customary right and leasehold (Sections 3 and 13, respectively), as well as the Regulations of 2003 and Section 34(2) of the Communal Land Reform Act of 2002 regarding the maximum duration of rights of leasehold.
8. To ensure that the interests of women and vulnerable groups are protected in the land administration process generally and the verification and registration of customary land rights specifically, the direct participation of women in village committees is encouraged.

The recommendation that applications be assessed by village/area committees in conjunction with local traditional authorities needs to be approached sensitively since the authorities may perceive this as an erosion of their power and rights of 'ownership' over land. However, village committees have already been established to perform this role in central northern Namibia and land and farming committees have existed for many years in Kavango. Having village/area committees to assist traditional authorities will allow their decisions to be more transparent and acceptable to all concerned.

In the spirit of criteria and thresholds being set locally for land applications, it is also recommended that directives be issued to make it clear that land rights may be held over more than one parcel.

## **Governance**

As was described in Chapter 2, several layers of authority are involved in the administration of communal land rights. People in each layer often have different perspectives and interests which are sometimes expressed in conflicting and confusing ways. These people often have limited experience in dealing with tenure arrangements, particularly because the Communal Land Reform Act 5 of 2002 and its Regulations of 2003 have only been in force for a short time. Their knowledge of other legislation, such as that protecting the rights of women, children and ethnic groups may be limited. Moreover, the transitional nature of tenure from a customary to documented, statutory system allows for misinterpretations and inconsistent approaches to land administration.

Many of these weaknesses can be addressed by implementation of the following recommendations:

1. The provision of training programmes to improve the knowledge and understanding of traditional leaders, staff of the Ministry of Lands & Resettlement and members of the Communal Land Boards.
2. The introduction of customary laws and provision of public awareness programmes to improve downward accountability of traditional leadership, as well as to ensure that leaders are elected democratically to the maximum extent possible.

3. The involvement of village/area committees in decisions regarding applications for land, as described in the previous section.
4. The provision of directives and guidelines to clarify any uncertainties regarding procedures for land allocation and the transfer of land rights.
5. Having land rights transferred directly from land holders to their heirs or to the buyers of land rights without the involvement of traditional authorities.
6. The establishment of Rural Land Management Areas and their councils to administer land locally, as described in Chapter 4, will also lead to the strengthening of decentralized decision-making.

Currently, all applications for land registration and leaseholds require endorsement by *recognised* traditional authorities, as stipulated in Section 1 of the Communal Land Reform Act of 2002. As a result, residents are unable to acquire statutory land rights in areas where traditional authorities have not been recognised. The same problem befalls residents living in the Bwabwata and Namib Naukluft National Parks who have no recognized land rights because they are affected by the legislation for these parks.

Other problems associated with land allocations being endorsed by traditional authorities stem from the wording of Section 20(a) and (b) of the Communal Land Reform Act of 2002 which determines that the power to allocate land rights vests in the Chief or if the Chief so determines the Traditional Authority of a traditional community. This means that allocations are to be confirmed by senior traditional leaders and not by local village heads. Residents in areas where boundaries between traditional authorities are unknown or disputed are reluctant or unable to apply for land rights since they do not know which authorities have jurisdiction. Senior leaders are also often unwilling to accept applications from those areas because doing so may create animosities between the 'competing' authorities. On the other hand, some leaders may encourage residents to apply for land allocations through their offices as a way of confirming or extending their areas of jurisdiction. Such equivocal conditions hold in the many areas where boundaries have not been established and/or approved by the Ministry of Regional & Local Government, and Housing & Rural Development.<sup>35</sup>

The current need for allocations to be endorsed by senior traditional authority (the chief, senior councillors and/or councillors, as defined by the Traditional Authorities Act 25 of 2000) creates another obstacle, namely that leaders are usually unable to verify the identity of an applicant and the boundaries of the land for which an application is made. The only members of a traditional authority that can really do this routinely are local village heads since they know the identities and boundaries of local residents. Village heads are also the only leaders familiar with local commonage areas and resources and, thus, the potential consequences of allocations over new land rights. Partial solutions to these problems may stem from implementation of the following recommendations:

1. Land allocations are to be endorsed by village/area committees and local headmen and then submitted directly to Communal Land Boards in areas which lack recognised traditional authorities or where jurisdiction by one or another authority is not clear.
2. Once implemented, the councils of Rural Land Management Areas will assume responsibility for the allocation of land rights.

There is general agreement that Communal Land Boards should be strengthened by ensuring that members are more knowledgeable of both statutory and customary regulations concerning land tenure prevailing in their regions. The following is recommended:

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<sup>35</sup> Hipondoka M. 2008. *Traditional authority areas in Namibia*. Report for Ministry of Lands & Resettlement, Windhoek.

1. Members should be committed, well-educated and knowledgeable on all matters concerning land tenure and local socio-economic conditions.
2. Membership should be rotated on a staggered basis so that each Board consists of people that have served for several years. This will help preserve experience and institutional memory.
3. At least one third of Board members should be women.

While it is outside the mandate of the Communal Land Reform Act of 2002 and this Communal Land Support project of the MCA-N, we note the apparently serious tenure vacuum that exists for traditional households located within declared urban areas as a result of local government proclamations. Most of these properties appear to have no legal tenure and their owners are unsure of their rights. The properties are thus prone to unfair expropriation and compensation. There are many anecdotal reports of households losing their tenure rights and/or being compensated unfairly. Within Oshikoto, Omusati, Oshana and Ohangwena, there are approximately 5,500 of these properties.

As a matter of some priority, it is recommended that a review be conducted to assess:

- If and how tenure is being formalised within new urban areas.
- The degree to which residents know their rights and options.
- Whether residents use registered customary land rights to help confirm their land rights.

### **Public awareness**

It is clear that in addition to the problems reported in this review resulting from inadequate or complex legislation, tenure in communal areas is confounded by inadequate information and a poor understanding of land rights. This affects every layer of society and governance, and it is strongly recommended that substantial efforts be made to raise public awareness. These efforts should address both the general conditions in which residents find themselves in communal areas as well as specific measures associated with acquiring land rights. The following aspects require particular attention, especially if the desired benefits of recommendations in this review are to be obtained:

- The formation, functioning and structure of Rural Land Management Areas and their Councils.
- The rights of vulnerable people to land and resources, with different awareness programmes being directed at different circumstances of vulnerability.
- The formation, functioning and responsibilities of village/area committees, and their relationships with traditional authorities.
- The development and use of criteria to assess applications for land rights.
- The responsibilities of traditional authorities to be accountable to the people they serve.
- The advantages and disadvantages of land registration.
- Measures to protect communities against unfair and excessive appropriation of land and commonage resources.
- The potential for using land as collateral security and associated risks.
- Measures to protect residents against unfair practices during land transactions.
- The rights of residents that find themselves within designated urban areas.
- The value of encouraging investment in communal areas and associated risks.

- Processes, advantages and risks as a result of moving from systems of customary tenure which are largely controlled by traditional authorities to documented, statutory systems in which individuals and designated communities have greater independence.
- All procedures concerned with applying for, and transferring, leasing, sub-dividing and selling land rights.
- All procedures to be followed by non-residents intending to acquire land rights for investments in communal areas.
- Procedures, responsibilities and legal measures to deal with fencing and other problems that arise as a result of unregulated tenure.
- Procedures regarding the inheritance of land rights.
- The establishment of maximum areas and other norms and criteria for land allocations according to local socio-economic circumstances.
- The need for traditional authorities, village/area committees, Rural Land Management Area Councils, Communal Land Boards and community-based institutions such as conservancies, community forests and water point associations to be particularly sensitive to the needs of the vulnerable, especially in checking against practices that exploit the commonages.
- The need for vulnerable people to be given preference in the allocation of larger parcels, land with soils suited to cultivation, and access to water and services.
- The need for traditional and other authorities to adhere strictly to the spirit and letter of the Racial Discrimination Prohibition Act 26 of 1991 which prohibits any form of discrimination, as well as all other legal provisions which protect the rights of vulnerable people.
- The advantages of registering land rights in the name of spouses jointly.
- The meaning and value of *de jure* rights over commonage resources and unregistered land holdings.
- Provisions for families and other self-defined groups of people to register their land rights.
- Provisions for compensation for the loss of individual properties in rural and urban areas, as well as commonages.
- Relationships and divisions of responsibilities and authority between traditional authorities and the councils of Rural Land Management Areas.
- Provisions and options for leaseholds.

The dissemination of information needs to be done in a way that takes account of the constraints many rural residents face in accessing and/or digesting information. Many people are illiterate, resource poor and poorly educated, having no prior knowledge about their land or other legal rights and how to use them. The use of local radio programmes may be the most effective way of disseminating information to large numbers of people. Public forums and meetings will also be required to facilitate extensive discussions of issues concerned with land rights in communal areas.

Materials used for public awareness programmes should also be incorporated into an Operations Manual for communal land tenure. The Manual will be an invaluable guide for everyone involved in the administration of land, in particular village/area committees, the councils or Rural Land Management Areas, staff of the Ministry of Lands & Resettlement staff and Communal Land Board members.

### Summary table of recommendations and proposed activities leading to implementation

	Recommendation	Action	Time frame for implementation	Linkage to 7 issues in the Terms of Reference
1	Individual property holders in Namibia should have equal <i>options</i> to use their land rights for economic purposes irrespective of where they happen to live.	Adopt policy, promote through public awareness programmes and amend legislation where needed	Immediate and medium term	Transfers and assignments for properties General
2	Communities who use and partially depend on commonages for their livelihoods to have <i>de jure</i> rights to commonage resources.	<b>A law must be passed</b> in terms of which all <i>de facto</i> rights to communal commonage are recognized as <i>de jure</i> rights. Until such law is passed, government must as a matter of policy treat <i>de facto</i> rights as <i>de jure</i> rights to immediately secure tenure.	Urgently needed to protect commonages against further land grabs	General Group rights
3	Local residents are to be compensated when their rights over commonages are lost.	This will follow automatically when <i>de facto</i> rights are recognised as <i>de jure</i> rights, even before formal registration thereof. Adopt policy and disseminate through public awareness programmes	Medium term	General Group rights

4	Provisions for individual tenure should accommodate (a) the wide spectrum of spatial and social arrangements in which people live in communal areas, and (b) the different and changing wishes of people to have security but also to potentially use their land as investments and financial instruments.	Adopt policy. <b>Delete the restriction in the Communal Land Reform Act</b> in terms of which there are only customary land uses for individually held land rights on communal land. Individuals should be allowed to use their land commercially with their customary land right, even without applying for a right of leasehold; and even without having obtained formal registration of the <i>de facto</i> customary right into a <i>de jure</i> right.	Medium term	Transfers and assignments for properties
5	Transfers of registered land rights should go directly between land-holders, for example from seller to buyer or from estate to heir.	<b>Provisions in the Communal Land Reform Act</b> , in terms of which land rights revert back to the Traditional Authority upon the land holder's death <b>must be scrapped</b> . Upon registration the rights will be dealt with in terms of common and statutory law. Pass legislation to this effect, and amend the Deeds Registries Act 47 of 1937.	Medium term	Transfers and assignments for properties
6	The term customary land right to be possibly replaced with the terms 'Registered Land Right' once an individual's customary land right has been registered.	Debate and consider options further. <b>Make changes to Communal Land Reform Act or cater for this in the new legislation.</b>	Medium term	Transfers and assignments for properties
7	Procedures should be implemented to make it easy for land holders to transfer, assign and sub-divide land, as well as to apply for new portions.	Develop procedures and guidelines, and develop public awareness regarding their use.	Immediate	Transfers and assignments for properties
8	The registration of customary land rights should possibly be voluntary.	Further debate and consideration required. Adopt policy, promote through public awareness programmes and amend legislation where needed. <b>Section 28(3) of the Act</b> which puts a time limit on the registration of existing land rights <b>should be amended</b> .	Medium term	Transfers and assignments for properties



9	Consider placing a temporary moratorium on the registration of new land allocations to protect commonages against land grabs that may occur when land becomes tradable	Further debate and consideration required. <b>Ministerial directive</b>	Immediate	Transfers and assignments for properties
10	Individual land rights should be allocated for 99 years	<b>Amend Section 26 of the Act</b> in terms of which the land right endures only for the natural life of the holder; also <b>amend Section 27</b> in terms of which the right can be cancelled due to failure to comply with condition or restriction to the land right.	Medium term	Transfers and assignments for properties
11	Introduce new measures for properties in communal areas to be legally registered with deeds and to be surveyed according to appropriate standards	Investigate alternatives and amend or introduce new legislation as required in the Deeds Registries Act 47 of 1937 and Land Survey Act 33 of 1993.	Immediate	Transfers and assignments for properties
12	Customary land rights may be registered in the name of more than one person	Although in practice some communal land rights are already being registered in the name of both spouses, the wording of Section 25 and 26 of the Act does not accommodate this. <b>The Act must be amended</b> to expressly allow for registration of land rights in the names of both spouses. This will further obviate the provision that land revert back to traditional authority for reallocation to the surviving spouse.	Medium term	Rights of vulnerable people
13	The type of tenure should not determine how land is used.	Adopt policy, promote through public awareness programmes and amend legislation where needed	Immediate and medium term	Transfers and assignments for properties

14	<p>Individuals may use their registered customary land rights as they wish to ensure that commercial and not-for-profit uses of the land are permissible.</p>	<p>Adopt policy, promote through public awareness programmes and amend legislation where needed.</p> <p>It has been suggested that Section 21(c) of the <b>Act be amended</b> to create any new category of rights, including rights to use land commercially and group rights. However, any further form of tenure created in terms of Section 21(c) would still be a form of customary tenure and would be subject to all the limitations which the rest of Part 1 of the Act imposes on customary land rights (for example, section 23: size, section 26: duration, and section 27 cancellation).</p> <p>Therefore the solution is not to create a new category within the parameters of the current Act, but to <b>pass a new law</b> which either has correct categories, or better still, amend the Act so that it does not impose rules of how land may be used as part of the land rights allocated. The use of the land should be a matter of local land use planning, and not a part of the content of a land right.</p>	<p>Immediate and medium term</p>	<p>Transfers and assignments for properties</p>
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15	Mechanisms be established for the designation and registration of Rural Land Management Areas (RLMA) for communities wishing to register RLMAs throughout communal areas, but with the exception of small-scale commercial farming areas.	<p><b>Amend the current law</b> to explicitly allow for group tenure over communal land rights, as included in section 5.1(a) of the National Land Tenure Policy of 2008. Legislation enabling the formation of RLMA should include the minimum provisions which a constitution of the RLMA should contain with regard to accountability, representation, democratic decision making, gender equality, use and reporting of funds, etc. (comparable to the Nature Conservation Amendment Act 5 of 1996 which enabled the formation of communal conservancies). Note the concerns above regarding attempts to amend Section 21(c) of the Act.</p> <p>Note also that it is not certain if the same general process should be available for families to register land rights, or whether these should be provided for separately.</p>	Immediate and medium term	Group tenure
16	As much authority as possible should be given to RLMAs (as private legal entities or as public law bodies) and their elected Rural Land Councils to manage the land and affairs of local residents.	Adopt policy and ensure consequent provisions are built into legislation and RLMA constitutions.	Immediate and medium term	Group tenure
17	Through RLMAs, local communities to obtain rentals if their commonages are allocated to non-resident users for commercial gain	The enabling legislation should allow for RLMAs to benefit from such commercial use of the commonage. This also follows automatically when RLMA are given formal rights over the land.	Medium term	Group tenure

18	Until legislation allows for RLMAs, the Ministry of Lands & Resettlement and its partners begin to develop group tenure areas, institutional structures, and methods of doing local land-use planning as pilots to test implementation methodologies and identify potential bottlenecks.	Ministerial approval required to start testing and developing the process	Immediate	Group tenure
19	RLMAs should be private bodies which act in terms of government legislation which defines their functions and rights.	<b>Amend the current law</b> to more explicitly encourage group tenure over communal land rights, as included in section 5.1(a) of the National Land Tenure Policy of 2008. The new or amended legislation to include minimum provisions which a constitution of the RLMA should contain with regard to accountability, representation, democratic decision making, gender equality, use and reporting of funds, etc. (comparable to the Nature Conservation Amendment Act 5 of 1996 which enabled the formation of conservancies.	Medium term	Group tenure
20	Relationships and divisions of responsibilities and authority between traditional authorities and local management committees should be established in each RLMA according to the wishes of the local community involved.	<b>New or amended legislation</b> enabling the formation of RLMA should include the minimum provisions which a constitution of the RLMA should contain with regard to accountability, representation, democratic decision making, gender equality, use and reporting of funds.	Medium term	Group tenure

21	Each traditional authority should establish maximum areas which can be considered as normal within local socio-economic contexts. 'Maximum areas' would take into account and include separate parcels or fields allocated to one individual.	<p><b>Section 23 of the Act be amended</b> accordingly so that applications for land over a certain size is not referred to the Minister for approval.</p> <p>Also amend Regulation 3(1) of 2003 which determines maximum sizes of customary land rights.</p>	Medium term	<p>Properties larger than 20 hectares</p> <p>Properties larger than 50 hectares and/or to be leased for more than 10 years;</p>
22	Wherever possible, commercial enterprises should not have rights of leasehold but rather 'registered land rights' equivalent to those proposed for individuals.	<p><b>While Section 21(c) of the Act might be amended</b> to create any new category of rights, the land right would still be a form of customary tenure and would be subject to all the limitations which the rest of Part 1 of the Act imposes on customary land rights (for example, section 23: size, section 26: duration, and section 27 cancellation).</p> <p>Therefore the solution is not to create a new category within the parameters of the current Act, but to pass a new law which either has correct categories, or better still, a new Act which does not impose rules of how land may be used as part of the land rights allocated. The use of the land should be a matter of local land use planning, and not a part of the content of a land right.</p>	Medium term	Rentals on leaseholds

23	In instances where leaseholds are considered necessary, options should be provided for leasehold rights to be for as long as possible, preferably for 99 years and be subject to single initial rental payments and not be encumbered by provisions that stringently limit uses. This will increase the potential for leaseholds to be used as security for credit.	<b>Delete section 34(2) of the Act</b> which requires Minister's approval for leaseholds longer than 10 years.	Medium term	Rentals on leaseholds
24	Rentals should not be levied if the costs of rentals threaten the economic and financial sustainability of businesses or where the costs of collecting rentals exceed the monetary benefits.	Adopt policy and advise all authorities and the public.	Immediate	Rentals on leaseholds
25	If renewable leases are required, rental conditions (which include lease periods, conditions of renewal, sums to be paid and conditions for land rights) should be determined case-by-case.	Adopt policy and advise all authorities and the public. Amend legislation where needed.	Medium term	Rentals on leaseholds
26	Rental conditions (lease periods, conditions of renewal, sums to be paid and conditions for land rights) should benefit communities as far as possible, be congruent with the value of resources lost to local residents and the need for economic development.	Adopt policy and advise all authorities and the public. Amend legislation where needed.	Immediate and medium term	Rentals on leaseholds Group tenure

27	Following the establishment of Rural Land Management Areas, rental and lease agreements should be made by and between the lessee and the Land Council which would receive the rental on behalf of local residents.	Adopt policy and advise all authorities and the public. Amend legislation where needed.	Immediate and medium term	Group tenure Rentals on leaseholds
28	Rental payments for registered leases should not be made to traditional authorities.	Adopt policy and disseminate information to all authorities and the public.	Immediate	Rentals on leaseholds
29	When not registering transfers in the Deeds Office, the Ministry of Lands & Resettlement should involve itself in leases to the minimum, leaving these agreements to Rural Land Management Areas and transactions between the land holders, banks and conveyancers. Controls over businesses should be left as far as possible to the licensing offices of the Ministry of Trade & Industry, while the state should collect revenue from the use of its land through taxes to the Receiver of Revenue.	Adopt policy and amend legislation where needed.	Medium term	Rentals on leaseholds
30	Tourism ventures <i>outside</i> conservancies and RLMAs should have long term land rights. If leases are required these should be with the state.	Adopt policy and inform relevant authorities.	Immediate	Rentals on leaseholds
31	Tourism enterprises <i>inside</i> conservancies and community forests should only pay lease fees to these management institutions, and thus not to the state.	<b>Section 32 of the Act must be clarified</b> that the enterprise is not to pay regular lease fees to government institutions.	Medium term	Processing of leaseholds in conservancies

32	Communal Land Boards should recognise and apply the principle that lodge development within a conservancy should only take place if the investor has a contract with the conservancy	<b>Expand the provisions of section 31(4) of the Act</b> to prescribe more than just compatibility with the conservancy's management and utilisation plan	Medium term	Processing of leaseholds in conservancies
33	It is not the role of Communal Land Boards to concern themselves with the nature and terms of a contract between the conservancy and the investor.	Adopt policy and inform relevant authorities.	Immediate	Processing of leaseholds in conservancies
34	Conservancies should update their management and utilisation plans and lodge them with the Communal Land Boards.	Inform relevant authorities	Immediate	Processing of leaseholds in conservancies
35	Conservancies should be allowed to gain leasehold rights over their designated wildlife and tourism areas.	The right of leasehold to conservancies should not prescribe the land use. <b>Thus, section 30(1) of the Act</b> in terms of which leasehold for agricultural purposes may only be granted in designated areas should be deleted.	Medium term	Processing of leaseholds in conservancies
36	Once properties have been registered, inheritance should proceed according to statutory and civil law in terms of the deceased's will or in terms of the laws of intestate succession (without a will). Land rights therefore remain the property of the estate.	<b>Amend Section 26 of the Act</b>	Medium term	Rights of vulnerable people



37	While rights over communal land should be safeguarded for local residents, protections should not unduly discriminate against outsiders, particularly those wishing to invest in communal areas.	Policy should advise all authorities not to violate provisions of Racial Discrimination Prohibition Act 26 of 1991 and to promote economic development.	Immediate	General
38	Individuals may hold rights over more than one portion of land.	Ministerial directive to inform public and develop procedures and guidelines to accommodate land holders with separate parcels as long as these fall within locally set norms.	Immediate	General
39	Before the land right over an area that exceeds a local norm is formally recorded in the name of the holder, the intended registration must be publicised for a period of one month so that any objections can be lodged and dealt with.	<b>Change Regulation 2(3)</b> which requires only display of the notice of the application for 7 days. The period should be longer and the registering authority must do more to ensure that affected parties are notified, possibly including delivering letters or verbally informing the affected parties. Regulation 2(4) must be mandatory rather than optional.	Immediate	Properties larger than 20 hectares Properties larger than 50 hectares and/or to be leased for more than 10 years
40	The validity of applications for land that exceed local norms must be confirmed in writing by the local village/area committee, the village head and Chief of the traditional authority, and this documentation will accompany the application for registration.	<b>Amend Section 24 of the Act</b> to the effect that the Chief must obtain the local village/area committee's and head's written confirmation of the application.	Medium term	Properties larger than 20 hectares Properties larger than 50 hectares and/or to be leased for more than 10 years

41	Criteria be developed for the assessment of applications by local village/area committee, the village head.	Amend Regulations and ministerial directive and public awareness programmes	Immediate	Properties larger than 20 hectares Properties larger than 50 hectares and/or to be leased for more than 10 years
42	Traditional authorities, village committees, Communal Land Boards and community-based institutions such as conservancies, community forests and water point associations to be particularly sensitive to the needs of the vulnerable, especially in checking against practices that exploit the commonages.	Ministerial directive to provide information through public awareness programmes	Immediate	Rights of vulnerable people
43	Rural Land Councils should have particular responsibilities to safeguard the interests and well-being of the poor, as well as other vulnerable people by checking and approving all land allocations, registrations and transfers.	<b>Include in legislation providing for the registration of RLMAs</b> and their constitutions. Provide information through public awareness programmes. Clear procedures are required to guide decision-making	Medium term	Rights of vulnerable people
44	Where possible, vulnerable people should be given preference in the allocation of larger parcels, land with soils suited for cultivation, and access to water and services.	Policy directive to be adhered to at all levels including RLMAs. Perhaps legislate affirmative action obligations on RLMAs and Communal Land Boards.	Immediate	Rights of vulnerable people

45	To protect the rights of vulnerable people traditional and other authorities must ensure that they adhere strictly to the spirit and letter of the Racial Discrimination Prohibition Act 26 of 1991 Act and any other legislation that prohibits discrimination.	Policy should advise authorities not to violate provisions of Racial Discrimination Prohibition Act 26 of 1991 and to provide affirmative options for vulnerable people.	Immediate	Rights of vulnerable people
46	Regardless of their marital status, men and women shall be entitled to the same legally secure tenure, rights in or to land and benefits from land.	Promote public awareness information that this is already part of the highest law of the country, the Constitution: Article 10 Equality and Freedom from Discrimination: (1) All persons shall be equal before the law. (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.	Immediate	Rights of vulnerable people
47	Provide and promote affirmative action for women to ensure that women and men have comparable access to communal land.	Policy directive to be adhered to at all levels. Perhaps legislate affirmative action obligations on traditional authorities, RLMAs and Communal Land Boards.	Immediate and medium term	Rights of vulnerable people
48	Each traditional authority, or group of authorities with similar socio-economic conditions and land uses within a region, should set threshold land areas, criteria and time limits to be used for the assessment of all applications irrespective of the intended land uses. These criteria should also be used to assess whether existing 'fences' may be retained or not.	Provide Ministerial directive and provide public information on new processes. <b>Section 23 of the Act be amended</b> accordingly so that applications for land over a certain size is not referred to the Minister for approval.	Immediate and medium term	Properties larger than 20 hectares; Properties larger than 50 hectares and/or to be leased for more than 10 years

49	Applications for new properties and the ratification of existing enclosures should be assessed in relation to the set criteria to check if substantial areas of commonage water, fruit trees, timber, fishing grounds, rights of way, grazing, hunting grounds, firewood etc will be lost and the approximate number of households of local residents affected by the appropriation. In cases of intended investment, applications should also be assessed in terms of their benefits for local communities and national interests.	Provide Ministerial directive and provide public information on new processes.	Immediate	Properties larger than 20 hectares; and  Properties larger than 50 hectares and/or to be leased for more than 10 years
50	In areas which lack recognised traditional authorities or where jurisdiction by one or another authority is not clear, land allocations are to be endorsed by village/area committees and local headmen and then submitted directly to Communal Land Boards	<b>Section 3</b> (Maximum size of land that may be held under customary right) and <b>Section 13</b> (Maximum size of land that might be granted under a right of leasehold) of the Regulations of 2003, and Section 34(2) of the Communal Land Reform Act of 2002 regarding the maximum duration of a leasehold <b>should be scrapped.</b>	Medium term	Properties larger than 20 hectares  Properties larger than 50 hectares and/or to be leased for more than 10 years
51	Village/area committees should be established where necessary and they should be encouraged to assume further roles regarding the management of land in their villages. Eventually, these roles and responsibilities should be taken over by Rural Land Councils.	Provide Ministerial directive and provide public information on new processes.	Immediate	Group tenure

52	The direct participation of women in village committees is encouraged to ensure that the interests of women and vulnerable groups are protected in the land administration process generally and the verification and registration of customary land rights specifically,	Policy directive.	Immediate	Rights of vulnerable people
53	Provide training programmes to improve the knowledge and understanding of traditional leaders, staff of the Ministry of Lands & Resettlement and members of the Communal Land Boards.	Ministerial directive.	Immediate	General
54	The introduction of customary laws and provision of public awareness programmes to improve downward accountability of traditional leadership, as well as to ensure that leaders are elected democratically to the maximum extent possible.	Launch information campaign and training programmes, and policy directive to be adhered to at all levels. Perhaps legislate obligations on traditional authorities.	Immediate and perhaps medium term	General
55	The provision of directives and guidelines to clarify any uncertainties regarding procedures for land allocation and the transfer of land rights.	Include in Operations Manual	Immediate	General

56	Communal Land Board members should be committed, well-educated and knowledgeable on all matters concerning land tenure and local socio-economic conditions. A requirement for all members to have a tertiary education should be considered.	Provide Ministerial directive.	Immediate	General
57	Membership should be rotated on a staggered basis so that each Communal Land Board consists of people that have served for several years. This will help preserve experience and institutional memory.	Provide Ministerial directive.	Immediate	General
58	At least one third of Communal Land Board members should be women.	Provide Ministerial directive.	Immediate	General

## Appendices

### Appendix 1. International examples of the application of group tenure

The concept of providing communities with secure group tenure over their land has been implemented in many different countries. In some countries community associations are provided for which operate as private associations with clearly defined rights in law. In other cases community land management institutions are incorporated into government administrative structures.

In many cases the institutional and legal arrangements for the formation of private associations are similar to those required for Namibian conservancies and community forests. These provisions include the need for an elected body that is accountable to residents, the adoption of a constitution and legal *persona*, clearly defined and agreed boundaries and the establishment of some form of management plan. Three examples of group land rights from elsewhere in Africa are provided below.

#### Example 1: Village Land Act (1999) Tanzania:

The following is a summary of the key points regarding group tenure contained in the Act:

- Makes provision for Village Land Councils (VLCs) which operate as trustees, on behalf of village members and are fully accountable to these beneficiaries
- The main purpose of the Act is to set up a community-based system for managing land ownership in rural areas.
- Land is held in Trust by the State, but citizens may own *rights* over land in perpetuity.
- The following may become land rights holders: individuals, spouses, a family unit, a group of two or more persons or as a *whole community*. The rights are held in perpetuity.
- Makes provision for the protection of common property
- A Village Assembly must agree on exactly which land within the village area is owned communally and then registers this as Communal Village Land
- If Government wanted any part of this land for a public purpose, it would have to pay for this as if it were the private property of the community
- VLCs administer land according to the prevailing local customary laws of the day, but with some protections for women, children and vulnerable persons
- Self definition of the village lands is possible, but to be negotiated with neighbours
- Individual and family land rights are recognised and registered by the VLC

#### Example 2: Uganda Land Act 1998

The following is a summary of the key points regarding group tenure contained in the Act:

- Communal Land Associations (CLAs) may be established as private bodies to be land rights holders on behalf of a community
- CLAs have an elected management committee
- The CLA must have a constitution approved by members and gains a legal persona so that the management committee may enter into contracts
- The management committee holds the land and exercises its powers on behalf of the CLA members

- Land rights of individuals/families are recognised and certificates of title are issued
- Provision for identification of commonage and that a land management scheme for the commonage must be developed
- CLA may allow non members to use the commonage

Example 3: Mozambique Land Act 1997

The following is a summary of the key points regarding group tenure contained in the Act:

- Land is owned by State, but provision is made for acquisition of a land use and benefit right (known as a DUAT)
- Communities may gain a DUAT issued in the name of the community
- Communities identify themselves and boundaries need to be established
- Authorisation of the DUAT depends partly on existence of a management plan
- Individual community members may request individual titles, after the particular plot of land has been partitioned from the relevant community land and following community consultation
- *De facto* rights recognised: through occupancy by citizens who have been using the land in good faith for at least ten years, or by local communities
- Holders of DUATs may defend their rights against any encroachment by another person and may submit their title certificate in the context of loan applications.

## **Appendix 2. *De jure* rights**

Legal mechanisms would be needed to establish *de jure* land rights for local residents who use commonages. However, the following goals and provisions should be considered, as drawn from the example of legislation proposed for South Sudan)<sup>36</sup>.

- rights in land under customary *de facto* tenure shall be an assured security of occupancy irrespective of whether or not their interest is held individually or in association with others;
- land rights held in common shall have equal force and effect in law with rights acquired through statutory allocation, registration or transaction;
- the right to make reasonable use of the common land, to gather wood fuel and building materials and harvest the resources of the common land jointly with all other members of the community;
- the right to exclude non members of the community from the common land;
- *de jure* land rights may be freely gifted, sold or otherwise transferred to other members of the community;
- land under *de jure* rights can be leased out by a customary lease and sublease;
- the right is a fully private land right and should Government want to take that land for a public purpose then it must pay the owner full compensation for the value of the land and for benefits that are lost when the land is removed from the right holder.

The provision of *de jure* rights would encourage the need for transparency and accountability of traditional authorities downwards. Any allocation of commonage land by a traditional authority to

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<sup>36</sup> Provided by Liz Alden Wily, personal communication.



an individual would require that the authority first consults the people who stand to lose their *de jure* rights over the area to be allocated. This would reduce the risk of large scale land alienation by outside interests at the expense of local land right.

### **Appendix 3. Rural Land Management Areas (RLMA) and Rural Land Councils**

The following guidelines and provisions are suggested for the formation of these institutions.

Any group of people with a traditional right to an area of communal land may apply to the Minister for recognition/registration as a Rural Land Management Area. The RLMA shall be declared in the Government Gazette by the Minister if he/she is satisfied that:

- The group of persons are local residents that have traditional rights to the land;
- The area is sufficiently demarcated and boundaries have been agreed with neighbours;
- The group of persons has an elected board which shall act as the executive decision-making body of the RLMA. The traditional authority will be represented on the Board;
- The RLMA has been agreed by the relevant traditional authority and regional council;
- The RLMA has a constitution that establishes it as a legal person that may enter into contracts and open bank accounts, sets out how frequently the board will meet, makes provisions for elections to the Board, quorums, etc.

Once gazetted, the RLMA shall have the following powers:

- To allocate land rights to residents of the area as individual rights for life, for residential, domestic, agricultural and commercial purposes. Land may be allocated to a person or to a family;
- To lease land to any non-resident person or organisation or company for any business purpose within the area of jurisdiction of the RLMA;
- To set rent and other conditions for the leasing of such land for business purposes;
- To determine who from outside the boundaries of the RLMA may use the common grazing and other common resources of the RLMA and on what terms, including the charging grazing fees if so desired;
- To determine, in conjunction with the residents of the RLMA, appropriate land uses (including stocking levels) for the commonages and to take appropriate measures to enforce these land uses.

Once the RLMA has been gazetted, it shall have the following responsibilities:

- To oversee the demarcation of land allocated for all purposes including land allocated prior to the establishment of the RLMA and hold records of all such allocations and demarcations;
- To register all land allocations and demarcations with the Communal Land Board and, where necessary in terms of Section 33(2) of the Communal Land Reform Act, with the Deeds Office;
- To safeguard the interests of the poor and other vulnerable residents;
- To keep records of any land-use plans, or other plans relevant to land use in the RLMA and to consider these plans when making decisions regarding the allocation of land (e.g. community forest plans, conservancy plans, tourism plans, *stocking levels* etc.);
- To consult with all legal bodies established to manage natural resources within the boundaries of the RLMA (such as conservancies and community forests);
- To establish a bank account in which all receipts must be deposited, and the Council must make annual financial statements available to residents;

- To decide how to use any surplus income after operating costs have been deducted. This should be done by the RLMA Council and residents at their AGM.

A person and/or family that receives land allocated by the RLMA, or who were allocated land prior to the establishment of the RLMA shall have the following rights over the land:

- To use the land for residential, domestic agricultural and business purposes;
- To allow other persons to use part of the land on any terms which may be agreed between the two parties;
- To bequeath the land rights to other family members;
- To sell their land rights on any terms which may be agreed between the two parties, provided that where land rights have been allocated to a family, the family members must agree to the sale, and the Council of the RLMA must approve the sale of the land.

The Minister may withdraw the registration of a RLMA if he/she believes the RLMA is not acting in the interests of residents (criteria for such a decision, and for an appeal process should be developed).

Note that Section 21 of the Communal Land Reform Act describes the kind of customary land rights which may be allocated in respect of communal land, and Section 21(c) speaks of a right to any other form of customary tenure that may be recognised and described by the Minister by Notice in the Gazette. It is thus possible that the Minister could recognise group rights as a new category of communal land tenure under Section 21(c) of the Act.

Practically, this would entail the publication of a Notice in the Government Gazette, in terms of which the Minister announces a new category of right under Section 21(c) of the Communal Land Reform Act, namely a customary communal land group right. The Notice should further state that provisions of Section 23 (size limitations), Section 26 (duration limits) and Section 27 (the traditional authority has the right to cancel a customary land right) do not apply to customary communal land group rights.

The Rural Land Management Area approach is structured around these simple constructs which should be employed to the extent possible:

1. **Rural Land Areas:** these are land areas which are defined by rural communities in consultation with neighbouring communities and which are discrete, not over-lapping and have clearly agreed boundaries. Depending upon the decision of the community, the RLMA may become the private, group-owned absolute property of the community or the area over which the community exercises jurisdiction without ownership.
2. **Rural Land Title:** this is awarded to a community where it is decided that the community is rightfully recognised as the legal owner of the RLMA. This would be an absolute title in perpetuity, vested in the community, and unable to be alienated. It would refer to the root ownership of all land within the RLMA but would not prevent the community from being able to issue entitlements to parcels of land within the RLMA or its right to retain certain areas as its collective property (commons). The nature of title would be similar to the title currently held by the state over communal lands.
3. **Rural Land Area Boundary:** this refers to the perimeter boundary of the RLMA and which in each case would be agreed by the Council with representatives of neighbouring communities through a process of boundary walking and mapping.
4. **Rural Land Council:** this is the democratically-elected and voluntarily-formed land administration authority, recognised as the lawful manager over land and resource matters

in the RLMA. It would be formed in accordance with certain fixed procedures laid down in Regulations by the Minister along with voluntary guidelines for the community to consider. An example of legal requirements would be in the representation of members, such as necessarily including representatives of vulnerable groups, and ex officio members of resource-based groups, such conservancies. In all cases the traditional authority local to the area would be a member and in the first instance it may be determined that the traditional authority should chair the council, with a view to eventually making this position electable in the longer term. A critical principle of Council is that they are the elected management body and fully responsible and accountable to the community membership.

5. **Rural Land Area Assembly:** this refers to the community membership defined as all adults of 18 years and above who live permanently within the RLMA or who make the RLMA their *principal* residence. Community members who have principal residence elsewhere must be accorded the opportunity to vote on decisions at the proposed quarterly meetings of the Community Assembly. Dates for these meetings would be permanently fixed so all members are aware on which four days of the year they should be in the village to attend. A quorum for decision making should be established.
6. **Rural Land Area Rules:** these are the Rules which the Council administers. They would be defined as a mixture of Regulations laid down as nationally applicable to matters on which each Council has full discretion.
7. **Community:** this is a self-defining entity for the purposes of localised land tenure and administration. Communities would be advised to always build upon what exists, such as upon headman areas. Where populations are very low, clusters may be viable. Occasions may also arise where the land area is extremely remote from settlements, shared in effect by several communities, and without jurisdiction by an immediately local headman, and in these cases, communities local to the area may decide to make this a distinct Rural Land Management Area with its own distinctive tenure and governance regime (e.g. under a Senior Headman). 'Community' for the purposes of land law should be a legal person, identifiable by its name. For purposes of decision-making, members should define what they mean by 'community member'.
8. **Rural Land Use Plan:** this refers to a simple zoning plan which the community develops. Guidelines for this would be issued. Communal Land Boards and technical personnel with appropriate skills may provide technical assistance and especially assistance with aerial photographs or maps for the community to work with. Following agreement of zones, and an interim testing period as to their viability, the Communal Land Boards should be responsible for ensuring that the zones or plan are mapped, and the community provided with copies.
9. **Rural Land Area Register:** this would be the Land Book created by each RLMA Council within which Rules are recorded, boundaries and boundary agreements lodged, the description of the Communal Areas within each RLMA fully described, and information as to each individual entitlement recorded.

#### Appendix 4. Steps required for the development of Rural Land Management Areas.

Steps	Activities	Support required
1.1 Information to community members	Meetings with community members to inform them about the RLMA, how it can be formed, the powers it would have, and advantages and disadvantages to the community. These meetings should be held with as many community members as possible, and not just with a few leaders. However the TA should be involved in the meetings	Holding of community meetings to provide information about RLMAs/RLMCs. Ensure as many people as possible are involved including TA. Inform councillor.  Identify whether community wants to form an RLMA (this might take some time for a decision to be made, but shouldn't be rushed). The first RLMA should be where we have a good idea that people are already interested and should act as a model for others to see and hopefully follow.
1.2 Identification of the community land area	Identify the boundaries of the community land area i.e. which village or villages it includes. This should include all residential, crop growing and commonage used by that community.	Assist in identification of boundaries – drive the area with GPS.
1.3 Negotiate and agree boundaries with neighbours	Once the community has identified its land area, the boundaries should be negotiated and agreed with neighbouring communities. While this can be time consuming it is crucial to do this before land areas are registered by government. It will be difficult to deal with any disputes once an area is registered and disputes could severely hinder the operation of registered RLMAs. Once finalised the boundaries should be mapped.	Assist/facilitate negotiation with neighbours if requested or it is felt outside dispute resolution would be useful.  Assist in mapping the final boundaries with GPS.
1.4 Establish representative Rural Land Management Council	Community meetings to discuss the need for RLMC, hold elections including as many residents as possible. Agree on level of TA representation in the RLMC.	Facilitation, and logistical support to holding community meetings to discuss the need for the committee, logistical support to holding elections
1.5 Draft constitution	Hold meetings to discuss the importance of the constitution and	Technical assistance/legal advice in developing the constitution; facilitation in assisting the community to identify what

	<p>decide what should be in it.</p> <p>Constitution should set out the objectives of the RLMC and its rules of operation including approval of budgets, means for deciding how income will be used, election of office bearers, holding of AGMS, financial management, etc.</p>	<p>they want in the constitution. Logistical support for community meetings. It is not sufficient to simply use a template constitution and work with the RLMC committee only. To ensure good governance residents need to be involved in the process of developing the constitution.</p> <p>Compile first draft of constitution based on results of community meetings Provide feedback to the community, revise if necessary. Finalise constitution with legal advice</p>
1.6 Register residents and record all existing land rights in the RLMA	Register households and identify and record all existing land rights within the RLMA	Assist RLC in registration process – provision of transport, help set up recording method and data base. Help identify appropriate office for RLMC for storing of data, meetings, etc. In some cases it might be necessary to provide funding for construction of an appropriate office.
1.7 Gain endorsement of TA and Regional Councillor	RLMC should get the written endorsement of the TA and Regional Councillor for the formation of the RLMA and its boundaries.	N/A
1.8 Develop basic Land Use Plan*	Identify, agree and map main land use areas of the community, including areas for residential/crop growing expansion, the existing commonage and any large scale land areas used for agriculture/ wildlife/ forestry/tourism etc.	Facilitate development of land use plan, making sure as many residents are involved as possible. Ensure copy of plan is kept in RLMA office.

## Appendix 5. Terms of reference for matters concerning leaseholds (quoted verbatim)

*A. Rentals payable on state leaseholds:* Leaseholds in the communal areas are issued on the basis of lease agreements that include an annual payment of rent to the state. In June 2004, the Cabinet approved new 'interim' rates, replacing the rates set for PTOs in 1991. Since there is no record of property market transactions in communal areas to use as a reference, the new rates, which will be valid until 2009, were determined using items on the Consumer Price Index. The MLR stated at the time that it would look at a more comprehensive method of determining rentals for communal sites.<sup>37</sup>

<sup>37</sup> The Namibian, July 20, 2004

At the same time, the Cabinet also ordered MLR's Directorate of Valuation and Estate Management to determine rental for hotels, lodges and camping sites on an individual basis. These are to be calculated on income projections submitted in the feasibility study or business proposal. The rationale for this was that the CLBs would be in a position to charge what they deemed appropriate for the economic benefit of the area, based on what the investor would be prepared to give back to the community. The Cabinet further made a decision that a figure of 8 percent of gross income plus the interim fees be considered as a minimum. The contractor will perform a review of these rental values and the methodology for determining them will be identified and explained.

*B. Processing of applications for leaseholds of over 10 years or for over 50 hectares:* The Communal Land Reform Act currently requires Ministerial approval of any leasehold that is for longer than 10 years, or for an area larger than 50 hectares. The requirement for Ministerial approval is likely to create a significant bottleneck in the CLS Sub-activity, which is focusing on long term land rights for large tracts of land. In addition, the requirement for Ministerial approval is perceived by some investors (in all sectors, including agriculture and tourism) to require too much time and to impose unnecessary layering of approvals considering that all leaseholds already require approval of both the CLB and TA. The result of the requirement for Ministerial approval has been a preponderance of leaseholds of just under 10 years or just under 50 hectares. The review will include consideration of the elimination of the requirement for Ministerial approval, or the delegation of Ministerial authority to the CLBs, in cases in which leasehold applications have been approved by CLBs and TAs in compliance with published procedures that include opportunities for public review and comment, as well as other safeguards against land grabs at the expense of local communities.

*C. Processing of leaseholds in conservancies:* The current perception among investors in the tourism sector is that the process for approval of tourism leaseholds in conservancies is too cumbersome and time-consuming. Unclear and ill-defined procedures for CLB and MLR approval of proposed leases and for confirming that proposed leases are consistent with the conservancy's land use plan contribute to time delays. The Consultant shall review and analyze these procedures and shall recommend methods for streamlining the process that are consistent with the continued protection of the interests of conservancies (including the possible elimination of the requirement for Ministerial approval in the case of leases of over 10 years). The Consultant's review shall include an analysis and recommendations regarding the appropriate pricing structures and durations of such leaseholds.

## **Appendix 6. Observations on rentals payable on state leaseholds**

The Communal Land Reform Act of 2002 and its regulations are ambiguous about rentals. Section 32 states that a leasehold may only be granted by a Communal Land Board once 'an amount in respect of that right and nay improvements on the land in question is paid to that board' [my emphasis], suggesting that that this is a once off payment. The option provided in Section 32(1) (c) for paying this amount in instalments further confirms this reading. Regulation 14 provides guidelines on determining the 'amount payable in respect of right of leasehold and improvements'. Four factors have to be taken into account for doing so:

- The particular purpose for which the rights are acquired;
- The value of the improvements, if any, on the portion of land;
- The size of the portion of land in respect of which the right has been granted; and
- The period for which the rights of leasehold has been granted.

While Communal Land Boards may determine rentals themselves, they are authorised by the Act to appoint valuers. The only reference to monthly payments for land leased from the State appears section 2 of Form 9 (memorandum of lease). The form suggests that the amount payable by the

holder of rights of leasehold can be done upon registration or, alternatively, per month. The Communal Land Reform Act requires that monies collected from rentals have to be paid into a fund to be established for the purpose of regional development.

Pursuant to the Communal Land Reform Act valuers in the Ministry of Lands & Resettlement set out to determine rental values for tourism establishments in communal areas. The absence of fully functioning land market in the communal areas posed certain challenges to the methodology of setting out rental fees. The comparative method for example, could not be employed for tourism establishments as a starting point. Consequently valuers in the Ministry of Lands & Resettlement chose to calculate rentals following the profit and/or accounting method of valuation. In simple language: rentals were based on the annual gross turnover of tourism establishments. This method required that the Ministry of Lands & Resettlement is provided with audited income statements of tourism establishments in communal areas for the last 3 years to ensure a historical analysis of the business accounts. Leaseholders not yet in operation were requested to submit business proposals. Despite requests for tourism operators to submit such audited statement, only one operator responded.

The universally accepted principle is that 10% of gross turnover can be levied for land with all necessary infrastructure in place. Where infrastructure is absent, 5% is regarded as reasonable. Because Namibia did not have any experience with rentals in communal areas, Cabinet pitched the rentals for tourism enterprises at 8% as a maximum. This brief discussion suggests that the determination of rentals is flexible in so far as the methodology takes into consideration a variety of factors, not least the impact of rentals on the financial viability of an enterprise.

The methodology of determining rentals for small-scale commercial farms in designated farming areas is different. Since few – if any – of these are operational, valuers in the Ministry of Lands & Resettlement use the comparative method. In practice this involves assessing *rentals* paid for comparable land in the freehold sector. These values are then discounted to account for the absence of infrastructure in communal areas, for example. However, the assumption of valuers is that the state will finance most infrastructure developments on these farms, which in turn will be reflected in the rentals.

Many conservancies have entered into joint venture agreements with commercial tourism operators. The latter develop the required infrastructure to accommodate tourists and market the operation through their established marketing channels. In return, operators pay fees to conservancies. These fees range between 5% and 12% of net turnover (Ministry of Lands & Resettlement 2010a: 5). In addition, a bed night levy of 2% has to be paid by tourism operators to the Namibian Tourist Board (Ministry of Lands & Resettlement 2010b: 5). Together, these two fees thus amount to a maximum of 14% of turnover. If another 8% of gross turnover is added for rentals, tourism operators in conservancies would have to pay close to 20% of gross turnover in fees and rentals. Considering that these payments are made in addition to other taxes (income and VAT for example) the financial burden on tourism operators becomes very high and increases the risk of losing further investments in tourism in conservancies.

In total seven tourism establishments were making payments amounting to a total of N\$96,000 to traditional authorities in 2009. Six of these were in Caprivi and one in Kunene. This amount is relatively small in relation to the overall payments of N\$ 20.6 million made by operators in cash and kind to conservancies and individual households in 2009, but represents a payment that is not regulated properly and perhaps not transparent.

Tourism operators in communal areas that are not part of joint ventures with conservancies, like privately owned camp sites and lodges in Kavango, for example, clearly do not pay fees to conservancies. However, they are said to make regular payments to traditional authorities and are also required to pay a turnover levy to the Namibian Tourist Board. Some traditional authorities

justify demands for payments by referring to the fact that small commercial enterprises such as *cuca* shops for example, also have to pay a fee to the traditional authority. However, payments to traditional leaders are not regulated and must be assumed to differ vastly between traditional authorities and tourism operators. There appears to be no transparency on how such payments are determined, or what they are being used for.

The legal situation with regard to the powers of traditional authorities to receive monies for land, are ambiguous. Section 18 of the Traditional Authorities Act, 2000 states that

A traditional authority may *with the consent of members of its traditional community* acquire, purchase, lease, sell or otherwise hold or dispose of moveable and immoveable property in trust for that traditional community and shall have such rights in respect of the acquisition and disposal of such property as may reasonably be necessary or expedient for the carrying out of its functions under this Act [our emphasis].

The same Section also authorizes traditional authorities to establish Community Trust Funds to be held in trust for the members of their traditional communities and to 'determine the manner in which and the persons by whom the contribution contemplated...' be made '*with the consent of the members of its traditional community*' [our emphasis].

This suggests that the Traditional Authorities Act, 2000 gives traditional leaders the legal power to raise income through levies. Whether these powers extend to communal land remains a moot point. Significantly, however, the Act requires that members of traditional communities have to be consulted and their consent obtained before any actions contemplated under Section 18 are implemented.

By contrast, Section 42 of the Communal Land Reform Act, 2002 as amended, prohibits traditional leaders to receive any payments – whether cash and/or kind – for the allocation of customary land rights.

The picture that emerges from this brief discussion is that tourism operators are subjected to several levies/payments that in total amount to a substantial sum of money. If not kept within acceptable limits, this may leave little incentive for newcomers to develop tourism in communal areas. Moreover, it is not entirely clear to some operators how to distinguish between rentals and other levies. What is therefore called for is a much simpler system that is transparent and consistent.

## **Appendix 7. Observations on leaseholds for conservancy land**

Confusion arose from the Communal Land Reform Act and its Regulations not having provisions (procedures) to guide the Communal Land Boards on how to consider and allocate leasehold rights in conservancies. The only existing provision is that "Communal Land Boards should consider the management plan of the conservancies". As a result of the lack of guidelines, the Boards could not process such applications and applicants became frustrated.

In addition, some conservancy management committees have consented to leasehold applications before they were considered by the Communal Land Boards. Since no allowance is made for unilateral consent by conservancies, the applications have not been approved by the Communal Land Boards. Applicants were also misled into thinking that conservancies have the mandate to approve the leases. In some cases, leasehold applicants by-passed the conservancies and submitted their applications directly to the Boards. These sorts of circumstances have led to confusion and mistrust between applicants, the Communal Land Boards and conservancies.

There has also been debate concerning the appropriateness of a conservancy taking a lease over the whole conservancy area. Concerns have been raised that taking out a lease over the whole area



would over ride any customary rights in the conservancy area and the primary right to land would reside with the conservancy.

If the primary right to land resides with the conservancy then the question arises of who does the conservancy represent? The Forestry Act effectively defines the members of the community forest as people with rights over the communal land where the community forest is established. However, membership of conservancies is more complicated. Conservancy constitutions usually state that members will be residents over the age of 18. In some cases members are required to appear on a register of members, although this does not necessarily mean that a person is not a member if he or she has not registered their membership. Some residents believe they are members of the conservancy because they fall under the traditional authority that initiated or approved the conservancy formation, regardless of whether they appear on a register of members. However, the point is that some residents who can claim traditional rights to the land can potentially be excluded from membership. This casts doubt over the advisability of providing a lease over land to an institution that may not adequately represent the persons who have rights to that land.

Options are to issue leases that specifically state that no customary rights will be affected, to change the conservancy legislation to bring them into line with the membership of community forests, or to ensure that all conservancies revise the membership clauses in their constitutions - a rather daunting task. Rather than promote the idea of conservancies taking out a lease over the whole area, they should be enabled to take out a lease over their designated wildlife and tourism areas subject to the existing provisions of the Communal Land Reform Act of 2002.