

# Land reform and agrarian change in southern Africa

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Contested land tenure reform in South Africa:  
The Namaqualand experience

Poul Wisborg and Rick Rohde

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# Contested land tenure reform in South Africa: The Namaqualand experience

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## Abstract

**T**he legacy of apartheid land policy in South Africa remains one of the most conspicuous manifestations of past injustices. To correct this legacy, diverse land reform efforts have centred on the constitutional mandate for land restitution, redistribution and tenure reform.

The Transformation of Certain Rural Areas Act 94 of 1998 (Trancraa) is the first post-apartheid legislation to be passed and implemented to reform 'communal' land tenure. It aims to transfer state land in 23 former 'coloured rural areas' to residents or accountable local institutions. During 2001 and 2002 civil society organisations, local people, municipalities and the Department of Land Affairs introduced the Act in six areas in Namaqualand of the Northern Cape.

During the same period, a Communal Land Rights Bill for the former 'homelands' has been the subject of consultation, published in August 2002, and adopted in a fundamentally revised version by Cabinet in October 2003 and by Parliament in February 2004. With its reliance on non-elected 'traditional councils', the Communal Land Rights Bill of 2003 departs in major ways from the policy approach of Trancraa. Trancraa was enacted in the context of the 1997 White Paper on South African Land Policy with its emphasis on individual rights and community choice about ownership and administration of land. The Act emphasised the role of municipalities both in implementation of tenure reform and envisaged future governance.

In spite of dramatic policy changes, the experience of implementing Trancraa in Namaqualand may hold lessons for the implementation of the Communal Land Rights Bill with respect to resources, process, power relations and protection of rights. The Trancraa process represents a small but significant investment by government, but the time, funding and institutional support required to carry out effective tenure reform was seriously underestimated. Furthermore, the Act and implementation process did not address the constitutional right to 'comparable redress', and did not include land development or guarantees of future institutional support.

Strengthened tenure rights appear vulnerable if isolated from training, finance and integrated development initiatives. A neo-liberal assumption that 'property rights' and 'markets' by themselves will transform rural areas where people are in deep crisis due to unemployment, HIV/Aids, corruption and food insecurity appears ill-founded and dangerous.



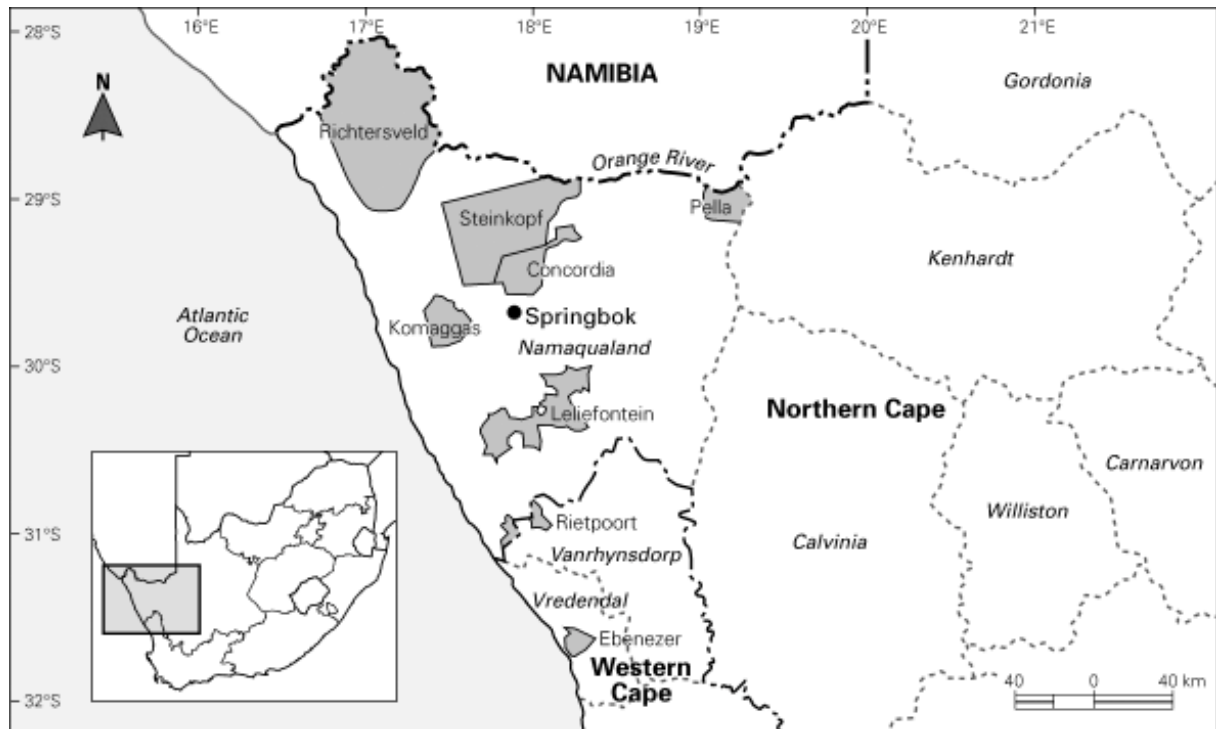


Figure 1: Namaqualand and ‘certain rural areas’

Source: Timm Hoffman, University of Cape Town. Map: Simon Todd.



## 1. Introduction: Towards land tenure reform in South Africa

**F**ollowing three and a half centuries of colonial and apartheid rule and exploitation, South Africa's 'negotiated revolution' brought the first democratically elected government to power in 1994, and with it expectations and promises about bringing an end to inequality. The preamble of the 1996 Constitution holds that 'South Africa belongs to all who live in it, united in our diversity' and resolves to 'Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights'. The Bill of Rights commits government to ensuring equitable access to land, providing tenure security or comparable redress, and offering restitution of land to people who have lost land due to racial discrimination after 1913. The White Paper on South African Land Policy of 1997 recognises that land rights are vested in people rather than institutions such as tribal or other local authorities, and insists that individual rights of members must be respected through democratic decision making and nondiscrimination (DLA 1997:xii and section 3.20.2).

Land reform has progressed with a range of pieces of legislation, activities and achievements, but also with increasing frustration at the lack of political priority, slow pace and disappointing socioeconomic impacts of land reform (Lahiff 2001). Some 60 000 commercial farmers own 82 million ha (67% of total area) and only 2.3% of commercial farmland has been redistributed since 1994 (Kepe & Cousins 2002). The ANC-led government now allocates about 0.35% (R1 billion<sup>3</sup>) of public spending to land reform, of which about one third is available to land redistribution and tenure reform (Mingo 2002).

An estimated 16 million people, or 35% of South Africa's population, live in former 'homelands' that comprise less than 14% of the total land area. Whether in former 'coloured reserves' or 'homelands', insecure tenure is an aspect of the persistent apartheid of space, assets and opportunities that hinders economic development and leaves people vulnerable (Ntsebeza 1999; Kepe 2001). Communal land tenure reform is the most protracted part of South Africa's land reform programme and faces deep inequalities of gender, class and race (Claassens 2000; Cousins 2002b). Ten years into the 'new' South Africa the majority of rural people are still waiting for changes to make their land rights secure. The 1999 draft Land Rights Bill was shelved after the change of minister that year. A new draft Bill was discussed at the November 2001 National Land Tenure Conference in Durban (RSA 2001), and in August 2002 government published a new Communal Land Rights Bill (CLRB) for public review (RSA 2002). The debate involved threats of violence from some 'traditional' leaders who see democratic principles as a threat to their power base (Moore & Deane 2003). In October 2003 Cabinet adopted a dramatically changed version of the Communal Land Rights Bill (RSA 2003a). The Bill placed the responsibility for land administration with 'traditional local councils' provided for in the Traditional Leadership and Governance Framework Act (RSA 2003b). The Land Rights Bill was debated in highly critical submissions and hearings in November 2003<sup>4</sup> and approved by the parliamentary Portfolio Committee on Agriculture and Land Affairs in January 2004 and by Parliament on 12 February 2004.

However, a useful model of land tenure reform legislation has already been enacted and implemented in relation to another apartheid category of rural areas. The Transformation of Certain Rural Areas Act 94 of 1998 was drafted through a consultative process in the mid-nineties as a result of civil



society advocacy during and after the struggle against apartheid. Trancraa was enacted in the context of the 1997 White Paper on South African Land Policy with its emphasis on individual rights and community choice about land ownership. The Act emphasised the role for municipalities both in implementation of tenure reform and envisaged future governance.

Trancraa provides for transferring land ownership to residents or accountable local institutions in 23 'rural areas' currently held in trustee ownership by the state under apartheid legislation.<sup>5</sup> These 'Act 9 areas' cover 1.8 million ha and are home to about 70 000 inhabitants in four provinces (Catling 1996).<sup>6</sup> Replacing authoritarian, permit-based control, Trancraa honours the rights of residents by stipulating that people have to be consulted about land ownership, that their user rights shall be respected and that future land governance shall be democratic and nondiscriminatory. With its reliance on non-elected 'traditional councils', the Communal Land Rights Act of 2004 departs in major ways from the policy approach of Trancraa. Valuable lessons might still be drawn from the experiences with implementing it in Namaqualand.

## 2. Namaqualand

**N**amaqualand is an arid to semi-arid area situated in the northwest corner of South Africa, bordering on the Atlantic and Namibia.<sup>7</sup> It is named after the Nama, one of several 'Khoe-speaking' peoples who, together with the San, are the indigenous inhabitants of the area. Against San and Nama resistance, settlers penetrated Namaqualand from the 1730s. Namaqualand was annexed to the Cape Colony in two moves of the northern boundary, in 1798 and 1847. Colonial expansion gradually undermined Nama society through superior weapons, diseases and economic exploitation (Boonzaier et al. 1996). Some indigenous people were hunted or captured and kept on farms as slaves, others fled north seeking new land.

By the beginning of the 19th century the Nama were largely a landless proletariat and mission stations became their only places of refuge. The Namaqualand 'communal areas' were based on 'tickets of occupation' granted to the mission stations and the resident populations of indigenous or mixed descent trying to protect themselves against dispossession and exploitation. As labour pools and places for 'surplus people' to

survive, the 'reserves' remained useful for the actors controlling Namaqualand's cyclical mining and farming economy.

Loss of access to natural resources and men's greater access to paid jobs reduced women's status and exacerbated their traditionally limited political participation (Archer & Meer 1997). Women are in a minority as herd and plot owners, but active in other traditional and emerging land uses, such as tourism and the collection of medicinal plants and nutritious herbs. In 1994 a large gathering of women met to discuss the General Law Amendment Act 108 of 1993 that aimed to convert occupation rights to family lands to ownership, perceived as a threat to women's interests because in most cases men were the registered occupiers (Archer & Meer 1997).

The state took administrative control of the areas through the Mission Stations and Communal Reserves Act 29 of 1909 and more than 20 other Acts and amendments following it (Hendricks 1995; Pienaar 2000). Successive apartheid governments attempted to reform the areas, including the attempt to force individualisation of community lands in the 'economic units' programme (Archer et al. 1989). As elsewhere, these top-down tenure policies created lasting suspicions of tenure reform as neglecting the real problem of resource distribution and forcing inappropriate institutions (Letsoalo 1987). People in the Namaqualand Act 9 areas feel strongly about the loss of ancestral lands to the state, white farmers and mining companies within a legal system that did not recognise their land rights as semi-nomadic pastoralists. Yet the official view has been that 'Namaqualand rural land claims cannot be addressed through the Land Claims Court process because of the constitutional 1913 cut-off date agreed to for land restitution matters' (DLA 2001). However, recent judgments by the Supreme Court of Appeal (March 2003) and the Constitutional Court of South Africa (October 2003) have challenged this view by ruling that the Richtersveld community is entitled to restitution of land.

Today, Namaqualand comprises about 48 000km<sup>2</sup> and a population of about 80 000 people in four municipalities.<sup>8</sup> Some 30 000 people have their homes in six 'Act 9 areas' (NDMT 2000). About one third of 6 000 households in the 'communal areas' are estimated to be engaged in farming, mainly with small stock, supplementing wage incomes and state pensions (DoA 2001). Post-apartheid land redistribution has increased the land available to the 'communal' areas by 21% (Table 1), increasing the share from 25% to 30% of the total area of Namaqualand.<sup>9</sup> In addition, state farms (372 888ha) have provisionally been



approved for allocation to Act 9 area communities. If completed, this transfer will increase the share to 38% of the total area.

Approximately 670 farm properties, held under individual title by people of European descent, cover 25 000km<sup>2</sup> or 52% of Namaqualand, averaging 3 700ha each. The number of farmers is actually much lower, as multiple farm ownership is common, and a commercial farmer's rule of thumb holds that at least 5 000ha are needed for a 'viable' farm. Despite land redistribution, privately-held farms are on average six times the size of the average land endowment of a livestock-owning family in one of the Act 9 areas (645ha). In spite of this disparity in access to and ownership of land, residents of the Act 9 areas speak about their sense of belonging: *'Is ons grond' – It's our land!*

Between 1995 and 2000, the six Act 9 areas had their own 'transitional local councils', but as of January 2001 new municipalities incorporated the Act 9 areas with surrounding private commercial farms and nearby towns.<sup>11</sup> Municipalities are required to prepare integrated development plans (IDPs), which (in relation to commonage) link land management, democratically-elected commonage committees and the introduction of user fees to cover commonage maintenance costs (Anderson & Pienaar 2003).

**Table 1: 'Certain rural areas' or 'Act 9 areas' in Namaqualand**

	Old Commonage <sup>1</sup>		New Commonage <sup>2</sup>		Increase		Total <sup>3</sup>		People	ha per capita
	(ha)	%	(ha)	%	(ha)	%	(ha)	%		
Leliefontein	159 182	13%	32 627	20%	191 809	13%	4 825	40		
Concordia	75 693	6%	40 760	54%	116 453	8%	4 564	26		
Pella	48 276	4%	34 912	72%	83 188	6%	4 092	20		
Komaggas	62 600	5%	27 228	43%	89 828	6%	4 927	18		
Steinkopf	329 000	28%	110 023	33%	439 023	31%	7 822	56		
Richtersveld	513 919	43%	0	0%	513 919	36%	3 643	141		
Total	1 188 670	100%	245 550	21%	1 434 220	100%	29 873	48		

Source: SPP 2003: Steinkopf Verslag 4.

1. Act 9 trust land vesting in the state 2. Redistribution farms or 'new farms' 3. Not included are state farms provisionally allocated to the Act 9 area communities (372 888ha)

## 3. Trancraa

### 3.1 The Act

**T**rancraa is a remarkably short document of about five pages. It sets out a broad and flexible framework to be followed during a ‘transitional period’, during which municipalities must examine and report to the minister of Agriculture and Land Affairs, making recommendations as to which entity should get ownership rights. While the decision rests with the minister, the Act spells out various conditions attendant on this decision. At the time of writing the minister has yet to make the final decision about the transfer of land.

The main stated aim of Trancraa is to provide for ‘the transfer of certain land’ to (1) a municipality; (2) a communal property association (in terms of the Communal Property Associations Act 28 of 1996); or (3) another body or person approved by the minister. The transfer of land applies to the Act 9 area held in trust by the state, but not to township areas, which will continue to vest in government (excepting residential plots to which people may register private title). Trancraa recognises and provides resources to survey, record and map family and individual use rights and resolve conflicts surrounding these rights. It explicitly defines the accountability of a municipality to the right-holders, should it become the owner of the land.<sup>13</sup>

### 3.2 The implementation process

Trancraa was formulated within the context of local government legislation but before all legislation and administrative structures were in place.<sup>14</sup> Implementation therefore had to await the demarcation of new municipal boundaries and other matters. Following local government elections in December 2000, the transitional phase of Trancraa was implemented from January 2001. During 2001 and 2002 Surplus People Project (SPP)<sup>15</sup> worked with locally-elected transformation committees, municipalities and the Department of Land Affairs (DLA) to implement the transitional phase of Trancraa in the six Act 9 areas. Public interest lawyers from the Legal Resources Centre (LRC) participated in strategising and provided training and legal advice.

The implementation was a process of facilitation and awareness building. The transformation committees played a key role in carrying out the tasks of the transitional phase (Box 1), in co-operation with ‘commonage committees’ (*meentkomitees*).





The SPP held meetings for lawyers, politicians, developers and Act 9 area residents in order to impart information about the Act. The SPP and the transformation committees met almost every month; DLA, municipalities and the SPP held quarterly pilot (*loods*) committee meetings to review progress and make decisions. SPP, the LRC and the transformation committees prepared regulations regarding livestock and cropland management promulgated by the municipalities. Working with professional surveyors, they recorded family claims to cropland based on historical use, which proved to be a dynamic and problematic process of negotiating rights and boundaries. Tenure reform under the Trancraa legislation turned out to require time, resources and skills beyond the imagination of even experienced facilitators.<sup>17</sup>

#### **Box 1: Tasks of the transformation committees**

1. Continuous submission, communication and liaison on the implementation plan for the transformation process
2. The determination of all residents as defined in section 1 of Trancraa
3. Enquiry and determination of all rights held by residents in the land
4. Conflict resolution and mediation
5. Drafting of a land use and administrative plan
6. Holding public meetings so that all residents are informed about the possible entities to which the land could be transferred
7. Arranging a referendum for all residents to vote on the choice of an entity to which the land should be transferred

Source: RSA (2001a). Public notice, *Government Gazette*, 6 July

### **3.3 Community referenda**

The Act leaves the means of expressing the community preferences open and the decision to hold advisory referenda was arrived at through consultation between the SPP and the transformation committees. During November 2002 to January 2003, community referenda were held in five of the six areas. The referenda ballot paper provided three ownership alternatives: 1) communal property association (CPA), 2) municipality, or 3) option of own choice (including individual title).

	<b>Municipal %</b>	<b>CPA %</b>	<b>Own %</b>	<b>Spoilt %</b>	<b>Votes Total</b>
Leliefontein	59%	37%	1%	3%	889
Richtersveld	4%	94%	0%	2%	1 000
Pella	42%	58%	0%	1%	653
Concordia	44%	53%	0%	3%	419
Steinkopf	45%	52%	1%	2%	2 064
<b>SUM</b>	<b>39%</b>	<b>58%</b>	<b>1%</b>	<b>2%</b>	<b>5 025</b>

Source: Surplus People Project, February 2003

The results show a majority for CPAs in four of the five areas (Table 1). Less than 1% voted for the 'own choice' option, reflecting the fact that residents rejected individual privatisation of commons as impractical and socially irresponsible. The referendum turnout of about 38% of the voters reflects the fact that many residents are not active land users, as well as the perception that past consultation processes were ignored by government (for example concerning mineral rights and municipal boundary demarcations).

The referendum victories for CPAs may express distrust of municipalities as managers of community land or more general political concerns. Municipal councillors had played a key role in implementing Trancraa. Although the attitudes and involvement varied, the process revealed some distrust in the relationship between the Act 9 area residents and the new municipal units, creating unforeseen tensions in the Trancraa process. From 2002, ANC leaders at local and district level had advocated municipal ownership of land. Some leaders advocating municipal ownership of the commons warned that CPAs would be treated no differently from the private farming sector in the future in that they would be liable to pay a property tax, rather than to receive development support. This exacerbated voters' fear of isolation and financial difficulties. Leaders also suggested that only municipal ownership would protect people against losing land through financial mismanagement by a CPA and ensure access to land for vulnerable groups such as women, the poor and the disabled. Voting for either a CPA or a municipality in some respects became like choosing between a rock and a hard place: people were aware that CPAs had a reputation for poor performance in



land administration and development. However, they also feared that municipal ownership would merely shift responsibility to a lower and poorer level of the state.

Some of these tensions between old tenure practices, legal reform and young local government institutions were brought out in community experiences described in the following section.

## 4. Participation and resistance: Three cases

### 4.1 Politics, land and CPA referendum victory – Pella

**I**n Pella on the Gariep (Orange River) in Khâi-Ma Municipality (Pofadder) people share a strong sense of ownership of their common land.<sup>21</sup> Both women and men were active in the process, but women's engagement was more pronounced here than in other areas where female farmers are in the minority and often assumed or told not to take an interest in land (interview with SPP staff, 2002). Pella experienced tensions between groups linked to the two main political parties (the African National Congress – ANC – and the Democratic Alliance). Several respondents complained that benefits from the municipality such as housing subsidies and temporary employment were used as patronage to the supporters of the ANC, provoking some non-members to complain about the 'new apartheid introduced in 1994': *'Some people think they have more rights than others. Because of the parties or the politicians. If there is work, some people get the work, others do not. You have to belong to a certain party'* (Pella resident, October 2001).

The polarisation of groups within Pella affected Trancraa more directly after ANC leaders took a public stance in favour of municipal ownership in early 2002, placing shared concerns about land within a broader political struggle. Trancraa involved a number of 'confrontations' over land rights in tourism and land development, and some residents claimed that the municipality was unwilling to hand over land, as demonstrated by a political leader who tried to control a tourism development project on community property. On the other hand, some enterprising farmers who advocated the CPA option also tried to secure exclusive rights to future irrigated lands, something that was effectively sidelined by the municipality and SPP.

In this context the 'new farms' and two state farms provisionally approved for transfer to Pella became an issue:

should they be included in the referendum and transfer of land or not? Residents had been informed through newsletters that all these lands could be transferred to the entity of people's choice in the referendum (SPP 2002).<sup>22</sup> Shortly before the referenda in 2002 the municipalities of Khâi-Ma and Nama-Khoi chose not to follow SPP and DLA advice to include the 'new farms'. Apart from ANC leaders, voters in Pella (and Concordia) assumed that the 'new farms' were included. Opposition leaders, who had advocated CPA ownership, only learnt about this after the referendum and said it would upset the majority who had voted for the CPA option.

In spite of political tension, the transformation committee and SPP succeeded in running a constructive consultation process, culminating in the charged referendum of 7 December 2002.<sup>23</sup> The fact that almost as many people registered for voting as for the 1999 national election testifies to the thoroughness of the information and mobilisation campaign led by SPP and the transformation committee. The Council of Churches monitored the referenda, with close attention to correct procedure. Before the result was announced, young female members linked with the ANC already predicted the outcome and cried because 'a CPA would run the community into debt and the land would be lost'. After careful counting the result was announced (58% for CPA, 42% for municipal ownership).

The young vice-chairman of the Pella ANC said in his speech that *'the result was surprising, but the people have spoken and the process was free and fair'*. Other reactions by ANC leaders indicated that they found it difficult to accept the result. Shortly after the referendum, farmers asking for help with broken water pipes were told by the municipal officer that there would be no further support for infrastructure maintenance, driving home the message that people should start facing up to the consequences of their choice to reject the municipal option. The mayor suggested that new rules would soon have to be applied to the 'new farms' (still municipal property and used, among others, by some prominent CPA supporters). At the time of writing, it remains to be seen whether the ANC and the municipality choose disengagement, obstruction or constructive involvement in land management in Pella.

## 4.2 Community division and Trancraa – Komaggas

Komaggas has a special history of community conflict, including a long-standing dispute over how to justify historical claims to the land (Sharp 1977; 1994). This conflict deeply affected the Trancraa process. Opposition to Trancraa came from the



powerful Komaggas-*inwonersvereniging* (residents' association). The leaders of this group, middle-aged to elderly men, argued that the Act mistakenly assumed that Komaggas belonged to the state and that residents had a private group title to the land, granted in the mid-nineteenth century by the governor of the Cape Colony and Queen Victoria. No 'transfer' back to the people was therefore required. Instead, opponents linked Trancraa to a municipal 'takeover' aimed at extracting fees and taxes. The *inwonersvereniging* leaders disputed the Act's division of Komaggas into 'land in the remainder' and 'town' area (excluded from the transfer). They rejected surveying of both residential and cultivated plots as contradicting the group title and leading inevitably to 'privatisation'. Surveyors were physically chased away by Komaggas residents on several occasions. The *inwonersvereniging* had previously launched a claim to the historical Komaggas land extending to the Atlantic Coast and expressed confidence that its diamond wealth and other resources could provide the base for a Komaggas *tuisland* (homeland), independent of the municipality. The organisation had prepared a 'constitution' to be prepared to take ownership and govern land under the Communal Property Associations Act of 1996 (KIV 2002). According to SPP, the claim did not follow formal guidelines and had therefore not been accepted by the Land Claims Commission. Leaders envisaged that the minister was giving Komaggas her personal attention:

*We already know the options and we have said we support option 1 [CPA]. Although the minister is in Pretoria, if she knows that Inwonersvereniging will win, why should she waste thousands on a referendum and all that. The minister has our land claim with 300 to 400 names as signatories. The opposition did not make a land claim. The minister might look at the voters' roll. Why should she then spend a lot of money on the referendum? If SPP had looked at the options of everybody, and not decided on the municipality, then it would have gone well.<sup>24</sup> The minister said in 1998: it is your land. We were told to claim land before the cut-off date and we have done so. We have written many letters, but they totally ignored them. (Inwonersvereniging, Executive Committee, Komaggas, April 2002).*

Those in favour of Trancraa, mainly supporters of the ANC, believed this Act gave residents an opportunity to strengthen rights to land and to participate in a wider process of transformation:

*I have attended a lot of meetings, and read a little bit of the Transformation [Act], and think it is a good thing. A lot of*

*people did not like [the] Transformation of Certain Rural Areas [Act], but at the end of the day the old Act was really an old apartheid Act, that just kept us on one side, and there was no economic growth and no economic empowerment to the people of Namaqualand. But most of our people have still got this tunnel vision that 'it is our land, so nobody can come and do anything on it'. They even did not want development, because they did not want to be responsible for certain things [...] They feel that the municipality will come and do things and that we will lose everything. It is a fear of payment, a fear of losing baasskap [control, leadership] over something. Unfortunately, we are sitting here and the whole country changes, and we did not want anything to change, but at the end of the day we cannot do anything about the change. (Former chairman of the Komaggas Land Committee, November 2001).*

Efforts by SPP, DLA and the municipality to resolve the conflict proved futile. In August 2002, the transformation committee informed the Nama-Khoi Municipality that they had not succeeded in implementing Trancraa. The municipality forwarded the case to the Minister of Agriculture and Land Affairs, requesting her to make a decision. Some expected her to 'give the land' to the municipality, while many Komaggas residents opposed that option and insisted upon their right to express their view in a referendum. During 2003 the *Inwonersvereniging* shifted strategy and started campaigning for a referendum in Komaggas.

While Komaggas has a unique history, the case also represents more general features of insecurity linked with sociopolitical change and confusion about the different 'legs' of the land reform programme. Sadly, the community attachment to its diverse land resources did not become a strength for the tenure reform process; opportunities to clarify and strengthen individual and family rights were missed and the prospects for good relations between the community and government worsened.

#### 4.3 Contested land management planning – Leliefontein

SPP reported that the transformation process in Leliefontein was the least problematic of the six areas (pers. comm. SPP, December 2002). The commonage and transformation committees worked well together with the municipality to fulfil the requirements of Trancraa.

In line with the Trancraa guidelines (Box 1), the process included a process of land use planning, and the creation of



new rules which in many respects replicated grazing and cropland regulations that had operated under the apartheid era 'management boards'. Grazing regulations typically involve headage payments and restrictions on animal numbers, especially on the 'new farms'. The Leliefontein decision to accept these new rules was taken by village commonage committees, many of which were interested in leasing camps on the 'new farms'. Management rules favour wealthier farmers who have access to transport and capital to pay herders: not surprisingly, many camps within the new farms have been allocated to such '*mense wat voor staan*' (people who stand at the front).

Even so, these more wealthy or progressive farmers complain that the municipality ultimately controls land allocation and maintenance, rather than the community-elected commonage committees (Lebert 2004). Linked to the limited capacity of the Kamiesberg Municipality to enforce grazing rules, the 'new farms' are already overstocked, predominantly by wealthier farmers. The idea that the 'new farms' might serve as 'stepping stones' for more progressive farmers to move out of the commons onto their own freehold farms is belied by the fact that none have done so and many move back and forth between the 'old' and 'new' farms (Rohde et al. 2002). Many farmers with small herds express the view that the new grazing regulations are inappropriate to their situation because they depend on being able to move according to personal circumstances, season and climatic conditions. Furthermore, many poor farmers are unable to pay a livestock tax and allege that the municipality is unable to maintain vital infrastructure such as wind pumps and fencing, and that grazing fees have been misappropriated.

Regarding croplands and family usufruct rights, SPP and the local committees were faced with many unclear boundaries and cases of overlapping ownership. Draft maps showing newly recorded boundaries were posted and discussed at meetings. Fields are typically 2ha–10ha in extent, but in some instances surveyors were 'persuaded' to mark off up to 500ha of commonage surrounding these plots, effectively privatising the grazing rights of these areas. There was little doubt in farmers' minds that the business of surveying and 'transforming' the commons in partnership with local government was problematic.

The referendum result in Leliefontein was closely contested, similar to Pella, Concordia and Steinkopf. Unlike Pella, the ballot in Leliefontein included the 'new farms' in the referendum. The outcome (59% majority for municipal ownership) reflects closer political allegiances with the ANC-dominated Kamiesberg Municipality. However, problems similar

to those experienced by CPAs involving patronage, transparency and capacity also exist under the municipal option. While a legal opinion by LRC tends to favour municipal ownership because national legislation allows government oversight of the developmental process, in practice weak capacity in local government has resulted in an inability to enforce grazing regulations, a reversal of pro-poor policies associated with the commons, the imposition of user fees, alleged misappropriation of funds and a management system that is conceptually inappropriate to communal farming practice.

## 5. Discussion and policy lessons for communal land tenure reform in South Africa

**T**rancraa was not designed as a 'pilot' project for tenure reform but as a parallel process for areas with a different history and legal framework than the 'homelands'. Here tenure reform shall address areas 10 times as large as those covered by Trancraa and may affect 200 times as many people. However, due to the delays in adopting and implementing a Communal Land Rights Act, the process of implementing Trancraa may now provide lessons derived from the diverse perspectives of residents and leaders in the rural areas, civil society facilitators, municipal officials, DLA officers and other policy makers. The comprehensive reports by SPP submitted in 2003 possibly make Trancraa in Namaqualand the best documented 'communal' tenure reform ever carried out in South Africa. Still, one now has to consider the change in policy objectives and fundamental principles between the White Paper on South African Land Policy and the Communal Land Rights Bill adopted six years later. With this caution in mind, in this section we reflect on the more significant achievements, constraints and lessons for tenure reform in other areas of South Africa.

### 5.1 The tenure reform approach – protecting rights, transferring ownership

Trancraa offers an unusual opportunity to change the rights and rules of common property governance through consultative policy making among land users, civil society organisations and local government. It provides a flexible legal framework that can be adapted to the diversity of conditions and needs of the 23 Act





9 areas. Its brevity and openness are virtues that commend it in relation to the more proscriptive and detailed approach of the different later versions of the CLRB. Trancraa thus attempted what Cousins (2002b) has called 'legislating for negotiability'.

The 'rights-based' approach of Trancraa is most clearly expressed in the respect for people's use rights and emphasis on achieving a balance of rights (section 3) and on non-discrimination and the accountability of democratic local government to residents (section 4). Trancraa gives effect (if only partially) to the policy that individuals who hold rights to 'communal' land have a right to choose a tenure system according to their circumstances (for example, DLA 1997:xii). In spite of social and political tensions, the respect for procedural rights made a consulted process possible in all cases except Komaggas. However, the question about whether recording of family rights was non-discriminatory and promoted the interests of women land users deserves close scrutiny and further follow-up. For example, SPP (2003a:38) reports that in Steinkopf only 3% (18 of 488) of family-claimed cultivated lands were registered in the name of women.

Trancraa was enacted shortly before drafters of the 1999 Land Rights Bill for the former 'homelands' started raising questions about risks involved in the 'transfer model' (Claassens 2000). The 1999 draft Land Rights Bill therefore placed more emphasis on giving legal protection to *de facto* rights and transfer of ownership as a possible subsequent process. Trancraa and later Communal Land Rights Bills (2001–4) share a focus on 'transferring land'. In the case of Trancraa, this transfer approach reflected demands by some groups to end paternalistic state trustee ownership. But where Trancraa focuses on 'municipalities and certain other legal entities', different versions of the Communal Land Rights Bill between 2001 and 2004 represent a shift to communities as juristic personae, traditional authorities and lately the 'traditional councils'.

During the implementation phase, the transfer approach increasingly unleashed fears, particularly as residents realised the uncertainty of government support. The Komaggas case illustrates how conflict over a one-time irreversible transfer increased the stakes and tensions, and made efforts to record and protect user rights impossible. Similar tensions were present in all the areas. In a process that unleashes conflict about the major stake of 'ownership', rights of individuals and families may suffer. Tenure reform must offer adaptable, stepwise options for protection of rights, in addition to a transfer of 'ownership' where that is requested (Cousins 2002a; 2002b).

## 5.2 Actors and co-ordination

In line with the South African policy of implementing land reform in co-operation between government and non-governmental organisations (DLA 1997:104), Trancraa illustrated how an alliance of government and civil society could engage land users in participatory tenure reform. Civil society organisations were not only active in formulating the Act itself, but also in defending and extending the application of legal rights during implementation. For example, SPP and LRC advocacy persuaded the transformation committees to include referenda in the process; SPP and LRC defended community interests in cases where community rights to land appeared threatened and they largely co-ordinated and formulated land use regulations promulgated by municipalities. To some extent civil society advocacy compensated for weaknesses of an Act that, for example, contains no provision for protecting and promoting women's interests. On the whole, Trancraa appeared to be a civil society-driven process with national government providing essential inputs in the form of financial resources and a legislative framework.

A lesson is that tenure reform requires a clear identification of the needs that NGOs can address and a strategy for involving NGOs in communication and advocacy. The dynamic and mature relationship between Namaqualand communities, the Surplus People Project and the Legal Resources Centre is possibly unique and may be hard to reproduce.

Trancraa was generally implemented as a consultation with the Act 9 area residents who held the right to participate under the terms of Trancraa. There was no social movement to create popular links between the different Act 9 areas and put pressure on government and other outsiders such as commercial farmers, developers, provincial government and the facilitators. Quarterly *loods* or pilot committee meetings ensured a degree of co-ordination between municipalities, DLA and SPP, but a broader stakeholder forum involving business, commercial farmers and other government departments could have been useful to pursue development opportunities created by tenure reform.

The fact that municipalities had a formal responsibility for implementation, and that they were possible future owners of land and political actors, placed them in an invidious position, giving rise to accusations of partisan behaviour.

*The Act puts the municipality in a very central position in a process where they are an interested party. This was problematic from the word go, and should be avoided at all*



*costs in any further tenure reform consultation processes (SPP staff, comment on earlier draft, 2003).*

On the other hand, the transformation committees and facilitators led a process of information dissemination, community meetings and finally referenda in five Act 9 areas and this gave the community a chance to hold municipal leaders accountable. In Pella both the CPA and municipal ownership were advocated by individuals who pursued narrow economic interests that threatened to unleash conflict. During the Trancraa process SPP and LRC contributed to clarifying rights issues and settling conflicts. The final expression of the majority view on land ownership was also a valuable expression of local democracy. The Komaggas breakdown shows how important it is that most community members and groups feel that they own the process of tenure reform. In spite of Trancraa's effort to link tenure reform with land use planning, the Leliefontein case contains warning signals that it remains difficult for community and local government to prepare and enforce responsive land management plans. Thus together the three cases demonstrate how tenure reform triggers and reveals fragile, multidimensional relations between individuals, communities and local government, testing how democracy – political, participatory and economic – is emerging and is contested in rural areas.

### **5.3 Resources for implementation and tenure redress**

The Trancraa process represents a small but significant investment by government. It is important to stress that the time, funding and institutional support required to carry out tenure reform under Trancraa was seriously underestimated.

We estimate that the total financial expenditure by the state was approximately R3 million or about R100 for each of the 30 000 inhabitants of the six Namaqualand rural areas<sup>17</sup>. Tenure reform in the former 'homelands' of South Africa is going to be hugely more demanding due to the size and complexity of the populations, areas and institutional structures. One may still imagine that there is an 'economy of scale' by working with large areas and groups. If one assumes that efficient DLA-NGO partnerships can do the job at 50% of the per capita cost that was incurred in the arid Namaqualand setting – which appears optimistic – the expenditure is R700 million (compared to an annual land reform budget of approximately R1 billion). Whether the South African government is willing to invest this much in communal land tenure reform is a matter of political priorities. The question of funding for implementation and

institutional support in the Communal Land Rights Bill has remained unclear: The official DLA estimate when the Bill was adopted by Cabinet was R68 million per year over an unspecified number of years (DLA 2003), but this was revised in the January 2004 hearings to between R408 million and R544 million (presumably total implementation cost). Senior DLA staff argued that budgets could not be prepared in time for the hearings and parliamentary debate due to the drastic changes in the Bill in Cabinet in October 2003 (PMG 2004).

Neither in word nor in deed did Trancraa give effect to the constitutional right to 'comparable redress' for people who fail to gain, or lose, from the reform process. This has been addressed in various versions of the Communal Land Rights Bill, but in vague terms in the version adopted by Cabinet (Marcus 2003:9–10). It is not clear whether and to what extent the 2003 costing of the Communal Land Rights Bill includes tenure redress. After the Bill/Act itself, a detailed budget is probably the clearest expression of government commitment to providing tenure security.

#### 5.4 Tenure reform, development support and transformation

Rather than an 'internal' reconfiguration of rights, the Constitution and land policy envisage that tenure reform is part of a transformative process that transcends the legal dualism and physical boundaries of the apartheid landscape, a 'healing the divisions of the past'. Tenure reform is the fundamental and future-oriented leg of land reform because it shall give institutional security to (some of the) resources 'transferred' under restitution and redistribution: *'Tenure reform is the mother of South Africa's land reform programmes'* (Sibanda 2001:53). In spite of a neo-liberal macroeconomic policy, policy makers have maintained a continuity from the Reconstruction and Development Programme to the Constitution and the 1997 White Paper on Land Policy that tenure reform is integral to and depends on state support for rural development:

*Tenure reform will indeed have a positive impact on the socio-economic development of these areas if it is accompanied by institutional and extension support. Tenure reform is therefore a necessary but not on its own a sufficient condition for socio-economic development. It must thus be accompanied by access to inputs, credit, extension services, assistance with transport, provision of access to markets and government complementary actions to stimulate the rural economy. Only then can the full benefits of tenure*



*reform be realised in terms of increased production of goods and services, growth and investment. Tenure reform must thus not only be seen as a set of measures aimed at combating rural poverty, it must also be seen as forming a firm basis for rural development and economic prosperity for individual households and communities. (Mayende 2001:4, similarly Sibanda 2001:3).*

Trancraa did not include land development or guarantees of future institutional support: links between tenure reform and development were weak or absent. Two former DLA employees who had worked with tenure reform expressed frustration at the lack of resources for adequate implementation, service provision and sustainable development after the transfer of land (interviews, April 2002). A lawyer from the Legal Resources Centre said that, *'Trancraa is a chance for the state to bail out'* (April 2002). Asked about the 'uncertainty' of future institutional support, an SPP facilitator responded that, *'That is the only thing that is for certain, that there is not going to be any support!'* (October 2002). A Namaqualand researcher commented that communal land is like exhausted mine land, no longer 'core business' within a corporate model of governance (S Robins, pers. comm, December 2002). Reflecting a similar kind of pessimism or realism, local government leaders expressed reluctance to support land management in communities opting for CPAs.

To realise wider development objectives and to change the skewed distribution of assets and opportunities, one must consider what capacity people have to influence and derive benefits from new land rights; how will such rights support them in enhancing livelihood practices and entering new economic sectors? Trancraa became most meaningful when local people started exploring and planning new ventures that they felt were facilitated by tenure reform, which in turn led them to identify other constraints. In that way, tenure reform became part of a learning process: planning the steps from 'owning land' to 'owning development'. However, people have little support in acquiring the skills, financial resources and appropriate technology that may enable them to become effective actors in development. Without support, change may not happen or will be controlled by external investors, 'traditional leaders' or government officials. The absence of development support made it difficult to take proactive measures to assist and involve vulnerable or marginal groups, such as herders hired from outside the communities and women farmers.

Communities affected by Trancraa in Namaqualand mainly

live in municipal townships and will therefore continue to receive municipal services regardless of land ownership. However, throughout South Africa, many communities are dispersed across 'communal' areas. Transferring title may hinder provision of desperately needed water, electricity, sanitation and other services. The 2003 CLRБ does not remove the constraints on developing infrastructure and services on private land (De Waal 2003).

Late in the Trancraa process, people increasingly discussed the option of letting the land remain in trust with central government (SPP staff, October 2002, referring to Steinkopf and Concordia). After long deliberations over what ultimately became reduced to only two legal options for vesting land rights, many participants felt that neither of them would work unless the government supported land administration and agricultural development (McIntosh Xaba 2003).

Institutional support is not merely a desirable add-on, but is necessary to give meaning to new rights and the demanding exercise of consulting on land tenure reform, which makes for the difference between permit-based and rights-based land governance. 'Communal' tenure reform will continue to test the South African democratic and developmental state and its ability to protect and enhance this complex public good – security of tenure for the users of the land.

At the time of writing (over a year after the referenda in Namaqualand), the minister has yet to make a decision about the future transfer of ownership. Transformation reports, prepared by LRC, SPP and the municipalities, were submitted to the minister in September 2003 with no clear recommendation that she abide by the referenda outcomes, except in the case of Richtersveld. Advice with regard to other Act 9 areas recommends that in the event that the minister transfers land to a CPA, the relevant municipality must:

*Negotiate an agreement with the CPA whereby the municipality undertakes management and control of the land and administers the user's rights on behalf of the CPA in terms of municipal regulations and the constitutional conditions. (SPP 2003b).*

The municipality will make 'necessary amendments on matters of existing grazing rights, cropland regulations, the constitution of the commonage committee and the progress of service delivery agreement', including the fixing of service delivery fees.

Where the minister decides in favour of municipal ownership, 'the same principles regarding the value of rights and



community interests should be stipulated in the Association's constitution, just as it is in that of the CPA' (SPP 2003b:section 7.6.4).

In other words, regardless of whether the ownership passes to a CPA or a municipality, the latter will have effective control and responsibility for determining and administering land rights. In the event that the minister makes a determination contrary to the will of the residents as expressed in the referenda, she will have made a mockery of the democratic process and called into question either the basic consultative framework of the Act or the probity of the NGOs and transformation committees in instituting a vote. This dilemma is lodged at the heart of the latest CLRB in the form of the minister's wide-ranging and ultimate decision-making powers in relation to a final determination and transfer of rights (RSA 2004:section 19).

## 5.6 Lessons

Strengthened tenure rights appear vulnerable if isolated from training, finance and integrated development initiatives. A neo-liberal assumption that property rights and markets by themselves will transform rural areas where people are in deep crisis due to unemployment, corruption, food insecurity and HIV/Aids appears ill-founded and dangerous, because it disregards the many other constraints on equal participation in the economy. To move from tenure reform to transformation requires a holistic focus on the human rights and the local tenure rights of land users through law and in practice. Summing up, we suggest some lessons from the Namaqualand experience with land tenure reform in 2001–02.

- Tenure reform must be about enhancing systems of governance that incorporate more adaptable and open-ended rights than 'ownership'.
- Local social movements that mobilise and hold leaders accountable are essential for effective tenure reform implementation.
- Civil society organisations made the process happen and defended residents' rights. To use this approach requires careful planning to identify what services are needed, who can provide them and how their accountability to both residents and government is secured. The protection and promotion of gender equality in changing tenure rights and participation in governance requires special attention to equal mobilisation of gender groups, careful analysis of gendered interests in resources and practices, and firm promotion of individual rights of land users.
- Recording and mapping family and individual user rights is

essential but requires a high degree of transparency and community involvement in order to avoid appropriation of common land by powerful individuals.

- Incapacity to participate in a tenure reform process may translate into a loss of rights for large groups of vulnerable households, including those headed by children and elderly people.
- Both institutional support and adequate funding are essential to the tenure reform process. Implementers of Trancraa may be consulted on the preparation of realistic budgets for tenure reform.
- The centralised decision-making powers of the minister could seriously devalue the consultative process, making a mockery of any so-called 'democratic' involvement by the affected communities.

It is unreasonable to load the challenge of poverty eradication onto land tenure reform alone. Property rights are not magic and do not exist in a policy vacuum. Judged by the experiences in the contested commons of Namaqualand, most rural South Africans will have to struggle for increased land tenure security for many years to come.

## Endnotes

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2. Dr. Rick Rohde (rick@rohde.fsbusiness.co.uk) is a research fellow at the Centre of African Studies, University of Edinburgh and a senior researcher at PLAAS, currently studying environmental history and land use in Namaqualand with a focus on Leliefontein.
3. At the time of writing the exchange rate was R7=US\$1.
4. Including legal opinions for the Commission on Gender Equality, the Human Rights Commission and the Legal Resources Centre that viewed the Communal Land Rights Bill as inconsistent with the Constitution (RSA 2003a; PLAAS/NLC 2003; Commission on Gender Equality 2003;





- Moore & Deane 2003; and De Waal 2003). Hearing and submissions are available at the Parliamentary Monitoring Group website [www.pmg.org.za/](http://www.pmg.org.za/). The Bill was passed during the short parliamentary session in February 2004, leading to new strongly-worded criticism (*Mail & Guardian* 2004; Govender 2004).
5. Rural Coloured Areas Act 24 of 1963 and Rural Areas Act 9 of 1987 (hence 'Act 9 areas', used in this paper).
  6. The area corresponds to about 10.5% and the population to less than 0.5% of that of the former 'homelands'.
  7. The major part falls in the '*Succulent Karoo*' plant geographical region, a desert shrub land, with foggy, mainly winter rainfall of 200–400mm. It has a high diversity of plant life (a total of about 3 000 species, one third of which are succulents). Low variability in rainfall in the central region explains the biological uniqueness, with between four to six times as many species as comparable winter rainfall deserts in for example Morocco and the Americas (Cowling & Pierce 1999). The eastern part, known as 'Bushmanland' (in which Pella falls), is a desert shrub land with lower and more erratic summer rainfall.
  8. Kamiesberg, Nama-Khoi, Richtersveld and Khâi-Ma Municipalities are part of the new Namakwa District (DC6).
  9. Farms have been bought by government from farmers and mining companies under the Municipal Commonage Programme. Farms vest in the municipalities subject to conditions that they must be used for the benefit of residents in the 'Act 9 areas' (245 550ha) and poor residents of other towns (73 752ha). 'New farms' in Namaqualand amount to 23% of total land area (1.35 million ha) redistributed in South Africa's land redistribution programme and about 3% of household beneficiaries (reflecting the low carrying capacity of the extensive rangeland). (Anderson & Pienaar 2003).
  10. About 25% of the land constitutes Act 9 areas, 5% constitutes 'new farms', 8% is owned by mines, 5% is under conservation (including 162 445ha Act 9 land in the Richtersveld), and 8% constitutes state farms approved for transfer to Act 9 communities and other public land (DoA 2001).
  11. For example, a new Nama-Khoi municipality (headquarters in Springbok) includes the three former rural areas of Komaggas, Steinkopf and Concordia. The three areas comprise about 17 000 people and 6 500km<sup>2</sup> of 'communal' land (SPP 2003b).

12. In 2002 an NGO staff member involved predicted that a transfer would be announced as 'good news' just ahead of the 2004 general election.
13. Trancraa, section 4: A municipality that becomes the owner:  
'a) Must afford residents a fair opportunity to participate in the decision-making processes regarding the administration of the land; b) Must not discriminate against any resident; c) Must give residents reasonable preference in decisions about access to the land; d) Must not sell or encumber the land, or any substantial part of it, without the consent of a majority of residents at a public meeting called for that purpose; e) Is accountable to the residents; f) Must manage and record effectively all financial transactions regarding the land; and g) Has fiduciary responsibilities in relation to residents'.
14. The Local Government: Municipal Structures Act 117 of 1998 and the Local Government: Municipal Systems Act 32 of 2000.
15. Surplus People Project ([www.spp.org.za](http://www.spp.org.za)) is a civil society organisation assisting rural communities in the Northern and Western Cape and has undertaken research, advocacy and land reform implementation in Namaqualand since 1987. SPP participated in drafting and preparing the Act. Its January 2001 tender to facilitate Trancraa in the six Namaqualand rural areas was approved by DLA only in October 2001, contributing to delays in the transition phase.
16. These committees had previously been established in order to assist transitional local councils (governing the Act 9 areas from 1995–2000) with managing additional commonage ('new farms'), acquired through the land redistribution programme.
17. The SPP's contract with the DLA to facilitate the process in Namaqualand was worth R2 million for the two-year period 2001–2002. In addition, DLA, local government and the LRC incurred costs, adding an estimated R1 million to the costs over this two-year period, in total equalling R100 or US\$15 for each inhabitant of the six Act 9 areas affected.
18. The residents of Komaggas did not vote due to conflict over Trancraa, see section 5.2.
19. A majority for the CPA option was pronounced in Richtersveld (94%), where community mobilisation had been more vigorous as a result of court cases dealing with land claims, and where a CPA had already been formed.



20. The number of people voting were equal to 37% of all voters in the five areas, or 39% of the people on the voters' list for the 1999 national elections (SPP 2003:4 and 64).
21. Pella land includes Act 9 land addressed by Trancraa (48 276ha – 51%), 'new farms' (34 913ha – 37%) and state farms provisionally approved for transfer (11 751ha –12%).
22. Transferring 'new farms' in the Trancraa process was in accordance with Notification 12, based on the Local Government: Municipal Systems Act of 2000, but required confirmation by the municipality. A senior provincial DLA official confirmed that it had been the intention that all the lands should be included in the same transfer process (discussion, December 2002).
23. Of the five areas, Pella had the greatest turnout: 1 114 individuals (compared to 1 159 for the 1999 national election) registered to vote, of whom 54% were women. Of those who registered, 653 (59%) voted (SPP 2003b:64).
24. For SPP, the Trancraa process was a delicate political balancing act. Different actors accused SPP staff of advocating either of the major ownership options.

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