Comparing and Contrasting Native Property Title Claims in South Africa and Australia

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NATIVE PROPERTY TITLE CLAIMS IN
SOUTH AFRICA AND AUSTRALIA

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1. INTRODUCTION

Land and land ownership has been a controversial subject ever since the creation of man. Most wars, family feuds and many ethnic tensions are caused because of disputes and disagreements regarding ownership of and claims on land. In the process millions of lives have already been lost and will still be lost because land ownership is probably the most sensitive and emotional issue through which wealth is generated and in which pride is vested. In both South Africa and Australia recent developments regarding land ownership rights have generated added uncertainty in the business community, both domestic and international. This uncertainty is having direct and indirect impacts on property values in each of these countries. The current paper will explore some of the underlying reasons for this uncertainty as well as proffering suggestions as to likely future impacts on property.

South Africa has become the latest country where the claim to land, be it by means of restitution, redistribution, market related methods or expropriation, has become the focus of international scrutiny. This development was predictable and is in line with the trend in several other countries such as Australia, New Zealand, the United States of America and others in Africa like Zimbabwe, Zambia, Namibia and Kenya - many of them countries in which European settlers established themselves some three centuries ago. In these countries there is a continuous process of claims, counter claims and efforts to find solutions to the issues. What makes South Africa different from most of those countries where the issue is still unresolved, is the fact that the greatest part of the land is owned by a minority of the population. Since the Rubicon speech on 2 February 1990 by the former President of South Africa, Mr. F.W. de Klerk, the table has been set for a new dispensation where political power to govern the country was placed in the hands of those who never had any political power. This came into fruition with the general election on 27 and 28 April, 1994 in which the outcome resulted in the transferral of government to an ANC majority government, representing mostly the black peoples of South Africa. The matter of restitution of rights in property and setting right injustices of the past has now started. The product of the land - mineral, agricultural and forestry - forms a major proportion of South Africa's Gross Domestic Product. Hence the manner in which restitution is dealt with will greatly determine the future of South Africa and its peoples and will influence the investment climate, and thus property values, for decades.

Less subject to international scrutiny, but nonetheless of significant importance to the Australian economy, there is similarly the issue of native land title. European settlement in Australia almost decimated the native population and, in the belief that Australia was not 'owned' by anyone, this settlement effectively denied native peoples any property rights. A landmark High Court decision in 1992, and the passing of resulting legislation in 1994, established that Australian Aboriginals did, in fact, have property rights prior to European settlement. As Native Title Claims unfold following on from this decision there is likely to be a significant impact in many sectors of the economy, including the property sector. To understand this impact it is necessary to consider the High Court decision (*Mabo and Others vs State of Queensland (1992)*) in an historical context and in the broader context of the impact.
on business opportunity. Prior to the High Court’s Mabo decision (as it has become known) the general costs of ‘doing business’ in Australia were well established and various property rights were well known. The Mabo decision has created an air of uncertainty that is currently being felt in the agricultural, pastoralist, mineral, fishing, timber and tourist industries - which, together, account for a significant proportion of Australia’s GDP. This uncertainty will continue to exist until all native title claims have been settled. It is the uncertainty, and the likely increased costs associated with native title, that will impact both directly and indirectly on property values.

2. CONTRASTS AND SIMILARITIES IN COLONIAL DEVELOPMENT

There are profound differences not only in the reasons underlying white settlement in both South Africa and Australia, but also in some aspects of the cultures of the Aborigines in these countries. Despite such differences it is interesting to compare and contrast early colonial development since it was during this colonial era that the seeds of current discontent over native title were sown.

In both South Africa and Australia, property expropriation can be seen as taking place in three distinct periods and at a cost of countless lives: containment, creeping expansion and rapid expansion.

Period of Contained Settlement Policy

The Portuguese were the first Europeans to sight both South Africa (1487) and Australia (1558), although only making rare landings in South Africa and none at all in Australia¹. However it was the Dutch who first took a serious interest in South Africa, with the Dutch East India Company (DEIC) establishing a settlement at the Cape in 1652 to act as a base for the servicing of its trading ships. The Dutch were also the first Europeans to land in Australia (1606, 1611, 1623, 1642) although, unlike South Africa, Australia did not lie on the main trade routes for the DEIC, hence there was no over-riding motive to establish a service base. The British landed in Australia in 1688 and 1699 but did not annex the country until 1770. Australia became of interest to the Colonial Authorities primarily as a consequence of the industrial revolution (upsurge in urban crime) and the American War of Independence (England lost the American Colonies as a place to send its convicts). Since South Africa did not become a British possession until 1814, and since British attempts to transport convicts to West Africa had failed, Australia (NSW) seemed an ideal place to establish both a Convict Colony and supply base for its whaling and naval ships (used to protect British trade routes to China, New Zealand and North America’s Pacific Coast)². The Colony was established in 1788.

At the time of first settlement both the Cape Colony and the NSW Colony were occupied by nomadic tribes³. Such nomadic tribes possessed no concept of ownership in the Western sense, so annexation by colonial authorities presented no legal difficulties. In both South Africa and Australia, however, initial notions were that the scope of possession would be limited. The Colonial Authorities in both cases had a contained settlement policy. For instance in the Cape Colony, to curb administration and other costs, the Dutch East India Company set boundaries to the
size of the Colony. Farms for the supply of maize and other crops were established
and, initially, there was trade with the Khoikhoi (one of the indigenous tribes) in
order to obtain a supply of fresh meat for the DEIC’s ships⁴. In the NSW Colony
the British Authorities decided that there would be limited settlement within defined
boundaries, these being set at 150 miles around Sydney⁵. As in South Africa the
boundary limits were set as a means of containing administration and other costs,
and it was hoped that convicts who had completed their sentence would take up
small holdings of land based along the lines of the English peasant society, and work
these as a means of earning funds for a return to England. In neither the Cape nor
New South Wales Colonies, at the time of settlement, were there any European
concepts of roads, buildings, agricultural plots etc. In the establishment of the
colonies the provision of these required, amongst other things, a source of cheap
labour. Slaves in the Cape and convicts in New South Wales provided this source.

Period of Creeping Boundary Expansion

Unexpected developments in both the Cape and NSW Colonies led to a creeping
expansion of the ‘limited’ boundaries. In the Cape the indigenous people were
found to be an unreliable source of meat supply and, as a consequence, the DEIC
encouraged the establishment of pastoral activities by Europeans⁶. As Dutch, and
later British, settlers developed farming and pastoral activities, the indigenous people
were pushed further north, towards the Orange River.

This creeping expansion, though not condoned by the Dutch East India Company
(and later the Dutch Colonial authorities), was a consequence of its need for a regular
supply of fresh meat, its loan farm system and the laws of inheritance. The loan
farm system was a concept applied by the Dutch East India Company whereby a
settler could claim a 6,000 acre farm and keep it indefinitely on payment of an annual
fee in ‘recognition’ of the DEIC’s dominion. In practice the farm could be bequeathed,
alienated or subdivided⁷. The laws of inheritance were such that a property was
required to be divided equally amongst a man’s sons. Such subdivision implied that
the subdivided farms were too small to support later generations. As a consequence
younger sons were provided with a few head of stock and a wagon and encouraged
to lay claim to land ‘further out’. In many instances they became trekboeren (grazers).

In the late seventeenth century farming activities were mixed. Many stockowners
lived permanently in agricultural areas and used distant land for pastures only.
However, by the turn of the eighteenth century more and more became trekboeren
who lived permanently on grazing farms, migrating seasonally for pasture. In time
the trekboeren developed the pastoral industry as a distinct entity from the
agricultural. The activities of the trekboeren were primarily responsible for the
creeping expansion of European settlement into new territories, expropriating, at a
significant cost of human lives, the lands that had traditionally been used by the
natives for hunting and herding.

In the NSW Colony, although the root causes of the creeping expansion of the
boundaries were different, the end result was the same. In the case of NSW the
intention of the Colonial Governors was to attain self-sufficiency in food production
for the colony within two years. This was to be achieved by allowing convicts who
had completed their sentence to take up and cultivate small land holdings. An unexpected development, however, was the taking up of these holdings not only by ex-convicts, but also by free settlers who arrived after the First Fleet, and by army officers. The available land within the 150 mile zone was soon devoured and hence, in a virtual replication of the creeping expansion of the Cape frontiers, there was a gradual pushing out of the Colony boundaries into land that had traditionally been used by the indigenous population for hunting and gathering.

**Period of Rapid Boundary Expansion**

The Colonial development in both South Africa and Australia also underwent a period of explosive boundary movement, although once again the underlying causes were different. The British rather than the Dutch were responsible for the rapid boundary expansion of the Cape Colony. England invaded the Cape in 1795 and 1806 and took formal possession in 1814-15. The British generated three sources of discontent amongst the existing population of the Cape which culminated in what has become known as the Great Trek, 1836-54: introduction of English laws, language and customs into the day to day operations of the Colony; illegalisation of the slave trade (1807) and the freeing of all slaves (1833); and the adoption of a tougher stand against the activities of the *trekboeren* in an effort to contain the boundaries and reduce conflicts with the indigenous population.

Although the discontent was widespread the initial numbers involved in the migration were relatively small, less than one hundred. These frontierspeople, and the others that followed, became known as *voortrekkers*, and their purpose was to find a 'free and independent' state. The migrants took all of their worldly possessions and left the Cape Colony. When the authorities made no attempt to halt the first *voortrekkers* as they crossed the Orange river the ensuing exodus numbered in the thousands. The *voortrekkers* moved north and east and settled in Natal, the Orange Free State and the Transvaal.

While the Great Trek had provided the impetus for the rapid expansion of the boundaries of white settlement in South Africa, in Australia this impetus for expansion was based on economics rather than discontent - the increased demand for wool to supply the woollen mills of England at the end of the Napoleonic Wars (when British trade with Europe was once again opened up). Although the 150 mile 'limits of location' of the Colony were not officially removed until 1829, these boundaries had been well breached by 1813. A decision was taken by Governor Bourke in 1836 that administrative and other costs could be partly recouped by instituting a ten pound squatter's fee. The increased demand for wool, coupled with this legalisation of squatting, added a huge impetus to the outward movement of the colony's boundaries.

The early pioneers of this expansion in Australia, driving their sheep and cattle before them, became known as the *overlanders*. As was the case with the *trekboeren*, the *overlanders* were largely responsible for the establishment of pastoralism as a separate industry during this period.
Conflicts with Indigenous Population for Control of Land

The activities of the trekboeren, the voortrekkers and the overlanders generated numerous conflicts with the indigenous population. The Europeans believed the land was theirs by right of conquest, the indigenous population believed the land was theirs by right of traditional occupation. The indigenous population had no European concept of individual ownership and alienation. The Europeans neither appreciated nor understood collective ownership and inalienable property rights.

The documentation on the wars over land between black and white in South Africa is richer than that in Australia. This is primarily because the indigenous population in South Africa had a more advanced hierarchical tribal structure, hence thousands of natives could be organised for a battle, thus the white settlers often had to mount major campaigns. In these campaigns, and in minor skirmishes, hundreds of thousands of lives have been lost. By way of contrast, the social structure amongst the Australian Aborigines was purely one of local groups numbering from 10 to 60, with no cohesion across groups. Although 10 to 15 such local groups would hunt and gather within a territory usually defined by natural barriers, there was no centralised power structure. With no overall leader to bring the groups together, a war between Australian Aborigines and Europeans could never really be fought, hence local conflicts over land were the norm. Nevertheless these conflicts were costly to the indigenous people and reduced the Aboriginal population in Australia from an estimated 300,000 in 1788 to 67,000 in 1876.

3. BACKGROUND ON LAND OWNERSHIP CLAIMS

The end product of the process of expropriation of the land in South Africa and Australia is remarkably similar. Prior to the recent developments in South Africa and Australia the indigenous population held very little control over the land. Early legislation in South Africa, for example, restricted Black ownership of the land to only 13% of the country’s 1.2 million square kilometres. Yet Black Africans made up 75% of the nation’s 39 million people. In Australia Aborigines, who comprise less than 2% of the population of 17.5 million, controlled about 8% of the country’s 7.6 million square kilometres. Let’s consider, then, the emergence of this situation.

SOUTH AFRICA

The colonial authorities in South Africa offered some recognition of the land rights of the indigenous population, although the recognition was often only token and usually had an ulterior motive of conflict avoidance. This can be seen in: the contained settlement policy of the Dutch, the attempts to enforce this policy by the British and the reversal of Sir Benjamin D’Urban’s land annexation policy by the British Aborigines Commission after the 1834-5 war with the Xhosa. In broad measure, however, the European settlers and their descendants viewed the land rights of defeated peoples as being very limited. Nevertheless, the war defeated peoples comprised a majority of the population and, after the formation of the Union of South Africa in 1910, the issue of land rights needed to be addressed. Between 1910 and 1970 the issue was addressed via the passing of a variety of Parliamentary
Acts that introduced very restricted rights for the non-white population. Legislation passed between 1971 and 1991 took some steps towards redressing these very restricted property rights, but it was nonetheless clear in 1991 that major land reform in South Africa was necessary.

The first significant piece of legislation addressing the property rights question was the *Black Land Act, 1913*. This legislation restricted Blacks to the acquisition of land only within designated reserves (scheduled areas). A Black person was thus prevented from acquiring land outside the reserved areas and a non-Black person land within any reserved areas\(^\text{13}\). These reserves comprised about 13% of the total land mass of South Africa. To control Black influx to urban areas the *Natives (Urban Areas) Act, 1923* restricted Black occupation to designated areas (later referred to as locations) near towns or cities\(^\text{14}\).

In an effort to promote better Black/White relationships, to improve the standard of living of Blacks and to improve their position as regards the occupation of land, *The Development Trust and Land Act, 1936* introduced the next major phase in land ownership in South Africa. Accordingly, the South African Development Trust (SADT) was established to administer the allocation of land for agriculture and pastures\(^\text{15}\). All the land reserved for Black occupation was transferred to the SADT for administration. From the funds available to it the SADT was given the responsibility of: the granting of advances to Black farmers; the development of the land; and the promotion of the general well being of Blacks. The Prime Minister was also empowered to extend the land available for this purpose.

Black urbanisation during the Second World War resulted in the *Blacks (Urban Areas) Consolidation Act, 1945* according to which separation of residential areas amongst the different race groups was again confirmed\(^\text{16}\). To regulate the enormous influx into urban and so called informal areas, the *Group Areas Act, 1950* and the *Prevention of Illegal Squatting Act, 1951* were passed. The former facilitated the acquisition, occupation and transferral of land in the areas designated Black. The Tomlinson Report in 1955 recommended that ownership of rural land be given to Blacks and that various small pieces of Black land be consolidated.

The *Group Areas Amendment Act, 1955*, introduced the principle of the relocation of persons 'disqualified' from living in certain areas. With the assistance of the *Community Development Act, 1966* people identified as being unsuitable to occupy a certain piece of land were relocated in other areas. The *Group Areas Act, 1966* confirmed land segregation by allocating specific areas exclusively to specific race groups. People not classified under such specific race groups, living in such areas, were then removed.

Until 1967 land occupation in Black urban areas was in terms of an informal, unregistered 30 year leasehold. This was changed by *Government Notice R1036 of 1968* according to which other forms of land control were introduced, including: site permits; residential permits; certificates of occupation; lodgers' permits; hostel permits; building permits; and trading permits\(^\text{17}\). These measures were on a personal basis and did not lead to the acquisition of ownership rights.
The National States Constitution Act, 1971 created the independent national states of Transkei, Bophuthatswana, Venda and Transkei (TBVC states) and the self-governing territories of KwaZulu, KwaNdebele, Gazankulu, Lebowa and QwaQwa came into being. Although very few countries outside of South Africa recognised the independent states, the Act was an attempt to provide Blacks with more control over a larger land mass.

This latter process was continued with the passing of the Blacks (Urban Areas) Amendment Act, 1978. This introduced 99 year leasehold in urban areas for specific categories of Blacks. White-controlled administration boards took over control of land in Black residential areas in terms of the Black Local Authorities Act, 102 of 1982. These were replaced in 1984 with development councils according to the Black Communities Development Act, 1984.

The Abolition of Influx Control Act, 1986 started a new phase in Black land occupation in South Africa. Hundreds of thousands of Blacks were lured into settling in urban areas with the result that informal squatter settlements sprung up like mushrooms in and around virtually every town and city in South Africa. Many of these settlements are grossly unmanageable, unhealthy, unclean, overpopulated and rife with crime and unruly gangs. The result of all this is that many of the established institutions of management and control, important infrastructure and stability in adjoining, traditionally stable residential areas are now also coming under pressure and in danger of collapse.

During the period 1986 to 1991 land was identified for informal settlements with the objective of ultimately upgrading squatter areas into residential areas of full status. The permits and rights outlined in Government Notice R1036 of 1968 were converted into leasehold without the payment of any transfer or registration fees. The Free Settlement Areas Act, 1988 regulated land occupation irrespective of race, by giving the State President the power to declare free settlement areas. As these free settlement areas are becoming more fully occupied, the danger of total collapse in these areas is increasing by the day.

In the period 1991 to 1994 it was clear that land reform had to be introduced into South Africa as matter of the greatest urgency. Outstanding factors underlining this urgency were, inter alia:

- Escalating population growth of about 2.7 percent annually
- Gross overpopulation of existing Black areas
- Uncontrollable urbanisation
- Shortage of suitable and available land for expansion
- Legal uncertainty because of the diverse land control system
- Pressure from within the system for change and from external sources, the latter not always aware of the real conditions and consequences of certain changes.

The points of departure of the White Paper on Land Reform in 1991, and of corresponding Bills, were that access to land is a basic human need and that the free enterprise system and private ownership are the best methods through which such
a basic need can be satisfied.  

The policy goals outlined in the White Paper were that: access to land must be broadened to the entire population; the quality and security of land titles must be upgraded; and land must be utilised as a national resource.

In an effort to realise the mentioned goals and objectives, the following Bills were published to counter and repeal previous legislation responsible for upholding measures that gave offence:

- Abolition of Racially Based Land Measures Bill, of 1991
- Upgrading of Land Tenure Rights Bill, of 1991
- Residential Areas Bill,
- Less Formal Township Establishment Bill, 113 of 1991
- Rural Development Bill

The major objective of de-racialising the South African land control system lead to the repeal of the following acts: the Black Land Act, 27 of 1913; the Development Trust and Land Act, 18 of 1936; the Group Areas Act, 36 of 1966; and the Free Settlement Areas Act, 102 of 1988. However, although these Acts were repealed, regulations, proclamations and institutions in terms of these Acts remained in place until specifically repealed or abolished.

An important amendment in land control took place in 1992 with the abolition of the SADT and the transfer of land to the administrators of the four former provinces. Several other changes also occurred during this period in order to pave the way for the 1994 general election. This mainly entailed the re-unification of the four TBVC countries and of the six self governing territories with the rest of South Africa.

The new Constitution of the Republic of South Africa, 1993 forms the basis of the new dispensation concerning property rights in South Africa. Chapter III contains a list of fundamental rights and can be compared to a Bill of Rights. Section 28 of Chapter III contains a very non traditional property clause which does not protect property or ownership but the rights in property. There is a duel reason for this drafting, namely to protect existing property relations and of correcting imbalances of the past. This necessitates the joint reading of Sections 121-123 of the Constitution as well as the newly promulgated Restitution of Land Rights Act, 22 of 1994, with the property clause. The property clause (Section 28) reads as follows:

(1) Every person shall have the rights to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights.

(2) No deprivation of any rights in property are expropriated otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of such compensation or, failing agreement, to the
payment of such compensation and within such periods as may be determined by Court of Law as just and equitable, taking into account all relevant factors including, in the case of determination, the use to which the property is being put, the history of its acquisition, its market value, the value of its investments in it by those affected and the interests of those affected.

It remains to be seen as to how the Constitutional Court will interpret the notion of property rights in this clause. It is possible that it could be interpreted broadly so as to include all rights, also limited real rights and personal rights in property and not just ownership.

Subsections 28 (2) and (3) distinguish between deprivations and expropriations of property. Deprivations are constitutional, provided they are carried out in accordance with law and are directly connected to police power of government in fulfilling regulatory functions.

Expropriations result in the taking away of rights in property and must therefore be accompanied by a valid public purpose and the payment of agreed compensations or compensation determined by court to be just and equitable. Expropriations are intended for public purposes only. Expropriation for the benefitting of a private person would be unconstitutional. The interpretation of "public purposes" with a narrow meaning, as against "public interest", which has a much broader meaning, is thus of the utmost importance. If public purpose is interpreted as meaning a prohibition of the expropriation of private land for the transfer to a private person or community, then redistribution could only be in respect of state owned land. Where the Constitution is aimed at achieving important socioeconomic goals and of being sympathetic to and correcting injustices of the past, it is unlikely that expropriation will not include the transfer of private property in terms of land reform policy.

Should agreement between the parties involved not be reached on the compensation for expropriation, it must be determined by court. According to the factors mentioned in Article 28 (3), it seems that the compensation standard need not necessarily be at market value.

It is against this background that the 1994 legislation is being enacted for the restitution and redistribution of land in South Africa. The infrastructure, the people involved, the role of government, of the Constitutional Court and of the population at large is going to be of extreme importance if the land issue in South Africa is to be settled in a peaceful manner.

AUSTRALIA

Terra Nullius - A Land Without Owners

Prior to the historic 1992 High Court decision in Mabo and Others vs State of Queensland (1992), the history of land tenure in Australia since European settlement could be traced to one phrase -terra nullius. Terra nullius effectively means land
belonging to no one. It is clear from the Colonial expansion described in the previous section that, at least in the initial stages of colonisation, settlers did not regard the indigenous people of Australia as possessing any land rights. The High Court decision, handed down on June 3, 1992 rejected the notion that Australia was terra nullius at the time of European settlement, and hence rejected the notion that the absolute ownership of land was vested in the Crown. In the first instance The High Court decision created some hysteria, along with a great deal of concern and uncertainty amongst mining companies, pastoralists, agriculturalists and the ordinary Australian. Before examining the implications of the Mabo decision, as it has come to be known, it is worthwhile briefly reviewing the land tenure system as it existed prior to Mabo.

In general terms Terra nullius implied that, given there were no known substitutes, English law became Australian law. Aboriginal laws and customs (and, thus, property rights claims) formed no part of the law (and land title) of the new colony. In laying claim to Australia the British Crown assumed sovereignty over the country. The Crown could, and did, grant various forms of title to land, in particular freehold title and leasehold title. Unlike some other countries, freehold title (and, of course, leasehold title) in Australia only has rights associated with the surface of the land - building rights, cultivation rights, grazing rights and the like. In broad principle, freehold and leasehold titles do not carry any rights associated with sub-surface materials, such rights remain vested in the Crown. The indigenous population, however, has a somewhat different view of ownership to that conceived under British law. To the Aboriginal people, ownership was collective and inalienable. Because of the absence of any concept of ownership in the western sense it was believed that Australia was not owned by anyone. Thus, within the doctrine of terra nullius Aboriginals, from 1788 until the early 1800’s, were not recognised as having any pre-existing land rights.

From this position of not recognising any native land rights there was an evolution in thought. Reynolds (1992) tells us that in the 1830’s various jurists offered opinions on the extent of native land rights. This culminated in the Colonial Office decision in 1848 to prepare an Order-in-Council, which was duly signed and publicly gazetted in 1849. This document gave Aborigines the right to hunt and gather on land held under pastoral leasehold. This legal opinion of the 1830’s on property rights was influential in the Colony for nearly twenty years between 1836 and 1855. In some Colonies (States) this resulted in the purchase of tribal lands in advance of settlement, whilst in others the result was the establishment of Aboriginal Reserves and the payment of compensation for the sale of Crown Land.23 As the Colonies (States) were granted self government native land rights were treated in a somewhat piecemeal and disjointed fashion. This process is exemplified by the following table which shows Aboriginal Freehold Land Ownership (and Population) as at 1993. The table reflects the evolution of native freehold title prior to the High Court Mabo decision - much of this unfolded between 1966 and 1991 via the passing of the following Acts of Parliament in various states and the Commonwealth:


**TABLE 1**

<table>
<thead>
<tr>
<th>State/Terr</th>
<th>Aboriginal Freehold</th>
<th>Proportion of all Aboriginal Freehold</th>
<th>Aboriginal Population</th>
<th>Proportion of all Aboriginal Residing in State</th>
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<tbody>
<tr>
<td></td>
<td>Pptn.of State (%)</td>
<td>(%)</td>
<td>Pptn.of State (%)</td>
<td>(%)</td>
</tr>
<tr>
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<td>33.7</td>
<td>67.2</td>
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<td>27.3</td>
<td>1.2</td>
<td>6.1</td>
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<td>5.4</td>
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<tr>
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<td>&lt;0.1</td>
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<tr>
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<td>&lt;0.1</td>
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<td>3.3</td>
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<tr>
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<td>8.3</td>
<td>100.0</td>
<td>1.6</td>
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</tbody>
</table>

**Mabo and Others vs State of Queensland (1992)**

Opinion on native land rights was slow to evolve past the 1849 _Order-in-Council_ with the most rapid change occurring from 1966. As various Aboriginal protection laws were passed by the States in the late 1800's and early 1900's, Middleton (1970) tells us that the question of land rights, if it was raised at all, referred to Aboriginal Reserves and that Aborigines themselves appeared to largely ignore the question of land rights up until the mid-sixties and early seventies. In fact the doctrine of _terra nullius_ was reaffirmed by the Northern Territory Supreme Court as late as 1971 in what has become known as the Gove land case (Milirrpum v Nabalco Pty.Ltd.). The first major statement on Aboriginal land rights came in the form of the _Aboriginal Land Rights (Northern Territory) Act, 1976_. However, this legislation did not have the impact on the Australian business community that the High Court Mabo decision had nearly two decades later. The 1976 _Act_ in no way questioned the security of tenure of the white population that had existed since 1788, the _Act_ did not create any uncertainty in the eyes of the broader Australian business community. The Mabo
decision has created a great deal of uncertainty both in some State Governments and in some sectors of the business community.

The High Court Mabo decision referred specifically and only to native title claims on a nine square kilometre island lying to the north of Australia in the Torres Strait. Eddie Mabo and four other members of the Meriam Tribe of Murray Island received national attention when they began a High Court action in 1982 seeking legal recognition of their traditional land rights on the island. The plaintiffs argued that Murray Island, along with surrounding reefs and small islands, had been inhabited continuously by the Meriam people prior to and throughout European settlement. It was claimed that, although the Colony of Queensland became sovereign over Murray Island and other islands in the Torres Strait, native title had never been validly extinguished and hence aboriginal land rights continued.

In 1985 the Queensland Government legislated to retroactively extinguish any land rights the Meriam people may have had. However, in 1988 the High Court ruled this legislation invalid as it contravened the Commonwealth Government's Racial Discrimination Act, 1975. In 1992 the Australian High Court handed down a six to one majority decision which granted native title to the Meriam people. In the process of handing down this decision the High Court overturned and ridiculed the 18th Century notion of terra nullius. On January 1st, 1994 the High Court's decision became enshrined in Australian law with the passing of the Native Title Act, 1993.

4. MECHANISMS FOR DEALING WITH NATIVE TITLE

In both South Africa and Australia mechanisms have recently been put in place to deal with the issue of property rights of the indigenous populations. In South Africa, with a population density of 31 persons per km², and where more than 75% of the people are Black Africans, the pressure for change has been far greater, as has been the potential for violent confrontation. With an indigenous population of less than 2% and a population density of just over 2 persons per km², the pace of change in Australia has been far more leisurely, with no violent confrontations to date. In South Africa the Restitution of Land Rights Act, 1994 allows for the expropriation of privately owned land, by way of contrast the Native Title Act, 1993 in Australia specifically excludes any native title claim on freehold land.

SOUTH AFRICA

The new Constitution and the passing of the Restitution of Land Rights Act, 1994, has introduced an entirely new deal as to land and land ownership in South Africa. Via these the mechanisms are in the process of being created through which land claims can be handled, with the potential of causing a major redistribution of land in South Africa. The Act provides for the restitution of land rights for persons or communities that were dispossessed as a result of any racially based discriminatory law. It also provides for the establishment of a Commission on Restitution of Land Rights and for a Land Claims Court.

Under the Act "A right in land" is defined as any right in land, whether registered or
unregistered. Dispossessed persons that continuously occupied land for a period of not less than 10 years prior to dispossession are included. It can include a customary law interest, interest of a beneficiary under a trust agreement as well as an interest of a labour tenant and a share cropper. The Minister of Land Affairs is to announce a date in the Government Gazette from which every person qualifying, must lodge a claim within three years.

Land claims are dealt with via the Commission on Restitution of Land Rights and the Land Claims Court. The functions of the Commission may be summarised as:

(a) To receive and acknowledge all claims for the restitution of land lodged in terms of the Restitution Act;
(b) To assist and advise claimants with their claims;
(c) To inform the public as to the persons that qualify for claims;
(d) To investigate all claims lodged;
(e) To compile a report to serve as evidence in the Land Claims Court;
(f) The Commissioner is also authorised to act as mediator in cases where two or more claims are lodged for the same piece of land;
(g) Where the parties concerned admit in writing that mediation is impossible, they must agree to have the case referred to the Land Claims Court and must certify such agreement.

The procedures for making a claim are quite specific and all parties with a claim on the land in question are given the opportunity to make submissions concerning the feasibility of the claims. Once evidence has been prepared The Land Claims Court must determine restitution of any right in accordance with the Restitution Act as well as any compensation matters referred to it by the Commission. Procedures in the Land Claim Court are similar to those of the Supreme Court and all relevant information is permissible. The lack of registration documents, title deeds, or any other form of ownership or right in property need thus not be a major stumbling block. Expert evidence and even hearsay is admissible.

According to the Act the Court must consider:

(a) The desirability of providing for restitution of rights in land, or compensation to people who were dispossessed of their rights as a result of, or in pursuance of racially based discriminatory laws;
(b) The desirability of remedying past violations of human rights;
(c) The requirement of justice and equity;
(d) The desirability of avoiding major social disruption.

An order of exclusion can be applied for by local and provincial authorities for the exclusion of land in the jurisdiction of these authorities. Accordingly, if allowed, the government land available for restitution can therefore be limited.

With regard to state owned land, if the feasibility of the claim is certified by the Minister of Land Affairs, the Land Claims Court is empowered to restore the specific or alternative state owned land to the claimants as restitution. Concerning privately
ownership options are available viz: to acquire the land and restore it to the claimants or to designate alternative state-owned land as compensation. Such acquisition can be by means of purchase or expropriation.

Should the option of expropriation be followed, it must be according to Section 35(5) of the Expropriation Act, 1975. The owner of the land is entitled to just and equitable compensation determined by agreement or by the Court in conjunction with the principles set out in Section 28(3) of the Constitution.

In the case of unfeasible restoration or acquisition, or if the claimant prefers alternative relief, the Court may order the State to grant appropriate right or alternative relief. Appeals against the decisions of the Land Claims Court are to either the Constitutional Court or to the appellate division of the Supreme Court.

AUSTRALIA

The pressure for change regarding the issue of native title has been far less in Australia, and the mechanisms that have been put in place appear far less complex, than in South Africa. On the other hand the indigenous people of Australia also seem far less likely to be able to successfully lodge a native title claim, especially if that claim is on other than Crown land. The passing of the Native Title Act, 1993 on 1st. January, 1994 provided the primary mechanism by which native title claims in Australia could be settled. The Act had four main aims:

(a) to recognise and protect native title;
(b) to validate existing freehold and leasehold titles or other grants which have extinguished native title;
(c) to set up a just and practical system for determining native title and for determining compensation where native title has been extinguished;
(d) to set up an accessible tribunal and court process for native title claims;

To achieve the above the Act set up:

(a) a Native Title Tribunal and
(b) a National Aboriginal and Torres Strait Islander Land Fund.

The Native Title Tribunal has two primary roles:

(a) to determine if native title exists and
(b) to determine the extent, if any, of compensation that may be required by the extinguishment of native title through past grants by the Government.

In those cases where native title has been validly extinguished, and where no compensation is payable, the Act also set up a National Aboriginal and Torres Strait Islander Land Fund to assist Aboriginal and Torres Strait Islanders to purchase and manage land.
Although much has yet to be tested in the courts, the Aboriginal and Torres Strait Islanders Commission is of the opinion that Crown Land (including associated shorelines, seas and submerged areas) is most likely to be the subject of native title claims.

To prove native title claimants must do two things:

(a) show that they have lived under the traditional rights and customs of the aboriginal people and have maintained a continuous association with the land and
(b) show that there have been no previous grants that extinguish native title.

Both claimants and non-claimants have a right of appeal to the Federal Court if there is dissatisfaction with the outcome of the Native Title Tribunal.

5. **INFLUENCE ON VALUE - THE IMPACT OF UNCERTAINTY**

**SOUTH AFRICA**

*Land Redistribution and Uncertainty*

Since the abolition of influx control in 1986, the South African real estate market has entered a new era in which, until now, unknown factors regarding redistribution have had an important influence on the working of the market mechanism in establishing prices. It will take time to determine the new trends that are being established and the long term influence of redistribution on value. At the moment we can only speculate, such speculation being based on what could reasonably be expected to develop.

The dismantling of influx control has resulted in an uncontrollable inflow of large numbers of people from the rural and traditional SADT and TBVC land to all cities and towns in South Africa. This has resulted in undisciplined settlement and overcrowding in and around most urban areas. Under normal conditions it will take several years before proper services of any nature can be introduced into many of these informal settlement areas. The much needed capital to finance these services is also not available. It will be difficult to get the private sector involved while the general sentiment persists of refusal amongst the inhabitants of these areas to pay for electricity and other services and to repay loans for the erection of houses.

Unemployment, over population, an exploding birth rate, rampant crime, lawlessness and a total disrespect for law and order are contributing factors in making most of these areas very difficult to control and manage in a civilised and orderly manner. The result is a general deterioration of everything in these settlement areas. This situation, and its associated conditions, has an extremely negative influence on property values, the quality of life and on safety in the established communities bordering and in the vicinity of these new informal settlement areas.
Keeping in mind that the influence can vary significantly from area to area, the effect on the value and use of land from 1986 up to 1995 can briefly be summed up as follows:

(a) Land and property has become unmarketable since no purchasers have been interested in buying land falling within the region of such informal settlement areas. Until new uses have been found for such land, or until such time as these areas have calmed down - thereby having less of a negative effect on surrounding areas - such land will remain virtually without market value;

(b) Traditional inhabitants on, and in the vicinity of, invaded land have been forced to abandon their property because of fear for their own personal safety and for that of their possessions. In this process such land is also invaded and they stand to lose ownership of their land with little or no compensation;

(c) Land has become unusable for its conventional use because of theft, plundering, assault and physical threats to safety and even life. Residential, agricultural, industrial and recreational land have equally fallen prey to the same destiny;

(d) In areas where there has not been a total loss of zoned use, and where some market transactions still take place, an average estimate in loss of value ranges from 30 to 60 percent of the previous market value. Whether this is a permanent loss in value, or just an over reaction which will be corrected over time, must still be demonstrated.

Instances where the above have occurred include the residential areas of Hout Bay and Kraaifontein in the Western Cape, Eersterus in the Transvaal, areas in and around Pinetown in Natal and to some extent in virtually all existing residential areas where the informal settlements were erected nearby.

Land zoned for agricultural use has become unusable for dairy purposes where plastic and other litter is finding its way into the food chain of the animals and where theft, trespassing and illegal slaughtering is making cattle, sheep, poultry and fruit and vegetable farming virtually impossible. Evidence of this has been reported from areas such as Philippi, De Noon and Phisanteictaal in the Western Cape, from farming communities around towns like Ventersburg, Wolmarssstad and Hartbeesfontein in the North West Province and from areas in the Eastern Cape, Natal and Free State Provinces.

In the CBD areas of Johannesburg such as Hillbrow and Joubert Park the illegal occupation of apartment and office buildings has taken place to the extent that such buildings are now abandoned by their owners, have fallen into a state of total dilapidation and have become health hazards, unfit for human use and shelter. The normal market value for such buildings has totally collapsed. What will become of these areas in terms of ownership, maintenance and use must still be determined.

The foregoing comments regarding the influence on property value are derived from instances reported in the news, from surveys of residents, appraisers, estate agents and from community leaders and officials. A statistical analysis has yet to be undertaken to determine the extent and impact on property values. As such,
therefore, the above evidence is still of a relatively unscientific nature, but little doubt exists that a huge aura of uncertainty regarding the value and use of property has settled over much of South Africa. As this uncertainty permeates the domestic and international business community it will have a detrimental impact on the general investment climate in South Africa with a consequent impact on property values.

**Uncertainty and the Influence on the Value of Mining Companies**

The mining industry is the single most important contributor to the South African Gross National Product. Yet a great deal of uncertainty hangs over the potential influence of the new dispensation (and decisions made during the process of land restitution) on the value of land currently zoned for mining activities. This uncertainty has two components:

(a) The Government is considering the concept of nationalising all mineral rights (which currently belong to private mining companies). This, in itself, will have a profound impact on the value of land used for mining;
(b) Redistribution via the Land Claims Court.

On this latter point the question is how mining land is going to be dealt with by the Land Claims Court if, for instance some individual, groups of individuals or even ethnic tribes, lay claim to that land on the grounds of historical occupation. If the Commission on the Restitution of Land, and ultimately the Land Claims Court, decide that the ownership of such land should revert back to the historical occupants, it will have a profound effect on the value of such land. Most of the land where such mining activities are currently being conducted can be claimed by some ethnic groups on the grounds of historical occupation. Therefore the decisions of the Court will have an important bearing on the trend in value of land and on major listed and other companies active in the mining industry.

**Uncertainty and Nature Reserves**

Vast areas of South Africa are proclaimed as nature reserves, prohibiting occupation by people not involved in the management of such areas. The best example is the internationally known Kruger National Park. Many people were moved from the land to make room for this inheritance of nature for generations to come. There are, however, already claims by tribes people that they want to move back to the lands of their forefathers. The fact that mineral deposits were also discovered in these areas complicates the matter in the sense that the land has potential economic value greatly exceeding the value of the claims for occupation. It is most likely that this, and other similar cases, will be brought before the Land Claims Court. The effect of the new dispensation on land values can be significant. It is still a matter of wait and see as to how it is ultimately going to be implemented.
AUSTRALIA

Uncertainty within the Business Community

It is not clear whether the High Court perceived the Mabo case as forming a precedent for similar claims on the mainland. In any case, prior to the passing of the Native Title Act 1993, the decision sent shock waves through the agricultural, pastoralist, mineral extraction, fishing and tourist industries as the evidence emerged that, at the very least, the Mabo decision would be used as a platform to launch a series of ambit native title claims. Such ambit claims served to increase the fear and anxiety in the general community, as well as the concern of the business community, regarding the implications of these claims.

The Mabo decision has added a new degree of uncertainty and, clearly, any increase in uncertainty will reduce the expected returns from mining and other ventures associated with land (and sea) titles that are the likely subjects of native title claims. Hogarth (1993) has suggested that there are at least three financial impacts flowing from Mabo:

1. Reduced Business Options. Companies facing Mabo type claims, particularly those in the resource industries, will face difficulty in getting partners for projects and in raising project finance because of the uncertainty regarding future tenure of title.

2. Increased Costs. Disputes are likely to be resolved at such costs to companies as compensation payments and additional royalties. In addition, significant legal costs and management time will be incurred in conducting due diligence necessary to determine the extent of exposure, if any.

3. Restricted Investment Options. Uncertainty will have a negative effect on investment decisions and new projects will continue to be so affected until land title uncertainties are resolved.

The Mabo decision has served to reduce certainty of title, and in virtually any business operation associated with property, title is of the utmost importance. The following represent the major ways in which the Mabo decision has served to increase uncertainty in the affected industries, and thus both directly and indirectly affect property values:

1. Large tracts of Australia may be subject to legitimate native land title claims. One estimate is that, potentially, 50% of Australia’s land mass may be owned and/or controlled by less than two percent of the population. Although in view of the Native Title Act, 1993 this is likely to be an overestimate, the potential exists for the following reasons:

a. Aboriginal leaders want native title to be revived once mining or pastoral titles expire and The Native Title Act, 1993 has allowed for the revival of native title in certain circumstances.
(b) These leaders also want Governments to *acquire* land for those Aborigines dispossessed by white settlement (and who, therefore, cannot prove continuous association with the land). To aid in this the *Act* has set up a National Aboriginal and Torres Strait Islander Fund to assist people "... to buy and manage land in a way that will provide them with economic, environmental, social or cultural benefits".32

(c) Vacant Crown Land is most likely to be the subject of native title claims and "the law as to the effect of pastoral leases on native title has not been finally settled". Vast areas of Australia are currently under Crown Land or Pastoral Lease33.

In this latter case, for instance, in the potentially worst affected State of Western Australia, 70% of the land area is currently either Crown Land or Pastoral Lease (this is in addition to large areas of the State currently leased to Aboriginals as well as land held in the form of Aboriginal Reserves).34 For the Australian Continent, 43% of the land mass is under pastoral lease and 13% of the land mass is vacant Crown Land. Although it is believed that the granting of a pastoral lease may have extinguished native title, this has yet to be fully tested in court since each case has to be decided on its merits. The first round legal battle has been decided in favour of the notion that the granting of a pastoral lease extinguishes native title (*Waamysis Tribe vs Century Zinc*, Feb.1995). This case is likely to generate further High Court action since the tribe in question was able to prove continuous occupation of the land and the lease had been applied 100 years earlier, but had never been taken up.

(2) It is not clear whether native title extends to water resources (surface, subsurface, marine), littoral (foreshores, beaches, sea-bed), and fisheries.35 Consequently all of these areas are also potentially subject to native title claims (and associated industries may be adversely affected by uncertainty of title). Section 6 of the *Native Title Act, 1993* states that the *Act* itself extends to the above areas, so it seems likely that a claim will be made for such areas under the Mabo decision and this will be tested in court;

(3) Although mineral rights on native title land will continue to reside with the Government, the issue of compensation is not fully resolved. Mining leases granted on native title land before the *Racial Discrimination Act 1975* may be valid and may thus have extinguished native title - but this has yet to be tested in court. Leases granted on native title land after this period may not be valid - although again this has yet to be tested in court. Though it would appear that native title holders cannot prohibit mining, they do have the right to negotiate with both the Government (the holder of mineral rights) and the mining company for appropriate compensation which may be based on profits, income or production.

(4) Although Aboriginal groups sought veto rights over mining on land granted to them under native title,36 they were successful in gaining negotiation rights (as described above). Clearly such negotiation rights extend to industries other than mining (tourist, fishing etc.). In the past Aboriginal groups have proved to be much tougher negotiators than governments regarding access to tribal lands for mineral
exploration and extraction\textsuperscript{37}. There is clearly a fear on the part of interested parties that this tough stance will continue with areas granted under native title (and hence the costs of operation may be expected to be higher than would otherwise be the case).

The clearest evidence to date on the impact of the Mabo decision on the Australian business community was provided by Mr. Jim Lewis, the Executive General Manager of BHP, Australia's leading resources company, in his address to the Australian Bureau of Agricultural and Resource Economics (ABARE) Outlook Conference (February, 1995)\textsuperscript{38}. Mr. Lewis pointed out that uncertainty over Native Title laws had already jeopardised 300 exploration licences in NSW and 76 in Queensland. This uncertainty had not only generated concern amongst foreign mining companies regarding the value of pursuing exploration projects in Australia, but it had also encouraged local mining companies to spend more (36\%) of their exploration budgets offshore. As the minerals and energy sector earned more than 44\% of Australia's export income Lewis claimed that the situation was becoming critical. Mr. Lewis stated that

"One of Australia's great strengths in attracting mining companies has been that we are a politically more stable country... This is now changing... Australia's attitude to security of tenure, whether of ownership, financial terms, land access or regulatory regimes, has given rise to greatly increased concern about the sovereign risk, that is, governments changing their minds about the rules of the game once the game has started".\textsuperscript{39}

In the Market Place

The air of uncertainty created by the Mabo decision may be expected to have an impact directly on the market value of companies and both directly and indirectly on property values in affected and peripheral areas.

(i) Stock Market

Subsumed in all of the discussion on Mabo is the question of infrastructure in areas that are potentially subject to native title claim. Of particular importance here, of course, will be mining leases (and the potential for such areas reverting to native title after the expiration of the lease). In many remote mining areas of Australia not only have transport systems been created for access, but entire townships have been set up to house the employees of mining companies. While lands that have been appropriated for roads, railways and other permanent public fixtures automatically extinguishes native title, this is not the case with similar structures created by private enterprise on leased property. In areas that are subject to Mabo type claims this has implications with regard to the financial viability of projects. Hogarth (1993) notes:

"In the process of preparing financial statements, the Corporations Law and the Australian Accounting Standards require that directors consider the carrying value of non-current assets. Thus, the directors must assess, at least annually, the viability
of each of their projects... The non-current assets most likely to be affected are:

* mineral properties, tenements and reserves;
* capitalised exploration, evaluation and development expenditure;
* plant and equipment and buildings.  

In the face of a Mabo type claim the value of these structures may have to be drastically written down, hence reducing the financial viability of the project, perhaps to the extent of prohibiting the project continuing as a going concern. The cessation of mining operations in remote areas would generate the movement of former employees from these areas in search of work. Until the implications of Mabo have been clearly settled companies must live with the uncertainty of the outcome.

Of course, the impact on a company's value extends beyond the mere impact on non-current assets as stated above. If there is uncertainty as to the likely returns from investment because of the potential that may exist for some or all of a company's property being subject to native title claims, then it is likely that this uncertainty will be reflected in a fall in the value of that company's stock on the market, with the consequent indirect effects this will have on property.  

(ii) Property Value

As noted earlier, a wide range of industries of substantial importance to the Australian economy will be directly affected by the Mabo decision - mining (mineral, oil, gas) agricultural, pastoral, forestry, fishery and tourism. The rural and mineral sectors alone account for about 74% of Australia’s export income. In the short to intermediate term the presence of uncertainty with regard to (a) the areas that may be subject native title claim (b) the costs associated with defending a claim and (c) the costs associated with successful native title claims, is likely to reduce business activity in those areas that may be subject to Mabo style claims. That this is currently happening is clear from the evidence, noted earlier, presented to the ABARE Outlook Conference. It is unlikely that any Mabo style claims will be successful in urban environments, however property values in affected rural areas are likely to fall in response to a downturn in business activity.

The direct impact on property subject to successful native title claim is readily apparent. Native title is not alienable by the common law, but only according to the traditional laws and customs. In effect this means that, ceteris paribus, Mabo type property cannot be bought and sold on the open market. Hence there is no value in exchange. It will not be clear until it is tested in the courts whether native title can exist alongside other property rights, such as property leased for pastoralist purposes. Although pastoral leases are alienable, those leases subject to the further encumbrance of native title are likely to command a lower value in exchange than unencumbered title. Since the passing of the Native Title Act, 1993 the Government of Western Australia has granted more than 8,000 titles on what was previously Crown Land (and potentially subject to native title), arguing that Crown Land was the jurisdiction of the State Government and thus not subject to the Commonwealth Act. In a decision handed down by the High Court on March 16, 1995 the actions of the WA
Government were overruled and the 8,000 titles were declared invalid. The value in exchange of this property immediately disappeared. Native title is yet to be tested for seas, shorelines and the like. It is clear that, until all such native title claims have been settled, the demand for areas likely to be subject to claim will be drastically reduced.

6 THE FUTURE

SOUTH AFRICA

The new dispensation heralding land ownership, land redistribution and land restitution being implemented in South Africa as from March 1995 will not transpire uneventfully. The mechanisms created to deal with the process, the sentiments and the emotions being addressed and the historical background against which this must take place, has the potential of stirring much dissatisfaction, frustration and even rebellion against the entire process. The following represent some of the aspects containing the potential of contributing to dissatisfaction amongst various sections of the population and of influencing property values and land ownership in South Africa.

Ever since history has been recorded battles have been fought about land and land ownership. South Africa is no exception. The pattern of land ownership, carried through to this day, was established more than three centuries ago. It will not be easy to redistribute land, especially agriculture land, within a three year period to the point where 30 percent is alienated from its current owners. It can be expected that the process will be accompanied with much emotion, stress and even hostility in some quarters.

Because of the sensitivity of the subject, it is extremely important that the process be dealt with in a sympathetic, equitable and expedient manner. Uncertainty has a very negative impact on morale, motivation and productivity. This is again especially true in the case of the agriculture sector, but its effect on national morale and racial relationships must not be underestimated. Failure in bringing the question of land redistribution to a swift and acceptable conclusion can cause great stress to various South African population groups.

South Africa is currently in the midst of the most radical political, economic and social changes in its recorded history. This was brought about by negotiation and a common will to create a better deal for all South Africans. Had it been because of war or an over running of one group by another, the outcome and the distribution of the spoils would have been much easier. In an effort to gain political power, many promises were made to the masses of the people as regards the improvement of their material well being. Twelve months after the General Election, not much has changed in this regard as yet. Large sections of the population are consequently becoming impatient, angry and, in many instances, unruly.

The redistribution of land has all the potential of becoming a political tool to try and satisfy those with high, but yet frustrated, expectations. The infrastructure created to
deal with the matter is established and is run by the majority political party in Parliament. If the matter becomes a political play ball with which political parties try to gain lost support amongst their supporters, the outcome could become disastrous.

Land is the basic natural resource on which all economic activities are founded. The South African economy is mostly based on the extraction of mineral resources which contributes a significant proportion of the Gross Domestic Product. The agricultural sector also plays an important economic role, as well as having a responsibility in feeding the nation. South Africa has traditionally been a food exporting country. Although there is always room for improvement, management of this primary production has traditionally been in the hands of entrepreneurs and farmers with a proven ability to optimise return. Should land redistribution result in a large portion of this land falling under the control of people with a main interest in, and tradition of, subsistence farming it could result in vastly lower productivity and food shortages resulting in suffering to the very groups redistribution was intended to help.

Land in South Africa is mainly owned by private individuals, legal forms of enterprise, tribal lands under the authority of the state and state owned land. For the purposes of redistribution, much is being made of the redistribution of alternative government land. At the moment no register of alternative government land exists, let alone a register of land available for redistribution. Compiling such a register will take time, with the potential of seriously delaying the redistribution process.

The Restitution of Land Rights Act, 1994 provides for local authorities to request the withdrawal of land belonging to them from the ambit of the redistribution process. The manner in which this provision is to be applied can have an important effect on the amount of land available for redistribution and the manner in which it will take place.

According to the recent legislation, the redistribution process is earmarked to be completed within a period of three years from a date determined by the Minister of Land Affairs. It has already been stated that, for the sake of peace and stability, the matter of land redistribution must be settled swiftly and justly. In the light of the abovementioned background and the enabling infrastructure, it is highly likely that this could become a long and frustrating process. The potential danger exists that the process will not yet be completed before the next general election in 1999. Should this be the case, the matter could develop into a political mine field, bringing with it political division and hostility amongst the peoples of South Africa.

South Africa has no experience of dealing with claims for the restitution or redistribution of land. The legal experts and the commissioners appointed on the Land Claims Court and on the Commission on the restitution of land claims have no track record of dealing with such sensitive matters. It is questionable whether the time earmarked for the completion of the process will allow them enough time to gain such experience.

The determination of just and equitable compensation is a matter which must still be worked out. There is no history of what the nature, extent or amount of
compensation should be.

It is expected that the traditional systems for registration and recognition of land title will be respected. There are, however, a number of matters yet to be resolved such as: owners rights in terms of illegal invasion and settlement on private land and in private dwellings; mass action and occupation of private property; and the extent to which the policing power of government will be executed.

In the light of this it is clear that uncertainty in the property market in South Africa will continue for the foreseeable future. This uncertainty will have a negative impact on the general investment climate as well as on rural and urban property values. This uncertainty makes it difficult to speculate as to a most likely land structure model for South Africa although it is likely that the impact on property values in the intermediate term will be negative.

AUSTRALIA

The Aboriginal people in Australia comprise less than two percent of the population. It has been many generations since any land rights issues have resulted in violence. The Aboriginal people themselves have shown a propensity to settle such issues through the courts - and it is likely that this will continue to be the practice. We can only speculate as to the likely long term impact of the Mabo decision simply because of the uncertainty surrounding the question of how much of Australia’s land mass can be successfully claimed under native title. Although it seems likely that the main areas subject to native title will be unalienated Crown Land it would appear that, if anything, the history of native title claims over the past twenty or thirty years has shown it is probably pointless to attempt to second guess the rulings of the courts on such matters as the likely co-existence of pastoral leases and native title. The recent Waanyirr vs Century Zinc court case (Feb.1995) is pertinent here. The Waanyirr proved continuing association with the land. However the Court ruled that the pastoral lease held by Century Zinc extinguished native title, despite the fact that the lease had been applied about 100 years ago, and had never been taken up. Nevertheless there are probably some guideposts that we can use to help us decide on a most likely land structure model.

Most Likely Land Structure Model.

In this scenario Aboriginals gain native title where that title has clearly not been extinguished by the granting of freehold and leasehold titles prior to the Racial Discrimination Act of 1975. Some Aboriginal groups are willing to extinguish any future native title claim in return for appropriate compensation. Mineral rights on native title land will reside with the Government whilst the Aborigines have negotiation rights on compensation. Aboriginals gain rights to negotiate regarding commercial activity on all property under native title. Whilst not receiving royalty payments for mineral rights, traditional owners share mining profits. Access rents (mining, forestry, tourism, fishing and the like) are paid directly to the traditional owners of the land.
This model is supported for the following reasons:

(i) Although yet to be tested in court, the available opinion suggests that the granting of pastoralist leasehold probably extinguishes native title (unless this leasehold was granted after the Racial Discrimination Act of 1975) and the Native Title Act 1993 makes it clear that freehold title automatically extinguishes native title.\(^6\)

(ii) While the Mabo decision is recent and has yet to be fully tested on the mainland, the Native Title Act 1993 makes it clear that native title holders will have negotiation rights with mining and other companies while mineral rights will reside with the Government;

(iii) The Jawoyn Association of the Northern Territory agreed in 1993 to extinguish any future native title claims to a particular area in return for a compensation package that included freehold title on other land of traditional significance.\(^6\)

CONCLUSIONS

SOUTH AFRICA

The following three to five years, including the nation wide local elections planned for October 1995, are going to be make or break years for South Africa. The new dispensation got off to a very uncertain and rocky start. The extent to which law and order will be maintained, personal and private rights be respected, existing administrative systems be kept in place and the ability to prevent South Africa from slipping into becoming just another Third World African Banana Republic will determine the future of the country.

The new political dispensation inherited an economic and financial infrastructure functioning similar to, and built on the same foundations as, the major Western countries. It is, however, faced with the dilemma that less than 20 percent of the population has a predominantly western culture, lifestyle and standard of living. The largest portion of the remaining 80 percent are Africans with a traditional African culture and expectations. With universal suffrage in place, it will be difficult for any government to merge these two poles.

As regards claims to rights in property and land ownership, the manner in which the created infrastructure is going to deal with the matter, will largely influence and determine the relationships between the various population groups. It is an extremely emotional matter which must be treated with the greatest sensitivity and fairness if there is to be a prosperous future for South Africa.

AUSTRALIA

Australia does not have the same pressures as South Africa and the changes that have been brought regarding native title will have far less reaching effects both on
property values and the general economy. The suggested likely native title model for Australia implies that the Mabo decision will result in a redistribution of income towards Aboriginals. This redistribution will increase costs of operation for certain firms in the affected industries and this may bring about the failure of some firms in those industries (with associated unemployment implications). Once the remaining firms have adjusted for increased costs of operation (and once all native title claims have been satisfied) few uncertainties will remain in this area. There is no evidence to suggest that Aborigines are anti-development, so it is reasonable to assume that, although they may be tough negotiators, mutually satisfactory outcomes will be achieved. It is reasonable to speculate, then, that the impact on business confidence and property values will only be short to intermediate term in nature and, over the long run, there will not be any major impact on either business confidence or property values in Australia resulting from the 1992 Mabo decision and the ensuing Native Title Act, 1993.


4. Wilson and Thompson also point out that, initially (1657) free farmers were granted about twenty eight acres in freehold which they were required to farm with cereals for twelve years before it could be sold. Cf. Wilson and Thompson, op.cit. p.194.


7. Davenport, T.R.H. South Africa - A Modern History, Macmillan, London, 1978, p.22. In theory a farmer could use as much land as he pleased, provided it did not overlay a neighbour’s use of the land. Where a conflict arose it was resolved by walking horse for half an hour in all directions from the first established homestead. This created a roughly circular farm of about 6,000 acres. Cf. Wilson and Thompson, op.cit. p.211.


9. Wool exports from NSW were 245 lbs. in 1807, 175,400 lbs in 1821 and 3,693,241 lbs. in 1836 with a further 1,710,000 lbs. from Van Diemen’s Land (Tasmania). Middleton, op.cit. p.54.


11. ibid.


16. Lemon, A. Apartheid, Boulder (publisher unknown), pp.232-242
17. Oliver, N.J.J. 'Property Rights in Urban Areas', SA Public Law 3(1) pp.23-33


22. The contribution of Dr.J. Pienaar from the Faculty of Law of Stellenbosch University is gratefully acknowledged for her interpretation of the property clause in the New Constitution and the mechanisms created for dealing with the restitution of land in South Africa.

23. For instance, in the establishment of South Australia the South Australian Colonisation Commissioners were required by the Colonial Office to purchase tribal land in advance of settlement. New South Wales, because it had been established some forty years earlier, was not required to pursue the path of purchasing tribal land. Instead, the Imperial Government determined that New South Wales should compensate aborigines for the loss of land. This was accomplished by the establishment of aboriginal reserves and by the payment of 15% from the revenue of all (Crown) land sales. Ibid.


26. The following information on the mechanisms was provided by the Commonwealth Law Courts, 1 Victoria Avenue, Perth.

27. In Australia ambit claims refer specifically to very high claims (whether for wages or, in this case, for land) made to a court, usually in anticipation of bargaining and compromise. Ambit claims may be made even though claimants know at the outset that the precise conditions for the claim cannot be established. A successful claim for native title requires proof of: 'the membership of the group; the right of the claimant to represent that group; the boundaries of the land claimed; a connection between the group and the relevant land, in continuous existence from before white settlement to the present day'. van Hatten,P, "Implications of Mabo's Case", The Valuer and Land Economist, Feb.,1993, p.330.
28. An example of an outlandish ambit claim was a decision by the Mullenjalri tribe of Queensland in 1992 to put the entire CBD of Brisbane under native title claim. The claim was ridiculed in the popular press, but it nevertheless served as a springboard for a series of similar claims on the rich farming districts of the Southern Highlands and North Coast of New South Wales, as well as the pastoral districts in the Central West and North West of that State. South East Queensland and areas around Alice Springs in the Northern Territory were also subjects of such ambit claims. Cf. Chamberlin, op.cit. and Godden, David "Some Economic Aspects of the High Court's 1992 Mabo Decision on Native Title", 22nd Conference of Economists, Perth, 1993, pp.17-18.


30. Howard, op.cit. p.23


32. Current Issues, op.cit.


34. Crough, op.cit. p.11 and p.14

35. Godden op.cit. p.5


37. Godden, op.cit. p.25.


40. Hogarth, op.cit. p.16


44. The last recorded case took place in 1928. Cf. Middleton, op.cit. p.65

45. Godden, op.cit. pp.6-8

46. Altman, op.cit. p.31