

# G:ENESIS

Implementation Evaluation of the  
Restitution Programme

Final evaluation report by Genesis  
Analytics for the DPME

1, 3, 25 version

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## LIST OF ACRONYMS

|       |   |         |  |
|-------|---|---------|--|
| ACLA  | Advisory Committee on Land Allocation               | MTEF    | Medium Term Expenditure Framework              |
| APP   | Annual Performance Plan                             | NARYSEC | National Rural Youth Service Corps             |
| BAS   | Basic Accounting System                             | NEPF    | National Evaluation Policy Framework           |
| CFO   | Chief Financial Officer                             | NLAC    | National Land Acquisition Committee            |
| CLCC  | Chief Land Claims Commissioner                      | ODI     | Originally Dispossessed Individual             |
| CPA   | Communal Property Association                       | PPM     | Programme Performance Monitoring               |
| CRLR  | Commission on Restitution of Land Rights            | PO      | Project Officer                                |
| DAC   | Development Assistance Community                    | PSU     | Post-Settlement Unit                           |
| DLA   | Department of Land Affairs                          | QCC     | Quality Control Committee                      |
| DPME  | Department of Performance Monitoring and Evaluation | RLCC    | Regional Land Claims Commissioner              |
| DRDLR | Department Rural Development and Land Reform        | SISS    | Settlement and Implementation Support Strategy |
| EBT   | Electronic Benefits Transfer                        | SOP     | Standard Operating Procedure                   |
| EDMS  | Electronic Database Management System               | SSO     | Standard Settlement Offer                      |
| ENE   | Estimates of National Expenditure                   | SSU     | Settlement Support Unit                        |
| EPMO  | Enterprise Portfolio Management Office              | TOR     | Terms of Reference                             |
| LCC   | Land Claims Court                                   | TOR     | Terms of Reference                             |
| MOU   | Memorandum of Understanding                         |         |  |

## GLOSSARY

|                        |   |
|------------------------|---|
| Rule 3 Report          | The report compiled by the CRLR to investigate the validity of the claim with respect to Sections 11(2) and Section 2 of the Restitution Act as described in more detail in Rule 3 of the Rules regarding the procedures of the CRLR in terms of the Restitution Act is referred to as the so-called Rule 3 Report.   |
| Rule 5 Report          | The comprehensive research report drafted by the CRLR to further investigate the claim lodged with reference to the key items listed in Rule 5 of the Rules regarding the procedures of the Commission in terms of the Restitution Act is referred to as the so-called Rule 5 Report. This can be referred to as the “research report”.   |
| Section 42D Report     | The Section 42D report is the final document or report prepared for submission to the Minister (or as delegated) in terms of Section 42D of the Restitution Act for consideration and approval containing all the details of the claim and proposed settlement agreement in settling the claim.   |
| Gazetting              | Gazetting refers to the publication of a notice of the land claim lodged in the Government Gazette as outlined in Section 11 of the Restitution Act.  |
| Financial compensation | Financial compensation is a form of equitable redress as provided for in the Restitution Act where the claimant is paid financially for the right in land lost as defined in Section 1 of the Restitution Act.  |
| Land compensation      | Land compensation is a form of equitable redress where the claimant receives the restoration of a right in land – including restoration of a right in land on original land disposed and or a right in alternative land as defined in Section 1 of the Restitution Act.   |
| Bundling               | Bundling of claims for research purposes occurs when a number of individual claims are researched together and processed together, though each individual claim remains separate and once approved are finalised individually i.e. processing of payments.  |
| Consolidation          | Consolidating claims for settlement purposes occurs when a number of claims are processed together and consolidated in one settlement. In this instance, claimants are artificially consolidated to form one legal entity to take transfer of the land.   |
| Settlement             | <p>The settlement of a claim occurs when:</p> <ol style="list-style-type: none"> <li>The Section 42D report is approved and signed by the Minister in terms of Section 42D of the Restitution Act; or</li> <li>A settlement agreement is made an order of the Land Claims Court in terms of Section 14(3) of the Restitution Act; or</li> <li>The LCC has made an order in terms of Section 35 of the Restitution Act; or</li> <li>A High Court has made an order on the matter referred to it for adjudication</li> </ol> <p>A claim is regarded as settled once the outcome of any of the above results in a financial commitment as recorded on the Commitment Register.</p> |
| Finalisation           | The finalisation of a claim occurs after settlement once the transfer of the equitable redress has taken place e.g. the payment of compensation and or the transfer land.   |
| Claimant verification  | Claimant verification is the process of identifying a person entitled to restitution of a right in land as described in Section 2 of the Restitution Act including a person or direct descendant of such person or deceased estate or a community or part of a community dispossessed of right in land after 19 June 1913 as a result of past racially discriminatory laws or practices.  |
| Options workshop       | The options workshop refers to a workshop hosted and or on-going process of engagement hosted and facilitated by the CRLR for the claimants to outline the various Restitution settlement options available to them as provided for in the Restitution Act...   |
| Commitment Register    | When a claim is considered to be settled any financial obligation assigned to the CRLR is recorded on the Commitment Register. Once on the Commitment Register, the CRLR is committed to finalise the claim by transferring / paying the relevant form of redress.  |
| Suspense Account       | Financial payments which are not collected in the allotted time by claimants are registered on the Suspense Account.  |
| Legal entity           | For a community claim to take ownership of land, a legal entity needs to be established, i.e. Section 21 company; Close Cooperation etc. In Restitution settlements this is generally in the form of a Communal Property Association (CPA) or a Trust.  |

## POLICY SUMMARY

The purpose of the evaluation was to assess whether the Restitution Programme has been implemented *efficiently and effectively*, and to identify how the programme can be improved in time for the next phase of the restitution process. The programme has managed to settle approximately 85% of the claims lodged since its inception, however, the findings of this evaluation reveal a range of systemic and operational weaknesses which compromise its efficiency and effectiveness.

The picture that emerges is one of inadequate and incomplete project, filing, performance and information management systems, and the proliferation of decision-making and accountability points within the Commission on Restitution of Land Rights (CRLR). The integration of the CRLR into the Department of Rural Development and Land Reform (DRDLR) has blurred its operational autonomy and resulted in it being stretched across a range of post-settlement activities which lie beyond its mandate. This has been exacerbated by the absence of clearly defined operating procedures, resulting in variations in the approaches to claim settlement across provinces and over time. Staffing is inadequate and inexperienced, and the development of the necessary managerial capacity has been undermined by the high turnover of staff, poor systems of induction, and inadequate ongoing training and support.

The report concludes with the following recommendations:

- The clear definition of the function of the CRLR as an independent entity dedicated exclusively to the administration of the restitution process. The CRLR's role must be clarified to commence definitively with the lodgment of a claim and to end with the submission of its final settlement recommendation. It should be screened from any activities which are not core to its mandate.
- The definition of a detailed business process and its elaboration into Standard Operating Procedures which describe every step in the restitution process, and the roles and responsibilities of staff.
- The rationalisation of all different existing management information systems (MIS) into a single, web-based system. The MIS should provide for the electronic management of every step in the business process and lay the basis for performance management and monitoring and evaluation (M&E).
- Provincial Restitution managers should be given responsibility (and budgets) for all non-capital aspects of their programmes.
- Performance management systems should be put in place which manage and reward staff according to: the quality of research; adherence to agreed procedures and systems; the integrity of the claims process; the quality and the rate of settled claims. A competent and dedicated HR capacity should be established within the CRLR, independent of the DRDLR.
- The current M&E system should be broadened to measure intermediate outputs of the settlement process as well as qualitative aspects. It should be used to capture and communicate best practice.
- The budget for the Restitution Programme needs to be re-considered. In the recent years, the budget for the Restitution Programme has been reducing; impacting on the CRLR's ability to settle the outstanding claims. In line with this, should the second phase of restitution take place, the CRLR will require a greater operational budget than that which is currently available.

In terms of immediate priorities, three recommendations are made:

- The current filing system must be cleaned up and systematised. All future cases should be managed through the MIS, strictly in relation to the prescribed operating procedures and delegations.
- All outstanding claims should be settled before any work begins on the processing of new claims.
- The operating procedures and MIS must be updated to reflect the criteria for new claims before any new claims are processed, and all necessary training of staff provided.

## EXECUTIVE SUMMARY

The evaluation of the Restitution Programme presented in this report is based on a process assessment of the Programme's implementation (from the lodgment of claims through to their finalisation), and covers the time period of January 1999 to 31 March 2013. The purpose of the evaluation was to assess whether the Restitution Programme has been implemented efficiently and effectively, and to identify how the Programme can be improved in time for the next phase of the restitution process.

The historical, political and policy context to land restitution and the complex legal and institutional arrangements that underpin it make for an extremely demanding and difficult operating framework for the Programme's implementation. For it to work requires a clearly defined and rigorously managed business process supported by a dedicated human resource function, and strong information and performance management systems.

Notwithstanding the Programme's success in settling approximately 85% of the claims lodged since its inception, the findings of this evaluation reveal a range of serious systemic and operational weaknesses which compromise its efficiency and effectiveness, and have undermined the achievement of its developmental purpose. The reasons for this are numerous and complex and, disconcertingly, have been extensively documented in previous assessments.

### Core Findings

The Commission on Restitution of land Rights (CRLR) has settled approximately 85% of the lodged claims. However, the overall picture that emerges is one of inadequate and incomplete project, filing, performance and information management systems, and the overlapping of decision-making and accountability structures within the CRLR and the Department of Rural Development and Land Reform (DRDLR). These have been aggravated by continual processes of restructuring and business process re-engineering.

The absence of consistent and clearly defined operating procedures has resulted in variations in the processes and approaches to claim settlement across different provinces, as well as inconsistencies in the process over time. The development of the requisite institutional and managerial capacity within the Programme has been undermined by an extremely weak human resources function, de-linked from the CRLR.

At the heart of many of the difficulties experienced by the Programme is its increasing focus on issues which are beyond its specific constitutional mandate. These include taking responsibility for post-settlement outcomes, resolving ongoing community and local political economy disputes, and taking responsibility for broader local economic development issues. These all lie beyond the legal and administrative scope of the restitution function, and they detract from the core tasks of the restitution process. Beyond the burden that this places on staff and resources, it results in the restitution process becoming 'relationship-driven' and subjective in nature, as opposed to adhering rigorously to a well-defined business process.

This reality is exacerbated by the absence of clearly documented operational procedures and functional administrative systems, the second major source of inefficiencies. These weaknesses can be broken down into process elements, management and procurement systems, and staffing functions.

The Restitution Business Process: The research reveals problems with the definition of tasks associated with each of the steps of the business process. The poor documentation of claims and incomplete files, both crucial to the legitimacy of any legal process and essential for the efficiency and integrity of the Restitution Programme, was a striking finding of the research. Beyond this, the claimant verification and research process is compromised by the inconsistent application of procedures and contribute to the poor quality and generic nature of much of the research. This in turn has resulted in the proliferation of review and authorisation steps which dilute accountability and undermine the Programme's efficiency.

These problems are compounded by the inexperience and lack of legal skills of programme personnel, inadequate archival systems and reference material, the inherent difficulty of eliciting the facts from claimants, and difficulties in accessing deeds information. The practice of 'bundling' claims not merely for research but also for settlement has also in many cases seriously compromised the outcomes of the research process. Taken together, these factors result in repeated 'send backs' of claims and conflict at later stages of the settlement and post-settlement process at great cost to the CRLR in terms of time and resources.

Management and Information Systems (MIS): the research noted a long evolution of different systems which are incomplete, unlinked and unsuitable as a tool for the effective management of the restitution process. This is compounded by the absence of any current Standard Operating Procedures (SOPs). A paper-based system of approval still prevails which results in delay, loss of documentation and the proliferation of decision-making milestones and authorisations. Furthermore, the absence of an effective MIS undermines the CRLR's ability to identify and remedy bottlenecks in the system and to guide its training and support functions. It similarly undermines the scope for effectively monitoring and evaluating progress, and for capturing and communicating learnings that should be a core feature of the process.

Staff Functions: While the definition and allocation of Restitution Management Support Offices' (RMSOs) staff functions appears to be appropriate, a range of weaknesses are apparent: project officers are typically inexperienced, under-qualified and not formally inducted or trained; legal practitioners lack experience and are unable to translate cases into a coherent overall legal framework to guide the legal processes of the CRLR; and staff do not apply rigorous or rule-based administrative processes. These problems are a consequence of a weak human resource function and capacity which, because it resides in the DRDLR and not the CRLR, is not adequately aligned to the CRLR's needs. These problems are enabled and reinforced by a weak performance management system which does not capture and monitor the necessary indicators of performance across the system and inadequately differentiates between quantitative and qualitative performance measures.

The Programme's monitoring arrangements are focused on assessing only two indicators: the number of claims settled and the number of claims finalised. There is no monitoring of the efficacy or quality of the claims process, of intermediate outputs or the overall qualitative aspects of settled claims. These inadequacies currently limit the ability of the system to pinpoint and respond to problems in the process, dilute the quality of its deliverables, and compromise its effectiveness, efficiency and impact.

The overall finding of the report is that the current ill-defined operational autonomy and focus of the CRLR; its inconsistently applied operating procedures and inadequate MIS; and its weak human resource capacity, performance management and quality control systems have severely compromised the efficiency and effectiveness of the Programme.

## **Recommendations**

In formulating these recommendations, the emphasis has been on addressing a limited number of crucial inadequacies, bearing in mind the extremely demanding context, the limited management resources and the demanding time-scale at the disposal of the CRLR. They are deemed to be a crucial pre-requisite for any prospect of success with the second phase of the restitution process:

- **The focus and function of the CRLR and the Restitution Programme must be more clearly defined and better communicated.** The CRLR's role must be clarified to be concerned *exclusively* with administering the legal process associated with the lodgment, review and settlement of restitution claims, and must have a precise beginning and end point (the formal registration of a claim and its final settlement).
- **The Restitution Programme's business and decision-making process must be reviewed, finalised and documented in terms of a strict, rule-based procedure.** This should take account of a careful review of best practice, and must be documented in a detailed Standard Operating Procedures (SOPs)

Manual which is widely distributed and supported by training. The defined restitution business process must be systematically applied, without deviation, to every claim lodged with the CRLR.

- **The different MIS currently in operation or development should be rationalised into a single, web-based MIS.** This should provide for the electronic management and oversight of every step in the business process, and should serve as the core vehicle for all relevant documentation and authorisations. It should provide for a clear location of responsibility and authority at every step in the process.
- **The CRLR's provincial offices should be given responsibility for all non-capital aspects of provincial programmes.** This should include authority (and budgets) for filling vacant posts and procuring services relevant to the restitution process.
- **Performance management systems should be put in place which manage national and provincial staff according to specific, measurable indicators.** These should at the least include: the quality of research; adherence to agreed procedures and systems; the integrity of the claims process and the quality of the settlement agreement; and the rate of settled claims.
- **A competent human resource (HR) management capacity should be established within the CRLR.** This should be independent of the DRDLR and be dedicated to serving the needs of the CRLR in respect of its performance management, training and staff development functions. Its focus and operations should be driven by the long-term targets, indicators and circumstances of the Restitution Programme.
- **The current monitoring and evaluation (M&E) system should be broadened to measure intermediate outputs of the settlement process as well as qualitative aspects of both the settlement process and its outcome.** It should provide independent oversight and quality assurance of each step in the process, and should be linked to the performance management system. The M&E framework should include a learning and communication function and the business process should be open to structured review and change in the light of this learning.
- Beyond facilitation and coordination activities (which take place before a claim is settled) **the CRLR should be formally absolved of any responsibility for post-settlement support, local economic development processes and funding of related activities (beyond that associated with the financial settlement of claims).**
- **The budget for the Restitution Programme needs to be re-considered.** In the recent years, the budget for the Restitution Programme has been reducing; thus impacting on the CRLR's ability to settle the outstanding claims. In line with this, should the second phase of restitution take place, the CRLR will require a greater operational budget than that which is currently available.

In terms of immediate priorities, three recommendations are made:

- **The current filing and recordal system must be cleaned up and systematised.** Concluded files should be reviewed to ensure they are complete in terms of content and chronology. Current files should be assessed in terms of their completion and compliance with legal process, and should be updated and systematised into the new MIS. All future cases should be managed through the MIS, strictly in relation to the procedures and the authorisation process defined in the SOP Manual.
- **Looking forward, all outstanding claims should be settled before any work begins, on the processing of new claims** arising from the recently announced second phase of restitution. Given that the window for new claims has been opened, the lodgment of new claims may proceed, but only in accordance with the requirements of the SOP Manual.
- **No new claims should be processed** before the criteria and focus determining access to the second restitution window have been translated into the SOP and incorporated into the new MIS.

# SUMMARY REPORT

## 1. INTRODUCTION

The National Evaluation Policy Framework (NEPF), approved in November 2011, sets out the context for a National Evaluation System for South Africa. The Department of Performance Monitoring and Evaluation (DPME) at the Presidency has been mandated to conduct a number of the evaluations under the NEPF. An implementation evaluation of the Restitution Programme was one of the fifteen evaluations scheduled for 2013/2014. The Restitution Programme is housed within the Department of Rural Development and Land Reform (DRDLR), in the Commission of the Restitution of Land Rights (CRLR). The remainder of this report summarises the analysis, findings and recommendations that emerged from the evaluation research.

The purpose of this evaluation is to assess whether the Restitution Programme has been implemented *efficiently and effectively*, and to identify how the programme can be improved for the next phase of restitution. The evaluation covers the implementation of the programme from lodgment through to finalisation of restitution claims. The time period under review is from *January 1999 to 31 March 2013*. As agreed in the inception meeting, the evaluation covers the following five provinces: Limpopo, KwaZulu-Natal, Western Cape, Eastern Cape and the Free State. These provinces were selected for the following reasons:

- Limpopo, KwaZulu-Natal and the Free State, because of their rural bias and the large volumes of land purchased in these provinces.
- Western Cape, because of the high number of urban claims resulting in financial compensation.
- Eastern Cape, because its restitution activity focuses largely on peri-urban areas, and has a focus on betterment, urban and rural claims.
- KwaZulu-Natal and Free State, as they have a blend of rural and urban claims.

### 1.1. OBJECTIVES OF THE IMPLEMENTATION EVALUATION

In order to assess the effectiveness and efficiency of the Restitution Programme, and to inform how the programme can be improved in the future, Genesis was guided by a number of key evaluation questions, namely:

- Are the set outputs of the Restitution Programme being achieved?
- Is the Restitution Programme implemented efficiently and effectively?
- What has made this intervention difficult to implement and are there examples of good practice that we can learn from?
- How can the process of the Restitution Programme be strengthened for future phases of restitution?
- How can the Restitution Programme be implemented more cost effectively?

### 1.2. EVALUATION CRITERIA

In order to evaluate the implementation of the Restitution Programme, Genesis made use of the internationally accepted Development Assistance Community (DAC) evaluation criteria<sup>1</sup>. The DAC criteria outline five measures against which a programme can be assessed, namely: relevance, effectiveness, efficiency, impact, and sustainability. As this is an implementation evaluation – i.e. evaluating whether the programme's operational mechanisms support the achievement of the programme's objectives - the study focused on effectiveness and efficiency, with some consideration given to sustainability. The guiding definitions of these criteria that we used to focus our work are summarised as follows:

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<sup>1</sup> DAC, *Principles for the Evaluation of Development Assistance*, OECD (1991). The OECD's DAC (Development Assistance Committee).

- **Efficiency** measures how the various resource inputs are converted into outputs - assessing how the Restitution Programme's processes support the efficient settling of the restitution claims lodged.
- **Effectiveness** measures the extent to which the programme's outcomes are being achieved - assessing Restitution's achievement of its targets for settled claims.
- **Sustainability** measures the extent to which the positive changes resulting from the programme can be expected to last after the programme ends. As this is an implementation evaluation, this measure focused on the extent to which the programme's *processes* contribute to the sustainability of the compensation received. It did not assess the sustainability of the land reform entities post settlement.

## 2. THE BACKGROUND TO RESTITUTION

Restitution is framed by three dates: **19 June 1913**, which marks the start of the period in which dispossession is legally recognised in the Constitution of the Republic of South Africa, 1996 (Act No 108 of 1996); **2 December 1994**, when the Restitution of Land Rights Act, 1994 (Act No 22 of 1994) (referred to as the Restitution Act) was implemented; and **31 December 1998**, which marks the cut off for the lodgment of claims.

### 2.1. CHRONOLOGY OF THE RESTITUTION PROGRAMME

In outlining the evolution of the Restitution Programme it is important to recognise that both the former Department of Land Affairs (DLA) and the CRLR were built from scratch following the democratic transition in 1994. The chronology of the Programme is described in detail below.

#### 2.1.1. 1994 – 2000: Stage 1

The Restitution Act was enacted on 2 December 1994, and the CRLR opened its doors in 1995. From 1 May 1995 eligible claimants were given three years to lodge claims. This period was later extended to the cut-off date of 31 December 1998. As of 31 December 1998, it was reported that a total of 63 455 claims were lodged, however, as some claims were split in the process of investigation the number of claims rose to 79 693 by 2004. The Land Claims Court (LCC) was established in 1996. The combination of establishing the CRLR as a new institution and the court-based claim settlement process meant that progress was slow in settling claims in the first five years of the programme and only 47 claims were settled in these years<sup>2</sup>. It was thus accepted that emphasis should shift to providing greater administrative capacity for mass processing of claims.

#### 2.1.2. 2001 – 2008: Stage 2

Historically there were sharp disagreements within the CRLR about where their role began and ended. A Settlement Support Unit (SSU) was established in the CRLR in 2002 which set out to give more substance to post-settlement planning and practice. The scope of the Settlement and Implementation Support Strategy (SISS) was subsequently extended to land reform as a whole. The strategy was launched in 2007 but was never implemented.

#### 2.1.3. 2009 – 2013: Stage 3

The DRDLR was created in 2009, opting for a 'three legged strategy' involving: sustainable land and agrarian transformation; rural development; and, land reform based on restitution, redistribution and land tenure reform. As of 1 April 2011, the CRLR was rationalised to create better synergy with, and clearer lines of accountability to the DRDLR<sup>3</sup>.

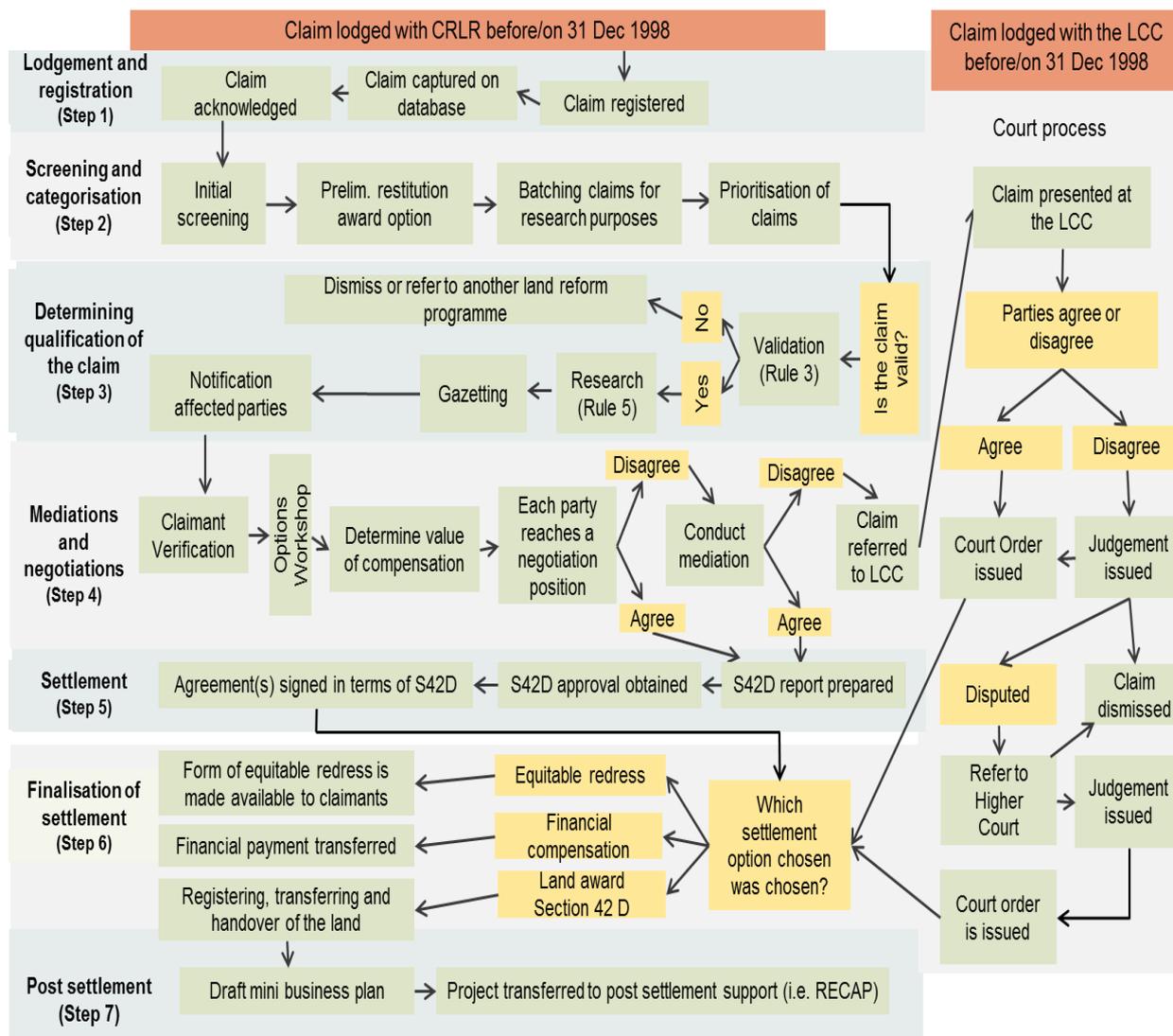
## 2.2. RESTITUTION CLAIMS PROCESS

Provinces follow the same broad process in settling claims; however, the detailed implementation differs per province. Figure 1 below illustrates the Restitution Programme's process flow in more detail.

<sup>2</sup> Hall (2011). "Reconciling the past, present and future: The parameters and practices of Land Restitution in South Africa"

<sup>3</sup> DRDLR (2011). "Annual Report: 1 April 2010 - 31 March 2011"

**Figure 1: Detailed process flow for the Restitution Programme**



Source: Genesis Analytics, 2013

As the scope of this evaluation does not include post-settlement support, the last phase in this evaluation focuses on the finalisation of claims and the handover of the claims for post-settlement support.

### 3. METHODOLOGY

In order to ensure the comprehensiveness of the evaluation, the DAC criteria were used as the foundation for the evaluation framework. In addition to the evaluation criteria of efficiency, effectiveness, and sustainability (as outlined in Section 1.2); the five evaluation questions as per the Terms of Reference (ToR) were consulted to identify 29 relevant themes with approximately 250 corresponding qualitative and quantitative questions. A multi-method approach was used to answer these questions, as described in Table 1 below<sup>4</sup>. The findings from these various sources were then consolidated and analysed in terms of the five evaluation questions.

<sup>4</sup> This methodology was approved by the Steering Committee through acceptance of the Inception Report, Proposed New Methodology request, and the Evaluation Plan.

**Table 1: Description of the evaluation methods**

|                                |   |
|--------------------------------|---|
| Document and literature review | This involved a review of the Restitution legislation; policy guidelines; training manuals; supporting Restitution administrative documentation; past reviews of the programme; academic articles and legal judgments which informed the settling of claims.  |
| Focus group discussions        | The document and literature review revealed that, beyond a common generic framework, there is no standardised settlement process followed by the various provinces. In order to better understand the process that is followed in practice, the Genesis team conducted a focus group with national CRLR staff and provincial staff.                 |
| Claim file assessments         | Restitution “projects” were selected randomly per province based on a 1% sample of the total number of settled claims. In total, a representative sample of 533 “projects” out of a total of 1,661 “projects” were assessed over the five provinces.  |
| Interviews                     | Interviews were conducted with both provincial and national CRLR staff, from PO level through to the Chief Land Claims Commissioner (CLCC). In addition to CRLR staff, DRDLR staff were interviewed and select claimants were interviewed.  |
| Case studies                   | Four case studies were conducted per province. These case studies involved assessing the claim file; and holding interviews with the Project Officers (POs), claimants, landowner (in projects involving land) and other relevant stakeholders. The projects selected for the case studies aimed to draw out issues representative of the province. |
| Review of quantitative data    | The quantitative data review analysed the Commitment Register for all nine provinces from 1998/99 to 2012/13. In addition to this, figures from the annual reports and strategic plans of the CRLR and DRDLR, and the National Treasury’s Estimates of National Expenditure (ENE) were analysed.  |

### 3.1.1. Limitations

As with any research, this evaluation relied on a number of critical assumptions and was subject to inherent constraints, which are summarised in the table below.

**Table 2: Limitations in the research**

| Limitations in the research   |
|---|
| Staff availability: In many instances, staff members were unavailable for meetings or cancelled meetings at the last minute to deal with more pressing demands.   |
| Accessing hard copy files: Many of the files are housed offsite, this delayed the process, and in some cases, the files could not be obtained <sup>5</sup> . Differences in the hardcopy reference number with the electronic reference number resulted in a time consuming process of matching the various sources for the claim analysis.           |
| Discrepancies between national and provincial data: In many provinces, the national list of projects differed from the provincial list. Similarly, expenditure figures differed between some of the provincial and the national lists. The overall report therefore used the national figures and the provincial reports used the provincial figures. |
| State of the files: The poor quality of the claim files limited the quantitative analysis that could be undertaken. As a means of overcoming this, a significant amount of qualitative research was conducted.  |
| Variances in the way in which the CRLR defined and counted a “settled claim” over the years (see Section 4.2.1 for more detail). This inconsistency reduced the focus and rigour of the statistical analysis that was undertaken as part of the research.   |

## 4. FINDINGS

The findings from the research process are discussed in detail below. The findings are outlined according to the DAC criteria used in the evaluation - *efficiency, effectiveness and sustainability*. The findings presented are an amalgamation of both the qualitative and quantitative research conducted at provincial as well as national level. As the files were selected randomly; it is important to note that the initial analysis of the files in terms of the type of claim, nature of the land use involved and the type of compensation selected by the claimants indicated that they were indeed representative of the provinces and as such suitable to answer the evaluation questions.

### 4.1. EFFICIENCY

The assessment of *efficiency* covered 24 indicators, which corresponded to 210 questions. The findings have been presented in three sections: the first section outlines the state of the files; the second section

<sup>5</sup> The Free State office was relocating at the time of the research, and thus hard copy files were not available. Those files stored in the Surveyor General’s office in the Western Cape could not be obtained.

presents the findings according to the key stages in the restitution process; and the third section outlines the over-arching, institutional findings.

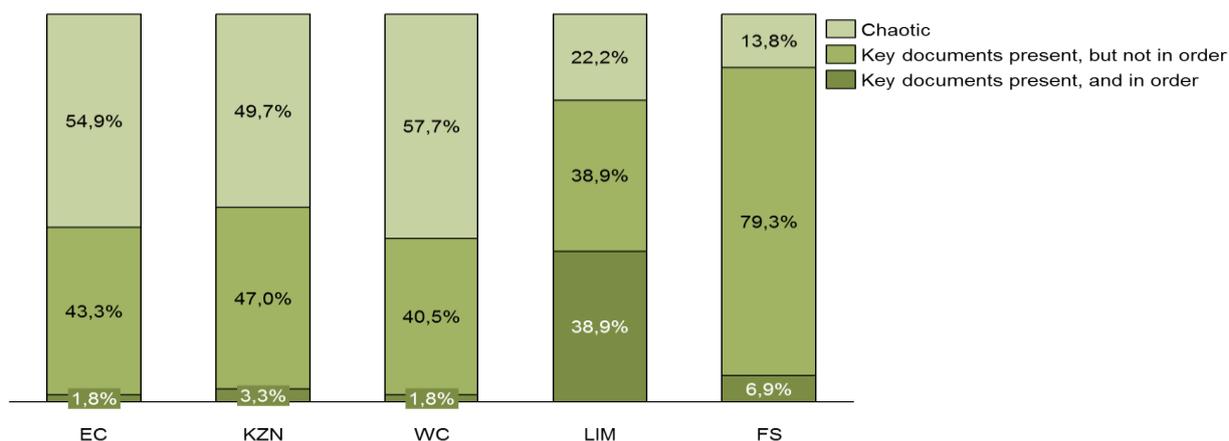
#### 4.1.1. State of the files

The research indicated that the files were missing a significant proportion of the key documentation. The files were substantially incomplete and as a formal record of proceedings did not comply with the administrative requirements of the legal process that underpins restitution. For the purposes of this evaluation, where possible, interviews were conducted with available POs as a means to fill the gaps in the case files.

In addition to looking at the completeness of the files, the provincial research teams gauged the condition and sequence of documents in the file. The outcome of this is described in Figure 2 below, illustrating the extent of the problem with no less than 50% of the files in three provinces being registered as ‘chaotic’ and, alarmingly, less than 3% in these same provinces having been found ‘in order’.

Other issues in the files which reflect shortcomings in the Programme’s filing system include: the case names in the file registry frequently differ from those on the actual file; there are inconsistencies in nomenclature, where seemingly identically named files are actually different claims and different communities with different KRN numbers; there are inconsistencies in the spelling of projects across the different databases and registry; and documents are misfiled with mixing of documents between files and random filing of documents with no logic or sequence to the record, making it difficult to assess the veracity or completeness of the restitution process.

**Figure 2: Description of the completeness and sequence of documents in the files**



Source: Genesis Analytics, 2013

#### 4.1.2. Efficiency according to the key stages in the restitution process

##### 4.1.2.1. Phase 1: Lodgment and registration

Lodgment of all claims was completed by 31 December 1998. According to Section 10 (1) of the Restitution Act, the claim form should include a “description of the land in question, the nature of the rights in land of which he, she, or such community was disposed and the nature of the right or equitable redress being claimed”<sup>6</sup>. However, this has not always happened in practice resulting in delays and difficulties in the validation of the claim, and non-compliance with the Restitution Act<sup>7</sup>.

##### 4.1.2.2. Phase 3: Determining the qualification of the claim (verification and research)

Key activities in this phase include the research of a claim to determine its validity, further research in terms of Rule 5, gazetting and claimant verification.

<sup>6</sup> Restitution of Land Rights Act (Act 22 of 1994)

<sup>7</sup> As is evidenced in the Ndebele-Ndzundza Community Re: Farm Kafferskraal No 181JS claim which was presented to the LCC in December 2002

#### 4.1.2.2.1. Verification and research

Provincial RMSO staff were asked to estimate the typical time taken to complete the Rule 3 (validation report) and Rule 5 (research report), depicted in Table 3 below. The time taken to complete the research was reported to be dependent on the complexity of the claim, the accessibility of data and whether the claim was urban or rural.

**Table 3: Average time taken to complete a Rule 3 and Rule 5 report**

|        | EC        | KZN <sup>8</sup> | WC        | LIM      | FS         |
|--------|-----------|------------------|-----------|----------|------------|
| Rule 3 | 12 months | 6-12 months      | 12 months | 2 months | 3 months   |
| Rule 5 | 10 months |                  | 5 months  | 1 month  | 6-8 months |

Source: Genesis Analytics, 2013

The Rule 3 and Rule 5 reports are missing in a significant number (well over 50% in four of the five provinces; in some cases as high as 80%) of files. In some instances the missing reports are as a result of POs amalgamating these into one report in order to expedite the research process. This practice occurred in all the provinces, but was most prevalent in KwaZulu-Natal where 40% of the files had a clearly amalgamated Rule 3 and Rule 5 report. The amalgamation of these reports has been challenged in certain provinces as this goes against the procedures as set out in the Rules of the Commission. The advantages and disadvantages of merging these reports, as reported by provincial staff, are outlined below.

**Table 4: Advantages and disadvantages to merging the Rule 3 and Rule 5 report**

| Advantages                          | Disadvantages   |
|-------------------------------------|---|
| The research process is done faster | A single report of lower quality and integrity, containing gaps in the research |
|                                     | Generic referencing to the dispossession that took place                        |
|                                     | Inconsistency with the application of the Rules of the Commission               |

Source: Genesis Analytics, 2013

The challenges, according to provincial interviews, to conducting Rule 3 verification and Rule 5 research are detailed in the table below.

**Table 5: Challenges to conducting research**

| Challenges to conducting Rule 3 and Rule 5 research   |
|---|
| There is often insufficient information on the claim form to determine if it is a prima facie valid claim, as per Rule 3.   |
| POs lack the legal skills needed to determine if the claim should be considered a prima facie valid claim, as per Rule 3.   |
| There are often difficulties in obtaining information from claimants. Where there is existing documentation, claimants tend to take a long time submitting it.  |
| There is often insufficient external documentation and archival reference material. In these cases the POs have to depend on oral history and testimony.  |
| There are difficulties in accessing information from the Deeds, Surveyor General and other government offices: <ul style="list-style-type: none"> <li>• The POs do not have access to digital retrieval of documents from the Deeds Office website;</li> <li>• There is no special arrangement for CRLR staff to access information – they are required to stand in the queue like any other client;</li> <li>• There is no available database with all relevant proclamations in terms of the different Acts used for dispossession; requiring each PO to research this each time; and,</li> <li>• Tenancy claims are not easy to research if the Originally Dispossessed Individuals (ODIs) are deceased and no one can verify the details of the claimed land; requiring surveyor general and local government records which take time to retrieve.</li> </ul> |
| Claimants often provide false information in order to further their claim or deliberately exclude siblings from the claim.  |
| There is no clearly outlined method for how to go about doing the research.   |
| The POs do not have the required skills to do the research adequately   |

Source: Genesis Analytics, 2013

<sup>8</sup> In KwaZulu-Natal these reports were typically amalgamated into one.

Bundling claims for research purposes was a common practice in the provinces, examples of this can be seen in the Brickfield, Durban North and Victoria Country case study in KwaZulu-Natal and the Magi, Athlone case study in the Western Cape. This was done as a means to process claims faster. Where the claimed land is a coherent and contiguous property, the time taken to settle the claim can be reduced. However, care needs to be taken as this practice has resulted in complications when finalising the claim, whereby bundling of claims in some instances has artificially conflated fundamentally distinct claims. This undermines the legitimacy of the research and results in major dysfunction and conflict in the settlement and post-settlement phases.

Research is consistently noted as a weak area within the CRLR (see Section 4.2.2). Weak research results in a significant number of cases being referred to the LCC, at great cost in terms of delay and financial resources of all stakeholders in the process, by claimants and landowners who question the basis of the CRLR's decisions<sup>9</sup>. An example of weak research is captured in the Balasi case study in the Eastern Cape. In this case, the weakness in the research directly contributed to delays in the finalisation of the claim. The research failed to identify the fact that there was an overlapping claim between the Balasi and Tyutyu, resulting in disputes in the negotiations process. As a result of this the claim is still not finalised.

#### **4.1.2.2.2. Gazetting process**

Of the files that could be assessed, the majority of the claims took 0-24 months from the completion of the validation to the gazetting of the claim. Inadequate research was noted as a key constraint to the gazetting process, resulting in incorrect gazetting. A negative impact of the gazetting process is that it can lead to disinterest for landowners in investing in the land or maintaining the land after a claim has been gazetted, resulting in a loss of value of the claimed asset to the State and the claimants. In the past, claims were often gazetted without consultation with the Information Management Unit (IMU)<sup>10</sup> or without the required information. Similarly, claims were grouped together and gazetted as one. As a result of these practices, claims had to be re-gazetted and amended at a significant cost to the CRLR<sup>11</sup>.

#### **4.1.2.2.3. Claimant verification**

Another core component of this stage involves claimant verification, which entails confirming each of the claimants and compiling the claimant list. This is faced with the following challenges:

- Inadequate skills and experience of POs: verification involves a wide range of skills such as interviewing and facilitating meetings with claimants and conducting research. This combination of skill sets was reportedly difficult to find. POs also reported not having the skills to test the claimant list against aerial photographs, which resulted in them accepting the claim on the basis of the community resolution.
- Difficulties tracing claimants: this is especially in cases where forced removals relocated claimants to a vast number of settlement areas. Verification must then be done in a number of different locations, which delays the process.
- Unavailable documentation: claimants often do not have copies of their IDs, marriage certificates and death certificates.
- Family disputes and intricate claimant relationships: claimant verification is complicated further when there are several wives or 'illegitimate' or 'adopted' children linked to the claimant.
- Fraudulent claimants: many opportunistic individuals attempt to use the restitution process as a means to benefit from claims from which they have no right. This is particularly the case in large, community claims.

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<sup>9</sup> An example of this is the Baphalane ba Ramokoka Community claim which was taken to the Constitutional Court where the Constitutional Court ordered that the CRLR not only made "common cause with the Community's case but it even gave succour to the misguided imputations of unprofessional non-disclosure against the landowners' lawyers"

<sup>10</sup> Consultation with the IMU would confirm if the claim had already been gazetted or settled.

<sup>11</sup> This is evidenced in the matter of Bouvest 2173 CC and Others v Commission on Restitution of Land Rights and Others (LCC68/2006) [2007] ZALCC 7 (7 May 2007)- <http://www.saflii.org/za/cases/ZALCC/2007/7.html>

A good practice for mitigating against fraudulent claimants is highlighted in the Sakkieskamp case study in the Western Cape, where the continuous and in-depth involvement of the community elders prevented fraudulent claimants from benefiting from the claim. Another good practice in the verification of claimants is evidenced in the East Bank case study in the Eastern Cape. The 2002 settlement agreement excluded a number of claimants and the majority of the churches involved in the claim. Households were excluded as the verification was not complete and churches were excluded as the valuation and settlement options had not been completed. By phasing the claim, the 2002 settlement agreement was reached relatively quickly as the CRLR was able to make progress without being delayed by those who still needed to be verified.

Claimant verification is noted as being one of most challenging activities in the restitution process. The Brickfield, Durban North and Victoria Country case study in KwaZulu-Natal is an example of weak claimant verification. In this example, 2 802 claims were bundled together. The verification list initially lacked ID numbers for claimants and for those ID numbers that were recorded, there were substantial differences between those listed in the Section 42D list and those in the gazette notices. The file research in Limpopo indicated that many of the verification processes were incomplete at the time of submitting the Section 42D report and that final verification processes were undertaken post-settlement, resulting in significant post-settlement delays.

#### 4.1.2.3. Phase 4: Negotiations

Of the files that could be assessed this most often took more than 3 years to complete. This phase includes a range of activities and processes focusing on both the claimants and current landowner(s), as well as any other interested parties. Key activities in this phase include: the options workshop, determining the so-called monetary value of the claim, and negotiations with claimants and landowners.

##### 4.1.2.3.1. Options workshop

The correlation between the option chosen by the claimants in the options workshop and the final option chosen is outlined in Table 6 below, illustrating that the final settlement option chosen does not differ substantively from what was chosen after the options workshop.

**Table 6: Correlation between option chosen at the options workshop and that chosen in the final settlement**

|  | EC  | KZN | WC  | LIM | FS    |
|--|-----|-----|-----|-----|-------|
| Same option selected                             | 44% | 47% | 47% | 81% | 75.9% |
| Option changed                                   | 9%  | 11% | 3%  | 0%  | 17.2% |
| No option workshop or relevant documents missing | 48% | 43% | 51% | 19% | 6.9%  |

Source: *Genesis Analytics, 2013*

The Wesselsbron case study in the Free State is an example of an innovative approach to settlement options, resulting in faster agreement with claimants. In this instance, a variety of different options were selected by the various claimants in the claim. A similar example of an innovative approach to settlement options is evidenced in the Ithala Game Reserve case study in KwaZulu-Natal. In this instance occupation of the game reserve could not be transferred. Instead, claimants were offered, and opted for, restoration of the title deed, without the physical occupation of the land, plus a financial award.

The following challenges to conducting the options workshop were noted by POs: claimants do not fully understand the restitution process and the options that are presented; there are frequently differing views among the claimants; POs need to have the necessary knowledge and experience to present the viable options to the claimants; there is a lack of policy guidance on the different types of compensation that can be presented, particularly for development options and no policy guidance on how to manage claimants whose options change through the process; the PO must take into account what option is most suitable for the claimants when presenting the options - as the claimants are not a homogeneous entity, this can be difficult to ascertain; the PO is unable to offer assurance about post-settlement support particularly as this is no longer housed in the CRLR; and, there are often disruptions in the workshop as individuals pursue their own agenda, after which it is difficult to restore order.

Two provinces indicated that there have been time periods where POs were instructed to promote one type of compensation over the others. Concerns were expressed that this is an unfair practice to the claimants and can result in conflict between the CRLR and the claimants. The Mamashiana Communal Property Association (CPA) case study in Limpopo is an example where directives were given to offer financial compensation to expedite the process, but the claimant community was resolute on land restoration.

#### 4.1.2.3.2. Negotiations with landowners

A core component of the negotiations with landowners is the valuation of the land. A good practice with the negotiations process is evidenced in the Baphalaborwa Ba Ga Mashishimale CPA case study. In this case the claim was separated into a four phase settlement approach. A number of landowners disputed the validity of the claim and the subsequent valuations, resulting in what would have been a lengthy negotiations process. As a result, the CRLR separated the claims such that claims where there was cooperation and agreement with the land owners could be settled first without being delayed by the claims where there was no agreement.

In many cases, the time taken between the initial valuation and the signing of the sales agreement is so long that landowners request a new valuation. This delays the process further and results in perpetual rounds of negotiations.

#### 4.1.2.4. Phase 5: Settlement

From the completion of the Section 42D report to when this is signed off by the Minister typically takes between two and four months. In 2011 the CRLR was rationalised to create better synergy with, and clearer lines of accountability to, the DRDLR. As a result of this, the Section 42D approval route form is now subject to multiple check points (the detail of this is outlined in *Section 4.1.3.4*). This results in an increased amount of time taken to get ministerial sign off, but is reported to result in better quality reports submitted and greater consistency in the Section 42Ds that are signed.

The total time from lodging a claim to when it is settled typically takes between 3 and 15 years<sup>12</sup>. Two provinces noted that these lengthy timeframes are as a result of long gaps between the lodgment of a claim and the subsequent validation in terms of Rule 3 and research in terms of Rule 5. An example of this is the Magi, Athlone case study in the Western Cape, where the time taken from acknowledging the receipt of the claim to the validation letter being sent was seven years<sup>13</sup>.

#### 4.1.2.5. Phase 6: Finalisation of settlement

Once a claim is *settled*, it still needs to be *finalised*<sup>14</sup>. According to national level interviews, a simple financial claim typically takes 6-8 weeks to finalise once settled; whereas a simple land claim typically takes three months. A complex land claim can take much longer to finalise as there are often problems with the registration of the legal entity that is to take transfer of the land, community infighting and claimant disputes, and landowners refusing to sign the sales agreement due to the lapse in time between the phases. The Ithala Game Reserve case study in KwaZulu-Natal is an example of finalisation being delayed for a significant period of time. The claim on Ithala Game Reserve was settled on 10 July 2006. However, this has still not been finalised as the finalisation is dependent on the development of a business plan via RECAP.

#### 4.1.2.6. Commitment Register

Ernst and Young undertook an assessment of the Commitment Register in 2012, finding its value to be R4.79 billion as of March 2012, 72% of which is for grant payments<sup>15</sup>. Most of the outstanding

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<sup>12</sup> In 61% of the files the Western Cape could not work this out as a result of insufficient documentation. Summing the average time taken to complete each of the key phases in the Western Cape gives an indicative 5.8 years to settle a claim.

<sup>13</sup> Similar instances of delays in this communication can be seen the matter of *Bezuidenhout and Others v Commission on Restitution of Land Rights and Others (LCC120/2006) [2008] ZALCC 13 (22 April 2008)*

<sup>14</sup> When the Section 42D is signed the claim is considered to be settled and is put on the Commitment Register. However, it is only finalised once the transfer of the land, financial payment or other redress has taken place

<sup>15</sup> Ernst and Young (2012). "Final Report on Restitution Technical Support".

commitments are older than three years, which is particularly concerning as the older projects are the most challenging to finalise. Provincial RMSO staff are responsible for clearing the Commitment Register. However it does not form part of their performance targets and thus can fall between the cracks, particularly as tracing claimants is a time consuming task. Other challenges to clearing the Commitment Register include availability of funding<sup>16</sup>, landowners wanting to renegotiate the land valuation due to the lapse in time between the phases of the restitution process, landowners dying, communities needing to establish a legal entity to take transfer of the land and community infighting. If the landowner signs the agreement but the land cannot be transferred to the claimant community for such reasons, it is reported that the land is transferred to the State, to be later transferred to the claimant community. This results in duplicate transfer costs and unnecessarily arduous requirements of the State.

#### **4.1.2.7. Suspense account**

Financial payments are transferred via an Electronic Benefit Transfer (EBT) or ABSA vouchers. The vouchers are valid for four weeks during which the claimants need to collect their money. If the funds are not collected, this amount goes onto the Suspense Account. The main reason for non-collection is the incorrect/inadequate verification of claimants. Interestingly, the suspense account peaked in the years during which the CRLR was set to close. According to national interviews, clearing the Suspense Account is faced with similar challenges as clearing the Commitment Register.

#### **4.1.2.8. Establishment of the legal entity**

As mentioned above, the establishment of the legal entity that is to take transfer of the land can significantly delay the finalisation of the claim. While not in the mandate of the CRLR, it has become the responsibility of the CRLR over time due to the delays resulting from the lack of capacity within the DRDLR to conduct this activity.

#### **4.1.2.9. Claims consolidated for settlement purposes**

In *Section 4.1.2.2* the consequences of bundling claims for research purposes was outlined. When done properly, this can result in a more expeditious process for processing claims. There are also examples of claims that have been consolidated for settlement purposes. These claims are reported to experience problems post-settlement such as claimant conflict. This is often the case when 'communities' are artificially grouped together. An example of this is the Mokotopong Case Study in Limpopo.

### **4.1.3. Efficiency according to institutional findings**

#### **4.1.3.1. Communication**

Evidence of communication with claimants and landowners (where relevant) in the claim file is illustrated in Table 7 below<sup>17</sup>. The discrepancies in communications with claimants is notable as many POs identified "walk-ins"<sup>18</sup> as one of the key factors that disrupt their work in settling claims. POs indicated that there were challenges with contacting original claimants as some had passed away and in other instances contact details were incorrect or were not provided in the first case. There are also instances where claimants are contacted telephonically. These conversations are not minuted or documented in any way. This is problematic from a legal point of view, which is often compounded when the PO on the claim changes, as all the institutional information is lost. The lack of communication with claimants was repeatedly noted as a concern in the case studies. The Bohlokong case study in the Free State is one such example. In this case, the communication with the claimant was so limited that the claimant thought that her claim had been disqualified.

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<sup>16</sup> In order to overcome the challenge of funding, the CRLR has set aside 25% of the annual budget for this purpose.

<sup>17</sup> The existence of communication on file is used as a proxy for if the communication took place. There was no way to determine if the lack of a letter was because the letter was not sent, or if this is because the letter has subsequently been lost.

<sup>18</sup> Where claimants arrive unannounced at the CRLR for updates on the progress of their claim.

**Table 7: Evidence of communication on file with claimants and landowners**

|   | EC  | KZN | WC  | LIM | FS  |
|---|-----|-----|-----|-----|-----|
| Evidence of a letter sent to the claimant acknowledging receipt of the claim                          |     |     |     |     |     |
| Yes   | 37% | 67% | 62% | 72% | 34% |
| No  | 63% | 33% | 38% | 28% | 66% |
| Evidence of a letter sent to the claimant alerting them that the claim form was found to be compliant |     |     |     |     |     |
| Yes   | 27% | 58% | 67% | 28% | 34% |
| No  | 72% | 42% | 33% | 72% | 66% |
| Evidence of the landowner being informed of the claim   |     |     |     |     |     |
| Yes   | 18% | 60% | 15% | 58% | 34% |
| No  | 19% | 36% | 65% | 39% | 66% |
| N/A   | 63% | 3%  | 21% | 3%  | 0%  |

Source: Genesis Analytics, 2013

POs and Project Coordinators noted that communication with landowners was sometimes a gap in their work as they focus mainly on claimants. Evidence of this is seen in Limpopo, where only three of the files reviewed have evidence of correspondence with landowners that financial compensation was chosen. The importance of the communication with landowners is illustrated in the matter of *Allie NO and Another versus Department of Land Affairs and Others*<sup>19</sup> where the lack of communication between the CRLR and the landowners resulted in the landowners contravening the Restitution Act when they tried to sell the land under claim.

Another aspect of communication is that between the national and provincial offices. The transfer of hardcopy files to national is normally done by courier service, which has cost implications and gives rise to the risk of misplacement and loss. POs and Project Coordinators noted that although they know when a document arrives at national, from there onwards they cannot track it and communication from national about the progress of the claim is limited.

#### 4.1.3.2. Outsourcing

Activities that historically have been outsourced include research, land valuations, land surveys, business planning services, tracing agents and senior legal councilors. The land valuation is currently the most significant service which is outsourced, and there is currently a process underway to establish the "Office of the Valuer General" which will be housed in the DRDLR and be responsible for land valuations.

Senior provincial RMSO staff noted that the advantage of outsourcing is that the service is done faster and was more easily managed. There are however a number of important constraints and negative consequences to outsourcing, including the arduous procurement channels that need to be navigated, resulting in the appointment of a service provider taking 2-3 weeks as it is done through the provincial DRDLR Shared Service Center; insufficiently skilled consultants; and poor monitoring of the outsourcing, resulting in processing delays and poor quality work.

#### 4.1.3.3. Electronic databases and file registry

To date the CRLR has implemented a range of databases. The CRLR originally used a database called Magic, whereafter the LandBase database was introduced in 2000. In 2006, a new system called UmhlabaWethu was developed and rolled out to the various provincial offices. Many of the provinces are still using both systems as LandBase is limited in what it can do – for example it cannot produce reports for management purposes while UmhlabaWethu is often inaccessible. These are also not project management tools. Currently a new project management system, *Enterprise Portfolio Management Office* (EPMO), is in the process of being designed according to each Branch's needs. This system will be a project management tool, run on project management principles.

<sup>19</sup> *Allie NO and Another v Department of Land Affairs and Others* (LCC13/00) [2002] ZALCC 50 (1 October 2002) <http://www.saflii.org/za/cases/ZALCC/2002/50.pdf>

The DRDLR has also put into place the EDMS, which is an electronic file storage system for storing scanned copies of the claim file electronically. Files were scanned onto this system by the National Rural Youth Service Corps (NARYSEC)<sup>20</sup> at a cost of R23 million. Challenges faced when working with EDMS include: EDMS is a read-only file and thus information cannot be updated or improved; it is not a file management system; EDMS is not consistent with the hardcopy files; and the scanning was poorly done where pages are misfiled and in no sequential order.

Microsoft Excel is used for both the Suspense Account and the Commitment Register. Similarly, a number of RMSO Chief Directors noted that they use Microsoft Excel for their management purposes. The use of Microsoft Excel is concerning as it is susceptible to human error, information is easily corrupted, updates are not done on a real-time basis and this is not a shared platform.

The research found that the provincial file registries do not comply with archival regulations. The DRDLR provincial SSC is now responsible for the file registry. In practice, files and documentation for claims are located haphazardly in a number of different places as many of the POs keep their project files in their offices. KwaZulu-Natal's Legal Unit raised concern around the Registry not complying with archival regulations as cases are thrown out by the courts as a result of this technicality. Our assessment suggests that this is symptomatic of the *status quo* in all RMSO offices.

#### 4.1.3.4. Human resource contingent

Each RMSO office noted concerns about the number of the staff in their offices. According to the data supplied, there were consistently more than 250 posts vacant every year, where in some years it was as high as 700 - 800. This is confirmed in Table 8 below, where staff constraints by location were captured through interviews. Together with the high rates of staff turnover that were reported, this translates into a weak institutional capacity within the CRLR.

**Table 8: Staff capacity issues raised by provincial/national staff**

|          |   |
|----------|---|
| EC       | <ul style="list-style-type: none"> <li>• An insufficient number of staff.</li> <li>• Has quality staff, however, a significant number of them cannot be promoted as they do not have post-matric qualifications, thus limiting capacity at middle management.</li> </ul>  |
| KZN      | <ul style="list-style-type: none"> <li>• The staff establishment was not filled due to budget constraints. The Legal Unit in particular felt that it was understaffed.</li> <li>• Only 50% of operations staff are adequately skilled to perform their tasks.</li> <li>• Expertise in research is a particular concern.</li> </ul>  |
| WC       | <ul style="list-style-type: none"> <li>• Lack of staff is a constraint to settling claims, and there are 20 vacant posts which cannot be filled because of a lack of budget.</li> <li>• Difficulties in finding adequately skilled POs</li> </ul>   |
| LIM      | <ul style="list-style-type: none"> <li>• Need to increase the staff compliment for post-settlement support, as Limpopo's CRLR staff are addressing this over and above their settlement commitments.</li> </ul>   |
| FS       | <ul style="list-style-type: none"> <li>• Need for more staff and corresponding additional budget.</li> </ul>  |
| National | <ul style="list-style-type: none"> <li>• High staff turnover</li> <li>• Regional Land Claims Commissioner (RLCC) lacked support as a result of the centralisation of this function.</li> <li>• Currently there are posts in the Communication Unit that are vacant, as such client liaison and parliamentary and ministerial inquiries are poorly managed.</li> <li>• High number of vacant posts for legal staff in the provinces and the unclear line of authority for legal staff. Legal staff, although adequately qualified, lack traditional legal experience.</li> <li>• Experienced, deserving personnel cannot be promoted as they do not have a post-matric qualification, which limits capacity in middle management.</li> </ul> |

Source: Genesis Analytics, 2013

The concerns raised in the interviews around high staff turnover are confirmed in a number of the case studies, including the Makwane case study in the Free State. Claimants noted that high staff turnover affected the consistency of the settlement process and delayed the process. Each time the PO

<sup>20</sup> NARYSEC, housed in the DRDLR, was established in 2011 with the aim of recruiting and developing rural youth to perform community service in their own communities.

changed, the claimants had to re-orient the new PO and had to re-submit documentation as there appeared to be no formal handover process to the new PO. Similarly, the Ebenaeser case study in the Western Cape illustrates the lack of capacity within the CRLR to deal with complicated cases where POs are required to be knowledgeable about the land use.

Interviewees noted that there was no induction process for new employees, although this is now said to be a key objective of the DRDLR such that induction and training on policies will be provided by the national Policy Unit. Other training provided is based on individuals' requests in their Performance Agreements.

In terms of staff management, project staff are monitored against their performance with regard to settling claims against their allocated targets. However, the quality of meeting these targets against set standards is not monitored and the complexities of the individual projects are not taken into account. This translates into a perverse incentive for staff to maximize the achievement of quantitative targets at the expense of quality, which is the key long-term indicator of success.

#### **4.1.3.5. Operational documentation, manuals and management systems**

The SSO is an example of good practice with regards to the CRLR's policies. This enabled the CRLR to dispense with complicated and expensive research around the historical value of the claim, thus expediting the settlement process. This is illustrated in the Magi, Athlone case study in the Western Cape, and the Brickfield, Durban North and Victoria County case study in KwaZulu-Natal.

The operational manuals and policy frameworks that guide the implementation of the restitution process are outdated, filed in no coherent order, do not reference other policies that should be read in conjunction with the manual, are not user-friendly and not easily accessible on the intranet of the DRDLR. In addition to this, the CRLR lacks Standard Operating Procedures (SOPs) and thus the policies are treated as "guidelines." A general concern noted by national staff is the lack of formalised, documented systems and procedures, and the fact that the current systems are dependent on the people driving them.

#### **4.1.3.6. Evolution of the business process**

The business process has changed over the years, the key changes and their consequences are outlined as follows:

- The centralisation of delegations: this is said to have resulted from an over-commitment of funds in the provinces by the former RLCCs. Respondents noted that this delays the settlement process, but has resulted in greater consistency in the approval of Section 42D reports
- The process of getting ministerial sign-off on a Section 42D report: this now involves 17 formal points of reference and sign-off, where at any point the Section 42D report can be sent back.
- The Quality Control Committee (QCC) chaired by the DRDLR Chief Financial Officer (CFO): this was introduced in 2011 to ensure synergy with, and improved accountability to, the DRDLR. This adds another inefficient check point for the sign-off of a Section 42D report.
- The CRLR was reintegrated into the DRDLR: this has resulted in a longer line of reporting and indirect access to the minister.
- Post-settlement support was removed from the CRLR to the DRDLR: in practice, post-settlement support is still being done by the RMSOs as staff within the DRDLR are perceived to be reluctant to take-on the Restitution Programme's post-settlement support projects as they do not have a clear understanding of restitution and they have their own projects and set targets to attend to.

#### **4.1.3.7. Monitoring and Evaluation of Restitution Programme**

The Programme Performance Monitoring (PPM) Directorate is for monitoring the Restitution Programme's performance against two indicators as outlined in the Commission's Annual Performance Plans (APPs):

- The number of claims settled;
- The number of claims finalised.<sup>21</sup>

The PPM Directorate receives monthly updates from the Information Unit of the CRLR on its performance in terms of these indicators, whereupon the PPM Directorate verifies the figures against copies of the Section 42D reports submitted and Basic Accounting System (BAS) expenditure information. There is no monitoring of the process of settling a claim, no intermediate outputs are monitored, and the qualitative aspects of settled claims are not measured.

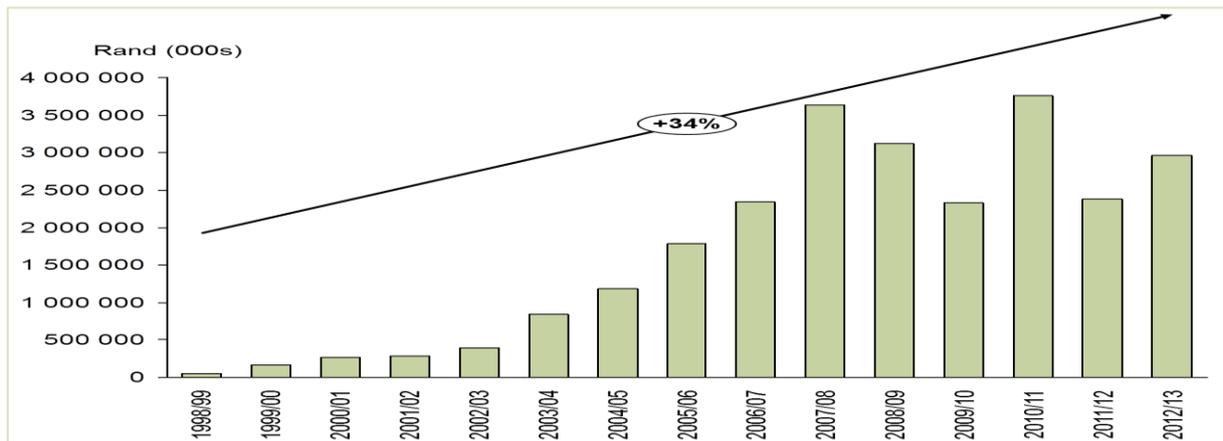
#### 4.1.3.8. Court referrals

It was reported that referring claims to the LCC was a straight-forward and efficient process. A common concern was the quality of information presented to the LCC, whereby it is reported to be of a poor quality and missing documents. National level interviews also noted that there is a divergence in the approaches taken in settling a claim between the LCC and the CRLR. The LCC takes only the direct claimant into account, whereas the CRLR actively looks for other claimants who might be related to that claim to broaden the benefits of the restitution process.

#### 4.1.3.9. Cost efficiency

Based on National Treasury estimates for the period under review (1998/99-2012/13), approximately R25.51 billion has been spent on the Restitution Programme. The amount spent per year has varied over the years, and has grown with a compounded annual nominal growth rate of 34%, as show in Figure 3 below.

**Figure 3: Actual expenditure from 31 March 1999 to 31 March 2013 on the Restitution Programme**



Source: Genesis Analytics, 2013, adapted from information from Treasury's Estimates of National Expenditure (1998-2013)

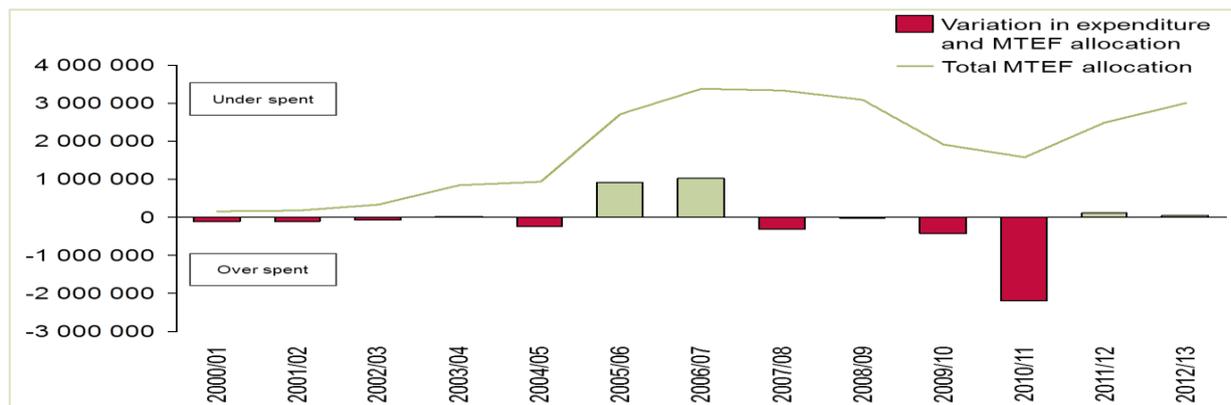
The increased expenditure in 2007/08 resulted from the CRLR's attempts to finalise all claims by March 2008 as per the President's directive. The spike in 2010/11 resulted from a once-off R2 billion reprioritisation made available to pay for urgent court orders and to finalise critical outstanding claims<sup>22</sup>. Without this reprioritisation, the expenditure pattern would have had a clearer peak in 2007/08, when the Restitution Programme should have ended, with a subsequent decline in expenditure until 2012/13 when there was significant impetus to speed up the process of settling outstanding claims. When this nominal expenditure is plotted against real expenditure, it appears that Restitution's expenditure is in line with inflation.

<sup>21</sup> An additional indicator has just been introduced around researching the of the reopening of the lodgment process

<sup>22</sup> This LCC ordered these critical payments to be made. An example of this is the matter of Quinella Trading (Pty) Ltd and Others v Minister of Rural Development and Land Reform and Others (LCC 03/2010) [2010] ZALCC 14; 2010 (4) SA 308 (LCC); [2010] 4 All SA 331 (LCC) (18 May 2010) where it was found that "It should not be necessary to force the State through a court order to comply with its contractual obligations"

The amount that the Restitution Programme receives from the MTEF is not based on the targeted number of claims to be finalised or settled in a given year, rather this amount is currently centered around a R3 billion baseline that is requested per annum. Figure 4 below illustrates the variance in actual expenditure to MTEF allocation at the beginning of the financial year.

**Figure 4: Variation in actual expenditure and MTEF allocation at the beginning of the financial year<sup>23</sup>**

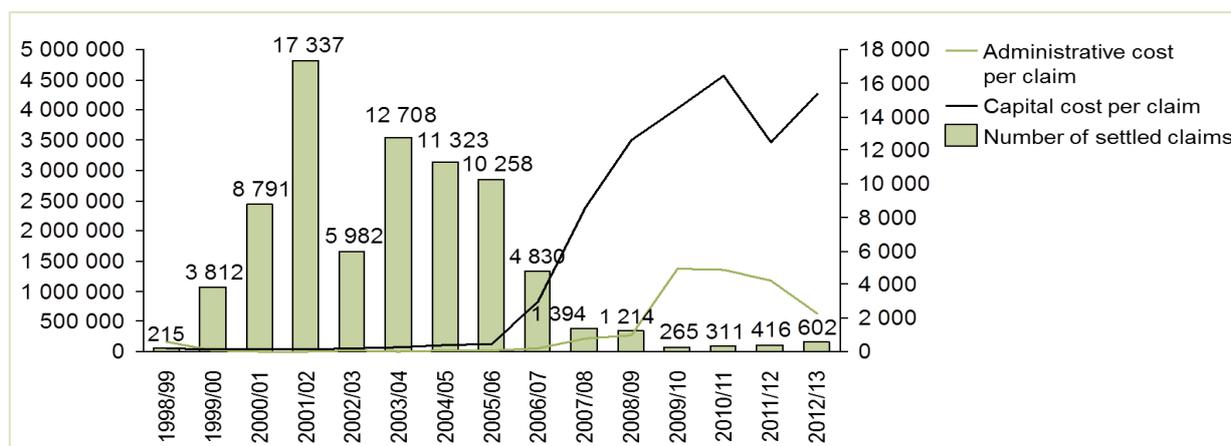


Source: Genesis Analytics, 2013, adapted from information from Treasury's Estimates of National Expenditure (1998-2013)

Over the period 2000/01 to 2013/13, the Restitution Programme overspent its allocated budget in eight years and underspent it in five years. In the last two years there has been an improved alignment between expenditure and the MTEF allocation, whereby Restitution spent 99% of its budget in the last financial year.

A key indicator for cost efficiency is the cost per claim, both in terms of capital costs and administrative costs incurred when settling a claim<sup>24</sup>. As is illustrated in Figure 5 below, the capital cost per claim has been increasing since 1998, with a sharp inflection in 2005/06 resulting from the attempt to finalise all claims by then. The lower capital cost per claim in the early years is indicative of the easy, financial compensation claims that dominated this period. The increased capital cost associated with the later years, is as a result of the more prevalent complex, land compensation claims that were being settled from this period onwards. Administrative costs per claim have reduced since 2010, partially as a result of the Post-Settlement Units (PSUs) moving to other branches in the DRDLR.

**Figure 5: Cost per claim from 31 March 1999 to 31 March 2013**



Source: Genesis Analytics, 2013, adapted from information from Treasury's Estimates of National Expenditure (1998-2013) and the CRLR's Commitment Register as at 31 March 2013

<sup>23</sup> Allocations for 1998/1999 and 1999/2000 are not available as a result of the programme's structure into the sub-programmes: Land Reform and the Implementation of Land Reform.

<sup>24</sup> Capital cost is calculated using the sum of land cost and financial compensation as indicated in the Commitment Register; administrative costs are calculated using the sum of the national and provincial sub-programmes as per the ENEs.

When capital costs<sup>25</sup> are broken down by province, it is evident that provinces which typically award land compensation (Limpopo and Mpumalanga) have the highest cost per claim, whereas those provinces that typically pay financial compensation (Gauteng and Western Cape) have the lowest cost per claim.

## 4.2. EFFECTIVENESS

The assessment of *effectiveness* covered three indicators; namely, the extent to which the Restitution Programme is achieving its targets; the claimants' experiences of the restitution process; and the barriers staff face in implementing the Restitution Programme.

### 4.2.1. Achievement of set outputs

The strategic objective of the Restitution Programme as highlighted in the CRLR Annual Report of 2012/13 is to provide the "*restitution of land rights or awards of alternative forms of equitable redress to claimants finalised within MTEF baseline allocation.*" Within this, the programme sets annual targets for claims to be settled, and recently has been setting targets for the number of claims to be finalised.

Measuring the performance of the Restitution Programme in terms of the number of claims settled, finalised and outstanding is met with the following inconsistencies:

- From 1994 to 2006, a settled claim was defined as the restoration of a right in land. However, from 2006 the CRLR moved away from this rights-based approach to counting the number of claim forms lodged.
- As of 31 December 2006, the CRLR was given a directive to stop reporting on all urban claims that were settled<sup>26</sup>.
- In 2006, the CRLR began settling claims in phases. From 2006 to 2009 these claims were counted as settled once one of the phases of the project was settled, however, from 2009 the claim was only considered to be settled once the settlement of *all* the phases were complete.

Similarly, analysing claims on a year by year basis is met with inconsistencies as claims are not static for the reasons outlined below:

- Post-settlement disputes stemming from the consolidation of claims resulted in instances of claims which were settled from 2006-2009 being withdrawn and replaced with new Section 42D approvals in 2012/13.
- There are instances of projects being moved from Mpumalanga to Limpopo (or vice versa) and from North West to Gauteng (or vice versa) due to provincial boundary demarcations.
- In some instances the statistical information for claims settled were amended after the initial approval date.

The total number of lodged claims quoted publicly is 79 696<sup>27</sup>. This is an amalgamated figure, consisting of both claim forms and rights restored, thus inaccurately depicting the exact number of claims lodged. According to the Commitment Register, as at 31 March 2013, 79 582<sup>28</sup> claims were settled. This again is an amalgamated figure, and thus is not directly comparable to the above figure. This figure differs from that which is publicly quoted as it includes urban claims that were settled post 2006, which are no longer publicly reported. There is currently a process under way to determine the exact number of outstanding claims in terms of claim forms lodged which has been indicated to the Genesis team to be approximately 8 733. Similarly, there is a process underway to determine the number of claims settled in terms of claim forms lodged. This is currently estimated to be in the region of 60 000.

For the reasons outlined above, the analysis of the number of settled claims per year versus that which was targeted is not without inaccuracies. Figure 6 indicatively shows the achievement of targets using the figures in the Commitment Register and targets that are quoted in the CRLR's strategic plans.

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<sup>25</sup> The total for settled claims includes the dismissed claims as well as adjustments due to ongoing verification

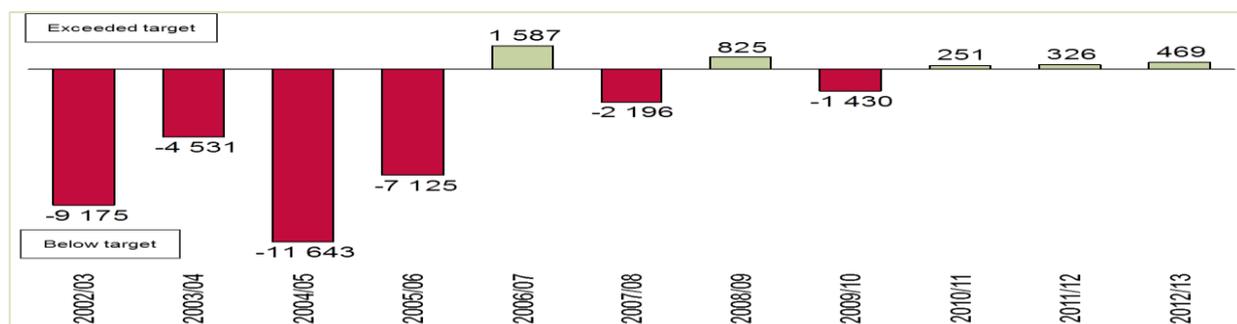
<sup>26</sup> Commission on Restitution of Land Rights (2007) "Annual Report 2006 – 2007" p. 33

<sup>27</sup> DRDLR (2006). "Annual Report: 1 April 2005 - 31 March 2006".

<sup>28</sup> CRLR's Commitment Register, as at March 2013.

Having over-estimated the number of claims to be settled in the earlier years, the CRLR has subsequently exceeded their targets for 2010/11 to 2012/13.

**Figure 6: Variation in the number of claims settled and that which was targeted<sup>2930</sup>**



Source: Genesis Analytics, 2013 adapted from information from the CRLR’s strategic plans (2002-2013) and the CRLR’s Commitment Register as at 31 March 2013

As of 31 March 2013 there was R4.97 billion outstanding on the Commitment Register, amounting to approximately 18% of the total commitment from 1995. Performance in terms of finalising these outstanding commitments is shown in Table 9 below. Actual performance of finalised claims is irregularly reported and the targets are less frequently reported.

**Table 9: Number of claims finalised, 31 March 2009- 31 March 2013<sup>31</sup>**

|                      | 2008/09 | 2009/10 | 2010/11 | 2011/12 | 2012/13 |
|----------------------|---------|---------|---------|---------|---------|
| No. claims finalised | 653     | 131     | 60      | 209     | 153     |

Source: Genesis Analytics, 2013 adapted from information from the CRLR’s annual reports (2008-2013)

#### 4.2.2. Barriers to implementation of the Restitution Programme

All RMSO staff were asked what they consider to be the key barriers to the effective implementation of the Restitution Programme. The prominent themes that emerged were:

- **Insufficient collaboration between the different stakeholders:** there is little collaboration between the CRLR, the Deeds Office, and other relevant government departments. Although there are some Memorandums of Understanding (MOUs) in place, these need to be revised to align with the current preferred implementation model. An example of where close collaboration between stakeholders can expedite the settlement process is the Steuflhof Group Claim case study. In this instance, the CRLR in the Western Cape and the City of Cape Town worked in close partnership, resulting in the development of low-cost housing for 36 claimants in less than a year.
- **Inadequate filing and management information systems:** there is no systemic means of enforcing a standardised approach to restitution, and, related to this, there are no “checks and balances” to monitor adherence in the existing systems. This means that documents are missing and key steps can be bypassed without any consequences. This is particularly problematic when POs leave and the institutional memory is lost, as the new POs cannot get the relevant information from the files
- **Non Restitution process related requirements:** requirements external to the CRLR are reported to significantly disrupt work in settling claims, including ministerial requests and departmental campaigns, meetings, and strategic sessions. RMSO staff are consistently asked to manage conflicts and facilitate community meetings in settled and finalised projects, activities which should be beyond their mandate. Two RMSO Chief Directors stated that instead of provinces devoting their time to the settlement of claims, RMSO staff spend 80% of their time dealing with the above mentioned non-restitution related matters. Claimant “walk-ins” were also noted as being a key source of disruption and distraction.

<sup>29</sup> Targets could only be found in the annual reports from 2002 onwards.

<sup>30</sup> From 2008/09 the Commission began reporting the number of dismissed claims; thus figures for 2008/09 onwards are exclusive of the dismissed claims.

<sup>31</sup> DRDLR (2013). “Annual Performance Plan: 2013-2014”

- **The flawed legal and institutional arrangements that are frequently put in place to manage the post-transfer settlement process;** the simplistic application of standardised 'pro forma' (CPA and Trust) legal arrangements without taking account of contextual differences rapidly gives rise to confusion and infighting which is typical of many, if not most, community claims.
- **Poor research and verification:** This results in project approvals being sent back at various stages of the business process, resulting in unnecessary, time-consuming and expensive court referrals and delays in having to redo research and claimant verification.

When asked which aspect of restitution is the most challenging, all five of the RMSO Chief Directors highlighted research and verification as being the most challenging aspect of the restitution process. This was corroborated in the national interviews, where five out of the six respondents to this question noted this as being the most difficult aspect of restitution.

#### 4.3. SUSTAINABILITY

The assessment of *sustainability* explored the extent to which the programme's processes enable the sustainability of the compensation awarded and received.

##### 4.3.1. Post-settlement support

The National Land Acquisition Committee (NLAC) has been established with the objective to facilitate the handover of a settled claim to ensure that post-settlement support is made available to the claimants in terms of the implementation of the 'Virtuous Cycle'<sup>32</sup>. This is considered to be too late in the restitution process to be effective as the new team in DRDLR does not have an adequate knowledge of the process followed, the claimants, or the settlement award selected and the reasons for this. It was reported by POs and senior RMSO management that the CRLR becomes the face of the claim throughout the settlement process and thus claimants are reluctant to place their trust in a new team, preferring to refer back to the CRLR. This results in the CRLR continuing their involvement in post-settlement activities.

The CRLR's involvement in claims post-settlement is evidenced in the Vusi Oakford case study in KwaZulu-Natal. In this case there was a community dispute regarding the re-sale of the land. The community was receiving rental income from a school building located on their land. However, when the community sold the land there was a dispute between the community, the new landowner and the Department of Education around the rental income. The CRLR was subsequently called in to handle the matter. This is beyond the mandate of the CRLR.

## 5. ANALYSIS AS PER THE TOR QUESTIONS

A number of key themes emerged from the evaluation, which together inform its conclusions and recommendations. The following section analyses these themes with reference to the evaluation questions outlined in the TOR.

Presenting the analysis of our findings according to these key questions has its own challenges. In analysing the findings of the file research according to these questions, it is important to recall the incompleteness of the quantitative data on which our analysis is founded, the diversity of circumstances and operating experiences across geographies, and the deeply complex nature of the processes that underpin 'restitution'. A high degree of aggregation was therefore necessary, particularly as the weak file data necessitated complementary reliance on the findings of key informant interviews in the targeted provinces and at the national level.

### 5.1. ARE THE SET OUTPUTS OF THE RESTITUTION PROGRAMME BEING ACHIEVED?

As discussed in *Section 4.2.1*, the objective of the Restitution Programme is to provide the "*restitution of land rights or awards of alternative forms of equitable redress to claimants finalised within MTEF*"

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<sup>32</sup> Mala Mala will be the first case to undergo this formal transition to the "Virtuous Cycle".

*baseline allocation*<sup>33</sup>. Within this objective, the CRLR sets annual targets of the number of claims to be settled and, recently, the number of claims to be finalised. *Section 4.2.1* illustrated the various changes in the way that a 'settled claim' was counted and how these figures can change *ex post* as the underlying definitions change. These variations in definition over time have resulted in wide variations in the quantification of the number of claims that have been settled under the programme. A rigorous assessment of the programme's performance in terms of meeting its targets is thus not feasible as there is no basis for consistent comparison of uniform indicators.

As outlined in *Section 4.2.1*, the CRLR over-estimated the number of claims that would be settled in the earlier years (up to 2005), whereafter there was a substantial improvement in the achievement of targets - or the more realistic setting of targets - driven by high level directives. As of 31 March 2013, the Commitment Register indicated that 79 582<sup>34</sup> claims had been settled out of the publicly quoted figure of 79 696 claims which were lodged. As noted, these figures have little meaning as they represent an amalgam of definitions, including 'claim forms' and 'rights restored', each of which result in different interpretations of a 'restituted claim'.

A more accurate indicator of the Restitution Programme's achievement in terms of claims settled derives from the current exercise the CRLR is undertaking to translate all its claimant records into the number of claim forms outstanding and settled to date. This indicates that the CRLR has settled approximately 85% of the total number of claims lodged<sup>35</sup>. Before this process was undertaken, setting restitution targets without knowing the exact number of claims outstanding was ill-informed. These targets were set based on political considerations and timeframes proclaimed for the finalisation of the work of the CRLR and the LCC. It is now acknowledged that credible targets need to be based on the reality the CRLR's ability to settle the claims and according to a standard definition of a 'settled claim'. This has since been agreed as referring to 'claim forms settled'.

As discussed in *Section 4.2.1*, a further complication in assessing the achievement of the programme's targets arises from the fact that as of 31 March 2013 there was R4.97 billion outstanding on the Commitment Register, amounting to 18% of the total restitution commitment since 1995; and a total of R90.9 million on the Suspense Account. These amounts arise as a result of settled claims not having been finalised for a variety of reasons ranging from flawed and/or disputed claimant verification to difficulties in tracing claimants post-settlement. Though the claims relating to these amounts are currently considered to be settled, these do not relate to a formal "restitution of land rights or award of alternative forms of equitable redress." This suggests that measuring 'claims settled' is an inaccurate indicator for whether the Programme is meeting its strategic objective. A more accurate measure would be the number of finalised claims – i.e. claims which have been settled and closed financially.

A further concern in measuring the Programme's performance relates to the CRLR's exclusive reliance on the quantitative indicator of the *number* of claims settled. There are no qualitative indicators measured and there is no focus on measuring the veracity or integrity of the process. The large number of claims that are settled but later refuted (or are refutable – an important consideration, given the pending opening of the next restitution window) because of poor research or incomplete documentation, or claims that need to be re-processed because of claimant conflict, reflect serious weaknesses in the Programme's ability to fulfill its purpose. They also highlight the need for the CRLR to include in its impact and performance measurement arrangements qualitative measures, targets and indicators which relate to the definitive and inclusive restoration of legal ownership rights.

Compounding this, there are currently no intermediate outputs measured for the Programme, with the result that the process is not adequately monitored in terms of its constituent steps. It therefore becomes difficult to identify and isolate problem areas timeously. Moreover, by not monitoring intermediate outputs, the CRLR has a limited indication of the number of claims at each point in the

<sup>33</sup> DRDLR (2013) "CRLR Annual report 2012-2013"

<sup>34</sup> The CRLR's Commitment Register, as at 31 March 2013, states that there have been 79, 582 claims settled. However, according to the CRLR this figure is approximately 76 000. The discrepancies may be as a result of the various definitional and related counting inconsistencies and the fact that the CRLR no longer reports on urban claims settled post 2006.

<sup>35</sup> 8733 are outstanding out of a total of 60,000 lodged.

process, which makes for difficulties in planning, budgeting and resource allocation. Monitoring intermediate outputs will also ensure accountability in relation to the quality of these deliverables; thus forming the basis for quality settlements which are less likely to be refuted, resulting in lower costs and delays, less scope for claimant conflict, and better prospects for the restitution award to lay the foundation for productive investment, employment creation and growth.

To conclude this analysis, the current measure used by the CRLR to assess the achievement of its restitution objective reflects a narrow and incomplete interpretation of the restitution process and its purpose. It significantly exaggerates the numbers of claims that have been finalised, and takes no account of a variety of qualitative indicators which determine the legal integrity and organisational coherence of each claim. This one-dimensional measure of the fulfillment of the Programme's objectives does more than misrepresent the Programme's restitution achievements. It misdirects the efforts and resources of the CRLR and its staff, it compromises the quality and content of the settlement process, and it undermines the foundation and prospects for long-term stability and development of claimants and or claimant communities. Therefore, while the Restitution Programme can be considered to have been successful in settling 85% of restitution claims, it has fallen well short of this figure in bringing these settlements to financial closure, and in fulfilling the legal-process requirements of the Programme. These shortcomings significantly undermine the fulfillment of the legal and rights-based purpose of the Restitution Programme, and compromise its ability to lay the foundation for future investment and development.

## 5.2. IS THE RESTITUTION PROGRAMME IMPLEMENTED EFFICIENTLY AND EFFECTIVELY?

### 5.2.1. Efficiency

Based on the findings outlined in previous sections, the Restitution Programme is deemed not to be an efficiently implemented programme. This is evidenced by the inordinate amount of time (2 – 15 years) taken to settle claims, and relates to problems that the research highlighted in respect of each phase of the restitution business process. In unpacking these problems and their consequences for the efficiency of the system, it is important again to acknowledge the hugely complicated nature of the restitution 'project cycle' and the reality of incomplete information that staff must deal with. This is compounded by ill-informed, disorganised and frequently opportunistic participants (claimants and land owners), and regular interference by a variety of authorities at various stages of the settlement process. The efficiency constraints summarised below are interlinked and mutually reinforcing, and would require a coordinated approach to address effectively.

At the heart of the Programme's inefficiencies is the **absence of adequate management information systems (MIS) and clearly defined, standardised procedures**. There is a lack of standardised operating procedures (SOPs) that clearly and comprehensively describe the legal and administrative processes that underpin restitution. This has resulted in the evolution over time, and across different geographies, of differing approaches to managing and settling claims. These divergences have become entrenched and have resulted in the proliferation of practices and approaches which together have diluted the overall process, thus deviating from and compromising the legal basis of the restitution process itself.

Moreover, **as the CRLR has evolved over time, various processes and structures have, understandably and necessarily, been implemented in order to improve the pre-existing process**. While the logic of each of these revisions may have been sound in its historical context, they have lacked a systematic and coordinated framework and the sum of these revisions has resulted in a highly disjointed and fragmented framework of operating procedures without any documentary base. This has resulted in major cost and time inefficiencies which manifest themselves at the key decision points, resulting in extensive 'send-backs', duplication of effort, backlogs, delays and court referrals.

Linked to, and compounding this, is the **absence of a single, integrated MIS** with which to manage the restitution process. The process is currently supported by a paper-based system which, beyond the problems of file and documentation management that this results in, does not allow for effective

management, decision-making and quality control. The inefficiencies that result from this include the following:

- **There is no means of tracking of projects through the restitution process:** Claims can lie dormant for extended periods of time and their quality and the timeliness of the different steps in the process cannot be effectively monitored. This results in high costs with respect to time and resources associated with frequent send-backs and updating claimants on the lack of progress. Moreover, the CRLR is unable to efficiently plan and budget for the finalisation of claims as it does not easily know the number (and value) of claims at the various points in the process. Problems and blockages in the process cannot be identified timeously, and key steps in the process are easily by-passed, resulting in poor quality subsequent outputs which require resource-intensive amendments or which simply fall below the legal standard required.
- **Timeous monitoring of the quality of restitution outputs is difficult:** The quality of intermediate outputs is not adequately monitored until the Section 42D is submitted, where after any required amendments are resource-intensive owing to the progression of the process. Projects which are poorly documented leave the CRLR vulnerable to legal challenge, and resource-intensive dispute resolution. The current system does not adequately capture all the documentation required nor the institutional memory associated with a claim's progression, resulting in extensive disruption, cost and duplication of work when - as frequently happens - the PO on the claim changes or when the claim is questioned.
- **The system cannot identify claims with similar characteristics or capture and disseminate key learnings:** This undermines the scope for cross-learning in the settlement of similar claims, resulting in unnecessary duplication of effort and high opportunity costs. As a process, restitution becomes rigid and fragmented and does not lend itself to controlled innovation or improvement.
- **Monitoring and evaluation of key indicators is compromised.** The scale and complexity of the national system means that, without an electronic, web-based MIS it is extremely difficult and costly to monitor operational progress at both claim and Programme level. This in itself is a major contributing factor to the poor quality of restitution's settlement outcomes and the cost and time implications that derive from this.
- **The system provides no basis for performance monitoring and management of staff.** The paper-based MIS system poorly aligns authority and responsibility at different points in the decision chain. Poor quality, delays or incomplete procedures are difficult to track and allocate responsibility for. This not only compromises the efficiency of the system but undermines any objective basis for performance management of staff at all levels – a critical long-term driver of operational efficiency.

**Weak human resources and management systems** are also a major cause of inefficiency. The causes are multifarious and interlinked, but relate to skill shortages across the board, inappropriate and inexperienced appointments, the absence of systematic training and induction arrangements, high rates of staff turnover across the board, the absence of effective performance management systems and a weak MIS. Limited and inappropriate M&E indicators limit the measurement of restitution deliverables to simplistic quantitative indicators ('numbers of claims settled') which in turn drives inappropriate behavior by Programme staff who have little regard for considerations of quality and timeliness.

Fundamentally, the **ill-defined nature of what the restitution process entails, at what points the process begins and ends, and the precise role of the Commission in this** are major sources of inefficiency. The lack of adequate operational autonomy of the CRLR from the DRDLR means that it is dependent on the Department for the appointment and performance management of staff and for its procurement needs. The inadequate autonomy of the CRLR around its role and purpose means that its staff are subject to frequent, debilitating interference around aspects of different claims, and settlement and post-settlement processes which lie beyond the CRLR's mandate. Related to this, the imposition of changes to the restitution business process by the Department and the extensive participation of CRLR's staff in a variety of departmental review and change processes is a major source of distraction for CRLR's staff, often with little relevance to its core mandate or functions.

**Insufficient and ill-defined arrangements for collaboration between the agencies responsible for restitution**, particularly relevant government departments - including other branches within the DRDLR such as the Surveyor General and the Deeds Office - results in major coordination problems and delays, thus negatively impacting the efficiency of the Programme.

### 5.2.2. Effectiveness

As described in *Section 4.2.1*, the Restitution Programme has exceeded its targets of settling claims in the last three years. However, this does not reflect a rigorous measure of the effectiveness of the Programme as it does not take into account the inconsistencies in the counting of claims; the differences between what is termed a finalised versus a settled claim; and the quality of these outputs. As has been detailed earlier, the risks and consequences of poorly researched and finalised claims are considerable and typically manifest themselves in dysfunction and conflict within the recipient communities, with severe consequences for the prospects of stability, investment and future growth.

An additional measure of the effectiveness of the Programme is the degree to which it contributes to achieving its stated result – in this case sustainable, equitable redress. *Section 4.3.1* illustrates the inadequate hand-over of claims from the CRLR to post-settlement support whereby the transfer to post-settlement agents is uncoordinated, takes place too late in the process, and is inadequate, thus disrupting productive activity and undermining long-term prospects. There is insufficient alignment from the DRDLR to support these claims, and the other relevant agencies, which are essential for a smooth transition in ownership. This undermines the sustainability of land which is transferred.

Whilst there is some degree of development support for land restoration, claimants who are paid financial compensation receive no such support in terms financial education and support for decision-making around different investment and consumption options,. Thus the sustainable and responsible use of this compensation by recipients is not ensured and frequently results in the capital asset of financial compensation being badly spent or wasted entirely.

In summary, for the last three years the Programme appears to have been effective when measured against the quantitative indicator of the number of claims settled. However, when more qualitative indicators are taken into account, the Programme's effectiveness is severely compromised and does not sufficiently contribute to the sustainability and development impact of the redress which lies at the heart of the restitution process. Beyond the well documented tendency of many settled claims to succumb to internal conflict as a result of these weaknesses, many of these claims will be exposed to counter claims once the next phase of restitution gets under way.

Against all these measures, the current Restitution Programme can therefore not be deemed to be efficient or effective. Based on the results of the evaluation, the programme can also not be judged to have laid or be laying a sound basis for poverty reduction and development.

### 5.3. WHAT HAS MADE THIS INTERVENTION DIFFICULT TO IMPLEMENT AND ARE THERE EXAMPLES OF GOOD PRACTICE THAT WE CAN LEARN FROM?

Since the Programme's inception, there have been a number of barriers to its effective implementation and conversely, a number of best practices that should inform the future implementation of the programme. The following section outlines the factors which have inhibited the programme's effective implementation and some of its best practices.

The Restitution Programme has been one of the most successful of the land reform programmes, resulting in the greatest transfers of land. While this study highlighted many examples of factors which impede the effective and efficient implementation of the Restitution Programme, it also identified examples of good practice which have enhanced the implementation of the programme.

**The SSO is one such best practice.** The case studies illustrated that having a standardised settlement value greatly assisted the POs in the negotiations stage and expedited the settlement process. This also enables the CRLR to be more cost efficient as valuations are not necessary if the claimant accepts the SSO.

**Effective collaboration between stakeholders has been shown to enhance the quality and sustainability of the restitution process.** This is particularly the case with sector specific or commodity specific claims where MOUs or partnerships with relevant government departments and private sector organisations are established. These set a basis for the negotiations process and ensure that both the CRLR and the landowner's expectations are aligned. Similarly, aligning local level interests and authorities through their inclusion in the process from an early stage reduces the time taken in the negotiations stage and improves the implementation of development assistance where this is selected as a settlement option. The use of multi-stakeholder Steering Committees - with representatives from the CRLR, landowners and claimants - has also proven to be an effective means for communicating with all relevant parties and as a forum for conflict resolution. Similarly, collaborating with appropriately qualified 3<sup>rd</sup> party experts – be it in research or legal representation - who ensure the quality and sustainability of the claim has been proven to be a best practice.

**Bundling of claims for research purposes** has been an effective and time-efficient way of processing multiple claims. This has worked best when the claimed land is a coherent and contiguous property. Furthermore, the strength, and validity, of batched claims is dependent on fundamental administrative processes being adhered to and meticulous record keeping of these processes and their rationale. Batching of claims should only ever be done for research purposes, and should never be consolidated for settlement purposes.

**Phasing the settlement of claims** has been shown to be an effective way of settling complex claims. In instances where there are distinct parties delaying the process, separating the claim such that the “easier to settle” parties are processed first is highly effective. For example, where a subset of the claimants cannot be easily verified, separating these claimants from those who can be easily verified is effective in expediting the process. This is also applicable in the negotiations stage where a subset of the landowners may be unwilling to settle.

**Innovative approaches to packaging redress options in relation to the feasibility of the land** has been shown to be more successful than a “one-size-fits-all” approach. For example, where the claimed land cannot be restored to the claimants, offering the restoration of ownership without the right to occupation has been shown to be a success. Another innovative approach to packaging redress options includes offering a combination of different settlement options to (different) claimants within a single claim. This enhances the sustainability of the settlement and reduces the time taken in the negotiations stage as claimants are able to select the settlement option that is most appropriate to them.

There are also a number of factors that have restricted the effective implementation of the Restitution Programme. **The CRLR has always operated within strict timeframes**, following from political pressures to settle all the lodged claims by a set year. These time pressures have resulted in the CRLR rushing to settle claims; conducting research in a hurried, incomplete manner; artificially consolidating claims to expedite the settlement process and, ultimately, conducting incomplete, legally unsound settlements. These difficulties are compounded by the absence of standardised procedures, systematically enforced and linked to a uniform management information system. Together, these factors present a significant barrier to the successful settlement of claims as these are often of a poor quality and are open to internal conflict and external challenge and refutation which impacts negatively on the sustainability of the settlement.

**The roles and responsibilities of the CRLR and the DRDLR are unclear.** Pre-1998, the CRLR was independent. However, this changed in 1998/99 when it was incorporated into the former DLA. The motivations for incorporating the CRLR into the Department and the underpinning logic was sound to provide for greater coordination and collaboration between branches to enable the effective implementation of the comprehensive rural development programme. However, this has resulted to some extent in duplication of post-settlement support in practice. It is a general perception that the DRDLR inadequately takes over the post-settlement aspects of the Restitution Programme's projects. As a result of this and to provide for continuity, the CRLR staff undertake these activities themselves, despite the fact that this is outside the mandate of the CRLR. This, in addition to the departmental

campaigns, meetings, strategic sessions and ministerial requests that have resulted from the CRLR's inclusion into the DRDLR, has resulted in the RMSOs reportedly spending up to 80% of their time on non-restitution related matters.

**The CRLR views the Restitution Programme as a social programme.** The CRLR's approach differs significantly to that of the LCC. The LCC deals only with the claimant as per the claim form, whilst the CRLR actively searches for additional claimants who are linked to the land under claim so as to extend the benefits of restitution. This results in additional work for the CRLR and impedes the process of settling the existing lodged claims. Linked to this, the the CRLR allows claimants to change their selected settlement option at any point in the process, resulting in arduous delays and increased costs.

**There is a lack of skilled and experienced staff, specifically research staff.** This results in weak research reports that continually need to be amended or research that is weak but still signed off. The former results in arduous additional demands on stretched staff, time delays and high costs as cases are referred to the LCC. The latter problem results in the conclusion of legally unsound settlements, claims that are open to refutation and resource-intensive dispute resolution processes. The poor state of the CRLR's archival record suggests that a large number of settled claims belong in this category. If, as may well be a feature of the next phase of the restitution process, settled cases are challenged as part of new claims by disaffected or excluded communities, the CRLR will have difficulty in defending the legality of many such settlements. Improved research will mean less re-doing of work already done, greater legitimacy of claims settled, and fewer disputes between stakeholders. Weaknesses in the CRLR's research capacity are exacerbated by the high staff turnover, absence of quality training and insufficient performance management systems, the features of which have been discussed in previous sections<sup>36</sup>.

## 6. RECOMMENDATIONS

The final two evaluation questions in the TOR relate to how the programme can be implemented more cost-efficiently and how it can be improved for future phases of restitution. These questions need to be considered together as improvements for the next phase of restitution have direct implications for cost savings and vice versa. In formulating these recommendations, the emphasis has been on addressing a limited number of crucial inadequacies, bearing in mind the extremely demanding context, the limited management resources and demanding time-scale facing the CRLR.

- **The focus and function of the Commission and the Restitution Programme must be more clearly defined and better communicated** – internally, politically across different departments that comprise the rural development cluster, and to the public at large. The CRLR's role must be clarified to be concerned exclusively with administering the legal process associated with the lodgment, review and settlement of restitution claims. The process thus defined must in all cases adhere to a clearly defined logical sequence, and must have a precise beginning and end point (the formal lodgment of a claim and its final settlement). The clear definition and communication of the CRLR's core mandate and function will help to screen its staff from involvement in activities beyond the mandate of the CRLR.
- **The Restitution Programme's business and decision-making process must be reviewed, finalised and documented in terms of a strict rules-based approach.** This should include a careful review of best practice, and must be documented in a detailed SOPs Manual covering every aspect of the agreed business process. It should be widely distributed and training provided to all relevant staff. Derogations from the SOPs Manual should require the formal authorisation of the CLCC.
- **The different management information systems currently in operation or development should be rationalised into a single, web-based management information system.** This should provide for the electronic management and oversight of every step in the business process, including documentation

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<sup>36</sup> Whereas the CRLR needs to give urgent attention to improving the quality of its research capacity, it is infeasible for it ever to acquire the kinds of expert research capacity that is needed to adequately research and verify many of the claims it receives. Such capacity only exists outside of the Commission – in universities, specialist research agencies and expert individuals. Arrangements, including the quality control of outsourced experts, need to be put in place to ensure that this expertise can be efficiently and effectively accessed and contracted as needed.

and authorisations. It should provide for a clear location of responsibility at every step in the process. This will enable the claim settlement process to be more structured, systematic and objective. The MIS will greatly facilitate monitoring and evaluation, the collation and communication of best practice and learning, and performance management of the CRLR's staff.

- **RMSO managers should be given responsibility for all non-capital aspects of provincial programmes.** This should include authority (and budgets) for filling vacant posts and procuring services relevant to the restitution process. Budget planning and management training must be provided including into the requirements of the PFMA. The Department's SSCs may continue to be used to support the CRLR's procurement functions, but authority should rest with the delegated CRLR official.
- **Performance management systems should be put in place which manage staff according to specific, measurable indicators** which should at least include: quality of research; adherence to agreed procedures and systems; the integrity of the claims process and quality of the settlement agreement; and the rate of settled claims. Linked to the MIS, this will enhance the objectivity and integrity of the system, facilitate a focused project management approach to the settlement process against consistent targets and indicators, and provide for greater accuracy and rigour in the management of claims. Roles and responsibilities of staff at national and provincial level need to be clearly defined and delineated, and indicators of performance developed for each.
- **A competent human resource (HR) management capacity should be established within the CRLR.** This should be independent of the DRDLR and be dedicated to serving the needs of the CRLR in respect of its performance management, training and staff development functions. Its focus and operations should be driven by the long-term targets, indicators and circumstances of the Restitution Programme. A priority should be the formalization of effective, PFMA-compliant arrangements for outsourcing critical research functions (which can never and should not be an internal function of the CRLR), and for ensuring adequate quality control and performance management measures.
- The current **M&E system should be broadened to measure intermediate outputs of the settlement process as well as qualitative aspects** of both the settlement process (e.g. its timeliness) and its outcome (e.g. the completeness, integrity and stability of a settled claim). It should provide independent oversight and quality assurance of each step in the process, and should be linked to the performance management system. The M&E framework should include a learning and communication function whereby good and bad practice is captured, lessons learned and effectively communicated. The business process should be open to formal change in the light of this learning.
- All references to the **CRLR's involvement in post-settlement support, local economic development processes and funding of related activities (beyond that associated with the financial settlement of claims) should be delinked** from the work and processes of the CRLR.
- **The budget for the Restitution Programme needs to be re-considered.** In the recent years, the budget for the Restitution Programme has been reducing; impacting on the CRLR's ability to settle the outstanding claims. In line with this, should the second phase of restitution take place, the CRLR will require a greater operational budget than that which is currently available.

In terms of immediate priorities, three recommendations are made:

- **The current filing and recordal system must be cleaned up and systematised.** Concluded files should be reviewed to ensure they are complete in terms of content and chronology. Current files should be assessed in terms of their completion and compliance with legal process, and should be updated and systematised into the new MIS.
- **Looking forward, all outstanding claims should be settled before any work begins on the processing of new claims** arising from the second phase of restitution. (The registration of new claims may proceed, but only in accordance with the requirements of the SOP Manual).
- **No new claims should be processed** before the criteria and focus determining access to the second restitution window have been translated into the SOPs and incorporated into the EPMO-MIS.

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