

# **Brief Memorandum of Advice on a Transitional Land Law for Timor Leste**

## **Executive Summary**

The current proposal for a transitional land law for Timor Leste:

- prefers long-term peaceful possession to claims based on Portuguese or Indonesian titles; and
- recommends compensation to claims based on Portuguese or Indonesian titles (where those claims lose to a long-term peaceful possessor).

Only Timorese citizens would be entitled to ownership or compensation under the proposal.

The current proposal is simple and practical compared to other alternatives. It has the greatest chance of success in the current institutional and social environment of Timor Leste.

The Government of Timor Leste may wish to consider 2 further issues in particular.

*East/West tension in Dili.* The current proposal may grant ownership to people from outside Dili who occupied housing in Dili in 1999/2000. Long-term Dili residents may object to this possibility. At the same time the alternative - limiting ownership to people who occupied in good faith - may lead to evictions of many Dili "outsiders", and may also revive East/West tensions.

*The status of claims based on *propriedade perfeita* and *hak milik*.* An alternative to the current proposal is to grant ownership to Timorese citizens who claim through *propriedade perfeita* or *hak milik*, even though the property is occupied by another. This approach needs to be balanced against the risk that it would increase the number of evictions, and hence the possibility of social conflict or institutional overload.

## **Background**

The Minister of Justice for the Government of Timor Leste has requested a brief memorandum of advice on a proposal for a transitional land law in Timor Leste. The request was made to the Australian Aid Agency (AusAID).

## **Context**

ARD Inc has prepared a document for discussion entitled: *Technical Framework for a Transitional Land Law for East Timor*. The document was prepared in conjunction with the Land and Property Directorate and the Ministry of Justice. It forms part of the USAID program: *Strengthening Property Rights in Timor Leste Project (Ita Nia Rai)*.

## **Introduction**

This memorandum:

- summarises the main features of the Current Proposal,
- outlines its main advantages and disadvantages, and
- briefly assesses alternatives.

Due to time and space constraints, the memorandum should be read as preliminary advice only. Any views expressed are not to be taken as representing the views of the Australian government.

## **The Current Proposal**

The proposed transitional land law will govern first registration and recognition of rights to land in Timor Leste. Four types of claims potentially provide a legal basis for first registration or recognition:

- Portuguese titles;
- Indonesian titles;
- possession; and
- custom

### *Undisputed Claims*

Most claims to land will be undisputed. First registration or recognition of undisputed claims will encourage legal certainty and investment in Timor Leste. Under the Current Proposal, undisputed claims will be recorded through systematic cadastral survey and issue of ownership title in areas designated as Formalisation Areas.<sup>1</sup> All earlier proposals for a transitional land law in Timor Leste include mechanisms to record undisputed claims through systematic cadastral survey.

### *Disputed Claims*

Some claims to land will be disputed. The Current Proposal suggests priority for the ownership claims of long-term peaceful occupiers. A claimant will receive an ownership right if he or she:

- peacefully took possession of a vacant property before 26 April 2006, without the authority of the previous possessor; and
- maintained possession in good faith for at least 5 consecutive years.

Possession may be maintained even though occupation has changed in the 5 year period, provided that the change of occupation occurred pursuant to a legitimate transfer (e.g. sale, transfer or inheritance).

### *The Status of Portuguese and Indonesian Titles*

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<sup>1</sup> Formalisation Areas include urban, peri-urban and "non-customary primary industry rural land" zones. Outside Formalisation Areas, there will be a legal presumption that custom governs matters relating to land tenure (see para. 18).

A Timorese citizen who is a peaceful long-term possessor, as defined in the Current Proposal, will receive an ownership right even when there is a competing claim based on a Portuguese or Indonesian title. In this event, a claim based on a Portuguese or Indonesian title will be satisfied through grant of compensation and not ownership. Compensation will only be payable to Timorese citizens.

Where there is (1) a peaceful long-term possessor and (2) competing claims based on Portuguese or Indonesian titles, the Current Proposal suggests that compensation be granted to the Indonesian title claim only as the most recent "Previous System Title Holder". The Portuguese title claim will not receive compensation.

Where there is no peaceful long-term possessor, a claim by a Timorese citizen based on Portuguese or Indonesian titles - including long term use rights such as *aforamento* or *hak guna bangunan*<sup>2</sup> - will receive a registered ownership right. Where there is (1) no peaceful long-term possessor and (2) competing claims based on Portuguese or Indonesian titles, the Current Proposal suggests that ownership be granted to the Indonesian title claim as the most recent "Previous System Title Holder". In this event, a Timorese citizen holding a Portuguese title will be entitled to compensation.

#### *State Land*

The proposed transitional land law will not apply to land under the public domain of the State (see Law No. 1/2003). Private claimants may not obtain ownership of land under the public domain of the State.

Land currently in possession of the State will be recorded automatically as state property. The State may also claim ownership of properties that are not currently in its possession.

#### *Statutory Protection against Eviction*

The Current Proposal includes temporary protection against eviction for current occupiers who do not succeed in a claim for ownership when they:

- took peaceful possession of a property without authorisation before 26 April 2006; and
- have no suitable alternative housing.

### **Potential Advantages and Disadvantages of the Current Proposal**

The Current Proposal is relatively simple and achievable. These are its main advantages.

The proposal reduces the risk of large-scale evictions by prioritizing long-term peaceful possession over claims based on Portuguese or Indonesian titles. Because the map of occupation has changed so much in Timor Leste since 1975, and 1999, there is little doubt that prioritising Portuguese or Indonesian title claims over long-term possession would create a risk of large-

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<sup>2</sup> Most claims based on *hak pakai* - a short-term use right under the Indonesian system - will not be eligible either for ownership rights or compensation.

scale evictions. Alternatively, if long-term peaceful occupiers were deemed to be tenants of owners claiming through Portuguese or Indonesian titles, there could be criticisms that this creates "feudalist" arrangements.

Other significant advantages relating to simplicity and practicality are summarised on p. 9 of the Current Proposal. They include reducing the burden on Timor Leste's Court system.

The potential disadvantages of the Current Proposal include the following.

*Political and community objections.* The Current Proposal will grant ownership rights to displaced persons who peacefully occupied vacant properties after the militia violence in late 1999/early 2000, without authorisation from the property owner, provided that they maintained this possession in good faith for at least 5 years thereafter. The act of occupation itself need not have been in good faith. The occupier may obtain ownership even though he knew that the property was owned by another.

Long-term Dili residents may complain that this approach rewards people from outside Dili who occupied houses in late 1999/early 2000, even though they knew that the houses were owned by others. In other words, granting ownership to long-term peaceful occupiers **may** have implications for so-called East/West tensions in Dili.

Similarly, the grant of ownership rights to long-term peaceful occupiers may reward people who occupied Indonesian civil servant housing after the militia violence in late 1999/early 2000. This possibility may be inconsistent with government plans to encourage civil servants to move to the districts as part of decentralisation programs (as the government may want to make this housing available to civil servants). In Dili, the issue of Indonesian civil servant housing may also have implications for so-called East/West tensions.

It may be necessary to deal with Indonesian civil servant housing as a separate issue under the Transitional Land Law.

*Overriding Portuguese Titles.* In international law, Portugal retained sovereign authority over East Timor during the period of Indonesian occupation. Under the international law doctrine of acquired rights, Portuguese titles remained valid as at the date that sovereignty was transferred to the new state of Timor Leste. Indonesia never obtained sovereignty over East Timor. Its international law status was that of belligerent occupier.

International law allows the new state of Timor Leste to legislate in relation to Portuguese titles. It may prefer long-term peaceful possessors over Portuguese titles on payment of compensation. But can it allow claims for compensation based on Indonesian titles to take precedence over Portuguese title claims?<sup>3</sup> Can it deny compensation for Portuguese title claims in cases when compensation is paid for Indonesian title claims? There are legal arguments based on

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<sup>3</sup> This is the result under the Current Proposal when there are competing Indonesian and Portuguese title claims, and ownership is granted to a long-term peaceful occupier.

international law, and constitutional guarantees of private property, that Portuguese claims may have rights of compensation even when Indonesian title claims have received compensation.<sup>4</sup>

*The Long-Term Status of Occupiers since 2006.* Occupiers since April 2006 will not receive ownership rights. They may receive temporary protection from eviction. But what will be their status if no attempt is ever made to evict them? Some Dili "outsiders" who are entitled to ownership based on long-term peaceful occupation since 1999/2000, but who were evicted from their homes in 2006, may never bring proceedings to recover possession of their property. In these circumstances, those who remain in the property should not be left with long-term forms of tenure insecurity. They should be entitled to claim ownership on ordinary principles of adverse possession under the land law of Timor Leste.

*The Status of Indonesian Titles Obtained in Bad Faith.* Neither ownership nor compensation may be granted to non-Timorese citizens. Hence granting priority to Indonesian freehold titles would not confirm or restore rights claimed by friends or relatives of the Suharto family and Indonesian military leaders.<sup>5</sup> But the Current Proposal does open the possibility that, where there is no long-term peaceful possessor, holders of Indonesian titles may proceed to sell the claimed property within a 2-year transition period. In this very limited set of circumstances, there is a risk that Indonesians who obtained Indonesian titles in bad faith will obtain monetary reward for their titles through a process of forced sale.<sup>6</sup>

### **Alternatives to the Current Proposal**

*Introducing good-faith requirements into the initial act of possession.* One alternative is to grant ownership to long-term peaceful possessors who acted in good faith at the time of occupation. That is: ownership will not be granted to occupiers who knew at the time of occupation that the property was owned by another.

Requiring initial occupation in good faith addresses the objections - from long-term Dili residents and others - that occupiers who knew the property was owned by another should not be rewarded with ownership. This may reduce the potential criticism that the Current Proposal favours "easterners" who occupied Dili properties in late 1999/early 2000. It would also address the status of Indonesian civil servant housing.

This said, introducing a requirement of good-faith would increase (1) the risk of large-scale evictions and (2) the potential delays associated with case-by-case determinations of good-faith.<sup>7</sup> The risk of evictions is significantly increased because most "outsiders" occupied housing in Dili

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<sup>4</sup> Any compensation payable to Portuguese title claimants may not necessarily include improvements instigated by others to the property since 1975.

<sup>5</sup> In fact, all the circumstances in which the Current Proposal would grant ownership or compensation rights to Indonesian titles should address the possibility that those titles were not obtained in good faith. For example, there is a large amount of land in rural Timor Leste that was held under *hak guna usaha* by cronies and members of the Suharto family. Under no circumstances should these titles be elevated into ownership or granted rights of compensation.

<sup>6</sup> Of course, the fact that it is a forced sale will reduce the price that may be obtained.

<sup>7</sup> Determinations of good-faith maybe facilitated by the use of presumptions.

in late 1999/early 2000 with knowledge that the property was owned by another. Under the good-faith principle, these people would require eviction if they currently remain in occupation.

Introducing a requirement of good faith occupation could also create or revive some East/West tensions as it would involve assessing each case of possession in the context of 1999/2000. In addition, the nature of initial occupation may be irrelevant if possession had been transferred to others through legitimate means.

*Granting priority to previous system ownership rights.* Another alternative is to prefer claims based on Portuguese freehold (*propriedade perfeita*) and Indonesian freehold (*hak milik*) to claims based on long-term peaceful occupation. Claims based on titles other than ownership would not have priority against long-term peaceful occupiers.

This alternative addresses the argument that previous system ownership rights should be respected in the transfer of sovereignty to Timor Leste. On the other hand, it also increases the risk of evictions in the event that significant areas of land are claimed on the basis of Portuguese or Indonesian freehold titles by Timorese citizens who are not currently in occupation of that land.

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