



water & forestry

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Legal Options for Community Partnerships with DWAF Forestry

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RAMBOLL

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List of Abbreviations



CBO	Community Based Organisation
CC	Close Corporation
CFA	Community Forestry Agreement
CPA	Communal Property Association
Danida	Danish International Development Assistance
DFID	Department for International Development (UK)
DLA	Department of Land Affairs
DWAF	Department of Water Affairs and Forestry
EU	European Union
NFA	National Forest Act (Act 84 of 1998)
NGO	Non Government Organisation
PFM	Participatory Forest Management
PPP	Private Public Partnership
WWF	World Wildlife Fund



1. Introduction

The Department of Water Affairs and Forestry (DWAF) has adopted Participatory Forest Management (PFM) as a general approach to all its activities. Although PFM is not specifically referred to in the National Forest Act (NFA), this participatory management approach is reflected in the NFA and the NFA, in turn, is reflected in PFM.

PFM seeks to ensure that there is a shared responsibility of forest management between key stakeholders and the state, and that there is a sustainable flow of benefits to key stakeholders. Through community involvement and partnerships, DWAF thus strives to consider local people's forest-based needs, their role in sustainable forest management and their involvement in decision-making processes.

Community Forestry Agreements (CFAs), as referred to in the NFA, play a central role in involving local communities in forest management and decision-making. These CFAs refer to partnerships between DWAF and a community or user group with regard to the use of a forest or forest products. Such a partnership can only be formed, however, if the community or group has formed itself into a legal entity.

In cases where legal entities do not exist, or are not functioning effectively, it would be necessary to establish them. This Guideline deals with the establishment of appropriate legal entities for community partnerships with DWAF. Based on these legal entities, DWAF staff and other organisations responsible for managing the forests will be able to contract and engage with community-based organisations as part of the broader participatory process.

This Guideline is part of the PFM Guidelines developed during the DWAF/Danida PFM Project (2001-2005). The PFM Guidelines aim to empower DWAF staff, the new custodians of the state forests and partners at local level to implement the new DWAF Forestry Vision. The PFM Guidelines are meant to support community upliftment in accordance with the DWAF Criteria, Indicators and Standards for Sustainable Forest Management.



2. About this Guideline

2.1 Aim and Objectives

This Guideline aims to provide an understanding of legal entities and their functioning. It guides forest managers and local groupings to facilitate the formation of legal entities at local level. It explains the steps required to prepare for, develop and implement these structures in a practical manner. Since every situation is different, the steps included here are fairly simple and broad and should be used in a flexible manner.

The forest manager should not be expected to play the role of a legal practitioner. Rather, because the forest manager is the regular and first point of contact with the community, he/she should guide and assist the community or user groups to organise themselves into the most appropriate legal entity. If the entity is already organised and decisions made regarding its functioning, it will be less costly to interact with a lawyer if this is needed.

In certain situations, it may be appropriate to hire a facilitator to assist in the process of forming a legal entity - this may be particularly necessary where conflict exists between primary stakeholders.

The objectives of this Guideline are to:

- Provide an understanding of the process of entering into the Community Forestry Agreement (CFA);
- Describe the legal mechanisms available for community utilisation of state forests;
- Provide a tool for easy understanding of the steps and processes involved in developing institutional mechanisms that have a legal standing.

2.2 Who is this Guideline for?

The target groups of the Guideline are DWAF forest managers, other custodians of state forests as well as local groupings. This Guideline will also be useful to PFM Forum/Committee members, CBOs, NGOs, environmental and development organisations and any other organisations that have adopted, or are establishing, community partnerships and public participation programmes.

2.3 How to Use this Guideline

Chapter 3 explains the legal mechanisms that are in place for utilisation of state forests, as well as the processes necessary to enter into a CFA.

Chapter 4 describes the key principles of institutional design and gives an overview of the basic legal institutions or entities that can be formed.

Chapter 5 provides the facilitator with a list of the key decisions a community group must make in order to design their legal entity.

Annex 1 details the decisions that need to be considered when forming a Communal Property Association (CPA).

Annex 2 provides a glossary, which explains words and terms used in the guideline.

Annex 3 presents a list of references used in the text as well as other useful documents, reports and guidelines.

Annex 4 gives an overview of the eight PFM Guidelines produced by DWAF.

This Guideline is a practical resource document. Sections of the Guideline can be easily copied for discussions, presentations and other training and development purposes, particularly Chapter 5.



3. Legal Mechanisms for Community Utilisation of State Forests

3.1 Activities Permissible within State Forests

Section 23 of the NFA provides a list of activities that are permissible in a state forest and for which a licence is required. These include:

- a. The establishment and management of a plantation;
- b. The felling of trees and removal of timber;
- c. The cutting, disturbance, damage and destruction of any other forest produce;
- d. The removal or receipt of any other forest produce;
- e. The use of land, structures and buildings for agricultural, commercial, communication, domestic, industrial, residential or transportation purposes;
- f. The use of roads;
- g. The moving of water, electricity, gas, fuel or any other thing across a state forest;
- h. The construction of any road, building or structure;
- i. The grazing or herding of animals;
- j. The cultivation of land;
- k. Hunting and fishing;
- l. The use of a state forest for recreational, educational, cultural or spiritual purposes;
- m. The use of a state forest for any other purpose provided that it is consistent with the sustainable management of the forest.

Forest produce is defined as "anything which appears or grows in a forest, including any living organism and inanimate objects of mineral, historical, anthropological or cultural value". The range of activities allowed is thus exceptionally wide.

The NFA thus anticipates that communities may wish to use the forest for subsistence or commercial purposes, or for recreational, educational and cultural purposes.

These uses may vary from bark harvesting to tourism uses, or to schools wishing to use the forest for environmental field trips. In some cases, the same permitted activity can either be a subsistence, recreational or commercial activity, e.g. hunting. This will have a bearing on the nature of the legal entity, as described in Chapter 4.

With regard to forming partnerships or agreements, it may be found that some communities are homogenous (e.g. a rural village adjacent to a forest), while others comprise vastly separate, and often dissimilar groups (e.g. the Knysna forests). Where they are homogenous, the community can be consulted as a whole, while separate groups should be consulted along interest groupings.

3.2 The Community Forestry Agreement

The NFA allows communities/user groups that wish to carry out any of the activities mentioned in Section 23 of the NFA (listed in section 3.1 above) for which a licence is required, or to manage a state forest, to apply to the Minister¹ of DWAF to enter into a CFA.

The CFA is the primary route towards *licensing* community activities in a state forest. The licence anticipates regular and organised use, the terms of which are governed by the licence conditions. The CFA is thus the written document that encapsulates *who may use what under which conditions*.

The CFA also empowers the Minister (and therefore DWAF) to make certain services and products available to previously disadvantaged groups.

¹ The NFA refers to "the Minister", but this includes persons to whom the Minister has delegated certain powers. These delegations are currently under review but in practice this will most likely be the DWAF Forestry Chief Director or an appropriate Director.

In particular, section 31(2)(h) of the NFA allows for a waiver of any financial payment such as the licence fee, rental or other compensation for rights granted to a community group. The waiver is allowed as long as this is fair in the context of the community's historical association with the land on which the forest is situated or the economic situation of the community.

DWAF may also provide assistance to the community to achieve their objectives by offering training and advice to such groups, establishing nurseries to provide seed and plants, or providing material and financial assistance.

The forest activities listed previously can also be licensed through normal, commercial licences as long as they are activities undertaken for commercial purposes. Purely commercial agreements with established commercial enterprises do not fall under the CFA provisions. These are subject to the Public Finance Management Act, which requires that such entities must enter into a Public Private Partnership (PPP) with the state. This requires, amongst others, the submission of a complete business plan to be approved by National Treasury.

The first enquiry to be made once a community group has expressed interest to apply for a licence is thus whether the proposed user has "an historical association with the land" and whether the economic situation of the group is such that it warrants deviation from the PPP process. If one of the latter two questions can be answered in the affirmative, it is suitable for a CFA. DWAF is currently in negotiation with Treasury to define the terms by which user groups can deviate from the PPP process. The aim is to obtain a blanket exemption from Treasury regulations for the use of forests/forest products by local communities.

3.3 The Community Forestry Agreement Process

Section 29 of the NFA details the requirements and procedure for making an offer to the Minister to enter into a CFA. This application (or offer) must include, amongst other things:

- Details of the membership of the community;
- A copy of the constitution or any other laws or custom, which regulate them.

Upon receipt of such an offer, the Minister must investigate it (section 29(4) of the NFA). It should be established whether there are other communities who could also be involved, as well as consultation with other organs of state having an interest in the matter. Here "other organs of state" will be determined by the type of use proposed (e.g. Department of Agriculture, Department of Environmental Affairs and Tourism, Department of Education) and will include the local authority. An evaluation of the suitability of the proposed use in comparison with its current or potential uses also needs to be conducted.

After this the Minister may reject, make a counter-offer or enter into a CFA with the community/user group. However, the groups must be organised into a legal entity in order to form this agreement. Once the CFA has been reached, a licence *must* be issued to that entity.

Up until now, CFAs have not been widely used within DWAF as the process is regarded as being cumbersome and complex. However, in practice the process is fairly simple and entails the following steps:

1. The forest manager will determine current uses and users of the forest - there may be an existing PFM Committee², which has been formed around a particular use(s), which will make identifying the use and users easier. Potential uses and users should be identified through a process of consultation. This process will involve an enquiry on historical rights holders and the current tenure arrangements. The following questions will need to be asked:
 - Which individuals or groups are currently using the forest?
 - Which of the permitted activities are they engaged in?
 - What are their tenure rights - do they have a historical connection to the forest?
 - Which other potential users could there be for the existing uses?
 - Which other potential permitted activities could there be in the forest?

² Refer to DWAF/Danida Guideline: Formation of PFM Forums and Committees (2005)

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2. If the users have not formed a legal entity, the forester will facilitate a process whereby they can form such an entity.³ The forest manager will consult with the appropriate organs of state (e.g. Department of Agriculture, Department of Environmental Affairs and Tourism) as well as local government on the proposed use and the proposed legal entity to be formed.
 3. The forest manager will draw up a Forest Utilisation Plan/Management Plan, based on the sustainable use and environmental impact of the proposed activity⁴.

It is preferable to have a Utilisation/Management Plan compiled at this stage of the process. It may, however, also be compiled after the issuing of the licence and be stated as a condition of the licence that such a plan has to be compiled before utilisation starts.

4. The plan and proposed use will be advertised for comment.
 - Although this is not a requirement in the NFA, this will enable other actual or potential users to comment or also apply.
5. The legal entity will then be encouraged to make a written offer to use the forest.
 - This written offer is equivalent to an application.
 - The plan, copy of the constitution and the comments of the various statutory and non-statutory stakeholders will be forwarded to the Directorate: Participative Forestry.⁵
6. The Directorate: Participative Forestry will scrutinise the application, and accept, reject or make a counter-offer if there are several potential forest user groups.⁶

³ This is detailed in Chapters 4 and 5.

⁴ Refer to DWAF/Danida Guideline: Sustainable Resource Use (2005)

⁵ Refer to DWAF/Danida Guideline: Formation of PFM Forums and Committees (2005)

⁶ DWAF is currently developing criteria to be used when considering a licence application in order to ensure objectivity and consistency. Refer to DWAF/Danida Guideline: Sustainable Resource Use (2005) - Umzimkhulu Bark Harvesting Licence

7. Upon signing the agreement, a licence will be issued to the legal entity, which will include the rules and conditions of the agreement.
8. A notice can be put in the local newspaper regarding the successful applicant and agreement.
 - This is not a requirement of the Act, but will serve to inform other local communities and user groups of the legal permission of a certain use, and encourage other users to apply to DWAF for licences. In this way forest activities can be controlled and monitored.

As can be seen from the CFA the legal entity is critical in this process. Without a legal entity with whom DWAF can enter an agreement with, no CFA can be reached.

What Forest Users Should Know

In order for a community or group who are currently using (or will in future make use of) the forest *to legally conduct their activities, an agreement* between DWAF and the user group needs to be formalised.

To sign such an agreement, the user group needs to be *organised into a legal entity*. The agreement will be signed with this entity.

Once the agreement has been signed, *a licence will be issued by DWAF to the legal entity*. This licence will contain the rules according to which the user group can pursue their activities.



4. Legal Structures For Community Involvement

4.1 Key Principles of Institutional Design

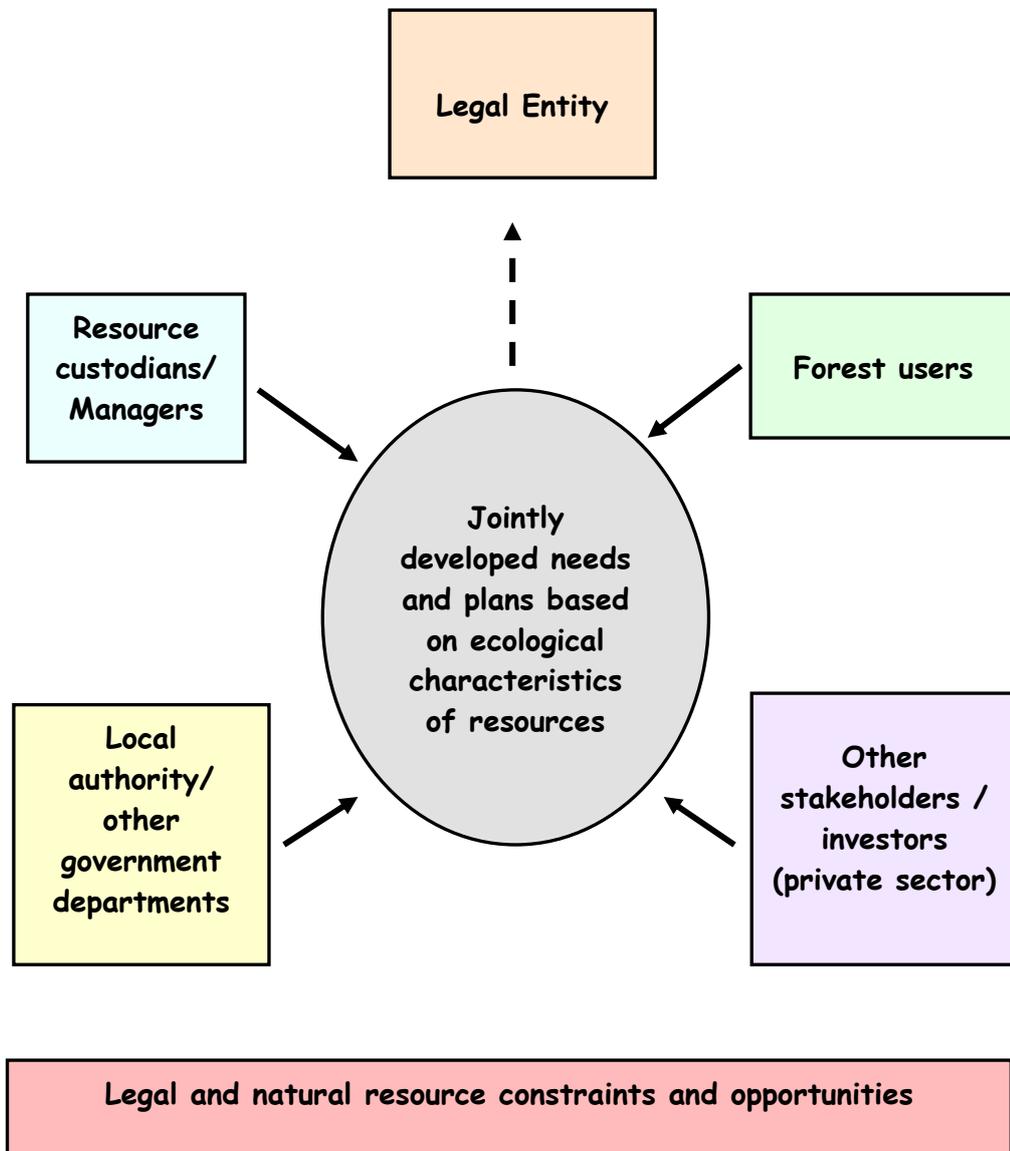
A legal entity is an *institution*, that is, it is an organised regulated pattern of behaviour amongst a group of people. Legal entities are distinguished from other institutions or organisations such as customary and traditional, by having constitutions in written form, and recognised by, and enforceable in a court of law.

The institutional make-up of any development effectively underpins its sustainability. It brings together the management agency, funding/donor agencies and beneficiaries under a common framework. This framework is prescribed by law and by contractual arrangements, based on the characteristics of the natural resource and legal opportunities and constraints. It sets up the way in which the community interests can be balanced with the ecological state of the assets. Where a project is correctly designed institutionally, the chances for success are greatly enhanced. Conversely, poor institutional planning can be associated with development failure.

The golden rule in institutional design is that "form follows function". Institutions should follow development objectives that suit the ecological characteristics of the natural resources concerned. In practice, this means that the design of the legal entity should be done in a participative manner and should take into account the characteristics, needs and objectives of the project and the community/user group.

Figure 1 illustrates the principle that the legal entity is the outcome of a process of investigation of development needs and plans as well as the ecological characteristics of the resource. Thus the form of the entity will follow the function or role that it has to undertake given these various external factors.

Figure 1: The Legal Entity as an Outcome



The appropriate legal entity should be the result of the interaction with various stakeholders. These stakeholders include other spheres of government, as well as other forest users and interested and affected parties. In many cases existing structures, such as the PFM Committees, will form the basis of the legal entity.

4.2 Legal Entities

An institution recognised in law that can contract, or form legally binding agreements and partnerships on behalf of itself, is regarded as a legal entity. It exists beyond the actual human membership and can continue to exist even if the membership changes completely (referred to as perpetual succession).

For most practical purposes, only persons can be the bearers of rights and duties and therefore form legal entities. Persons, in this context, can either be natural persons (i.e. humans) or legal persons (i.e. a body recognised by law as the bearer of rights and duties).

People primarily form legal entities in order to be able to act collectively towards a joint purpose and, importantly, enter into legal agreements such as contracts and partnerships. It provides for self-governance of joint affairs by creating a system for managing their collective interests, and with a constitution to guide them in their pursuit of this goal. Once the project is incorporated (formed into a legal entity), it is generally taken more seriously.

In the commercial world, people form legal entities in order to *reduce their personal liability* in case of insolvency of the enterprise, since the risk carried by contributors extends no further than the loss of the amount that they have contributed to the venture in the form of capital. This means that, should the legal entity become insolvent, the members of that entity are not personally liable for the debt. It also prevents them from being sued in their own name.

What is a Legal Entity?

A legal entity is group of people:

1. Who share the same interests;
2. Wish to act together and contract with another party;
3. Have agreed to a written constitution, which binds them;
4. Is recognised in law and can form legally binding agreements and partnerships.

Examples of legal entities:

A Trade Union is a group of workers who wish to collectively negotiate with their employer for better working conditions.

A Soccer Club is a group of people who wish to play sport together and compete against other teams.

4.3 Types of Legal Entities

The following sections describe the recognised types of commercial and non-commercial legal entities:

4.3.1 Commercial Entities

There are four types of legal entities, which can be established for commercial purposes, namely:

- A Company;
- A Close Corporation;
- A Co-operative;
- A Business Trust.

Company

This is an association of persons pursuing economic gain through a legal entity registered in terms of the Companies Act. There are two types of Companies, namely *Public Companies* and *Private Companies*. Public Companies have more than 50 shareholders and may raise capital from, and sell their shares to the public, while Private Companies generally have fewer than 50 shareholders, and are restricted in the transfer and sale of its shares. A Private Company may, however, also have employees of that Company who are shareholders, thus bringing the total to more than 50.

Company management is normally appointed, not elected, and the management does not necessarily have to be shareholders. A Company is required to have auditors and must furnish copies of its financial statements to the Registrar of Companies. A Company has perpetual succession which means that it carries on beyond the lifetime of its members.

The easiest method of registering a Company is to purchase an existing "shelf" or "off-the-shelf" Company (this refers to a company that has already been registered but is not trading.) If a new Company is formed, it needs to be registered with the Registrar of Companies.

Close Corporation

Close Corporations were introduced into South Africa in 1984 as a simple, less expensive and flexible form of small enterprise consisting of a single or a small number of participants to afford them the advantages of a separate legal personality. The Close Corporation is restricted to not more than 10 natural persons pursuing economic gain through a legal entity registered in terms of the Close Corporations Act. A Close Corporation is commonly referred to by the acronym "CC".

A CC is often, but not necessarily, run by its members. Unlike a company, a CC does not have to furnish its financial reports to the Registrar of Companies and does not require an auditor. It is therefore less costly to run.

The easiest method of forming a CC is to purchase an existing "shelf CC" (this refers to a CC that has been registered but is not trading). In the case of a newly formed CC, it must be registered with Registrar of Close Corporations.

Co-operative

The Co-operative is essentially an association of persons who have formed and registered a Co-operative in terms of the Co-operatives Act.

South Africa has a long history of Co-operative organisations. These Co-operatives include:

- *Buyers Co-operatives*: where the Co-operative buys in bulk in order to gain economies of scale;
- *Producers Co-operatives*: where a product is produced jointly in order to save production costs;
- *Marketing Co-operatives*: where people produce individually, but sell the product jointly in order to share marketing costs.

Co-operatives are normally managed collectively, and individuals can be held liable for the debts of the Co-operative.

Registration of a Co-operative is done through the Registrar of Co-operatives.

Business Trust

A Business Trust is the arrangement whereby property or a right to property is made over to another person or persons, the trustee(s), to be administered according to the provisions of the trust instrument (trust deed) for the benefit of the person(s) or beneficiaries designated in the trust deed.

In a Business Trust the trustee(s) does not merely protect and manage the trust assets, but uses these for conducting a business for profit in order to benefit the beneficiaries or to further the aims of the Trust. In the case of Business Trusts, beneficiaries of the Trusts do not own trust property or shares, but acquire a "beneficial interest" in the Trust. In order to allow for tradability of this interest, the beneficial interest is divided into units, which are allocated to each beneficiary.

Like a Company, a Trust can also be private or public. In the case of a Private Trust, the beneficiaries of the Trust must be restricted, e.g. to members of a certain community. This limited tradability exempts the Trust from complying with the requirements of the Unit Trust Control Act.

Although a Trust is strictly speaking not a legal person, the debts of the Trust are normally only payable from the trust estate and neither the trustee(s) nor the beneficiaries can be held liable for those debts. A Trust is generally not subject to the rules, which bind Companies.

Registration of a Business Trust is done with the Master of the High Court. An attorney can be employed to draw up the trust deed and lodge it with the High Court.

4.3.2 Non-Commercial Entities

All non-commercial organisations can apply to be registered as non-profit organisations in terms of the Non-profit Organisations Act 71 of 1997. This means that they will be exempt from income tax, and if they raise money from the public in the form of donations, will not need to pay donations tax.

If such an entity is classified as being for the public interest, it can secure the right from the Receiver of Revenue to issue section 18.a. tax certificates. This means that people/organisations making a donation to the entity can claim the donation as a tax-deductible expense.

There are four major non-commercial legal entities, namely:

- A Section 21 Company;
- A Charitable Trust;
- A Voluntary Association;
- A Communal Property Association.

Section 21 Company

This refers to a Company registered in terms of Section 21 of the Companies Act, which carries on its business not for commercial gain, but for the promotion of cultural, religious and recreational objectives.

Registration is done through the lodging of the founding documents with the Registrar of Companies.

Charitable Trust

This is a special form of Trust, which is created when property is handed over to trustees to be managed for charitable purposes and not business purposes. Registration is the same as for a Business Trust.

Communal Property Association (CPA)

This is an association of persons who wish to hold land communally and is registered in terms of the Communal Property Associations Act. A CPA must have as its main object the holding of property in common. A CPA is a legal entity with the capacity to sue and be sued and may incur rights and obligations in its own name. Like a Company, a CPA has perpetual succession.

A CPA is managed by a committee elected by its members. A CPA must make certain documents, such as minutes of Annual Meetings, available to the Director-General of Land Affairs. Property of the CPA may not be disposed of or otherwise indebted without the agreement of the majority of members, and if this is not met, such a disposal can be declared void.

A CPA needs to be registered with the Department of Land Affairs (DLA) and is usually arranged by DLA.

Voluntary Association

This refers to a group who have organised themselves into an entity with a constitution, but who do not have a commercial aim. Typical examples are sports clubs and churches. No formalities (such as registration) are necessary to form a Voluntary Association, and it is therefore inexpensive to form and run.

Voluntary Associations are normally managed by a committee elected from its members.

4.4 Choosing a Commercial Legal Entity

Companies, CCs and Trusts are all very flexible entities that can be constructed to fulfil the same function. Although neither the members nor management of any are liable for debts, the biggest difference between these legal entities is that a Trust is not a legal entity in its own right. A Trust may thus find it more difficult to obtain loan finance from commercial banks, since they have to serve separate notices to all the trustees in the case of a default.

As mentioned in section 4.3.1 Public Companies may raise capital from the general public and sell shares to the general public. As a result of this, they are not appropriate for community based forest enterprises. Private Companies, on the other hand, may be a suitable entity as long as there is a commercial purpose to the forest use and non-employee membership is less than 50. A Company can be bought "off-the-shelf" which reduces cost and time to have it registered.

In the case of a CC, the only restrictions to forming such an entity are on the number of participants (a maximum membership of 10 persons) and the nature of the members (they must be natural persons). Thus, for forestry utilisation projects involving fewer than 10 persons, Close Corporations can be utilised. This type of legal entity is particularly suitable in the case of small businesses. As with Companies, a "shelf CC" can be bought, thus reducing registration cost and time.

As mentioned in section 4.3.1, a Private Business Trust has restrictions regarding its beneficiaries. This is an advantage for a group or community wishing to use the forest, as the Trust is then exempt from having to meet the requirements of the Unit Trust Control Act.

This means saving on costs and administration. Also, a Trust does not pay income tax on benefits distributed to its beneficiaries, while beneficiaries are taxed on their own applicable scales. Thus members of rural communities, who are normally in very low tax brackets, can receive income from the Trust without that income first having been reduced by income tax.

Co-operatives are popular in egalitarian societies, where there is great emphasis on working together and individual incentive is regarded as a lower priority than the protection offered by the group.

However, should a Co-operative fail, the individuals may be held personally responsible. In the forestry context Co-operatives are suited for commercial ventures among smaller user groups or business enterprises that have high levels of inter-personal trust and, since it is generally difficult for a Co-operative to attract financial loans, where there is no need for external funding.

4.5 Choosing a Non-Commercial Legal Entity

Examples of non-commercial use of a forest include:

- An application for access to the forest by bird-watchers who wish to construct a hide for bird viewing (construction of a building in a forest);
- An application by hikers who wish to build a footpath through a forest (construction of a road);
- An application by a school to use the forest to practically illustrate botany to learners (educational use);
- An application by a community for subsistence use of the forest (grazing, gathering of forest produce, personal use, etc).

The choice of a legal entity for the non-commercial examples above would depend on whether the group intends to apply for funding from an external source⁷. Often groups wish to apply for funding from funding/donor organisations such as WWF or the EU, and these donors may have their own requirements for the type of legal entity they wish to engage with.

⁷ Refer to DWAF/Danida PFM Guideline: Fund Raising for Projects (2005)

Or, alternatively, groups may not wish for any funding or grant, only to protect their resource and to have security of rights and tenure. In such a case there would not be external pressure on the nature of the legal entity.

In all the examples above a Charitable Trust, a Section 21 Company or a Voluntary Association would be appropriate. The Voluntary Association is the simplest form of legal entity, and requires only a constitution to be adopted by its members, and no further legal requirements. A Voluntary Association may be the most appropriate legal entity in cases such as a hiking club or a botany association, which will not extract any forest products, nor have commercial purposes.

Where the benefits of the activity is aimed at society in general, a Section 21 Company is more appropriate, while a Charitable Trust is best suited when the beneficiaries are easily identifiable and can exercise internal control over the activities and proceeds. Section 21 Companies are registered with the Registrar of Companies, while Trusts have to be registered with the Master of the High Court.

If these entities apply to enter into a CFA, their constitution would have to reflect the non-extractive and non-commercial nature of their application.

A Communal Property Association (CPA) may be a suitable entity for land reform and agricultural projects, particularly where land rights are to be acquired for groups rather than individuals, and have been designed for this purpose. Its decision-making processes demand participation by all members of the CPA but, although democratic, this can be too cumbersome to deal effectively with pressing business decisions. CPAs are therefore usually more suited to holding land in common for subsistence land use by communities, such as grazing.

The advantage of a CPA is that there are various protections against abuse of authority in this system as DLA provides a monitoring function and must be invited to all Annual Meetings. This could also be a disadvantage, since it needs additional co-ordination and capacity requirements from DLA. DLA should always be consulted before recommending a CPA to a community.

Annex 1 lists the decisions to be considered when forming a CPA. This list can be used for other legal entities to ensure effective functioning and sustainability.

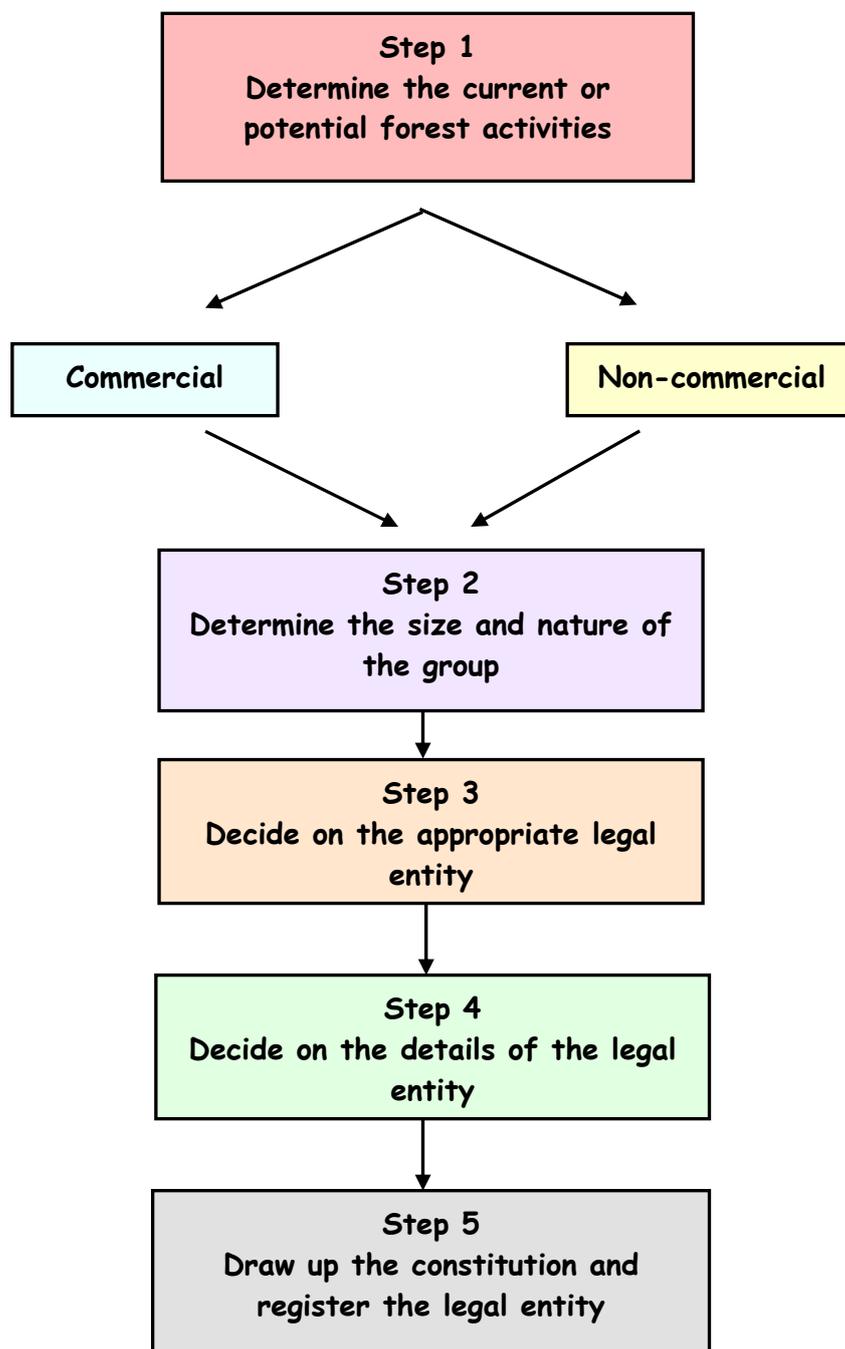


5. Forming the Legal Entity

5.1 The Process

Following the rule "form follows function", Figure 2 outlines the steps that should be carried out when facilitating the forming of a legal entity.

Figure 2: Steps for Forming a Legal Entity



5.1.1 Step 1: Determine the Current or Potential Forest Activities

The first step is to determine the nature of the community forest activity the group wishes to undertake.

An important distinction to make when considering the uses and activities in the forest is between *commercial* and *non-commercial* use. In the case of non-commercial uses, there is less need for high levels of formalisation. Commercial use, however, would lead to the establishment of one of the commercially focused legal entities (i.e. a Co-operative, Trust, CC or a Company).

A further useful distinction is between *consumptive* or *extractive* use, and *non-consumptive* use. Activities such as felling of timber, removal of forest produce and grazing of cattle are consumptive uses. The use of a forest for recreational, spiritual or educational use is non-consumptive.

A non-consumptive use such as recreational can be commercial (e.g. tour guiding in a natural forest in return for a fee), while a local hiking club using the forest with no financial incentive, is non-commercial⁸.

5.1.2 Step 2: Determine the Size and Nature of the Group

The *size of the group* is important, because certain legal entities such as CCs have a size limitation (10 people). For all legal entities and their size, one must consider the transaction and communication costs. In general, it is preferable for groups and groupings not to include a high number of people, except in cases where it can be said to be one, homogenous village, PFM Committee or a clearly defined group.

The *nature of the group* is also a determining factor when deciding on a legal entity. As stated in section 4.4, Co-operatives work well when the cohesion of the group supersedes individual reward and initiative. Groups with a highly commercial and individual return would be more suited to CCs, Companies or Trusts.

Another factor to be taken into account is whether the entity would need to apply for funding from a funding agent and, if so, whether the funder requires that a particular type of legal entity be formed.

⁸ Refer to DWAF/Danida Guideline: Sustainable Resource Use (2005)

5.1.3 Step 3: Decide on the Type of Legal Entity

Once the steps above have been completed, a decision must be made regarding which legal entity would be best suited to the group and their needs. Sections 4.4 and 4.5 detail the different options and broadly discuss the various situations to which the different entities are suited. It may be necessary, particularly in the case of a commercial venture, to consult a legal practitioner to assist with the decision of which legal entity to form.

Below are some examples of forest activities and the possible appropriate legal entities that could be formed.

Examples of Activities and Appropriate Legal Entities

Bark Harvesting

A group of 10 women wish to harvest bark from a natural forest and to sell their produce in the community. They trust each other and have always harvested bark together. They share the proceeds from their sales equally.

This group can either form a Co-operative or a CC. If the level of economic activity is low (i.e. turn over is small), a Co-operative is the simplest legal form.

Cycling Trips

A group of 8 youths wish to start cycling trips through an indigenous state forest. They wish to charge fees to tourists for the rental of the cycles. They do not have the finances to start the business, but wish to get a bank loan to purchase the cycles.

In this case the level of economic activity is higher, and the bank would prefer it if they formed a CC.

Timber Harvesting

The 5 operators of a bush-mill wish to obtain more timber for their mill. They also wish to enter into an agreement with an outside investor who would provide them with equipment and access to markets for their sawn timber. They have applied for a licence to extract timber.

This entity could be either a CC or a Private Company. The outside investor will probably prefer it to be a Company.

Tourism

A community living next to a state forest wishes to build a traditional village in a clearing in the forest and charge fees to tourists. They want to use this money for the benefit of the whole community, e.g. to improve the classrooms of their local school.

Although this activity is commercial, the purpose of the activity is charitable. In such a case the Section 21 Company or the Charitable Trust would be the appropriate legal entity.

5.1.4 Step 4: Decide on the Details of the Legal Entity

Once the type of legal entity, based on the type of forest use, the size of the group and the nature of the group, has been determined, the group must then put flesh to the skeleton of the organisation.

A workshop, or series of workshops with the group members has to take place to make the decisions listed below. These decisions will form the basis of the organisation's constitution.

1. Name

The exercise of choosing a name for the organisation can be time-consuming, but is often one of the most useful mechanisms to build consensus in a community group.

The following considerations apply:

- Passing off or creating confusion with an existing enterprise is not allowed, e.g. there is a company called "Anglo American Corporation" - the names "Anglo American CC" or Anglo American Trust" will thus be rejected.
- The name must not be rude or undesirable.
- A change of name has to be registered with the appropriate registration authority.

2. Executive

The executive is the leadership of the organisation. Note that small groups (approximately 5 or less people) do not need an executive. The executive plays an important role in any organisation as follows:

Number and Gender Specifications

- How many persons should be on the executive? The executive of the legal entity must try to establish a balance between including all relevant people and being able to run efficiently. Women should also be represented on the structure (e.g. a quota system can be put in place stating that half of the executive must be female).

Election of Executive

- What is the period of office before a new executive is elected?
- May office-bearers be re-elected?
- What is the eligibility of the executive - does each executive member have to be a member of the organisation or can they be from outside? Note that outside executive members are usually appropriate only for Companies or Trusts.

Nomination Procedure

- How are the executive members nominated (e.g. a written nomination plus letter of acceptance)?
- When is the executive elected (e.g. seven days before the Annual General Meeting.)?
- How should this nomination be delivered or registered?

Election Procedure

- How should members be elected (e.g. a show of hands or a secret ballot)?
- In the case of a tie, how should the vote be decided (e.g. hold a second round of voting)?
- How are members of the executive elected to certain positions (such as chairperson, treasurer, etc)?

Proceedings of Executive Meetings

- How often should the executive meet?
- How many would constitute a quorum (this is the number of members that must be present before the meeting can proceed)?
- What will be the method of keeping minutes?
- What will be the method of disseminating minutes (e.g. a minute book kept in a public place)?
- Does the chairperson have a deciding vote?

Removal of Executive

- How can the executive be removed if they have lost the confidence of the members (e.g. through a petition signed by majority of beneficiaries to force a Special General Meeting)?

Resignation of Executive

- What happens if some of the executive resigns (e.g. a procedure put in place for proceeding with reduced number of executive members)?
- What happens if more than half resigns (e.g. a Special General Meeting must be held within a specified period to elect new office bearers)?

Powers of Executive

- May the executive decide to withhold some of the income from members and invest it in another enterprise?
- If yes, is there a limit to the size and type of investment they may make?
- May they apply for loans from banks without specific authorisation from the General Meeting?

Signatories

- Who will sign cheques and deal with the bank account?
- How many signatories will there be?
- How will they be accountable to the executive (E.g. Audit Report)?

3. Meetings

Annual General Meetings (AGM)

- Time of the year that the AGM is held?
- How must notice be given of the AGM (e.g. written, displayed on a notice board or verbally)?
- What is the quorum (e.g. 50% of members) and process if no quorum was reached (e.g. the meeting is postponed by a week and the members present at the postponed meeting form the quorum)?
- Process for resolutions (e.g. in writing)?
- What should be the standard agenda? For example:
 - Election of chair;
 - Previous minutes;
 - Election of executive;
 - Chair's report;
 - Financial/treasurer's report;
 - Appointment of auditor;
 - Resolutions.

Special General Meetings

- What are the issues for which a Special General Meeting can be called?
- What is the procedure to call such a meeting (e.g. by petition, or automatically in the case of the resignation of more than 50% of the executive)?

Regular Meetings

- How often should regular meetings take place (e.g. monthly or every 3 months)?
- What will be the reason for meeting (e.g. to discuss the financial position of the business)?
- What are the decision-making powers at regular meetings (if any)?

4. Membership of the Legal Entity

- Who may become members of the legal entity (e.g. "all adults resident in Khayamandi Township", or "all persons whose applications have been approved and who have agreed to the terms of the constitution")? It is important that this is clearly defined.
- What is the process whereby one can become a member (e.g. application, nomination, residency, etc)?

- If an individual can only become a member after they have applied to the other members:
 - Who decides whether to grant membership status (e.g. the executive or all the members of the entity)?
 - On what basis can membership status be denied if the person is eligible?

5. Exit

- Can members be expelled from the organisation (e.g. when they have broken the constitution or when they have breached a term of the CFA)?
- If they can be expelled, there must be a fair procedure whereby they can state their defence (e.g. a disciplinary inquiry).
- May membership be transferred or sold to other members or to outsiders?
- If it may be sold, what is the procedure (e.g. the membership must be offered to all the other members equally)?

6. Conflict Resolution

- If there is no agreement on important issues or any other conflict, how is it dealt with? Section 45 of the NFA creates a dispute resolution panel, whose services may be made available to persons involved in participatory forestry issues. This refers to disputes that arise between the owner or person who controls the forest and members of the public.
- The role of local government and traditional institutions in conflict resolution should also be investigated.

7. Changing and Winding Up

- How can the constitution be changed (e.g. by a majority vote, or there may be certain sections that are protected in the constitution)?
- If an issue/section in the constitution is protected, what percentage of votes can change the constitution?
- What happens to the assets of the organisation if the members want to:
 - Change to another institutional form, or
 - Stop the activity they were busy with?

5.1.5 Step 5: Draw up the Constitution and Register the Legal Entity

The details, requirements and information resulting from the decisions made in step 4 now need to be arranged into a formal constitution. The group can approach a legal practitioner to do this. Since Voluntary Associations do not have to be registered, the members can be assisted to draw up their own constitution⁹.

Once the constitution has been completed, the registration of the legal entity needs to be done. It is, however, not recommended that forest managers attempt to undertake this on their own. Attorneys and auditing firms have professional people who can provide this service. The costs of registering the different legal entities vary, but if the group has reached clarity and consensus on the above decisions, it should be a relatively inexpensive exercise. If the selected legal entity is a CPA, the Department of Land Affairs will handle the registration process.

5.2 Reaching the Community Forestry Agreement

Once the constitution has been completed and the legal entity has been registered, the group is in a position to enter into a CFA with DWAF.

As described in the CFA process in section 3.3, the legal entity will make a written offer to the Minister. This offer or application should be accompanied by the constitution as well as the Utilisation/Management Plan if it has been completed. If all the documentation is accepted, the Minister will then sign a CFA with the legal entity and issue a licence (usually including conditions) for the requested forest use.

⁹ Refer to DWAF/Danida Guideline: Formation of PFM Forums and Committees, Annex 2 (2005)

Example of a Legal Entity Reaching a CFA with DWAF

A group of Rastafarians wish to harvest medicinal plants from a state forest in order to sell it in the community. With the help of DWAF staff they have drawn up a constitution and registered themselves as a Co-operative. While working with the group, the forest manager has been able to determine the sustainable levels and methods of harvesting the plants. This information has been compiled into a Utilisation Plan which stipulates where and when plants can be harvested, the harvesting method to be used, as well as how much may be harvested at a time. This Utilisation Plan is attached to the application made by the group.

The Directorate: PF scrutinizes the application and Utilisation Plan and, after consultation with the forest manager, other DWAF staff and other relevant government departments and organisations, accepts the application. A CFA is then entered into between DWAF and the Co-operative and a licence issued. Conditions are attached to this licence, one of which stipulates that the Utilisation Plan has to be strictly adhered to. Consequences of any deviation from the conditions are also stipulated.



Annex 1: Forming a Communal Property Association¹⁰

The following decisions need to be made when a group is considering forming a CPA:

- Has the group and the rules for group membership been clearly defined?
- Is the size of the group appropriate in relation to the resource base (funds, skills, etc)?
- Do the institutional and/or the organisational structures provide a voice for the less powerful in the group?
- Do the institutional arrangements promote the emergence of a community identity?
- Do resource management rules clearly establish the conditions for collective decision-making over resources, such as the right of the group to establish limits over individual use?
- Have boundaries been clearly defined?
- Are operational rules simple, unambiguous and easy to enforce?
- Have the number of rules been kept to a minimum?
- Is there provision for monitoring and punishment of infringements?
- Do rules take into account potential conflicts between different uses and users of the resources?
- Do rules establish the organisational form for decision-making (e.g. elected committees)?
- Does the user group have the right to modify and adapt rules?
- Has authority been allocated to the appropriate levels?
- Have relationships between the user group and government agencies and customary authorities been clarified?
- Have mechanisms been designed for negotiation and conflict resolution within and between user groups?
- Does trust exist among the user group?
- Is there a legitimate leader for the group?

¹⁰ Adapted from DLA: Guidelines for the Integration of Environmental Planning into Land Reform and Development (2001)



Annex 2: Glossary

Auditors

External financial experts who verify that the financial statements of the enterprise reflect the real financial position.

Beneficiary

A person who will secure direct benefit from a project or trust fund and on whose behalf the trust fund must be administered.

Capital

The amount of funds invested in, owned, or used by a legal entity.

Counter-offer

When an offer is made, a "counter-offer" is made signifying that the person to whom the offer was made is interested in concluding an agreement, but on different terms.

Default

To fail to fulfil an obligation or fail to make a payment when it is due.

Economies of scale

An economic term that implies that the larger the organisations, the lower the overheads and thus the greater the profit.

Egalitarian societies

Groups of people who believe in the principle of human equality.

Executive

The leadership of a legal entity who has the responsibility of ensuring that the constitution and other contracts, agreement, etc are adhered to.

Founding documents

All documents such as deeds, constitutions, etc needed for registration of a legal entity.



Incorporated

Formed into a legal entity.

Indebted

Owing money.

Insolvency

When a person's assets are exceeded by debts and that person cannot repay the debts. Also known as "bankruptcy".

Institution

A group of people with an organised and regulated pattern of behaviour.

Legal entity

An institution or organisation whose constitution is recognised and enforceable by law and can form legally binding contracts, agreements, partnerships, etc on behalf of itself.

Legal persons

A body recognised by law as the bearer of rights and duties.

Liability

A debt or other obligation to a third party.

Natural persons

Humans recognised by law as the bearer of rights and duties.

Perpetual succession

When a legal entity carries on beyond the lifetime of its members.

Quota system

When certain targets, e.g. gender representation, must be met, this is often done via a quota system, e.g. 50% of the executive must be female.

Quorum

The number of members that must be present before a meeting can proceed.

Resolutions

Decisions made during a meeting.



Statutory

Prescribed by law.

Tradability of interest

A beneficiary of a trust has a "beneficial interest" in the trust. "Tradability" refers to the possibility of selling or otherwise trading the beneficial interest and substituting the name of the beneficiary with another.

Trustee

The person who is given the responsibility of managing the trust fund for the beneficiaries.

Trust deed

The legal document which sets out the terms on which the trust fund is donated, including who the beneficiaries are.

Waiver

To refrain from using certain rights.

Winding up

When a legal entity is liquidated (comes to an end). This implies that all its debts are paid, and the balance distributed according to the provisions in its founding document (e.g. to another organisation with the same aims).



Annex 3: List of References

CILLIERS, H.S., BENADE, M.L., HENNING, J.J., DU PLESSIS, J.J., DELPORT, P.A. FOURE, J.S.A. and DE KOKER, L. (2000): *Entrepreneurial Law*. UNISA, Butterworths, Durban

This book provides a basic introduction to the various commercial legal entities in South Africa. It explains and details the forming and operating of each entity.

CILLIERS, H.S., BENADE, M.L., HENNING, J.J., DU PLESSIS, J.J., DELPORT, P.A. FOURE, J.S.A. and DE KOKER, L. (1992): *Corporate Law*. UNISA Butterworths, Durban

This book provides comprehensive information on Companies and Close Corporations. It is in a textbook form and deals mainly with the theoretical aspects of these legal entities.

DEPARTMENT OF LAND AFFAIRS (2001): *Guidelines for the Integration of Environmental Planning into Land Reform and Development*. Pretoria

This document provides an extensive overview of environmental legislation and policy, and provides practical guidelines for implementing these in rural development projects.

DEPARTMENT OF WATER AFFAIRS AND FORESTRY/Danida (2005): *PFM Guideline: Formation of PFM Forums and Committees*. Pretoria

The document deals with the different aspects of organising communities/user groups and other interested and affected parties into PFM Committees and Forums. It clearly explains the difference between the two and describes when to use each. It provides the basic steps of how to form a Committee and Forum plus includes a sample of a constitution.



DEPARTMENT OF WATER AFFAIRS AND FORESTRY/Danida (2005):
PFM Guideline: Fund Raising for Projects. Pretoria

The Guideline details the sources of possible funding for projects. It also provides a format for a funding proposal and details the development of a business plan. This document also provides a useful list of contact details of relevant funding agents.

DEPARTMENT OF WATER AFFAIRS AND FORESTRY/Danida (2005):
PFM Guideline: Sustainable Resource Use. Pretoria

The document deals with aspects of forest use and developing systems to achieve sustainability of forest products. It includes doing resource assessments and provides guidance on yield regulation as well as looking at regulatory approaches and alternative forest uses.

FAO (1999): *Good Practice Guidelines for Agricultural Leasing Arrangements*. Rome

These guidelines provide advice and information on sustainable land use arrangements for land not in private ownership. It details the aspects of leasing and the legal entities that can be formed to ensure fair and sustainable resource benefits.

Available on CD-ROM:

IIED (2002): *Instruments for Sustainable Private Sector Forestry*, London

This document discusses the various aspects of small-scale forestry opportunities. It also deals with appropriate partnerships with communities to ensure sustainable business opportunities and benefits.



Annex 4: The PFM Guidelines

The eight PFM Guidelines were prepared as part of the DWAF/ Danida PFM Project (2001-2005). The PFM Guidelines aim to empower DWAF staff, the new custodians of the state forests and partners at local level to implement the new DWAF Forestry Vision. The PFM Guidelines are meant to support community upliftment in accordance with the DWAF Criteria, Indicators and Standards for Sustainable Forest Management.

Some Guidelines target local groupings, where limited capacity prevails.

The Guidelines are available from the Directorate: Participative Forestry in DWAF, Pretoria.

Description and Main Target Groups

Guideline	Description	Main Target Groups
Stakeholder Participation	How to mobilise stakeholders at local level and form partnerships and agreements with local user groups/communities	DWAF and the new custodians of state forests as well as other departments/ organisations pursuing participation in natural resource management
Legal Options for Community Partnerships with DWAF Forestry	Legal mechanisms/entities available for local groups to co-operate and form CFAs with DWAF and thus obtain licences to use forests and their products	DWAF and the new custodians of state forests as well as local groupings (PFM Committees, CBOs, NGOs, clubs, small enterprises, etc)

Logical Framework Approach Project Planning	Planning and documenting a project and explaining what a project is, including the major projects funded by donors	DWAF and the new custodians of state forests and local groupings (NGOs, CBOs, Forest User Groups, etc)
Sustainable Resource Use	Multiple stakeholder use of indigenous forests through the development of sustainable resource use systems	DWAF and the new custodians of state forests and local groupings (NGOs, CBOs, PFM Committees, Forest User Groups, etc)
Project Monitoring and Evaluation	A tool for monitoring and evaluating projects in line with DWAF's new monitoring and regulatory role	DWAF and the new custodians of state forests
Fund Raising for Projects	How to compile a funding proposal and where community structures and other local groupings can apply for funding for forest related and natural resource management projects - complements the PFM Guideline: LFA Project Planning	Local groupings (NGOs, CBOs, Forest User Groups, etc)
Formation of PFM Forums and Committees	Aspects and procedures of developing local PFM structures and compiling a constitution in order that DWAF can liaise and form partnerships with communities through local structures - supplements the PFM Guideline: Stakeholder Participation	DWAF and the new custodians of state forests and local groupings (NGOs, CBOs, Forest User Groups, etc)
Financial Management of Projects	Simple aspects and processes of sound financial management of projects - many local groupings have limited capacity in this regard and can thus not apply for project funding	Local groupings (NGOs, CBOs, Forest User Groups, etc)