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Report of the Bills Committee on Land Titles Bill

Purpose

This paper reports on the deliberations of the Bills Committee on Land Titles Bill.

Background

2. The present system of land registration in Hong Kong is a deeds registration system (DRS) governed by the Land Registration Ordinance (LRO) (Cap. 128). The system provides a record of the instruments affecting a particular property, but gives no guarantee of title. Even if a person is registered in the Land Registry as the owner of a property, he may not be the legal owner because there may be uncertainty or defects in his title to the property. The uncertainty of title puts purchasers at risk, causes confusion to the general public and reduces the commercial potential of properties in some cases. In order to establish title to property, it is necessary in every case to check the title documents relating to all the transactions affecting the property that extend to not less than 15 years before entering into a new transaction of that property.

3. In May 1988, a Working Party on Title Registration chaired by the then Registrar General and comprising practising solicitors from prominent conveyancing law firms and representatives of the Law Faculty of the University of Hong Kong was set up to consider the desirability of converting the DRS to a land title registration system (LTRS). The Working Party, having considered the major types of registration systems operating in other jurisdictions, concluded that conversion to a LTRS was desirable. The Law Society of Hong Kong (Law Society) was consulted on the proposal and supported it in principle. Subsequently, Professor Peter Willoughby was appointed as a consultant to examine the conversion process in detail. In his report produced in March 1991, Professor Willoughby made recommendations for the conversion. The Law Society, Hong Kong Bar Association (Bar Association) and a number of other interested bodies were consulted on the proposal.

4. In November 1994, the Administration introduced a Land Titles Bill into the Legislative Council (LegCo) with a view to converting the DRS to a LTRS. A Bills Committee was formed by LegCo to scrutinize that Bill, but the scrutiny work could not be completed before the end of the legislative term in July 1995. The House Committee decided that the Bills Committee should curtail its work.

5. After the lapse of the previous Land Titles Bill in July 1995, the Administration maintained dialogue with the Law Society and a number of amendments were subsequently made to the original Bill. In January 1999, the Administration consulted the LegCo Panel on Planning, Lands and Works (PLW Panel) on a draft Land Titles Bill and subsequently issued the draft Bill to the concerned parties for comments. In November 1999, the Administration briefed the PLW Panel on the outcome of the consultation exercise and its proposed amendments to the draft Bill. Following that, the Administration reviewed and revised various elements of the draft Bill, and consulted the interested parties on the revised draft Bill.

6. In July 2002, the Administration consulted the PLW Panel on the revised draft legislative proposals. In December 2002, the Administration introduced the current Land Titles Bill (the Bill) into LegCo.

The Bill

7. The object of the Bill is to replace DRS with a new system of registering the title to land and the interests in the land subject to which the title is held. The new system aims to provide certainty both as to the ownership of land and the interests in that land because, subject to certain exceptions in the Bill, no matter may affect land unless the matter is registered. Under the new system, the Title Register shall be conclusive evidence of the title to registered land and it will no longer be necessary to review the historical title deeds to establish title as at present. This will give greater security to property interests and simplify conveyancing.

The Bills Committee

8. The House Committee agreed at its meeting on 3 January 2003 to form a Bills Committee to study the Bill. The Bills Committee first met on 19 March 2003. Hon Margaret NG was elected Chairman and Hon Albert HO Chun-yan was elected Deputy Chairman. The membership list of the Bills Committee is in **Appendix I**.

9. The Bills Committee has held a total of 39 meetings. Given that the introduction of a statutory LTRS is a significant development of land law in Hong Kong and would have significant implications on members of the public and legal practitioners, the Bills Committee has invited the public and the concerned parties, including the Law Society and the Bar Association, to give views on the Bill. The Bills Committee has received written submissions from nine organizations and one individual, and met with representatives from six of the organizations. The list of the organizations/individual concerned is in **Appendix II**.

Deliberations of the Bills Committee

10. The Bills Committee notes that under the existing DRS, registration of deeds governs priority of the deeds but does not confer title. All deeds shall have priority one over the other according to the priority of their respective dates of registration. Under the new LTRS proposed in the Bill, however, registration as owner confers title to the land. The Title Register is conclusive evidence of title in law. Unregistered interests are unenforceable against subsequent purchasers who obtained the property for value. Given that the Bill seeks to replace the existing DRS by the new LTRS to provide greater security to title and simplify conveyancing, the Bills Committee has examined in detail the policy issues involved and the proposed provisions in the Bill, including the conversion mechanism and indemnity scheme. In the course of examination, the Bills Committee together with the Administration have considered and finally accepted the Law Society's proposal for adopting the daylight conversion mechanism instead of the gradual conversion mechanism originally proposed under the Bill. This significant change has necessitated substantial amendments to the Bill to give effect to the daylight conversion mechanism and to remove those parts which have become obsolete because of the change. The Bills Committee has examined in detail the substantial amendments which will be moved by the Administration during the Committee Stage.

11. The Bills Committee's deliberations on the following major issues are summarized in this report:

- (a) Conversion mechanism (paragraphs 12 to 23);
- (b) Security of title (Rectification of title by court or Land Registrar) (paragraphs 24 to 32);
- (c) Indemnity scheme (paragraphs 33 to 60);
- (d) Effect of registration (including overriding interests affecting registered land) (paragraphs 61 to 70);
- (e) Matters capable of being registered (paragraphs 71 to 75);
- (f) Dispositions and transmissions (paragraphs 76 to 94);
- (g) Protection of holders and claimants of interests in land (Consent cautions, non-consent cautions and priority of interests; inhibitions and restrictions) (paragraphs 95 to 107);
- (h) Application to court by Land Registrar or persons other than the Registrar (paragraphs 108 to 113); and
- (i) Land boundaries issues (paragraphs 114 to 119).

Conversion mechanism

Midnight conversion

12. The Bills Committee notes that the previous Land Titles Bill introduced in 1994 proposed an automatic conversion arrangement under which land registers held under DRS would be deemed to be land registers under LTRS on the day when the new system came into operation. This conversion arrangement, also known as "midnight conversion", had caused concern, as automatic conversion would extinguish certain rights enforceable, though not necessarily registered, under the present system at the cut-off time.

Gradual conversion

13. To address the concerns about automatic conversion, the Administration proposes under the Bill gradual conversion from the present system to the new system over an indefinite period of time. Clause 12 sets out two routes through which existing properties can be converted from the present system to the new system: mandatory application for conversion upon the first assignment of any property after commencement of the Land Titles Ordinance (LTO) (if enacted); or voluntary application for title registration at any time after commencement of LTO. Any applications through these two routes must be accompanied by a certificate of good title issued by a solicitor after examination of the owner's title to the property. As regards properties that have not been converted or are barred from conversion for any reason, LRO would continue to apply. The Administration's proposal is to revisit the idea of automatic conversion some time after title registration is introduced and when people have become accustomed to it.

14. The Bills Committee notes that the Law Society has raised a number of fundamental concerns about the proposed conversion mechanism. The Law Society is of the view that without a mechanism for review and adjudication by a reference body under the auspices of the Land Registrar in cases of doubt, certificates of good title would place an unacceptable burden on solicitors. However, the Administration does not consider it appropriate for the Land Registry to establish such a mechanism, as it will add to the cost and complexity of conveyancing and will be difficult to safeguard against abuse. The Bills Committee appreciates the Law Society's concerns about the issue of certificates of good title, in particular the extent of solicitors' liability in the issue of such a certificate under clause 96(1) and 96(2). Members therefore urge the Administration to further discuss with the Law Society on the arrangements to be made to address solicitors' concerns.

Daylight conversion

15. In December 2003, the Law Society informed the Bills Committee that it has come to the conclusion that the Bill, which requires a solicitor to guarantee title by the issue of a certificate of good title, is unworkable and cannot be supported in the absence of a mechanism by which doubtful cases can be referred to the Land Registrar for review. The Law Society considers midnight conversion the best and most practical way to implement LTRS, as the "at the stroke" conversion and removal of

title defects will achieve the dual purpose of simplicity and certainty of the system. However, if that is not acceptable, the Law Society would support a daylight conversion mechanism which is an adaptation of the system operating in some states of Australia and in effect is deferred midnight conversion. Under the daylight conversion mechanism, existing properties on DRS are brought onto the Title Register after the lapse of a period of time, such as 12 years.

16. As midnight conversion is not an option acceptable to all parties concerned, the Bills Committee invites the Administration to examine the daylight conversion mechanism. Following discussion with the Law Society, the Administration has worked out a detailed scheme for the operation of such a mechanism. The main features of the scheme are as follows:

New Land

- (a) From the commencement day of LTO, all "new land" will be registered under LTRS and the title will be vested in the grantee as registered owner. All other land will remain under LRO until the expiry of 12 years from the commencement day (12-year incubation period);
- (b) From the commencement day of LTO, any claim arising through an unwritten equity created in respect of new land can only affect a purchaser for value if notice of the claim is registered as a non-consent caution;

LRO Land

- (c) Upon the expiry of the 12-year incubation period, all unregistered land will be converted automatically to LTRS except where either a "caution against conversion" stands or where matters lodged for registration under LRO have not yet completed registration. The current owner on the register kept under the LRO register would become the first owner under the Title Register under LTO;
- (d) During the 12-year incubation period, all existing or newly created unwritten equities affecting unregistered land can be protected by registration of a warning notice known as "caveat" under LRO; and
- (e) Caveats and cautions against conversion are cumulative protections. They may be employed at the same time. However, registration of a caveat or caution against conversion without reasonable cause will attract liability for damages.

Under the scheme, after conversion to the Title Register at the expiry of the 12-year incubation period, all unwritten equities (other than overriding interests) existing at or prior to the conversion will be null and void as against a registered purchaser or chargee for value unless protected by a non-consent caution (caveats being deemed to be non-consent cautions upon conversion).

17. The Administration is of the view that the daylight conversion mechanism is a practicable and reasonable way forward. While the Bills Committee has no objection to the adoption of the daylight conversion mechanism, members consider the proposal a significant change and that it is prudent for the Administration to consult the concerned parties on the proposed change.

18. Since the concerned parties have not raised objections in principle to the daylight conversion mechanism during consultation, the Bills Committee supports the Administration's proposal that Committee Stage amendments (CSAs) be drafted to give effect to the change. In this connection, the Bills Committee suggests that for the purpose of clarity, the transitional arrangements for the 12-year incubation period be set out in a schedule to the Bill and the full implementation of LTRS in the main body of the Bill. The Administration accepts the suggestion and proposes CSAs to achieve this effect. The major proposed CSAs are set out as follows:

- (a) To add a new part 2B in the Bill to provide for the registration of new land after the commencement day of LTO;
- (b) To add a new Schedule 1A to provide for the conversion of LRO land and long term leases from the existing system to LTRS upon expiry of the 12-year incubation period;
- (c) To add a new Schedule 3 to provide for all the consequential amendments to LRO, including the amendments to provide for caveats and cautions against conversion; and
- (d) In connection with (c) above, to delete from Schedule 2 the amendments to LRO related to the original gradual conversion mechanism.

Cautions against conversion and caveats

19. The Bills Committee also suggests that detailed provisions be made on cautions against conversion and caveats, which are new instruments to be created under LRO. Members note that under the Administration's proposal, for unregistered land, cautions against conversion to the Title Register can be registered under LRO within 12 years from the commencement day of LTO. Such cautions may be registered only in respect of any claims of title to land or beneficial interest in the land. A cautioner may withdraw a caution against conversion at any time. The owner of the property may apply to the court at any time for an order to remove the caution. Any person presenting wrongful cautions without reasonable cause will be liable for any damages caused thereby to the owner or any other person who has an interest in the land.

20. The Bills Committee also notes that cautioners are required to take prompt action to bring a conclusion to the dispute on title or interest. Under the Administration's proposal, cautions against conversion will lapse after 12 months unless the cautioner has commenced court proceedings to establish his claim. The registration of these cautions can only be extended by the court at its discretion upon

application. Application for extension must be made by the end of the 12-month validity period. Members are concerned that in the absence of a limit on the extension period, registration of cautions against conversion may be extended endlessly and the court may be overloaded with such applications. They consider that there is a need to impose a limit on the extension period. The Administration accepts members' views and proposes that the extension of the validity of a caution against conversion shall not be more than 12 months. The Administration would incorporate this into the new provisions on "cautions against conversion".

21. As regards registration of caveats, the Bills Committee notes that the Administration's intention is to provide a means for anyone who has a claim to an interest that is unregistrable under LRO to protect that claim against the effect of a subsequent sale to a bona fide purchaser after the land has been brought under LTO. A caveat gives notice of a claim but does not affect the validity of the claim or prejudice the priority of the claim. The Bills Committee also notes that under the Administration's proposal, a caveat may be withdrawn or removed. This provision mirrors clause 72 dealing with the withdrawal or removal of consent cautions and non-consent cautions, and the provisions for withdrawal or removal of cautions against conversion. Moreover, a caveat that is registered or maintained without reasonable cause may be liable in a suit for damages. Again this provision mirrors clause 73 for consent cautions and non-consent cautions, and the proposed provisions for cautions against conversion. Any caveat that remains registered against the land when it becomes registered land will become a non-consent caution on the Title Register. Some members are however concerned whether it is appropriate to allow all caveats to become non-consent cautions under LTRS. The Administration considers the proposed arrangement appropriate, as any matter that can be the subject of a caveat (unregistrable interests or equities) can be the subject of a non-consent caution.

Review of LTRS during the incubation period

22. To ensure safe and smooth conversion at the end of the 12-year incubation period, members suggest that a legislative or administrative measure be put in place to effect a review mechanism for the implementation of LTRS during the 12-year incubation period, so that any problem that may arise in the interim can be tackled in a timely manner. Members also suggest that a provision be added in the Bill to empower the Administration to extend when necessary the 12-year incubation period. The Administration accepts the Bills Committee's suggestions and agrees that a mechanism to review the implementation of the new system is necessary. The Administration also proposes a CSA to clause 101 to empower the Secretary for Housing, Planning and Lands (SHPL) to vary the 12-year incubation period by gazetting an amendment to the new Schedule 1A. This power is subject to the positive vetting of LegCo.

Commencement date of LTO

23. As regards the commencement date of LTO, the Bills Committee has no objection to the Administration's proposal that the new Ordinance be commenced two years after its enactment so as to allow sufficient time for putting in place the relevant regulations and finalizing the guidance notes for legal practitioners and members of

the public. Members however urge the Administration to make full use of the two-year period to ensure the effective implementation of the new Ordinance.

Security of title

Rectification by Court of First Instance

24. One of the main features of LTRS is to provide security of title. The Bills Committee notes that under the previous Land Titles Bill introduced in 1994, the land register would not be rectified so as not to affect the indefeasible title of an innocent purchaser even in the event of a fraudulent transfer of property achieved through the fraud of a third party. The proposal caused considerable concern because under the new system, the former registered owner would have no way of getting back his title to the property in case of fraud, whereas under the present system, the former registered owner could apply to the court for a ruling. In response to calls for the dilution of the principle of indefeasibility to protect the innocent former registered owner, the Administration proposes under the current Bill that the Court of First Instance (CFI) should be allowed to order rectification of the Title Register on the ground that where the court is satisfied that an entry on ownership has been made by fraud and the former registered owner has no knowledge of or has not caused or substantially contributed to the fraud by his act, neglect or default, and that it would be unjust not to rectify the Title Register (clause 81(3)). The court may take into account two matters when considering whether to rectify the Title Register where a fraud has occurred: the acts of the parties and the hardship to the parties (clause 81(4)). While specifically mentioning these two matters for consideration, the Bill does not limit the factors that the court may consider in reaching its conclusions. In order to strike a fair balance between certainty of title and justice in the circumstances of each case, the Administration considers that the court should be given the discretion to consider any factors in the particular case before making its decision.

25. The Bills Committee notes the view of the Real Estate Developers Association of Hong Kong (REDA) that clause 81 should be amended to the effect that an innocent former registered owner would always be entitled to have the Title Register rectified and his name restored to it. The Law Society considers that the court should only be given the discretion to order rectification in specific limited circumstances. The Bar Association is of the view that certain provisions in clause 81 fail to achieve the right balance between the requirement of certainty of title and justice in a particular case. In particular, the Bar Association has grave doubts as to whether a “knowledge test” should be adopted as the statutory criterion in determining whether the Title Register is subject to the court’s power of rectification. Mere knowledge of, as opposed to contribution or participation, to a fraud, mistake, omission or voidability of the instrument should not have the effect of depriving a person’s registered title. This would put a registered person’s title at a greater risk than that under the existing law. The exclusion of the right of a former registered owner to apply for rectification merely because he might have knowledge of the fraud at some stage is unsatisfactory. The Bar Association considers that even if the knowledge test is the appropriate test, it is necessary to clarify at what time the former registered owner has knowledge of the fraud.

26. Whilst supporting the proposal of providing the court with the power of rectification, the Bills Committee requests the Administration to consider how the views of the concerned parties could be addressed. Upon review, the Administration proposes to recast clause 81 to achieve the following purposes:

- (a) To remove the wide discretion given to the court under the original subclauses (3) and (4);
- (b) To provide in the proposed new subclause (3) that subject to the new clause 81A, CFI shall order the rectification of the Title Register to restore the title of the former registered owner if it is satisfied that the entry in the Title Register by or as a result of which the applicant lost his title was procured by or as a result of a void instrument or a false entry in the Title Register; the applicant was not a party to the fraud; and the applicant did not, by his act or by lack of proper care, substantially contributed to the fraud; and
- (c) To set out clearly in the proposed new subclause (2) that unless the conditions in subclause (3) apply, CFI may not order the rectification of the Title Register so as to affect the title of a person who is the registered owner of registered land or the registered lessee of a registered long term lease, who is in possession of the land and has acquired the land or lease for valuable consideration unless the court is satisfied that the name of such person was entered in the Title Register as the owner or lessee by or directly as a result of the fraud, mistake or omission in question or the void or voidable instrument in question, as the case may be, and that the person:
 - (i) was a party to the fraud; caused the mistake or omission; caused the instrument to be void or voidable, as the case may be;
 - (ii) had knowledge of the fraud/the mistake or omission/that the instrument was void or voidable, as the case may be, at the time the person's name was so entered in the Title Register; or
 - (iii) had, by his act or by lack of proper care, substantially contributed to the fraud, mistake or omission, or making the instrument void or voidable, as the case may be.

27. Members express concern about how the proposed expressions “substantially contributed” and “lack of proper care” in the proposed new subclauses (2)(b) and (3)(c) would be interpreted by the court. Noting from the Administration that the Law Society is satisfied with the proposed expressions but REDA has expressed its concern, members request the Administration to reconsider whether it is appropriate to adopt the proposed expressions. The Administration advises that the proposed expressions are adopted from relevant provisions in UK and that there is relevant case law in UK on how the court interprets the expression “lack of proper care”. The Administration also advises that it has explained the situation to REDA.

28. On the Administration's proposal to impose a limitation period of 12 years for the rectification of Title Register by the court (new clause 81A), the Bills Committee is concerned whether extension of the period should be allowed under certain special circumstances to provide for a situation where an owner may be out of Hong Kong or is a minor during the 12-year limitation period. To address the Bills Committee's concern, the Administration proposes to add a provision in the new clause 81A to provide that the Limitation Ordinance (Cap. 347) shall apply, with necessary modifications, to an application for the rectification of the Title Register under clause 81.

29. The Bills Committee notes that under clause 81(5), in any rectification case not involving any mistake or omission on the part of any person referred to in clause 8(3), if the Land Registrar is joined as a party, the Registrar shall not pay costs incurred by the parties in the proceedings and damages suffered by any parties in the proceedings. Noting the Administration's advice that the claims for such costs and damages would have to be made by application for indemnity and that this policy intent would be set out in the relevant regulations, members are concerned that it is not clear from the relevant clauses (including clauses 83 and 84(2)(b)) that such costs could be recovered from the Indemnity Fund. To address members' concern, the Administration proposes a CSA to add the new subclause (8) to clause 81 to set out this policy intent.

Rectification by Land Registrar

30. Clause 80(1) provides that the Land Registrar may rectify any error in or omission from the Title Register under the following two circumstances:

- (a) in the case of errors or omissions not materially affecting the interest of the registered owner of registered land or a registered charge, or the registered lessee of a registered long term lease; or
- (b) in any other case with the consent of all persons interested.

31. Members suggest that the Administration should consider adding a new item to clause 80(1) to provide for other circumstances which may not be covered by item (a) or (b) above, for example, where there is a typographical error in relation to the name of the registered owner. The Administration appreciates members' views and considers it desirable to have a clerical error rectified in a simple and cost-effective way. In this connection, the Administration makes reference to Rule 13 of the UK Land Registration Rules 1925 which provides that the Registrar can correct any clerical error. The Administration therefore proposes a CSA to add a new subclause (aa) to clause 80(1) to provide that the Registrar may rectify an error in or omission from the Title Register on proof to his satisfaction of the error or omission being of a clerical nature only. Members stress that such power of rectification should rest with the Registrar personally and should not be delegable.

32. Members are also concerned that clause 80 does not provide the Land Registrar with the power to remove, when a minor who has been registered in the Title Register as the owner of registered land attains the age of majority, the annotation “a minor” added after the minor’s name in the Title Register. To address members’ concern, the Administration proposes CSAs to add the new subclauses (3) and (4) to clause 80 for the purpose.

Indemnity scheme

33. The Bills Committee notes that under LRO, the Land Registry is liable for any losses arising from negligence on the part of the Registry. However, LRO provides no assistance to innocent parties who lose ownership of their properties because of fraud or the operation of that Ordinance, and the innocent parties may only recover their loss from the fraudster. The Bill provides for an indemnity scheme under which indemnity may be claimed under the following two circumstances:

- (a) Loss caused by an entry in or omission from the Title Register as a result of mistakes or omissions on the part of the Land Registrar or public officers assisting the Registrar (clause 82(1)(b)); and
- (b) Loss of ownership caused by an entry in or omission from the Title Register as a result of fraud on the part of any person (clause 82(1)(a)).

34. On item (b) above, the Bills Committee notes that under the proposed provisions, the fraud may have been committed by any person (including a member of the Land Registry staff), but it must affect the ownership of registered land or the registration of a person as the lessee of a registered long term lease. Examples of fraud quoted by the Administration include forged transfer made by a fraudster forging the signature of the registered owner to assign the property to a purchaser, and transfer made by one joint tenant forging the signature of another joint tenant assigning the property to a purchaser. The Bills Committee also notes that in cases of fraud, an application for rectification of the relevant entry or omission must first have been made under clause 81 and adjudicated by CFI and a corresponding order has been made before the party suffering loss could claim the indemnity.

35. The Bills Committee notes that the Administration intends to set up an Indemnity Fund through which all indemnity payments will be made, whether arising from fraud or mistakes or omissions. However, the Land Registry Trading Fund (i.e. Government) will reimburse the Indemnity Fund for any payments attributable to mistakes or omissions by Land Registry staff. The Administration proposes to set this out clearly in the regulations governing the Indemnity Fund.

36. The Bills Committee has examined the proposed indemnity scheme in detail, particularly the amount of indemnity payable, the constitutionality of the proposed cap on indemnity in cases of fraud, operation and financing of the Indemnity Fund and the possible levy rates.

Amount of indemnity payable

37. Regarding loss caused by mistakes or omissions on the part of the Land Registrar or public officers assisting the Registrar, the Bills Committee notes that there will be no cap on the indemnity. This is the same as under the existing DRS. The amount of indemnity payable proposed under the Bill is the value of the interest in the land immediately before the discovery of the mistake or omission concerned or, if there is a court order for rectification, the date of the court order (clause 83(1)(b) and (2)). To address the Law Society's concern, the Administration proposes CSAs to clause 83(1)(b) to provide that the amount of indemnity payable is the value of the interest in the registered land "on the date on which the mistake or omission concerned was made", and to delete clause 83(2). Members support the proposed CSAs, as they provide a more reasonable basis for calculating the amount of indemnity.

38. Regarding cases of fraud, the Bills Committee notes that the Administration proposes a cap on the indemnity. The amount of indemnity payable is the value of the interest in the land before the date of the court order on rectification or the amount determined by the Financial Secretary (FS), whichever is the lesser (clause 83(1)(a) and (3)). The Administration's proposed upper limit for the amount determined by FS is HK\$30 million for each case.

Proposed cap on indemnity in cases of fraud

39. The Bills Committee notes that the proposed cap on indemnity in cases of fraud has been an issue of contention. The previous Land Titles Bill introduced in 1994 provided for a cap of HK\$20 million for each case. The proposal invited criticisms about the fairness of the indemnity scheme, as owners of properties valued at over HK\$20 million who lost their properties as a result of fraud on the part of a third party would not be fully compensated. In the Bill, the Administration maintains its proposal of imposing a cap on indemnity, but raises the upper limit to HK\$30 million for each case.

40. Noting that other jurisdictions such as England, New South Wales (Australia) and Ontario (Canada) do not impose a cap on indemnity, the Bills Committee requests the Administration to provide justifications for its proposal. The Administration considers that the indemnity scheme, which is a self-financing scheme, should be funded by the users of LTRS. As deliberate fraudulent acts are difficult to anticipate and prevent, there should be a suitable device to limit the potential liability that the scheme has to carry. Moreover, the interest of individuals being compensated should be balanced against the costs to property owners and purchasers at large. The proposed cap would provide protection for the great majority of property owners, as over 99% of property transactions involve sums less than HK\$30 million. While the Government would be the compensator of first resort, persons suffering loss in excess of the limit of compensation could still recover the shortfall through further legal proceedings.

41. The Bills Committee notes that the Law Society, Bar Association, REDA and Hong Kong Institute of Surveyors (HKIS) object to the proposed cap on indemnity in respect of fraud cases. Heung Yee Kuk (HYK) considers that it is inadvisable for the Government to bear the financial burden of providing indemnity to property owners in cases of fraud, but if the indemnity scheme is to be implemented, it should provide protection to all property owners. The cap on indemnity is unfair to the owners of properties valued at over HK\$30 million.

42. The Law Society considers that there should be no cap on the indemnity to ensure that any person suffering any loss under LTRS will be properly compensated. HKIS queries the reasons for the Administration to apply different treatment to properties of higher value. The Bar Association is of the view that the constitutionality of the cap on indemnity is highly doubtful under Articles 6 and 105 of the Basic Law (BL). REDA also considers that the proposed cap, insofar as it attempts to deprive an innocent owner of his property without full compensation, is contrary to BL 6 and 105.

43. The Bills Committee is much concerned about the constitutionality of the cap on indemnity. BL 6 provides that the Hong Kong Special Administrative Region (HKSAR) shall protect the right of private ownership of property in accordance with law. BL 105 provides that HKSAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

44. The Bar Association points out that while imposing a general obligation on the government of HKSAR to protect private ownership under Article 6, BL goes on to provide, under Article 105, for the specific instances and species of property rights that the government has a duty to protect. Amongst the species of rights that are expressly specified under BL 105 is the "right to compensation" for lawful deprivation of property. BL 105 further expressly provides that such compensation shall correspond to the real value of the property concerned and shall be paid without undue delay. In the Bar Association's view, it is plain that the right of compensation for lawful deprivation of property is a guaranteed constitutional right. Equally the amount of compensation, which must correspond to the real value of the property, is guaranteed. Accordingly, once it is shown that there has been deprivation of property in accordance with any law, the Government has a constitutional duty to ensure that proper compensation is paid to the individual suffering from the deprivation. For this reason it is important to consider if the proposed legislation would have the effect of depriving private property rights or ownership. If it has that effect, any cap which seeks to reduce the amount of compensation to below the real value of the property deprived would, ipso facto, be a breach of BL.

45. The Bills Committee notes the following arguments put forward by the Administration to support its view that the Bill is consistent with BL 6 and 105:

(a) The theme of continuity provided in the Joint Declaration

It is established that the Joint Declaration may be used as a guide to the interpretation of BL. The part of the Joint Declaration corresponding to BL 6 and 105 is Section VI of Annex I. This provides that: "rights concerning the ownership of property, including those relating to acquisition, use, disposal, inheritance and compensation for lawful deprivation shall continue to be protected by the law." It is clear from this that the right to compensation for lawful deprivation of property under BL 105 basically mirrors the right to compensation for lawful deprivation of property prior to the reunification. If certain interference with property rights did not give rise to any right to compensation before the reunification, it is unlikely that it would be within the scope of "deprivation" for which compensation is payable under BL 105.

(b) Pre-existing law

Under the present land registration system operating since 1844, interests in land can be rendered unenforceable in certain circumstances. No compensation would be paid by the Government for the loss of such interests due to the operation of this system.

(c) Comparative jurisprudence

The comparative jurisprudence of the Australian Courts and that under Article 1 of the First Protocol of the European Convention on Human Rights (ECHR) shows that the kind of deprivation envisaged is expropriation by the State, or authorized by the State for public purposes. Legislation of the kind as the Bill is legislation which merely adjusts competing rights, and is not legislation providing for State or State authorized expropriation of property. Accordingly there is no deprivation under BL 105.

46. Notwithstanding the above, the Administration admits that the Bill will interfere with or control ownership of property rights in land. This gives rise to a further question of whether such interference or control is consistent with BL 6 and 105. In this connection, the Administration points out that in the jurisprudence developed under ECHR, a fair balance needs to be struck between the general interests of society, which any interference with or control of property rights must aim to serve, and the protection of the individual's property rights. The Administration is of the view that the proposed indemnity scheme satisfies the fair balance test. Two major reasons are that the proposed cap of HK\$30 million available under the scheme will be sufficient to provide full coverage to well over 99% of transactions, and where the scheme is insufficient to meet the full extent of the loss it does not take away the right that individuals now have to seek personal remedy against the third party fraudster and, by giving assurance of recovery of up to the cap amount puts the party taking the action in a stronger position to pursue it.

47. The Bills Committee notes that both the Bar Association and REDA do not accept the arguments put forward by the Administration. On the argument on the Joint Declaration, the Bar Association considers that the argument is fallacious. While the Bar Association accepts that the Joint Declaration can be used as an aid to the interpretation of BL, it points out that it is BL itself, not the Joint Declaration, which is the constitution of HKSAR. The Bar Association further points out that property rights which existed before reunification are preserved by BL. One of those property rights is the fundamental principle of common law as expressed by the maxim *nemo dat qui non habet* (no one gives who possesses not), and an owner will not lose his ownership of property as a result of fraud by another person. This is because the fraudster acquires no title by his fraud, and cannot pass title which he himself does not have. It has been held in *HKSAR v. Ma Wai Kwan David* [1997] HKLRD 761 that on the interpretation of BL, the common law which existed before the resumption of sovereignty continues to apply to HKSAR after the reunification, and there is no need for a separate act of adoption by the National People's Congress for the common law to continue to apply. In the Bar Association's view, it follows that the *nemo dat* principle of the common law continues to apply to HKSAR after reunification. However, the *nemo dat* principle is altered by the Bill. Subject to the provisions of rectification, an owner will lose ownership of his property even though the registration of title by another person is the result of fraud. A fraudster would thus be able to pass title to another person at the expense of the former owner. It would seem clear that insofar as the proposed legislation seeks to remove the right of the owner to retain ownership of property from the effect of fraud, that is a deprivation of his property right – a right protected and guaranteed by BL.

48. Whilst accepting that there were already limitations to the operation of the *nemo dat* rule, the Bar Association considers that BL preserves the common law subject to those limitations which already existed prior to reunification. The mere existence of such pre-existing limitations does not give the Government the liberty to take away rights which are not otherwise limited by those pre-existing limitations. The right to restore ownership free from the effects of fraud is one such right. It is preserved and protected by BL. The fact that there are other pre-existing limitations cannot be a ground for taking away this protected right. If the argument of the Government were correct, the Government would be able to rely on the existence of such pre-reunification limitations to expropriate all private properties in HKSAR without compensation at all.

49. On the Administration's view that comparative jurisprudence in Australia and under ECHR shows that deprivation in this context is directed against State expropriation or State authorized expropriation for public purposes, the Bar Association doubts whether the comparison is appropriate.

50. On the Administration's view that the proposed indemnity scheme satisfies the fair balance test, the Bar Association points out that on the basis that deprivation of property is well justified, and otherwise lawful, BL requires that proper compensation be paid for such lawful deprivation. The proposed cap on indemnity, which arbitrarily limits the compensation to HK\$ 30 million, is not the compensation required by BL. In the context of BL, fair balance does not come into the equation at all once deprivation is shown. The BL leaves no room for argument that the amount of

compensation shall depend on the public interests involved, or that it shall be reduced if there is some general interests that should be considered other than the real value of the property deprived.

51. To facilitate the Bills Committee to examine this contentious issue, the Legal Service Division (LSD) of the LegCo Secretariat has been invited to give advice on the issue. LSD observes that nothing in the Bill directly expropriates any property. Hence, direct deprivation is out of the question. What remains to be ascertained is whether the title registration scheme affects the substance of a property to such an extent that there would be a de facto deprivation. The *Kowloon Poultry* case^{Note 1} appears to have accepted that BL 105 does cover a de facto deprivation. Under the Bill, it cannot be maintained that no compensation would be paid at all but only that the compensation would not correspond to the real value of the property when that real value exceeds the cap or the limitation. Consequently, the most that can be argued against the cap and the limitation is that they may result in a partial deprivation of an owner's property. It only does not guarantee full compensation. In LSD's view, the Bill is not a piece of legislation directed at partial deprivation of an owner's property. On the contrary, when comparing with the existing law, it would be a significant improvement as it would guarantee compensation to victims of fraud up to the cap without them needing to sue the fraudulent parties. The objective of the Bill is to establish a system of title registration for protection of property owners. Its provisions would affect and redefine rights of property owners. The cap and the limitation may result in an owner not being able to fully recover his losses. Applying the reasoning in *Kowloon Poultry* case, it is not unreasonable to conclude that the Bill is a piece of legislation of a general character affecting and redefining the rights of property owners. It follows that the cap and the limitation would not constitute a deprivation for the purposes of BL 105.

52. Moreover, LSD agrees with the Administration that the test of fair balance should be satisfied before rules interfering with property rights or legal relationship between individuals should be regarded as compatible with BL 6 and 105. The balance appears to be between the benefits to society having the title registration scheme and the protection of owners when not having the scheme and at the same time between the majority of owners who can enjoy having an indemnity scheme with reasonable levies and a minority being fully indemnified for their losses.

53. As regards the question of whether the proposed cap on indemnity contravenes BL 6, LSD advises that the fact that in some cases an owner may not be able to recover all his losses under the indemnity scheme or against the Government owing to any fraud, act or omission could not be taken to mean that the law does not protect ownership of property.

Note 1

In *Kowloon Poultry Laan Merchants Association v. Department of Justice [CACV 1521/2001]*, the Hong Kong Court of Appeal (CA) considered an appeal from CFI. The appellants were a poultry wholesalers' association. They complained that the Government's requirement of separating the locations for sale of chicken from those for sale of water birds had caused them to suffer severe financial losses, and the Government had refused to compensate them for such losses. They claimed that this was a deprivation of property within the meaning of BL 105. CA held that the requirement of separate location was a control of land use and not a deprivation.

54. Having considered the views of the Administration, concerned parties and LSD, members remain doubtful about the constitutionality of the proposed cap on indemnity in cases of fraud. Members are concerned whether the Bill would be struck off after enactment if subsequently found to be unconstitutional. Some members have quoted a scenario in which a person lost ownership of his land that was worth \$10 billion as a result of fraud by a third party. Being entitled to be indemnified by the Government up to HK\$30 million only, he challenged the cap on the indemnity in reliance on BL 6 and 105, and the cap was subsequently ruled by the court to be inconsistent with the above constitutional provisions. The Administration was asked if this scenario occurred, whether it would seek an interpretation of BL 6 and 105 from the Standing Committee of the National People's Congress (NPCSC). The Bills Committee is advised by the Administration that NPCSC is unlikely to exercise its power of interpretation of BL under BL 158(1) save in wholly exceptional circumstances. The Administration is fully committed to upholding the principles of "one country, two systems", a high degree of autonomy and judicial independence, and it would not seek an interpretation under BL 158(1) lightly. As the concerns over the issue of reference to NPCSC arise from doubts on the constitutionality of the cap, the Administration considers that its arguments demonstrating the strength of the Administration's case that the cap is fully constitutional would address these concerns. Members are assured by the Administration that the indemnity scheme and the level of the cap will be reviewed as experience is gained with the operation of LTRS in Hong Kong. As mentioned in paragraph 26(b) above, the Administration has proposed to amend clause 81 to introduce a new subclause (3) which aims to preserve the existing legal position of an owner when a void instrument has been used to try to dispose of their property.

Operation and financing of Indemnity Fund

55. The Bills Committee notes the Administration's proposal that the operation of the Indemnity Fund will be governed by regulations to be made under the Bill. Under clause 100(1), SHPL may make regulations to empower the Land Registrar to manage and invest the moneys of the Indemnity Fund, and to borrow for the purposes of the fund. Given that the Indemnity Fund and the power of the Registrar in respect of the fund are not mentioned in the main body of the Bill, members are concerned whether it is sufficient to provide such power in the regulations. They consider it more appropriate to provide in the main body of the Bill for the establishment of the Indemnity Fund and that the Registrar may manage and invest the moneys of the Indemnity Fund, and borrow for the purposes of the fund subject to the regulations to be made by SHPL under clause 100. The Administration accepts members' view and proposes a CSA to add the new clause 87A to provide for the establishment of the "Land Titles Indemnity Fund" and that the amount of indemnity awarded under clause 84(1) or (2)(b) shall be paid out of the Fund. The Administration also proposes a CSA to add the new subclause(1)(aa) to clause 6 (Functions and powers of Registrar) to provide that subject to the regulations, the Registrar shall be responsible for the general management and administration of the Fund.

56. On the financing of the Indemnity Fund, the Bills Committee is advised by the Administration that the Fund is a self-financing fund with the main sources of finance as follows:

- (a) Levy on registration;
- (b) Money recovered from wrongdoers who have contributed to losses by their fraud or negligence, and indemnity has been paid in respect of the losses;
- (c) Payments from the Land Registry Trading Fund in case of losses caused by mistakes or omissions by Land Registry staff; and
- (d) Interests from money in the Indemnity Fund.

57. Under the Administration's proposal, the reserve in the Indemnity Fund is proposed to be HK\$150 million to be accumulated in a ten-year period to meet unexpected claims. After the enactment of LTO, the Administration will seek the Finance Committee's approval to arrange a stand-by loan facility of HK\$150 million for the Indemnity Fund from the Government to meet claims before the reserve is built up.

Levy rates

58. The Bills Committee is concerned about the levy rates to be charged under LTRS. The Administration considers that the levy should not be a flat rate but should be graduated to reflect the value of the property involved. In this connection, the Administration has examined two possible approaches but not yet decided on the approach to take. The first is for a tiered structure, with a fixed levy for any property whose value falls within a specified range. The advantage of a tiered scheme is that the cost of the levy is clear and does not have to be calculated by the applicant and rechecked on payment. Its drawback is that, within each tier, purchasers of properties below the mid-point value pay slightly more in proportion to the value of the property than those buying at above the mid-point value. The second approach is to assess the levy as a percentage of the value of the property. While this approach is more equitable than a tiered scheme, its drawback is that each purchaser has to calculate the levy to be paid and the calculation needs to be checked on receipt. To raise the estimated level of funding of HK\$37.5 million^{Note 2} a year, the estimated levy rates under the two possible approaches provided by the Administration is set out in **Appendix III**.

Note 2

It is assumed that each year there may be between 5 and 10, say, 7.5, claims at an average of HK\$3 million a claim, and that every other year there may be one claim up to the cap of HK\$30 million. To meet this level of claims, the Indemnity Fund would require HK\$37.5 million a year.

Costs of indemnity claims

59. The Bills Committee notes that under clause 84(2)(b), a successful claimant may be awarded costs and expenses incurred in relation to the claim by the court. Members are advised by the Administration that if such costs are awarded, they will be paid out of the Indemnity Fund. If they have been incurred defending a claim for loss arising from error or omission on the part of the Land Registry, then the Land Registry Trading Fund will be liable to repay the Indemnity Fund.

Claims by professional indemnity insurers

60. The Bills Committee notes that express provision is made in clause 82(5) to bar professional indemnity insurers from subrogating to the rights of any person against the Indemnity Fund. The Administration's policy intent is that professional indemnity insurers, rather than the Indemnity Fund, will compensate persons who suffer loss caused by members of a profession. This gives rise to the Law Society's concern that the proposed provision would result in the Hong Kong Solicitors' Indemnity Fund Limited being the default insurer for conveyancing transactions in Hong Kong. The Administration clarifies that if a professional indemnity insurer has paid out for that part of a loss that was caused by the mistake or omission of Land Registry staff, the insurer would be entitled to recover that payment from the Land Registry. The Administration considers that the deletion of clause 82(5) is the simplest way to achieve this. Any claim by a solicitor (or by his insurer subrogating to his rights) would then be subject to exactly the same test laid down in clause 82(1) as a claim by any other person.

Effect of registration

61. The Bills Committee notes that the Bill applies to all land held under a Government lease (clause 3(1)). The Bill also sets out the effect of first registration of land on ownership (clause 14), the effect of registration of subsequent transfers or transmissions (clause 21), and the effect of registration of long term lease (clause 22). Given the adoption of the daylight conversion mechanism, members support the Administration's proposal that clause 14 be deleted and that a provision on the effect of first registration of new land be included in the new Part 2B and for LRO land in the new Schedule 1A.

62. On the effect of registration of transfers or transmissions, the Bills Committee notes that clause 21(1) provides that after a Title Register has been opened, when a subsequent transfer or transmission is registered, the property is vested in the person registered as the owner. To improve the clarity of the subclause, the Administration accepts members' suggestion that the subclause be amended to the effect that the registration of a person as the owner upon a transfer of land shall vest in the person who is registered as the owner of the land the legal estate or equitable interest and rights described in subclause (1A).

63. As regards the effect of registration of long term lease, the Bills Committee notes that clause 22(1) provides that immediately upon registration of a person as the lessee of a long term lease, he will be vested with:

- (a) the interest in the lease (that is, the right to use the property during the term of the lease); and
- (b) all rights attaching to the land which may be exercised by virtue of that interest.

The person holds this interest and can exercise these rights free from all other interests and claims.

64. However, a registered owner and a lessee of a long term lease will be subject to:

- (a) any terms and conditions in the Government lease;
- (b) any registered matter affecting the land; and
- (c) any overriding interest affecting the land specifically allowed under clause 24.

Overriding interests

65. The Bills Committee notes that the overriding interests set out in clause 24(1) will still affect registered land notwithstanding that the interests are not the subject of any entry in the Title Register. Members note the Administration's policy intent that by providing a clear limit on the overriding interests that will be accepted and removing the claim of any other unregistered interests, greater clarity and certainty will be provided. However, HYK is of the view that overriding interests should not be retained, and that if the Administration insists that overriding interests be retained, they should be entered in the Title Register. Members are advised by the Administration that overriding interests, which are allowed under the existing conveyancing system in Hong Kong and the title registration systems in England, Ontario and New South Wales, are important rights in the land that have to be protected even if they may not be registered. Many of such interests are impractical to register because of the onerous burden and cost that this would place on the public.

66. Whilst having no objection to the Administration's proposal of subjecting registered titles to some well-defined categories of overriding interests, members have examined the list of overriding interests set out in clause 24(1) in detail. Members note that certain easements are set out in clause 24(1) as overriding interests, including any rights of way (subclause (1)(c)(ii)), any rights of water (subclause (1)(c)(iii)), any easements provided for in any instrument within the meaning of the Land Registration Regulations and has been either registered or accepted for registration under LRO (subclause (1)(c)(i)), any implied easements that arise upon sale of part of land by an owner (subclause (1)(d)), and any easements of necessity (subclause (1)(e)).

67. On clause 24(1)(d), the Law Society is concerned that the proposed provisions do not cover all implied easements. Instead of seeking to define when an easement is implied under the Bill, the Law Society considers that it may be easier to simply limit the operation of subclause (1)(d) to any easements which are implied by law on the disposition or transmission of any land and which are not expressly granted or reserved in any instrument. The Bar Association has no objection to the Law Society's proposal but suggests that "or rights" be added after "any easements". The Administration accepts the proposed changes and will move a CSA to amend subclause (1)(d) accordingly.

68. The Bar Association also points out that a notable omission in the Bill is the absence of any provision to cater for the possibility that easements may be acquired by prescription. Members are advised by the Administration that under the English law it is possible to acquire an easement over freehold land by a long period of use over the land if such use has been exercised without force, without secrecy and without permission. The position in law may be stated in general terms that an easement under prescription may be acquired by uninterrupted use over servient land for more than 20 years unless the common law presumption of there being a grant is rebutted or the use was based on permission or licence. However, in view of the uncertain existence of an easement by prescription under Hong Kong land law^{Note 3}, the Administration does not intend to include an easement of prescription as an overriding interest which might be construed as a statutory recognition of the existence of such easement in Hong Kong. The exclusion means that any claimant for an easement by prescription may need to protect his claim either by a caveat under LRO or by a non-consent caution under LTO. A claimant might also commence an action and register a *lis pendens*. Before there is any court decision ruling out the possibility of an easement by prescription in Hong Kong, the Land Registrar will consider those claims as claims that may affect land for the purpose of registration.

69. As regards the Bar Association's view that the Administration should consider making specific provisions to address how the doctrine of prescription is to operate in relation to registered land, members are assured that this is a matter of legal policy to which the Administration will give further thought.

70. The Law Society further points out that if the aim of the Bill is to bring certainty of title, then the issue of adverse possession should be addressed in the Bill. Members are advised by the Administration that the issue of adverse possession stems from the operation of the Limitation Ordinance, but is not an issue of registration. The Administration also confirms that the Bill has never intended to change the law with respect of adverse possession. In the light of the comments of the Law Society, REDA and other parties on this issue, the Administration will be making recommendations for changes for consideration in subsequent legislation.

Note 3

In Hong Kong, Reyes J. in *Kong Sau Ching v Kong Pak Yan* [2004] 1 HKC 119 commented that the common law doctrine of prescription from time immemorial seemed to have little practical application to Hong Kong, whether or not it was part of the English common law actually received into Hong Kong in 1843. However, the judge concluded that, had he not found in the Plaintiffs' favour on other reasons, he would have been prepared to find for the particular Plaintiffs in respect of the acquisition of an easement by prescription over the disputed right of way. In other words the possibility of acquisition of easement by prescription in Hong Kong is still there.

Matters capable of being registered

71. The Bills Committee notes that under the existing DRS, instruments are registrable under section 2 of LRO if they affect any land in Hong Kong. These instruments include agreements for sale and purchase (ASP), assignments, mortgages, tenancy agreements, court orders and deeds of mutual covenants (DMC), etc. Members are concerned how these instruments would be dealt with under LTRS. To address members' concern, the Administration has provided a comparison of the instruments registrable under DRS and the matters registrable under LTRS, which is in **Appendix IV**.

72. Members are advised by the Administration that clause 4 provides for the four categories of matters that shall be capable of being registered under LTRS, as follows:

- (a) A matter expressly stated to be registrable under LTO or in any other Ordinance (clause 4(a));
- (b) A matter that is a dealing in a piece of registered land, a registered charge or a registered long term lease (clause 4(b));
- (c) An order affecting registered land, registered charge or a registered long term lease issued or made for the purpose of enforcing a judgment (clause 4(c)); and
- (d) In any other case, the matter affects registered land, a registered charge or a registered long term lease and the Land Registrar permits it to be registered (clause 4(d)).

73. Being concerned that clause 4(d) is too wide, members request the Administration to consider whether the subclause should be amended to confine the scope of the Land Registrar's power. Upon review, the Administration considers it appropriate to provide the Registrar with the power under clause 4(d) to register any matter that affects registered land, a registered charge or a registered long term lease but not covered by clause 4(a), (b) or (c).

74. The Bills Committee has no objection to the Administration's proposal of moving clause 4 from Part 1 (Preliminary) to the new Part 2A (Registration procedures and connected matters) of the Bill.

75. The Bills Committee notes that under LTRS, dispositions and transmissions are the main categories of matters that will be registered on the Title Register. They cover a wide variety of conveyancing instruments. The Bills Committee has examined the relevant provisions in detail (Part 5 and Part 7 of the Bill) and its deliberations on the major issues involved are summarized in the following paragraphs.

Dispositions

76. Dispositions are acts by the owner of registered land which affect his rights in the land. Examples of dispositions are transfers, charges, discharges, easements, charging orders, covenants and DMC. The Bills Committee is advised by the Administration that after the enactment of LTO, any disposition of registered land will only be effectual at law to pass the legal estate or legal interest when it is registered under the provisions of LTO, but nothing prevents any interest of a disposition taking effect in equity before registration.

Charging orders

77. The Bills Committee notes that clause 34(1) provides that subject to certain exceptions, where a charging order has been registered, the registration of the order shall cease to have effect upon the expiration of five years after the date of registration, but the order may be re-registered from time to time. To address members' concern that the priority of a charging order should be retained upon its re-registration, the Administration proposes that clause 34(1) be amended to the effect that if the re-registration of a charging order is made before the expiration of a current period of registration or re-registration of the order, then the order shall retain its original priority.

Implied covenants

78. Clause 43(a) provides that the provisions of the Bill shall not prejudice the operation of section 35 of the Conveyancing and Property Ordinance (CPO) (Cap. 219). Clause 43(b) puts it beyond doubt that implied covenants shall not be entered in the Title Register. Noting that section 35(2) of CPO states that the covenants implied under that section may be excluded, varied or extended in the assignment or legal charge, members are concerned how implied covenants which have been excluded, varied or extended will be dealt with under LTRS. Members are advised that the Administration's intention is that excluded, varied or extended covenants and any new covenants should be registered with the transfer or charge that gives rise to them. The fact that there are exclusions, variations or extensions of the implied covenants provided for by section 35(2) of CPO would be noted in the remarks column of the transfer or the legal charge in the Title Register. As there is no express provisions in the Bill for the above mechanism, the Administration will propose CSAs to clause 43 to provide explicitly for this mechanism and to link up section 35 of CPO with the provisions of the Bill.

79. Members also suggest that the Administration should consider issuing guidelines to solicitors on how implied covenants will be dealt with under LTRS. The Administration confirms that it would issue such guidelines in due course.

Covenants and DMCs

80. The Bills Committee notes that the registration of covenants and the registration of DMCs are provided in two separate clauses (clauses 50 and 51). It is expressly stipulated in clause 50(3) that in clause 50, "covenant" does not include a DMC within the meaning of clause 51. Members are advised by the Administration that clause 51 was introduced to address the Law Society's concern that there is a need to provide for the registration of DMCs in a single clause, having regard to the fact that DMC is a very common instrument affecting land in Hong Kong and the difficulties in separating and registering each of the rights, easements or covenants contained therein.

81. However, members note LSD's view that a separate clause is not required for registration of DMCs if clause 50(3) is removed. Given that LTRS is a system for registration of interests and not registration of instruments, it does not seem appropriate to provide for the registration of DMC, which is an instrument, in the Bill. Moreover, it is very difficult to define "DMC", and there is no comprehensive definition of this term in existing legislation. The Law Society's concern about the difficulties in registering each of the rights, easements or covenants contained in a DMC could be addressed by a CSA to the effect that one single registration of a covenant in the DMC against the relevant title would operate to effect the registration of all the easements, rights and covenants contained in the DMC which affect the registered land. Whilst maintaining its view that the registration of DMCs should be provided for in a separate clause, the Administration agrees that the proposed CSA mentioned above should be introduced.

82. Members note that the validity and enforceability of DMC covenants among the owners of a multi-storey building or an estate development are now governed by CPO. The combined effect of sections 39, 40 and 41 of CPO makes all DMC covenants, which benefit the land, enforceable against the occupiers of the building; the covenantor (i.e. the owner who first gave the covenant); his successors in title (e.g. a subsequent purchaser); and any person deriving title from them (e.g. a tenant). Section 41(9) of CPO expressly provides that the DMC, after being registered with the Land Registry under LRO shall bind the successors in title of the covenantor and the persons deriving title from them, whether or not they have actual notice of the DMC covenants. On the concern about whether clause 51 would change the existing law on the validity and enforceability of covenants which are contained in a DMC and which may create easement, right, etc. which may benefit and affect the land, members are assured by the Administration that clause 51 would not change the existing law, and that the validity and enforceability are still governed by the provisions of CPO mentioned above. As the drafting of clause 51 could not achieve this policy intent, the Administration proposes to amend the clause to put it beyond doubt that nothing in that clause shall prejudice the operation of sections 39, 40 and 41 of CPO except to the extent provided by LTO. The Administration also agrees to introduce a CSA to add a consequential amendment to section 41 of CPO to the effect that a covenant in the DMC registered in the Title Register under LTO against the land affected by the covenant shall bind the successors in title of the covenantor and the persons deriving title under or through him or them whether or not they had notice of the covenant (Section 94 of Schedule 2 to the Bill).

Disposition by minors

83. The Bills Committee notes that under the existing law, a minor has capacity to hold or own land but has no capacity to deal with the land during his minority. Under clause 61(1), a minor is not enabled to deal with registered land by virtue of being the owner of the land.

84. The Bills Committee also notes that under clause 61(2), where a disposition by a minor of registered land has been registered and the person to whom the disposition is made acted in good faith and for valuable consideration, and the minority of that minor was not disclosed to that person at any time before the registration of the disposition, that disposition will not be set aside only on the ground of that minority. Members note that the proposed provision is different from the existing practice. Under current case law, a minor can have any disposition set aside, even if it is to a bona fide purchaser for value who did not have notice of the minority of the owner. The Administration points out that this will undermine the security that it is intended to give a bona fide purchaser under the Bill. Nevertheless, clause 61(3) provides that the name of a minor may be registered in the Title Register as the owner of registered land but the words "a minor" will be added after the minor's name and thus the minority of the minor will be disclosed. In such case, as the minority of the minor is disclosed, clause 61(2) will not apply and the existing common law will apply instead.

85. In connection with clause 61(3), members consider that a mechanism should be put in place for the removal of the words "a minor" when the minor concerned attains the age of majority. The Administration accepts members' view and proposes CSAs to add the new subclauses (3) and (4) to clause 80 to provide that where, pursuant to clause 61(3), the name of a minor is entered in the Title Register as the owner of registered land, and the owner attains full age, then the owner may make an application to the Land Registrar to remove the words in the Title Register which describes him as a minor. On receipt of such an application, the Registrar shall, if he is satisfied that the owner concerned has attained full age, remove the words.

Transmissions

86. The Bills Committee notes that transmissions are the passing of title to registered land, a registered charge or a registered long term lease from one person to another person under a court order, under an ordinance or by operation of law. The Bill provides for registration of transmission on death of an owner, in bankruptcy cases, on liquidation and in other cases.

87. Under clause 62, where one or more joint tenants of registered land dies, the Land Registrar, on proof to his satisfaction of the death, shall remove the name of the deceased from the Title Register. Members suggest that the Administration should consider whether the name of the deceased should be removed from the Title Register or retained as a historical record. Members are advised by the Administration that upon proof of the death of a joint tenant, the Register will remove the name of the deceased joint tenant from the column "Name of Owner" in the Title Register. An appropriate note will be added in other columns to highlight the transmission of

ownership to the surviving joint tenant under clause 62. The historical record containing the name of the deceased owner immediately before the change will be kept as part of the permanent records of the Land Registry and made available for public search upon payment of a prescribed fee.

88. Clause 62(1) provides that where one of two or more joint tenants of registered land dies, the remaining joint tenant or tenants shall be subject to any interests subject to which the deceased joint tenant held the land, charge or lease immediately prior to his death; which are unregistered; and which are enforceable against the land or lease. Members request the Administration to clarify whether it is its policy intent that the remaining joint tenant or tenants shall be subject to the same rights and incumbrances as those before the death of a joint tenant, i.e. transmission on death of a joint tenant will not change the status quo apart from the change in ownership, and the remaining joint tenant would hold the land subject to exactly the same rights and incumbrances as before without any alternations. The Administration confirms that this is its policy intent, and agrees to improve the drafting of clause 62(1) to make clear this policy intent.

89. Clause 62(2) provides that the Land Registrar shall not remove the name of a deceased from the Title Register unless he is satisfied that:

- (a) estate duty is not payable under the Estate Duty Ordinance (EDO) (Cap.111) on the deceased's interest in registered land, the registered charge or the registered long term lease concerned (clause 62(a)); or
- (b) where such estate duty is payable on such interest, the estate duty has been paid or its payment postponed in accordance with the provisions of that Ordinance (clause 62(b)).

90. On clause 62(2)(a), the Administration agrees to members' observations that a registered charge is not chargeable to estate duty under section 18 of EDO and that the reference to a registered charge will be deleted from the subclause.

91. On clause 62(2)(b), members are concerned how the purchaser of a property could come to know that the payment of estate duty has been postponed in accordance with the provisions of EDO. Upon review, the Administration considers that even if a purchaser is aware of a mere postponement of payment, it does not remove the possible incumbrances on the property. The Administration therefore proposes to revise the condition precedent in clause 62(2)(b) to the effect that it is necessary to satisfy the Land Registrar either that the estate duty has been paid or its payment has been secured to the satisfaction of the Commissioner of Estate Duty. Members have no objection to this proposed amendment.

92. Clause 65 provides for the effect of transmission on death and dealing by personal representative. Members request the Administration to improve the drafting of the clause in the same way as clause 62(1) so as to clearly set out the policy intent that the transmission on death will not change the status quo apart from the change of ownership (i.e. that upon death of the owner of registered land, the personal representative to be registered as the owner would hold the land subject to exactly the

same rights and incumbrances as before). The Administration agrees to improve the drafting of clause 65 accordingly.

93. Noting that clause 67 provides for transmission on liquidation, members are concerned how receivership would be dealt with under LTRS. Members are advised by the Administration that under LTRS, both an appointment of a receiver by court or an appointment under a legal mortgage or equitable mortgage by deed may support an application for registration of a restriction under clause 77 if it is at the instance of a mortgagee or chargee of the property. If it is an appointment of receiver made by the court by way of equitable execution upon the application of a litigant in action who is not interested in the land, he should at the same time apply for an inhibition under clause 74 to restrain registration of any dealings inconsistent with the order of appointment of receiver.

94. Members note that clause 69(2) provides that the Land Registrar shall not enter particulars of the trust in the Title Register. Given the Administration's policy intent that clause 69(2) shall not affect the entry of cautions, inhibitions and restrictions which may contain particulars of the trust, members suggest that the Administration should introduce suitable amendments to make clear its policy intent. The Administration proposes a CSA to add the new subclause (2A) to clause 69 for the purpose.

Protection of holders or claimants of interests in land

95. The Bills Committee notes that the Bill gives the holders or claimants of interests in land various means to have their interests or claims protected on the Title Register. A holder or claimant of interests in land may:

- (a) apply for registration of a consent caution or a non-consent caution regarding dealings in land under clause 70;
- (b) apply to CFI for an inhibition under clause 74; and
- (c) apply to the Land Registrar to impose a restriction under clause 77.

The registration of a consent caution or a non-consent caution is recognized as giving notice of the interest under the Bill. An inhibition will prevent registration of any dealings in the land. A restriction will prohibit specified dealings.

Consent cautions, non-consent cautions and priority of interests

96. The Bills Committee notes that the Bill provides for the registration of two forms of cautions which may affect registered land, a registered charge or a registered long term lease. The distinction between the two forms is that one requires the consent referred to in clause 70(1) before it can be registered ("consent cautions") while the other ("non-consent cautions") does not. The purpose of a consent caution is to protect the interest of a person who in good faith and for valuable consideration intends to effect a dealing in, inter alia, registered land. The purpose of a non-consent caution is to serve a warning to persons proposing to deal with, inter alia, registered land that the

cautioner either claims an interest in the land or has presented a winding-up petition against the owner of the land. However, the registration of a non-consent caution shall not of itself affect the validity or otherwise of the interest which is the subject of the non-consent caution (clause 71(3)). A person who maintains or presents a caution wrongfully and without reasonable cause may be liable for damages (clause 73).

97. To facilitate the Bills Committee's consideration of the proposed provisions on consent cautions and non-consent cautions, LSD of the LegCo Secretariat has been invited to compare the provisions governing priorities under the existing DRS in LRO and the new LTRS in the Bill. LSD draws the Bills Committee's attention to the following issues on consent cautions:

- (a) A consent caution is only registrable with the consent of the owner if the land is not affected by any prior consent caution (clause 70(1)(a));
- (b) A consent caution is only registrable with the consent of the prior cautioner if a prior consent caution has been registered (clause 70(1)(b));
- (c) No subsequent interest can obtain priority without the cautioner's express consent (clause 70(1)(b)); and
- (d) Where a dealing, which is the subject of a consent caution, is registered, the priority of the dealing relates back to and takes effect from the priority of the first consent caution in respect of the same dealing (clause 33(7)(a)).

98. The Bills Committee is advised by LSD that paragraph 97(a) and (b) above are not provided for under the existing DRS in LRO. On paragraph 97(c) above, similar effect is provided under section 3(1) of LRO. As regards paragraph 97(d) above, no such effect is provided under LRO except as between a subsequent assignment and a registered ASP. However, this is effected by operation of law and not by any express statutory provision. In LSD's view, both paragraph 97(b) and (d) above are not absolutely necessary to preserve the priority of an interest registered by a consent caution as the doctrine of notice still applies.

99. Members note LSD's view that the requirement under paragraph 97(b) above would be a restriction on an owner's power of disposition of his own land. For example, where a consent caution has been registered by a mortgagee bank, a subsequent purchaser would need the bank's consent before he can register a caution of the sale and purchase agreement. By the same logic, a subsequent mortgagee would also require the consent of the cautioner before he can register a consent caution to preserve his priority. Members are concerned that as revealed from past experience, it may be difficult and would involve costs to seek such consent from the mortgagee bank. The Administration appreciates members' concern and proposes a CSA to recast clause 70(1).

100. As regards paragraph 97(d) above, LSD considers that determining priority according to the date of presentation of application would be sufficient. In fact, that would mean continuation of the present priority system. Relating back would change the law and could have unintended effects. Once a consent caution has been registered, any subsequent charging order would be ineffective. To that extent, the law would be changed. Under the present law, where an owner has entered into a sale and purchaser agreement and a charging order is registered prior to the execution of the assignment of the land, the charging order would attach to the proceeds of sale (*Ho King-yim v Lau King-mo* [1980] HKLR 42). Under the provisions of the Bill, the transfer will relate back to the date of the entry of the consent caution and the charging order will affect neither the land nor the proceeds of sale (Willoughby & Wilkinson, *Registration of Titles in Hong Kong*, 1995, 103). Hence, it would not be too difficult for a debtor to register a consent caution for a bogus sale and purchase agreement to defeat any attempt of his creditors to charge his property. LSD also points out that in certain circumstances, unintended consequences could result. If a sub-sale agreement is registered by consent caution before that of an equitable mortgage, the sub-purchaser could take free of the mortgage. The purchaser vendor could therefore skip redeeming the mortgage. Similarly, if an owner has agreed to sell his property with completion to take place a year later and seeks to refinance his mortgage, the new mortgagee would be postponed to the purchaser. Members are concerned that the proposed relating back provision would change the law and could have unintended consequences. Upon review, the Administration agrees to propose a CSA to delete clause 33(7)(a). The Administration also agrees to propose a CSA to delete a similar relating back provision in clause 33(7)(c) in respect of non-consent cautions.

101. The Bills Committee notes that under the Bill, a *lis pendens* may be registered as a non-consent caution. While clause 73 provides that a wrongful registration of consent cautions or non-consent cautions without reasonable cause will attract liability for damages, LRO only provides power to the court to order vacation of *lis pendens*, but is silent on the point whether the court may award damages against a person for his wrongful registration of a *lis pendens*. The Bills Committee therefore requests the Administration to examine how clause 73 compares with the common law position on claims for damages in tort.

102. Having researched the case law, the Administration's conclusion is that the case law authorities do tend to show that a claim for damages for a "wrongful and injurious" registration of instrument resulting in loss may be actionable. However, "injurious" in this sense means without reasonable and probable cause, and with malice. Thus a claimant who makes a common law claim in tort for wrongful registration will probably be required to prove an element of "malice". Under clause 73, however, "malice" does not have to be proved. The reasoning behind this is that proof of "malice" requires a proof of the intention of the wrongdoer, which is difficult to obtain. Requiring such proof is likely to undermine the intention of providing a sufficient deterrent to wrongful registration lest cautions be abused. The Administration believes that the "without a reasonable cause" test adopted in clause 73 should provide a more effective deterrent effect while still safeguarding the cautioner's interest by availing him of a fairly straightforward defence against a charge that he has acted "wrongfully". Given the need to deter wrongful registrations and provide a clear statutory basis for a claim for damages arising out of such a registration, the

Administration considers that the slight departure from the common law position in clause 73 is justified.

103. Members consider that claims for wrongful registrations under DRS and LTRS should be in line with each other. The Administration accepts members' view and proposes consequential amendments to LRO accordingly.

Inhibitions and restrictions

104. The Bills Committee notes that the Bill provides for two new forms of restraints on disposition. The first is "inhibitions", being orders of CFI inhibiting the registration of dealings in registered land (clause 74). The second form is "restrictions", being orders made by the Land Registrar, upon application by a person, prohibiting dealings in registered land, if the Registrar is satisfied that the powers of the owner concerned to deal with the land should be restricted (clause 77). Both an inhibition order or a restriction may be for a specific period of time; until the occurrence of an event, e.g. a minor attaining full age, consent given by a particular person, etc.; or generally until a further order by CFI or the Land Registrar as appropriate.

105. Noting that an injunction is the only avenue available under the existing system to restrain dealings, members request the Administration to clarify the differences between injunctions and inhibitions/restrictions. Members are advised that an inhibition is a specific order granted by the court under clause 74 that stops the Land Registrar from registering dealings of the land. A person who has obtained an inhibition shall present an application to the Land Registrar for an entry to be made on the Title Register. The application must be accompanied by a sealed copy of the court order. The Registrar is obliged to give effect to the order and shall register the inhibition accordingly (clause 74(2)). While an inhibition is in force, no dealing which is inconsistent with it shall be registered (clause 75). On the other hand, an injunction is granted by the court in exercise of its wider jurisdiction under section 21L of the High Court Ordinance (Cap. 4) and stops the party concerned from exercising his powers of disposition.

106. As regards the differences between inhibitions and restrictions, members are advised by the Administration that an application for a restriction may only be made by a person interested in the land (clause 77(1)(a)) while an application for an inhibition may be made by any person. Members are however concerned that clause 74(1) has not specified the circumstances under which CFI may make an order inhibiting the registration of any dealing in registered land, and that the scope of the power of the Land Registrar in making a restriction under clause 77(1) is not clear.

107. Upon review, the Administration proposes to amend clause 74(1) by adopting the criteria laid down in section 46(1) of the United Kingdom (UK) Land Registration Act 2002 to allow the court to act if it appears to the court that "it is necessary or desirable to do so for the purpose of protecting a right or claim in relation to a registered estate or charge". The Administration also proposes to amend clause 77(1) by adopting the criteria laid down in section 42 of the UK Land Registration Act 2002 with suitable modification to provide that the Land Registrar may only enter a

restriction after being satisfied that the powers of the owner of the registered land or the registered charge, or of the lessee of the registered long term lease, to deal in the land, charge or lease should be restricted to prevent invalidity or unlawfulness in relation to dealing in the land, charge or lease; or protect an interest or claim in relation to the land, charge or lease. The Administration further proposes to adopt the UK approach to define the person entitled to make an application for restriction. The new subclause (5) is proposed to be added to clause 77 for the purpose to provide for a definition of "interested person". To allow time for the Administration to consider carefully the scope of the definition of "interested person", members accept that the term means, inter alia, a person who falls within a class of persons prescribed by the relevant regulations. In this connection, members request the Administration to put in place the relevant regulations before the commencement of LTO. The Administration agrees to do so. The Administration also indicates that it would make reference to the relevant provisions in the UK Land Registration Rules in drafting the relevant regulations.

Application to court by Land Registrar and persons other than the Registrar

Application to CFI by Land Registrar for directions

108. The Bills Committee notes that clause 88 provides that in any case of doubt or difficulty or in any matter not provided for under the Bill, the Land Registrar may apply to CFI for directions on principles of law. Members request the Administration to provide the justifications for clause 88; to define the scope of powers of the Registrar under the clause; and to explain why the clause is included in Part 10 (Appeals) of the Bill.

109. Members are advised by the Administration that many jurisdictions operating title registration systems have provided the registration authority with mechanisms to state a case to the court for the court's opinion. For example, under the UK Land Registration Act 1925, the registrar was given certain power to refer a case to the court for opinion. The New South Wales Real Property Act 1900 also allows the Land Registrar to apply to the court for opinion. The Administration considers that a similar provision in the Bill is likely to prove useful, especially in the early years of operating LTRS. Such a mechanism will allow directions to be sought on important questions of law, in turn facilitating dealings in land with certainty and in a timely manner. The Administration's intention is that the Registrar should resort to this provision only when faced with issues of law that are of general importance to the performance of his duties, the exercise of his powers and the discharge of his responsibilities under the Bill. The Administration does not anticipate that the power would be used frequently. The Registrar would have to justify fully to the court why he is seeking direction and not relying on his own legal advisors; otherwise the court might decline to give directions on his application. The Administration agrees that clause 88 should be amended to clearly reflect this policy intent. The Administration also confirms that clause 88 is intended to be of general application and that it should not be placed in Part 10 of the Bill.

110. In connection with the above, members support the Administration's proposal of moving clause 88 to Part 2 (Organization and administration) of the Bill as the new clause 6A. Members note that under the new clause, the Land Registrar may apply to CFI for direction if any question of law arises in respect of the performance or exercise of any functions or powers imposed or conferred on the Registrar by or under LTO. Some members remain concerned about the need for the provision having regard that the Land Registrar may seek legal advice from the Department of Justice, and may seek judicial review where there is a dispute between an applicant and the Registrar. On members' question of whether any other Government officials in a similar position have powers comparable to those of the Land Registrar under the original clause 88, the Administration points out that in Hong Kong law, similar provisions may be found in insolvency cases. For example, section 82(3) of the Bankruptcy Ordinance (Cap. 6) provides that the trustee may apply to the court for directions in relation to any particular matter arising under the bankruptcy. Similarly, under section 200(3) of the Companies Ordinance (Cap. 32), a liquidator may apply to the court for directions in relation to any particular matter arising under the winding up. The right of referral to the court for directions has been sparingly exercised by the Official Receiver & Trustee. It has proved useful, however, when he has been faced with a complex issue of law which has a general importance to his performance of public duties.

111. While the scope of the new clause 6A is narrower than that of the original clause 88, some members are concerned whether regulations would be made to govern the exercise of power by the Land Registrar under the new clause 6A and to provide for the procedures for implementation. The Administration agrees to consider the need to make regulations. The Administration also agrees to take into account some members' views that if the application may involve any inter-party hearings, there is a need to ensure that the other party would know what steps he should take and his rights in the circumstances, especially if the provision may have implications on any appeals against decisions made by the Registrar under clause 89.

Application to CFI by persons other than Land Registrar

112. Clause 95 provides that a person interested in registered land, a registered charge or a registered long term lease may apply to CFI by petition or originating summons in respect of any question relating to the title or an interest in the land, charge or lease. Noting that the scope of this clause is wider than that of section 12 of CPO which provides the application by a vendor or purchaser of land, members request the Administration to provide the justifications for the expanded scope of clause 95. Members are advised by the Administration that given that the Bill covers a great variety of interests and matters, it is appropriate to provide a procedure to resolve questions on law relating to the title or an interest in land, charge or lease raised by a purchaser, a person claiming overriding interests, a cautioner, a chargee, a lessee or any other person interested in the land, charge or lease.

113. To address members' concern that the reference to "petition" in clause 95 does not fit present day circumstances, as people rarely apply to CFI in respect of questions of title by petition, the Administration agrees that the reference to petition be deleted from the clause. As regards members' concern about the rules on the procedures under clause 95, the Administration points out that under clause 91, the Chief Justice may make rules for regulating applications under the Bill to CFI.

Land boundaries

114. The Bills Committee notes that under DRS, land boundaries are not guaranteed. In the previous Land Titles Bill introduced in 1994, the Administration has not proposed to provide any form of guarantee for land boundaries under LTRS. While some interested parties have expressed their view that guarantee of land boundaries should be part of LTRS, the Administration considers that this would present great complications given the past history of land boundary survey in Hong Kong. As only boundaries surveyed since the establishment of the Geodetic Datum in 1980 (which represents only about 7% of existing properties) could be assured immediately, the Administration maintains its previous proposal and does not provide any form of guarantee for land boundaries under the Bill. The Administration however proposes that an avenue be provided under clause 92(1) for owners of registered land to apply to the Director of Lands for a determination of their lot boundaries.

115. The Bills Committee notes that HYK supports the Administration's proposal to allow the owner of registered land to make an application to the Director of Lands for a determination of lot boundaries. However, HYK considers that when an owner of registered land makes such an application, if the Director considers that the existing land boundary plan is acceptable for the purpose, he should verify the plan together with the relevant District Survey Office before causing the plan to be registered under clause 92(3)(c). The Bills Committee also notes that HKIS considers it most important that LTRS should provide reliable and adequate records about the particulars of the landed interest including plan showing the size, boundary and layout of the interests. Whilst appreciating that the Administration is not ready to provide any form of guarantee for land boundaries under the Bill, HKIS considers that the Administration should address the boundary problems of the Demarcation District lots in the New Territories by bringing these old land survey records up to the standard. In this connection, HKIS is concerned that under clause 92(2)(b), the Director of Lands shall not make a determination of lot boundaries in respect of a lot held under a block Government lease, i.e. a Government lease of old schedule lots.

116. The Bills Committee appreciates the concerns of HYK and HKIS, and requests the Administration to consider their views. On HYK's views on clause 92(3)(c), the Administration confirms that it will set out the criteria for deciding whether a land boundary plan, including the existing plan prepared by the Survey and Mapping Office of the Lands Department, is acceptable for determination of the boundaries of a lot and registration in the Land Registry. As regards the concern of HKIS about clause 92(2)(b), the Administration agrees to delete the subclause to address the concern.

117. Given that the determination of lot boundaries by the Director of Lands should be beneficial to members of the public, members consider that clause 92 should come into operation upon commencement of LTO, not upon the expiry of the 12-year incubation period. In the light of members' views, the Administration confirms that clause 92 will come into operation upon commencement of LTO, but it will only apply to land that is registered under the Ordinance. The Administration intends to introduce a similar provision under a suitable ordinance that will apply to land not yet registered under LTO.

118. The Bills Committee also requests the Administration to provide information on the procedures for and the time required to process an application for determination of lot boundaries under clause 92(1), and the fees involved. The Bills Committee is advised by the Administration that the Director of Lands will process such an application according to the procedures set out in clause 92(3). For cases where an existing plan is available and is acceptable to the Director of Lands, the processing time should not take more than two weeks and the fee (exclusive of the fee for registration at the Land Registry) will be charged on a cost recovery basis and the Administration's current estimate is about \$1,100. For cases where the land owner is required to appoint an authorized land surveyor to conduct a land boundary survey, the Director of Lands will need about four weeks to complete the plan checking process, and the fee (exclusive of registration fee) will also be charged on a cost recovery basis. The Administration's current estimate is about \$6,500.

119. As regards some members' concern about the re-alignment of lot boundaries, the Administration confirms that the Bill does not contain any provision to address the issue of re-alignment of boundaries for lots in the urban area or in the New Territories. To re-align boundaries affecting private lots without seeking the agreement from the lot owners concerned may affect private property rights and may have human rights implications. Members are advised that the Director of Lands is now actively discussing with HYK on possible measures to address the issue.

Follow-up actions to be taken by the Administration

120. As mentioned in paragraph 23 above, the Bills Committee has no objection to the Administration's proposal that LTO be commenced two years after its enactment so as to allow sufficient time for putting in place the relevant regulations and finalizing the guidance notes for legal practitioners and members of the public. At the request of members, the Administration has undertaken that:

- (a) the list of regulations set out in **Appendix V** will be put in place before the commencement of LTO;
- (b) a review of LTO will be conducted during the two-year period between its enactment and commencement; and
- (c) the LegCo Panel on Planning, Lands and Works will be consulted in due course on the proposed commencement date of LTO before the commencement notice for the Ordinance is published in the Gazette.

The Administration also agrees that the commencement notice should be subsidiary legislation subject to the vetting of LegCo.

121. At the request of the Law Society, the Administration has also undertaken:
- (a) to work with the Law Society so as to address any subsisting points of concern and any issues that emerge on further consideration of the drafting of LTO before its implementation; and
 - (b) not to implement LTO pending the review of the Solicitors (Professional Indemnity) Rules and the Professional Indemnity Scheme by the Law Society on the issue of double payment from the Solicitors Indemnity Fund in respect of any claim arising from LTO and to effect any consequential amendments in this regard.

122. The Administration has also undertaken to take the follow-up actions set out in **Appendix VI**.

Committee Stage amendments

123. The Bills Committee has no objection to the CSAs proposed by the Administration. The Bills Committee has not proposed any CSAs.

Recommendation

124. The Bills Committee supports the Administration's proposal that the Second Reading debate on the Bill be resumed on 7 July 2004.

Consultation with House Committee

125. The House Committee, at its meeting on 25 June 2004, supported the recommendation of the Bills Committee in paragraph 124 above.

《土地業權條例草案》委員會
Bills Committee on Land Titles Bill

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法律顧問 Legal Adviser	顧建華先生	Mr KAU Kin-wah
日期 Date	2003年3月19日 19 March 2003	

Appendix II

Bills Committee on Land Titles Bill

List of organizations/individual submitted views on the Bill

- * 1. The Real Estate Developers Association of Hong Kong
- * 2. Consumer Council
- * 3. The Law Society of Hong Kong
- * 4. The Hong Kong Institute of Surveyors
- * 5. Hong Kong Bar Association
- * 6. Heung Yee Kuk New Territories
- 7. Director, Hong Kong Institute of Asia-Pacific Studies,
The Chinese University of Hong Kong
- 8. Hong Kong Society of Accountants
- 9. The Hong Kong Association of Banks
- 10. First American Title Insurance Company

Remark:

“*” denotes those organizations the representatives of which have attended a Bills Committee meeting(s).

Land Title Registration System

Estimated levy rates under two possible schemes

The figures are calculated on the basis of obtaining \$37.5 million in funding from the actual number and value of assignments registered for 2002/03, and are for illustrative purposes only.

<i>Fixed \$ rate 5 value bands</i>	<i>Fixed % scheme 0.017%</i>
<i><\$750,000</i> \$90	\$42.50 for a \$0.25 million property \$128 for a \$0.75 million property
<i>\$750,000 to \$3 million</i> \$340	\$170 for a \$1 million property \$425 for a \$2.5 million property
<i>\$3 million to \$10 million</i> \$900	\$595 for a \$3.5 million property \$1,275 for a \$7.5 million property
<i>\$10 million to \$20 million</i> \$2,200	\$1,700 for a \$10 million property \$3,400 for a \$20 million property
<i>\$20 million to \$30 million</i> \$4,000	\$5,100 for a \$30 million property
<i>Over \$30 million</i> \$4,000	\$5,100 for a property over \$30 million
<i>Explanatory Note:</i> The same levy is charged on every property within each band.	<i>Explanatory Note:</i> The same % rate is levied on every property. The amount received varies with the value of each property.

(Source: Annex A to the paper provided by the Administration on "Indemnity Scheme — Levy Rates and Miscellaneous Matters" (LC Paper No. CB(1)2207/02-03(06))

**Comparison of registrable matters
under the existing deeds registration system and
the proposed land title registration system**

Instruments registrable under deeds registration system	How the matter will be dealt with under the Land Titles Bill (The number and letter indicate the subclause of clause 4 that provides the necessary authority)
1. Provisional Agreement for Sale and Purchase	1. Consent Caution – 4(a)
2. Agreement for Sale and Purchase	2. Consent Caution – 4(a)
3. Agreement for Sub-Sale and Purchase	3. Consent Caution – 4(a)
4. Supplemental Agreement for Sale and Purchase	4. Consent Caution – 4(a)
5. Assignment	5. Transfer – 4(a)
6. Vesting Assignment	6. Transfer – 4(a)
7. Building Mortgage	7. Charge – 4(a)
8. Mortgage	8. Charge – 4(a)
9. Legal Charge	9. Charge – 4(a)
10. Debenture	10. Charge – 4(a)
11. Second Mortgage	11. Second Charge – 4(a)
12. Transfer of Mortgage	12. Transfer – 4(a)
13. Sub-mortgage	13. Charge on registered charge – 4(a)
14. Consolidation of Mortgage	14. Non-consent caution – 4(a)

Instruments registrable under deeds registration system	Matters registrable under the land title registration system
15. Equitable Mortgage of uncompleted building units	15. Consent Caution – 4(a)
16. Agreement for Mortgage	16. Consent Caution – 4(a)
17. Deed of variation of mortgage	17. Charge – 4(a)
18. Assignment of Mortgage Loan with negative pledge clause	18. Non-consent caution – 4(a)
19. Supplemental Mortgage	19. Charge – 4(a)
20. Collateral Mortgage	20. Charge – 4(a)
21. Further Charge	21. Subsequent Charge – 4(a)
22. Receipt on Discharge of a charge	22. Discharge of registered charge – 4(a)
23. Release	23. Discharge of registered charge – 4(a)
24. Discharge	24. Discharge of registered charge – 4(a)
25. Reassignment	25. Discharge of registered charge – 4(a)
26. Assignment of Rental Proceeds with negative pledge clause	26. Non-consent caution – 4(a)
27. Assignment of Sale Proceeds with negative pledge clause	27. Non-consent caution – 4(a)
28. Partial Release	28. Partial discharge of registered charge – 4(a)
29. Partial Reassignment	29. Partial discharge of registered charge – 4(a)

Instruments registrable under deeds registration system	Matters registrable under the Land title registration system
30. Partial Discharge	30. Partial discharge of registered charge – 4(a)
31. Partial Receipt	31. Partial Discharge of registered charge – 4(a)
32. Partial Satisfaction	32. Partial Discharge of registered charge – 4(a)
33. Lease	33. Lease – 4(a)
34. Tenancy Agreement	34. Lease – 4(a)
35. Assignment of lease	35. Lease – 4(a)
36. Agreement for lease	36. Consent Caution – 4(a)
37. Sub-lease	37. Lease – 4(a)
38. Under-lease	38. Lease – 4(a)
39. Licence	39. Dealing – 4(b)
40. Declaration of Trust	40. Transfer – 4(a)
41. Probate	41. Transmission – 4(a)
42. Letters of Administration	42. Transmission – 4(b)
43. Deed of Family Arrangement	43. Dealing – 4(b)
44. Deed of Gift	44. Transfer – 4(a)
45. Assent	45. Transfer – 4(a)
46. Deed of Surrender to the Government	46. Transfer – 4(a)
47. Notice of Resumption	47. Overriding interests – 4(a)

Instruments registrable under deeds registration system	Matters registrable under the land title registration system
48. Vesting Notice	48. Overriding interests – 4(a)
49. Deed of Mutual Covenant	49. Deeds of mutual covenant – 4(a)
50. Sub-deed of mutual covenant	50. Deeds of mutual covenant – 4(a)
51. Memorandum of Re-allocation of shares	51. Dealing – 4(b)
52. Power of Attorney	52. Dealing – 4(b)
53. Deed of Exchange	53. Transfer – 4(c)
54. Deed of Partition	54. Dealing – 4(b)
55. Appointment of Trustee – S.18 (New Territories Ordinance)	55. Matter registrable under other enactment – 4(a)
56. Succession	56. Matter registrable under other enactment – 4(a)
57. Memorandum of Charge of outstanding management fee	57. Charge – 4(a)
58. Death Certificate	58. Transmission – 4(a)
59. Deed Poll – division of land	59. Division – 4(a)
60. Deed Poll – Change of name	60. Change of Name – 4(a)
61. Deed of Rectification	61. Dealing – 4(b)
62. Deed of Confirmation	62. Dealing – 4(b)
63. Confirmatory Release	63. Discharge of registered charge – 4(a)
64. Confirmatory Legal Charge	64. Legal Charge – 4(a)
65. Confirmatory Agreement for Sale and Purchase	65. Consent Caution – 4(a)

Instruments registrable under deeds registration system	Matters registrable under the land title registration system
66. Confirmatory Assignment	66. Transfer – 4(a)
67. Memorandum of Change of building name	67. Matter affecting registered land – 4(d)
68. Cancellation Agreement	68. Withdrawal of consent caution – 4(a)
69. Letter of Rescission	69. Withdrawal of consent caution – 4(a)
70. Certification of Incorporation on change of name	70. Change of Name – 4(a)
71. Occupation Permit	71. Matter affecting registered land – 4(d)
72. Deed of Severance	72. Dealing – 4(b)
73. Charging Order Nisi	73. Charging Order – 4(c)
74. Charging Order Absolute	74. Charging Order – 4(c)
75. Writ of Summons	75. Non-consent caution – 4(a)
76. Court order for enforcement	76. Order for enforcement of judgment – 4(c)
77. Court order for vesting property in a person	77. Transmission – 4(a)
78. Bankruptcy order	78. Transmission – 4(a)
79. Notice of discontinuance	79. Withdrawal of non-consent caution – 4(a)
80. Exclusion Order	80. Matter registrable under other enactment – 4(a)
81. Order under S.33(1) of the Buildings Ordinance	81. Matter registrable under other enactment – 4(a)

Instruments registrable under deeds registration system	Matters registrable under the land title registration system
82. Order under s.24(1) of the Building Ordinance	82. Overriding interest – 4(a)
83. Order under s.26 of the Buildings Ordinance	83. Overriding interests – 4(a)
84. Order under s.27A of the Buildings Ordinance	84. Overriding interests – 4(a)
85. Notice of unauthorized development under S.23(4A) of Town Planning Ordinance (Cap.131)	85. Matter registrable under other enactment – 4(a)
86. Closure Order under s.153B of Crimes Ordinance	86. Overriding interests – 4(a)
87. Certificate of charge on property under s.18A(1) of Legal Aid Ordinance	87. Matter registrable under other enactment – 4(a)
88. Consent Letter	88. Overriding interests – 4(a)
89. Letter of removal of alienation restriction	89. Overriding interests – 4(a)
90. Modification Letter	90. Overriding interests – 4(a)
91. Waiver Letter	91. Overriding interests – 4(a)
92. No-objection Letter	92. Overriding interests – 4(a)
93. Letter of compliance	93. Matter registrable under other enactment – 4(a)
94. Nomination	94. Matter affecting registered land – 4(d)

Instruments registrable under deeds registration system	Matters registrable under the land title registration system
95. Redevelopment order under s.4 of Demolished Buildings (Re-development of Sites) Ordinance	95. Matter registrable under other enactment – 4(a)
96. Memorandum of deposit of title deeds	96. Charge – 4(a)

(Source: Annex to the paper provided by the Administration on "Comparison of Registrable Matters" (LC Paper No. CB(1)2207/02-03(04))

**List of Regulations to be enacted
before commencement of the Land Titles Ordinance**

1. Land Titles Regulations

These will cover most of the specific provisions for regulations set out in Clause 100(1) or referred to in other clauses of the Bill, the exceptions being those dealt with under the other sets of regulations listed below.

2. Land Titles Indemnity Fund Regulations

These will provide for the detailed operation of the Indemnity Fund established under Clause 87A of the Bill. They will cover the matters as set out in Clause 100(1) subsections (zh) to (zm) .

3. Land Titles (Fees and Levies) Regulations

These will be made under Clause 98 to provide for the fees to be paid to the Registrar for matters set out in sub-clause (1) and the levy to be paid for the purposes of the indemnity fund under sub-clause (2A).

4. Land Titles Transitional Regulations

These will be made under Clause 100(1)(zp) and will provide for matters required to support Clauses 8 and 9 of Schedule 1A and any other purely transitional matters.

5. Court Rules

These may be made by the Chief Justice under Clause 91 to provide any necessary rules for regulating appeals and other applications.

All the regulations (items 1 to 4) are needed to ensure the smooth implementation of the new system and will be enacted before commencement of the Ordinance.

Rules under item 5 are at the discretion of the Chief Justice. The Administration will refer matters to him for consideration after enactment and will request that the necessary rules be made before commencement of the Legislation.

Bills Committee on Land Titles Bill

**List of follow-up actions to be taken by the Administration
after enactment of the Land Titles Bill**

Part A: Making of rules and regulations

Apart from preparing the regulations highlighted in clause 100 of the Bill, the Administration has also agreed to take the following actions where regulations are concerned -

1. To specify in the regulations relating to the **original clause 4(a)** the means by which notices and orders relating to premises under other Ordinances, such as section 153M of the Crimes Ordinance (Cap. 200) can be registered under the original clause 4(a) as matters expressly provided for in other enactments (*item 26 of the list of follow-up actions to the thirty-fifth meeting of the Bills Committee on 11 June 2004*);
2. To check whether there are any existing laws of court that govern the exercise of power by the Land Registrar under the **new clause 6A** and consider the need to make regulations to provide for the relevant implementation procedures (*item 6 of the list of follow-up actions to the thirty-third meeting of the Bills Committee on 1 June 2004*);
3. To make recommendations for the Chief Justice to make rules for regulating applications made to the court under **clause 95** (*page 29 of LC Paper No. CB(1)1544/03-04(01)*);
4. To put in place the regulations prescribing the class of persons referred to in **clause 77(5)(c)** on the definition of "interested person" before the commencement of the Land Titles Ordinance (LTO) (*item 4 of the list of follow-up actions to the thirty-eighth meeting of the Bills Committee on 18 June 2004*); and
5. In connection with item 4 above, to put in place all the relevant regulations before the commencement of LTO and consult the LegCo Panel on Planning, Lands and Works in due course on the proposed commencement date of LTO before the commencement notice for the Ordinance is published in the Gazette (*item 5 of the list of follow-up actions to the thirty-eighth meeting of the Bills Committee on 18 June 2004*).

Part B: Preparation of guidelines, guidance notes and the like

The Land Registry has agreed to prepare the following to facilitate implementation of the new land title registration system (LTRS) -

6. To prepare Land Registry Circular Memoranda and other advisory publications for solicitors, estate agents and other practitioners once the Bill is enacted. These documents will be drafted in consultation with the relevant professional bodies and issued before the Bill is brought into effect (*item 4 of LC Paper No. CB(1)1425/03-04(02)*); and
7. To prepare practice guides and explanatory notes on the use of cautions, restrictions and inhibitions, similar to those issued by the Land Registrar in England, for reference by the public and practitioners. The Administration would also ensure that the above and all practice guides and explanatory notes on the registration of matters under the Bill would be ready before the implementation of LTRS, and that they will be regularly updated and made available to the legal practitioners and the public on the Internet (*item 40 of LC Paper No. CB(1)1425/03-04(02) and item 4(d) of the list of follow-up actions to the twenty-eighth meeting of the Bills Committee on 13 April 2004*).

Part C: Further consequential amendments to be introduced after enactment of the Bill

The Administration has agreed to consider further consequential amendments arising from the Bill, as follows -

8. To make any other consequential amendments to the relevant legislation in recognition that the current practice of disposal of land by deeds would discontinue after the implementation of LTRS, so that such legislation would not apply to land registered under LTRS (*item 11 of the list of follow-up actions to the thirty-first meeting of the Bills Committee on 11 May 2004*);
9. To relay to the Secretary for Home Affairs for his consideration of introducing amendment to the definition of “common parts” in section 2 of the Building Management Ordinance (Cap. 344) the following comments, namely, that the original and proposed revised definitions of “common parts” are not comprehensive enough to cover all relevant cases. For example, supplemental deeds of mutual covenant may not fall under the definitions. The definitions may also fail to exclude the case where certain parts of the building are dedicated to public use and hence are not common parts (*item 9 of the list of follow-up actions to the thirty-sixth meeting of the Bills Committee on 15 June 2004*);

10. To consider outside the context of the Bill how registration as owners in cases relating to t'so should be dealt with, so as to address the Bills Committee's concern that section 15 of the New Territories Ordinance (NTO) (Cap. 97) only governs cases relating to clan, family or t'ong (*item 14 of the list of follow-up actions to the thirty-sixth meeting of the Bills Committee on 15 June 2004*);
11. To invite the Law Society of Hong Kong (Law Soc) to deal with the consequential amendments to the Solicitors (General) Costs Rules (Cap. 159 sub. leg.) as part of the overall arrangement for the implementation of the LTRS (*page 35 of LC Paper No. CB(1)1544/03-04(01)*);
12. To carry out in the 2-year period between the enactment and commencement of the Bill a review of the references in the Bill to the register kept under the existing deeds registration system (DRS), namely, "the land register kept in the Registry" or "the land register kept under the Land Registration Ordinance" and make any necessary simplification (*item 15 of the list of follow-up actions to the thirty-sixth meeting of the Bills Committee on 15 June 2004*);
13. To ensure that any provision incompatible with the Conveyancing and Property Ordinance (Cap. 219) would be rectified during the 2-year period between the enactment and commencement of the Bill (*item 28 of the list of follow-up actions to the thirty-fifth meeting of the Bills Committee on 11 June 2004*); and
14. To introduce any other additional consequential amendments that may become necessary during the period between the passage of the Bill and the implementation of LTRS in the form of subsidiary legislation that require positive vetting of the Legislative Council (*item 33 of LC Paper No. CB(1)1425/03-04(02)*).

Part D: Clauses to be reviewed after enactment of the Bill

The Administration has agreed to review the following clauses of the Bill after its enactment -

15. To do some research during the 2-year period between the enactment and commencement of the Bill and, in consultation with Law Soc and other relevant parties, revisit the Assistant Legal Adviser (ALA)'s concern that by putting in **clause 29(1)** a universal prohibition on the creation, extinguishment, transfer, variation or affection of land by means other than by registration under the Bill, and qualifying such with subclause (2), the power of an owner to dispose of his property would be significantly affected (*item 2 of the list of follow-up actions to the thirty-ninth meeting of the Bills Committee on 21 June 2004*);

16. To revisit **clause 33(8)** and address Law Soc's concern about the subclause as a result of the retention of the words "under a provisional agreement for sale and purchase or an agreement for sale and purchase" therein (*item 3 of the list of follow-up actions to the thirty-ninth meeting of the Bills Committee on 21 June 2004*);
17. To revisit **clause 35(3)** to address Law Soc's concern that the protection given to a registered charge under the Bill may be too limited (*item 5 of the list of follow-up actions to the thirty-ninth meeting of the Bills Committee on 21 June 2004*);
18. To review **clause 43** in consideration of ALA's view that implied covenants should take effect upon registration and not when the relevant transfer is signed (*item 14 of the list of follow-up actions to the thirty-seventh meeting of the Bills Committee on 17 June 2004*);
19. To consider how to address ALA's concern that, because of the reference to "the entry in the Title Register" in **clause 81(4)**, it is not clear whether a fraud or voidable transaction that would give rise to a claim for rectification in relation to land which was registered under the Land Registration Ordinance (LRO) (Cap.128) can be rectified after the commencement of LTO (*item 8 of the list of follow-up actions to the thirty-eighth meeting of the Bills Committee on 18 June 2004*); and
20. To review the provisions in **clause 92** after introducing a similar provision in a suitable ordinance that will apply to land not yet registered under LTO (*item 13 of the list of follow-up actions to the thirty-eighth meeting of the Bills Committee on 18 June 2004*).

Part E: Other issues

The Administration has also undertaken to take the following actions after enactment of the Bill -

21. To carry out fresh calculations closer to the time of implementation of the LTRS the estimated levy rates for the properties valued over \$30 million set out in Annex A to the paper on "Indemnity Scheme: Levy Rates and Miscellaneous Matters" (*LC Paper No. CB(1)2207/02-03(06)*). Consideration will then be given to the rate to be applied to each value of property (*item 15 of LC Paper No. CB(1)1425/03-04(02)*);
22. To discuss with the relevant parties on the relevant procedures, forms and documents once the terms of the Bill are settled. The exercise will be undertaken in parallel with the preparation of regulations under the Bill and a presentation may be made to members before the regulations are submitted for approval (*item 18 of LC Paper No. CB(1)1425/03-04(02)*);

23. To consider how the public, or a solicitor acting on behalf of a member of the public, may search properties by owners' names provided that they comply with the requirements under the Personal Data (Privacy) Ordinance (Cap. 486) (*item 20 of LC Paper No. CB(1)1425/03-04(02)*);
24. To consult Law Soc on the applications register under the LTRS, so that legal practitioners would in future know how to deal with it (*item 16 of the list of follow-up actions to the thirty-sixth meeting of the Bills Committee on 15 June 2004*);
25. To resolve before commencement of the Bill certain issues, such as the documents to be kept under the LTRS under clause 44(1), which the Administration has agreed to resolve with Law Soc after enactment of the Bill (*item 23 of the list of follow-up actions to the thirty-seventh meeting of the Bills Committee on 17 June 2004*);
26. To provide in due course the relevant case law in the UK on how the court interprets the expression "lack of proper care" in **clause 81** (*item 7(b) of the list of follow-up actions to the thirty-eighth meeting of the Bills Committee on 18 June 2004*); and
27. To reply to Heung Yee Kuk shortly regarding its comments on the paper on "Report on Consultation on Revisions to Conversion Mechanism and Rectification Provisions" (*LC Paper No. CB(1)1230/03-04(04)*), and provide the Bills Committee with a copy of the reply (*item 25 of the list of follow-up actions to the thirty-eighth meeting of the Bills Committee on 18 June 2004*).