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BY FAX (28696794) AND BY POST

13 March 2009

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Mr. Simon Cheung,
Clerk to Joint Subcommittee
on Amendments to LTO,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.

Dear Mr. Cheung,

**Panel on Development and Panel on Administration of Justice and Legal Service –
Joint Subcommittee on Amendments to Land Titles Ordinance (“LTO”)
[Meeting on 19 March 2009]**

Thank you for your letter dated 13 February 2009.

We attach, for the consideration of the above Joint Subcommittee, the Law Society’s submissions on the Administration’s latest proposal on amendments to the “*Conversion Mechanism*” in the LTO. We are pleased to confirm that our President and representatives from the Working Party on LTO (“WP”) (土地業權條例工作小組) (“工作小組”) will attend the Joint Subcommittee meeting on 19 March 2009 on the subject:-

Mr. Lester Huang (黃嘉純律師), President (律師會會長)

Mr. Andy Ngan (顏安德律師), Chairman of WP (工作小組主席)

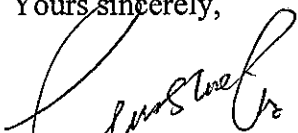
Mr. John Davison (戴永新律師), member of the WP (工作小組成員)

Ms. Chu Wing Shuet, Christine (朱穎雪律師), Assistant Director of Practitioners Affairs (執業者事務部副總監)

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Regarding the Administration's other proposals on amendments to the "*Rectification and Indemnity Arrangements*" in the LTO, as we are presently consulting the views of the Hong Kong Solicitors Indemnity Fund Ltd., we would reserve our position until we had the opportunity to review their comments.

Yours sincerely,



Christine W. S. Chu
Assistant Director of Practitioners Affairs

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THE LAW SOCIETY'S SUBMISSIONS ON THE ADMINISTRATION'S LATEST PROPOSAL ON AMENDMENTS TO THE LAND TITLES ORDINANCE – THE CONVERSION MECHANISM

The Law Society has considered the latest proposals put forward by the Development Bureau in its December 2008 paper on amendments to the “*Conversion Mechanism*” in the Land Titles Ordinance (“*LTO*”) and has the following comments:

Background of the “*Daylight Conversion Mechanism*” provided in the 2004 Ordinance

1. The method of conversion of land registration from the existing deeds registration system to the title registration system is a fundamental feature of the LTO and has been extensively discussed for the past 20 years. The “*Daylight Conversion Mechanism*” represents the consensus of the Government, the Legislature and various stakeholders after more than 20 years of deliberations.
2. When the Administration first mooted registered titles for Hong Kong in 1988, the Administration formed the view that the existing registration of deeds system was as good as a title registration system, in fact, if not in law, and Hong Kong was ready for title registration by “midnight conversion”. In fact, the 1994 Bill was premised on that. The Law Society has all along supported the “*Midnight Conversion Mechanism*” and believes it is the most straightforward and cost-effective method by which title registration should be implemented in Hong Kong as the “*at a stroke*” conversion and removal of technical title defects will achieve the dual purpose of simplicity and certainty of the system. It has also pointed out to the Administration the problems associated with a gradual conversion process.

3. The Legislature in the 2000-2004 session deliberated on and rejected the idea of “*gradual conversion*” given that this will entail an open-ended process of conversion with the risk of creating a two-tier property market with detrimental effect on the value of the property that remains on the deeds registers.
4. As some stakeholders have expressed concerns over the risk that substantive unregistered rights will be lost during the conversion process in a “*Midnight Conversion Mechanism*”, the “*Daylight Conversion System*” was agreed upon as a compromise. Its benefits are to bring all existing properties into the new system within a defined period without requiring owners to make any application, or for lawyers or the Land Registry to review title; and yet it gives sufficient notice and opportunities to interested parties to assert their claims to the property. The 12 years incubation period has its jurisprudential foundation in the limitation period for recovery of land.
5. The Law Society is keenly aware that the 2004 Ordinance was passed by the Legislative Council on the Administration’s undertaking to work with all stakeholders, including the Law Society, to review certain issues and is committed to bringing this project to fruition. However, the “*automatic conversion*” process under the “*Daylight Conversion Mechanism*” was not one of the issues which the Administration and the Law Society agreed should be reviewed.
6. The Law Society was thus taken aback when the Administration has come up with a proposal on such fundamental change more than 4 years after passage of the law. It has all along been recognized that “*automatic conversion*” has to be premised on a reliable register and that “*we possess one*” was what the Administration had been trumpeting since day one. The Administration has also acted decisively in supporting the system in the Legislative Council during the process of passing the 2004 Ordinance
7. Given there has already been extensive debate on the subject, the Law Society submitted that any proposal for substantial change to the conversion mechanism at this stage should only be accepted with a cogent case.
8. However, for reasons outlined below, **the Law Society does not think the Administration has made out a case warranting a substantial change to the**

conversion process. It does not see the newly proposed mid-way house conversion mechanism as an efficient one to resolve the problems that the Administration has highlighted. What the Law Society can see will be disproportionate costs to the community for unlikely risks.

Has the Administration made out a Case for Change?

9. It appears that what has really prompted the Administration's proposal for change is one of financial consideration. The Administration's main concern with the "*Daylight Conversion Mechanism*" is on Government's exposure to increased liability on automatic conversion with unquantifiable risks to the Land Titles Indemnity Fund and the Land Registry Trading Fund and yet, it is unable to build up sufficient reserve to cover these liabilities on conversion given the limited amount of levy it could collect during the initial years of LTO implementation.
10. On the Government's increased liability on an automatic conversion process, the Administration says:
 - (a) there are problem registers on which it is not clear who the true owner is. Two types of problem registers are identified:
 - (i) multiple registers, i.e. with 2 or more registers for the same property; and
 - (ii) double ownership registers, i.e. with more than one chain of title under one register;
 - (b) the Administration could only identify all multiple register cases with certainty and the number of these cases will not be great (less than 500 to date). However, the double ownership registers cases will only become apparent from an examination of the deeds, and the extent of the problem could only be ascertained from an investigation of all the 2.8 million registers;
 - (c) it is impracticable both in terms of manpower resources or time for the Government to carry out an in-depth investigation of title for each of the 2.8 million registers within the 12-year incubation period;

- (d) the Land Registrar has no power either to withhold the problem registers from conversion or to give a special status to the converted titles that would not prejudice a subsequent determination of ownership by the court;
- (e) there is also the concern that the existing LRO register may not be accurate due to the mistakes or omissions of other parties;
- (f) however, on conversion, the Land Registry will be obliged to keep a corresponding register for all LRO properties involving stating who the registered owner is and will be liable to any party who suffers loss due to inaccuracy in the land titles register.

11. The Law Society believes the Administration has exaggerated the problems and misconceived the Government's liabilities for errors transferred from the LRO registers.

12 It was only after repeated requests from the Law Society's Working Party on LTO that the Government provided 4 real cases of the so-called problematic titles for consideration:

- (a) 3 cases concern New Territories land under the Block Government Lease. However, it appears that:
 - (i) the problems of these cases arose out of "*administrative errors*" on the part of the Government in keeping proper LRO registers (e.g. by maintaining 2 registers for the same property, putting more than one transaction under one register when a sub-register should have been created, putting entry on the "*encumbrance*" side or "*remark*" column of the register when it should be on the "*ownership*" side, etc.);
 - (ii) the proper solution for these cases should really be for the Land Registry to put the register in order before conversion; and
 - (iii) the titles in these cases, having apparently been in undisturbed registration for a long time, are prime candidates for "*upgrading*" under the concept of "*good holding title*" in the Government's new proposed mechanism.
- (b) In respect of the only case concerning titles in "*urban*" areas, the

“problem” (relating to lesser number of undivided shares for the ground floor than that originally allocated) is not, in the Law Society’s views, a real legal problem given the decision of *Jumbo King Ltd. v. Faithful Properties Ltd and ors* (2/12/1999, FACV 7/1999).

13. The Law Society believes the number of problem registers is insignificant compared to the 2.8 million titles. It is hard to imagine a significant portion of the LRO registers involving conflicting claims on ownership but the interested parties are happy to ignore their claims over the years. So far as the Law Society is aware, the number of successful claims whereby ownership has been displaced because of defects in title is negligible. If the Administration is serious about applying *“good holding titles”* to Hong Kong, they should be guided by the experience of other jurisdictions. U.K. wound up its insurance fund for registered titles in 1971 and did not see the need for a successor fund and the title insurance business in the United States seems to be a thriving business. Although both jurisdictions operate on different conveyancing regimes, they all point to how rarely holding under a title is disturbed. **The Administration should release its research in this regard and provide statistics to support their claim on the extent of the problem.**

14. On whether Government’s liability is substantially increased on automatic conversion, it should be noted that under the 2004 legislation:
 - (a) the deeming conversion provision in Schedule 1 preserves all existing interests on conversion, including unregistered interests, until there is a *“transfer”*. Section 25 governs the effect of registration of the *“transfer”* and the so-called guarantee on title by the Government is not an absolute one but qualified by being subject to, inter alia, *“current entries against the titles”*. According to the Administration, those entries denoting broken chains of titles will be carried over to the titles register;

 - (b) the Government will only be responsible under the LTO for fraud committed *“after”* conversion and the indemnity under Section 84(4)(c) will not cover any pre-existing errors at the date of conversion of the LTO;

 - (c) so far as the Government’s liability under the LRO is concerned, the status quo will remain. The Government has liability for the problem registers under the LRO system and cannot deny that:

- (i) the Land Registry maintains a public register under the LRO well knowing the public will rely on the integrity of the register; and
- (ii) although the LRO system is a system of registration of document, the LRO confers priority even though the person who seeks to register an instrument knows about a prior transaction or the owner selling twice.

The question of liability is all the more apparent in cases where more than one register are being kept for the same piece of land. Any such liability, which the Government currently has and which as presently alleged cannot be quantified, will remain with the Government after conversion.

- 15. Given the number of problem cases is not significant and the unlikely risks involved, the Law Society does not see it justified to put all the 2.8 million titles to screening with all the attendant disruption to property market and significant costs to the community.
- 16. The Administration also raised, as another justification for the change, the concern regarding the complexity of the provisions on "*conversion of caveats*". However, the Law Society does not share with the Administration that this concern cannot be resolved by way of clear legislative drafting.

Problems with the new proposed Conversion Mechanism

- 17. The alternative conversion mechanism now proposed by the Administration will involve a 2-tier process before the LRO properties will gain the full status of registered title:
 - (a) "*Converted title*"
all eligible LRO land will be brought under LTO registers about 3 years after commencement and gain the mid-way house status of "*converted land*" but transactions in "*converted land*" would remain subject to any subsisting interests and title would have to be deduced as required under the CPO until title is upgraded;
 - (b) "*Upgrading of title*"
such "*converted land*" can be upgraded on an application made when there is a transaction, at a specified time after "*conversion*" (12 years as presently suggested) on the Land Registrar being satisfied that "*good*

holding title” has been shown.

18. **The Society does not see the newly proposed mid-way house conversion mechanism as an efficient one to resolve the problems highlighted by the Government.** The new proposal cannot assist to identify the problem registers except in a haphazard manner but will just procrastinate the resolution of the problem for at least 15 more years, giving potential for more transactions on problem titles. In the Administration’s own estimation, more than 8 million documents can be expected to be registered during the 12 years period for up-grading. This will only be “*delaying*” and “*expanding*” the problem.

19. On the contrary, the failure to adopt an automatic conversion system defeats one of the primary benefits of the legislation, namely, the removal of technical defects in title in one go and **the Law Society could see significant defects with the new mechanism:**
 - (a) the “*Daylight Conversion Mechanism*” was devised to avoid having a dual system for the LRO lands but the Government’s proposal will have reverted to that, with all the attendant problems of a dual system, including:
 - (i) properties under the 2 systems being associated with different values with “upgraded” titles having greater value than those that remain under the old system. There will be confusion in the market as affected owners may not readily understand why their properties should suffer a sudden drop in value compared to that of their neighbours;
 - (ii) maintaining two systems instead of one indefinitely would also add to the overall administrative costs;
 - (b) the alleged benefit of “*conversion of LRO land being accelerated*” is unreal. The Administration admitted that this is not a real registered title. The so-called benefit of being safeguarded under LTO in respect of LTO transactions is quite hollow, when titles are passed under CPO, presumably under the advice of solicitors. In essence, it will be solicitors who are responsible for such titles;

- (c) the upgrading process will be unnecessarily costly to the public and disruptive to the property market:
- (i) the proposed conversion process is an open-ended one and will result in an indefinite timetable for upgrading 2.8 million titles with a dual system running. The experience in Australia would suggest that unless automatic conversion is adopted, conversion could take ages. In England, the title registration introduced in mid-19th century and premised on approval of title did not embrace the whole of England until 1990;
 - (ii) the costs for having a full title registration system in Hong Kong can be considerable as this would require the estimated 2.8 million owners taking out applications for upgrading and paying fees for their title deeds to be reviewed. Whilst the costs for an upgrading process have not been made known, it was noted that the current fees of the Government for reviewing a surrender/re-grant is HK\$16,400.00 and HK\$42,950.00 for issue of a new Government Lease. **The Government should indicate how such costs will compare to the alleged “liabilities” of the Land Registry under the 2004 system;**
 - (iii) on the aspects of manpower resources and administrative costs, it is unclear how the Administration is to cope with the large number of applications on upgrading given the high volume and high speed nature of conveyancing transactions in Hong Kong. It is noted, paradoxically, that one of the reasons put forward by the Administration for the change is that, the Land Registry, having to deal with daily transactions, has scant resources to vet the 2.8 million titles;
 - (iv) it is unclear how long the upgrading process will take and how the market will react to, or if there is a market for, titles pending up-grading. In England, it takes 8 to 9 months for a title to be verified. The time it takes for a title to be verified in Hong Kong would not be any shorter;

- (v) the Administration advised that the Land Registrar will make decision on an upgrading application on the basis of the “*good holding title*” concept provided in the UK Land Registration Act. Although the principle behind “*good holding title*” is clear, its application is a matter of judgment call and subjective analysis will be required to upgrade a “*converted title*” to “*registered title*”. The examples of problem registers given by the Administration give concern that the “*good holding title*” concept will be sensibly applied and there will be uncertainty in the market whether the Land Registrar will upgrade a title;
- (vi) the new mechanism does not provide any constructive proposals as to how the problem titles could be cured or upgraded. It is difficult to accept the idea of provisional title when such title can be condemned in perpetuity with no mechanism to ensure all provisional titles will mature into absolute ones;
- (vii) in order to protect the owners' interest against any wrongful exercise of the Registrar's power in determining whether a title will be allowed to be upgraded, the LTO has also to provide a remedy which will likely to be an appeal to the courts. This entails further complication and uncertainty as well as time and costs for the owners.

Way Forward

- 20. The community has to consider ultimately whether it will favour a conversion system by way of automatic conversion or by the Land Registrar verifying title.
- 21. The purposes of the 12-year incubation period under the Daylight Conversion Mechanism are:
 - (a) to enable those with existing claims in the property under the LRO to protect their interests before conversion by registering a caveat or a caution against conversion against the property;
 - (b) for the Government to embark on a wide public education campaign to explain the effects of the new legislation so that those who wish to take action to protect a claim they have can do so within a period that the

law considered as appropriate.

22. The Law Society maintains the view that in the interests of the public, the existing Daylight Conversion Mechanism should be retained. It is more straightforward and cost effective to adopt an automatic conversion process with the onus being placed upon those with claims to the property to clarify their interests in the register in the 12-year incubation period before conversion shall take place than by a gradual conversion process requiring the Land Registrar to approve 2.8 million titles on the concept of “*good holding title*”.
- 23 The Law Society will support any legislative amendments to enable the Land Registrar to clean up the Register or for the parties to clean up their titles before they can apply to register. In this regard, we recommend re-introducing something like Clause 70 of the Willoughby’s Bill but with the Land Registrar’s power to make prohibitive order being brought forward, e.g. by providing for such power in the LRO, so that the Land Registrar will have power to require those interested to resolve their disputes.

In conclusion, the Law Society wishes to point out that on final analysis, a registered title system is a state-run title insurance system and its success depends implicitly on the commitment on the part of the Government. The cap on indemnity has already undermined the Government’s commitment to registered titles. The present proposal is tantamount to an unjustifiable disparagement on conveyancing in Hong Kong. Further, insurance does not exist in an universe of risks-free. It is all about calculated risks. Nevertheless, if registered titles are “*curative*” in nature, if “*good holding title*” is about holding under that title being unlikely to be disturbed, in real life, how often is holding under a title being disturbed? Why the Administration has chosen not to disclose its actuary’s report, when they are the correct professional to assess such risks?

The Law Society of Hong Kong
13 March 2009