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**Panel on Development and  
Panel on Administration of Justice and Legal Services**

**Report of the  
Joint Subcommittee on Amendments to Land Titles Ordinance**

**Purpose**

This paper reports on the deliberations of the Joint Subcommittee on Amendments to Land Titles Ordinance (the Joint Subcommittee).

**Background**

Present system of land registration

2. The present system of land registration in Hong Kong is a deeds registration system (DRS) governed by the Land Registration Ordinance (Cap. 128) (LRO). The system provides a record of registration of the instruments affecting a particular property, but does not guarantee title. Even if a person appears on the relevant register in the Land Registry as the owner of a property, he may not be the actual legal owner because his title to the property may be defective. In order to establish title to property, it is necessary in every case to check the historical 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.

### Land Titles Bill introduced in December 2002

3. In December 2002, the Administration introduced the Land Titles Bill into the Legislative Council (LegCo). The object of the Bill was to replace DRS with a new system that registers the title to land and the interests in the land subject to which the land is held. The proposed new system aimed to provide greater certainty to property titles and simplify conveyancing.

4. The Bills Committee on Land Titles Bill (the Bills Committee) commenced its work in March 2003 and presented its report to the House Committee on 25 June 2004. The Bills Committee had in particular extensively discussed three major issues, namely the conversion mechanism, the rectification mechanism and the indemnity scheme. The relevant deliberations were recapitulated in **Appendix I**.

5. The then proposal of the Administration was for the Land Titles Ordinance (Cap. 585) (LTO) to 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 the Bills Committee, the Administration undertook to conduct a review of the LTO during the two-year period between its enactment and commencement, and to take follow-up actions on various issues raised during the scrutiny of the Bill.

6. On 7 July 2004, LegCo passed the Land Titles Bill as amended by all the Committee Stage amendments moved by the Administration.

### The Administration's reports on post-enactment work in December 2004 and May 2007

7. On 21 December 2004, the Administration briefed the LegCo Panel on Planning, Lands and Works (PLW Panel)<sup>1</sup> on the actions being taken to prepare for implementation of the land title registration system (LTRS), as well as the proposal to create one permanent and four supernumerary directorate posts in the Land Registry to assist with the preparation and operation of the new system. The Administration informed the Panel that since the enactment of the LTO in July 2004, the Land Registry had

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<sup>1</sup> The PLW Panel has been replaced by the Panel on Development since the 2007-2008 legislative session.

established a Steering Committee and a Review Committee to steer and carry out the review of the LTO. These committees had membership drawn from Government departments and from major stakeholders including the Law Society of Hong Kong (Law Society), the Hong Kong Bar Association, the Real Estate Developers Association of Hong Kong, the Hong Kong Association of Banks, the Hong Kong Mortgage Corporation Ltd, the Estate Agents Authority, the Consumer Council and the Heung Yee Kuk (HYK). During various stages of the preparation for implementation of the LTRS, the Land Registry would continue to discuss issues with the major stakeholders, to seek views from interested parties and to provide briefings on request. The Administration would also continue to work closely with the Law Society, in particular its working party on title registration, to address any issues of concern.

8. On 22 May 2007, the Administration updated the PLW Panel on the progress of the preparatory work, and sought members' support for the retention of the four supernumerary directorate posts in the Land Registry for three years up to 4 October 2010 to continue with the preparatory work. Regarding the various issues on which the Administration had undertaken to the Bills Committee to take follow-up actions, the Administration reported that the Administration had either resolved or identified solutions for most of the issues. The Administration also advised that there were further issues identified during the review.<sup>2</sup> In gist, the Administration informed the PLW Panel that –

- (a) substantial amendments to the LTO were required to ensure the efficient operation of the LTRS;
- (b) an amendment bill would be prepared and submitted to LegCo before commencement of the LTRS; and
- (c) opportunity would be taken to address concerns previously raised about the language and organisation of the LTO.

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<sup>2</sup> vide LC Paper No. CB(1)1643/06-07(07)

The Administration's report on work progress in December 2008 and the appointment of the Joint Subcommittee

9. On 19 December 2008, the Administration reported to the Panel on Development (DEV Panel) on the progress of the preparatory work for the implementation of the LTRS. According to the Administration, there remain four substantial issues awaiting finalization before an amendment bill of the LTO could be brought to LegCo for consideration. These issues were –

- (a) the relationship between the LTO and other legislation;
- (b) arrangements for updating land boundaries;
- (c) modification to the conversion mechanism in the LTO; and
- (d) modification to the rectification and indemnity provisions in the LTO.

10. In respect of the issues mentioned in paragraph 9(c) and (d) above, the Administration advised that it would shortly launch a three-month consultation exercise to solicit public views as well as continue discussions with major stakeholders.<sup>3</sup>

11. During the discussion at the DEV Panel meeting on 19 December 2008, members agreed that as the Administration's work on the preparation of amendments to the LTO involved important and complicated issues, consideration should be given to establishing a subcommittee under the relevant Panel(s) or the House Committee so that LegCo could monitor the work in a more focused manner and provide input in the bill drafting process. Subsequently, a joint meeting of the DEV Panel and the Panel on Administration of Justice and Legal Services (AJLS Panel) was held on 20 January 2009 to consider the matter. The two Panels agreed that a joint subcommittee should be formed for the purpose.

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<sup>3</sup> The two relevant consultation papers and the initial views of the Law Society, the Bar Association and the Real Estate Developers Association of Hong Kong on the Administration's proposals were given in the Administration's paper (Annexes A to C to LC Paper No. CB(1)396/08-09(06)).

## **Deliberations of the Joint Subcommittee**

12. Under the chairmanship of Dr Hon Margaret NG, the Joint Subcommittee has held 10 meetings. The Joint Subcommittee's deliberations have mainly focused on the issues relating to the conversion and rectification mechanisms and the determination of land boundaries, because these issues have important implications on the implementation of the LTRS and the Administration has, at different times over the past few years, proposed major changes to the relevant frameworks laid down in the LTO to address the issues identified during the post-enactment review and the concerns raised by stakeholders. During its course of deliberations, the Joint Subcommittee had on two occasions invited interested and concerned parties to give views on issues related to the LTO and met with their deputations at the meetings on 19 March 2009 and 29 April 2010. The membership of the Joint Subcommittee and a list of the organizations/individuals that have submitted views to the Joint Subcommittee are given at **Appendices II** and **III**.

13. The Joint Subcommittee's deliberations on the following major issues are summarized in this report –

- (a) Conversion mechanism (paragraphs 14 to 32);
- (b) Rectification mechanism (paragraphs 33 to 45);
- (c) Determination of land boundaries (paragraphs 46 to 56); and
- (d) New two-stage conversion mechanism (paragraphs 59 to 63).

### Conversion mechanism

#### *Risks identified in the post-enactment review*

14. Under the conversion mechanism provided in the LTO (2004 conversion mechanism), all eligible existing land<sup>4</sup> for which registers have been kept under the LRO will be converted automatically to land registered under the LTO 12 years after the LTO commencement date. At the meetings on 19 March and 21 April 2009, the Joint Subcommittee was informed by the

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<sup>4</sup> "Eligible existing land" is land that meets the definition of land for which title can be registered under the LTO and against which no caution against conversion subsists and no outstanding deed remains pending registration.

Administration that the post-enactment review of the LTO had brought to light that the 2004 conversion mechanism, together with the rectification and indemnity provisions, would give rise to risks and liabilities which would place undue strain on public funds and the Land Registry Trading Fund. The Administration therefore considered it necessary to modify the 2004 conversion mechanism.

15. The major issues identified by the Administration in its post-enactment review of the LTO relating to the 2004 conversion mechanism were as follows –

- (a) Problematic registers: There are cases where titles are not clear, such as cases where there are two or more registers of the same lot with different owners or more than one chain of ownership under the same register. Under the enacted LTO, the existing registers will be deemed to form part of the title register and title will be vested in the person named in the title register as owner. Under the LTO, there is nothing to stop such cases from conversion or any provision to deal with the consequences.
- (b) Conversion liabilities: Under the 2004 conversion mechanism, the existing registers are deemed to form part of the title register. But the Administration could not rule out that some registers might not be accurate, and the Government may be liable for any loss caused to parties where the title register is not correct. The Government's exposure to such liabilities will arise from the conversion day.

*Proposed modified conversion mechanism in the 2009 public consultation*

16. In its consultation paper on "Conversion of Existing Land and Property to Land Title Registration System" for the public consultation conducted from January to March 2009, the Administration proposed a modified conversion mechanism with the aim of managing the identified risks by assuming them more gradually. The main features of the modified conversion mechanism relevant to risk management were as follows –

- (a) All LRO land would be brought under the LTO at an early date to automatically become "converted land" about three years after commencement of the Ordinance. Fees and levy income

could be collected from all registered dealings, thereby accelerating the accumulation of sufficient amount for the compensation fund, instead of being limited to the small proportion of transactions represented by new land.

- (b) After conversion, indemnity would be provided for losses arising from post-conversion fraud affecting ownership, or from mistakes or omissions occurred after conversion. There would be no indemnity under LTO in respect of pre-conversion matters.
- (c) Before full indemnity would be given, a title of converted land would have to be upgraded. Upgrading could be applied for by the owner. The Land Registry would decide whether or not to approve upgrading. The decision would be subject to an appeal mechanism.
- (d) After upgrading, indemnity subject to the cap would be provided in cases of fraud affecting ownership and would also cover cases with pre-conversion fraud affecting ownership.

17. The Joint Subcommittee noted that the proposed modified conversion mechanism did not receive support from the deputations attending the meeting on 19 March 2009. The Law Society pointed out that the "Daylight Conversion" mechanism in the LTO was a result of substantial deliberations among the parties concerned with all relevant factors taken into account in the years preceding the enactment of the LTO. The Law Society did not think the Administration had made out a case warranting a substantial change to the conversion process. It did not consider that the newly proposed mid-way house conversion mechanism was an efficient one to resolve the problems that the Administration had highlighted, but consider that there were significant defects with the proposed modified mechanism. The Law Society considered that there would be disproportionate costs to the community for unlikely risks if the proposed modified conversion mechanism was adopted.

18. HYK expressed the view that the three-year period for conversion of LRO land to LTO land was insufficient, as many indigenous people lived overseas and needed more time to deal with the land conversion matters. HYK also expressed grave concern about the title upgrading process based on a case-by-case investigation, and doubted whether the Land Registry would

have adequate resources to handle the possible scenario of huge volume of applications flooding in to seek title upgrading. HYK stressed that the interests of property owners would be seriously affected if there were delays in the title upgrading process. Other deputations expressed concern that the proposed modified conversion mechanism was too complicated and would likely cause confusion to the market.

19. The Joint Subcommittee noted that the conversion mechanism, together with the rectification and indemnity provisions in the enacted LTO, were building blocks of the LTRS, and the modifications<sup>5</sup> proposed by the Administration would mean a major overhaul of the system. The Joint Subcommittee also noted that the factors enumerated by the Administration and the risks that the Administration believed would materialize had all been raised and discussed at great length during the sittings of the Bills Committee on Land Titles Bill from March 2003 to June 2004, and it was on the basis of the Administration's assurance that the proposed LTRS was workable that the Bill was passed by the Legislative Council in July 2004.

20. In order to place the matter on the right footing, the Joint Subcommittee decided at the meeting on 21 April 2009 that the Chairman should write on behalf of the Joint Subcommittee to the former Secretary for Housing, Planning and Lands and the incumbent Secretary for Development to convey to the Administration the concerns of Joint Subcommittee members and to seek a full explanation on (a) how the serious "mistake" of approving the system under the LTO came about necessitating radical revision; and (b) the amount of resources expended on the part of the Administration on the 2002 Land Titles Bill.

*The Administration's assurance to proceed within the 2004 "Daylight Conversion" framework*

21. The Secretary for Development (SDEV) replied on 26 May 2009 and attended the Joint Subcommittee meeting on 16 June 2009. In her reply, SDEV explained that the Administration conducted public consultation from January to March 2009 on the major outstanding matters concerning conversion and rectification not because the Administration thought there were fundamental flaws that had to be dealt with before the legislation commenced

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<sup>5</sup> The modifications to the rectification mechanism proposed by the Administration in the 2009 public consultation are discussed in paragraphs 33 to 36 of this report.

but because, after careful review of the papers submitted to the Bills Committee, presentations given to Members and discussions recorded, the Administration considered that these matters had not been clearly identified and deliberated on during earlier discussions. SDEV further advised that having regard to the views received during the consultation exercise, the Administration was developing proposals for appropriate risk management measures within the framework of the "Daylight Conversion" mechanism enacted in 2004. SDEV also assured the Joint Subcommittee that as the Bureau Secretary responsible for the subject, she would do her utmost to bring the legislation into operation as soon as possible and to ensure that the Land Registrar had the means to manage the risks in a prudent and effective manner for the benefit of the community.

22. As regards the amount of resources expended on the part of the Administration on the 2002 Land Titles Bill, SDEV advised in her written reply that between June 1999 when a team was re-established in the Land Registry to prepare a new Land Titles Bill and July 2004 when the Bill was enacted, around \$10.7 million was spent by the Land Registry on the staff dedicated to the Bill and services required to assist them.<sup>6</sup>

23. At the meeting on 16 June 2009, the Administration reported on the responses to the public consultation, highlighting that there was support for some modifications to the 2004 conversion mechanism to address known cases of indeterminate ownership and provide some means to protect the Land Registry Trading Fund from the conversion liabilities, but these should be made within the enacted framework of the "Daylight Conversion" mechanism; and there was very strong opposition to the proposed modified conversion mechanism, which involved scrutiny of individual registers at the owners' expense before upgrading to full title and an uncertain timetable for completion of the conversion exercise.

24. The Administration advised that after assessment of the options available, it recommended to uphold the spirit of automatic conversion at the end of 12 years after commencement of the LTO and manage those identified

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<sup>6</sup> Separately, the Legislative Council Secretariat was asked to provide information on the amount of resources spent by the Secretariat on servicing the Bills Committee on Land Titles Bill. The relevant information was provided vide LC Paper No. CB(1)1826/08-09(02). In gist, the Bills Committee had held 39 meetings from March 2003 to June 2004, and the total meeting time was 91 hours and 25 minutes. In terms of staff costs, the resources deployed to service the Bills Committee was in the region of \$3 million.

risks by proceeding to amend the LTO to modify the "Daylight Conversion" mechanism. To deal with known cases of indeterminate ownership<sup>7</sup>, the Administration proposed to empower the Land Registrar to withhold certain land registered under LRO from conversion to registered land under the LTO, by registering a "Land Registrar's caution against conversion" (LRCAC) against the concerned properties. Moreover, the Administration advised that it would introduce appropriate financial measures to cope with liabilities arising from the automatic conversion mechanism, and to back up the Land Registry Trading Fund to ensure that charges to users of the services of the Land Registry would be maintained in an orderly manner. In this connection, the Administration advised that the Financial Secretary had agreed to back up the LTO financially, and it was the Administration's target to submit the LTO amendment bill to LegCo towards the end of 2010.

25. The Joint Subcommittee welcomed the Administration's commitment to proceed with amendments to the LTO within the 2004 "Daylight Conversion" framework (i.e. automatic conversion 12 years after commencement of the LTO), and to make appropriate financial arrangements to ensure that liabilities arising from conversion to the LTRS would be suitably met. The Joint Subcommittee in principle accepted the Administration's recommendation to introduce an appropriate mechanism to deal with cases with problematic titles, and urged the Administration to discuss with the Law Society and other major stakeholders to specify clear criteria and circumstances for the use of the proposed LRCAC mechanism.

#### *Mechanism for Land Registrar to register caution against conversion*

26. The Joint Subcommittee deliberated the Administration's proposal on the LRCAC mechanism on 7 December 2009. Under the proposal, the Land Registrar will be empowered to exclude properties with indeterminate ownership from automatic conversion to the LTRS on the Conversion Day. Before the Registrar invokes the power, the Land Registry will carry out investigation work to establish whether the apparent problems found in known cases of indeterminate ownership can be resolved before the Conversion Day. If the investigation fails to resolve the uncertainty, the Registrar will publish a Notice of Intention in the Gazette, send a copy of the Notice of Intention to the owner concerned and register the Notice of Intention against the land

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<sup>7</sup> At that time, the Administration had identified about 480 known problematic cases of indeterminate titles.

concerned. Affected parties will be given 60 days or such extended period as the Registrar considers appropriate to object to the registration of the LRCAC. After registration, affected parties can make representation to the Registrar or seek a Court order to have the LRCAC removed. Until a Court order is given or the Registrar is satisfied that the LRCAC can be removed, the property will remain governed by the LRO and will not be converted to the LTRS.

27. The Joint Subcommittee considered that the situations under which the mechanism might be invoked by the Land Registrar were not precise and detailed enough, and in invoking the mechanism, the Administration would be shifting the burden of resolving indeterminate ownership to property owners. The Joint Subcommittee considered that the mechanism should only be deployed as the last resort to deal with known cases of indeterminate ownership and the Administration should exhaust all in-house measures to resolve indeterminate ownership before invoking the mechanism. The Joint Subcommittee urged the Administration to specify the criteria for invoking the mechanism in a more circumspect manner, formulate a detailed work plan for handling cases of indeterminate ownership within the 12-year transitional period, and consider whether a mechanism should be put in place to review the Registrar's decision of registering an LRCAC or refusing to remove an LRCAC.

28. At the meeting on 29 April 2010, the Administration assured the Joint Subcommittee that the LRCAC mechanism would only be invoked as the last resort after all possible efforts to resolve the indeterminate ownership problem of a particular register had been exhausted. Thorough investigation would be carried out within the Administration to establish whether any apparent problems found in known cases of indeterminate ownership could be resolved. The target is to complete the investigation of all cases known to the Registrar within the first half of the 12-year incubation period.

29. To address the Joint Subcommittee's concern about the need for a clear set of criteria for registering an LRCAC, the Administration proposed that the Registrar would *only* register an LRCAC if s/he has reasons to believe that –

- (a) there are more than one register kept under LRO in respect of more than one parcel of LRO land bearing the same lot number;

- (b) there are more than one register kept under LRO in respect of the same parcel of LRO land<sup>8</sup>; or
- (c) the person whose name appears in the register kept under LRO as the current owner of the LRO land may not be the true owner<sup>9</sup>.

30. To allow more time for concerned parties to resolve the problem of indeterminate ownership, the Administration proposed that the Notice of Intention would be registered only if the ownership problem could not be resolved by the end of the tenth year after the commencement of the LTO. The Administration also accepted the Joint Subcommittee's suggestion and proposed to establish a Review Committee to be chaired by a legally qualified person with members representing the legal profession, consumer interests and the relevant trades. The Review Committee would review the Registrar's decision to register an LRCAC or to refuse to remove an LRCAC and make a recommendation as to whether the LRCAC should be removed. The Registrar would, having regard to the recommendation, make a final decision confirming or reversing his/her previous decision. If the Registrar confirms his/her decision to register the LRCAC, the interested party may seek a court order for removal of the Notice of Intention and the LRCAC.

31. According to the Administration, stakeholders had been consulted on the modified proposal and they agreed to the proposed criteria for registering an LRCAC as set out in paragraph 29 above. While stakeholders did not have strong objection to the provision of an administrative review mechanism to review the Registrar's decision to register an LRCAC, some cast doubts on its cost-effectiveness given that, regardless of the Review Committee's recommendation, only the Court would have the final say on the matter.

32. As regards the financial measure to cope with liabilities that may arise from the automatic conversion mechanism, the Administration advised that any proven claims will be met by the LRTF out of its own resources including uncommitted retained earnings. Where necessary, the Administration is prepared to seek the approval of the LegCo Finance Committee for a stand-by

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<sup>8</sup> According to the Administration, these would likely involve cases with multiple ownership claims.

<sup>9</sup> According to the Administration, these may include, for example, cases in which there are more than one chain of title to the LRO land in the same register kept under LRO.

loan facility if the resources available to the LRTF are insufficient to cover proven claims and to finance the smooth operation of the Land Registry. The terms of the loan will be determined when the need for a stand-by loan facility arises.

### Rectification and indemnity arrangements

#### *Issues identified in the post-enactment review*

33. Under section 82(3) of the LTO, the Court shall make an order of rectification in favour of a former registered owner (if innocent) if he lost his title by or as a result of fraud, irrespective of whoever is currently the registered owner. This is referred to as the "mandatory rectification rule" (MR rule) of the LTO. In accordance with the relevant provisions in the LTO<sup>10</sup>, the innocent purchaser will be protected, through payment of an indemnity out of the self-financing Land Titles Indemnity Fund up to a cap of \$30 million<sup>11</sup>.

34. In its post-enactment review of the LTO, the Administration has identified the following major issues with respect to the MR rule provided in the LTO –

- (a) the rule might undermine public confidence in the title register and a prudent purchaser would demand investigation into the title history, thereby defeating the original purpose of the LTO;

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<sup>10</sup> Section 84(1) states that a person suffering loss by reason of an entry in the register or omitted from the register that has been obtained, made or omitted as a result of fraud (as determined at the end of rectification proceedings under section 82) which has affected the ownership of registered land shall be indemnified by Government in respect of that loss. Section 85(3) provides that the Financial Secretary may, by notice published in the Gazette, set a limit (commonly called 'the cap') on the amount of indemnity to be paid in such cases. Section 85(1)(a) specifies the amount of the indemnity in fraud cases. Where the value of the interest in the registered land that has been lost on the date on which the entry was obtained, made or omitted is less than the cap, then the amount to be paid is the value of the interest lost. Where the value of the interest in the registered land that has been lost is higher than the designated cap then the cap amount is to be paid.

<sup>11</sup> When the 2002 Land Titles Bill was examined at the Bills Committee, the Administration proposed to set the indemnity cap at \$30 million for each claim. According to the Administration's estimate at that time, the proposed cap would provide protection for the great majority of property owners, as over 99% of property transactions involve sums of less than \$30 million.

- (b) it would be practically impossible to restore title to the former owner where the property has been surrendered to or resumed by the Government before a claim for rectification is made;
- (c) there would be complications if the property has been divided up and sold to a number of new owners; and
- (d) as the LTO contains a provision which bar the payment of indemnity in any case where the fraud took place before the date of conversion, if the MR rule is to be retained, any post-conversion purchaser could find himself facing loss of the property without any indemnity due to a pre-conversion fraud. This again would undermine public confidence in the title register.

*Modifications proposed in the 2009 public consultation*

35. In the 2009 public consultation, the Administration proposed that the MR rule in section 82(3) be maintained but made subject to the following three exceptions –

- (a) when the land affected has been surrendered or resumed prior to discovery of the fraud;
- (b) when the land has been divided up and sold to multiple bona fide new owners prior to discovery of the fraud; and
- (c) when the current registered owner is a bona fide purchaser for value and is not the first person to have been registered as the owner since the fraud.

36. The Administration reported to the Joint Subcommittee on 16 June 2009 that for the first two proposed exceptions, stakeholders generally appreciated the complexity of the related issues, and yet felt strongly that the indemnity cap should be removed to protect an innocent former owner failing to recover the property. As for the third proposed exception, the overwhelming view was that the MR rule should be maintained, regardless of the distance of the current registered owner from the fraudulent transaction. The Joint Subcommittee noted that at that time, the Law Society had not yet given its views on the issue.

*Law Society's views and stakeholders' responses*

37. At the Joint Subcommittee meeting on 29 April 2010 attended by deputations, the Joint Subcommittee noted the Law Society's strong objection to the MR rule. In its submission, the Law Society pointed out that since an innocent former owner would, under the LTO, be restored as owner if (i) he lost his title by or as a result of fraud and (ii) the relevant entry in the Title Register was procured by a void instrument or was a false entry, this might encourage a purchaser to go behind the Title Register to investigate previous transactions in order to obtain greater assurance that his title would not be at risk. This would undermine the certainty of title and would work against the objective of simplifying conveyancing procedures. The Law Society held the view that "indefeasibility of title" is a cornerstone of a LTRS and that the MR rule should be removed. While the Law Society advocated the adoption of the "immediate infeasibility" principle<sup>12</sup>, it put forward the following two compromising alternatives for the Administration's consideration –

Option 1: to delete the MR rule in section 82(3) of the LTO but to retain the limited discretion given to the court under section 82(1) and (2) to rectify the register against the "current" registered owner in circumstances where he is at fault; and

Option 2: to follow the 2002 position of the United Kingdom as per Schedule 4 of the Land Registration Act 2002, in that the "certainty of title" is upheld while the purchaser would be held responsible for his own fraud or lack of care.

38. The Law Society made the following additional points at the Joint Subcommittee meeting on 29 April 2010 –

- (a) It was the Administration who initiated the idea of providing exceptions to mandatory rectification in December 2008, and the Law Society had indicated support at the time.

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<sup>12</sup> As explained by the Law Society, under the principle of "immediate indefeasibility", a bona fide purchaser who relies on the title register in dealing with the registered owner and registers a transfer, obtains a clear and valid title, even though the transfer instrument to the owner with whom he has dealt is void for fraud or forged, except in the case of fraud by the purchaser himself.

- (b) The Law Society understood and respected the stance of HYK with regard to the MR rule. As a way out for the impasse, a possible move was to leave lands held by indigenous villagers out from the LTRS at the initial stage.
- (c) In view that the MR rule was introduced in fear of fraud, the Government should refer to the experience of the British Columbia in Canada by introducing relevant safeguarding measures in the LTRS to prevent instances of fraud.
- (d) To uphold public confidence in the LTO, the Administration should lift the indemnity cap to demonstrate its commitment to the LTRS and the bar on indemnity for pre-conversion fraud should be removed.

39. At the same meeting, HYK expressed the view that it subscribed to the principle of "back to the original owner", and believed that land title obtained through fraud and dishonest means should be restored to the original owner. With the provision offering indemnity for land purchasers suffering from frauds already in place, HYK could not understand why the MR rule could not be incorporated into the LTO. In so far as the LTO was concerned, HYK's main concern was the protection of the titles of land owners. The lands in the New Territories could value more than \$30 million, and in any event indigenous villagers tended to prefer land ownership to any form of compensation. HYK did not support the suggestion of repealing the MR rule from the LTO.

40. The Joint Subcommittee also noted the Administration's observation that the issues raised by the Law Society were fundamental and had far-reaching implications on the LTRS. The Administration stressed that in considering the way forward, due regard had to be given to the fact that the MR rule in the enacted LTO represented the consensus reached after extensive deliberations amongst the Administration, stakeholders and LegCo. In arriving at this consensus, a fair and appropriate balance had been struck amongst a wide variety of interests in society, involving some give-and-takes by all parties concerned. The difficulties that might be encountered in the attempt to reach any new consensus could not be under-estimated. As such, revisiting this fundamental issue would take time, which would significantly impact on the planned legislative timetable and the implementation of title registration.

41. The Joint Subcommittee considered that the concerns of the Law Society over the MR rule were valid, since rectification of land ownership, if allowed, would upset the reliability and certainty of the LTRS under the LTO. The Joint Subcommittee however appreciated that the issues regarding the implementation of the LTO had increased in number and complexity and would take some time to resolve. The Joint Subcommittee requested the Administration to consider the views from stakeholders and come up with a workable system for the LTO that would best serve the public interest.

42. The Administration reported at the Joint Subcommittee meeting on 28 June 2010 that the Administration had held an in-depth discussion with stakeholders on the concerns of the Law Society regarding the rectification and indemnity arrangements, and the stakeholders expressed divergent views towards the Law Society's stance. To take the matter forward, the Administration had requested the Law Society to provide further information on the extra steps in conveyancing procedures that would be necessary if the MR rule was adopted. Meanwhile, the Administration was also exploring other possible options for discussion with stakeholders.

43. At the Joint Subcommittee meeting on 23 December 2010, the Administration recapitulated the background to the MR rule and set out the following considerations regarding the implications of abolishing the MR rule and removing the cap on indemnity and the bar on indemnity for pre-conversion fraud –

- (a) When the Land Titles Bill was introduced in 2002, it was then proposed that the Court should be given the discretion to rectify the Title Register in favour of an innocent former owner if the Court considered that it would be unjust not to do so. The arrangement was similar to the United Kingdom model under the Land Registration Act 2002 as recently suggested by the Law Society. In the course of the Bills Committee's examination, however, there were concerns from stakeholders that an indefeasible title for a purchaser, together with a cap on indemnity payable to an innocent former owner in the case of fraud, might amount to deprivation of property if the Court did not rectify in favour of the former owner. The MR rule was eventually introduced at the final stage of the Bill's deliberation in 2004 in order to address the concerns of stakeholders and on the suggestion of the Bills Committee.

- (b) Since there would not be any title checking under the LTO's automatic conversion mechanism, removing the cap on indemnity and the bar on indemnity for pre-conversion fraud could subject the Land Titles Indemnity Fund to tremendous financial risks and could result in substantial increase in the levy to be charged. In this connection, the Administration has noted that *none* of the major common law jurisdictions<sup>13</sup> that operate an LTRS with indefeasible title for purchasers and indemnity for fraud would follow the arrangement of converting historical land registers to the LTRS automatically without appropriate measures to mitigate the associated risks. The Administration has also noted that fraud prevention measures (such as the requirement to present the title certificate of the seller before registering a transfer under section 29 of the LTO) can only be applied to *new* transactions under the LTRS. Such measures will not relieve the Land Titles Indemnity Fund from potential liabilities arising from pre-conversion fraud.
- (c) According to an actuarial consultant engaged by the Land Registry in 2006, the probability of insolvency of the Land Titles Indemnity Fund would increase significantly if the cap on indemnity was removed, rendering it susceptible to bankruptcy if more high-valued claims were payable. Practically, it would not be possible to assess or contain the risks associated with pre-conversion fraud. Furthermore, the experience of other jurisdictions indicated that there was a marked increase in the number and magnitude of property fraud in recent years. In view of the recommendations of the actuarial study and the rising trend of property fraud, it would be necessary to reassess the risks of the Land Titles Indemnity Fund and its levy rate, having regard to any amendments made to the relevant provisions of the LTO.
- (d) In view of the inter-relationship between conversion, rectification and indemnity, any modifications to these core elements of the LTO would have to be considered in a holistic

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<sup>13</sup> Examples include England and Wales, Scotland, Ontario and New Zealand. Singapore does not provide indemnity payment for fraud cases.

manner. The exclusion of lands in the New Territories held by indigenous villagers would not absolve the Administration from the need to reconsider all the core elements of the LTO if the MR rule were to be modified or abolished. It would also complicate the land title registration regime by creating three classes of lands (new lands, existing lands eligible for automatic conversion and existing lands in the New Territories held by indigenous villagers to be excluded from automatic conversion) governed by different sets of legislation, which might cause considerable confusion to the public. In addition, there should be convincing justifications for partial application of a policy, and there could be legal implications as well.

44. The Administration further reported that the following views had been offered by members of the Land Titles Ordinance Steering Committee<sup>14</sup> (LTOSC) –

- (a) The Law Society maintained their views. The Law Society indicated that they appreciated the Administration's concern on risks and liabilities to the Land Titles Indemnity Fund and the implications of the levies on ordinary home buyers if the cap on indemnity and the bar on pre-conversion fraud were to be removed.<sup>15</sup> On the other hand, they considered that parties to property transactions had already been bearing considerable risks and costs under the existing DRS, and the LTRS with indemnity payment would represent a significant improvement.

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<sup>14</sup> The LTOSC is convened by the Land Registrar to, inter alia, consider recommendations on amendments to the LTO arising from the review of the Ordinance. See paragraph 7 above regarding its membership.

<sup>15</sup> On the issue of indemnity, the Law Society pointed out in its submission to the Bills Committee in December 2010 (LC Paper No. CB(1)790/10-11(01)) that the Government had so far failed to justify the need to retain the cap by disclosing information and statistics from Hong Kong and overseas jurisdictions on the evidences of fraud and indemnity fraud under their LTRS and/or fraud cases in property transactions generally despite repeated requests by the Law Society. As a profession having the closest relation to conveyancing, the Law Society pointed out that it is not their experience that defects in title will, in any notable number of cases, result in titles being disturbed. The Law Society's position remained that the cap on indemnity should be removed, but if the final decision were to maintain the cap, their position was that there should at least be a mechanism in the legislation to ensure that the amount of the cap would be revised from time to time to ensure that it would cover the majority (say, not less than 99%) of the properties in Hong Kong.

The benefits of the new system should outweigh the associated costs.

- (b) HYK remained strongly opposed to any changes to the MR rule. They pointed out that as a statutory advisory body on New Territories affairs, HYK's purview was not confined to lands held by indigenous villagers. They were concerned about the impact of the removal of the MR rule on *all* New Territories lands and properties. Under common law, the former owner would recover the property in case of fraud. An innocent former owner in the New Territories might be worse off under the new system if the MR rule were to be removed. This was particularly so with the cap on indemnity. They did not agree with the Law Society's proposal to exclude lands in the New Territories held by indigenous villagers from the application of the LTO at its initial stage of operation, as it would vastly complicate the land registration system in Hong Kong. In the event that the MR rule were to be abolished, however, the cap should also be removed so that an innocent former owner could be fully compensated.
- (c) The Real Estate Developers Association of Hong Kong reiterated its support for a system of indefeasible titles without any MR rule or cap on indemnity. If the cap was to be preserved, however, the MR rule should be maintained in order to preserve the interests of the innocent former owner.

45. At that Joint Subcommittee meeting, the Administration indicated that in view of the great differences in the views of the major stakeholders, it would continue to maintain close liaison with them and explore viable options to take forward the land titles exercise. While noting the difficulties for the Administration to arrive at an agreed course for the major LTO amendments, members expressed grave concern that the Administration had yet to come to any policy decision after gathering views and concerns from major stakeholders, and that it was not possible to come up with a timetable for the LTO amendment bill. Mr Albert HO commented that there had been adequate discussions on relevant issues over the years. Unless the Administration had come to a policy decision, the work to prepare for the implementation of the LTO would drag on indefinitely. Mr Paul TSE and Mr Abraham SHEK expressed disappointment with the poor progress of the

Administration's work in bringing the new LTRS into operation. Mr TSE pointed out that the existing DRS requiring solicitors to go through previous transaction records was causing plenty of wastage of resources. As it was not possible for the proposed amendments to the LTO to gain the consent of every stakeholder, the Administration should demonstrate the will and courage to take decisive steps forward. Mr SHEK highlighted that the cap on indemnity would give rise to a lot of problems in future. The Chairman pointed out that the stakeholders mostly affected by the implementation of the LTO or otherwise would be the property owners in Hong Kong. It was most important for LegCo and the Administration to ensure that the LTO would be implemented in manners truly beneficial to the Hong Kong public. She urged the Administration to make its policy decisions based on sound and valid justifications after listening to the views of the major stakeholders.

#### Determination of land boundaries

46. Section 94 of the LTO seeks to provide an avenue for land owners to apply to the Director of Lands for determination of boundaries regarding their lots and registration of the resultant plans in the Land Registry. The provision only applies to land that has been brought under the LTO. When the 2002 Land Titles Bill was deliberated at the Bills Committee, the Administration indicated to the Bills Committee that it would give consideration to introducing a similar provision in a suitable Ordinance that would apply to land not yet covered by the LTO.

47. At the Joint Subcommittee meeting on 7 October 2009, the Administration advised that in the post-enactment review of the LTO, it has identified certain deficiencies of the land boundary determination mechanism under the LTO, including the following –

- (a) Pursuant to section 94(4) of the LTO, the Director of Lands is not allowed to make a determination of the boundaries of a lot if the existing plan or new plan changes the boundaries or area or measurement of that lot as shown on a land boundary plan kept in the Land Registry or on any Government lease.
- (b) The word "determination" is defined with a narrow sense in section 94(6) to mean, in relation to a boundary, adding the bearings, boundary dimensions and coordinates wherever applicable in the process of updating the boundary, whereas boundary determination

is concerned with ascertaining the exact boundaries of a lot, not simply "adding" bearings, dimensions and coordinates or "updating" what is outdated.

- (c) Sections 94(4) and 94(6) of the LTO will render the Director of Lands unable to entertain many applications for boundary determination of "existing" land, thus limiting the usefulness of the system for boundary determination.

48. To provide for a system of determination of land boundaries applicable to both land governed by the LRO and land registered under the LTO and to deal with the inadequacies of the mechanism provided for under the LTO, the Administration proposed to repeal the entire Section 94 of the LTO and introduce into the Land Survey Ordinance (Cap. 473) (LSO) the relevant provisions modeled on the current provisions in Section 94 of the LTO. The major elements of the proposal include the following –

- (a) to allow the Director of Lands, on account of the more accurate measurements and information available and on the basis of the acceptance criteria (to be) set out in the code of practice issued under the LSO, to accept an existing plan or a new plan (which may be prepared by an authorized land surveyor and checked by the Director of Lands or be prepared by the Director of Lands) and, with the consent of the owner of the adjoining lot, cause the existing plan or new plan to be registered in the Land Registry, although the existing plan or new plan will result in minor changes to the bearings, boundary dimensions and coordinates as shown on any land boundary plan of the lot kept in the Land Registry and registered under the LRO or the LTO;
- (b) to add a provision to the effect that an existing plan or new plan of a lot (which may be prepared by an authorized land surveyor and checked by the Director of Lands or be prepared by the Director of Lands) caused to be registered by the Director of Lands upon the determination of land boundaries under the LSO shall supersede any land boundary plan of that lot kept in the Land Registry and registered under the LRO or the LTO;
- (c) to include a new provision to allow the Director of Lands to keep an existing plan or a new plan of a lot acceptable to him

and make such plan available for inspection by any person albeit the Director of Lands is unable to obtain the lot owner's consent or, where applicable, the adjoining lot owner's consent to cause that existing plan or new plan to be registered in the Land Registry;

- (d) to empower the Director of Lands to authorize public officers to enter the adjoining lot for the purpose of checking the new plan of the subject lot prepared by the authorized land surveyor or conducting the necessary land boundary survey of the subject lot; and
- (e) to make related amendments to the LSO including revising the functions of the Land Survey Authority to include the determination of land boundaries, and providing that a land boundary plan for land subdivision shall be checked by the Land Survey Authority before submission of the relevant instrument to the Land Registry for registration.

The then intention of the Administration was to take forward the proposals by way of consequential amendments to be made under the LTO amendment bill.

49. During the discussion on 7 October 2009, Joint Subcommittee members expressed concerns on whether and how the proposed land boundary determination system would provide an effective avenue for resolution of the problem of undetermined land boundaries, and how the interests of land owners would be affected under the proposed system. Specifically, members raised questions on the legal consequences if a new plan as determined by the Director of Lands is different from the old plan kept in the Land Registry or shown on the Government lease, the legal status of a "non-consent new plan"<sup>16</sup> and the legal implications of such plan on related conveyancing transactions.

50. While noting members' concerns, the Administration advised that it was not the Administration's intention to go for mandatory registration of the land boundary plans for each and every lot. The proposals put forth by the Administration were meant to improve the existing arrangements for

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<sup>16</sup> A "non-consent new plan" refers to a new plan where the relevant owners do not give consent for it to be registered but which will be kept by the Director for public inspection.

determination of land boundaries; they were not designed to solve the wider problems of unclear land boundaries.

51. At the meeting on 7 December 2009, the Administration reported on the initial views of the relevant Government departments and the Administration's legal advisors on the issues raised by Joint Subcommittee members. The Administration indicated that as the issues had complex legal and policy implications, more time was needed to examine them in detail and carefully.

52. At the meeting on 29 April 2010 attended by deputations, the Joint Subcommittee noted the views of the Hong Kong Institute of Surveyors on the matter. The Institute supported the Administration's proposal and further proposed the following –

- (a) A legal framework for determination of land boundaries and proper registration of land boundary plans should be established under the LSO; such a legal framework would lay the foundation for effective land administration which was vital to an efficient land market.
- (b) A land boundary plan produced by an authorized land surveyor through detailed surveying process with due regard to all evidence available should carry legal effect and be taken as prima facie evidence for ascertaining the extent of land parcel as described in a lease.
- (c) The Administration should maintain a land boundary records system under the Land Survey Authority and share these records with the public.
- (d) All land boundary plans should be checked thoroughly by the Administration prior to formal registration.

53. At the same meeting, HYK expressed the view that determination of land boundaries was a highly complicated subject and had been under discussion between HYK and the Administration for a few decades. HYK believed that land boundaries should be dealt with separately outside the LTO, in order not to hold up the implementation of the LTRS.

54. The Administration responded at the meeting that section 94 of the LTO stipulated that the determination of land boundaries was subject to the terms and conditions of the concerned government lease. This implied that the interests of land owners would be protected by the lease. Although the Administration had started to digitize all the land boundary plans since 1989, it might still take some years to establish a land boundary records system allowing public access through the Internet as suggested by the Hong Kong Institute of Surveyors. The Administration had been keeping land boundary records prepared by itself and private surveyors, and noted the Institute's suggestion of establishing a statutory framework to give legal status to these land boundary plans.

55. In June 2010, the Joint Subcommittee received a submission from the Association of Government Local Land Surveyors. The Association expressed support for the Administration's proposal, but highlighted its concern about the lack of a solid timetable for the proposed legislative work. The Association emphasized that for the new LTRS to operate smoothly, the LTO should never be implemented without the corresponding amendments for determination of land boundaries. The Joint Subcommittee requested the Administration to provide a response on the Association's submission.

56. The Administration reported at the meeting on 23 December 2010 that it had carefully examined the Joint Subcommittee's concerns on determination of land boundaries and their complex legal and policy implications. Relevant stakeholders were consulted at the Cadastral Survey Consultative Committee meeting held in August 2010. Their views remained diverse. To avoid complicating matters, the Administration considered it more appropriate to examine the issues relating to the determination of land boundaries as a separate exercise from the amendment of the LTO. Under this approach, the momentum for taking forward both exercises would be sustained. The Administration assured the Joint Subcommittee that it would consider all relevant views, including those from Joint Subcommittee members, all relevant professional bodies and interested parties in examining the proposal on determination of land boundaries.

Other issues

57. At the meeting on 7 October 2009, the Joint Subcommittee noted the papers<sup>17</sup> on the following subjects prepared by the Administration –

- (a) Comparison of the LTO and the Conveyancing and Property Ordinance (Cap. 219) (CPO);
- (b) Implied Covenants under section 35 of the CPO; and
- (c) Definition of "deed of mutual covenant" in section 53 of the LTO.

58. At the Joint Subcommittee's request, the Administration has provided information<sup>18</sup> at the meeting on 16 June 2011 on the latest positions of its work in areas which are technical, straightforward and not controversial. The information covers the following –

- (a) the follow-up actions taken by the Administration on those issues that were raised during the scrutiny of the 2002 Land Titles Bill and listed in Appendix VI of the Bills Committee's report; and
- (b) the latest positions of the further issues, other than the issues relating to the conversion and rectification mechanisms, identified by the Administration in the course of the post-enactment review of the LTO.

**Latest development – New two-stage conversion mechanism**

59. At the meeting on 16 June 2011, the Joint Subcommittee noted that the Administration has developed a new two-stage conversion mechanism with corresponding modifications to the rectification and indemnity arrangements. The main features of the proposed new option include the following -

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<sup>17</sup> vide LC Papers Nos. CB(1)2675/08-09(01), CB(1)2675/08-09 (02) and CB(1)2675/08-09(04)

<sup>18</sup> vide Annexes A and B to LC Paper No. CB(1)2434/10-11(01)

- (a) On commencement of the LTO, the LTRS with immediate indefeasibility will forthwith apply to new land<sup>19</sup>. For LRO land<sup>20</sup>, the conversion process would involve two stages of automatic conversion (Two-Stage Conversion Mechanism).
- (b) After a lead-in period<sup>21</sup> from the date of operation of the LTO on new land, all LRO land except those subject to stopped deeds will undergo the first stage of conversion (primary conversion) and will be automatically brought under the LTO on a designated date.
- (c) During the 12 years from the primary conversion (incubation period), land with primary title will remain subject to subsisting interests<sup>22</sup>, while new transactions and interests created after primary conversion will be effected in the manner and form prescribed under the LTO. Meanwhile, the MR rule will apply to restore title to an innocent former owner who lost his property as a result of fraud, except where it is practically impossible to restore title to the innocent former owner<sup>23</sup>. Indemnity with cap will be payable to a displaced owner in respect of fraud which occurred after primary conversion. A registered owner who wishes to preserve the MR rule may choose to register an opt-out caution against his own property during the incubation period. The effect of registering an opt-out caution is to prevent the property from automatic full conversion of title, so that the MR rule will continue to apply.

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<sup>19</sup> "New land" means land granted under a Government lease or an agreement for a Government lease on or after the date of commencement of the LTO (s.20 of the LTO).

<sup>20</sup> "LRO land" means land (as defined in s.2(1) of the LTO) which is the subject of a Government lease for which a register has been kept under the Land Registration Ordinance (Cap.128).

<sup>21</sup> A lead-in period of about two to three years is required for preparatory work including development of a computer system for the conversion and gaining experience from the operation of LTRS for new land.

<sup>22</sup> Subsisting interest means an interest (whether registered or unregistered) that is subsisting as at the date of primary conversion and that would have been enforceable against the current registered owner had the land remained under the LRO system.

<sup>23</sup> The exceptions to the MR rule which have been agreed by stakeholders are: (a) where the property affected had been surrendered for public purpose or resumed prior to the discovery of the fraud; and (b) where the property had been redeveloped and sold to multiple new purchasers and it would be inequitable to restore title to the former owner. Please also refer to paragraphs 35 and 36.

- (d) By the end of the incubation period, land with primary title will undergo the final stage of conversion (full conversion) and will automatically be fully converted to registered land, except where the land is subject to –
  - (i) a warning notice registered by a claimant of an unregistrable subsisting interest;
  - (ii) a Land Registrar's Caution<sup>24</sup> against full conversion for reason of indeterminate ownership;
  - (iii) an opt-out caution registered by the owner who does not want the title of his property to be fully converted to registered land status; or
  - (iv) a non-consent caution in respect of rectification proceedings.
- (e) Upon full conversion, bona fide purchasers of registered land who are in possession and for valuable consideration will, subject to sections 82(1) and 82(2) of the LTO, enjoy indefeasible title. A subsisting interest which is not protected by a registered matter will be subject to other registered matters. Indemnity with cap will be payable to a former owner who cannot restore title in respect of fraud which occurred after primary conversion.

60. According to the Administration, the proposed new option would involve major changes to the legal framework laid down in the LTO and that its adoption would inevitably require considerable new provisions. In this regard, the Chairman has enquired whether the proposed new option represents a change from the position stated in the letter of the Secretary for Development to the Joint Subcommittee dated 26 May 2009 and sought explanation for the proposed changes. She has also asked about the Administration's timetable for preparing the necessary amendments to the LTO to bring the legislation into operation.

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<sup>24</sup> According to the Administration, the operation of this mechanism would be similar to that of the LRCAC mentioned in paragraph 26 above.

61. The Administration has explained that the proposed changes are mainly related to the implementation arrangements; basic principles such as automatic conversion and indemnity with cap laid down in the LTO remain unchanged. A major contentious issue that had to a great extent held up the preparatory work for the implementation of the LTO over the past two years is whether the MR rule under section 82(3) of the LTO should be retained. In order to address and balance the divergent views and concerns of stakeholders, particularly those of the Law Society and HYK, over the MR rule and related issues, the Administration has been liaising closely with the stakeholders over the years and, taking into account their views and suggestions, has developed the present new option. The Administration believes that the proposed new option should be able to balance the needs and concerns of different stakeholders and could better serve the public interest.

62. The Administration has also advised that at the meeting of the LTOSC held on 26 May 2011, the stakeholders represented in the Steering Committee generally welcomed the Administration's efforts in addressing their divergent views and concerns, and considered that the proposed new option appeared feasible in forming the basis for further discussion with a view to taking the land titles exercise forward. The stakeholders would examine the proposal in further detail and would revert with their comments in about two months' time. The Administration aims to come up with a consolidated proposal that is acceptable to the stakeholders by the end of 2011, and thereafter consult the public on the proposal during the first and second quarters of 2012. While the Administration will simultaneously continue with the preparation of the necessary amendments to the LTO, the Administration would only be able to come up with a full package of the necessary amendments after consideration of the views received from the public.

63. The Chairman and Hon Audrey EU have expressed regret with the Administration's unsatisfactory progress since 2004 in taking forward the LTO amendment exercise despite a substantial commitment of time and public resources over the years, and they consider this is very much attributed to the Administration's swaying policy stance on certain core issues over the years. As the Administration will mainly engage the stakeholders represented in the LTOSC and thereafter the general public in the coming year with a view to arriving at a general consensus on the way forward for the implementation of the LTO, Joint Subcommittee members have agreed that there should be no need for the Joint Subcommittee to continue its work in the 2011-2012 legislative session. When the Administration is able to come up with a full package of

necessary amendments to the LTO after the consultation exercise, it would be appropriate for the Administration to report the work progress with relevant proposals to the DEV Panel and the AJLS Panel.

**Advice sought**

64. Members are invited to note the deliberations of the Joint Subcommittee and its recommendation that there is no need for the Joint Subcommittee to continue its work in the 2011-2012 legislative session.

Council Business Division 1  
Legislative Council Secretariat  
14 October 2011

**Summary of the deliberations of the Bills Committee on Land Titles Bill  
(introduced in 2002) on the conversion mechanism, the rectification  
arrangements and the indemnity scheme**

Conversion mechanism

On the conversion mechanism, the Bill proposed gradual conversion from the present deeds registration system (DRS) to the new land title registration system (LTRS) over an indefinite period of time. Under this mechanism, existing properties could be converted to the new system either by mandatory application upon the first assignment of any property after commencement of the Land Titles Ordinance (LTO) or voluntary application for title registration at any time after commencement of LTO. However, 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.

2. The Law Society of Hong Kong (the Law Society) raised its grave concern 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 did not consider it appropriate for the Land Registry to establish such a mechanism, as it would add to the cost and complexity of conveyancing and would be difficult to safeguard against abuse. In December 2003, the Law Society informed the Bills Committee that it had come to the conclusion that the proposed conversion mechanism in the Bill was unworkable, and counter-proposed a daylight conversion mechanism similar to the system being operated in some states of Australia.

3. The Bills Committee then invited the Administration to examine the Law Society's proposal for a daylight conversion mechanism. Under the daylight conversion mechanism subsequently proposed by the Administration, all new land will be registered under the new land title registration system after the commencement of LTO, and the title will be vested in the grantee as registered owner. All other land will remain under the existing Land Registration Ordinance (LRO) (Cap. 128) until the expiry of 12 years from the commencement day. Upon the expiry of the 12-year incubation period, all unregistered land will be converted automatically to the new system except 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 LRO register will become the first owner under the Title Register under LTO. 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.

4. Since the concerned parties had not raised objections in principle to the daylight conversion mechanism during consultation, the Bills Committee had examined in detail the substantial amendments to be moved by the Administration to give effect to the change. To ensure safe and smooth conversion at the end of the 12-year incubation period, the Administration accepted the Bills Committee's suggestions to put in place a mechanism to review the implementation of the new system during the 12-year incubation and to empower the Secretary for Housing, Planning and Lands (subsequently amended to "Secretary for Development") to vary the 12-year incubation period, whilst the exercise of this power shall be subject to the positive vetting of LegCo.

#### Rectification of title

5. On the circumstances under which the Court may order rectification of title, the Bills Committee shared the concern of a number of parties that the relevant provisions in the Bill failed to achieve the right balance between the requirement of certainty of title and justice in certain circumstances. After review, the Administration proposed to recast the provisions by --

- (a) removing the wide discretion given to the Court under the original provisions;
- (b) providing that subject to the new clause 81A (now section 82 of LTO), on an application made by a former registered owner of registered land, the Court of First Instance shall order the rectification of the Title Register to restore the title of the applicant if it is satisfied that firstly, 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; secondly, the applicant was not a party to the fraud; and thirdly, the applicant did not, by his act or by lack of proper care, substantially contribute to the fraud; and

- (c) setting out clearly the circumstances under which the Court of First Instance may order the rectification of the Title Register so as to affect the title of a person who is the registered owner of registered land and who is in possession of the land and has acquired the land for valuable consideration.

### Indemnity scheme

6. Under the indemnity scheme provided for in the Bill, indemnity may be claimed for two types of loss caused by an entry in or omission from the Title Register. While there is no cap on the indemnity for the loss as a result of mistakes or omissions on the part of the Land Registrar or public officers assisting the Registrar, the indemnity for the loss of ownership as a result of fraud is subject to a cap, the amount of which will be determined by the Financial Secretary by notice published in the Gazette. The Administration proposed to set the cap at \$30 million for each case.

7. The Administration explained that as deliberate fraudulent acts were difficult to anticipate and prevent, there should be a suitable device to limit the potential liability that the indemnity scheme has to carry. Moreover, the interests 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 \$30 million. Persons suffering loss in excess of the limit of compensation could still recover the shortfall through further legal proceedings.

8. The Bills Committee noted that other jurisdictions such as England, New South Wales and Ontario did not impose a cap on indemnity, and that a number of parties including the Hong Kong Bar Association (the Bar Association) and the Real Estate Developers Association of Hong Kong objected to the proposed cap and questioned its constitutionality in relation to Articles 6 and 105 of the Basic Law. Having considered all the arguments, members of the Bills Committee remained doubtful about the constitutionality of the proposed cap on indemnity in cases of fraud. The Administration however maintained its view that the cap was fully constitutional, whilst assuring the Bills Committee that the indemnity scheme and the level of the cap would be reviewed as experience was gained with the operation of the new land title registration system in Hong Kong.

**Panel on Development and  
Panel on Administration of Justice and Legal Services**

**Joint Subcommittee on Amendments to Land Titles Ordinance**

**Membership list**

<b>Chairman</b>	Dr Hon Margaret NG
<b>Members</b>	Hon Albert HO Chun-yan Hon Miriam LAU Kin-ye, GBS, JP Hon Timothy FOK Tsun-ting, GBS, JP* Hon Abraham SHEK Lai-him, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon CHEUNG Hok-ming, GBS, JP Prof Hon Patrick LAU Sau-shing, SBS, JP Hon Paul TSE Wai-chun, JP* Hon Alan LEONG Kah-kit, SC (up to 28 January 2010) (since 22 May 2010) Hon LEUNG Kwok-hung*
	(Total: 11 members)
<b>Clerk</b>	Ms Anita SIT
<b>Legal Adviser</b>	Mr KAU Kin-wah

\* These members joined the Joint Subcommittee when the 2010-2011 legislative session commenced.

**Panel on Development and  
Panel on Administration of Justice and Legal Services**

**Joint Subcommittee on Amendments to Land Titles Ordinance**

**List of organizations/ individuals  
that have submitted views to the Joint Subcommittee**

Name of organization/ individual	Meeting(s) attended	Written submission(s)
Association of Government Local Land Surveyors	-	CB(1)2198/09-10(01) CB(1)2198/09-10(01)
Consumer Council	-	CB(1)1028/08-09(07)
Estate Agent Association	19 March 2009	-
Estate Agents Authority	19 March 2009	CB(1)1028/08-09(03)
Estate Agents Management Association	19 March 2009	-
Heung Yee Kuk	19 March 2009 29 April 2010	CB(1)1028/08-09(04) CB(1)1109/10-11(01)
The Hong Kong Association of Banks	-	CB(1)1028/08-09(09)
Hong Kong Chamber of Professional Property Consultants Ltd.	19 March 2009	CB(1)1028/08-09(05)
The Hong Kong Institute of Surveyors	19 March 2009 29 April 2010	CB(1)1054/08-09(02) CB(1)639/09-10(01) CB(1)1737/09-10(01) CB(1)1789/09-10(01)

<b>Name of organization/ individual</b>	<b>Meeting(s) attended</b>	<b>Written submission(s)</b>
The Law Society of Hong Kong	19 March 2009 29 April 2010	CB(1)1054/08-09(03) CB(1)2226/08-09(01) CB(1)1296/09-10(01) CB(1)1737/09-10(02) CB(1)2421/09-10(01) CB(1)790/10-11(01)
Mr LEUNG Shou-chun, Fellow member of the Hong Kong Institute of Surveyors	-	CB(1)639/09-10(02)
Properties Agencies Association	19 March 2009	CB(1)1054/08-09(01)
The Real Estate Developers Association of Hong Kong	19 March 2009	CB(1)1593/08-09(01) CB(1)1028/08-09(06) CB(1)1737/09-10(03)
Society of Hong Kong Real Estate Agents Ltd.	-	CB(1)1028/08-09(08)