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《土地業權條例草案》委員會秘書

陳女士：

#### **《土地業權條例草案》——業權保險**

閣下11月27日的來函收悉，謹此致謝。我們從函中得悉立法會的有關法案委員會要求本公司：

1. 就業權保險是否《土地業權條例草案》(“條例草案”)建議設定彌償上限的一項可行對策提出意見；
2. 說明保費率方面的資料；
3. 說明關於提供業權保險的資料；及
4. 就可如何用業權保險來補足條例草案提出意見。

我們會在本函回應上述首3個問題。然而，由於第四個問題須作詳細闡釋，謹同時附上文件一份，當中論述條例草案的限制，以及可如何利用業權保險，推行一個更周全的土地業權制度，為公眾提供更大保障。謹請法案委員會考慮該文件所載的意見，因為條例草案的適用範圍、擬議實施方式，以及實施起來對香港物業市場所造成的影響，均令人深表關注。為方便參考，我們會在本函綜述文件內各項要點。

#### **1. 業權保險是否條例草案建議設定彌償上限的一項可行對策？**

這個問題的答案為“是”，但當中有若干保留。有一點可以肯定，就是業權保險能夠針對超出條例草案保障範圍的風險提供保障(而一如下文所述，該等未獲涵蓋的風險範圍甚廣，遠非只與設定彌償上限有關)。

然而，長遠來說，要使業權保險成為一項針對彌償上限的可行補救措施，必須有一間或更多保險公司承辦此類保險業務，並作出妥善的再保險安排，以便就一段固定時間提供所需服務。倘業權保險的承保範圍一般只限於條例草案載述的少數風險，所涉業務僅為賠償額是3,000萬港元以上的個案，這對保險公司來說是否有足夠的吸引力，實在是個疑問。

要解決上述問題，必須針對彌償上限及條例草案的一切其他限制，訂立較周全的土地業權保險計劃。這樣，本公司定有興趣就一段既定時間提供此類保險服務。

## **2. 保費率方面的資料**

我們就香港為業權投保的土地業權制度收取的參考保費，數額載列於隨附文件附錄5。採用該等保費率，大致上能針對文件所述各類不同風險提供保障。有一點要注意，保費率的高低取決於很多因素，特別是能否設立一個周全的保障業權制度、最終落實的法例、有關程序和代位權利。

本公司的業務遍及60多個不同的司法管轄區。我們在各個司法管轄區分別收取不同的保費，視乎有關地區所實施的法例，以及我們對所涉風險的評估而定。保費率的差距頗大。本函的附錄開列我們在加州(本公司註冊成立的司法管轄區)所收取的保費。

為迎合各個市場的需要，我們在業務所及的每個國家分別有不同的經營策略。因此，我們並未能提供在其他國家收取的保費率方面的資料，因為該等保費率不能直接比較。舉例說，我們在英國的業務集中為業權欠妥的物業提供保險。在澳洲，本公司自1996年成立以來，則一直在轉按交易中向銀行及貸款人提供業權保險。

## **3. 關於提供業權保險的資料**

### **(a) 在香港及其他國家提供業權保險的事宜**

我們在任何國家建立業權保險業務之前，均會盡我們應盡的努力，仔細研究當地的土地擁有權制度，以決定有關制度是否符合本公司簽發保單的內部承保指引，以及能否以合理的收費水平提供業權保險。當中最大的挑戰在於風險分析，因為很多國家在土地方面的法律原則均不夠明確。

我們在香港展開業務之前曾進行上述研究。自2001年在香港成立後，本公司就各類物業交易進一步定出詳細的承保指引。從承保的角度而言，我們在香港一直能夠提供重要的業權保險服務。此外，鑒於香港的土地業權制度行將有所改變，

我們亦對條例草案本身進行了詳細的研究，探討業權保險可如何有助條例草案獲得通過。

#### **(b) 條例草案實施後在香港提供業權保險的事宜**

這個問題的答案，確實要視乎條例草案的形式、尤其是轉制機制而定，同時亦取決於律師賠償基金如何處理物業轉易的風險，而我們深信此點是息息相關的。然而，我們大致上認為，條例草案所訂的彌償範圍實在太窄，而轉制機制又有太多問題，因此當條例草案獲得通過後，業權保險業在香港將大有可為。

話雖如此，一如隨附文件所述，我們認為可以積極得多的方式運用業權保險，來協助推行土地業權制度。

### **4. 對於可如何用業權保險來補足條例草案的意見**

#### **(a) 彌償範圍的限制**

香港地產建設商會對條例草案提出了一項重要的反對意見。該會基本上認為，若某人因實施土地業權制度而無辜地喪失土地權益，該人應有權就其損失獲得十足彌償。該會此項意見是針對條例草案擬設彌償上限的做法。

然而，條例草案實際亦在另一些重要的層面上，偏離這項基本原則。事實上，就受影響權益的數目而言，該等其他限制可能更加重要，因為若條例草案以現有形式獲得通過，結果極有可能會令人喪失土地的擁有權及其他權益，而得不到**任何**補償。這是絕對不能接受的。

要對該等限制作出補救，以設立一個可行而有用的土地業權制度，政府或第三者承保人必須接受土地業權制度的內在風險。

因此，業權保險最主要是藉收取一個公眾負擔得起的費用，消除彌償範圍的一切重大限制，以補條例草案的不足。我們相信業權保險可作為工具，使政府能夠推行香港物業市場所需那種土地業權制度。

條例草案所訂彌償範圍的限制，在隨附文件已作深入探討。該等限制可扼述如下：

- (i) 設定彌償上限，把損失款額超逾上限者置諸不理。由於付出有值代價的真誠買方擁有有關物業時，要更正業權註冊紀錄，未必會獲得批准，這清楚表示有關人士可能會失去土地權益，而得不到十足補償。

- (ii) 在首次註冊之前如有欺詐、錯誤或遺漏，但直到後來才發現，在此情況下將不會獲得彌償。因此有一個重要的問題，就是若在首次註冊之前發生欺詐事件，以致喪失某項權益，該項權益的擁有人根本無權申索任何補償。
- (iii) 就欺詐作出彌償，只限於喪失擁有權權益的情況。若喪失承按人權益或其他權益，例如承租人的佔住權益或契諾受益人的權益，則似乎不會有任何彌償。承按人權益顯然是最常受該項限制影響的權益。我們認為這項規定會大大削弱擬議制度的成效。
- (iv) 因屬無效或可使無效的交易而蒙受損失(由土地註冊處人員導致者除外)，將不會獲得彌償。在屬無效及可使無效的交易方面有不少例子，可以導致喪失權益而沒有補償。
- (v) 喪失非書面衡平法權益，將不會獲得彌償。在擬議土地業權制度下，付出有值代價的真誠買方可取得物業，而不受非書面衡平法權益所約束，除非權益持有人藉註冊警告書保障有關物業。沒有註冊的衡平法權益的持有人，將不獲支付彌償。很多家族的情況通常亦涉及此類權益，但把警告書註冊是一種激進的做法，故此未必適宜用於該等家族的情況。

業權保險能針對上述一切限制提供保障，而且一如下文所述，在實施土地業權制度時可採用該項保險安排。

條例草案的一大好處，是能夠矯正業權欠妥的技術問題，從而使物業轉易及按揭的交易過程更為暢順。事實上，業權欠妥多是一些技術問題。然而，所有業權欠妥的情況基本上均帶有同一風險：除物業的表面擁有人外，還有人對該物業持有若干權益或產權負擔。

透過土地業權制度“矯正”該等業權欠妥的情況，會產生一種風險，就是現有的物業權益及產權負擔可能因實施土地業權制度而終止，但不會獲得補償。要絕對肯定地決定甚麼是技術上的業權欠妥，甚麼是真正的業權欠妥，並無任何預定的方法。故此，我們認為有需要設立一個制度，藉此把喪失物業權益的可能性減至最低，而當失去任何權益時，又能獲得十足補償。如沒有這種保障，香港的土地業權制度定受批評。

## **(b) 轉制機制**

原則上，我們認為把物業納入土地業權註冊紀錄的制度，在安排上應以合理方式，盡量達到以下各項目標：

- (i) 轉制機制須具效率，能夠處理要轉至新制的眾多物業。

- (ii) 轉制機制不得謀求向律師施加一些不屬其專業職能的責任。
- (iii) 轉制機制不得在大量個案中形成“雙層物業市場”，以致在新制度下註冊的權益，價值高於其他權益。
- (iv) 轉制機制不得對物業市場或經濟造成損害。
- (v) 因轉制而喪失的權益數目必須十分有限。
- (vi) 必須就所有喪失的權益作出補償。

關於物業如何轉至新制一事，多年來一直引起很大爭論，至今仍然如此。由於條例草案以現有的草擬方式而言，未能在最大程度上達到上文所述的目標，因此，我們在隨附文件中就轉制機制提出了詳盡的意見。

我們建議採用另一方案，即“作出彌償的過渡性轉制”。此項安排可有助解決律師會所提出關於依靠律師簽發妥善業權證明書的問題，以及其他人士過往就“午夜改制”所提出的問題。

作出彌償的過渡性轉制，主要是指根據《土地註冊條例》以註冊擁有人的名義將物業業權註冊，但須受根據《土地註冊條例》註冊的一切產權負擔所規限，而在有關物業的首次交易之前，亦須受所有非書面衡平法權益規限。凡在註冊物業的首次交易之後，因任何理由而喪失非書面衡平法權益，蒙受損失的人將會獲得彌償。

這樣，轉制過程將可暢順得多，既沒有由律師簽發妥善業權證明書所存在的問題，又能夠為衡平法權益的擁有人提供充分保障。但要注意一點，這項建議並非用業權保險配合土地業權制度的先決條件。

### **(c) 一個受保的土地業權制度有何好處**

概括而言，我們認為一個為業權投保的土地業權制度若制訂得宜，可以帶來以下好處：

- (i) 避免物業權益可能被剝奪而得不到足夠補償，或在某些情況下，沒有任何補償。
- (ii) 在欺詐個案中，除喪失擁有權權益可獲彌償外，若失去其他權益(例如承按人權益)，亦可得到彌償。
- (iii) 除了因土地註冊處人員導致的損失而可獲彌償外，因屬無效或可使無效的交易或錯誤而蒙受損失，亦可得到彌償。

- (iv) 在首次註冊之前如有欺詐、錯誤或遺漏，但直到後來才發現，在此情況下將可獲得彌償。
- (v) 在首次註冊後喪失沒有註冊的第三者權益，將可獲得彌償。
- (vi) 彌償上限反映物業價值。
- (vii) 無須依靠律師簽發沒有保留或有所保留的妥善業權證明書。
- (viii) 土地註冊處無須負責承擔就作出更正的申索抗辯和推行有關計劃所需的費用。
- (ix) 與該制度有關的費用由直接受惠於該制度的人承擔。
- (x) 避免間接依賴律師賠償基金，以及可免受律師賠償基金在財政和涵蓋範圍方面的限制。
- (xi) 避免政府對律師採取法律行動。
- (xii) 避免轉制機制可能損及物業的價值。
- (xiii) 避免轉制機制可能對物業市場構成不利影響。
- (xiv) 律師簽發的有關證明書未有涵蓋的事宜，大部分均在承保範圍內，為消費者提供保障。

**(d) 業權保險在土地業權制度中的用處**

要用業權保險來補足土地業權制度，方法有幾種。至於選擇哪種方法，則視乎所採用的轉制機制而定，但基本上有下列3個可行方案：

- (i) 直接保險 —— 作為業權註冊的一項先決條件，受保的擁有人、銀行或相關的其他各方可投購直接保險，以便直接向業權承保人追討有關費用。
- (ii) 再保險 —— 業權承保人同意就向土地註冊處彌償基金提出的申索，提供再保險服務。有關的再保險安排可包括申索管理，並能彌補訟費方面的損失。保額有可能高於土地註冊處的彌償款額和彌償上限。
- (iii) 直接保險+再保險 —— 這是直接保險和再保險的混合安排。業權註冊的一項先決條件是，擁有人、銀行及因可予註冊的文書而受惠的任何其他人士(例如承按人或承租人)須就每項物業交易投購業權保險。與此同時，在

業權承保人與土地註冊處之間亦會作出再保險安排，針對不在直接保險承保範圍內的任何損失提供保障。在此情況下，有些申索會直接由業權承保人處理，其他申索則會由土地註冊處或代表土地註冊處的保險人處理，並可透過再保險機制追討有關損失。

**(e) 與針對進行物業轉易時有所疏忽的保險有何關係**

物業轉易保險可以多種不同方式，為業權事項和非業權事項提供保障。物業轉易的風險與土地業權制度之間關係密切，而我們認為，業權保險能夠用來限制向律師賠償基金提出的申索，以及重新調整律師賠償基金的供款額，同時又能藉此設立一個受到全面保障的土地業權制度。視乎風險管理程序的實施情況，業權承保人會免除針對律師的代位權和其他權利。這樣將可大大減輕物業轉易申索對律師賠償基金造成的負擔。土地業權與物業轉易的風險為律師賠償基金所帶來的影響，最好能夠一併考慮。

我們認為，長遠而言，香港必須實施土地業權制度，但條例草案的限制卻把該制度的成效減低，達至一個令人無法接受的程度。我們相信業權保險有助大幅提升本港土地業權制度的成效。

謹盼本函及隨附文件能為法案委員會提供其想知道的主要資料。然而，由於當中涉及一些複雜的事宜，我們希望有機會與法案委員會會晤，討論該等事宜。若法案委員會有興趣進一步探討我們的看法，我們樂意提供任何協助。

**First American Title Insurance Company**

行政總裁 —— 香港

吳歌麗

副本致：吳靄儀議員(主席)

2003年12月29日

## 附錄 參考保費

### 直接保險

直接保險是指向持有物業權益的人，例如擁有人及承按人，發出業權保險保單。

### 二手物業

保險金額 (港元)	香港		美國加州	
	擁有人的 保費(港元)	相關一方的 保費(港元)	擁有人的 保費(港元)	相關一方的 保費(港元)
最高200萬	1,200	500	8,000	3,000
2,000,001 – 4,000,000	0.1%	800	0.3%	4,350
4,000,001– 8,000,000	0.085%	1,200	0.25%	6,000
8,000,001 – 30,000,000	0.08%	2,500	0.2%	10,000
30,000,001 – 75,000,000	0.075%	5,000	0.19%	35,000
75,000,001或 以上	0.06%	10,000	0.15%	無

注意比較之下，價值超過600萬港元的物業，印花稅率為3.75%。

### 再保險

基本上，此類保險的保費相當於二手物業直接保險保費率(按交易的成交價值計算)的一半，並只須在首次註冊時繳付。





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# LAND TITLES BILL

## Title Insurance in a Land Titles Registration System

### 1. INTRODUCTION

The present system of land registration in Hong Kong comprises a deeds recording system governed by the Land Registration Ordinance. Under this system, documents relating to interests in land are submitted to the Land Registry and their particulars are recorded on the land register. The deeds recording system gives no guarantee of title.

The introduction of a land titles registration system could significantly improve the system of land ownership and transfer in Hong Kong if the land titles system is structured appropriately. Eventually this will become imperative for, without an efficient and reliable land titles system, value from land cannot be readily released, either through sale or mortgage.

Conveyancing procedures within the ambit of the existing system have become increasingly cumbersome. The existing system is ripe for modernisation particularly in the context of the steps being taken elsewhere in the developed world towards electronic conveyancing.

### 2. OPERATION OF PROPOSED LAND REGISTRY INDEMNITY SCHEME

#### 2.1 Overview of title registration

- (a) Under clause 14 of the Land Titles Bill (“Bill”), when title to land is first registered, the first registered owner becomes vested with the relevant estate which is registered (it might be a Government lease or an agreement for a Government lease by virtue of conditions of grant) and all rights that attach to that estate. The relevant estate is held subject to the matters referred to in the Bill including, principally, registered matters and overriding interests, but is held free from all other interests and claims. In other words, the title becomes indefeasible on registration, although that indefeasibility is not absolute as the register is subject to rectification by the Registrar and the Court of First Instance.
- (b) There are two basic situations where an owner of an interest in property can lose that interest under the Bill:
  - (i) **Pre-existing interests which manifest themselves as “defects in title”.** All defects in title have the same basic effect: someone else other than the apparent owner has or may have some interest in or encumbrance over the property. So a person with such an interest may lose that interest if another bona-fide person acquires the property for value, takes possession of it and becomes the registered owner. So the act of bringing a property under the title registration system has, in one sense, the effect of purging pre-existing defects in the title of the registered owner. By curing such pre-existing defects then, there is a risk that current property interests and encumbrances may cease as a result of the land titles system. Appendix 1 sets out some examples of such risks.
  - (ii) **Loss of ownership of property following first registration.** Under the present law, an innocent “former” owner will generally be able to recover his property from a person who has acquired it even if that person did so innocently, paid fair value and has taken possession of it. Under the proposed system, the former owner will not be able to recover his property in such

circumstances. The former owner's remedy lies in the Land Registry indemnity but is subject to a cap of HK\$30m.

- (c) One of the main challenges for the land titles system is to decide where these risks are to be borne; by the person whose interest is adversely affected, the Land Registry, the certifying solicitor or a professional title insurer. The proposal under the present draft of the Bill is hybrid: the risk is borne by the person whose interest is adversely affected or the certifying solicitor (depending on the circumstances) with the Land Registry only basically picking up the risk of post-registration fraud to a cap of HK\$30m. This has been viewed as a major flaw in the proposed system.

## **2.2 Treatment of unwritten equities**

Under the existing deeds registration system, it is possible for a person to acquire an interest in a property by way of occupation or contribution towards mortgage repayments. It is not necessary to protect that interest by registration. Other unwritten equities are also capable of existing, such as resulting trusts and equitable mortgages. Purchasers of the property will be subject to these interests if they have notice, whether constructive or actual, of the interest.

However, under the proposed title registration system, bona fide purchasers for value take the property free from such interests unless the interest holder protects it by registration of a caution. No indemnity is payable to the holder of such an unregistered interest. Registration of a caution may be seen as an aggressive act which is inappropriate for many family situations where such interests usually arise.

Although a land titles system strives to give certainty in ownership, this should not be achieved at the cost of extinguishing existing interests. The system should aim to preserve all existing property interests even if a view is taken regarding the treatment of such future interests.

## **2.3 Circumstances for payment of indemnity**

- (a) Under clause 82(1) of the Bill, in précis, the Government will indemnify a person suffering loss by reason of an entry in or omission from the register when the entry is a result of:
  - (i) mistake or omission by the Land Registry staff; or
  - (ii) the fraud of any person which affects the ownership of the registered land or lease and is the subject of an order in relation to an application for rectification under clauses 81(1) or 81(3) whether or not the order grants or refuses rectification.
- (b) However, under clause 82(2) – (4), in précis, no indemnity is payable if:
  - (i) the person suffering loss has himself caused or substantially contributed to the loss by his fraud or negligence;
  - (ii) the person suffering loss has derived title (other than in good faith and for valuable consideration) from a person who contributed to the loss by his fraud or negligence;
  - (iii) an omission from the register results from a failure to register the document;
  - (iv) fraud, mistake or omission was discovered before the date of first registration of the land or the lease;
  - (v) fraud, mistake or omission occurred before the date of first registration of the land or the lease but was discovered on or after that date.

## **2.4 Amount of indemnity**

Under clause 83 of the Bill, the amount of the indemnity payable shall not exceed, in respect of each entry in respect of which an indemnity is payable, the following:

- (a) in a fraud case, the value of the interest in the land or the lease immediately before the date of the order on an application for rectification under clause 81(1) or (3) up to the maximum cap determined by the Financial Secretary in force at the date of discovery of the fraud, presently proposed to be HK\$30m;
- (b) in any other case, the value of the interest in the land or lease immediately before the discovery of the mistake or omission, ie there is no cap.

## **2.5 Procedure for claiming indemnity**

- (a) The procedure for claiming the indemnity is governed by clause 84 of the Bill. The application shall be made in a specified form to the Land Registrar by an interested person. The Land Registrar decides whether the right of indemnity has arisen and, if so, the value which shall satisfy that right. If the Land Registrar decides that no right has arisen, he will refuse the application.
- (b) If a person does not agree with the Land Registrar's decision, he may appeal to the Court of First Instance and may also be awarded costs.
- (c) The time limit to file a claim for indemnity is 6 years from the date of cause of action which shall be deemed to arise when the claimant knows or, but for his own default, might have known of the existence of his claim.

## **2.6 Recovery of indemnity paid**

- (a) Under clause 86 of the Bill, where an amount is paid by way of indemnity, the Land Registrar may:
  - (i) recover that amount from the persons who caused or substantially contributed to the loss by their fraud or negligence; and
  - (ii) enforce any express or implied agreement or other right, including rights of subrogation or otherwise against any person (including a professional indemnity insurer) to which the person who is indemnified would have been entitled.
- (b) This has the effect, amongst other things, of allowing the Land Registrar to seek repayment of the indemnity amount, in appropriate cases, from a fraudulent or negligent solicitor, and his professional indemnity insurer.

## **2.7 Comments on indemnity scheme**

Leaving aside the drafting issues and assuming the intent of certain provisions, the following substantive limitations in the indemnity and rectification scheme are apparent:

- (a) in case of fraud, an indemnity will only be given for loss which affects an ownership interest. This appears to mean that an indemnity will not be given for loss of a mortgagee's interest or other interests such as an occupational lessee's interest, or a covenantee's interest
- (b) an indemnity will not be given in respect of loss suffered as a result of a void or voidable transaction or a mistake (other than by Land Registry staff);

- (c) an indemnity will not be given in respect of fraud, mistake or omission which was discovered before first registration;
- (d) an indemnity will not be given in respect of fraud, mistake or omission which occurred before first registration but was not discovered until afterwards;
- (e) each indemnity payment is subject to a cap of HK\$30m.

The limitations in paragraphs (a) – (e) above can all amount to dispossession of genuine property interests without payment of either full or, in some cases, any compensation. This is a major problem and subjects the Government to claims that it is acting unconstitutionally. The limitations may also discourage investors from the property market which is obviously to be avoided if at all possible. Ideally, the limitations should be removed and an indemnity should be given in much wider circumstances.

### **3. ISSUES WITH CONVERSION MECHANISM**

#### **3.1 Introduction**

In principle, the system by which a property is brought onto the land titles register should be designed to achieve all the following objectives as far as is reasonably possible:

- (a) the conversion mechanism must be efficient and capable of handling the numbers of properties to be converted
- (b) the conversion mechanism must not seek to impose obligations on solicitors which go beyond their professional function
- (c) the conversion mechanism must not result, in any significant number, of cases in a two-tiered market so that interests registered under the new system have a greater value than other interests
- (d) the conversion mechanism must not undermine the property market or economy
- (e) the number of interests lost as a result of the conversion must be very limited
- (f) all interests lost must be compensated.

The issue of how properties are converted to the new system has been a cause of considerable concern over the years and remains so under the present draft of the Bill which does not achieve to the greatest extent possible the objectives outlined above.

#### **3.2 Gradual conversion**

Under the present draft of the Bill, it is proposed that the Land Registry itself will carry out minimal checks and will instead require the production of a solicitor's certificate of good title before registering an interest. In this way, the Land Registry seeks to minimize claims on the Land Registry Indemnity Fund and also provide a route for claiming against the certifying solicitor if his certificate of title was given fraudulently or negligently.

The proposed reliance on certificates of title gives rise to several serious problems. We comment on these as follows:

- (a) In investigating title, two types of issue are of relevance here:
  - (i) matters beyond the solicitor's knowledge or control; and

- (ii) uncertainties on which a judgment call must be made.

The qualifications from the standard form of certificate to banks recommended by the Law Society deal with issues that are within category (i). Appendix 2 summarizes those qualifications and the type of risks arising from them. The majority of these matters covered by these qualifications are in fact covered by title insurance even though the risks are not ascertainable. However, the issues of most concern in the proposed land titles system are those on which a judgment call must be made: category (ii).

- (b) In many cases, a solicitor will be able to advise a purchaser and mortgagee of the existence of a title defect and the likelihood of it evolving into an actual loss. The ultimate risk is taken by the purchaser and the mortgagee if the solicitor has discharged his duty to advise. However, it would be improper in these circumstances to confirm unequivocally that the title is good. To do so would involve the solicitor (and his professional indemnity insurer) in taking the risk that a title defect will not give rise to an indemnity in the future. This is not a solicitor's function.
- (c) Another example of the type of problem which could arise is where a solicitor believes a title defect has expired, such as an old undischarged legal mortgage. If he certifies title is good on this basis, the interest is wiped out on registration and the mortgagee will not be entitled to an indemnity under the proposed system on two separate grounds: the defect occurs before first registration and does not affect an ownership interest. This also is plainly not a solicitor's function – a solicitor cannot judge the rights of persons to their property interests in this way particularly where no indemnity is provided under the Bill. A court declaration could be obtained but this is not the easiest procedure and subjects the clients to considerable cost.
- (d) It is also inappropriate to impose such risks ultimately on SIF at the cost of the solicitors' profession as a whole when many solicitors have little or anything to do with conveyancing. This must be wrong in principle. The persons benefiting from the system are primarily property owners and banks and so the reasonable cost of the benefits of the system should be borne by them in a fair and equitable way. In other jurisdictions where Torrens-type systems operate, it is recognized that problems occurring when land is first registered are unavoidable. A statutory fund is often established by the Land Registry to provide compensation for loss of interests resulting from registration with the fund being financed by a levy upon each registration. Such an arrangement is viable in Hong Kong but the question is whether the Government wishes to take the risk of the levy being inadequate. In this context it must be remembered that the circumstances in Hong Kong in 2003, where there a large numbers of old unregistered titles containing numerous changes of ownership, are unique.

The report by Willis commissioned by the Law Society on the review of the SIF specifically points out that the introduction of a land titles system creates greater risks for solicitors and therefore greater liabilities for the SIF. Willis takes the view that any liabilities arising from first bringing an interest in land under the registered system must be quarantined from the rest of the SIF which means an additional financial burden on conveyancing solicitors.

- (e) It is to be borne in mind that the current system of solicitors' certificates of title is not without imperfection, particularly in the context of a land titles system:
  - (i) In view of the complex conveyancing and title system, extreme competition and absence of scale fees, it is well established that conveyancing standards are variable. In order to give a certificate properly, a solicitor will have to undertake a full due diligence exercise. This may well require additional legal



work to that currently undertaken by many solicitors in order to reach the required standard for certification. In view of present financial constraints, it can be expected that some solicitors will be less diligent than professional standards require.

- (ii) These concerns are founded in the evidence provided by the claims history of SIF. The report of SIF for the year 2001/2002 does not appear to be available yet. However, in 2000, 96% of the value of claims related to conveyancing matters. In 2001, about 50% of the value of claims related to conveyancing matters, the reduction being due in part to the sustained fall in the property market. In view of the broad range of work undertaken by the profession as a whole, from corporate finance to litigation, these figures are a cause of real concern. Further, the figures do not reflect the complete picture because a solicitor may settle a claim with a client direct without notifying SIF in order to avoid adverse publicity.
  - (iii) If a certificate is improperly given, the Land Registrar will have a right of action against the solicitor but he has to prove fraud, or negligence in failing to spot fraud. Such claims would involve the Land Registry in pursuing litigation against solicitors which, on any regular basis, would be undesirable for political and economic reasons.
  - (iv) A claim upon SIF is subject to limitations. SIF does not cover loss if there is no negligence or if the loss results from fraud by a partner or sole practitioner. It covers only the fraud of employees. The maximum amount of indemnity payable under SIF is presently HK\$10m whilst under the Land Registry Indemnity Fund, the maximum amount of indemnity payable is proposed to be HK\$30m. There may be no top-up insurance as there is no legal requirement for this.
  - (v) The operation of SIF at the moment is inherently uncertain as it is subject to a separate and comprehensive review.
- (f) To overcome the problems of issuing solicitors' certificate of title, we understand that a number of solutions have been discussed and upon which we comment as follows:
- (i) A "title master" panel was proposed to be set up to determine questionable title issues discovered by a solicitor. Registration of title in certain cases would depend on the determination of the panel. There were a number of problems apparent in this and we understand that this proposal is now unlikely to be pursued. However, for completeness our comments on this proposal are set out in Appendix 3.
  - (ii) A solution was discussed whereby a solicitor could give a qualified certificate of title, in which case the property would remain within the current deeds recording system. This would cause a number of difficulties: the solicitor would be liable for diminution in value of the property if he wrongly failed to give a clean certificate and this would in turn lead both to potential claims against solicitors and SIF, and the blighting of properties, particularly as nearly all properties in Hong Kong have some sort of defect in title.
  - (iii) We understand that a further solution is being mooted whereby only new properties are brought onto the register. If our understanding is correct, no new unwritten equities would be permitted to be created in respect of other properties and there would be some sort of automatic or "daylight conversion" in 12 years' time. Our comments on this proposal are as follows:

- (1) The solution does not provide an answer for the risk of extinguishing unwritten equities or wiping out property interests as outlined above. It merely delays the problems for 12 years.
  - (2) It would be undesirable for the administration initially to support a land registration system for all properties but then to limit it to primary market properties because of an inability to certify good title to many of such properties. This would be a distinct indication from the Government that the existing land titles system is inherently unsafe. This would directly affect the property market and, at the very least, not assist the recovery of the economy and the property market. It would also adversely affect the development of REITs.
  - (3) To delay transition to the new system for secondary properties for a period of 12 years would mean that solicitors have to contend with the existing cumbersome system for a considerable period.
  - (4) The advent of electronic conveyancing is likewise delayed considerably in contrast to the rest of the developed world where major steps are being taken to prepare for and implement this.
- (g) In summary then, the gradual conversion mechanism would achieve some of the objectives outlined but not all of them. In particular:
- (i) It seeks to impose obligations on solicitors which go beyond their professional function;
  - (ii) Depending on its final form, it could result in a two-tiered market so that interests registered under the new system have a greater value than other interests
  - (iii) Again, depending on its final form, it may undermine the property market or economy
  - (iv) Interests may be lost which are not compensated.

### **3.3 Midnight conversion**

The problems outlined in paragraph 3.1(g) (i)-(iii) could be avoided if a midnight conversion is adopted.

However, a midnight conversion mechanism does not solve the inherent problem that interests in property may be lost which are not compensated. On a midnight conversion, the title of each individual property becomes registered automatically under the new land titles system. This means that all existing title defects will be cured but such defects may actually comprise real and subsisting interests in property (see the examples in Appendix 1).

Furthermore, on a midnight conversion, unless holders of unwritten equities have protected their interests by registration of a caution (assuming this were possible), their interests will be eliminated. It is prudent to assume that a significant number of these interests exist being in aggregate of considerable value. It is simply inequitable to disregard them.

However, the limitations of a midnight conversion can be overcome by putting in place a proper compensation scheme coupled with a system to preserve equitable interests until the first dealing with the property, in other words indemnified transitional conversion.

### **3.4 Indemnified transitional conversion**

The following is an outline of an indemnified transitional conversion mechanism:

- (a) Indemnified transitional conversion would take place on a designated date when title to the relevant property would be vested in the person who is the registered owner under the Land Registration Ordinance. However his interest will be subject to all encumbrances registered under the Land Registration Ordinance **and**, until the first dealing of the property, all those unwritten equities which are incapable of registration pursuant to the Land Registration Ordinance.
- (b) Upon the first dealing of the property, solicitors would be required to request the registered owner to declare the existence of unwritten equities, for example by:
  - (i) disclosing the names of the persons occupying the property;
  - (ii) disclosing whether the whole of the purchase price of the property has been provided by the registered owner.
- (c) Upon completion of the first dealing of the property, the “new” owner’s title would be free from all unwritten equities unless they are registered as a caution.
- (a) Where unwritten equities have been lost on the first dealing of the property for whatever reason, the person suffering the loss would be indemnified.

Under an indemnified transitional conversion, all the problems associated with either gradual or midnight conversion should be capable of being resolved satisfactorily and it would achieve all of the objectives outlined in paragraph 3.1 above. Most importantly, the risks of extinguishing property interests are balanced by putting in place a preservation and compensation system.

This would be possible if the proposed land titles system gave more comprehensive indemnities, whether from the Government or a third party insurer.

## **4. USE OF TITLE INSURANCE IN A LAND TITLES SYSTEM**

### **4.1 Overview of title insurance**

Title insurance basically protects legal and equitable interests in real property. The insurer agrees to compensate for loss suffered as a result of insured risks. The risks include:

- All defects in title discoverable from title deeds and public records
- Forgery, fraud, undue influence, duress and incapacity
- Third party’s beneficial interests
- Invalidity and unenforceability of the insured mortgage
- Lack of stated priority for the insured mortgage

In summary, all risks which are covered by a solicitor’s certificate of title, and many which are not, are covered by a title insurance policy. The insurer also defends claims by third parties against title at its own cost.

The insurance amount is usually the market price of the property at the time when the policy is issued with 100% inflation cover built in for properties up to a value of HK\$20m. The title insurer indemnifies against loss suffered as a result of the title defect up to the insurance amount.

## 4.2 Comparison between a solicitor's certificate of title and title insurance

The following chart compares a solicitor's certificate and title insurance:

Solicitor's Certificate	Title Insurance	Remarks
Solicitor carries out title investigations and searches and confirms that title is not defective	Title insurer or certifying solicitor carries out title investigations and searches and title insurer issues a policy that title is not defective	No issue that is covered by solicitor's certificate is excluded from title insurance coverage.  In relation to the proposed insurance under the Bill, all title investigations would be carried out by solicitor although title insurer would carry out additional checks and balances in relation to valuable properties
If solicitor identifies defects, he reports on them and bank and purchaser can decide whether to proceed	If title defects are identified, title insurer lists them in the policy. In some cases, title insurer takes risk of defect materialising into loss. In others, defect will be excluded from cover	The great majority of common title defects will be covered by title insurance
If solicitor does not report on title defects which were identifiable, he may be liable in negligence	If title is defective, title insurer is liable without need to prove negligence	Proving negligence takes time and money. Claiming under a no-fault policy is easier
Solicitor excludes certain issues from his certificate which he cannot identify: <ul style="list-style-type: none"> <li>• Fraud</li> <li>• Forgery</li> <li>• Duress</li> <li>• Incapacity</li> <li>• Authenticity of documents</li> <li>• Beneficial interests</li> <li>• Independent advice</li> <li>• Accuracy of Land Registry records</li> <li>• Loss of priority due to prior instruments being registered</li> </ul>	Title insurance covers certain issues which cannot be identified: <ul style="list-style-type: none"> <li>• Fraud</li> <li>• Forgery</li> <li>• Duress</li> <li>• Incapacity</li> <li>• Authenticity of documents</li> <li>• Beneficial interests</li> <li>• Independent advice</li> <li>• Accuracy of Land Registry records</li> </ul>	The qualifications from the solicitor's certificate referred to in paragraph 3.2(a) above are dealt with in the title insurance policy giving the consumer and lender more comprehensive protection  Title insurance can be provided for loss of priority due to prior instruments being registered within the gap period in certain cases by way of endorsement
Solicitor excludes, expressly or impliedly, issues which he cannot ascertain e.g. <ul style="list-style-type: none"> <li>• Implied easements</li> <li>• Encroachments by or to buildings on the property or any right of way</li> <li>• Defective construction</li> <li>• Environmental issues</li> <li>• Bankruptcy laws</li> </ul>	Additional endorsements can be given for certain issues which can be ascertained eg <ul style="list-style-type: none"> <li>• Implied easements</li> <li>• Encroachments by or to buildings on the property or any right of way</li> </ul> Exclusions for defective construction, environmental issues and bankruptcy laws are contained in the policy	Additional endorsements are usually only given for higher value properties  A title insurance policy does not exclude any matters for which a solicitor could be liable in negligence

Solicitor's Certificate	Title Insurance	Remarks
If a third party claims against the property, then costs of the defence are borne by the owner or bank. If they win the case, they will normally be able to recover about 50% from third party	If a third party claims against the property, then costs of the defence are borne by insurer in their totality	<b><i>Our experience is that the majority of claims expenditure comes within this head</i></b>
Unless a solicitor's firm takes out non-mandatory top-up professional indemnity insurance, insurance cover is limited to HK\$10m	Insurance is only limited to the insured amount specified in the policy. Reinsurance is taken in respect of higher value properties to protect the owner	Reinsurance is usually taken on properties worth more than HK\$150m
A certificate is usually only given to the solicitor's purchaser and bank clients, not successors in title	An insurance policy will usually be given to purchaser (but not his successors in title), to the bank and to the bank's successors in title	
Amount payable if solicitor is negligent is dependent on courts. Generally, amount awarded will be diminution in value of property at date defect became known. However, certain cases have calculated this loss as at date of negligence itself	Insurance policy will indemnify for diminution in value of the property at the time of the claim or payment, whichever is greater, up to insured amount. Policy includes inflation coverage up to 100% where the initial insured amount is up to HK\$20m	Endorsements can be given to commit to an increase of the insurance amount upon fresh searches taking place

#### 4.3 Comparison between Land Registry indemnity scheme and title insurance - Coverage

The following chart summarises the substantive limitations of the proposed indemnity scheme and compares them with a title insured scheme:

Land Registry indemnity scheme	Title insurance
In case of fraud, an indemnity will be given for loss of any ownership interest	Same protection - in case of fraud, an indemnity will be given for loss of any ownership interest
In case of fraud, indemnity will not be given for loss of following interests: <ul style="list-style-type: none"> <li>• Mortgagee</li> <li>• Beneficial owner</li> <li>• Covenantee</li> <li>• Dominant tenement</li> <li>• Lessee</li> <li>• Other registrable interest</li> </ul>	In case of fraud, indemnity will be given for loss of following interests: <ul style="list-style-type: none"> <li>• Mortgagee</li> <li>• Beneficial owner with interest arising before title registration</li> <li>• Covenantee</li> <li>• Dominant tenement</li> <li>• Lessee</li> <li>• Other registrable interest</li> </ul>
Indemnity will not be given for loss of unregistered third party's interest upon first registration	Indemnity will be paid for loss of unregistered third party's interest upon first registration (save voluntary registration)
Indemnity will not be given for loss as a result of:	Indemnity will be given for loss as a result of:

Land Registry indemnity scheme	Title insurance
<ul style="list-style-type: none"> <li>void or voidable transaction</li> <li>mistake (other than by Land Registry staff)</li> </ul>	<ul style="list-style-type: none"> <li>void or voidable transaction</li> <li>mistake (other than by Land Registry staff)</li> </ul>
Indemnity is subject to a cap of HK\$30m	Indemnity is only subject to insurance amount specified in policy which will reflect property value i.e. which may be higher or lower than the Land Registry indemnity which is fixed
Consumer bears cost of bringing or defending claims for rectification and Land Registry bears the cost of administering the scheme	Costs of defence of claims and administration of scheme are borne by title insurer

#### 4.4 Comparison between Land Registry indemnity scheme and title insurance - Exclusions

The following chart compares exclusions from the right to an indemnity under the Land Registry Indemnity Fund and from a title insurance policy:

Exclusion under indemnity scheme	Exclusion under title insurance policy
Person suffering loss has himself caused or substantially contributed to the loss by his fraud or negligence	Same exclusion
Person suffering loss has derived title (other than in good faith and for valuable consideration) from a person who contributed to the loss by his fraud or negligence	Same exclusion
An omission from the register results from a failure to register the document	No such exclusion if the mechanism for putting insurance in place is as described below
Fraud, mistake or omission was discovered before the date of first registration of the land or the lease	Same exclusion - Indemnity will not be given for fraud, mistake or omission which was discovered before first registration but with clarity as to what "discovered" means, with protection for the innocent purchaser if rectification is ordered, and the relevant date would be the date of the policy
Fraud, mistake or omission occurred before the date of first registration of the land or the lease but was discovered on or after that date.	No such exclusion

#### 4.5 Comparison between Land Registry indemnity scheme and title insurance - Indemnity

- (a) Under the Land Registry indemnity scheme, in case of fraud, a person can only recover the value of the ownership interest in the property or the long lease immediately before the date of the rectification order up to a maximum of HK\$30m.
- (b) Under a title insurance policy, the title insurer indemnifies loss suffered by the insured as a result of a covered risk up to the insurance amount. Where the insured is the owner of the property, the insurance amount is the price of the property when the policy is taken out and for properties up to HK\$20m, a 100% inflation coverage is

included in the standard policy. For properties whose value is above HK\$20m, inflation coverage can be taken out at an additional premium.

- (c) The insured may have the right during the policy to top up the insurance amount at an additional premium provided that there is no subsisting claim and subject to certain criteria such as production of a clear up-dated land search. The amount of additional premium required to be paid for the top up policy would, in general, not exceed 0.05% of the additional insurance amount.

#### **4.6 Benefits of an insured indemnified conversion**

- (a) Avoidance of potential dispossession of a property interest without adequate, or in some cases, any compensation
- (b) Indemnity given in fraud cases for loss of interests other than ownership interests eg mortgagee interests
- (c) Indemnity given for loss resulting from void or voidable transactions or mistake (other than by Land Registry staff)
- (d) Indemnity given for fraud, mistake or omission which occurred before first registration but was not discovered until afterwards
- (e) Indemnity given for loss of unregistered third party's interest upon first registration
- (f) Limit on indemnity reflective of value of property
- (g) Avoidance of need to rely on unqualified or qualified solicitors' certificates of title
- (h) Avoidance of Land Registry liability for cost of defending claims for rectification and administering the scheme
- (i) Cost of system borne by persons who directly benefit from it
- (j) Avoidance of indirect reliance on SIF and exposure to financial and coverage limitations of SIF
- (k) Avoidance of legal action by Government against solicitors
- (l) Avoidance of potential blighting of properties through conversion mechanism
- (m) Avoidance of potential adverse effect on property market through conversion mechanism
- (n) Coverage for most matters excluded from a solicitor's certificate for consumer's protection

### **5. OPERATION OF AN INSURED LAND TITLES SYSTEM**

#### **5.1 Overview**

There are several ways in which title insurance can be used to complement the land titles system and this would depend upon which conversion mechanism is adopted. However, we comment generally on the different applications of title insurance as follows:

## **5.2 Direct insurance**

The owner, bank and any other person benefiting from a registrable instrument, e.g. a mortgagee or lessee, takes out title insurance as a pre-condition to first registration and subsequent dealings. The form of the policy and underwriting procedures would be standardized and agreed with the Land Registry.

If the owner, bank and any other person benefiting from a registrable instrument suffers loss as a result of an entry made or omitted from the title register, which is covered under the policy, he does not claim against the Land Registry Indemnity Fund but against the title insurer.

## **5.3 Reinsurance**

The Land Registry agrees with the title insurer to reinsure claims on the Land Registry Indemnity Fund.

The reinsurance arrangement could include claims management and cover legal costs. It would probably not include claims for Land Registry error but this could be discussed. Cover could exceed the amount of the Land Registry's indemnity. There are different ways in which a reinsurance arrangement could work, for example:

- (a) whole loss
- (b) percentage of loss on a per claim basis
- (c) excess of aggregate loss
- (d) percentage of excess of aggregate loss

Division of liability could be either a straight pro-rata basis or on a primary and secondary liability basis.

## **5.4 Direct Insurance + Reinsurance**

This is a combination of the methods set out in paragraphs 5.2 and 5.3. The owner, bank and any other person benefiting from a registrable instrument, e.g. a mortgagee or lessee, take out title insurance upon each dealing of the property as a pre-condition to registration. At the same time there is a reinsurance arrangement between the title insurer and the Land Registry which deals with any losses which are not covered by a direct insurance policy.

Accordingly, certain claims are dealt with directly by the title insurer, others could be dealt with by or on behalf of the Land Registry and losses recovered under the reinsurance mechanism.

## **5.5 Illustrations of use of title insurance**

The charts set out in Appendix 4 compare by illustration the treatment of claims under an uninsured and insured title registration system.

## **5.6 Indicative procedures for issuing a title insurance policy on a purchase and mortgage**

- (a) The solicitor acting for a purchaser and his bank requests title insurance from the title insurer. The solicitor gives a certificate to the title insurer in a specified form which does not require certification of good title but does certify the non-existence of facts which would be reasonably known to a solicitor in conducting due diligence in a property acquisition. For instance, the title insurer may require the solicitor to give a certification in the following form: "Each assignment has been executed pursuant to a power of attorney which does not pre-date the relevant assignment by more than 12 months". The solicitor also certifies that he has undertaken certain required steps, for example, to verify the identity of a party to an instrument.



- (b) The title insurer issues a title insurance policy to the purchaser and bank upon production of the solicitor's certificate in the form specified by the title insurer and upon payment of the premium.
- (c) The solicitor applies for title registration of the purchaser and the bank with the Land Registry by production of appropriate title insurance policies.
- (d) For those properties whose value is above HK\$10m, the title insurer would wish to carry out additional checks and balances to those referred to above.

## **5.7 Premiums**

Indicative premiums are set out in Appendix 5. These rates broadly cover the type of risks referred to in this paper. Note these rates are dependent on the legislation, particularly the current scope for dispute engendered by the complexity of the drafting, the procedures, subrogation rights and scope of risks.

## **5.8 Inter-relationship with insurance for negligent conveyancing**

- (a) According to the Willis report, solicitors' negligence in failing to spot or investigate a title defect accounts for 10% of losses totalling approximately HK\$86m in a five year period. The figure is alarming in the context of the Bill whereby registration of title takes place upon production of a solicitor's certificate of title and many potential losses of interests are not compensated.
- (b) Under the land titles system, the property will be held subject to any registered matters affecting the property, for example, an existing mortgage. If a solicitor fails to advise his client of any such matters recorded in the title register, the client will not be able to claim an indemnity from the land registry. The remedy will lie against the solicitor in negligence.
- (c) Again, under the land titles system, ownership of property is conferred by registration. It is proposed in the Bill that no indemnity shall be payable for an omission from the register which results from a failure to register a document. If a solicitor fails to register a transaction for a purchaser, the purchaser's interest will not be protected by the title registration system. The remedy lies against the solicitor in negligence.
- (d) There are many other instances where negligence can occur in conveyancing transactions and many issues are both title and non-title related matters. The following is taken from the Willis' report: "Under a registered title system mistakes such as breach of undertaking, conflict of interest, delay, failure to answer requisitions, failure to conduct searches, fraud, late stamping, loss of documents and missed time limited will still continue". Appendix 6 sets out the broad categories of claims over the past few years.
- (e) Conveyancing insurance is available to cover both title and non-title matters in a number of different ways. The inter-relationship between conveyancing risk and the land titles system is close and we believe that title insurance is capable of use to limit claims on SIF, to realign contributions to SIF and to provide, at the same time, a comprehensively insured land titles system. Subject to the implementation of risk management processes<sup>1</sup>, the title insurer will waive subrogation and other rights against solicitors. This will relieve SIF much of the burden of conveyancing related claims. The land titles and SIF aspects of conveyancing risk should preferably be considered alongside one another.

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<sup>1</sup> Risk management deals with management of legal practice such as recording time limits, recording information and ensuring that there is an adequate reminder and audit system to monitor that conveyancing staff strictly follow established processes.

## **6. DETAILED PROPOSAL**

We would suggest that a working group be established with the Land Registry and the Law Society Land Titles Working Committee to consider title insurance in relation to the Bill with the aim of submitting to the Bills Committee a detailed scheme for its consideration by the end of February 2004.

## **7. RESERVATION**

This paper has been prepared to enable First American Title Insurance Company to enable the Bills Committee of the Legislative Council to assess how title insurance may be used as a means of dealing with the limitations of the land titles system as presently proposed. The details of any title insurance scheme and premium rates would need to be fully considered in the context of the scheme as a whole. This paper does not comprise any commitment.

## **8. SUMMARY**

The Bill will constitute an important and beneficial piece of legislation which will give certainty of land ownership and enable the ready release of financial value in land. It will bring much needed reform to an antiquated and increasingly difficult system of conveyancing. However, to do this effectively, a comprehensive system needs to be put in place based on clear and usable legislation. Title insurance can play an invaluable role in this system and assist in resolving many of the issues raised by the present proposals. It can add value to the consumer, mortgage lenders and the legal profession as a whole. We believe that the solutions suggested in this paper deserve detailed analysis and consideration.

**First American Title Insurance Company<sup>2</sup>**  
29th December 2003

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<sup>2</sup> Information about First American Title Insurance Company is set out in Appendix 7.

**APPENDIX 1**  
**Examples of property interests and encumbrances that may cease as a result of the title registration system**

Title issue	Risk	Affected person
Defective corporate execution by company of document in chain of title	Company has not authorized sale and claims ownership of property. Transaction is void	Company
Donee executed assignment on behalf of owner pursuant to out-dated power of attorney	Donor has revoked power either expressly or by death  Transaction is voidable at donor's or donor's estate's instance	Donor
Donee executed assignment in favour of himself pursuant to power of attorney given by donor to him	Transaction is voidable at donor's instance	Donor
Trustee exceeded his powers under trust deed in selling trust property	Transaction is voidable at beneficiary's instance	Beneficiary
Personal representative exceeded his powers under a will in selling deceased's property	Transaction is voidable at beneficiary's instance	Beneficiary
Owner was not of a sound mind when he executed assignment	Transaction is void	Owner
Owner's signature in assignment differed from his signature in previous assignment	"Owner" is not true owner, a fraudster is party to assignment	True owner
Owner's name in assignment differed from his name in previous assignment	"Owner" is not the true owner, a fraudster is party to assignment	True owner
Invalid nomination in chain of title: nominator failed to relinquish his interest in property	A resulting trust has been created in favour of nominator	Nominator
Missing assignment in chain of title	Creation of equitable mortgage	Equitable mortgagee
Old undischarged mortgage in chain of title	Mortgagee's interest is subsisting	Legal mortgagee
HOS - Approval of Housing Authority to assignment has been not given	Restriction of alienation has not been removed. Transaction is void	Housing Authority (non-payment of premium)

## APPENDIX 2

### Analysis of qualifications and assumptions under solicitor's completion certificate

Qualification/assumption	Risk
Execution of mortgage accords with usual conveyancing practice	Mortgage is invalid or unenforceable.
Mortgage will rank as a first legal mortgage subject to Land Registration Ordinance	Mortgage does not rank as a first mortgage including encumbrances registered within priority period.
Solicitor is <i>of the opinion</i> that the property has good and marketable title	Mortgagee has no remedy where negligence cannot be proved. It is often moot whether a solicitor has been negligent.
Third party interest of which Bank deemed to have notice	Bank takes subject to any third party interest whether or not it is discoverable from public records
All signatures on documents relevant to title and security are genuine	Mortgage void due to fraud
All documents are originals or authentic copies	Mortgage void due to fraud
The execution and delivery of the title deeds and documents has been duly authorised	Mortgage void due to fraud
Each individual executing a document was of full age and capacity	Mortgage void
Each individual has been advised to seek independent advice	Mortgage unenforceable because it was executed under duress
The Land Registry files contain all relevant matters and searches were and continue to be accurate	Mortgagee's interest is unenforceable or encumbered
No person to whom any cheque or cashier's order has been delivered will misappropriate it	Loss of funds and loss of priority due to fraud
This certificate is not to be relied upon by any other person or corporation	Subsequent owner of insured mortgage has no remedies against negligent solicitor of originating mortgagee

### APPENDIX 3

#### Comments on title master solution to issues with title certification

- (a) The panel would work only within the limitations of the existing system described in paragraph 3.2 of this paper. By adopting this procedure the opportunity of enhancing the title registration system and dealing with the criticisms raised against it would be lost. This was the most significant problem with this proposal.
- (b) The status of the panel would need to be settled. Would the Land Registry or the purchaser or the mortgagee be able to sue the title master panel for negligence (if indeed negligence could be proved)? If so, the issues of principle referred to in paragraph 3.2 of this paper apply. If not, the Land Registry would be liable for any judgment errors made by the title master panel to the limited extent of the indemnity.
- (c) It is inevitable that there would be disputes between the vendor's solicitor and the panel. Disputes involve time and costs. Ultimately, either the solicitor, the Land Registry or the consumer would bear the costs.
- (d) If a solicitor gave a defective certificate to the Land Registry by making a wrong judgment on title issues, he would presumably be liable to the Land Registry. To avoid such liability, it could be expected some solicitors would refer many title issues, including trivial ones, to the panel for a decision. Again, this would be a cost to be borne by either the solicitor, the Land Registry or the consumer.
- (e) The Land Registry would have to incur costs in appointing persons to sit on the title master panel. The average hourly rate of a first class solicitor with 10 years' Hong Kong property experience is around HK\$3,000 per hour. If a lower figure is involved, the standard of service is to be questioned.

## APPENDIX 4

### Comparison of the treatment of claims under an uninsured and insured title registration system

#### Direct insurance

	Interest to be protected	Facts	Uninsured Title Registration	Insured Title Registration
1	Owner (fraud)	<ul style="list-style-type: none"> <li>• A is registered owner</li> <li>• B fraudulently transfers property to C, a bona-fide purchaser for value who enters into possession</li> <li>• C becomes registered owner</li> <li>• Rectification will not be awarded against C</li> </ul>	<ul style="list-style-type: none"> <li>• A will be entitled to indemnity from Land Registry Indemnity Fund</li> </ul>	<ul style="list-style-type: none"> <li>• A will be entitled to indemnity from title insurer</li> </ul>
2.	Owner (no fraud)	<ul style="list-style-type: none"> <li>• A is registered owner of a property which is tenanted</li> <li>• A grants power of attorney to B</li> <li>• B, honestly not knowing that A has revoked the power of attorney, sells property to C, a bona fide purchaser for value</li> <li>• C becomes registered owner</li> <li>• A discovers "mistake", seeks rectification</li> <li>• Rectification is awarded against C because he is not in possession of property (assuming possession means occupation)</li> </ul>	<ul style="list-style-type: none"> <li>• C will not be entitled to indemnity from Land Registry Indemnity Fund</li> </ul>	<ul style="list-style-type: none"> <li>• C will be entitled to indemnity from title insurer</li> </ul>
3.	Mortgagee	<ul style="list-style-type: none"> <li>• A is registered owner</li> <li>• B fraudulently becomes registered owner</li> <li>• Mortgagee grants mortgage loan to B</li> <li>• A discovers fraud</li> <li>• Rectification is granted, A is restored as the registered owner</li> <li>• Mortgage is (presumably) void</li> </ul>	<ul style="list-style-type: none"> <li>• Mortgagee cannot claim indemnity from Land Registry Indemnity Fund: its loss does not affect ownership</li> </ul>	<ul style="list-style-type: none"> <li>• Mortgagee entitled to indemnity from title insurer</li> </ul>
4.	Lessee	<ul style="list-style-type: none"> <li>• A is registered owner</li> <li>• B fraudulently becomes registered owner</li> </ul>	<ul style="list-style-type: none"> <li>• C cannot claim indemnity from Land Registry indemnity Fund: its loss does not</li> </ul>	<ul style="list-style-type: none"> <li>• C entitled to indemnity from title insurer</li> </ul>

	Interest to be protected	Facts	Uninsured Title Registration	Insured Title Registration
		<ul style="list-style-type: none"> <li>B grants a lease to C for a term of 10 years</li> <li>A discovers fraud</li> <li>Rectification is granted</li> <li>Lease is (presumably) void</li> </ul>	affect ownership	
5.	Owner of dominant tenement	<ul style="list-style-type: none"> <li>A grants a right of way in favour of X by a deed of easement</li> <li>A sells the property to B subject to deed of easement</li> <li>After becoming the registered owner, B fraudulently removes the registration of deed of easement</li> <li>B sells the property to C, a bona fide purchaser for value who takes free from X's interest</li> </ul>	<ul style="list-style-type: none"> <li>X cannot claim indemnity from Land Registry Indemnity Fund: its loss does not affect ownership</li> </ul>	<ul style="list-style-type: none"> <li>X entitled to indemnity from title insurer</li> </ul>

## Reinsurance

	Interest to be protected	Facts	Uninsured Land Title	Insured Land Title
6.	Owner within chain of title (no fraud)	<ul style="list-style-type: none"> <li>A grants a power of attorney to B</li> <li>A dies, power of attorney is revoked and ceases to have effect</li> <li>B, not knowing that A has died, sells property to C, a bona fide purchaser for value who takes possession</li> <li>Solicitor acting for C issues certificate of title based on information available to him</li> <li>C becomes registered owner</li> <li>A's estate applies for rectification when "mistake" is discovered</li> <li>No rectification is granted against C</li> </ul>	<ul style="list-style-type: none"> <li>A's estate cannot claim indemnity from Land Registry Indemnity Fund: mistake occurred before first registration but was discovered afterwards</li> <li>A's estate can possibly claim against solicitor if he can establish either a contractual relationship or a duty of care and can prove negligence</li> <li>In the absence of either, A's estate can only recover loss by suing B if it can establish breach of fiduciary duty</li> </ul>	<ul style="list-style-type: none"> <li>A's estate is entitled to indemnity from Land registry indemnity Fund</li> <li>Title insurer reinsures Land Registry Indemnity Fund risk</li> </ul>
7.	Owner within chain of title (fraud)	<ul style="list-style-type: none"> <li>A grants a power of attorney to B</li> <li>A dies, power of attorney is revoked and ceases to have effect</li> <li>B fraudulently sells</li> </ul>	<ul style="list-style-type: none"> <li>A's estate cannot claim indemnity from Land Registry Indemnity Fund because fraud occurred before date of first registration but</li> </ul>	<ul style="list-style-type: none"> <li>A's estate is entitled to indemnity from Land Registry Indemnity Fund</li> <li>Title insurer reinsures Land Registry</li> </ul>

	Interest to be protected	Facts	Uninsured Land Title	Insured Land Title
		<p>property to C, a bona fide purchaser for value who takes possession</p> <ul style="list-style-type: none"> <li>• Solicitor acting for C issues certificate of title based on information available to him</li> <li>• C becomes registered owner</li> <li>• A's estate applies for rectification when the fraud is discovered</li> <li>• No rectification is granted against C</li> </ul>	<p>was discovered afterwards</p>	<p>Indemnity Fund risk</p>
8.	Dispossessed mortgagee	<ul style="list-style-type: none"> <li>• A buys property with an undischarged mortgage dated 1970</li> <li>• Solicitor issues certificate of title taking the honest but mistaken view that title is in order notwithstanding undischarged mortgage</li> <li>• Land Registry accepts title for registration</li> <li>• Mortgagee claims subsisting interest in property as money is still owing</li> </ul>	<ul style="list-style-type: none"> <li>• Mortgagee cannot claim indemnity from Land Registry Indemnity Fund: there is no fraud nor Land Registry mistake</li> <li>• Mortgagee cannot claim against solicitor for negligence because solicitor acting for A does not owe Mortgagee a duty of care</li> <li>• Mortgagee is left with no remedy</li> </ul>	<ul style="list-style-type: none"> <li>• Mortgagee is entitled to indemnity from Land Registry Indemnity Fund</li> <li>• Title insurer reinsures Land Registry Indemnity Fund risk</li> </ul>
9.	Unregistered third party's interest	<ul style="list-style-type: none"> <li>• According to Land Registry records under deeds registration system, A is owner of property</li> <li>• B acquires a beneficial interest in property by repayment of mortgage</li> <li>• A sells property to C, a bona fide purchaser with notice of B's interest</li> <li>• C becomes registered owner</li> </ul>	<ul style="list-style-type: none"> <li>• B cannot claim indemnity from Land Registry Indemnity Fund because unregistered third party's interest is not protected by title registration</li> <li>• B is left only no remedy against A</li> </ul>	<ul style="list-style-type: none"> <li>• B is entitled to indemnity from Land Registry Indemnity Fund</li> <li>• Title insurer reinsures Land Registry Indemnity Fund risk</li> </ul>



## APPENDIX 5 Indicative pricing

### Direct Insurance

Direct insurance means a title insurance policy is issued to the person with an interest in the property e.g. owner, mortgagee. The premiums are given in two categories, first for owners and secondly for other insured parties

**Primary properties** (Properties sold by a developer and held under a Government Lease whose lessee is the developer)

Insurance amount (HK\$)	Owner's Premium	Interested Party's Premium
Up to 10M	0.05% subject to a minimum of HK\$750	HK\$500
10,000,001 or above	0.06%	HK\$1,000

**Secondary properties** (All properties other than primary properties)

Insurance Amount (HK\$)	Owner's Premium	Interested Party's Premium
Up to 2M	HK\$1,200	HK\$500
2,000,001 – 4,000,000	0.1%	HK\$800
4,000,001– 8,000,000	0.085%	HK\$1,200
8,000,001 – 30,000,000	0.08%	HK\$2,500
30,000,001 – 75,000,000	0.075%	HK\$5,000
75,000,001 or above	0.06%	HK\$10,000

Note by comparison that on the value of a property above HK\$6m, stamp duty is at 3.75%.

### Reinsurance

The Land Registry can reinsure residual claims on the Land Registry Indemnity Fund which are not covered under direct title insurance with a title insurer. The premium will be half the secondary property direct insurance rate based on the consideration of the transaction. This would only be paid on first registration.

**Appendix 6<sup>3</sup>**

**Number and value of claims by type of errors in conveyancing between 1st October 1996 to 30 September 2001**

<b>Types of errors in conveyancing</b>	<b>No. of claims</b>	<b>% of total no. of claims</b>	<b>% of total value of claims</b>
Breach of undertaking	23	1.83	1.15
Conflict of interest	20	1.59	0.71
Delay irrespective of time limits	12	0.95	2.31
Failure to spot/investigate defect	125	9.92	10.29
Failure to act according to client's instructions	15	1.19	0.67
Failure to advise correctly	110	8.73	29.98
Failure to answer requisitions	28	2.22	7.30
Failure to conduct searches properly	10	0.79	1.07
Failure to verify/check information	36	2.86	2.35
Fraud by clients	15	1.19	2.19
Fraud by employees	9	0.71	1.29
Fraud by principals	14	1.11	6.89
Incorrect preparation/drafting	44	3.49	2.24
Insufficient information	20	1.59	0.15
Late pleadings/requisitions	2	0.16	0.13
Late or failure to issue proceedings	2	0.16	0.26
Late/failed registration	38	3.02	2.78
Late/failed stamping	8	0.63	0.25
Loss of documents	7	0.56	0.03
Missed time limits	22	1.75	3.77
No apparent negligence	43	3.41	1.79
Other failure to take correct action	43	3.41	4.09
Causes not specified	17	1.35	0.87
<b>Total</b>	<b>663</b>	<b>52.62</b>	<b>82.56</b>

<sup>3</sup> Extract from Professional Indemnity Scheme 2000/2001 Year Annual Report

**APPENDIX 7**  
**Information about First American Title Insurance Company**

First American Title Insurance Company has been in the title insurance business for approximately 115 years. It is a wholly owned subsidiary of the First American Corporation, a New York Stock Exchange listed company with revenues of over US\$4.7 billion and stockholders' equity of over US\$1.5 billion in 2002. The First American Corporation, has over 25,000 employees in more than 1,300 offices throughout the world.

First American Title Insurance Company is rated A+ (Superior) by A. M. Best; A- (strong) as a Security Circle Insurer by Standard & Poors; and A3 (Good) by Moody's.

First American Title Insurance Company operates a branch, not a subsidiary, in Hong Kong. This means that the worldwide resources of First American Title Insurance Company will be applied against settling any claims. This gives direct access to the financial capacity of First American Title Insurance Company.