

HPLB/LTB Paper 01/04

**《土地業權條例草案》條例草案委員會
對律師會的‘白晝’改制建議的初步回應**

目的

本文件對律師會 2003 年 12 月 16 日信中建議的‘白晝’改制制度提出初步回應。本文件特別扼要說明上述建議須對現時條例草案作出的更改的性質。

背景

2. 律師會在其 2003 年 12 月 16 日信件的附件概述他們的建議，該信件載於本文件附件 A，以供參考。該建議的要點如下： -

- (a) 所有物業會被載於一個臨時註冊紀錄內；
- (b) 由條例草案生效日期起，任何新的不成文權益都不可針對土地強制執行；
- (c) 由生效日期起計 12 年內，臨時業權可被根據提交註冊警告書所提出的申索推翻；
- (d) 12 年後，除非有人提交針對註冊的警告書，否則物業會被轉至正式的業權註冊紀錄，並受彌償計劃保障；
- (e) 在過渡期不會有自願轉制或正式註冊新物業。

對現行條例草案的影響

3. 如果律師會的建議獲採納，則政府須對現行條例草案作出更改。附件 B 表列政府初步評估有關更改的範圍。

初步評估

4. 律師會的建議嘗試找出一個解決方法，把大部分物業轉至業權註冊紀錄，並在轉制過程期間不會出現喪失實在但沒有註冊的權利的風險，而這些風險須由政府或律師承擔。該建議以收回土地的時限為準則，目的是在轉制前終絕可能出現的索償權利。這方面類似早前建議的 15 年轉制期。然而，建議更跨進一步，打算採納一個附加制度針對首次註冊提出警告書。新建議會為對物業權益提出申索的人提供渠道，防止他因首次註冊而喪失權利(如果他打算或正透過法庭確立他的權利的話)。針對首次註冊而提出警

告書是英國業權法例的特色。律師會建議除非已經展開法律程序以解決警告書內載的事宜，否則該等警告書應在 12 個月後失效。

5. 該建議要求在批予註冊業權前的 12 年期間，所有物業都須載於臨時註冊紀錄。我們對這樣做能否帶來益處存疑。載於臨時註冊紀錄的物業正如在現行制度下一樣看來須受所有沒有註冊的申索的規限。此外，載於臨時註冊紀錄的物業不會受條例草案的更正及彌償條文保障。情況並沒有真正改變而具充分理由支持創造新的詞語。建議的主要內容似乎是要防止在條例草案生效後設定任何新的沒有註冊的權益，這一點可以透過現行的契約註冊制度處理，即在有關期限後將物業轉至業權註冊。因此，實在沒有必要開立一個臨時註冊紀錄。

6. 建議沒有包括在新例生效和轉至業權註冊期間設立的新物業(即根據任何政府租契批出的土地)直接轉至業權註冊紀錄的條文。我們看不到有任何有力理據延遲為新物業作出業權註冊。

7. 有關建議不容許提出任何自願轉制的申請，也沒有說明必須強制申請的情況。

8. 政府正向律師會就其建議尋求進一步澄清，並會於 1 月 30 日向條例草案委員會詳細匯報。

2004 年 1 月
房屋及規劃地政局



THE
LAW SOCIETY
OF HONG KONG
香港律師會

3/F WING ON HOUSE · 71 DES VOEUX ROAD
CENTRAL · HONG KONG DX-009100 Central 1
香港中環德輔道中 71 號
永安集團大廈 3 字樓

TELEPHONE (電話) : (852) 2846 0500
FACSIMILE (傳真) : (852) 2845 0387
E-MAIL (電子郵件) : sg@hklawsoc.org.hk
HOME PAGE (網頁) : <http://www.hklawsoc.org.hk>

Our Ref : Land Titles Bill
Your Ref : HPLB(B) 76/85/08 Pt.69
Direct Line :

BY FAX (28992916) AND BY POST

16 December 2003

Miss Cheung Siu Hing
Housing, Planning & Lands Bureau
Murray Building,
Garden Road, Hong Kong.

Dear Miss Cheung,

LAND TITLES BILL – CONVERSION MECHANISM

Our recent discussions on the Society's concerns on the Bill refer. Our Council has carefully reviewed the conversion mechanism proposed under the Bill. It has come to the conclusion that the existing Bill, which requires a solicitor to guarantee title by the issue of a good title certificate, is unworkable and cannot be supported in the absence of a mechanism by which doubtful cases can be referred to the Land Registrar for review.

Certificate of Good Title or Holding Title

We have already pointed out the difficulties in practice for solicitors to issue certificates of good title given that in many instances, a completely clean certificate of title is not possible.

Whilst the proposed system may be improved by allowing solicitors to disclose defects and providing for regulations to enable a solicitor to know when a qualified certificate will and will not disqualify a title from registration, it is impossible for any modified system to cater for all situations. To make the system work, there would need to be a reference body under the auspices of the Land Registrar to which solicitors can refer in cases of doubt.

We have further considered the possibility of "lowering the bar" to require for certificates of "good holding title". Again, whatever level of certificate may be required; there will need to be a reference body in cases of doubt. There is also an additional concern with good holding title certificates, namely, the conveyancing profession at large will not be familiar with the concept and this may create an additional level of confusion.

President	Vice Presidents	Council Members				Secretary General
Ip Shing Hing	Anson K.C. Kan Michael J. Lintern-Smith	Denis G. Brock Anthony W.K. Chow Junius K.Y. Ho Lester G. Huang	Andrew Jeffries Alex T.H. Lai Amy Y.K. Liu Peter C.L. Lo	Billy W.Y. Ma Kenneth S.Y. Ng Timothy C. Parkes Sylvia W.Y. Siu	Herbert H.K. Tsoi Wong Kwai Huen Cecilia K.W. Wong	Patrick R. Moss

We understand that the Government are not willing to set up any reference body under the auspices of Land Registrar to act as adjudicators of what will or will not be allowed for first registration in cases of doubt.

Other Options:

Midnight Conversion

The Council considers that Midnight Conversion is the best available method by which Title Registration should be implemented as the "at the stroke" conversion and removal of technical title defects will achieve the dual purpose of simplicity and certainty of the system.

There should be a suitable time lag between passing the Bill and an implementation date to allow for publicity both in HK and overseas jurisdictions to alert potentially interested persons and so as to allow the Land Registry to prepare for implementation.

Daylight Conversion

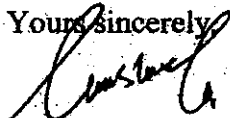
The Council has also discussed, as an alternative to Midnight Conversion, a Daylight Conversion system, which is an adaption of some systems that operate in Australia. Attached is a short note of how such a system would operate.

In effect it is a deferred Midnight Conversion. It places all existing titles in incubation for an appropriate period, which is suggested as 12 years which is tied to the general limitation period. No voluntary registration is permissible. For existing titles solicitor would need to check title in the same way as present with an important qualification, namely that it would only be possible to deal with these properties after the Bill was implemented as if they were registered titles i.e. by transactions on the Register and that transactions off the Register would not be recognised as creating interests in land. This is important so as to ensure that during the incubation period no new unregistered rights are created. On expiration of the incubation period all existing titles will be converted unless action has been taken to prevent this.

Recommendations

The Council recommends that Midnight Conversion is the best and most practical way to implement the Land Titles Bill. However, if this is not acceptable, then a system of Daylight Conversion along the lines indicated would be an acceptable and viable alternative which the Law Society would support.

Yours sincerely



Christine W. S. Chu

Assistant Director of Practitioners Affairs

c.c.: Ms. Margaret Ng - Chairman of the Bills Committee on Land Titles Bill



SUGGESTED SCHEME OF DAYLIGHT CONVERSION (Simple Outline)

Part I - The Scheme

- 1) Under the present LRO, the only "interests" that will displace the order of priority of registered instruments are "unwritten equities". Upon commencement date of the bill, no new unwritten equity would have effect. Only registered matters, defined overriding interests or matters existing before the commencement date would be enforceable. In other words as from commencement date, "unwritten" interests *in personam* could be created, enforceable in contract but not *in rem*, enforceable against the land.
- 2) From a designated date, all properties would be placed on a "provisional" or "interim" title register by transferring all the relevant entries kept under the Land Registration Ordinance ("LRO") and upon which LRO will expire. "Cautions" will, as from that date, be permitted to be registered against such "provisional" or "interim" title. The status of a "provisional" or "interim" title is that it will be defeasible, i.e. it could be "defeated" by a claim made under a caution.
- 3) 12 years after 2), all properties on the "provisional" or "interim" register would be brought fully under the title registration system again except where a caution has been lodged. The titles then will be indefeasible except for overriding interests, fraud, etc. as set out in the Bill.
- 4) Cautions against conversion from the "provisional" or "interim" to the final register could be lodged at any time and would lapse one year after lodgment if the cautioner has not commenced court proceedings to assert his claim.

Part II - Advantages

The above arrangements would entail:

- no additional liability on the Government to examine or approve title
- no market pressures or liabilities on solicitors arising from certificates of good title
- all properties are treated alike, avoiding labelling effects that may influence market sentiment.
- Owners of "unwritten equities" will have the "limitation period" (i.e. 12 years) to assert their claims, thus preserving their legal rights.

附件 B：採納律師會的‘白晝改制’建議需對《土地業權條例草案》作出更改的初步評估

	部/條	須作出的更改	備註
1.	第 1 部第 2 條	新加入‘臨時業權’，‘臨時業權註冊紀錄’及‘針對轉制的警告書’的定義。	現時沒有界定這些詞語的意思。須檢討現行的定義以確保一致。 如同意不需要臨時業權，則只需要界定‘針對首次註冊警告書’的意思。
2.	新部	新設部分以涵蓋臨時業權，這部分需包括： 1. 條例生效時，禁止任何新的不成文權益具對物效力。 2. 條例生效時，把所有土地轉至臨時業權。 3. 臨時業權性質的定義。 4. 訂出不適用於臨時業權的條例草案條文(例如第 81 條和 82 條)。 5. 《物業轉易及財產條例》如何適用於臨時業權。 6. 針對首次註冊的警告書的條文。	如同意不需要臨時業權，則只需第 1 及 6 項。 如使用臨時業權，很多現行條文包括第 21、22、23(2)、24、26 及 29 便須修改以配合這個情況。如不使用臨時註冊紀錄，則可避免作出該等修改。
3.	新部	新設部分涵蓋在 12 年後將所有物業(下述物業除外)轉至業權註冊紀錄： (a) 針對該等物業首次註冊的警告書仍然生效；及 (b) 為該等物業遞交註冊的文書仍未妥為註冊。	另一選擇是在第 2 部插入，取代第 12 及 13 條。
4.	第 2 部，第 12、13 條	廢除	由‘白晝改制’的機制取代。
5.	第 11 部，附表 2	作出相應修訂以廢除《土地註冊條例》及規例	