

HPLB/LTB Paper 05/04

**《土地業權條例草案》
對轉制機制及更正條文作出修訂的諮詢報告**

目的

政府曾對《土地業權條例草案》所載的轉制機制和更正條文作出更改建議，並就此徵詢各主要團體的意見。本文件匯報諮詢結果。

背景

2. 政府於 2 月 13 日舉行的條例草案委員會第 24 次會議上提供轉制機制和彌償及更正安排等重要問題的立場報告。報告概述由土地註冊處和律師會工作小組擬訂的新轉制方法，並且建議對第 81 條(規管更正的條文)作出一些修訂。政府告知委員當局須就建議作出更改的可接受性徵詢其他團體的意見，並且承諾向委員匯報諮詢結果。

3. 除了繼續與律師會進行討論外，土地註冊處處長也向下述團體發送載於立法會文件編號 CB(1)968/03-04(02)附件 A 的建議：

- (a) 大律師公會
- (b) 消費者委員會(“消委會”)
- (c) 香港銀行公會(“銀行公會”)
- (d) 香港測量師學會(“測量師學會”)
- (e) 鄉議局
- (f) 香港家庭法例會(“家庭法例會”)
- (g) 香港會計師公會(“會計師公會”)
- (h) 香港地產建設商會(“地產建設商會”)
- (i) 香港女律師協會(“女律師協會”)

4. 此外，當局也有與下述團體/代表舉行會議：消委會法律保障事務小組、鄉議局執行委員會、銀行公會及地產建設商會的代表、家庭法例會主席及女律師協會的成員。我們已經收到消委會、大律師公會、鄉議局、地產建設商會及測量師學會的意見書，上述意見書的副本載於附件，以供參考。

5. 土地註冊處處長曾於 3 月 4 日與大律師公會的主席和代表，以及律師會主席和律師會工作小組的成員會面，並在會上討論大律師公會在初步意見書提出的意見。

對轉制機制的意見

6. 消委會支持草案所述的逐步轉制機制。雖然消委會原則上沒有對白晝改制機制提出反對，但認為轉制會影響非書面衡平法權益中可能出現的申索，並就這一點提出一些問題。消委會指出待該等問題得到澄清後，他們才表達對轉制機制的支持。

7. 鄉議局先前拒絕午夜轉制的方案，對目前草案所建議的逐步轉制機制也提出一些問題。他們現在原則上支持新的機制，但建議提供渠道，容許有關權益能夠在轉制之後受到法庭保護。

8. 測量師學會沒有對建議提出反對意見。

9. 地產建設商會原則上並不反對建議，但提出類似消委會提出的問題，並建議透過逆權管有而取得的權利，應該被看作類似由非書面衡平法權益產生的權利。

10. 大律師公會已提交其初步意見，對於建議方案中容許註冊非書面衡平法權益引起的申索通知的效力，他們提出多個更深入的問題。英國有法例訂明由實際佔用引致的權利須當作凌駕性權益處理，他們建議政府採用類似英國這項法例的條文而不是容許這類申索註冊。

11. 在 3 月 4 日舉行的會議上，大律師公會的代表表示他們所提出關於保護非書面衡平法權益的問題，基本上屬於影響任何業權註冊計劃的一般性問題。他們認為這最終是一個應如何處理非書面衡平法權益的決策問題。至於白晝改制機制本身，他們認為這個機制較在首次條例草案提出時的午夜轉制機制或目前草案規定出示妥善業權證明書的方法為佳。

12. 會議期間，土地註冊處澄清給予非書面衡平法權益申索提出通知的時限的意向。在轉制當日，任何能夠提出非書面衡平法權益申索的人，都不會被阻止申請在業權註冊紀錄記入非同意警告書，不論有關訴訟是否在轉制前引起。這個意向主要訂明付出有值代價的買家不會受這類申索影響，除非在他購入物業前已經有知會備忘或非同意警告書獲註冊。與會者留意到第 33(7)(a)條的運作，該條文容許由同意警告書事項產生的交易，可以取得該同意警告書的優先次序。該條文旨在保障買家和承按人在交易完成前免受新事項干預，也看來可以解決優先次序的問題。

13. 銀行公會在發出本文件時仍未作出書面回應，然而，他們表示原則上不反對建議中的轉制機制。

14. 家庭法例會認為經修訂的機制可以取得合理的平衡，並且歡迎建議中的知會備忘及針對轉制的警告書的制度。

對更正條文的意見

15. 地產建設商會及鄉議局都歡迎建議的更改。建設商會要求“偽造”的定義須依據《刑事罪行條例》第 IX 部對偽造的釋義。他們仍堅持反對法庭在更正個案(涉及偽造個案除外)作出決定時，可把‘各方的困難’作為考慮因素。

16. 大律師公會歡迎有關偽造個案的建議，但對於在其他個案給予法庭這麼大的酌情權就有所保留。他們也要大家留意證明偽造申索所需的證據及隨後需要保存若干紀錄的問題。律師會認同他們的意見。

17. 在與大律師公會及律師會於 3 月 4 日舉行的會議上，土地註冊處處長注意到無論如何都須重新草擬第 81 條，訂明在偽造個案中須對不知情前度業主作出更正。在重新草擬條文的過程中，政府會探討須列明較明確的考慮範圍，以便法庭行使酌情權此關注。

18. 其他團體並無就此事提出具體意見。

其他意見

19. 大律師公會及地產建設商會在其意見書及銀行公會在討論期間，都重申他們較早前對彌償條文表示的關注。雖然大律師公會及地產建設商會都留意到對有關偽造的更正條文作出更改實際上是草案的一項改善，但仍然反對在欺詐個案繼續設定上限。我們明白銀行公會主要關注到對喪失擁有權設定彌償上限的規定，他們憂慮如果作出更正，銀行便會喪失物業抵押的保證。

政府的立場

20. 政府認為由於沒有團體原則上反對白晝改制的整體計劃內容，因此可以擬備委員會審議階段修正案供條例草案委員會考慮，以實施此計劃。上文第 12 段所述的意向已經解答消委會提出的問題，即非書面衡平法權益的申索人不會單單因為有關訴訟是在轉制之前引起，而被阻止申請非同同意警告書。這個意向也可解釋大律師公會提出的部分問題。政府正研究是否應該透過凌駕性權益的機制，給予實際佔用人更大的保障。然而，政府亦留意到大部分其他團體都關注到應盡可能限制凌駕性權益的運作。

21. 政府已經接受大律師公會就更正條文提出的意見，即如果有偽造指控的情況出現，便有需要保留可提供證據的文件。條例草案會加入擁有人及承押記人須保留指定文件的條文。

22. 政府正研究各團體就法庭在欺詐個案的酌情權提出的問題。由於要對偽造個案作出修訂而須重新草擬第 81 條，我們正研究如何在重新草擬的過程中解決各團體對在其他個案的酌情權方面所表示的關注。

23. 政府留意到大律師公會和建設商會對在欺詐個案設定彌償上限的立場，但我們仍堅持載於以往提交條例草案委員會的意見書的立場。

24. 至於銀行公會的憂慮方面，政府正考慮提出委員會審議階段修正案，規定處長在因喪失擁有權而支付彌償時須顧及註冊抵押的問題(惟須視乎他們會否提交進一步書面意見)。

房屋及規劃地政局
2004 年 3 月



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2 March 2004

Mr. Kim Salkeld,
The Land Registrar,
Queensway Government Offices,
28/F.,
66 Queensway,
Hong Kong.

Dear Mr. Salkeld,

Re: Land Titles Bill
Revisions to Conversion Mechanism
& Rectification Provisions

We enclose herewith the preliminary view of the Bar on
“Daylight Conversion”.

Yours truly,

Edward Chan S.C.

Encl.

香港大律師公會

香港金鐘道三十八號高等法院低層二樓

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Vice Chairmen 副主席:

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Ms. Janine Cheung 張玉燕

Mr. José-Antonio Marmollet 毛樂禮

Mr. Donald Leo 劉健能

Re: Land Titles Bill

Comments on Revisions to Conversion Mechanism & Rectification Provisions

1. We refer to the letter of 9th February 2004 from the Land Registrar inviting the Bar to give its views on the proposed changes to the Conversion Mechanism and the Rectification Provisions of the Bill.

Daylight Conversion

2. The most distinctive feature of the “Daylight Conversion” mechanism is that no claim arising through “unwritten” equitable interest in land created after the commencement date of the Bill can affect purchasers for value unless notice of the claim is registered.
3. The above proposal has far-reaching consequences for the equitable doctrines of resulting and constructive trusts, as well as a variety of “personal equities”, which are indispensable devices used by the Courts to solve a host of problems which typically arise under informal family arrangements (e.g., the pious son who purchases a home for his parents and has it conveyed into the parents’ name without intending to make a gift of it, the aged parent who contributes to the purchase price of a child’s home

in return for a promise that she would be allowed to live there, the spouse who has made “contributions” towards the acquisition of the matrimonial homes, etc...). The “beneficiaries” of such “unwritten” equitable interests are typically not aware of the existence of their rights until after a dispute has arisen or alternatively, would never have contemplated that there is any need for negotiation of anything. This doctrine of unwritten equities is not limited to domestic relationship. In commercial context, there is also the problem of the right of subrogation which plays an important role in cases of refinancing. In the circumstances, we have reservations as to whether the requirement of “registration” of their claim is realistic.

4. Under the existing deeds registration system, only “instruments in writing” are required to be registered. Non-registration renders the interests created by the instrument unenforceable against subsequent purchasers for value. However, “unwritten” equitable interests are by definition incapable of registration and whether or not they can be enforced against subsequent purchasers for value would depend on the operation of the doctrine of notice.
5. In principle, we see no reason why a purchaser who has actual notice of an “unwritten” equity should not take subject to it.

6. We note that in England, “unwritten” equitable interests are protected as overriding interests to the extent they are rights of “persons in actual occupation”. This remains the case notwithstanding successive legislative reforms over the years which have progressively reduced the categories of overriding interests.

7. Whilst it may be argued that “unwritten” equitable interests feature much less prominently in the context of Hong Kong given that traditional Chinese society places far greater emphasis on the importance of the name appearing on the title deeds, major changes to the enforceability of “unwritten” equitable interests would still have wide social ramifications. We would therefore urge the Administration to give serious consideration to conferring the status of overriding interests on at least some of the “unwritten” equitable interests even though that would to some extent introduce greater uncertainties into the system of registered titles.

8. Another potential problem may arise in respect of “priorities” of registration. Under the existing deeds registration system, priority is accorded to registered instruments according to their dates of execution provided they are registered within one month. In the case of “unwritten” equitable interests, are they supposed to be accorded priority by reference to the date of their creation or the date of their registration as a claim?

9. As the law stands, where the equities are equal, the first in time prevails. This means that an equitable interest (whether by instrument or otherwise) created prior in time to the agreement for sale and purchase would bind a purchaser for value if he has notice of it before completion even if he had no notice at the date of agreement. Applying this principle, logically any claim in respect of “unwritten equities” which is registered should likewise bind a purchaser for value provided it is created before the date of the agreement. However, it is unclear whether in order for an “unwritten” equitable interest to bind a “purchaser for value”, the claim has to be registered before any specifically enforceable agreement for sale and purchase is concluded or the claim can be registered at any time before the date of the conveyance.
10. Yet a further problem may arise in respect of competing priorities between “unwritten” equitable interests which came into existence prior to the commencement date of the Bill and those interests which only came into existence after the commencement date. According to our understanding, during the 12 years interim period, the position of pre-commencement date “unwritten” equitable interests should continue to be governed by equitable principles and would remain enforceable against all except a purchaser for value without notice. An unregistered pre-commencement date “unwritten” equitable interest would enjoy priority over a registered post-commencement date “unwritten” equitable interest, irrespective of whether

the later interest is given priority in accordance with the date of creation of the interest or the date of its registration as a claim. What would happen if the pre-commencement date “unwritten” equitable interest is subsequently registered as a “caveat”? Would it retain its original priority or lose priority to a post-commencement date “unwritten” equitable interest which has been registered as a claim at an earlier point in time? The provisions of the Bill would need to make the position clear so as to leave no room for doubt.

Rectification in Cases of Forgery

11. We welcome the Administration’s belated recognition that an innocent former owner should not suffer a loss which is not fully compensated where a change of ownership has been procured by forgery. However, we have reservations as to the wisdom of the proposed wide discretion given to the Court for rectification in cases of fraud.

12. A right of rectification is by definition an inroad into the integrity of the register of titles. The existence of the possibility (albeit rare) of rectification in the case of fraud casts a serious doubt over the reliability of the register and this is exacerbated by the existence of the upper limit to the amount of compensation payable to the registered owner against whom

rectification is ordered. This is especially where there appears to be a wide and unguided discretion given to the Court to order rectification for fraud.

13. In the interest of certainty, we believe that the criteria for ordering rectification in non-forgery cases should be clearly defined and we repeat our previous submissions in this regard.

14. Although automatic rectification in cases of forgery will preserve the *nemo dat* rule in favour of the original rightful owner and hence the upper limit to the amount of compensation is no longer an issue as far as he is concerned, the absence of full compensation can still work injustice on the innocent registered owner against whom rectification is ordered. The absence of full compensation for the innocent registered owner may also have potentially serious impact on the liability of conveyancing solicitors. We will therefore once again urge to Administration to consider removing the upper limit on indemnity.

15. Further consideration would also need to be given to how the automatic right to seek rectification in cases of forgery will work in practice. The party seeking rectification faces a considerable evidential burden which would often be impossible in the absence of the original of the forged document. This would mean that notwithstanding the establishment of a

register of titles, a system should be put in place for preserving the instruments of transfers.

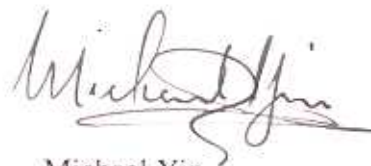
Dated the 2nd day of March, 2004.



Edward Chan, S.C.



Horace Wong



Michael Yin



新 界 鄉 議 局 HEUNG YEE KUK NEW TERRITORIES

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傳真及郵遞

檔案編號：三十三／五／〇一四〇號

日期：二〇〇四年三月二日

土地註冊處
蘇啓龍處長：

《土地業權條例草案》

感謝閣下出席本局於本年2月17日舉行的本屆第三次執行委員會會議，向本局議員介紹貴處正考慮就《土地業權條例草案》(草案)兩大方面作出的修訂，並尋求本局意見。本局了解是次貴處提出的修訂建議主要集中在設定轉制機制及土地註冊更正兩方面，有關草案的其他問題，貴處將會在日後再作研究。

有關設定轉制機制問題，草案原先建議以午夜改制方式運作，本局素來認為此機制將會引起混亂。今貴署建議將物業納入業權註冊紀錄的機制作出更改，即以白晝改制方式替代，本局原則上表示支持。

有關建議的好處是，讓業權人在條例生效的十二年時間之內，就物業業權的任何權益作出處理。但本局認為，在白晝改制的機制上，應該要提供一個彈性機制，即倘若有業權人在該十二年內，因某些特殊情況或原因，未能獲悉有關業權註冊的轉制機制，導致其失去物業權益，法例應容許該業權人可向法庭提出申請處理其權益，以避免扼殺有關人士獲得處理物業權益的機會。

有關土地註冊更正問題。政府自從十年前提出草案一直堅持，任何不知情及已付代價之物業買家無論因任何欺詐、錯誤或遺漏而買入土地物業，其物業業權經土地註冊處註冊後，即成為該物業的合法業主，而原來業權人是不能向該買家取回其物業業權，亦未有規定法庭需頒布命令將有關物業的業權歸還原本業權人。鄉議局對此建議帶來的負面影響非常關注，特別是新界不少業權人均長期身處海外，若因



新 界 鄉 議 局

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一時不察，被他人以欺詐手法導致其物業業權喪失，即使可獲得政府賠償，亦未必足以抵償原來業權人無端失去其土地業權之全部損失。

爲此，雖然社會其他團體或許對政府有關建議表示接受，但過往十多年本局仍不斷強烈要求政府及有關當局提出修訂，並建議假如因欺詐、偽造而促使物業擁有權有所變更及轉移，政府必須將物業業權歸還不知情的原來業權人，即物歸原主。經過本局近十年的努力和游說，最近終於獲得 貴處接納本局之建議。對於 貴處終能從善如流，本局表示非常欣慰。

新界鄉議局主 席：劉皇發

副主席：林偉強

(秘書處代) 新界鄉議局

秘書處

SECRETARY



HEUNG YEE KUK NEW TERRITORIES

File Reference : 31/5/0140

Date : 2 March 2004/3

By Fax and Post

Mr K Salkeld, Land Registrar

Dear Mr Salkeld,

Land Titles Bill

Thank you for attending our third Implementation Members' Committee on 17 February this year. You briefed our members about the changes your department was considering to make on two major aspects of the Bill and sought our advice on the proposed changes. We understand that the proposed changes focused on two aspects, namely the establishment of the conversion mechanism and the change to land registration. Your department will consider other issues of the Bill later.

The Bill originally proposed that the conversion mechanism be operated in the manner of gradual conversion. The Kuk has always considered that this mechanism would lead to chaos. Your department now proposes changes to the mechanism for bringing property onto the title register i.e. to be replaced by daylight conversion. This proposal is acceptable in principle to the Kuk.

The advantage of the proposal is that title owners may handle all interests in respect of title within 12 years from the commencement of the legislation. However, this Kuk considers that a flexible mechanism should be provided for the Daylight Conversion mechanism, i.e. the law should allow title owners to apply to the court to decide their interests if they have lost their interests to properties without notice of the title registration conversion mechanism due to certain special circumstances or reasons within the 12-year period so that their opportunities to decide their interests

would not be taken away.

As regards the change to land registration, the Government has been insisting since ten years ago when the Bill was introduced that any innocent purchaser for valuable would become the legal owner of the property once his title to property was registered in the Land Registry notwithstanding that he had acquired the property due to any fraud, mistakes or omissions. The original owner could not get back his title from the owner and the Court is not allowed by the law to order restoration of title to the original owner. The Kuk is very concerned about the negative effect this proposal would bring about, particularly to the many title owners of the New Territories who stay overseas for the long term. The possible compensation made by the Government might not be sufficient to fully cover the total loss of interests of original title owners which are caused by other person's fraud due to their oversight.

In this connection, though other associations may agree to the proposal of the Government, the Kuk in the past ten years has been strongly demanding the Government and the authorities concerned to make proposal for amendments. We have also proposed that the Government must restore the property to the innocent original owner where the change and transfer of ownership was procured by fraud and forgery, i.e. return something to the rightful owner. We have been making efforts and lobbying for nearly ten years and your department has finally accepted our proposal. We are very pleased that your department is willing to follow good advice.

(N.T. Heung Yee Kuk Secretary)

for Chairman of HYK : LAU Wong-fat

Vice Chairman : LAM Wai-keung



香港地產建設商會

THE REAL ESTATE DEVELOPERS ASSOCIATION OF HONG KONG

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Room 1403, World-Wide House, 19 Des Voeux Road Central, Hong Kong.
Tel: 2826 0111 Fax: 2845 2521

1 March 2004

By fax & by mail

Mr. Kim Salkeld
Land Registrar
28/F Queensway Government Offices
66 Queensway
Hong Kong

Dear Kim,

Land Titles Bill

Thank you for your letter of 11 February 2004.

The views of REDA are as follows:

Daylight Conversion

We do not have any in principle objection to the concept of "Daylight Conversion".

We note that unwritten equities which have not been registered as a caveat or caution within 12 years from the commencement of the Land Titles Bill ("LTB") will be void. In the majority of cases, unwritten equities arise where a member of family puts up the whole or part of the purchase price for the acquisition of a property but he or she is not named as one of the owners in the Assignment. In the absence of education, many of them will be unaware that they will lose their rights even though they may be in actual possession of the property. We would like to know how the Administration proposes to educate the public that unwritten equities would need to be registered within the 12-year period.

With regard to rights acquired by adverse possession, it would appear that such rights should be given the same treatment as unwritten equities so that, unless such rights are registered as a caveat or caution within 12 years, they will be void. The public should similarly be educated on the need to register such rights within the 12-year period.



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Rectification-former innocent owner

We welcome and support the Administration's proposal that an innocent former registered owner shall always be entitled to a rectification of the Title Register and to the restoration of his name to the Register if the change of ownership is procured by forgery.

We would, however, like to be assured that "forgery" will, in the LTB, have the same meaning as the word is used in Part IX of the Crimes Ordinance.

With regard to rectification in other fraud cases not amounting to forgery, we would like to be assured that the relative hardship to the parties is not a factor which the court is to take into account in deciding whether the Title Register should be rectified. As we have repeatedly pointed out, if hardship is to be considered, a party who is financially stronger will, more likely than not, lose out. All other things being equal, it may come down to the simple question of "who can afford to lose out". This cannot be right nor can this be equitable.

Cap on indemnity

Whilst the Administration's proposal addresses our concern regarding the deprivation of the property of an innocent owner by reason of forgery, we remain concerned about the appropriateness of a cap on the indemnity.

The objective of the LTB is to increase the security and convenience with which property transactions can take place in Hong Kong and to achieve this by providing that (1) title can be established as a matter of fact by reference to the Title Register and (2) an innocent purchaser's registered title is indefeasible, or if it is defeasible, he will be properly compensated.

A cap on the indemnity means that the objective cannot be fully achieved and we would ask the Administration to consider adopting the United Kingdom model (see paragraphs 5 to 7 of Schedule to the Land Registration Act 2002) so that:

- (i) no cap is placed on the indemnity;
- (ii) no indemnity is provided if there is any fraud on the part of the claimant;



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- (iii) to the extent that the loss results from a lack of proper care of the claimant, the indemnity will be reduced to such extent as is fair having regard to the claimant's share in the responsibility;
- (iv) the amount of the indemnity will be determined by the court.

If the Administration were to insist on a cap and the Bill is otherwise acceptable, we are prepared to support the Bill provided that:

- (a) an innocent owner is always entitled to a rectification of the Land Register and restoration of his name to the Register where the change in ownership is procured by forgery;
- (b) in cases of fraud other than forgery, hardship to the parties is not a relevant consideration when the court decides whether the Register should be rectified; and
- (c) the cap is set at an appropriate level.

Yours sincerely

Louis Loong
Secretary General



1 March 2004

BY FAX & POST
#2596 0281

Mr Kim Salkeld
Land Registrar
The Land Registry
Queensway Government Offices
28/F., 66 Queensway
Hong Kong

Dear Kim,

Land Titles Bill

Thank you for your letter of 16 February 2004 informing HKIS the latest proposed changes to the Land Titles Bill.

The introduction of "Incubation" period in the proposed "Daylight" conversion is another alternative to resolve the many arguments of the "Overnight" conversion or "Conversion by Phase". HKIS does not have adverse comment on this "Daylight" conversion and other issues as outlined in your above mentioned letter.

The Institute and our members have always been following the captioned Bill in its changes and future implementation. Our previous comments on the Bill should prevail and we maintain that they should be attended to. Lastly, we are happy to receive any updates and contribute our views in future consultations.

Yours sincerely



Tony Tse
President

c.c. Mr. Gordon Ng – Secretary General, HKIS