(立法會秘書處譯本，只供議員參考用)

香港大律師公會

向《土地業權條例草案》委員會提交的意見書

1. 《土地業權條例草案》委員會秘書於2003年3月20日致函大律師公會，邀請本會就該項正由立法會審議的條例草案提出意見。大律師公會現按立法會參考資料摘要所列擬議土地業權制度的5項要點，在下文各段逐項提出本會的意見。

業權保障

2. 大律師公會認同業權註冊制度的主要特點，必須是業權明確無疑，任何人只管接受經註冊的業權，便不再需要進一步查核或有所懷疑。然而，大家須接納一點，就是不能規定註冊業權在任何情況下均不可推翻，法院或其他機構應獲賦予某些權力，以更正所註冊的業權。儘管如此，為求明確起見，可作更正的情況必須清楚界定，這點至為重要。

3. 大律師公會大致上贊同在法例中訂明詳細的法定指引，供法院據以行使其權力及酌情權。但本會關注到，條例草案第81條的若干條文未能在確保業權明確的要求及就特定個案秉行公正兩者之間，達致適當平衡。

4. 從條例草案第81(2)(a)條的措辭看來，如管有土地的業權註冊擁有人以有值代價取得其業權，*凡該擁有人知悉*導致尋求作出該項更正的有關欺詐、錯誤或遺漏，或該文書之屬無效或可使無效的情況，則法院有權命令針對有關註冊擁有人而更正業權註冊紀錄。大律師公會非常質疑應否採用"是否知情"這項驗證準則，作為決定法院是否有權命令更正業權註冊紀錄的法定準則。正如大律師公會在先前提交的意見書(請參閱大律師公會於1999年2月9日提交的意見書第8.6段)中指出，土地業權註冊的重要概念是，業權必須明確，使處理土地的人可以之為依據。在此方面，情況與可流轉票據法例背後的理念並無不同。根據現行法例，取得業權的人即使知悉先前的轉讓或業權可使無效，仍可獲得妥善業權，只要 (請參閱附錄I)

出讓該業權的人擁有妥善的業權便可。僅僅知情相對於造成或有份造成欺詐、錯誤、遺漏或可使無效情況，不應令人失去註冊業權。這項條文的草擬方式似乎有這樣的意思：一旦擁有人知悉在業權的有關過程中有欺詐、錯誤或遺漏之處，其業權便可能被法院命令更正。大律師公會不理解有何理由要在條例草案作出規定，使註冊擁有人的業權承受較在現行法例下為大的風險。

5. 前註冊擁有人或前註冊承租人純粹因為其可能在某階段知悉有關的欺詐，而被剝奪申請更正註冊紀錄的權利，這情況亦有欠理想。根據條例草案第81(3)(b)(i)條，若前註冊擁有人或承租人對該項欺詐知情，似乎法院無權命令作出更正。我們在此再次質疑應否以"是否知情"這項驗證，作為法院在此情況下行使權力的適當準則。為何前註冊擁有人或承租人純粹因為知悉有關欺詐，便要失去尋求法院協助作出更正的權利？欺詐的受害人若沒有參與或無份造成該項欺詐，純粹知悉有關欺詐未必會令他不會成為受害人。舉例而言，欺詐或不誠實的陳述可能是對第三方作出，而該第三方的某些行動可引致前註冊擁有人或土地承租人的業權被毀或負上產權負擔。前註冊擁有人對有關欺詐知情，單單此點未必能防止欺詐的發生，而第三方亦未必知悉該項欺詐。前擁有人或承租人可能不知悉有第三方，而且亦可能沒有任何方法或機會及時向其作出知會，以防止欺詐的發生。也許情況是，前擁有人或承租人只在欺詐行為作出後，才獲悉該項欺詐。根據現時條文的草擬措辭，只要一旦證明前擁有人在任何時候對欺詐知情，即使他絕無參與其中，任何更正註冊紀錄的申請均不會受理。

6. 即使"是否知情"是適當的驗證準則，要問的重要問題是：在何時知悉？從條例草案第81(3)(b)(i)條的措辭未能清楚看到，究竟是否只在前註冊擁有人或前註冊承租人*在欺詐發生之時已*知悉該項欺詐，法院才無權命令更正有關的註冊紀錄。此情況顯然有欠理想，而我們敢說一句，立法原意應非如此。純粹因為前註冊擁有人或前註冊承租人在某時刻獲悉有關欺詐，便禁止他尋求更正註冊紀錄，這做法沒有理據支持。實際上，除非與直至前註冊擁有人或前註冊承租人知悉有關欺詐，並不預期他會申請更正註冊紀錄。該項條文的草擬方式引起很大的疑問，就是究竟前註冊擁有人或註冊承租人在*何時*知悉有關欺詐，方會令其失去申請更正註冊紀錄的權利。若立法原意是規定在前註冊擁有人或前註冊承租人

*在欺詐發生之時已*知悉該項欺詐的情況下，他才不得申請更正註冊紀錄，這點便須清楚訂明。不過，大律師公會建議從條例草案第81條刪除所有對"是否知情"這項驗證準則的提述。

7. 此外，條例草案第81(3)(c)條英文本首句末的"neither"一字，似乎是草擬上的文書錯誤。按推斷原擬用字應是"either"(而非"neither")。若實情並非如此，便會引致相當荒謬的情況，就是若更正註冊紀錄申請所針對的註冊擁有人或註冊承租人對有關欺詐*既不*知情，*亦無*造成或在相當程度上有份造成該項欺詐(條例草案第81(3)(c)條)，在此情況下註冊紀錄或可得到更正；反之，若註冊擁有人或註冊承租人*是*對有關欺詐知情，或造成或在相當程度上有份造成該項欺詐(條例草案第81(2)條)，在此情況下註冊紀錄卻*不可*得到更正！假設這僅是一項文書錯誤，撇除上述有關以"是否知情"作驗證準則的意見不談，既然第81(2)條基本上提述同樣的規定，因何又要訂定條例草案第81(3)條，這實在並不清楚。這只會令人對法例更感混淆，因為並無明顯理由要訂定與第81(2)條只有些微分別的第81(3)(c)條。舉例而言，第81(3)(c)條所訂的"知情"，並不包括對錯誤或遺漏知情，亦不包括對任何文書無效或可使無效的情況知情。但第81(2)條(範圍較廣的條文)是除第81(3)(c)條另有規定外，就有關事宜作出規定，這樣的寫法令人質疑註冊擁有人或承租人對欺詐以外的任何事情(例如錯誤、遺漏或文書無效或可使無效等)知情，這點是否無關重要。此方面的立法用意實在令人費解。

<u>逐步改制</u>

8. 大律師公會贊成當局的建議，認為應循序漸進逐步改制，而在新的土地業權註冊制度獲得普遍接受前，不應考慮自動改制的做法。

<u>彌償基金</u>

9. 新的土地業權註冊制度會大大損害*nemo dat quod non habet(*意即"*買家不可能從根本沒有業權的賣家得到業權*")的原則。根據條例草案第81條，在可否作出更正方面設有極大限制。因此，土地權益在法律上的保障將大為減少，而除了凌駕性權益外，許多法定權益如未獲完全或準確記錄在土地註冊紀錄內，亦可能變成無效。除作出更正這項補救外，有關彌償的法例規定將成為唯一的補救方法。不過，擬議法例在作出彌償方面設有極大限制。

10. 條例草案第82(1)條規定，只可因土地註冊處處長或任何協助土地註冊處處長的公職人員的欺詐、錯誤或遺漏而作出彌償。欺詐只被界定為包括不誠實及偽造。除這明文規定包括的情況外，有一點並不清楚：該用語是否只局限於普通法欺詐(即明知或在並不相信為真確無訛的情況下，或在不理會是真還是假的情況下罔顧後果地就事實作出虛假陳述；請參閱**Derry v. Peek** (1889) 14 Cas. 337)，又或是否包括衡平法下的欺詐(有時稱為推定欺詐)，而衡平法下的欺詐更涵蓋範圍更為廣泛的情況，例如不當影響及洩漏機密等(一般可參閱**Snell on Equity**，第13版，第610頁及以後各頁)。

11. 法例擬稿並無對"遺漏"及"錯誤"作出界定。單方面的錯誤是否包括在內?

12. 條例草案第82(2)(a)條規定，任何人如本身作出欺詐或有"疏忽"，均不得獲得彌償。鑒於在現行法例下，土地擁有人的土地權益可根據"*買家不可能從根本沒有業權的賣家得到業權*"的原則，而就第三者的欺詐享有絕對保障，而他一般無須對第三者負上任何謹慎責任，以防止欺詐；正因如此，相對於"欺詐"的情況，若他因新的土地業權註冊制度而蒙受損失，我們看不到有任何理據，規定不得就"疏忽"情況支付彌償。當局的用意是否真的要將旨在就失去業權而作出補償的彌償條文，訂為一項以追究過失為本的計劃？若然，則當事人的"疏忽"程度是否相關？舉例而言，土地擁有人如並無打理其在香港的土地(他可能已移民、並不通常居於香港，或純粹過於懶惰)，可能成為了欺詐的受害人。相反，他假若居於香港，較勤於處理其地產事務，或會可免出現欺詐的情況(例如假若他能更審慎行事，不向朋友交付授權書，便不會被朋友欺詐地予以濫用，而令其蒙受損失)。然而，在普通法中，土地擁有人無須對任何人負上謹慎責任 —— 他沒有責任採取任何步驟來保障自己，以免成為欺詐的受害人。在決定其產權時，疏忽根本不是考慮的因素。然而，在擬議計劃下，他可能會被剝奪其獲得補償的權利，原因是他有"疏忽"，沒有採取或會使其可免成為欺詐受害人的步驟。這是適用於產權法的普通法原則一大變革。大律師公會看不到有任何充分理由要進行如此變革。

13. 大律師公會同樣無法看到有任何理據要訂立條例草案第82(4)(c)條。該條訂明不得就在*首次註冊日期之前*發生但只在該日期之後發現的任何欺詐、錯誤或

遺漏支付彌償。在不少情況下，*如非因為*首次註冊，在首次註冊日期之前發生的任何欺詐、錯誤或遺漏，均不會令土地擁有人失去權益；至於規定因沒有在首次註冊時將其權益完全或準確地記錄在土地註冊紀錄(假設這是由於第82(1)條所訂的欺詐、錯誤或遺漏所致)而蒙受損失的土地擁有人，不得就其損失獲得十足賠償，同樣沒有任何理由。

14. 更重要的是，大律師公會強烈反對條例草案第83(1)(a)(ii)及83(3)條一併產生的效力，令財政司司長可以其認為適當的任何方式，限制須支付作為彌償的款額。據大律師公會了解，當局預期不會根據每宗個案的情況，逐一釐定彌償款額，而會由財政司司長設定一個適用於所有情況的限額。現時條例草案所建議的限額為3,000萬元。

15. 由於彌償是那些不合資格要求作出更正的人可獲得的最後補救，若擁有人並非因本身的錯失而令其權益終絕，這類個案應一律獲付十足彌償，若未能做到這樣，原則上有錯。

16. 大律師公會對設定彌償上限的做法仍不信服，而且仍然認為政府當局提出的理由站不住腳。政府當局的看法是，"有能力進行金額超過3,000萬元的物業交易的個人及公司，應可充分保障自己免受欺詐"。一如本會先前在2002年3月25日提交的意見書中指出，期望任何人(即使是如何富有的人)會防範其物業免受欺詐的想法，根本不切實際，而事實上欺詐行為往往是在受害人全不知情的情況下作出。大律師公會認為，在此方面歧視富有的人，原則上並不正確。至於有意見認為擬議彌償制度可為物業擁有人提供他們現時所沒有的保障，同樣是自欺欺人的說法。土地擁有人現時根據"*買家不可能從根本沒有業權的賣家得到業權*"原則獲得保障的權益，將不會有任何損失。因此，如非因要推行新的業權註冊制度，根本無須就有關權益訂定任何保障機制。 (請參閱附錄II)

17. 雖然大律師公會承認在徵費額方面有一些實際問題要考慮，以及彌償基金可能會因一次數額巨大的申索而耗盡，但擬議法例一旦實施，或會導致私有產權遭到侵佔，而在欺詐個案中，有關物業擁有人更是沒有錯失而有此後果。就原則而言，若制定一些法例，使任何人的財產被剝奪而又沒有提供足夠而合理的補償，絕非一個文明社會的正確做法。在此方面，大律師公會亦強烈質疑擬議法例所造成的侵佔產權效果，是否符合《基本法》第六及一百零五條的規定。

18. 申索彌償的程序受條例草案第84條所規管。然而，在此類法律程序中，誰是與申索人的對手方並不清楚明確。究竟應是土地註冊處處長還是律政司司長？這點應在條文中清楚訂明。

19. 條例草案第85條試圖把彌償申索視為簡單合約債務，即彌償申索受6年的時效期規限。適用於收回土地的法律程序的時效期為12年。在很多情況下，申索彌償的權利實際上是用作補償土地擁有人已喪失收回土地的權利。因此，大律師公會認為彌償申索類似於收回土地的法律程序，故沒有理由訂立一段較短的時效期。

20. 條例草案第85條又訂明，"*訴訟因由須當作是在申索人知道或若非由於其本身的錯失則****應已知道****其申索的存在之時產生*"。按照《時效條例》的條文，"應已知道的英文原文"might have known"應為"should have known"。純粹基於可能有途徑(即使可能性是如何低)發現訴訟因由便當作產生訴訟因由，未免於理不合。顯而易見，把驗證準則定為申索人*應*已知道而不是*可能*已知道申索存在，會更合符公正原則。

<u>凌駕性權益</u>

21. 大律師公會支持規定註冊業權須受某幾類清楚界定的凌駕性權益規限的建議。

22. 大律師公會重申在2002年3月25日的意見書第17段中就佔用人權益所提出的意見。在條例草案的現有擬稿中，顯然沒有處理與佔用人權益有關的問題。 (請參閱附錄II)

23. 條例草案亦明顯忽略了另一點，就是並無訂定條文以處理可能藉時效歸益權取得地役權的問題。雖然一般的意見認為由於香港所有土地(聖約翰座堂所在的土地除外)均是以官契持有的土地，故時效歸益權在香港並不適用，但仍有一些有力論據，贊成容許契約持有人根據喪失現今批地權的原則取得地役權。在英國，上訴法院就**Simmons v. Dobson**[1991] 1 W.L.R 720一案所作的裁決，似乎解決了這方面的問題；但在香港，這方面的問題仍有很多疑問尚未解決。到了最近，上訴法庭在**Prosperous Tone Ltd. v. Pearl Fame Development Ltd.** 一案 (CACV 1128/2001，無彙報的2002年3月6日的判決)中，才在這樣的假設(儘管有關事宜並無爭議)上立論：在香港，契約持有人可藉時效歸益權取得通行權。基於

上述案例，大律師公會相信，當局根本不可在假設時效歸益權不適用於香港的基礎上進行立法。

24. 另有一點亦相當重要，就是要清楚界定政府因政府租契所訂契諾屢屢遭到違反而根據政府租契條款獲得的土地重收權，應否視為凌駕性權益。

<u>土地界線</u>

25. 大律師公會贊同有關建議，即在業權註冊制度以外的途徑，另行處理土地界線所引起的糾紛。就此，大律師公會重申在2002年3月25日的意見書第26至28段中提出的意見。 (請參閱附錄II)

<u>雜項事宜</u>

26. 大律師公會注意到，雖然條例草案的現有擬稿已處理本會在先前提交的意見書中表達的若干關注事項，但仍有一些事項未獲處理。舉例而言，大律師公會在1999年2月9日的意見書第7.1及7.2段，曾提及若干與同意警告書有關的問題。大律師公會察悉，條例草案的現有擬稿並無處理大律師公會的關注事項，以致問題依然存在(見條例草案第70(1)條)。至於在非同意警告書(有時或稱為"敵意警告書")方面發現的若干問題，同樣未獲得處理。大律師公會不想在這份意見書中逐字逐句複述這些關注事項，但希望當局再次留意大律師公會先前提交的意見書的內容。大律師公會認為先前所提出的意見現時仍然適用，並認為政府沒有理由對該等意見完全置諸不理。若這些問題在條例草案中未獲妥善處理和解決，日後勢將引起大量訴訟。 (請參閱附錄I)

2003年4月23日

COMMENTS OF THE HONG KONG BAR ASSOCIATION
on Land Titles Bill

Overview of the Bill

1.1 The Land Titles Bill ("the Bill") proposes to replace the existing deeds-based system of land-holding in Hong Kong (supplemented by the Land Registration Ordinance, Cap. 128) by a new form of statutory title which in England has been described as "absolute". Under the proposed scheme, the present system under the Land Registration Ordinance (Cap. 128) of registering instruments affecting land will be replaced by a new system of registering the title to the land and the interests in the land subject to which the title is held (see the Explanatory Memorandum).

1.2 Upon registration, the registered owner of the Crown Lease or long-term lease (defined as a lease granted for more than 21 years at a premium) would be vested with the corresponding leasehold estate in the land, irrespective of any defect in the title of his predecessors, subject only to undisclosed Overriding Interests and the risk of Rectification being ordered against him.

1.3 This new form of statutory title constitutes a radical departure from the common law concept of landholding whereby usually the assignee can not obtain a better title than that of the assignor. The obvious exceptions would be cases where the

doctrine of estoppel or section 3(2) of the Land Registration Ordinance comes into play. Where the assignor's title is defective for whatever reason, the vesting of a statutory absolute title in the new registered owner upon registration will create a major exception to the common law rule of *nemo dat quod non habet*. Except in the case of an overriding interest and subject to rectification, existing legal rights will be extinguished if not reflected in the new registration. As such, we feel that the impact of the proposed changes should be widely publicised and their implementation should only take place after informed public discussion and consultation and only with the support of the public. We are concerned that the public may think that this Bill merely introduces changes to the form of conveyancing documents and conveyancing procedure only.

Definitions

2.1 The definition of a "Charge" in Clause 2(1) of the Bill is much wider than the definition of "mortgage" and "legal charge" in the Conveyancing and Property Ordinance (Cap.219). The proposed definition would cover any transaction whereby registered land or a registered long-term lease is made security for, inter alia, "the fulfilment of a condition or obligation". It is not entirely clear, however, whether this wider definition is wide enough to make the following types of security a "Charge" with the meaning of the Bill:-

(a) an equitable mortgage by the mere deposit of title deeds;

(b) an equitable charge created by a person appropriating registered land to the discharge of some debt or other obligation (e.g. a will or a voluntary settlement which charges land with the payment of a sum of money);

(c) a vendor's lien;

(d) a purchaser's lien.

If all or any the above fall within the definition of a "Charge", presumably they can be registered pursuant to Clause 32 of the Bill and the person in whose favour they are made would become an "owner" thereof within the meaning of the definition in Clause 2(1). We suggest that the position be appropriately clarified in the Bill. Is it intended that these special kinds of securities should be Charges within the meaning of the Bill?

2.2 The definitions of "caution", "consent caution" and "non-consent caution" are unhelpful. A "consent caution" is defined as a caution with the consent referred to in Clause 66(1) and a "non-consent caution" is defined as a caution without such consent. [N.B. It is *not* defined as a caution registrable in circumstances provided in Clause 66(3). If it had been so defined, the position would perhaps be easier to understand]. It is impossible to decide what is and what is not a consent caution or a non-consent caution without knowing what exactly

is a caution in the first place. And it is not helpful to go back to the definition of "caution" because, one then finds it defined simply as meaning "a consent or non-consent caution"! That certainly does not advance the understanding of the term in any constructive way. It is to be noted that in Clause 66(1), a consent caution can only be registered in relation to a dealing in land, charge or long-term lease which is effected "in good faith and for valuable consideration", provided that there is the requisite consent. If a non-consent caution is simply a caution without that consent, does it mean that a non-consent caution would similarly be restricted to dealings in good faith and valuable consideration? Does it mean that dealings without valuable consideration are not registrable even as non-consent cautions? We do not think that that was intended to be the legislative intention. Certainly Clause 66(3) as it presently stands would otherwise have been wide enough to cover any interest acquired without valuable consideration (the words "whether contractual or otherwise" are wide) but for the rather confusing definitions in Clause 2(1).

2.3 We have also found the definition of "registered matter", which presently is in the form of a definition by way of exclusion, not terribly helpful. The definition is important because, under Clause 19(2)(b) and 19(4)(b) the absolute ownership of the person registered as owner is subject to any registered matter affecting the land.

2.4 "Dealing" is defined as including disposition and transmission but otherwise is not comprehensively defined. Again this is liable to cause doubts and confusion. Transmission (which is defined as registration of any matter to record the passing of title by operation of law) apart, what is a dealing? Supposedly the draftsman intends that the concept of "dealing" to be wider than "disposition", but other than that it is not clear what is and what is not a dealing. There are various kinds of agreements (an agreement to transfer, to charge etc.) which are expressly excluded from the definition of "disposition". Are these agreements dealings or not? Presumably sale and purchase agreements and provisional sale and purchase agreements are "dealings" as Clause 66(2) contemplate them to be so. While it is reasonably clear from the Bill that dealing is more than just the summation of disposition and transmission, the scope of "dealings" are not clear from the Bill. We suggest an appropriate clarification be introduced to remove any doubts in this regard.

2.5 Further we consider that the definition of "disposition" should make it clear whether an assent is to be treated as a disposition.

Organisation and Administration

3.1 There is no separate definition of "Government Lease" in the Bill. Presumably the definition of Government Lease in s.3 of the Interpretation and General Clauses Ordinance applies. This includes an agreement for a Government Lease such as

conditions of sale, grant or exchange. However, the Bill does not apply to Government land which is not subject to a Government Lease (see Clause 3(1)(b)). Accordingly, rights over this kind of Government land are not registrable and not searchable. It is not impossible that privately-owned land in Hong Kong may have quasi easements in the form of rights of way over the Government land in the neighbourhood. Conversely it is also possible that in granting a lease, the Government may reserve rights over the demised land in favour of the neighbouring Government land. There is no reason why these rights and incumbrances should not be made discoverable. If the scheme of having registered title to land is meant to be comprehensive, consideration should be given to include Government land in the scheme provided for in the Bill.

3.2 We would particularly mention Clause 5(2)(a) of the Bill. Clause 5(2)(a) is couched in mandatory terms and the Registrar is under a statutory duty to keep and maintain in each land registry the Government Lease for each parcel of land. Again, it is well known that in respect of many parcels of land in Hong Kong the relevant Government leases were lost and the counterparts which should be kept by the Government were also missing. Many of them were said to have been lost during the Japanese occupation. Indeed there were quite a number of cases reported in the law reports where the cause of litigation was the missing Government Leases (see e.g. ***Gatewood Ltd. v. Silver Noble Investment Ltd.*** (1992) 1 HKC 473, ***Wong Wai Ming v. Tang Tat Chi*** (1993) 1 HKC 341, ***BMC International***

Ltd. v. Star Win Co. Ltd.). We do not see how the Registrar can possibly carry out his statutory duty where the Government Lease is in fact missing in relation to a particular parcel of land.

3.3 In this connection, we suggest that Clause 41 of the Bill should also be reviewed to tackle the problem of missing Government Leases. Very often, the loss of Government Leases (and their counterparts) is not the fault of the land-owner and even if it were his fault, we do not see any reason for punishing this fault by making the land unsaleable. Under the present law, such land with missing Government Leases is almost unsaleable (unless the vendor has expressly contracted out his duty to prove title). By reason of Clauses 5(2)(a) and (c), it would appear to us that the Government Lease would be "an instrument referred to in" the current entries in the Land Register in respect of registered land for the purpose of Clauses 41(1)(a)(i) & (ii). Thus by reason of Clause 41(a) of the Bill, such land would continue to be unsaleable because the vendor would not be able to produce any copy of the Government Lease. To make things worse for the vendor, under the scheme of registered land, he cannot even contract out his obligation under Clause 41(1)(a) because of the words "notwithstanding any stipulation to the contrary". It may not be fair to those land-owners who find themselves in such a position.

3.4 We note that under Clause 11(3) of the Bill, transitional provisions are made to make the interest under certain types of documents protected as if they had been registered as consent

cautions. We note however that the list under Clause 11(3)(a) to (f) does not include the following types of documents:-

(a) powers of attorney (particularly those used in connection with the New Territories Small Houses scheme or other security arrangements);

(b) option agreements;

(c) pre-emption agreements.

These documents which are presently registered in the Land Registry should in our view be protected in the same way as the documents enumerated under (a) to (f) of Clause 11(3).

3.5 The power of the Registrar to close an old register and only transfer the information on the current ownership to a new register may impede the proper investigation of title. Care should be taken in conferring such a power to the Registrar and relying wholly on his judgment or discretion.

3.6 The provisions in Clause 18(5) is likely to give rise to serious (and probably unintended) consequence to co-owners of land. The sub-clause provides that the Registrar *shall* refuse to register *any matter relating to an undivided share* in registered land unless and until an application for the division of the land into undivided shares has been registered showing or specifying such rights to the use and occupation of the land or

part thereof, as may be appurtenant to the ownership *of that share*. On these wordings, the co-owners of land holding undivided shares in the land cannot register themselves as owners holding the land as tenants in common, unless, in relation to their co-ownership, there has been an application registered for such division of the land specifying their respective rights to the use and occupation thereof. In effect, these tenants in common would be forced to destroy their unity of possession or forced to make a deed of mutual covenants if they want to register their co-ownership. We do not see any justification for this.

3.7 Clause 18(5) should also be considered in conjunction with Clause 52(1) of the Bill. That Clause clearly contemplates the right of joint tenants and tenants in common to register the instrument of transfer in their favour. If Clause 52(1) is to be read subject to Clause 18(5), then tenants in common could not be registered as owners unless they agree to destroy their unity of possession. This we believe is an unintended consequence arising from the present drafting of Clause 18(5).

Effect of Registration etc.

4.1 Clause 19(2)(d) provide:-

"*any interest –*

(i) existing immediately before the appointed day;

(ii) affecting the land;

(iii) which was not registered under the repealed Ordinance(and whether or not it was capable of registration under that Ordinance); and

(iv) which was, immediately before the appointed day, enforceable against the person who is the owner of the land immediately upon the beginning of the appointed day,

in the case, but only in the case, ***of that person****.*"

It is not clear to us what is meant by "that person" in the last sentence of Clause 19(3)(d). Does it mean to refer to the person entitled to the interest or does it mean to refer to the person who is the owner of the land immediately upon the beginning of the appointed day? This uncertainty should be clearly addressed in the Bill.

We think it is more probable that "that person" is intended to refer to the landowner as he is the only "person" mentioned in the subsection. If so, does "that person" includes the person's assigns or successors-in-title?

If "that person" includes his assigns and successors-in-title, the operation of Clauses 20(1) & (2) (relating to the position of transferees without valuable consideration) and Clauses 61 to 64 (relating to the position of various successors-in-title acquiring the land by transmission as opposed to transfer)

would presumably apply. Transferees of the land-owner for valuable consideration will obviously take the land free from the unregistered interest. But those who acquire the land by voluntary transfer and/or by transmission may not. Is that what is intended to be achieved by Clause 19(2)(d) so that the unregistered interest would indefinitely continue to burden these assigns and successors-in-title of the land-owner?

On the other hand, if "that person" in Clause 19(2)(d) refers to the person having the interest concerned, does it include his assigns and/or successor-in-title? The interest is unregistered, and in many cases, unregistrable under the Land Registration Ordinance. Is it intended that the holder of the interest can lawfully pass his interest to another person giving the latter the right to enforce it against the land-owner? Again this would have the effect of perpetuating the unregistered interest indefinitely.

4.2 In respect of Clause 19(4)(d) we would raise a similar comment as in (1) above.

4.3 Clause 20(4) is incomprehensible as it presently stands and was probably drafted under a misconception of the law on squatter title. It has been held by the House of Lords in the case of ***St. Marylebone Property Co. Ltd. v. Fairweather*** (1963) AC 510 that the squatter's extinguishment of the tenant's title would not thereby render the squatter a tenant of the landlord. Thus the mere fact that the tenant's interest has been extinguished by the

squatter does not elevate the squatter to the position of the leasehold tenant vis-à-vis the landlord. In the absence of any provision in the Bill which overrules the effect of the ***Fairweather*** decision, we cannot see how the Court of First Instance can ever make an order to the effect that a squatter "has become the owner of registered land". An owner of registered land is defined in Clause 2(1) as being either the owner or holder of a Government lease or an undivided share in the land. A squatter can never be such an owner or holder. A squatter's title is in law quite different in nature from that of a leasehold tenant against which he bars. In the situation where a squatter wants to dispose of his squatter title, special provisions would have to be made in the relevant sale and purchase agreement to expressly provide for the same. A squatter cannot sell his interest as though he was selling as a leaseholder. We therefore do not see how Clause 20(4) can ever apply. That sub-clause has to be redrafted to take into account the special nature of a squatter title.

Furthermore, to mandatorily require the Court to specify the interest subject to which the squatter holds the land would impose an almost impossible task on the Court. Our Courts presently play an adjudicatory role in our adversarial system of justice. Clause 20(4) would have the effect of enjoining the Court to take on an inquisitorial role to find out what interests may be binding on the squatter. Very often the dispute put before the Court for its decision (such as whether a squatter's occupation has been long enough to bar the leaseholder's title)

would not enable the Court to go further so as to be in any position to specify the other interests (which may not even feature in the case before the Court) which are binding on the squatter. We would suggest that the word "shall" be changed to "may, if it thinks fit", or words of similar effect.

4.4 In relation to such squatter title, we would also mention Clause 21(1)(i). The sub-clause provides as follows:-

> "*(i) any rights acquired, or* ***in the course of being acquired****, in the land where, by virtue of the operation of an enactment relating to the limitation of actions, the title of the registered owner* ***has been extinguished***".

A squatter title could only be acquired by the final and absolute extinguishment of the leaseholder's title. The squatter title is either acquired or not acquired. The leaseholder's title is either extinguished or not extinguished. If the squatter's occupation (or any previous occupations by other squatters of which he is entitled to take advantage) is one day short of the limitation period, there is no squatter title acquired. It is difficult to see how rights "in the course of being acquired" could ever be relevant when it is a requirement of this overriding interest that the title of the registered owner "has been extinguished".

4.5 Clause 22 is entitled "Entries in Land Register to constitute actual notice". We suggest that the title should be amended by removing the word "actual". While it is right to deem a person

to have notice of what are registered, in consequence of which he would not be able to plead ignorance of the same, it is another thing to provide that he is deemed to have *actual* notice of every entry in the Land Register. Actual notice of the person may have very serious implications on charges of fraud.

Dispositions

5.1 By the combination of Clauses 26(4) and (6) the doctrine of part performance is in effect wholly abolished. Under the present law, part performance may be relied upon by a party seeking specific performance but not damages. It appears that the Bill seeks in part to reverse the position – under Clause 26(4) no Court shall grant an order for specific performance of an unregistered instrument, but the right to claim *damages* on an unregistered document appears to be preserved. We note that s.3(1) of the Conveyancing and Property Ordinance is not going to be repealed but s.3(2) will be amended by providing that the same be "subject to section 26(4) of the Land Titles Ordinance". Thus an oral agreement which is evidenced by a sufficient memorandum may still be enforced, although that is subject to the prohibition regarding specific performance on an unregistered instrument. Presumably if the memorandum evidencing the oral contract has been registered there is no bar to specific performance. But where the memorandum is not registered, does s.26(4) serve to prohibit specific performance of the oral agreement? It is arguable that s.26(4) only prevents the court from granting an order for specific performance of an

unregistered instrument. However, in ordering specific performance of an oral agreement, the Court is not ordering specific performance of the memorandum which evidences it at all. It is true that the oral agreement is being evidenced by the unregistered memorandum but the fact remains that in ordering specific performance, the court is ordering specific performance of the oral contract, not the memorandum which evidences the contract. It may well be that the objective for which Clause 26(4) is designed may not be effectually achieved by its present wordings.

5.2 We note from Clause 31(5) that in order to discharge a registered Charging Order it is now necessary to have a Court Order providing for the discharge. Full payment of the judgment debt in respect of which the charging order was made is not sufficient. The judgment debtor would need to apply for an order for discharge in order to remove the relevant entry. This may be time consuming and commercially troublesome for the parties. We fail to see why an entry cannot be made to the Register recording that the judgment debt in respect of which the charging order was made has been fully satisfied with an appropriate acknowledgement by the judgment creditor. If this is done, we fail to see why this document should not be given the effect of discharging the Charging Order. Very often last minute settlement is reached between a judgment creditor and a judgment debtor at a time when the judgment debtor is anxious to sell his property and there should be no reason why the statute should place an obstacle to the title by failing to reflect

timeously the effect of the settlement and the satisfaction of the judgment debt.

5.3 Clause 46(1) resembles s.41(2) of the Conveyancing and Property Ordinance. However in s.41(2)(c) of the latter Ordinance, the wordings used are:-

> *"(2) This section applies to any covenant, whether positive or restrictive in effect –*
>
> *(a) ……*
>
> *(b) ……*
>
> *(c) which is expressed **and** intended to benefit the land of the covenantee and his successors in title or persons deriving title to that land under or through him or them.*"

In Clause 46(1) of the Bill, the words "which is expressed **or** intended to benefit" are used. The replacement of the conjunction "and" with the conjunction "or" is to be greatly welcomed. We note however that in the proposed amendments to the Conveyancing and Property Ordinance, no amendment has been included to amend s.41(2)(c) of the Conveyancing and Property Ordinance to bring it into line with Clause 46(1) of the Bill. We would strongly urge that consideration be given to amend s.41(2)(c) of the Conveyancing and Property Ordinance in this respect.

5.4 Clause 53 of the Bill provides, inter alia, as follows:-

> "*Nothing in this Ordinance shall be construed as affecting:-*
>
> *(a) a right of succession to land under Part II of the New Territories Ordinance.*"

In the case of land under Part II of the New Territories Ordinance, where there is no probate, the present position is that a successor claiming to have the right of succession would have to satisfy the Land Officer that he is entitled to such land in succession to the deceased owner (s.17 of the New Territories Ordinance refers). The Land Officer is supposed to have expert knowledge of New Territories custom. However, Clause 59(3) of the Bill provides for the registration by transmission in cases of New Territories land. That sub-clause provides in these terms:-

> "*(3) Where under section 17 of the New Territories Ordinance (Cap.97) as read with section 12 of the New Territories land (Exemption) Ordinance (cap.452) any registered land is vested in any person as a successor, that person shall, on the presentation to the Registrar of evidence which satisfies the Registrar that the land has so vested, be entitled to be registered by transmission as the owner of the land in place of the deceased person concerned.*"

How would a person present evidence to satisfy the Registrar that the land has vested in him as a successor? Is he going to obtain a certificate of some sort from the Land Officer, or is it intended that the function of the Land Officer shall be taken over by the Registrar? Is the Registrar to be taken to have such expert knowledge, as a Land Officer is, of New Territories custom? We would suggest that the Government should also consult those bodies representing the interest of the indigenous New Territories people on this point.

Transmissions and Trusts

6.1 Clause 27 provides –

> *"Where a trustee in that capacity is registered as the owner of registered land … he shall, in dealing with the land … be deemed to be the owner of the land … and no disposition by the trustee to a bona fide purchaser for valuable consideration shall be defeasible by reason of the fact that the disposition amounted to a breach of trust.*"

6.2 On the face of it Clause 27 has the effect of conferring upon every trustee of land the power of sale. This would be a departure from the existing law, where the trustee's power of sale must be specifically provided for in the trust deed.

6.3 However, it is not clear as to whether "trustees" include trustees holding on resulting trust or constructive trust and also others in

fiduciary positions. Also the effect of notice of the terms of trust is also unclear.

6.4 Clause 27 must be read in conjunction with Clause 65(4) which provides that –

> "***No person dealing with land … shall be deemed to have notice*** *of the terms of the trust to which the land … is subject and no breach of those terms shall create any right or indemnity under this Ordinance.*"

However, "no person shall be deemed to have notice" is not the same as "all persons shall be deemed not to have notice". For example, since under the existing law the power of sale must be specifically provided for in the trust deed, would it be necessary for the purchaser to show that he knew of the existence of a trust deed before he could be allowed to act on the basis that the trustee had the power to sell to him? Conversely, if he is not aware of the existence of any trust deed, should it be inferred that he must therefore be taken to know that in fact the trustee did not have any power of sale?

6.5 The position is further complicated when one takes into account of Clause 65(5) –

"A person –

> *(a) dealing with land,… shall,* ***in the absence of evidence to the contrary****, be entitled to assume that the exercise by the trustee*

concerned of the power of sale over the land, … is not a breach of the terms of the trust to which the land … is subject;

(a) who suffers loss in consequence of the exercise by the trustee concerned of that power in breach of the terms of that trust shall have a remedy in damages against that trustee."

The words in bold seems to suggest that if the purchaser has actual notice of the breach of trust , then he cannot be protected; but under Clause 27, he is entitled to assume that the trustee is owner. Further, if a bona fide purchaser can take the property free from the trust, it would be hard to imagine how he could suffer any loss in consequence of the exercise by the trustee of the power in breach of the terms of the trust unless Clause 65(5) is not meant to protect someone with notice (most probably constructive notice) of the breach of trust.

6.6 The scope of protection given to purchasers with notice (actual or constructive) of the lack of power of sale under the terms of the trust to dispose of the land should be clearly defined. If the intention is that purchasers with notice of any breach of trust are not to be protected, the wording of Clause 27 can be changed to "no disposition … shall be defeasible by reason <u>only</u> of the fact that the disposition amounted to a breach of trust". If the Ordinance is intended to give the power of sale to all persons in fiduciary capacity (including constructive and resulting trustees) so that even the purchaser who has constructive knowledge of the lack of power would obtain good

title and the rights of the beneficiary would simply be directed against the proceeds of sale, provided that the sale is for valuable consideration and in good faith, then it should be made clear.

6.7 Clause 58 provides –

> *"… where one of 2 or more joint tenants … dies, … the remaining joint tenants shall be subject to any interests –*
>
> *(a) subject to which the deceased joint tenant held the land … immediately prior to his death;*
>
> *(b) which are unregistered; and*
>
> *(c) which are* ***enforceable****."*

The wording should make it clear whether "enforceable" means enforceable against the deceased joint tenant or the surviving joint tenants or enforceable against the land as an incumbrance.

6.8 Clause 61 provides for the powers and duties of personal representatives. The common law position is that the personal representative may have a power of sale, yet this power is subject to Section 54(1) & (2) of the Probate and Administration Ordinance (Cap.10). Does it mean that upon the Bill coming into effect any one personal representative who is registered as the owner of the land in that capacity may

validly sell and assign the land? Furthermore does Clause 61affect the requirement of an assent?

Cautions and Restraints in Dispositions

7.1 Clause 66(1) appears to provide that in the case of a second or subsequent charge, the charge would not be registrable unless the prior chargee consents to the registration. This represents a fundamental departure from the existing law, and a departure which we have grave reservation. Currently if the first charge should contain express prohibition against further charges, the further charges would still be valid as between the chargor and the further chargee although it could not affect the rights of the first chargee or persons deriving title through him. The further charges may still be presented for registration and the interest of the further chargee protected. We do not see any convincing ground for a change of the law in this respect.

7.2 Further, as presently drafted, where there are more than one prior consent cautions which affect the land, Clause 66(1)(b) would only require the consent of the cautioner of the last of such consent cautions. This is difficult to understand. When the first chargee gave his consent to the registration of the 2nd charge, he may have done so only on the basis that there would be no further charges (i.e. no 3rd charge or 4th charge etc.). Yet under the present draft, the 3rd charge may be registered with the consent of the 2nd chargee only, despite the fact that the 1st chargee might have vehemently objected to the making of the

3rd charge. We find the logic of this provision very difficult to understand.

7.3 Clause 66(5) provides as follows:-

> "*A transfer in registered land or a registered long term lease which is not for valuable consideration shall not be registered unless there is registered at the same time a non-consent caution to the effect that, in consequence of that transfer, the land or lease is or may become subject to a first charge under section 18(1) of the Estate Duty Ordinance (Cap.111).*"

This kind of compulsory non-consent caution will presumably be left on the Register forever. We do not know how, on the present scheme, such cautions may be removed. It is to be noted that this form of non- consent caution was merely a kind of warning that there may be a first charge under section 18(1) of the Estate Duty Ordinance and is not the same as a first charge under section 18(1). Hence it could not be removed under the machinery provided in Clause 68(2).

7.4 Clause 69 make provisions for wrongful cautions. Presently, where a wrongful claim is made calculated to hamper another person's interest in or his disposal of land, the legal remedy is a claim for "slander of title" or "malicious falsehood" (sometimes called "injurious falsehood"). It is a necessary ingredient for the tort to prove malice and actual damage (see ***Ratcliffe v. Evans*** (1892) 2 QB 524). The tort is not actionable per se.

It now appears that the test for a claim for maintaining or presenting a wrongful caution is one of "wrongfully and without reasonable cause". Malice apparently is no longer required. Is there any justification for adopting a less stringent test than what is provided at common law?

7.5 We would also mention Clause 73 of the Bill. We doubt if there is any necessity for such a provision. Indeed we look at it as a attempt to create another Land Court. The section has the effect of conferring upon the Registrar a role beyond that of purely administering a land registration system. Is the Registrar to be vested with a duty to prevent fraud or improper dealings of land? It is not clear from Clause 73(1) what may constitute such "improper dealing" or "sufficient cause" so as to trigger the exercise of the power under Clause 73. We have grave reservations to this Clause and the justification therefor.

Rectification and Indemnity

8.1 Given the exception to the rule of *nemo dat quod non habet*, rectification would seem to provide an obvious answer to those who find themselves losing out as a result of their interests not being fully or accurately recorded on the land register. However, the availability of rectification is severely restricted under the proposed legislation.

8.2 The powers of the Court of First Instance to order rectification of the Land Register are set out in Clause 77 –

> "*(1) … the Court of First Instance may order rectification … where it is satisfied that the entry has been obtained, made or omitted, as the case may be, by –*
>
> *(a) the **fraud, mistake or omission**, as the case may be, of any person; or*
>
> *(b) without prejudice to the operation of section 3(4)(i), means of a void or voidable instrument,*
>
> *and whether or not the entry was made, obtained or omitted, as the case may be, before, on or after the appointed day.*
>
> *(2) The Land Register shall not be rectified under subsection (1)so as to affect the title of the owner of registered land or a registered charge, or the lease of a registered long term lease, who –*
>
> *(a) is in **possession** of the land and has acquired the land for **valuable consideration; or***
> *(b) has acquired the charge or the lease for valuable consideration, unless the owner or the lessee –*
> *(i) had knowledge of –*
> *(A) the fraud, mistake or omission; or*
> *(B) the voidness or voidability of the instrument,*

> *in consequence of which the rectification is sought; or*
>
> *(ii) caused such fraud, mistake, omission, voidness or voidability or substantially contributed to it by his act, neglect or default.*

8.3 The concepts of "fraud, mistake or omission" require clarification. "Fraud" is said to include dishonesty and forgery in the definition section of the Bill but that definition would appear to be non-exclusive. For instance, it is not clear whether the draftsman contemplated "equitable fraud" and if so, what is the reason for not stating it clearly? The concepts of "omission" and "mistake" are not defined at all, leaving scope for arguments. For example, would it be necessary to show that the "omission" was negligent and would "unilateral mistake" be sufficient?

8.4 It would appear from the wordings of Clause 77(2) that the Courts have no power to order rectification against a registered owner *in possession* who has acquired his title for valuable consideration (Clause 77(2)(a)); and as against any other registered owner who has acquired his title for valuable consideration, the power would only be available if that registered owner has knowledge of or has caused or substantially contributed to fraud, mistake, omission, voidness or voidability (Clause 77(2)(b)).

8.5 It is unclear whether it was a clerical error in the drafting to apply the qualifying words "unless the owner or the lessee … (to the end of the Clause)" only to Clause 77(2)(b) and not to the whole of Clause 77(2)(a) & (b). If this were not the case, then rectification would not be available except in the limited number of cases where the registered owner is a voluntary donee or where someone has purchased an interest in remainder. This is because on the current drafting of Clause 77(2)(a), no rectification may be granted against a bona fide purchaser who had furnished valuable consideration if he is in possession. We note that valuable consideration is not the same as full market consideration, and a bona fide purchaser does not mean that he could not have any notice of any interest of others or notice of any fraud or defects in title in the previous dealings in the same property. Furthermore a person who buys the property with some fraudulent misrepresentation is still one who is in possession of the land and has acquired the land for valuable consideration. It is hard to see the justification for such a severe restriction on the right to rectification.

8.6 If the words were applied to both Clause 77(2)(a) and (b), then the result is still unsatisfactory. The central idea of a registered title must be that there must be certainty in the title so that persons dealing with the land would be able to rely on it. In this respect, the position is not dissimilar to the rationale behind the law on negotiable instruments. The present law is that such a person who has knowledge of the voidability of a previous assignment or previous title may still acquire a good title, if the

person from whom he acquires the title has a good title. The way this Clause is drafted would seem to mean that once an owner is aware that there is fraud, mistake or omission somewhere up the chain in the title, then he is susceptible to rectification by Court and could not get the protection of Clause 77(2)(a).

8.7 Moreover, the Ordinance should expressly provide for the extent to which the existing equitable relief of rectification would continue to be available alongside the statutory form of rectification under Clause 77. Whilst the English position is that the Courts retain the inherent jurisdiction to order rectification (**Hynes v. Vaughan, (1985) 50 P & CR 444**), the English legislation also provides for a much wider power to order rectification.

8.8 Whatever might be the scope of rectification under the proposed legislation, the new system of land title registration will result in a drastic in-road into the *nemo dat* rule. Legal protection for interests in land would be drastically reduced and save in the limited cases where rectification is available, a host of legal interests which do not qualify as overriding interests would be defeated whenever there is a registration. The only remedy would then lie in the statutory provision for indemnity.

8.9 The combined effect of Clauses 79(1)(a)(ii) & 79(3) is that the Financial Secretary will be able to limit the amount payable as indemnity in any manner he thinks fit. It does not appear that

determination on a case by case basis is envisaged; rather, the Financial Secretary will set limits which will be applicable across the board. There is no criteria laid down for the Financial Secretary's determination, nor is there any procedure for challenging or appealing against the correctness of his determination.

8.10 Since indemnity is the remedy of last resort for those who do not qualify for rectification, the failure to provide a full indemnity in all cases where an owner has had his interest extinguished through no fault of his own would be wrong in principle. The operation of the proposed legislation would amount to expropriation of private property rights without just compensation.

8.11 The procedure for claiming indemnity is governed by Clause 80. However, it is unclear as to who should be the counter party in this kind of proceedings. Is it meant to be the Land Registrar or the Secretary for Justice? This ought to be made clear.

8.12 Clause 81 attempts to treat a claim for indemnity as a simple contract debt, i.e., subject to a limitation period of 6 years. The limitation period applicable to proceedings for recovery of land is 12 years. Claims for indemnity are akin to proceedings for the recovery of land and there is no reason for imposing a shorter limitation period.

8.13 Clause 81 further provides that "*the cause of action shall be deemed to arise at the time when the claimant knows or, but for his own default,* ***might have known****, of the existence of his claim*". In accordance with the existing provisions in the Limitation Ordinance the words "might have known" should read "should have known".

Offences

9.1 Clause 91(2) is very alarming. The difference between Clause 91(1) & (2) is that it is an essential requirement that fraud is required in Clause 91(1). However in Clause 91(2), the offence is complete so long as the defendant has acted without lawful authority or reasonable excuse. We also believe that in this case, the intention of the Bill is to cast the onus on the defendant to show that he acted with lawful authority or reasonable excuse. Yet taking into account the sort of acts referred to in paragraphs (a) to (f) of Clause 91(1), the result would be vary alarming. We would like to point out that the acts referred to in paragraphs (a) to (c) are themselves wholly innocuous acts. For instance, the act referred to in Clause 91(a) is "issues or makes, or causes the issue or making of, any application for the registration of any matter". Thus if a solicitor honestly believing that he has the instruction of his client to complete the sale and purchase of a flat, submits an application for the registration of the transfer, he will be guilty of the offence unless the fact that he is instructed by his client is a sufficient lawful authority or reasonable excuse for him to

make the application. However if he negligently thinks that he has the authority but in fact his instruction to act has been withdrawn, then he will no longer have any lawful authority or reasonable excuse for making the application for the registration of the matter. He will be guilty of an offence and liable to be imprisoned for 3 years. Examples of this kind can be multiplied. We see absolutely no reason for criminalising mere negligent acts. However this would appear to be an area which the Law Society would be a lot more concerned with.

Dated this 9th day of February, 1999.

附錄 II
Appendix II

HONG KONG BAR ASSOCIATION

Comments on the Revised Land Titles Bill

Introduction

1. The Bar refers to the letter of the Land Registrar to the Bar Chairman dated 24th December 2001 by which the Bar was informed that changes were being made to the Land Titles Bill ("**the Bill**") and enclosing a paper ("**the Paper**") which explained the major changes. It has been asked to give its comments on these changes.

2. The Bar has been told that drafting of the Revised Bill is now proceeding but the process is complex and likely to take sometime. Until the Bar has the opportunity to see the actual draft of the Revised Bill, it will not be able to give its specific comments to the proposed legislation. At this stage, its comments can only be general and they are made in relation to the changes outlined in the Paper.

3. The Bar has previously submitted its comments on the previous draft of the Bill by a report dated 9th February 1999 ("**1st Report**"). On 24th November 1999, it made its further comments on 7 issues of concerns raised by the Land Registrar ("**2nd Report**").

4. The Bar would repeat paragraph 1.3 of the 1st Report in which it expressed the view that the impact of the Bill was significant and it was important that the proposed changes should be widely publicized and their implementation should only take place after informed public discussion and consultation. The public must not be misled into believing that the proposed changes are merely procedural in nature, or that the same are merely designed to simplify conveyancing documents and procedures. The proposed legislation is a substantive reform of land titles in Hong Kong.

5. In the following paragraphs, the Bar shall set out its views on the proposed revision of the original Bill.

Application of the Bill

6. The Bar notes that the previous proposal of effecting an overnight conversion of the land registration system has now been dropped. Instead there will be a gradual conversion from deeds to title registration so that a dual system will exist in parallel after the enactment of the Bill into legislation. It believes this is a step in the right direction. It has had grave reservation to the original proposal for overnight conversion and it is pleased that its reservation has been addressed. It agrees that automatic conversion should only be considered at a later stage after the

public has become familiar with the new system. It believes that the previous proposal of overnight conversion, involving as it is a very drastic change to land titles in Hong Kong, is a recipe for disaster. The dropping of that proposal is very much welcomed.

7. The Bar's concern about the dual system now proposed is a practical one. Will the Land Registry computer and information facilities be able to handle such a dual system working in parallel? It notes that in the Paper, it is said that the Land Registry system will be able to handle the complexities of parallel running. However, previously the Government had given the impression that the Land Registry would not be able to cope with a dual system (c.f. para. F2 of The Law Society's Submissions on the Land Titles Bill (14th draft)). It assumes that the Land Registry information system will be extended and upgraded to cope with the task but it would suggest that a system audit be carried out of the relevant information system to ensure that it is indeed able to handle the workload involved.

Conversion

8. There was previously a proposal of a 15 year limit for gradual conversion. In the Bar's 2nd Report, it expressed its reservation regarding a 15 year limit. As the Paper no longer mentions such a limit, it assumes that the limit is now dropped. It welcomes this as we do not think that such a limit is either necessary or appropriate. Obviously, the idea of an automatic conversion may be considered

at the later stage once the new system proves to be working well and public confidence on it is established.

9. The Bar is however not too sure about the "voluntary conversion" mentioned in para.10(c) of the Paper. It appears from para.11 of the Paper that upon voluntary conversion, unregistered interest will continue to affect the property until the owner subsequently sells the property. The question is, what benefit will accrue to an owner applying for voluntary conversion? The answer to that question is not clear from the Paper. If no advantage is to be obtained, then it is unlikely that any land owner will want to incur expenses in engaging a solicitor to examine the title and provide a certificate of good title for the purpose of the voluntary application. There will be no incentive for him to do so. His property will be brought into the new system when he sells his property anyway. It believes that if the government's intention is to encourage land owners to switch to the new system as soon as possible, then it must be made clear to the public what advantage will be gained by applying for voluntary conversion.

10. From paragraph 9 and 10(b) of the Paper, it appears to us that the intention behind the legislation is that there will be an automatic application for registration of title whenever there is a genuine sale and assignment of the property and presumably a mortgage whether legal or equitable would not automatically bring the

property into the new system. However, while it is now not possible to have a legal mortgage by way of assignment, it continues to be possible that an assignment may be held to be an equitable mortgage if in essence the assignment is by way of security. It is not unknown that an assignment with a right of re-purchase under certain conditions could amount to an equitable mortgage. It is therefore necessary for assignment to be clearly defined.

11. In principle the Bar has no objection to the requirement of a certificate of good title in the case of an application for first registration by first assignment or by voluntary application. There is however little justification that such certificate may only be issued by solicitors. There is no reason why a certificate by a barrister should not suffice. It further notes that because of this requirement of a certificate of good title, many of the title problems faced by conveyancers at the moment (such as the problem arising from loss of Government or Crown lease, obsolete offensive trade clause in the Crown lease, uncertainty of boundary especially in the old schedule lots under a Block Crown Lease or cases of missing lots under a Block Crown Lease), would remain unresolved by this proposed legislation. As certificates for good title cannot be issued for properties affected by these problems, conversion by way of voluntary application would not be possible for these properties.

Unregistered interests

12. As pointed out in para.11 of the Paper, unregistered interests will continue to affect properties brought under the title registration system through an application for voluntary conversion. After the conversion however once the owner has sold the property, the unregistered interests will no longer affect the property if the new purchaser had given value for the purchase. The Bar takes this to mean that after voluntary conversion, transactions other than transfer for valuable consideration will continue to be affected by unregistered interests. So, for example, if the property is assigned by way of gift, or if there is a transmission of title upon death, bankruptcy or liquidation, the property will still be affected by unregistered interests. Perhaps this point should be confirmed and clarified with the Government.

13. Although the position is not entirely clear from the Paper, the Bar takes it that under paragraph 10(b) of the Paper, a voluntary assignment by way of gift will still operate to make the transferee's title a registered title. If this is so, there would also be the problem arising in cases where the property is assigned for less than its market value. Bearing in mind that a purchaser for value would obtain a "perfect" registered title whilst it would appear that a volunteer would have to take the title subject to unregistered

interests, disputes may frequently arise as to whether the consideration paid is the market value or is otherwise adequate.

14. It appears that there is no provision making any transmission by operation of law, such as by succession or bankruptcy, a triggering point for registered title. If an assignment by way of gift will make the title a registered title although the registered owner will still have to take the property subject to unregistered interests, there is little basis for saying that a transmission by operation of law should not have the same result.

15. The Bar repeats para.4.1 of its 1st Report where it dealt with the ambiguity arising from the previous draft relating the unregistered interests. It hopes that the confusion mentioned in its 1st Report will be clarified when the Revised Bill is redrafted.

Overriding interests

16. The Bar supports the government's view that some well-defined categories of overriding interests to which registered titles would be subject should be retained in the proposed legislation. It agrees that interests such as those arising from short term tenancies, stamp duty first charge, squatter rights etc. should continue to

qualify as overriding interests and it is either impractical and indeed sometimes impossible to require registration of these interests. It is not cost effective to require short term tenancies to be made in writing and then registered, and it is not practical to expect registration of squatter rights. The same would apply to interests such as public rights (rights to repair highways, public drainage etc.). Such provisions for overriding interests are commonly found in corresponding legislation in other jurisdictions (see as an example, the English Land Registration Act 1925, section 70) and it does not see any problem so long as these overriding interests are well-defined. However it is of the view that other rights of the Government such as rates and property tax should not qualify as overriding interest.

17. One notable omission in the previous draft of the Bill is the absence of a counterpart of s.70(1)(g) of the Land Registration Act 1925 in relation to occupiers' interest. In England, the rights of a person in actual occupation of land or in receipt of rents and profits thereof has been preserved by statute as an overriding interest, save where enquiry is made of such person and the rights (which often take the form of rights under a resulting trust) are not disclosed. The retention of such interests as a kind of overriding interest for the purpose of title registration has given rise to cases in England such as **Williams & Glyn's Bank v. Boland** [1981] AC 487. In Hong Kong, the famous decision of **Wong Chim Ying v. Cheng**

Kam Wing [1991] 2 HKLR 253 has confirmed the validity of such interests as being equally applicable in the context of deeds registration (see also **Wong Lai Suk Chun v. Wong Chiu Ming** [1993] 1 HKC 522). Is it intended that the new legislation would statutorily repeal the **Boland** case, or is it intended that such occupiers' interests be dealt with under the relevant provisions dealing with trusts? If the intention is the former, one would want to see a good justification for purposely taking away by the stroke of a pen the interests of such persons. If the intention is the latter, it would repeat the comments made by us in paragraphs 6.1 and 6.6 of its 1st Report and its comments regarding the trust provisions of the previous draft of the Bill, particularly regarding its query on the effect of notice as raised in paragraph 6.3 of our 1st Report.

18. It is also important to clearly define whether the Government's right of re-entry under the terms of the Government Lease for accrued breaches of the covenants in the Government Lease should be treated as overriding interests.

Title Certificate

19. The Bar is not too sure about the purpose of the title certificate mentioned in paragraph 13 of the Paper. Apparently it is now the owners' free choice as to whether or not to apply for a title

certificate. It is however not clear what advantage would he get by paying a fee to obtain such a certificate if the same is not mandatory or required for proof of title. The Bar does not understand the statement that "Once issued, the title certificate will be a *title document*". In what way would the title certificate be a title document if the title register remains the conclusive evidence of the title to registered land? Presumably the production of a title certificate would *prima facie* prove the state of the up-to-date entries on the title register as at the date of the certificate. Is it intended that the purchaser be entitled to rely on the certificate as accurately recording the relevant entries on the register so that no further searches would be necessary in respect of those entries? If not, and separate proof of title is still necessary, why would anyone want to pay a fee for a certificate which is of little use? (The incentive would be even less if it is made mandatory, once the certificate is issued, that the same be produced and surrendered to the Land Registry on the sale of a property. If an owner has applied and obtained such a certificate but somehow lost it, he might find himself in great trouble when he subsequently sells his property − he has caused an unnecessary title document to be created and then is unable to produce it.) If yes, and the certificate turns out to be either incorrect or incomplete, is it intended that recourse could be made to the indemnity fund for any loss suffered as a result? The Bar believes that the revised Bill should make this clear so that there would not be any room for doubt.

Indefeasibility of title of the purchaser

20. The Bar repeats its comments made in paragraph 5 of our 2nd Report. It maintains the view that the fact that the register can be rectified represents an exception to the certainty which a title registration system is aimed to achieve. It accepts that this is an unavoidable exception but such exception should not be left at large. To give the Court the wide power of ordering rectification whenever it is satisfied that a failure to do so would be unjust is to introduce a large amount of uncertainty into the system. While it supports the proposal to widen the scope of rectification as provided in the original draft of the Bill, the Bar strongly disagrees with the idea of simply leaving everything to be decided by the Court. There should be clear statutory guidelines and limitations imposed on the Court's power of rectification. It believes that it is not conducive to establishing an efficient and certain system of land titles if "justice" is to be employed as a sole criterion in determining the exercise of the power of rectification. Concepts of "hardship" and "justice" are necessarily relative between the parties involved, but in commercial dealings certainty and speed is sometimes more important than the relative justice in an individual case. The whole point of having a title registration system is to establish a system of land titles under which professional advisers and parties alike would be able to say with confidence and with

minimum trouble whether the title of a property is good or not. Even in difficult cases where recourse to the Courts is required, it would be desirable that legal advisers would be able to tell their clients the statutory criteria that would be adopted by the Court in the exercise of its power. It would offer little comfort to parties who unfortunately have to find themselves involved in such litigation that the validity of the title hinges on the Court's view of what is just and what is not just. The parties are entitled to expect that the Court would deal with matters of land title according to some well-defined guidelines. Rectification of land titles is not the kind of matter which should be left to the unfettered and absolute discretion of the Court, and judged only by reference to the relative justice of the individual case.

21. The Bar would urge the administration to reconsider this matter and be cautious in unnecessarily diluting the certainty of title registration which is after all the primary objective of the whole system.

Indemnity

22. The Bar remains unconvinced that there should be an upper limit on the indemnity. It takes the view that the reason suggested to the effect that "individuals and companies that are able to engage in property transactions valued at over $30 million are well able to

safeguard themselves against fraud" is fallacious. It is unreal to expect anyone, however rich, to guard against fraud on his properties, and indeed very often fraud is perpetuated wholly without any knowledge on the part of the victim. It does not feel that it is in principle right to discriminate against the rich in this connection.

23. Th Bar recognizes the practical consideration regarding the amount of levy and the possibility of one large claim draining the fund. On the other hand, the effect of the proposed legislation is that property rights are being expropriated, and in cases of fraud, through no fault of the owner concerned. As a matter of principle, it is not right for any civilized society to enact legislation having the effect of depriving a person of his property without adequate and equitable compensation. In this connection, it would remind the Government of its obligations under Articles 6 and 105 of the Basic Law under which the HKSAR has the duty of protecting private ownership of property in accordance with law. Where properties are deprived in accordance with law, there is a right to compensation for which the HKSAR has the duty to protect. Such compensation shall, in accordance with Article 105, "correspond to the real value of the property concerned at the time and shall be freely convertible and paid without delay". Whether the proposed upper limit might infringe this part of the Basic Law needs to be carefully examined by the administration.

24. Another issue that required to be addressed in connection with the question of indemnity is the class of persons who are qualified to make claims. On the wordings of the previous draft, and it appears from paragraph 5 (a) of the Paper, that the indemnity is only available to owners who has suffered loss as a result of fraud of any person or the mistake of the Land Registry staff. However it must not be forgotten that it is not only the owners who can suffer loss. Incumbrancers (e.g. a mortgagee whose mortgage is fraudulently discharged), like the owners, can be the victims of fraud. If indemnity is made available only to those who "suffered loss of ownership" (as paragraph 5 (a) seems to suggest), incumbrancers who have been cheated out of their securities might be left without any remedies at all.

25. As regards mistake of the Land Registry staff, the Bar does not know if it is intended that mistakes that are being "carried over" from the present register to the title register would be covered by the indemnity. Certainly it is well known that the present register is not necessarily accurate, but the present register would form the basis of the future title register. However, under the previous draft of the Bill, the Land Registry staff whose mistakes may give rise to claim for indemnity are only those persons referred to in Clause 8 (3) of the Bill, and it is not clear that those persons would include the staff working in the Land Registry before the coming into

effect of the new legislation. That being the case, mistakes that are being carried over from the old register may well be exempted from the protection of the indemnity provisions and it does not see any justification for it.

Land Boundaries

26. Certainly the owners who would be keen to obtain a registration of land boundary plans are those who presently have a dispute with neighboring owners over the lot boundaries of their properties, or who have reasons to believe that such disputes are likely to arise in the future. The Bar is of the view that it may not be just to the neighbouring owners for an owner, knowing that he has a dispute with his neighbours or that a dispute is likely to arise, to secure registration of a lot boundary plan behind the back of his neighbours. This is particularly so in those cases where the relevant plan is prepared by land surveryors appointed by him as described in paragraph 16 (e) of the Paper. The Bar therefore suggests that a requirement be made as a condition for any application for registration of boundary plans that proper notice be given to neighbouring owners and a way be provided for these neighbouring owners to make any objection or submission to the Land Registrar within a specified period of time.

27. It is also not clear what legal effect would follow from the

registration of the boundary plans. As pointed out in the Paper, the indemnity provisions would not apply to boundaries description. Would registration of boundary plans serve as either conclusive or prima facie evidence of the boundaries of the lot as identified in the registered plans? If not, what advantage will be gained by registering such lot boundaries plans?

28. Finally, the Bar would like to point out that the question of boundary and the question of title to any property are intertwined. If the boundary of the land is such that certain part of the land is occupied by a neighbour, then under the existing law, the title to the land could not be said to be a good title.

Criminal Liability

29. The Bar agrees with the proposed revision to the provisions of criminal liability.

Dated this 25th day of March 2002