



FIRST AMERICAN TITLE INSURANCE COMPANY

29 December 2003

BY FAX 2869 6794
AND BY POST

The Clerk
The Bills Committee on Land Titles Bill
Legislative Council Secretariat
3/F Citibank Tower
3 Garden Road
Central

Dear Ms Chan

Land Titles Bill – Title Insurance

Thank you for your letter of 27 November from which we note that the Bills Committee of the Legislative Council has asked us to provide the following:

1. Comments on whether title insurance is a potential means of dealing with the proposed cap on the indemnity under the Land Titles Bill (“Bill”);
2. Information regarding premium rates;
3. Information regarding the provision of title insurance; and
4. Comments on how title insurance can be used to complement the Bill.

We respond to the first three of these questions in this letter. However, the fourth question requires detailed comment and we attach a paper which comments on the limitations of the Bill and how title insurance could be used to provide a more comprehensive and protective land titles system. We would ask that this paper is considered by the Bills Committee in view of the serious concerns expressed regarding the scope of the Bill, its proposed manner of implementation and the effect this may have upon the Hong Kong property market. We have summarised in this letter the principle points made in our paper for your ease of reference.

1. **Is title insurance a potential means of dealing with the proposed cap on the indemnity under the Bill?**

The answer to this is a qualified yes. Title insurance is certainly capable of covering the excess of risks excluded by the Bill (and as mentioned below, those exclusions go far wider than the simple cap on the indemnity).

However, for title insurance to be a feasible long term remedy to the cap on the indemnity, one or more insurance companies needs to be committed, with adequate reinsurance arrangements in place, to provide the product where required over a fixed period of time. If title insurance is generally limited to coverage in excess of HK\$30m for the limited risks set out in the Bill, then there is a question mark as to whether this would be sufficiently attractive for insurance companies.

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The answer is to provide a more comprehensive insured land titles scheme which would deal both with the cap on the indemnity and all the other limitations of the Bill. In this case our insurance company would certainly be interested in providing this product over a committed period of time.

2. Information regarding premium rates

Indicative premiums which we would charge in relation to a Hong Kong title insured land titles system are set out in Appendix 5 of the attached paper. These rates broadly cover the wide range of risks referred to in the paper. Note the rates are dependent on a range of issues but in particular a comprehensive insured system being put in place, the final legislation, the procedures and subrogation rights.

We operate in over 60 different jurisdictions and charge different premiums in different jurisdictions dependent on the legislation in place and our perception of the risks involved. The rates vary considerably. The Appendix to this letter sets out the premiums we charge in California, the jurisdiction in which are incorporated.

To meet with the needs of each market, we have differing business strategies in each country in which we operate. We are therefore not able to give the rates we charge in other countries because they will not form a direct comparable. For example, in The United Kingdom, our business concentrates on providing insurance to properties with a defective title. In Australia, since being established in 1996, we have been providing title insurance to banks and lenders in refinance transactions.

3. Information regarding the provision of title insurance

(a) Issues in the provision of title insurance in Hong Kong and other countries

Before we establish a title insurance business in any country, we undertake a meticulous due diligence study on the land holdings system to determine whether the system meets our internal underwriting guidelines for issuance of policies and whether title insurance can be provided at a reasonable cost. The main challenge is analysing the risk as many countries have less than certain land law principles.

We carried out this exercise before we set up business in Hong Kong. Since being established in Hong Kong in 2001, we have further developed our detailed underwriting guidelines for all types of property transactions. From an underwriting point of view, we have been able to provide a valuable title insurance product in Hong Kong. In addition, in view of the forthcoming change in the land titles system, we have carried out a detailed study on the Bill itself exploring how title insurance can facilitate the passing of the Bill.

(b) Issues in the provision of title insurance in Hong Kong after implementation of the Bill

The answer to this question really depends upon the form that the Bill takes and in particular the conversion mechanism. It also depends upon the treatment of conveyancing risk within the Solicitors Indemnity Fund and we very much view this as a linked issue. However, our general comment is that the scope of the indemnity provided by the Bill is so limited and the conversion mechanism so problematical, there will be ample scope for the title insurance business in Hong Kong after the passage the Bill.

Having said that, we believe that title insurance can be used in a much more positive way to assist the implementation of the land titles system as explained in our attached paper.

4. Comments on how title insurance can be used to complement the Bill

(a) Limitations on scope of indemnity

The Real Estate Developers Association of Hong Kong (“REDA”) has essentially raised one fundamental objection to the Bill, that is, that if a person can innocently lose an interest in land as a result of the operation of the land titles system, he should be entitled to have his loss indemnified in full. REDA has pointed specifically to the proposed limit of the indemnity under the Bill.

However, the Bill actually departs from this fundamental principle in several other important ways. Indeed, in terms of the number of interests affected, these other limitations are perhaps more important for the consequence of passing the Bill in its present format could well be the loss of ownership and other interests in land without **any** compensation whatsoever. This must be unacceptable.

To remedy these limitations so as to provide a useful and workable land titles system requires the acceptance of the risks inherent in a land titles system, either by the Government or by a third party insurer.

So the most significant way in which title insurance can complement the Bill is by dealing with all of the material limitations on the scope of indemnity at an affordable cost. We believe that title insurance is a tool which can enable the Government to implement the type of land titles system the Hong Kong property market needs.

The limitations on the scope of indemnity in the Bill are dealt with in depth in the attached paper. However they may be summarised as follows:

- (i) The cap on the indemnity irrespective of loss above this amount. As rectification of the register may not be awarded if a bona fide purchaser for value is in possession of the relevant property, this clearly means that an interest in land could be lost without full compensation.
- (ii) No indemnity for fraud, mistake or omission before first registration that is not discovered until afterwards. So, importantly, if fraud occurred before first registration which leads to a loss of an interest, then the owner of that interest has no right to claim any compensation at all.
- (iii) Indemnity for fraud limited to loss of ownership interests. It appears there will be no indemnity for loss of a mortgagee’s interest or other interests such as an occupational lessee’s interest or a covenantee’s interest. Mortgagees’ interests are obviously the most common of the interests affected by this limitation. We believe that this provision renders the proposed system largely ineffectual.
- (iv) No indemnity for loss resulting from void or voidable transactions (other than by Land Registry staff). There are many examples of void and voidable transactions which could result in loss of interests without compensation.
- (v) No indemnity for loss of unwritten equities. Under the proposed land title system, bona fide purchasers for value take the property free from unwritten equities unless the interest holder protects it by registration of a caution. No indemnity is payable to the holder of unregistered equitable interests. Registration of a caution is an aggressive act and is inappropriate for many family situations where such interests usually arise.

Title insurance is available to cover all of these limitations and can be used in conjunction with the land titles system as described below.

One of the major benefits of the Bill is that it will cure technical title defects and thus facilitate smoother conveyancing and mortgaging transactions. Many title defects are indeed technical in nature. However, all title defects bear the same basic risk: someone other than the apparent owner has some interest in or encumbrance over the property.

By “curing” such defects then through the land titles system, there is a risk that current property interests and encumbrances may cease, without compensation, as a result of the land titles system. There is no pre-defined way of determining with absolute certainty what is a technical or real defect. Accordingly, we believe that a system needs to be put in place whereby the potential for the loss of property interests is kept to a minimum but that any interests that are lost are fully compensated. Without this safeguard, the Hong Kong land titles system will be subject to criticism.

(b) Conversion mechanism

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

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

The issue of how properties are converted to the new system has been a cause of considerable debate over the years and remains so. We have given detailed comments in the attached paper on the conversion mechanism, for the present draft of the Bill fails to achieve to the greatest extent possible the objectives outlined above.

We have suggested an alternative, indemnified transitional conversion, which may assist in dealing with the issues raised by the Law Society regarding the reliance on solicitors' certificates of title and the issues raised in the past by others regarding midnight conversion.

An indemnified transitional conversion essentially means the registration of title to the property in the name of the registered owner under the Land Registration Ordinance but subject to all encumbrances registered under the Land Registration Ordinance and, until the first dealing of the property, all unwritten equities. Where on the first dealing of the registered property, unwritten equities are then lost for whatever reason, the person suffering the loss will be indemnified.

This then would allow a much smoother conversion without the problems inherent in solicitors' certificates of title but with full protection for the owners of equitable

interests. Note however that this suggestion is not a pre-requisite to the use of title insurance in relation to the land titles system.

(c) Benefits of an insured land titles system

In summary, we believe that a title insured land titles system could have the following benefits if framed correctly:

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

(d) Uses of title insurance in a land titles system

There are several ways in which title insurance can be used to complement the land titles system and this would depend upon which conversion mechanism is adopted. However, basically there are three options:

- (i) Direct insurance - the insured owner, bank or other interested party could take out direct insurance as a pre-condition of registration and recover directly from the title insurer.
- (ii) Reinsurance - the title insurer agrees to reinsure claims on the Land Registry indemnity fund. The reinsurance arrangement could include claims

management and cover legal costs. Cover could exceed the amount of the Land Registry's indemnity and the limits on the indemnity.

- (iii) Direct Insurance + Reinsurance. This is a combination of direct insurance and reinsurance. The owner, bank and any other person benefiting from a registrable instrument, e.g. a mortgagee or lessee, take out title insurance upon each dealing of the property as a pre-condition to registration. At the same time there is a reinsurance arrangement between the title insurer and the Land Registry which deals with any losses which are not covered by a direct insurance policy. Accordingly, certain claims would be dealt with directly by the title insurer; others would be dealt with by or on behalf of the Land Registry and losses recovered under the reinsurance mechanism.

(e) Relationship with insurance for negligent conveyancing

Conveyancing insurance is available to cover both title and non-title matters in a number of different ways. The inter-relationship between conveyancing risk and the land titles system is close and we believe that title insurance is capable of use to limit claims on SIF, to realign contributions to SIF and to provide, at the same time, a comprehensively insured land titles system. Subject to the implementation of risk management processes, the title insurer will waive subrogation and other rights against solicitors. This will relieve SIF of much of the burden of conveyancing related claims. The land titles and SIF aspects of conveyancing risk should preferably be considered alongside one another.

We believe that the land titles system is imperative for Hong Kong in the long term but that the limitations of the Bill reduce its effect to an unacceptable extent. We believe title insurance can assist in producing a much more effective land titles system for Hong Kong.

We hope that this letter and the attached paper will give the Bills Committee the core information it has sought. However, there are complex issues involved and we would welcome the opportunity of meeting with the Committee to discuss them. If the Committee is interested in exploring further our ideas, we would be delighted to assist in any way we can.

Yours sincerely



Hilary Cordell
Chief Executive Hong Kong
First American Title Insurance Company

c.c Hon Margaret Ng (Chairman)

Appendix Indicative pricing

Direct Insurance

Direct insurance means a title insurance policy is issued to the person with an interest in the property e.g. owner, mortgagee.

Secondary properties

Insurance Amount (HK\$)	Hong Kong		California, USA	
	Owner's Premium (HK\$)	Interested Party's Premium (HK\$)	Owner's Premium (HK\$)	Interested Party's Premium (HK\$)
Up to 2M	1,200	500	8,000	3,000
2,000,001 – 4,000,000	0.1%	800	0.3%	4,350
4,000,001– 8,000,000	0.085%	1,200	0.25%	6,000
8,000,001 – 30,000,000	0.08%	2,500	0.2%	10,000
30,000,001 – 75,000,000	0.075%	5,000	0.19%	35,000
75,000,001 or above	0.06%	10,000	0.15%	nil

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

Reinsurance

Basically, the premium would be half of secondary property direct insurance rate based on the consideration of the transaction and this would only be paid for first registration.



*First American
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in a
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CONTENTS

- 1. INTRODUCTION**
- 2. OPERATION OF LAND REGISTRY INDEMNITY SCHEME**
 - 2.1 Overview of title registration
 - 2.2 Treatment of unwritten equities
 - 2.3 Circumstances for payment of indemnity
 - 2.4 Amount of indemnity
 - 2.5 Procedure for claiming indemnity
 - 2.6 Recovery of indemnity paid
 - 2.7 Comments on indemnity scheme
- 3. ISSUES WITH CONVERSION MECHANISM**
 - 3.1 Introduction
 - 3.2 Gradual conversion
 - 3.3 Midnight conversion
 - 3.4 Indemnified transitional conversion
- 4. USE OF TITLE INSURANCE IN A LAND TITLES SYSTEM**
 - 4.1 Overview of title insurance
 - 4.2 Comparison between a solicitor's certificate of title and title insurance
 - 4.3 Comparison between Land Registry indemnity scheme and title insurance - Coverage
 - 4.4 Comparison between Land Registry indemnity scheme and title insurance - Exclusions
 - 4.5 Comparison between Land Registry indemnity scheme and title insurance – Indemnity
 - 4.6 Benefits of an insured indemnified conversion
- 5. OPERATION OF AN INSURED LAND TITLES SYSTEM**
 - 5.1 Overview
 - 5.2 Direct insurance
 - 5.3 Reinsurance
 - 5.4 Direct insurance + Reinsurance
 - 5.5 Illustrations of use of title insurance

- 5.6 Indicative procedures for issuing a title insurance on a purchase and mortgage
- 5.7 Premiums
- 5.8 Inter-relationship with insurance for negligent conveyancing

6. DETAILED PROPOSAL

7. RESERVATION

8. SUMMARY

- Appendix 1 Examples of property interests and encumbrances that may cease as a result of the title registration system
- Appendix 2 Analysis of qualifications and assumptions under solicitor's completion certificate
- Appendix 3 Comments on solutions to issues with title certification
- Appendix 4 Comparison of the treatments of claims under an uninsured and insured title registration system
- Appendix 5 Indicative pricing
- Appendix 6 Number and value of claims by type of errors in conveyancing between 1st October 1996 to 30 September 2001
- Appendix 7 Information about First American Title Insurance Company

LAND TITLES BILL

Title Insurance in a Land Titles Registration System

1. INTRODUCTION

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

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

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

2. OPERATION OF PROPOSED LAND REGISTRY INDEMNITY SCHEME

2.1 Overview of title registration

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

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

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

2.2 Treatment of unwritten equities

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

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

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

2.3 Circumstances for payment of indemnity

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

2.4 Amount of indemnity

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

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

2.5 Procedure for claiming indemnity

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

2.6 Recovery of indemnity paid

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

2.7 Comments on indemnity scheme

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

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

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

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

3. ISSUES WITH CONVERSION MECHANISM

3.1 Introduction

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

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

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

3.2 Gradual conversion

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

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

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

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

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

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

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

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

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

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

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

3.3 Midnight conversion

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

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

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

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

3.4 Indemnified transitional conversion

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

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

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

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

4. USE OF TITLE INSURANCE IN A LAND TITLES SYSTEM

4.1 Overview of title insurance

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4.6 Benefits of an insured indemnified conversion

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

5. OPERATION OF AN INSURED LAND TITLES SYSTEM

5.1 Overview

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

5.2 Direct insurance

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

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

5.3 Reinsurance

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

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

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

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

5.4 Direct Insurance + Reinsurance

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

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

5.5 Illustrations of use of title insurance

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

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

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

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

5.7 Premiums

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

5.8 Inter-relationship with insurance for negligent conveyancing

- (a) According to the Willis report, solicitors' negligence in failing to spot or investigate a title defect accounts for 10% of losses totalling approximately HK\$86m in a five year period. The figure is alarming in the context of the Bill whereby registration of title takes place upon production of a solicitor's certificate of title and many potential losses of interests are not compensated.
- (b) Under the land titles system, the property will be held subject to any registered matters affecting the property, for example, an existing mortgage. If a solicitor fails to advise his client of any such matters recorded in the title register, the client will not be able to claim an indemnity from the land registry. The remedy will lie against the solicitor in negligence.
- (c) Again, under the land titles system, ownership of property is conferred by registration. It is proposed in the Bill that no indemnity shall be payable for an omission from the register which results from a failure to register a document. If a solicitor fails to register a transaction for a purchaser, the purchaser's interest will not be protected by the title registration system. The remedy lies against the solicitor in negligence.
- (d) There are many other instances where negligence can occur in conveyancing transactions and many issues are both title and non-title related matters. The following is taken from the Willis' report: "Under a registered title system mistakes such as breach of undertaking, conflict of interest, delay, failure to answer requisitions, failure to conduct searches, fraud, late stamping, loss of documents and missed time limited will still continue". Appendix 6 sets out the broad categories of claims over the past few years.
- (e) Conveyancing insurance is available to cover both title and non-title matters in a number of different ways. The inter-relationship between conveyancing risk and the land titles system is close and we believe that title insurance is capable of use to limit claims on SIF, to realign contributions to SIF and to provide, at the same time, a comprehensively insured land titles system. Subject to the implementation of risk management processes¹, the title insurer will waive subrogation and other rights against solicitors. This will relieve SIF much of the burden of conveyancing related claims. The land titles and SIF aspects of conveyancing risk should preferably be considered alongside one another.

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

6. DETAILED PROPOSAL

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

7. RESERVATION

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

8. SUMMARY

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

First American Title Insurance Company²
29th December 2003

² Information about First American Title Insurance Company is set out in Appendix 7.

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

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

APPENDIX 2

Analysis of qualifications and assumptions under solicitor's completion certificate

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

APPENDIX 3

Comments on title master solution to issues with title certification

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

APPENDIX 4

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

Direct insurance

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

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

Reinsurance

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

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

APPENDIX 5 Indicative pricing

Direct Insurance

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

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

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

Secondary properties (All properties other than primary properties)

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

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

Reinsurance

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

Appendix 6³

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

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

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

APPENDIX 7
Information about First American Title Insurance Company

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

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

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