

Bills Committee on Land Titles Bill

**Preliminary Response to Law Society Proposal
For 'Daylight Conversion'**

Purpose

This paper provides an initial response to the proposal for a system of 'daylight conversion' outlined in the letter of 16th December 2003 from the Law Society. In particular it outlines the nature of the changes to the present bill that this proposal would require.

Background

2. The Law Society proposal was outlined in the attachment to their letter of 16th December 2003, a copy of which is attached as Annex A for ease of reference. The main features of the proposal are:-

- (a) All properties are to be placed on a provisional register;
- (b) As from the commencement date of the bill, no new unwritten interests can be enforceable against the land;
- (c) The provisional title can be defeated by a claim made under a caution lodged for registration within 12 years from the commencement date;
- (d) After 12 years, properties will be brought under the full title register and protection of the indemnity scheme unless a caution against registration has been lodged;
- (e) There should be no voluntary conversion or full registration of new property in the interim.

Impact on Existing Bill

----- 3. At Annex B is a table that sets out the Administration's initial assessment of the extent of changes that would be needed to the present Bill if the Law Society proposal were to be adopted.

Preliminary Assessment

4. The Law Society proposal endeavours to find a solution to the process of bringing most properties onto the title register without risk of loss of substantive unregistered rights during the conversion process, which risk would have to be borne by either Government or the solicitors. It uses the limitation period for recovery of land to extinguish possible claims before conversion. In this respect it is similar to earlier proposals for a 15 year conversion period. However, it goes beyond this by proposing the adoption of an additional system of cautions against first registration. This would give a claimant to an interest in property a means to prevent loss of that right due to first registration if he intended to or was in the process of establishing his right through the courts. Cautions against first registration are a feature of the English title legislation. The Law Society proposes that such cautions should lapse after 12 months unless proceedings have commenced to resolve the issue underlying the caution.

5. The proposal calls for all properties to be placed on a provisional register during the 12 years prior to registered title being granted. We are doubtful as to the benefit of this. While on the provisional register a property would appear to be subject to all the unregistered claims to which it may be subject under the present system. Furthermore, property on the provisional register would not be protected by the rectification or indemnity provisions of the Bill. There would be no real change of status that would justify creating new terminology. The key provision in the proposal appears to prevent any new unregistered interest being created after the commencement of the Bill. This could operate with the existing deeds registration system to prepare for conversion to title registration after the lapse of the limitation period. It does not need a provisional register.

6. The proposal does not include provision for any new properties (that is, land granted under any Government lease) created during the period between commencement of the legislation and the conversion to title registration to be brought directly onto the title register. We do not see any strong grounds for deferring title registration for new properties.

7. The proposal does not allow any voluntary applications for conversion nor does it provide for circumstances in which applications are mandatory.

8. The Administration is seeking further clarification from the Law Society on the proposal and will report further to the Bills Committee on 30th January.

Housing, Planning and Lands Bureau
January 2004



THE
LAW SOCIETY
OF HONG KONG
香港律師會

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

BY FAX (28992916) AND BY POST

16 December 2003

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

Dear Miss Cheung,

LAND TITLES BILL – CONVERSION MECHANISM

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

Certificate of Good Title or Holding Title

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

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

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

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

Other Options:

Midnight Conversion

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

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

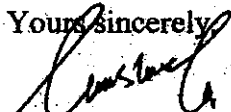
Daylight Conversion

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

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

Recommendations

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

Yours sincerely


Christine W. S. Chu
Assistant Director of Practitioners Affairs

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



For copy received on 16.12.2003

SUGGESTED SCHEME OF DAYLIGHT CONVERSION (Simple Outline)

Part I - The Scheme

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

Part II - Advantages

The above arrangements would entail:

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

Annex B : Initial Assessment of Changes required to LTB to provide for ‘Daylight Conversion’ as proposed by Law Society

	Part/Clause	Requirement	Remarks
1	Pt 1, Cl 2	New definitions for ‘Provisional Title’, ‘Provisional Title Register’, ‘Caution against conversion’	Not presently defined. Existing definitions will have to be reviewed to ensure consistency. If it is agreed that provisional title is not necessary, only a definition of ‘caution against first registration’ is required.
2	New Part	New Part is to cover Provisional Title. It will need to include: <ol style="list-style-type: none"> 1. Effect of commencement to preclude any new unwritten interest having an effect in rem. 2. Effect of commencement to convert all land to Provisional title 3. Definition of nature of provisional title 4. Definition of provisions of bill not applicable to provisional title (e.g Cl 81 and Cl 82) 5. How CPO applies to provisional title 6. Provision for cautions against first registration 	If it is agreed that provisional title is not needed, only items 1 and 6 are required. If provisional title is used, many existing clauses including 21, 22, 23(2), 24, 26 and 29 will have to be modified to allow for this condition. If a provisional register is avoided, such modifications can be avoided.
3	New Part	New Part to cover conversion to title register of all properties after 12 years except: <ol style="list-style-type: none"> a) properties against which cautions against first registration stand; and b) properties for which instruments delivered for registration have not yet been duly registered. 	Alternatively, to be inserted in Part 2 in place of clauses 12 and 13.

	Part/Clause	<i>Requirement</i>	<i>Remarks</i>
4	Part 2, Cl 12, 13	Repeal	Replaced by 'daylight conversion' mechanism
5	Part 11, Schedule 2	Make consequential amendments to repeal LRO and regulations	