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Bills Committee on Land Titles Bill

Background Brief on Land Titles Bill

Purpose

This paper sets out the background of the Land Titles Bill, and summarizes the major concerns raised by Legislative Council (LegCo) Members on the main features of the relevant legislative proposals put forward by the Administration in 1994 and the draft legislative proposals in 1999 and 2002.

Background

2. The present system of land registration is a deeds registration system (DRS). Even if a person is registered in the Land Registry as the owner of a property, he may not be the legal owner because there may be uncertainty or defects in his title to the property. The uncertainty of title places purchasers at risk, causes confusion to the general public and reduces the commercial potential of properties in some cases. In order to establish title to property, it is necessary in every case to check the title documents recording all the transactions affecting the property that extend to not less than 15 years before the current contract of sale of that property.

3. In May 1988, a Working Party on Title Registration chaired by the then Registrar General and comprising practising solicitors from prominent conveyancing law firms and representatives of the Law Faculty of the University of Hong Kong was set up to consider the desirability of converting the present DRS to a land title registration system (LTRS). The Working Party, having considered the major types of registration systems operating in other jurisdictions, concluded that conversion to a LTRS was desirable. The Law Society of Hong Kong (Law Society) was consulted on the proposal and supported it in principle. Subsequently, Professor Peter Willoughby was appointed as a consultant to examine the conversion process in detail. In his report produced in March 1991, he made recommendations for the conversion. The Law Society, Hong Kong Bar Association and a number of other interested bodies were consulted on the proposal.

4. In November 1994, the Administration introduced a Land Titles Bill into LegCo with a view to converting the present DRS to a LTRS. A Bills Committee was formed by LegCo to scrutinize the Bill. As the scrutiny of the Bill could not be completed before the end of the term in July 1995, the LegCo House Committee agreed on 16 June 1995 that the Bills Committee should curtail its work.

5. After the lapse of the Bill in July 1995, the Administration maintained dialogue with the Law Society and a number of amendments were subsequently made to the original Bill. In January 1999, the Administration consulted the LegCo Panel on Planning, Lands and Works (PLW Panel) on a draft Land Titles Bill and subsequently issued the draft Bill to the concerned parties for comments. In November 1999, the Administration briefed the PLW Panel on the outcome of the consultation exercise and its proposed amendments to the draft Bill. Following that, the Administration reviewed and revised various elements of the draft Bill, and consulted the interested parties on the revised draft Bill.

6. In July 2002, the Administration consulted the PLW Panel on the revised draft legislative proposals. In December 2002, the Administration introduced the current Land Titles Bill (current Bill) into LegCo.

Major concerns raised on legislative proposals in 1994, and draft legislative proposals in 1999 and 2002

7. The major concerns raised by LegCo Members on the main features of the legislative proposals put forward by the Administration in 1994 and the draft legislative proposals in 1999 and 2002 are summarized in the following paragraphs.

Conversion arrangement

8. The Land Titles Bill introduced in 1994 proposed an automatic conversion arrangement under which land registers held under the DRS would be deemed to be land registers under the LTRS on the day when the new system came into operation. The proposal caused concern, as automatic conversion would extinguish certain rights enforceable, though not necessarily registered, under the present system at the cut-off point. Members of the then Bills Committee formed to study the Bill supported a gradual approach.

9. To address the concerns about automatic conversion, the Administration proposed under the revised draft Bill in 1999 gradual conversion from the present system to the new system over a period of 15 years. When the PLW Panel was consulted on 18 November 1999, members considered the revised proposal not entirely different from the original one, as

the problem of automatic midnight conversion would still remain, though deferred for 15 years.

10. Under the current Bill, gradual conversion from the present system to the new system is proposed, without a fixed period after which automatic conversion will take place. A property will be brought under the LTRS on the first assignment of the property after the commencement day of the Land Titles Ordinance (if enacted), new issue of the Government lease or on voluntary application by an owner. Properties which are not brought under the LTRS will remain on the DRS.

11. When the PLW Panel was consulted on the current proposal on 5 July 2002, the Administration provided the following responses to members' questions:

- (a) In view of the strong objections against the revised proposal put forward in 1999, the Administration considered it not appropriate to set a fixed date for automatic conversion at this stage. It would revisit the idea of automatic conversion some time after the implementation of the new system and when people have become accustomed to it;
- (b) With the reforms undertaken by the Land Registry in recent years to increase its efficiency, the Administration was confident that the DRS and LTRS could be operated in parallel without undue costs; and
- (c) As regards properties with problems identified in the historical title deeds which could not be rectified (e.g. missing signature of a previous owner of the property who had already passed away), given that the period for perusing the historical title deeds in tracing the chain of titles for property transactions was 15 years, such properties might be able to register under the LTRS if the problem identified was beyond the 15-year period.

Indefeasibility of title of purchaser

12. One of the main features of the LTRS is to provide security of title. Under the Land Titles Bill introduced in 1994, the land register would not be rectified so as to affect the indefeasible title of innocent purchaser even in the event of a fraudulent transfer of property achieved through the fraud of a third party. The Government would indemnify the innocent original owner up to a limit and such compensation would be recoverable from the party responsible for the fraud. Members of the then Bills Committee were concerned that under the new system, the original owner had no way of getting back his title to the property in case of fraud, whereas under the existing system, the original owner could apply to the court for a ruling. Some members considered that

the original owner should be given back the title to the property and the bona fide purchaser of the property should be given monetary compensation.

13. The Administration retained its original proposal in the draft Bill put forward in January 1999. Some members of the PLW Panel considered the proposed arrangement unfair to the original owner, in particular where the value of the property might exceed the upper limit of indemnity. They considered that it should be left to the court to decide the title to a property in fraudulent transfer.

14. In response to strong representations from LegCo Members and other parties that the principle of indefeasibility should be diluted to protect the innocent original owner, the Administration proposed under the revised draft Bill in November 1999 that the court should be allowed to order rectification of the land register where the court is satisfied that a failure to do so would be unjust. When the PLW Panel was consulted on 18 November 1999, a member enquired about the meaning of "unjust" and whether there were similar provisions in other jurisdictions. The Administration then advised in its reply dated 7 March 2000 (circulated to members of the Panel on 8 March 2000 vide LC Paper No. CB(1)1128/99-00) that section 82(3)(c) of the Land Registration Act 1925 of England and Wales also provided the court with such power of rectification when it was considered that it would be unjust not to rectify the register. The Administration also provided two English cases which included decisions on the meaning of "unjust" in section 82(3)(c) of the Land Registration Act (*Claridge v Tingey* [1967]1 WLR 134-142 and *Epps and another v Esso Petroleum Co. Ltd.* [1973]1 WLR 1071-1083).

15. In the current Bill, the Administration retains its revised proposal in November 1999 and further proposes that the court may take into account two criteria when considering whether to rectify the title register where a fraud has occurred: the acts of the parties and the hardship to the parties (Clause 81(3)). At the PLW Panel meeting on 5 July 2002, members were advised by the Administration that the first criterion, "acts of the parties", might include the acts committed before and after the change of property ownership. As regards the second criterion, "hardship to the parties", the court might consider the hardship caused to the parties by the loss of the ownership of the property in question.

Indemnity provisions

16. The Land Titles Bill introduced in 1994 provided an indemnity scheme for people who suffered loss by reason of an entry in or an omission from the land register arising from either fraud affecting the ownership or mistakes/omission of the Land Registry staff. The proposed scheme would provide indemnity for two types of losses: loss due to negligence of the Land Registry staff and loss as a result of fraud by any person. On the first type of loss, the proposed scheme would provide, as is already the case under the

existing system, full compensation for persons suffering loss as a result of negligence of the Land Registry staff. As regards loss due to fraud, the indemnity would be capped at a limit determined by the Financial Secretary and published in the gazette. An initial upper limit for each claim was proposed to be \$20 million.

17. While a member of the then Bills Committee opined that the Administration should give due consideration to the practicability of provision of such a comprehensive indemnity scheme, some members queried why the indemnity for fraud should be capped. In this connection, members noted that the Governments in the United Kingdom and most other commonwealth countries did not cap their indemnity. In response to members' queries, the Administration provided the following reasons for proposing an upper limit and setting it at \$20 million for each claim:

- (a) The indemnity scheme was designed to be self-financing. It should be funded by the users of the LTRS. The interest of individuals being compensated should be balanced against the costs to property owners and purchasers at large.
- (b) Deliberate fraudulent acts were difficult to anticipate and prevent. There should be a suitable device to limit the potential liability that the scheme had to carry.
- (c) The spirit of the scheme was to protect those most in need, i.e. the average flat owner.
- (d) The proposed upper limit would provide protection for the great majority of property owners since about 99.2% of property transactions involved sums less than \$20 million. Purchasers of properties costing over \$20 million were usually companies or people who should have adequate resources and legal advice to protect their interest.
- (e) Setting too high a limit might have the effect of encouraging parties to act less prudently than they should.
- (f) Government would be the compensator of first resort. Persons suffering loss in excess of the limit of compensation could still recover the shortfall through further legal proceedings.

18. After reconsideration, the Administration proposed under the revised draft Bill in 1999 and the current Bill (clauses 82 to 86) to retain the indemnity provisions. It also proposed that the upper limit for each claim in fraud cases to be raised to \$30 million. This proposed sum would cover 99.6% of all property transactions. When the PLW Panel was consulted on 18 November 1999 and 5 July 2002, a member expressed concern about the proposed cap of

\$30 million on the indemnity fund. The member considered that the Administration should set up a mechanism to provide reasonable protection to the owners of properties valued at over \$30 million. The Panel noted the Administration's view that owners of such properties could secure title insurance for value in excess of the \$30 million indemnity limit if necessary.

Financial implications

19. The then Bills Committee formed to study the Land Titles Bill in 1994 was advised that an indemnity reserve fund of \$100 million would be required to be set up in the Land Registry to meet payments of compensation under the scheme. The fund would be built up by setting aside part of the registration fee.

20. As regards the current Bill, the reserve in the indemnity fund is proposed to be \$150 million to be accumulated in ten years. The Administration proposes to arrange a stand-by loan facility of \$150 million for the indemnity fund from the Government to meet claims before the reserve is built up. It will seek the approval of the LegCo Finance Committee for the loan facility after the enactment of the Ordinance. When the PLW Panel was consulted on 5 July 2002, some members expressed concern about the additional fees and levy to be imposed on property owners under the LTRS. They were assured that the Administration would try to keep the registration fees and the levy on application for registration to finance the indemnity fund at a low level as far as possible. The Administration's aim was to keep the registration fees plus levy under the new system at a level comparable to that of the registration fees under the present system. It was expected that the levy for each application would not be more than a few hundred dollars.

21. On the other hand, the current proposal of a gradual conversion could impose increased compliance cost initially on property owners due to the requirement for solicitors to issue certificates of good title to enable conversion on first sale and voluntary application by owner. Some solicitors might demand fees over and above those that they currently charge for conveyancing. Members of the PLW Panel were advised by the Administration that it would liaise with the Law Society to ascertain the likely order of fees to be charged.

Overriding interests

22. Under the Land Titles Bill introduced in 1994, title to property would continue to be affected by certain overriding interests as at present. These interests would affect the land no matter whether they were registered or not.

23. The Administration proposed under the revised draft Bill in 1999 to retain the overriding interests which are necessary rights affecting the land and are not always practicable to be entered into the register. A minimum number of overriding interests was included in the revised draft Bill in order to confer

full ownership of the Government leases subject to these overriding interests similar to other overseas title registration jurisdictions. The Administration also recommended retention of the right of adverse possession as it was a long recognized statutory right which was also recognized as an overriding interest in the United Kingdom and in New South Wales, Australia.

24. The Administration proposes to define in the current Bill (clause 24) a limited list of overriding interests which are neither practical nor feasible to register and remove all other unregistered interests in the revised draft Bill. When the PLW Panel was consulted on the current proposal on 5 July 2002, a member expressed concern that the proposal would have impact on ownership of properties. In other words, the registered owner under the LTRS would not be 100% recognized by law as the owner of the property. Members were advised that the Administration would keep the categories of overriding interests to be protected to a minimum and define them clearly in the legislation so as to give property owners, purchasers and sellers the greatest possible degree of certainty.

Solicitor's criminal liability

25. Under the Land Titles Bill introduced in 1994, a person who verified an application for registration (either a solicitor or a public officer) would commit a criminal offence if he falsely or recklessly verified an application.

26. In response to concerns that the criminal liability on reckless verification was too onerous, the Administration proposed under the revised draft Bill in 1999 that a criminal offence was committed only for fraudulent verification of an application for registration. When the PLW Panel was consulted on 18 November 1999, a member queried the need to introduce this proposal, as fraudulent acts had already attracted criminal liability under the criminal law. The Administration pointed out that the successful operation of the LTRS relied heavily on the integrity of the legal profession. There was thus a need to make express provisions in the Bill for criminal liability for fraudulent verification of an application for registration. The member was unconvinced of the Administration's explanation.

27. In the current Bill (clause 96(1)(d)), the Administration retains its proposal under the revised draft Bill in 1999.

Land boundaries

28. Under the DRS, land boundaries are not guaranteed. All along, the Administration has proposed no change in this respect under the LTRS. At the PLW Panel meeting on 18 November 1999, some members pointed out that the land register would not be the conclusive evidence of title to properties because it did not guarantee land boundaries. A member also pointed out that land register could not serve its purpose as far as missing lots were concerned.

The Administration considered it practically difficult to ascertain the accuracy of land survey in the New Territories which had been done years before, and yet land boundaries should not be a problem for urban land.

29. In the current Bill, the Administration does not propose to provide any form of guarantee for land boundaries under the LTRS. When the PLW Panel was consulted on 5 July 2002, members were advised that as the land boundary surveys conducted since the establishment of the Geodetic Datum in 1980 covered less than 10% of all lots, the Administration considered it not appropriate to introduce a guarantee of land boundaries at this stage. Nevertheless, the Administration proposed to provide an avenue for lot owners to apply to the Director of Lands to have their lot boundaries surveyed and registered in the Land Registry (clause 92 of the current Bill). As the number of properly surveyed lots in Hong Kong built up in future, the Administration might revisit the issue and consider providing a guarantee of land boundaries in due course.

Council Business Division 1
Legislative Council Secretariat
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