

HPLB/LTB Paper 06/04

Bills Committee on Land Titles Bill

**Outstanding Responses to Matters
Raised by the Bills Committee**

Purpose

This paper addresses the outstanding issues raised by the Bills Committee in previous meetings.

Background

2. Given that the Bills Committee is going to commence clause-by-clause examination of the Bill at its meeting on 20 April 2004, the Administration has been invited to provide a written response to the outstanding issues raised at previous meetings for the Bills Committee's consideration. Our response is attached at the Appendix for members' consideration.

Housing, Planning and Lands Bureau
April 2004

Outstanding Responses to Matters Raised by the Bills Committee

	<u>Meeting Reference and Item Description</u>	<u>Administration's Response</u>
1.	<p><u>First Meeting : Item 4(c).</u> To provide a paper on the proposed amount of indemnity covering the following aspects: (a)... (b)... (c) the views expressed by the concerned parties in previous consultation exercises on the administrations' proposal to cap the indemnity in fraud cases and the Administration's response to their views.</p>	<p>Comments made on the cap on indemnity in fraud cases by various parties and the Administration's reply to them prior to introduction of the Bill in December 2002 are at Annex A.</p>
2.	<p><u>Third meeting : Item 2.</u> To provide a sample of the certificate of good title.</p>	<p>Since the requirement for a certificate of good title will now be removed from the Bill this is now not required.</p>
3.	<p><u>Ninth meeting: Item 3</u> As stated in the letter dated 25 June 2003 from the Clerk to Bills Committee to the Secretary for Housing, Planning and Lands, to provide before the Bills Committee meeting on 31 July 2003 a progress report on the Administration's deliberation with Law Soc on issues relating to the certificate of good title.</p>	<p>A brief note was given in para. 2.3 of paper CB(1)2305/02-03(09). Negotiations continued through the second half of 2003 and have led to the removal of the requirement for certificates of good title.</p>
4.	<p><u>Tenth meeting : Item 1</u> To consider issuing practice directions or guidelines on the operation of the land title registration system to relevant practitioners after implementation of the system.</p>	<p>The Land Registry will prepare Land Registry Circular Memoranda and other advisory publications for solicitors, estate agents and other practitioners once legislation is enacted. These documents will be drafted in consultation with the relevant professional bodies and issued before the legislation is brought into effect.</p>
5.	<p><u>Eleventh meeting : Item 2</u> To liaise with the Law Soc on the arrangements to be made to address solicitors' concerns about the issue of the certificate of good title, in particular the extent of solicitors' liability in the issue of such a certificate under the provisions in clause 96(1) and 96(2). To report on progress made in due course.</p>	<p>Report made on 13 February 2004 that conversion mechanism requiring certificates of good title to be replaced by 'daylight' conversion mechanism.</p>
6.	<p><u>Eleventh meeting : Item 3</u> To clarify the Administration's policy intent on solicitors' liability, i.e whether a solicitor would be subject to criminal liability if he negligently issued or caused the issue of a certificate of good title. To consider whether clause 96(1) and 96(2) reflect the policy intent, and clarify the meaning of "without lawful authority" in clause 96(2).</p>	<p>It has been agreed that certificates of good title will now not be used. The question of liability in this respect falls away. "Without lawful authority" in Clause 96(2) means being without the right at law to do the relevant acts specified in that clause.</p>

7.	<p><u>Eleventh meeting : Item 12</u></p> <p>To provide a paper to explain the provisions in clause 14(1)(b) and the need for registration of the equitable interest in the land involved, and advise the Bills Committee of the number of pieces of land involved and their present status.</p>	<p>Under Section 14(1)(a) of the Conveyancing and Property Ordinance (Cap.219), the lessee's equitable interest under his right to a Government lease shall become a legal estate in the land held under a Government lease upon compliance with the conditions precedent.</p> <p>If the conditions precedent have not been complied with, the lessee has an equitable interest in the land held under the agreement for a Government lease. Section 14(1)(b) of the Bill is drafted to cover these cases and states the actual equitable interest in the land held by these lessees under the existing law.</p> <p>The Lands Department has advised that as at October 2003 there were 200 cases of agreements for Government leases which were executed after 1.4.1999 and in respect of which certificates of compliance have not been issued.</p>
8.	<p><u>Twelfth meeting : Item 2</u></p> <p>On the paper on "Indemnity Fund Operation — Supplementary Information" (LC Paper No. CB(1)2464/02-03(03)), to confirm whether there is any provision in the Bill which gives effect to the statement in paragraph 15 of the paper that "the case of the Indemnity Fund (IF) having to borrow money to cover a payment for which the Land Registry is liable will not arise" and also the Administration's proposed arrangement that the IF would be indemnified by payment out of the Land Registry Trading Fund (LRTF) in case of mistake or omission of Land Registry staff; if there is, to highlight the relevant clause(s); if there is not, to consider adding such a provision to make the situation clear and to define the ambit of the provisions to be set out in the Regulations on the operation of the IF.</p>	<p>Members were concerned that the Indemnity Fund should not be left in debt through making a payment for which the Land Registry is liable. But, no indemnity can be paid without there already being a decision on liability. In the case of indemnity because of a mistake or error on the part of the Land Registry, the Registrar or a Court will have already found that there is a mistake or error for which the Registry is liable. In fraud cases, the court will have determined that there is fraud and that the Registry is implicated. The Land Registry Trading Fund is then liable under the terms of the Trading Fund Ordinance (Cap.430) to reimburse the Indemnity Fund. S. 5(2) requires a trading fund to meet its expenses and liabilities. S. 9(2) allows a manager of a trading fund to apply to the Loan Fund if borrowing is needed to meet liabilities. It is on the basis of these provisions in the Trading Fund Ordinance that the statement in paragraph 15 of LC Paper No CB(1) 2464/02-03(03) was made. The Administration does not consider that further provisions are needed under the LTB in this respect.</p> <p>The Indemnity Fund Regulations will provide for:-</p> <ul style="list-style-type: none"> - establishing an indemnity fund - powers of the Registrar under direction from the Financial Secretary - payments into the fund (which will be defined to include payments from the Land Registry Trading Fund due to indemnity payments made under CI82(1)(b) and costs connected with that payment) - payments out of the fund - the financial year and accounting

		<p>requirements</p> <p>- reporting requirements.</p>
9.	<p><u>Twelfth meeting : Item 3</u></p> <p>According to paragraph 21 of the paper on “Indemnity Fund Operation — Supplementary Information” (LC Paper No. CB(1)2464/02-03(03)), in general, fraud committed by anyone, including Land Registry staff, will be covered by Clause 82(1)(a), and the LRTF will not be responsible for reimbursing the IF for indemnity payments so made. To take the following actions:</p> <p>(a) As a matter of law, to explain the position under the common law whether an employer is responsible for the fraud committed by his employee in the official capacity. As a matter of policy, to explain the general policy of the Government in this regard.</p> <p>(b) As regards this Bill, to explain why the Administration is taking the position mentioned in paragraph 21 of the paper and highlight the relevant provisions in the Bill.</p> <p>(c) In response to members’ view that the Land Registry should be responsible for all acts (including fraud) of its staff performed in their official capacity, to advise whether the Government would be vicariously liable for the fraud committed by its employee if the act is within the course of employment and whether the Bill changes the common law on this aspect. To also advise whether the differentiation between a staff member of the Land Registry committing fraud in his official capacity and outside his duties is provided for in the Bill and whether it is practicable to make such a differentiation. Moreover, to consider whether the Land Registry would be responsible for the fraud committed under the following scenarios:</p> <p>(i) Fraud committed by a staff member of the Land Registry through the negligence of his supervisor;</p> <p>(ii) Fraud committed by someone who conspires with the Land Registry staff.</p> <p>(d) To consider whether the existing provisions are sufficient to empower the Government to reimburse the IF from the LRTF for indemnity payments as proposed by the Administration.</p>	<p>(a) The position under the common law is that an employer is usually liable for an employee’s fraudulent conduct which falls within the scope of the employee’s authority, actual or ostensible. By words or conduct the employer must have induced the third party to believe that the employee was acting within his authority. The third party must also prove that his position has been altered to his detriment in reliance on that belief. Whether the Government will actually be vicariously liable for a fraud committed by an employee in his official capacity will have to be decided on the specific factual circumstances of each case. No general rule can be stated.</p> <p>(b) The relevant provisions of the bill are in Clause 82, subclauses (1)(a) and (1)(b). Which sub-clause will be applicable will depend on the particular circumstances of any case.</p> <p>(c) As noted in response to (a) above, the Administration considers that the Government may be responsible for losses caused by its officers acting in the course of their duties. In the case of fraud committed by an officer, Government’s liability will depend on the circumstances of the case. In the context of the Land Titles Bill, fraud that affects the ownership of registered land, whether due to entry or omission of an entry from the register, is given special treatment. Irrespective of whether the person committing the fraud is a public officer or not, the Indemnity Fund will pay an indemnity to an innocent party who loses the property due to the fraud.</p> <p>(d) As noted in response to item 8 above, the Administration is of the view that the Trading Fund Ordinance already provides assurance that the Land Registry Trading Fund will be responsible for any liabilities it incurs due to indemnity being paid on account of mistake or omission on the part of the Registrar or his staff.</p>

10.	<p><u>Twelfth meeting: Item 4</u></p> <p>In relation to the paper on “Roles of Registration Authority and Solicitors — Comparison with the English System” (LC Paper No. CB(1)2464/02-03(04)), to consider adopting the English system under which there is a shared responsibility between the Chief Land Registrar and solicitors on the examination of title prior to registration of a property. To also seek the views of Law Soc in this regard and draw up a workable system for the proposed land title registration system (LTRS) in Hong Kong.</p>	<p>As reported at the 24th meeting on 13th February, various ideas for dealing with the examination of title under a gradual conversion mechanism have been explored. Given the difficulties found with all of them, the Administration and Law Society have agreed that the ‘daylight’ conversion mechanism would provide a better solution to the problem of conversion.</p>
11.	<p><u>Twelfth meeting: Item 6</u></p> <p>According to the paper on “Responses to Miscellaneous Issues” (LC Paper No. CB(1)2464/02-03(05)), the one-month relation back rule under the existing system will be abolished after the implementation of the LTRS. To take the following actions:</p> <ul style="list-style-type: none"> (a) To provide the justifications for the proposed abolition of the one-month relation back rule, including the problems encountered under the existing system. (b) To address members’ concern that the proposed abolition of the one-month relation back rule may result in operational difficulties and possible confusion because the persons concerned may rush through all the procedures and documents involved in a property transaction in order to effect early registration, to examine how the proposed arrangement could be improved. For example, a shorter relation back period may be provided. In this connection, to take into account the normal time required for clearing bank cheques in a property transaction, and preparing a consent caution and the Sales and Purchase Agreement. To also make reference to the practices adopted in other jurisdictions in this regard. (c) To provide a sample of the application form(s) for registration of consent cautions and non-consent cautions. To also include in the application form(s) a cross-reference to the title register. 	<ul style="list-style-type: none"> (a) Justification for the abolition of the one month relating back rule, including description of the problems arising with it under the present system are given in Annex B. (b) A description of how priority is protected and how the difficulties envisaged by members will be avoided under the proposed system is given at Annex C. (c) Samples of application forms are attached with Annex C.
12.	<p><u>Twelfth meeting: Item 8</u></p> <p>According to paragraph 9 of the paper on “Responses to Miscellaneous Issues” (LC Paper No. CB(1)2464/02-03(05)), a charging order has to be re-registered every five years under section 17 of the Land Registration Ordinance (LRO) (Cap. 128), and clause 34(1) incorporates this</p>	<p>Being considered and addressed in the CSAs.</p>

	<p>requirement into the Bill. Given the Administration's policy intent that the doctrine of notice will be abolished under the LTRS, the Assistant Legal Adviser is concerned that clause 34(1) is unable to ensure that the priority of a charging order will be retained upon its re-registration even though its wording is a replica of section 17 of the LRO. To examine how this concern could be addressed.</p>	
13.	<p><u>Thirteenth meeting: Item 2</u></p> <p>To consider revising both the English and Chinese texts of the drafting of the first part of clause 70(1) to improve the clarity of the provision.</p>	<p>This is being done in the CSAs.</p>
14.	<p><u>Thirteenth meeting: Item 4</u></p> <p>Regarding the provision on effect of cautions in clause 71, the Bills Committee notes the advice of the Assistant Legal Adviser that there is no similar provision in the relevant English legislation. To provide justifications for including the provision in the Bill and examine the impact of the provision, in particular its impact on the priority of a mortgagee bank in a property transaction when a consent caution is registered by a sub-purchaser immediately after the registration of a consent caution by a purchaser.</p>	<p>Clause 71 serves two purposes. The first is to make explicit that the entry of a caution does not prevent other matters from being registered. This avoids any doubt. From the English Land Registration Act 2002 S.72(2) it may be inferred that other matters can be registered, even after an application for priority search. A similar inference can be drawn from S.32(3). The English Solicitors are familiar from long practice with the fact that notices (the equivalent of cautions under the UK system) do not prevent registration of subsequent matters. In the context of introducing title registration into Hong Kong it is considered preferable to avoid having to draw inferences and to make explicit the effect of cautions.</p> <p>The second effect of the clause is to allow for subsequent matters to take priority over a prior caution in specific circumstances. This is considered necessary because of the frequent use of sub-sales in Hong Kong. The interests of mortgagees are protected by the fact that the priority of the first dealing can only be deferred if that dealing is itself dependent on the second or if the prior cautioner (which would include a bank if a mortgage had been given) has given consent. In practice it appears rare for a mortgage to be given in respect of a dealing when a sub-sale is intended, but the caution mechanism can still be used to protect a mortgagee should there be one. If a purchaser enters into an equitable mortgage, a consent caution can be registered to protect the bank's interests. If the purchaser then subsells his interest, the bank's consent to the sub-sale has to be obtained. In giving the consent, the bank will also give consent to register a consent caution in respect of the sub-sale agreement. Upon completion, the equitable mortgage will be discharged and a confirmor assignment will be executed. The priority of this assignment will be</p>

		related back to the registration of the consent caution by the first purchaser.
15.	<p><u>Fourteenth meeting: Item 1(a)</u></p> <p>(a) To consider revising the level of the estimated levy rates for the properties valued over \$30 million set out in Annex A to the paper on "Indemnity Scheme: Levy Rates and Miscellaneous Matters" (LC Paper No. CB(1)2207/02-03(06)).</p>	As stated in paragraph 7 of the paper, the rates given in the Annex were illustrative estimates. Fresh calculations will have to be carried out closer to the time of implementation. Consideration will then be given to the rate to be applied to each value of property.
16.	<p><u>Fourteenth meeting: Item 3</u></p> <p>According to paragraph 17 of the paper on "Response to Drafting Issues" (LC Paper No. CB(1)2501/02-03(03)), the Administration proposes to make appropriate amendments to clause 34 to state clearly that re-registration of a charging order or lis pendens shall have a priority relating back to its first registration. In drafting the proposed amendments, to set out clearly the legal effects of the re-registration before and after the expiry of the five-year period provided in clause 34(1) and the priority of the charging order or lis pendens upon the re-registration.</p>	This is being done through the preparation of CSAs.
17.	<p><u>Fourteenth meeting: Item 4</u></p> <p>To discuss with the Assistant Legal Adviser on the technical issues relating to priority of registered matters (e.g. clause 33) and seek the views of the Law Soc on the issues. To report the outcome of the discussion to the Bills Committee in due course.</p>	Discussion has been held with the ALA and the Law Society. Annex C sets out how the mechanism is intended to operate. Formal confirmation from the Law Society that they continue to prefer this mechanism is awaited.
18.	<p><u>Fourteenth meeting: Item 5</u></p> <p>To discuss with the relevant parties, including the Law Soc, on the proposed procedures, forms and documents for the implementation of the LTRS. To then provide a paper to the Bill Committee, summarizing the views and concerns of the relevant parties, and advising how the views and concerns could be addressed. To facilitate the Bills Committee's understanding, to also arrange a presentation on the relevant procedures, forms and documents.</p>	This exercise will need to be carried out once the terms of the Bill are settled. It will be undertaken in parallel with the preparation of regulations under the Bill and a presentation may be made to members before the regulations are submitted for approval.
19.	<p><u>Fourteenth meeting: Item 6</u></p> <p>To go through the Bill to review whether the relevant documents are all needed for the implementation of the LTRS, which is a system focusing on registration of interests but not registration of documents. In this connection, to review clause 44(1)(a)(ii) and consider whether it is appropriate to require the vendor to provide the purchaser with a copy, print or extract of or from any instrument referred to in any current entries in the Title Register.</p>	This will be done as part of the exercise noted above. Clause 44(1)(a)(ii) will be amended by way of CSA.

20.	<u>Fifteenth meeting: Item 1</u> To consider making it clear to the public, in particular solicitors, that they may search properties by owners' names provided that they comply with the requirements under the Personal Data (Privacy) Ordinance (Cap. 486).	The Land Registry is studying the technical and administrative requirements for this to be done.
21.	<u>Fifteenth meeting: Item 2</u> To further consider the details of the format of title register(s) and consult the Bills Committee before implementation of the land title registration system (LTRS).	We are seeking formal views from the Law Society on this item and on items 22 & 24.
22.	<u>Fifteenth meeting: Item 3</u> To seek the views of the Law Soc on whether the Administration's proposal for a separate register for long-term lease could address its concern, and report the outcome of the discussion to the Bills Committee in due course.	See 21
23.	<u>Fifteenth meeting: Item 5</u> Whilst having no objection to the provision of the "date of registration" in the Title Register (sample attached in Annex 1 to the paper on "Format of Title Registers" (LC Paper No. CB(1)38/03-04(04)), members note that according to clause 33, matters appearing in the Title Register shall have priority according to the order in which the applications which led to their registration were presented to the Land Registrar. To consider whether it is more appropriate to replace the "date of registration" in the Title Register by other terms, such as "date of presentation for registration" or "date of delivery of application for registration". If the "date of registration" is to be retained in the Title Register, to consider the need to make it clear to the public that upon registration of a dealing, the date of registration shall be the date of presentation of that dealing (paragraph 6 of the paper on "Format of Title Registers").	Using the term 'Effective Date' on the Register is the clearest term for the user. 'Effective Date' is defined by Clause 33.
24.	<u>Fifteenth meeting: Item 6</u> To consider the Assistant Legal Adviser's view that the English system has three separate registers, namely the property register, proprietorship register and charges register, which is a clearer arrangement to avoid any possible confusion.	See 21.
25.	<u>Fifteenth meeting: Item 9</u> To seek Law Soc's views on whether clauses 70(2) and 33(7)(b), if read together, could provide for the proposed arrangement in relation to the registration and relation back of an interest created under a provisional agreement for sale and purchase or an agreement for sale and	A formal response from the Law Society is awaited.

	purchase during the stamping period of these instruments as elaborated in paragraph 4 of the paper on "Response to Miscellaneous Issues" (LC Paper No. CB(1)38/03-04(05)).	
26.	<p><u>Sixteenth meeting: Item 7(a)</u></p> <p>(a) To amend the heading of clause 69 to make it clear that particulars of trusts, but not the trusts themselves, are not to be entered in the Title Register.</p>	Being dealt with in CSA.
27.	<p><u>Seventeenth meeting: Item 1(a)</u></p> <p>In relation to clause 43, to take the following actions:</p> <p>(a) Members note that the new land title registration system (LTRS) is different from the existing deeds registration system (DRS) in the sense that it is a system focusing on registration of interests but not registration of documents. Under the LTRS, implied covenants would come into effect upon registration of the relevant interest transferred but not upon registration of the relevant document. Members therefore consider it not appropriate for clause 43(a) to provide that the provisions of the Bill shall not prejudice the operation of section 35 (Implied covenants) of the Conveyancing and Property Ordinance (CPO) (Cap. 219). In this connection:</p> <p>(i) To consider amending clause 43(a) and other relevant clauses in the Bill to rectify the situation; and</p> <p>(ii) To liaise with the Assistant Legal Adviser on how the drafting of clause 43 could be improved to clearly spell out the policy intent that implied covenants would come into effect upon registration of the relevant interest transferred.</p>	Being dealt with in CSA.
28.	<p><u>Seventeenth meeting: Item 6(a)</u></p> <p>In relation to clause 96, to take the following actions:</p> <p>(a) To explain how the different levels of penalty under clause 96(1) to (6) have been fixed, and describe how they compare with those fixed for other offences.</p>	<p>The different levels of penalty under Clause 96(1) to (6) have been proposed with the following policy intentions;</p> <p>(i) fraudulent offences should be given serious penalties so as to preserve the integrity of the title registration system and accuracy of the Title Register.</p> <p>(ii) the penalties for offences in Clauses 96(2) to (6) are fixed according the seriousness of the offences and intention of the offender.</p>

		<p>Comparisons with other offences are:-</p> <p>(1) forgery – a person who makes a false instrument commits the offence of forgery and is liable on conviction to imprisonment for 14 years (Section 71 of Crimes Ordinance – Cap.200).</p> <p>(2) copying of a false instrument – a person who makes a copy of an instrument which is and which he knows or believes to be a false instrument commits an offence and is liable on conviction to imprisonment for 14 years (Section 72 of Crimes Ordinance – Cap.200).</p> <p>(3) using of a false instrument – a person who uses an instrument which he knows or believes to be false commits an offence and is liable to imprisonment for 14 years (Section 73 of Crimes Ordinance – Cap.200).</p> <p>(4) using a copy of a false instrument – a person who uses a copy of an instrument which is and which he knows or believes to be a false instrument is liable on conviction to imprisonment for 14 years (Section 74 of Crimes Ordinance – Cap.200).</p> <p>(5) fraud – if any person by any deceit and with intent to defraud induces another person to commit an act or make an omission, which results either –</p> <p style="padding-left: 40px;">(i) in benefit to any other person; or</p> <p style="padding-left: 40px;">(ii) in prejudice or a substantial risk of prejudice to any person other than the first-mentioned person,</p> <p style="padding-left: 40px;">the first-mentioned person commits fraud and is liable on conviction for imprisonment for 14 years. (Section 16A of Theft Ordinance (Cap.210))</p> <p>(6) obtaining property by deception – any person who by any deception dishonestly obtains property belonging to another, with the intention of permanently depriving the other of it shall be liable on conviction for imprisonment for 10 years (Section 17 of Theft Ordinance (Cap.210)).</p> <p>(7) making false entry in register of births etc. – any person who knowingly and unlawfully makes any false entry of any matter relating to any birth, baptism, marriage, death or burial shall be liable on conviction to imprisonment for life (Section 88 of Crimes</p>
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		Ordinance (Cap.200)).
29.	<p><u>Eighteenth meeting: Item 1</u></p> <p>In discussing the paper on "Title Insurance" (LC Paper No. CB(1)274/03-04(03)), the Administration quoted some press reports on the experience in the operation of title insurance in the United States. To facilitate the Bills Committee's consideration of the issue, to provide the relevant press reports.</p>	These are at Annex D.
30.	<p><u>Eighteenth meeting: Item 2</u></p> <p>The Bills Committee is pleased to note that the Administration agrees to add a new item (c) to clause 80(1) to provide that, on provision of the relevant supporting documents, the Land Registrar may rectify an error in or omission from the Title Register if it has resulted from a clerical error (LC Paper No. CB(1) 274/03-04(05)). In preparing the relevant Committee Stage amendments, the Administration is invited to take account of members' views that the scope of the new item should be confined to that proposed, and the power of rectification should rest with the Land Registrar personally and should not be delegable.</p>	Noted. To be dealt with in CSAs.
31.	<p><u>Eighteenth meeting: Item 3</u></p> <p>To address members' concern about the problems of unclear land boundaries in the New Territories and the discrepancy between the actual location of some small houses and their locations shown on the relevant boundary plans, to advise whether the Administration has any plans to deal with the problems and if so, how the problems could be addressed.</p>	The Lands Department will continue to resolve individual land boundary disputes as and when they arise during the course of work such as land resumption for infrastructure projects. Where land boundary disputes arise that affect Government land, Government will resolve the matter with the concerned party. A dedicated team exists within Lands Department to deal with any complex boundary cases that arise. Where land boundary disputes are between private parties these can be resolved by mutual agreement or a Court ruling can be sought. The Administration does not consider it appropriate to compel private owners to establish boundaries where these are uncertain or to intervene itself without specific need since this is likely to generate extensive disputes.
32.	<p><u>Nineteenth meeting: Item 1</u></p> <p>To address members' concern that the Chinese version of the phrase "application for the registration of any matter" in clause 96(7) ("尋求將任何事項註冊的申請") is clumsy, to consider improving the Chinese version of the phrase. A member suggests that the Chinese version be simplified as "要求註冊任何事項的申請".</p>	Being dealt with in CSAs.
33.	<p><u>Nineteenth meeting: Item 2</u></p> <p>In discussing the paper on "Part 11 of the Bill -</p>	In CSA we will provide for SHPL to be able to

	<p>Miscellaneous Provisions" (LC Paper No. CB(1)274/03-04(07)), members note that under clause 102, the Secretary for Housing, Planning and Lands may by Gazette notice amend Schedule 2 to the Bill. Members also note the Administration's advice that the purpose of clause 102 is to cater for any additional consequential amendments that may become necessary during the period between the passage of the Bill and the implementation of the land title registration system. To consider introducing such additional consequential amendments in the form of subsidiary legislation that require positive vetting of the Legislative Council.</p>	<p>amend Schedule 2 to deal with certain matters but will specify substantive matters that have to be dealt with by way of subsidiary legislation.</p>
34.	<p><u>Nineteenth meeting: Item 3</u></p> <p>Members are concerned that clause 74(1) has not specified the circumstances under which the Court of First Instance (CFI) may make an order inhibiting the registration of any dealing in registered land. Given that "inhibitions" is a new feature provided under the Bill, to set out clearly in the Bill the circumstances under which the CFI may make the order.</p>	<p>To address Member's concerns, the Administration proposes to amend Clause 74(1) to adopt the criteria laid down in Section 46(1) of the UK Land Registration Act 2002. This allows the Court to act if: "it is necessary or desirable to do so for the purpose of protecting a right or claim in relation to a registered estate or charge.." The criteria are wider than those laid down for the registrar to enter restrictions. The Administration considers this appropriate.</p>
35.	<p><u>Twentieth meeting: Item 3</u></p> <p>Having examined the Administration's written response (LC Paper No. CB(1)468/03-04(03)), members still consider that the scope of the power of the Land Registrar in making a restriction under clause 77(1) is not clear. Members also express the following points of concern:</p> <p>(a) While the Administration has pointed out that the Registrar may exercise the power only on application by a person interested in registered land and where he is satisfied that the powers of the owner of the registered land should be restricted, this is not clearly reflected in clause 77(1).</p>	<p>(a)&(b) The Administration proposes to adopt the criteria laid down in the U.K. Land Registration Act 2002, s.42 with suitable modification¹. The Land Registrar may only enter a restriction after being satisfied that the powers of an owner of land or charge or a lessee of lease to deal in the land, charge or lease should be restricted in order to :-</p> <p>(i) prevent invalidity or unlawfulness in relation to dispositions of a registered estate or charge; or</p> <p>(ii) protect a right or claim in relation to a registered estate or charge.</p>

¹ The section reads:

- (1) The registrar may enter a restriction in the register if it appears to him that it is necessary or desirable to do so for the purpose of-
 - (a) Preventing invalidity or unlawfulness in relation to dispositions of a registered estate or charge,
 - (b) Securing that interests which are capable of being overreached on a disposition of a registered estate or charge are overreached, or
 - (c) Protecting a right or claim in relation to a registered estate or charge.
- (2) No restriction may be entered under subsection 1(c) for the purpose of protecting the priority of an interest which is, or could be, the subject of a notice.
- (3) The Registrar must give notice of an entry made under this section to the proprietor of the registered estate or charge concerned, except where the entry is made in pursuance of an application under section 43.
- (4) For the purpose of subsection 1(c), a person entitled to the benefit of a charging order relating to a trust shall be treated as having a right or claim in relation to the trust property.

<p>(b) Members are concerned how the Registrar would arrive at the conclusion that a restriction should be made to prohibit all dealings in the registered land (a restriction). In this connection, members note that under clause 77(1)(b) and (c), the Registrar may impose a restriction after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, and after being satisfied that the powers of the owner of the registered land should be restricted. It seems that the Registrar is empowered to perform certain quasi-judicial functions with a high degree of discretion. It seems that the Registrar may impose a restriction after considering the evidence given by a third party who has no interest in the land. The Registrar's power seems so broad that he may impose a restriction not directly consequential upon registered interests.</p> <p>(c) It is not clear whether the term "an application" in clause 77(1)(a) refers to an application for registration of a restriction, or other types of applications, such as an application for registration of title.</p> <p>To provide a paper to set out the policy intent and the scope of power of the Registrar under clause 77(1), to give examples to illustrate how the Registrar would arrive at the conclusion that a restriction should be imposed, and to respond to the above points of concern expressed by members. To also examine whether the present drafting of clause 77(1) could fully reflect all these aspects and if not, to consider how the drafting could be improved.</p>	<p>The UK Law Reform Commission's report² provides specific examples of the circumstances in which the Registrar may act:-</p> <ul style="list-style-type: none"> (i) Where the registered proprietor is a corporation or statutory body that has limited powers. If a restriction were not entered to record that limitation, the proprietor's powers of disposition would, as regards any disponee, be taken to be free of any limitation affecting the validity of the disposition; (ii) Where the registered proprietor has contracted with some third party that he or she will not make any disposition either at all or without the consent of that third party. An obvious example of this is a right of pre-emption. (iii) Where trustees of land are required to obtain the consent of some person to a disposition. <p>An advantage in adopting the model of the English Land Registration Act 2002 will be the ease of reference to judicial guidelines from the case law decided under that section.</p> <p>The Administration will also adopt the U.K. approach to define the person entitled to make application, and to adopt the model of the UK section 43(1) so that application may be made by a person if -</p> <ul style="list-style-type: none"> (i) he is the relevant registered proprietor, or a person entitled to be registered as such proprietor; (ii) the relevant registered proprietor, or a person entitled to be registered as such proprietor, consents to the application; or (iii) he otherwise has a sufficient interest in the making of the entry. <p>(c) Noted. It is intended to be an application for an entry of restriction only. Being</p>
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² "Land Registration for The 21st Century- A Conveyancing Revolution" dated 31 May 2001 jointly issued by the U.K. Law Commission and the Land Registry. Paragraph 6.40

		<p>dealt with in CSAs.</p> <p>CSAs will be prepared to implement the Administration's intention subject to any views Members may have.</p>
36.	<p><u>Twentieth meeting: Item 4</u></p> <p>To facilitate the Bills Committee's further consideration of whether indemnity should be provided for wrongful registration of restrictions by the Land Registrar, the Administration is invited to advise whether other remedies are available for a person who suffers from the wrongful registration of a restriction, in particular through fraud by a third party.</p>	<p>(a) There is a mandatory enquiry procedure under Clause 77(1)(b). Any affected owner will have opportunity, therefore, to present any objection he has before a restriction is registered. The possibility of a wrongful registration or a registration by fraud is therefore unlikely. Furthermore, under Clause 79(1) an affected owner can apply to the Registrar for the removal of a restriction, or he may apply to the Court under Clause 79(2) after a restriction has been imposed.</p> <p>(b) If the Land Registrar acts improperly or unfairly in the process of the application and enquiry, it is open to the affected owner to appeal against the Registrar's decision under Clause 89 or to apply for judicial review of the Land Registrar's decision</p> <p>(c) Were it to be established that a restriction had been entered or rejected by mistake, and that, in consequence, some party had suffered a real loss, the Administration is of the view that the Land Registry may be liable for compensation. Clause 82(1)(b) of the Bill allows for this.</p>
37.	<p><u>Twentieth meeting: Item 5</u></p> <p>Members are pleased to note from the paper on "Power of Land Registrar (Miscellaneous Issues)" (LC Paper No. CB(1)468/03-04(03)) that the Administration would propose suitable amendments to clause 88 to reflect the policy intent that the Registrar would not frequently use the power under the clause to apply to the court of First Instance for directions on principles of law, and that the Registrar would have to justify fully to the court why he is seeking direction and not relying on his own legal advisors. Members also point out that the direction should only be sought on principles of law in respect of a specific case, but not "[i]n any case of doubt or difficulty or in any matter not provided for under this Ordinance" as presently provided for in clause 88. In this connection, the Administration is invited to make reference to the relevant provisions in the Land Registration Act 1925 in England and Wales, and the Real Property Act 1900 in New South Wales (Annex to the paper). The relevant provisions in</p>	<p>Being addressed in CSAs.</p>

	the Land Registration Act 1925 is preferred because they provide for the involvement of the affected parties.	
38	<p><u>Twentieth meeting: Item 6</u></p> <p>Clause 81(5) provides that in any rectification case not involving any mistake or omission on the part of any person referred to in clause 8(3), if the Land Registrar is joined as a party, the Registrar shall not pay costs incurred by the parties in the proceedings and damages suffered by any parties in the proceedings. Noting the Administration's advice that the claims for such costs and damages would have to be made by application for indemnity and that this policy intent would be set out in the relevant regulations, members are concerned that it is not clear from the relevant clauses (including clauses 83 and 84(2)(b)) that such costs could be recovered from the Indemnity Fund. To review the drafting of the relevant clauses to ensure that this point is clearly reflected.</p>	Being dealt with in CSA.
39.	<p><u>Twentieth meeting: Item 7</u></p> <p>To provide a paper to address the following points of concern expressed by members when examining the paper on "Rectification of Title Register by Court" (LC Paper No. CB(1)524/03-04(03)):</p> <p>(a) Members are concerned whether the original owner of a property, "A", who has lost the ownership of the property to "B" through fraud many years before, during which the property was sold to "C" and then "D", may still apply to the Court of First Instance (CFI) for rectification of the title register. While the Administration claims that the original owner may do so, members doubt whether this is provided for in clause 81. According to clause 81(1), the CFI may order rectification of the Title Register by directing that an entry therein or omitted therefrom be removed, amended or entered, as the case may be. It seems that the term "an entry" refers to the current entry only.</p> <p>(b) Having noted the Administration's advice that the full meaning of the term "fraud" would be determined according to case law, members are concerned that the scope of the term may change from time to time. To provide some typical examples of "fraud" that may be committed in relation to title registration.</p> <p>(c) Clause 81(4) provides that the CFI may, in</p>	Clause 81 is being amended extensively. We intend to remove the causes of the questions that have been raised on the old clause.

	<p>exercising its discretion on whether the Title Register should be rectified, consider such factors, including the "hardship to the parties". Members are concerned that this requirement may give rise to uncertainty. To provide information on overseas practices in this regard.</p> <p>(d) Referring to the Hong Kong Bar Association's concern about whether a "knowledge test" should be adopted as the statutory criterion in determining whether the Title Register is subject to the CFI's power of rectification, the Administration is invited to provide a written response on this point.</p>	
40.	<p><u>Twenty-first meeting: Item 2</u></p> <p>To follow up the following two points raised by members when discussing ALA's concern about the appropriateness of permitting the registration of a restriction upon the appointment of a receiver under a debenture or legal charge:</p> <p>(a) Members note that whether a restriction would be registered depends very much on how the Land Registrar interprets the relevant legislation, such as the insolvency law, and/or legal documents. Given the implication of the registration of restrictions and the absence of indemnity for wrongful registration of restrictions, there is a need to put in place safeguards against wrongful registration of restrictions caused by misinterpretation of the relevant legislation and/or legal documents. In members' view, such safeguards may include soliciting legal advice where necessary, issuing relevant guidelines for reference, and putting in place a mechanism where the affected parties could present their views if their legal points are different from those of the Land Registrar, etc.</p> <p>(b) There are similarities and differences between the appointment of a receiver by court and the execution of a power of attorney by the owner of a property. To advise how powers of attorney would be dealt with under the land title registration system.</p>	<p>(a) It is current practice under the Land Registration Ordinance that the Land Registrar will seek internal legal advice on the registrability of an instrument whenever he is in doubt on points of law. An issue of general importance or complicity may be referred to the Department of Justice or counsel in private practice for further advice. This will continue to be the practice under the title registration system. Under the LTB the Land Registrar, when facing a difficult question of law of importance, will have an additional channel under Clause 88 to seek a more authoritative direction from the court.</p> <p>The mandatory enquiry procedure under Clause 77(1)(b) gives an affected owner full opportunity to present his views or objections to the Land Registrar before any restriction is registered. Clause 79 gives him opportunity to apply to the Registrar or the Courts for removal of a restriction after registration.</p> <p>The Land Registry intends to issue practice guides and explanatory notes on the use of cautions, restrictions and inhibitions, similar to those issued by the Land Registrar in England, for reference by the public and practitioners.</p> <p>(b) A Power of Attorney may support an application for registration under Clause 4(d) of the LTB if the grantor or the grantee under the Power of Attorney chooses to do so.</p>
41.	<p><u>Twenty-second meeting: Item 1</u></p> <p>According to Annex B to the paper on "Preliminary Response to Law Society Proposal For "Daylight Conversion"" (LC Paper</p>	<p>Even under the daylight conversion mechanism the Land Registration Ordinance will have to remain in effect until such time as every piece of</p>

	<p>No. CB(1)730/03-04(05)), if the daylight conversion system proposed by the Law Society were to be adopted, consequential amendments to repeal the Land Registration Ordinance (LRO) (Cap. 128) would be required. The Assistant Legal Adviser (ALA) is of the view that if LRO is to be repealed, there is a need to add in the Bill provisions similar to those existing in the LRO which provides for the duties and functions of the Land Registry. The Administration is invited to consider ALA's view.</p>	<p>land that cannot be converted at the main conversion date is finally brought under the title registration system. How long this will be is uncertain. The Administration considers that arrangement for repeal of the LRO is better considered after the effect of the daylight conversion mechanism has been observed. Most provisions of the LRO with respect to the functions and duties of the Land Registry are mirrored in the Land Titles Bill.</p>
42.	<p><u>Twenty-second meeting: Item 2</u></p> <p>Under the daylight conversion system proposed by the Law Society, all properties will be placed on a provisional register for 12 years. After 12 years, all properties on the provisional register would be brought under the full title register unless a caution against registration has been lodged. ALA is of the view that if the daylight conversion system is adopted, consideration may be given to model the Bill on the 1994 version of the previous Land Titles Bill with the addition of a schedule setting out the transitional arrangements for the 12-year period. The schedule may be deleted upon expiry of the 12-year period. The Administration is invited to consider ALA's view.</p>	<p>This general approach has been agreed and will be reflected in the CSAs presented.</p>
43.	<p><u>Twenty-second meeting: Item 4</u></p> <p>If the daylight conversion system is adopted, members consider it essential to ensure safe and smooth conversion at the end of the 12-year period. The Administration is invited to put in place a legislative or administrative measure to effect a review mechanism for the implementation of the system during the 12-year period, so that any problem that may arise in the interim can be tackled in a timely manner. To also add a provision in the Bill to empower the Administration to extend when necessary the 12-year period.</p>	<p>The Administration agrees that regular review of the implementation of the new system is necessary. Provision to allow for extension of the period before conversion will be made as part of the CSAs.</p>
44.	<p><u>Twenty-third meeting: Item 2</u></p> <p>Members are concerned whether there are any differences in nature and effect between the cautions registered during and after the 12-year incubation period under the daylight conversion system proposed by the Law Soc; and if there are, the differences. To look into this point in consultation with Law Soc.</p>	<p>There is no difference in effect between a caveat as proposed under the Land Registration Ordinance and a non-consent caution as proposed under the Land Titles Bill. Both serve to give notice of a claim. A caution against conversion under the Land Registration Ordinance will be different in that it will prevent conversion of the property until judgement has been given or agreement reached on the claim or the caution lapses due to failure by the claimant to pursue action.</p>

45.	<p><u>Twenty-third meeting: Item 3</u></p> <p>To advise the Bills Committee of what the Title Register would look like during and after the 12-year incubation period under the daylight conversion system.</p>	<p>Draft registers are set out at Annex E.</p>
46.	<p><u>Twenty-fourth meeting: Item 1</u></p> <p>In discussing the paper on "Position Report on Main Issues" (LC Paper No. CB(1)968/03-04(02)), members note that during the 12-year incubation period, all existing or newly created unwritten equities affecting unregistered land can be protected by registration of a warning notice known as "caveat" under the Land Registration Ordinance (Cap. 128), and that the caveat will automatically take effect as non-consent caution under the new land title registration system (LTRS). Referring to clause 70(10) of the Bill where it is provided that the Land Registrar (LR) may refuse to register a caution which he considers unnecessary, members suggest the Administration to consider the need to provide LR with the power to refuse to register a caveat which he considers unnecessary. The Administration is also invited to consider whether it is appropriate to allow all caveats to automatically take effect as non-consent cautions. An alternative proposed by members is that a caveat will be regarded as an application for non-consent caution under the new LTRS.</p>	<p>(a) The Administration considers it is appropriate to treat a 'caveat' under the LRO as a deemed non-consent caution upon conversion to the LTB system. Any matter that can be the subject of a caveat (unregistrable interests or equities) can be the subject of a non-consent caution. The procedure for the registration and the removal of a caveat under the LRO and a non-consent caution under the LTB will be similar.</p> <p>(b) Details about the registration and removal of caveats – and the deemed non-consent cautions they become on conversion - are being dealt with in the CSAs.</p> <p>(c) The proposed caveats under the LRO will be confined to use in respect of unregistrable interests or equities. If the subject matter of the caveat is outside this scope (e.g it is a matter that can be registered or does not relate to an interest in land) then the Land Registrar will be able to refuse to register the caveat.</p>
47.	<p><u>Twenty-fourth meeting: Item 2</u></p> <p>In discussing the paper on "Position Report on Main Issues" (LC Paper No. CB(1)968/03-04(02)), members note that cautions against conversion will lapse after 12 months unless the cautioner has commenced court proceedings to establish his claim, and that the registration of these cautions can be extended by the court at its discretion upon application by the end of the 12-month validity period. Members are concerned that in the absence of a limit on the extension period, registration of cautions against conversion may be extended endlessly and the court may be overloaded with such applications. To address the above concern, the Administration is invited to consider the need to impose a limit on the extension period.</p>	<p>The Administration agrees that the extension of the validity of a caution against conversion shall not be more than 12 months in the aggregate, taking into account the possibility that the extension may be granted by the court on one occasion or on several successive applications for a short period of extension.</p>
48.	<p><u>Twenty-fourth meeting: Item 3</u></p> <p>At the Bills Committee meeting on 13 January 2004, the Administration was invited to consider introducing a review mechanism for the implementation of the daylight conversion system during the 12-year incubation period. At this meeting, the Administration is invited to</p>	<p>The Administration intends to make provision to allow the interim period to be extended if necessary. We do not think that reducing the interim period would be welcomed by the community. Were provision to be introduced to allow this to happen it is likely to cause disquiet.</p>

	consider introducing a review mechanism for the length of the incubation period, so that the period can be extended or shortened when necessary.	
49.	<p><u>Twenty-fourth meeting: Item 4</u></p> <p>Members note that as proposed by the Administration, properties under new leases granted by the Government through auction or tender after commencement of the Bill would come directly under the LTRS. In this connection, the Administration is invited to advise the Bills Committee of the types of land which would be defined as "new land", and to provide examples of what would and would not be regarded as such.</p>	<p>The definition will be set out in the CSAs. Basically, any new grant which contains a clause which makes the recipient liable to any interests prevailing before the date of the grant will not be considered as 'new land' but will be required to go through the daylight conversion process.</p>
50.	<p><u>Twenty-fourth meeting: Item 5</u></p> <p>Members note that the Administration intends to modify the rectification provisions under the Bill to provide for rectification in favour of an innocent former owner if the change of ownership is procured by a forgery. In this regard, the Administration is invited to take the following actions:</p> <p>(a) To clearly define the term "forgery" in the Bill.</p> <p>(b) According to the Administration's response given at the meeting, it is revealed from recent case law that the court in the United Kingdom has almost without exception granted rectification in respect of the cases where the change of ownership is procured by a forgery. To provide the relevant case law for the Bills Committee's reference.</p> <p>(c) Given the Administration's current proposal on rectification, the purchaser's solicitor may need to check all relevant title documents in previous transactions to ensure that no forgery has been committed. The proposal might have implications on the liability of solicitors. Since the vendor did not have any obligation under the Bill to provide such documents for inspection, the relevant proposal might need to be amended. To examine, in consultation with the Law Society, the implications of the</p>	<p>(a) The definition of 'forgery' is being dealt with under the CSAs.</p> <p>(b) The two relevant English decisions are (i) <i>Argyle Building Society v Hammond</i> [1985] 49 P&CR 148 Conv135, Court of Appeal (Civil Division), and (ii) <i>Hayes v Nwajiaku</i> [1994] Chancery Division 10.6.1994 [On LexisNexis]</p> <p>(i) Based on the judgment of <i>Arygle Case (1985)</i>, when exercising its discretion of rectification of title, the court will exercise its jurisdiction according to the same general principles of equity without making a difference between registered land and unregistered land unless the court's discretion is restricted by some specific statutory provisions.</p> <p>(ii) In <i>Hayes Case (1994)</i> the Deputy Judge stated that "the power to order rectification is, of course, a discretionary one but, where a co-owner has forged a transfer, there is (subject to s.82(3)³) usually an overwhelming case for rectification as against the transferee and their mortgagees."</p> <p>In other words, in England the court will rectify the title in favour of an innocent</p>

³ Section 82(3) of the U.K. Land Registration Act 1925 [Rectification of the register] : "(3) The register shall not be rectified, except for the purpose of giving effect to an overriding interest [or an order of the court], so as to affect the title of the proprietor who is in possession -

(a) unless the proprietor has caused or substantially contributed to the error or omission by fraud or lack of proper care; or

(b) ...

(c) unless for any other reason, in any particular case, it is considered that it would be unjust not to rectify the register against him.

	<p>proposal on the liability of solicitors and how the Bill should be amended to cater for the proposal.</p> <p>(d) When preparing the Committee Stage Amendments to effect the Administration's current proposal on rectification, to take account of the Hong Kong Bar Association's views on security of title made in its submission dated 23 April 2003 (LC Paper No. CB(1)1517/02-03(07)).</p>	<p>former owner in a case of forgery unless the court's discretion is restricted by some statutory provisions like s.82(3) of the U.K. Land Registration Act 1925.</p> <p>(c) The duty of a conveyancing solicitor as to investigation of forgery will be the same before and after the Bill. Now he is checking and comparing the signatures appearing on the available title deeds. In future he is doing the same on the title deeds and documents available to him. If only copies are kept under the current law, the solicitor would be obliged only to examine the copies with his best endeavour. The precautions in verification of the identity of a person executing an instrument should also remain unchanged.</p> <p>(d) Noted. Being dealt with under the CSAs.</p>
51.	<p><u>Twenty-fourth meeting: Item 7</u></p> <p>On the Administration's consultation with the major stakeholders on the revised proposal for the conversion mechanism, to find out how the proposed change would affect their original positions. To also provide a paper on the outcome of the consultation for the Bills Committee's consideration at its meeting on 9 March 2004.</p>	<p>Done. Paper on "Report on Consultation on Revisions to Conversion Mechanism and Rectification Provisions" (LC Paper No. CB(1) 1230/03-04 (04))</p> <p>(Issued on 9 March 2004)</p>
52.	<p><u>Twenty-fifth meeting: Item 1</u></p> <p>In discussing the paper on "Responses to Miscellaneous Issues" (LC Paper No. CB(1)1057/03-04(03)), members note that if the daylight conversion mechanism and the proposed changes to the court's power of rectification of registered title in the case of forgery are adopted, the Administration considers that compulsory retention of certain title documents for future reference for an appropriate period of time is necessary. The Administration also proposes to impose a limitation period of 12 years for the rectification of Title Register. In this regard, the Administration is invited to take the following actions:</p> <p>(a) To ensure that there will be clear provisions for the compulsory retention of documents, in particular which party (owners, solicitors or mortgagee banks) should be responsible for keeping the documents. Some members consider that solicitors should not be required to keep the documents. To consult the Law Soc and report the outcome to the Bills Committee in due course;</p>	<p>(a)&(b) Being discussed with the Law Society.</p> <p>(c) To be dealt with in CSAs.</p>

	<p>(b) The proposed changes to the court's power of rectification of registered title in the case of forgery would have great impact on the claim of negligence against solicitors and in turn on the Professional Indemnity Scheme of Law Soc. To clarify the duty of a solicitor in this regard, in particular whether a solicitor would be under a duty to check all the documents to ensure that no forgery has been committed. To also consult Law Soc on this issue; and</p> <p>(c) To provide for a situation where an owner may be out of Hong Kong or is a minor during the 12-year period, to consider whether the period should only be counted from the date when the owner becomes aware of the forgery in question and whether extension of the period should be allowed under certain special circumstances.</p>	
53.	<p><u>Twenty-fifth meeting: Item 2</u></p> <p>In discussing the paper on "Responses to Miscellaneous Issues" (LC Paper No. CB(1)1057/03-04(03)), members note the sample Title Register showing transmission of interest upon the successive death of more than one joint owners. In this regard, the Administration is invited to take the following actions:</p> <p>(a) To consider how the following concerns of members could be addressed:</p> <p>(i) Under the existing practice, transmission on death of a joint tenant will take effect by operation of law on the date of death of the deceased joint tenant. Under the new land title registration system, the Administration proposes to revise the condition precedent to transmission on death of a joint tenant in clause 62(2)(b) to the effect that it is necessary to satisfy the Land Registrar either that the estate duty has been paid or its payment has been fully secured to the satisfaction of the Commissioner of Estate Duty. It is not clear which date (e.g. the date of death of the deceased joint tenant or the date of alteration of title registration) should be regarded as the date on which the ownership is transmitted to the surviving joint tenant(s). The legal status of the</p>	<p>(a) It is the policy intention that transmission on death of a joint tenant will take affect on the date of death of the deceased joint tenant. Clause 21 will be amended.</p> <p>(b) CSAs will be introduced to amend Clause 62(2).</p>

	<p>ownership between the two dates is also unclear; and</p> <p>(ii) There appears to be an anomaly: If transmission will take effect on the date of death of the deceased joint tenant, it may contradict clause 21 which provides that "a transfer or transmission shall, when registered, vest [the land] in the person becoming the owner of the land"; if transmission will take effect on the date of alteration of title registration, it may be contrary to the Common Law rule that transmission on death of a joint tenant will take effect on the date of death of the deceased joint tenant.</p> <p>(b) Members consider the formulation, "the Registrar shall not comply with subsection (1)..." in clause 62(2), rather odd as it seemed to ask the Land Registrar not to comply with certain part of the Bill. To consider replacing the term "comply with" with a more appropriate term.</p>	
54.	<p><u>Twenty-fifth meeting: Item 3</u></p> <p>In discussing the paper on "Responses to Miscellaneous Issues" (LC Paper No. CB(1)1057/03-04(03)), members note that the Administration may adopt section 41(1) of the New South Wales Real Property Act 1900 as the model to make amendments to clause 29(1) of the Bill in order to remove some interpretation problem due to the word "create". In relation to implied covenants, to consider the Assistant Legal Adviser (ALA)'s view that clause 43 on covenants for title should also be amended.</p>	Being addressed in CSAs.
55.	<p><u>Twenty-fifth meeting: Item 4</u></p> <p>Clause 61(3) provides that the words "a minor" shall be added after a minor's name if the minor is registered in the Title Register as the owner of registered land. Responding to members' view raised at the meeting on 19 December 2003 that a mechanism should be put in place for the removal of the words "a minor" when the minor concerned attains the age of majority, the Administration considers that clause 80 would enable the Land Registrar to remove the annotation on presentation of evidence that the owner has attained the age of majority (paragraph 19 of the paper on "Responses to Miscellaneous Issues" (LC Paper No. CB(1)1057/03-04(03)). Members share ALA's view that clause 80 as presently drafted does not provide the Registrar the power</p>	To be addressed in CSAs.

	to remove the annotation. The Administration is invited to amend clause 80 as appropriate.	
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Annexes

- A Comments on the Indemnity Cap and Responses made before gazetting of Land Titles Bill 2002.**
- B Justification for ending one month relating back provision.**
- C How priority is protected under Title Registration System and samples of application forms.**
- D Articles on Title Insurance.**
- E Form of Register during the ‘interim’ period and after conversion to title registration.**

Annex A

Summary of issues raised on Cap on Indemnity in fraud cases during 2001 Consultations

<u>Issues</u>	<u>Raised by</u>	<u>The Administration's Response</u>
(a) There should not be an upper limit on the indemnity in fraud cases.	(a) Bar Association	(a) An unlimited indemnity in fraud cases may result in the collapse and draining of the Indemnity Fund if there is an exceptionally high value claim. Unlimited indemnity will also result in a very high level of levy which is unfair to the general average value property owner.
(b) Indemnity should also be payable to any party who is affected by a rectification order.	(b) Law Society	(b) The present clause 78(1) as drafted covers such persons.
(c) The Government should bear the insurance premium to provide indemnity for property over the upper limit.	(c) Heung Yee Kuk	(c) The insurance premium will be very high and the owners should be able to buy insurance in the private sector.
(d) It is doubtful whether the proposed upper limit might infringe Article 105 of the Basic Law which states that where properties are deprived in accordance with law, there is a right to compensation corresponding to the real value of the property concerned.	(d) Bar Association	(d) The Basic Law Unit of the Department of Justice has confirmed that the upper limit is not in breach of Article 105.
(e) Incumbrances (e.g. a mortgage whose mortgage is fraudulently discharged), should also be entitled to indemnity.	(e) Bar Association	(e) The Government cannot give indemnity to victims in fraud of all types of instruments as the Indemnity Fund would be exposed to excessively high risk.
(f) Mistakes that are being carried over from the old register upon conversion may be exempted from the protection of the indemnity provisions.	(f) Bar Association	(f) The victims of these mistakes can claim under s.23A of the Land Registration Ordinance or under the common law.

Justification for removing the one month relating back provision

Section 5 of the Land Registration Ordinance provides that all deeds, conveyances and other instruments in writing, including judgements, will take effect and have priority from their date of execution so long as they are registered within one month from the execution.

2. As noted in *Hong Kong Land Law* (Sarah Nield. 1996. P.51 section 3.3.4): “This back-dating mechanism is very convenient for the purchaser, mortgagee, or other person taking the benefit of the instrument. They have a month in which to submit their instrument for registration without affecting their priority.”

3. As the author goes on, however : “It is less convenient for those wishing to search the register to ascertain their priority position, for it is impossible for the register to give an accurate up-to-date picture. There is always the possibility that an instrument may be submitted for registration, which can claim priority up to one month before the date of the search (see for example *Aie Company Ltd v Kay Kam Yu (1994) HCt No A48 of 1991*). This situation represents one of the major defects of the ordinance...”.

4. While it is noted that the likelihood of registration of an instrument without knowledge is low due to the retention and inspection of title deeds, the defect remains.

5. In the original draft of the Land Titles Bill, Professor Willoughby proposed that there should be a system of priority searches, similar to those allowed in the English title registration system. Under this, a prospective purchaser can apply for a special search certificate from the Land Registry that will prevent registration of any other dealing for 30 days. The consent of the owner would be required, in order to prevent frivolous or malicious abuse of the procedure.

6. During deliberations on the draft bill it was noted that the stamp duty requirements – under which there has to be an agreement for sale and purchase for every residential conveyancing transaction - would present difficulties for the operation of a priority search mechanism. It was concluded that a mechanism to allow for relation back to a caution lodged in respect of the agreement for sale and purchase would provide sufficient protection. Once the caution is lodged – a simple and straightforward process – all subsequent applications for registration of a transfer or charge relating to the caution are protected, removing any need to rush for registration. It was noted that the caution mechanism could apply equally well to commercial property. The fact that a caution would not lapse unless specific action was taken to remove it was seen as an advantage over a priority search which would lapse automatically after 30 days.

Protection of Priority Under Title Registration System

Under the title registration system, the position of a person intending to effect a dealing in registered land is protected by:-

- (a) The consent caution mechanism (Clauses 70(1) & (2), 71(1)); and
- (b) The priority provisions (Clause 33(1) & (7))

These clauses are set out at the back of this annex for ease of reference.

A person who intends to effect a dealing in registered land, such as a purchase, a sub-purchase or an equitable charge, may enter a consent caution in respect of his intended dealing.

The caution may only be entered with the consent of –

The owner – with respect to a purchase

The prior cautioner (purchaser) – in respect of a sub-sale

(The sub-purchaser – in respect of a sub-sub-sale, etc)

The entry of a consent caution does not prohibit the making of subsequent entries but it does have two effects:

First, the interest protected by the caution will take priority over all subsequent dealings, except for:-

any dealing which is necessary to complete the protected interest; or

any dealing to which the cautioner consents.

Thus, the interest of a purchaser protected by the entry of a consent caution will take priority over all subsequent dealings, save the transfer to the cautioner necessary to give effect to the sale and purchase agreement, or where he consents.

Second, the entry in the Register affects the priority of the subsequent related dealing by the cautioner. Clause 33(7)(a) provides that where an application is presented for the subsequent registration of a dealing which is the subject of a consent caution, the priority of the dealing, if registered, relates back to and takes effect from the priority of the consent caution as determined by the order of application for entry of the caution. This means that a transfer in favour of a purchaser will relate back to the date of his

application for his consent caution and will take priority over any charging order that is registered subsequent to that application.

Illustration:

X owns land that is subject to a legal charge (mortgage) to ABC bank

X agrees to sell the land to Y

Y registers a consent caution in respect of the sale and purchase agreement.

Y applies to LMNO Bank for a mortgage

P applies for a charging order against the land

Y applies for registration of the transfer of the land to him on completion.

- ❑ Y will take the land free of P's charging order since his priority is protected by the consent caution.
- ❑ Proceeds of the sale will be used to discharge ABC bank's legal charge.
- ❑ The new LMNO's Bank legal charge is not affected by the charging order as its charged interest is the purchaser's interest in the land, the priority of which is related back to Y's consent caution.

Points to note:

After registration of the consent caution, there is, therefore, no rush to register any dependent dealings. All financial arrangements can be settled between the various parties before the application for registration of the transfer or legal charge is submitted.

The only point at which there is any rush is over registration of the consent caution itself since, if another person gets in with a prior consent caution, that will upset the purchaser's priority.

Preparation and submission of the application for registration of a consent caution is a simple matter. While it is incumbent on the purchaser to instruct a solicitor, and for the solicitor to then act promptly, similar requirements face anyone else who seeks to intervene. Samples of application forms are appended.

Clause 70(2) allows for registration of the consent caution to proceed before completion of stamping. On completion of the stamping, a second caution is registered which secures priority from the date of the first caution.

If the vendor refuses to give his consent to the caution but the purchaser still wishes to proceed despite the doubts that refusal of consent may raise, then the purchaser can register a non-consent caution. This will have the effect of protecting the priority of the purchaser's equitable interest against any person with whom the vendor subsequently deals (Clauses 70(3) & 33(7)(c)).

Full text of relevant clauses of Bill.

Clause 70(1) states:

A person who in good faith and for valuable consideration intends to effect a dealing in registered land, a registered charge or a registered long term lease may, with the consent in the specified form of –

- (a) where the land, charge or lease is not affected by any prior consent caution, the owner of the land or charge or the lessee of the lease; or*
- (b) in any other case, the cautioner in respect of the prior consent caution which affects the land, charge or lease (or, where there is more than one such consent caution and, without prejudice to the generality of Section 33, the last such consent caution which was registered),*

present to the Registrar an application for the registration of a consent caution in respect of the dealing.

Clause 70(2) states:

Where an instrument which is a provisional agreement for sale and purchase or an agreement for sale and purchase in respect of registered land or a registered long term lease has been presented for stamping under the Stamp Duty Ordinance (Cap 117), then a consent caution in respect of that dealing may be registered if, but only if, the application ...is accompanied by a statutory declaration by the purchaser under the dealing to the effect that the instrument has been so presented.

Clause 71(1) states:

Where a consent caution has been registered in respect of registered land, a registered charge or a registered long term lease –

- (a) subject to section 70(1)(b) and without prejudice to the generality of section 6(2)⁴, the consent caution shall not of itself prohibit the making of entries in the Title Register affecting the land, charge or lease;*
- (b) section 33(1) shall not operate to prevent any matter registered subsequent to the consent caution from having priority over the dealing the subject of the consent caution if, but only if –*
 - i) that dealing is dependent on that matter having such priority; or*
 - ii) the cautioner in respect of the consent caution consents thereto.*

Clause 33(1) states:

Subject to ...section 71(1)(b), matters appearing in the Title Register shall have priority according to the order in which the applications which led to their registration were presented to the Registrar...

Clause 33(7) states:

It is hereby declared that –

- (a) without prejudice to the generality of section 71(1)(b), where an application is presented to the Registrar for registration of a dealing the subject of a consent*

⁴ The powers of the Registrar to register matters

caution, the priority of the dealing, if registered, relates back to, and takes effect from the priority of the first consent caution in respect of the same dealing as determined in accordance with subsection (1) or, where applicable, that subsection as read with paragraph (b);

(b) without prejudice to the generality of section 71(1)(b), where –

- i) a consent caution (“first consent caution”) referred to in section 70(2) has been registered in respect of a dealing;*
- ii) the ... agreement ...to which the first caution relates is stamped under the Stamp Duty Ordinance; and*
- iii) another consent caution (“second consent caution”), accompanied by that stamped ...agreement...is registered in respect of that dealing not later than 30 days after the registration of the first consent caution, then the priority of the second consent caution relates back to, and takes effect from the priority of the first consent caution as determined in accordance with subsection (1);*

(c) ...(deals with non-consent cautions)

(d) ...paragraph (a)...shall not operate to affect the priority of a caution as determined in accordance with subsection (1).

Appendix to Annex C

Sample Form for Application for Consent Caution

For Land Registry use only	Application No.		Fee(\$)
	Presented at the Land Registry on		

Form No.

Application to register a Consent Caution in respect of a dealing in registered land in the Land Registry under the Land Titles Ordinance

Registered land affected including address (if any)	Undivided Shares	Lot No.			Title No.
	House No.	Street Name			
					Application Nature Code
	Block	Flat	Floor		
Supporting Instrument	Date				Supporting instrument required/ not required* by law to be stamped
	Nature				
Intended dealing	Nature				
	Consideration				
Particulars of cautioner	Name (surname first for individuals)		Identification Document No. (See Note 3)		Stamp Office No. (If applicable)
					Solicitors Code

I/We,, being the registered owner(s) of the registered land affected/the cautioner(s) of caution application no.*
registered against the registered land affected
hereby consent to this caution and its registration as a Consent Caution

Signature(s) of registered owner(s)/ cautioner(s)*

HKID No./ Company No.

Date

Witness:
(signature of solicitor)

.....
(name of solicitor and firm)

.....
(date)

I/We,, a solicitor, hereby certify that -

(name)

- (a) the instrument/instruments* attached to this application -
 - (i) has/have* been prepared by me or under my direction; and
 - (ii) to the best of my knowledge, information and belief-
 - (A) has/have* been duly executed by the parties thereto; and
 - (B) is/are* effective in law for the purposes of this application;
- (b) the particulars contained in this application are correct; and
- (c) this application -
 - (i) has been prepared by me or under my direction; and
 - (ii) has been so prepared in accordance with the provisions of the Land Titles Ordinance (of) and the subsidiary legislation made thereunder applicable to this application

.....

(signature of solicitor)

.....

(name of firm)

.....

(date)

Delete whichever is inapplicable.

P.T.O. for notes for completion of this form

- Note: 1. Every box must be completed. If any box is not applicable, please put down a dash “___”
2. If space is insufficient, show particulars on a separate sheet and make a reference to this on the application form. Please staple the sheet to the application form when you lodge the application.
3. If the identification document is NOT a Hong Kong identity card, please state the type of document also.

Articles on Title Insurance

- (a) An article “Cut your title insurance costs” from Kiplinger magazine (a US based financial and business advisory publication);
- (b) Consumer information about Title Insurance published by the American Land Title Association; and
- (c) An article from the Australian Financial Review, dated 28th December 2002, discussing whether title insurance was needed there under the Torrens system of title registration.

Note: Articles (a) and (b) have been downloaded from the internet. Article (c) has been retyped from the original newspaper cutting for ease of reading.

BASICS

Cut Your Title Insurance Costs

by Melynda Dovel Wilcox

Who would be foolish enough to shell out several thousand dollars for an overpriced product that they knew little about and would most likely never really need?

Just about everyone who has ever bought a house. Home buyers can spend days haggling with sellers over a few thousand dollars on the purchase price or whether the chandelier conveys. But once the deal is done they don't bat an eyelash at spending another 0.5% to 1% of the mortgage amount as a one-time premium for title insurance. What's more, they don't bother to look for the best deal and probably can't even name their insurer.

Home buyers are in this fix because you can't get a mortgage without title insurance. Lenders require it to protect themselves against any title problems that may surface after the property changes hands. But while it's the lender that benefits, it's generally the homeowner who pays the bill -- which totaled more than \$8.7 billion in 1999, one-third more than doctors and hospitals spend on medical-malpractice coverage. Home buyers generally funnel all that money directly to the title insurer their real estate agent or settlement company recommends.

So this is title insurance in a nutshell: You, the homeowner, pay a premium to the title company to protect your lender from mistakes made by the company when it does a title search. Are you a sucker, or what?

To make matters worse, even though you're paying the bill, the title company's client is the real estate agent, lender, lawyer or homebuilder who brought in your business. Part of your premium likely goes toward rebates or other rewards for the referral (critics call them kickbacks), which many title insurers consider a cost of doing business.

"At one time, title companies would take entire real estate firms on ski trips," says Erin Toll, director of consumer affairs for the Colorado Division of Insurance, one of several state insurance departments that have been taking more aggressive action against insurers for their cozy business practices. During the past four years California has levied financial penalties totaling more than \$4.2 million against title companies for unlawful rebates. Two pending cases could result in an additional \$11 million in fines.

"It's a very creative industry, and they are extremely competitive with each other," says Toll. But it's the middlemen, not consumers, who benefit, because companies don't compete on price. "The consumer isn't in a position to exert market pressure to drive down the price of title insurance," says Birny Birnbaum, an economic consultant who has served as an expert witness at title-insurance-rate hearings.

Claims are rare

Most title problems are discovered and corrected during the title search at the time a property is sold. If a discrepancy comes up after the property has changed hands, the insurer will most likely pay to clear up the problem. In a worst-case scenario -- some long-lost cousin of a former owner resurfaces and lays a legitimate claim to the property, for instance -- you would lose the house but the insurance would kick in to pay off the mortgage and protect the lender from any loss.

Most claims occur within the first three years of a mortgage, before your equity has built up and while the lender is bearing the lion's share of the risk. If there's a claim, it's the lender, not the policyholder, who collects. Lenders hardly ever collect either, because claims are extremely rare.

Claims are so rare, in fact, that insurers spend as little as 5 cents to 10 cents of every premium dollar to pay them. In Texas, only 2 cents of every premium dollar goes to pay claims. The rest of the money goes toward expenses -- including the high fixed cost of maintaining a large database of title information (not to mention the cost of ski trips) -- or is retained by the company as profit. By contrast, companies that sell auto or health insurance typically spend 90 cents or more of every premium dollar on claims.

Industry sources say that the most common claims involve a forged signature somewhere in the title chain, which even the most diligent title searcher can't always discern at the time of sale. A classic example is a divorcing couple who own a piece of property jointly. The husband decides to sell it without his wife's knowledge and forges her signature. When she discovers the fraud and demands her half of the proceeds, the title insurer will most likely negotiate a settlement.

But data from title-company filings with the insurance department in New Mexico, for instance, show that over the past three years, forgeries accounted for an average of only 1% of losses. Errors made by the title company during its search, such as failing to unearth a tax lien or a judgment lien, accounted for more than half of losses, so home buyers end up paying for the company's mistakes.

Despite the combination of infrequent claims and lack of competition, industry profit margins from 1992 to 1996 were in line with other types of insurance, says Charles Nyce, professor of risk management and insurance at the University of Georgia's Terry College of Business. Nyce speculates that strong housing markets since the mid '90s have changed the picture, allowing companies to spread their expenses over more policies and increase their return. "In Texas, title companies have had rates of return in excess of 25% for eight to nine years running," says Birnbaum, well above other lines of insurance, such as auto or homeowners.

Coverage for homeowners

Once in a blue moon, title insurance pays off for homeowners -- but only for those who buy a separate policy for themselves. As you pay down your mortgage, the lender's exposure to a title defect declines and yours increases. For an additional one-time premium of as little as \$30, you can buy an owner's policy (as opposed to the required lender's coverage) to protect your equity.

That's a relatively cheap price for peace of mind. "Without an owner's policy, there's no protection at all for the consumer," says Birnbaum. "Then you're just paying a substantial premium to protect the bank's interest."

In some states you may not have to pay more for owner's coverage. In fact, you may have purchased owner's insurance without realizing it (check your settlement sheet). You'll certainly want an owner's policy if you're paying cash or making a substantial down payment.

Cut your costs

You may not have a choice about whether to buy title insurance, but you can choose your insurer and you don't have to overpay for coverage. A Kiplinger's survey of title-insurance rates in Alexandria, Va., St. Louis, Mo., and Walnut Creek, Cal., showed that a couple of phone calls could save you \$250 to \$400 on a policy for a \$350,000 house. (In Florida, Texas and a few other states, the insurance department sets uniform rates. Iowa uses a different system, described below).

When you purchase title insurance, you're generally also buying escrow and other services related to the closing. To compare prices, find out the total cost of doing business with each company for all services. In New Mexico, for instance, title-insurance premiums are set by the state, but closing and escrow fees are not.

Start shopping around as soon as you've received a good-faith estimate of your loan costs, which the lender is required by law to provide within three days of the loan application. First American has a title-fee calculator at its Web site, and Stewart Title, another large insurer, has a search engine to help you find a title agent in your area.

Ask the current owners which insurer holds the existing policy on their house. If a company can save time by updating the original search, you can get a lower reissue rate, says David Cox, a consulting actuary who specializes in title insurance. Similarly, ask for a discount if you're refinancing. You could save half the cost of a new policy.

If you're a first-time buyer struggling to raise enough cash to pay closing costs, ask the seller to pay for title insurance. That's common practice in California, New Mexico and Washington.

State insurance departments say they get very few complaints about title insurance. Caught up in the heady process of buying a home, consumers will do whatever it takes to get the house.

But if you weren't informed about what you were buying or weren't given adequate opportunity to select your title insurer, speak up. If there are enough complaints, state insurance departments will investigate.

Many departments are waiting to see whether the recent dismantling of barriers among providers of financial services will hurt consumers. For instance, a bank could set up its own title-insurance company to handle all the mortgages written by the bank. While efficient for the lender, it makes it dicier for borrowers to compare rates and could lead to higher prices.

Regulators in Colorado are also cracking down on companies that fail to file their rates or use rates other than those on file. "Companies might be charging a homeowner in a certain neighborhood one price and a builder another price, which could be illegal," says Toll of the Colorado Division of Insurance.

Iowans Get a Bargain

Home buyers in Iowa can be reasonably certain that they aren't paying too much for title protection. In that state, homeowners typically purchase a title-guaranty certificate from a division of the Iowa Finance Authority that provides the same coverage as title insurance at a fraction of the cost: \$1 per \$1,000 of the mortgage amount, plus an additional \$150 to \$300 for a lawyer to prepare a summary of the property's transaction history. For example, on a house with a \$150,000 mortgage, that would mean a maximum of \$450, versus as much as \$1,500 for title insurance in any other state.

"Iowa titles are considered to be the cleanest in the nation," says Matthew White, deputy director of the finance authority's title-guaranty division. Last year the agency generated more than \$1 million in profits, which are earmarked for low- to moderate-income housing programs.

Kiplinger.com

Why You Need Title Insurance

Title insurance, especially Owner's title insurance, is extremely important when purchasing a house or piece of property. Yet many consumers are unsure about what title insurance is and what it protects against. Here are some answers to the more common questions about title insurance.

Types of Title Insurance

How Am I Protected?

Common Title Problems

I'm refinancing, why do I need new title insurance?

I'm buying a newly built home, do I need title insurance?

Finding a Local Title Company

Refinancing: Is It for You?

Need More Information?

Types of Title Insurance

There are two types of title insurance: Lenders title insurance, also called a Loan Policy, and Owner's title insurance. Most lenders require a Loan Policy when they issue you a loan. The Loan Policy is usually based on the dollar amount of your loan. It protects the lender's interests in the property should a problem with the title arise. The policy amount decreases each year and eventually disappears as the loan is paid off.

Owner's title insurance is usually issued in the amount of the real estate purchase. It is purchased for a one-time fee at closing and lasts as long as you or your heirs have an interest in the property. This may even be after the insured has sold the property. Only Owner's title insurance fully protects the buyer should a problem arise with the title that was not uncovered during the title search. Owner's title insurance also pays for any legal fees involved in defending a claim to your title.

Prices, and the way title insurance is issued, vary from state to state. Contact a title company in your state to see how it is handled. For a list of title companies in your area, [click here](#). Simply enter your city and state.

How Am I Protected?

In order to issue title insurance, the title company must search public land records for matters affecting that title. Many search the "chain" of title back 50 years. Twenty-five percent of title searches find a title problem that is fixed before the insurance is issued. Some examples of items that can cause a problem are: deeds, wills and trust that contain improper information; outstanding judgments or tax liens against the property; and easements. Title companies fix the problems then issue the title insurance.

Occasionally, in spite of an exhaustive title search, hidden hazards can emerge after closing. Things such as mistakes in the public record, previously undisclosed heirs

claiming to own the property; or forged deeds could cloud the title. Owner's title insurance offers financial protection against these by negotiating with third-parties, and paying claims and the legal fees involved in defending the title.

Common Title Problems

Here are three short stories on some common title problems:

Fraud & Forgery

(NAPS) - Those involved in real estate fraud and forgery can be clever and persistent. which can spell trouble for your home purchase.

In a western state, an innocent buyer purchased an attractive home site through a realty company, accepting a notarized deed from the seller. Then another couple, the true owners of the property- who lived in another locale- suddenly appeared and initiated legal action to prove their interest in the real estate was valid. Under the owner's title insurance policy of the innocent buyer, the title company provided a money settlement to protect against financial loss. As it turned out, the forger spent time in advance at the local court house, searching the public records to locate property with out of town owners who had been in possession for an extended period of time. The individual involved then forged and recorded a deed to a fictitious person and assumed the identity of that person before listing the property for sale to an innocent purchaser, handling moot contracts through an answering service. Also, the identity of the notary appearing on deeds was fictitious as well.

Fraud and forgery are examples of hidden title hazards that can remain undetected until after a closing despite the most careful precautions. Although emphasizing risk elimination, an owner's title insurance policy protects financially through negotiation by the insurer with third parties, payment for defending against an attack on the title as insured, and payment of valid claims.

Conflicting Wills

(NAPS) - Conflicts over a will from a deceased former owner may suggest a study topic for law school. But the subject can take on a reality dimension and all too quickly your home ownership is at stake.

After purchasing a residence, the new owner was startled when a brother of the seller claimed an ownership interest and sought a substantial amount of money as his share. It seemed that their late mother had given the house to the son making the challenge, who placed the deed in his drawer without recording it at the court house. Some 20 years later, after the death of the mother, the deed was discovered and then filed. Permission was granted in probate court to remove the property from the late mother's estate, and the brother to whom the residence initially was given sold the house. But the other brother appealed the probate court decision, claiming their mother really did not intend to give the house to his sibling. Ultimately, the appeal was upheld and the new owner faced a

significant financial loss. Since the new owner had acquired owner's title insurance upon purchasing the real estate, the title company paid the claim, along with an additional amount in legal fees incurred during the defense.

Missing Heirs

(NAPS) - When buying a home, it's important to remember what you don't know can cost you.

As an example illustrating the need for precautions, The American Land Title Association pointed to a couple who purchased a residence from a widow and her daughter, the only known heirs of the husband and father who died without leaving a will.

Soon after the sale, a man appeared - claiming he was the son of the late owner by a former marriage. As it turned out, he indeed was the son of the deceased man. This legal heir disapproved of his father's remarriage and had vanished when the wedding took place. Nonetheless, the son was entitled to a share of the value of the home, which meant an expensive problem for the unwary couple purchasing the property.

Although the absence of a will hindered discovery of the missing heir in a title search of the public records, ALTA said that owner's title insurance issued at the time of the real estate transaction would have financially protected the couple from the claim by the missing heir. For a one-time charge at closing, owner's title insurance will safeguard against problems including those even an exhaustive search will not reveal.

ALTA reminded that owner's title insurance is necessary to fully protect a home buyer. Lender's title insurance, which is usually required by the mortgage lender, serves as protection only for the lending institution.

I'm refinancing, why do I need title insurance?

When you refinance you are obtaining a new loan, even if you stay with your original lender. Your lender will require lender's title insurance to protect their investment in the property. You will not need to purchase a new owner's title policy; the one you bought at closing is good for as long as you and your heirs have an interest in the property.

Even if you recently purchased or refinanced your home, there are some problems that could arise with the title. For instance, you might have incurred a mechanics lien from a contractor who claims he/she has not been paid. Or you might have a judgment placed on your house due to unpaid taxes, homeowner dues, or child support for instance. The lender needs reassurance that the title to the property they are financing is clear.

If it has been no more than 10 years since you bought your house or refinanced, ask for a reissue or discount rate. They are not available in every state, and you might have to meet some criteria to be eligible, so be sure to ask.

I'm buying a newly built home, do I need title insurance?

Construction of a new home raises special title problems for the lender and owner. You may think you are the first owner when constructing a home on a purchased lot. However, there were most likely many prior owners of the unimproved land. A title search will uncover any existing liens and a survey will determine the boundaries of the property being purchased. In addition, builders routinely fail to pay subcontractors and suppliers. This could result in the subcontractor or supplier placing a lien on your property. Again, lenders want to be sure the property has clear title, and they are insuring the correct property. Purchasing owner's title insurance will protect you against these potential problems and pay for any legal fees involved in defending a claim.

Finding a Local Title Company

Closing your loan can vary from state to state, and even within the same county or city. Settlements can be conducted by lenders, title insurance companies, escrow companies, real estate brokers or attorneys. Be sure to ask your Realtor® how your settlement will be handled.

www.alta.org

Australian Financial Review : Thursday 28th November 2002

US Title Insurers Meet Local Opposition

Tina Perinotto

US companies are blitzing the property conveyance market in Australia, selling more than 3,000 title insurance policies a month, but the move has stirred a bitter debate in property law circles.

The policies, sold by a number of firms including First Australian Title (a subsidiary of First American Title), promise to make conveyances quicker and less costly by removing the need to carry out all searches normally required for a property transaction.

They promise to cover financiers and property owners for a range of risks such as fraud within the Torrens Title system.

Some of their clients are banks and financiers, with the likes of Macquarie Bank, Westpac and St. George already on board.

The sceptics are unimpressed. Insure what, they ask ?

Australia's Torrens Title system is among the best in the world and is gradually spreading through Asian countries as well as Canada and Europe, they say. It has made buying and selling property relatively fast and secure. Australia's conveyance system is also relatively efficient and inexpensive.

According to an article in the *Law Society Journal*, published by the Law Society of NSW, insurers in the US found fertile ground for the product on the back of inefficient state deed registration systems and events such as the Civil War when many deeds were destroyed.

Today 85 percent of all transactions in the US carry title insurance and it is mandatory for residential properties attached to mortgage backed securities.

Its spread globally is in tandem with globalisation and the expectation of US business models to use title insurance.

But critics say this global by-product might be a little like other global products such as fast food and soft drink – part unnecessary, part addictive.

Property law specialist Neil Cameron, who recently retired from Allens Arthur Robinson, told *The Australian Financial Review* that relying on title insurance would undermine Australia's strong conveyance system and add significantly to costs associated with buying property.

Eliminating the need for full searches because of reliance on insurance would in time undermine the diligence of the conveyancing industry, he said.

And although, omitting searches will lower costs initially, solicitors' costs will rise because they will need to understand and advise on a growing number of policy variants.

Mr Cameron said there were four or five products on the market and each had different exclusions.

Generic exclusions include environmental contamination, native title claims and rights reserved under Crown grants, but with breaches of these covered.

The policies would each have to be read and understood, and someone had to pay for that, Mr Cameron said. “ This is a technical area that most purchasers wouldn’t have clue about,” he said.

Another area that is little understood is that the policies cover defects in title, such as a sewer owned by an authority on a property. But it does not cover defects in quality, which may involve a building that needs to be demolished because it does not have council approval.

Monash University law lecturer Pamela O’Connor can see a place for title insurance because she believes the Torrens system is far from perfect and favours the buyer of a property rather than a legitimate owner.

Title insurance, can protect an owner or financier against fraud, she said. For instance, the insurance can protect against adverse possession, such as a squatter who can lay claim to the property simply by occupying it for a number of years.

If rates and taxes have not been paid for more than a certain period, “you could be buying a property from someone who doesn’t have anything to sell, because the rates and taxes secured over the property would take priority”.

Another possible scenario would be when a liability is secured over a property which then reduces the ability of the financier to recover what is owed.

Ms O’Connor agreed with Mr Cameron, however, that the exclusion problem was an “an issue”.

Perhaps the answer was to refer people to insurance brokers, but this would create a new demand and may increase costs, she said.

CAVEAT

Under Land Registration Ordinance and **before automatic conversion** to the Title Register under Daylight Conversion

Owners Particulars

Name of Owner	Capacity (if not sole owner)	Memorial No.	Date of Instrument	Date of Registration	Consideration
ABC Development Ltd.	- -	0000000	00.00.1988	00.00.1988	- -
SZETO Man Lung	- -	0000000	23.11.1990	15.12.1990	\$800,000.00
		Remarks:	Assignment		

Incumbrances

Memorial No.	Date of Instrument	Date of Registration	Nature	In Favour Of	Consideration
0000000	00.00.0000	00.00.0000	Occupation Permit	- -	- -
2222222	00.00.0000	00.00.0000	Deed of Mutual Covenants	- -	- -
8888888	10.12.2000	3.1.2001	Legal Charge	FGH Bank	
				Remarks: The consideration is all money	

Deeds Pending Registration

- - -

Caveat / Caution against Conversion

Memorial No.	Date of Registration	Nature of Dealing / Claim	Supporting Document	Name of Party	Consideration	Remarks
1234567	00.00.2006	Claim for beneficial interest	Caveat under s.00 of LRO	Lee Yee ¹ [Administr1][Administr2]	Kar - -	

¹ Wife of SZETO Man Lung who claims to have made contribution to the purchase price

CAVEAT

After automatic conversion to the Title Register under the Daylight Conversion mechanism

Owners Particulars

Name of Owner	Capacity (if not sole owner)	Nature of dealing	Application No.	Date of Registration	Consideration	Remarks
SZETO Man Lung	- -	Assignment dated 23.11.1990	- -	15.12.1990	\$800,000.00	Memorial No.0000000 under LRO
<i>Caveat as per Memorial No.1234567 [Effective as non-consent caution by virtue of ss.00 of LTB]</i>						

Incumbrances

Application No.	Date of Registration	Nature of Dealing / Claim	Supporting Document	Name of Party	Consideration	Remarks
	00.00.0000	Occupation Permit	Occupation Permit	- -	- -	Memorial No.0000000 under LRO
- -	00.00.0000	Deed of Mutual Covenants	Deed of Mutual Covenants dated 00.00.0000	- -	- -	Memorial No.2222222 under LRO
- -	3.1.2001	Charge	Legal Charge dated 10.12.2000	FGH Bank	All money	Memorial No.8888888 under LRO
- -	00.00.2006	Beneficial interest	Caveat under s.00 of LRO	Lee Kar Yee	- -	Memorial No.1234567 under LRO
LRE0000000	00.00.2007	Non-consent caution	Writ of Summons under HCA0000/00 (for removal of caveat)	Plaintiff:SZETO Man Lung Defendant: Lee Kar Yee	- -	- -

Application Pending Registration

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