

Bills Committee on Land Titles Bill

**Comparison between
Proposed Land Title Registration System for Hong Kong
And other Jurisdictions**

Introduction

This paper outlines the main features of title registration systems already operating elsewhere and compares these with the system proposed for Hong Kong under the Land Titles Bill.

2. The systems in New South Wales, Australia; England; and Ontario, Canada have been selected for particular reference. New South Wales provides an example of one of the original ‘Torrens Title’¹ systems replacing deeds registration. England and Ontario provide different examples of title registration operating alongside deeds registration.

3. Descriptions of the three systems are given in the annex. The main body of the paper covers particular topics that are relevant to Hong Kong’s Land Titles Bill. Most comparisons are made with the three jurisdictions noted above, but information from other jurisdictions is provided where it is of relevant interest².

General

4. Title registration has been introduced in all Australian States, New Zealand, England, Scotland, Ireland, most Canadian Provinces, twelve states in the USA, Singapore, Malaysia and in a number of other countries operating under common law systems. Germany, Holland, most other parts of Continental Europe, South Africa and Japan have registration systems that have similar effect to title registration but either the term ‘title registration’ is not used or they do not operate under a common law system. With the reintroduction of land registration in Mainland China in recent years, title registration systems have been established in a number of places, such as Shenzhen and Shanghai.

¹ Named after Sir Robert Torrens who established the first title registration system in South Australia in 1858.

² Most comparisons are made with common law jurisdictions. Only limited reference is made to jurisdictions that operate under other legal systems.

Conversion

5. The following approaches have been taken to bring property onto title registers: -

- (a) **Purely voluntary.** This was the approach taken with the earliest English legislation of 1862 and 1875. It was ineffective as only a handful of properties were brought onto the title register.
- (b) **Voluntary for existing properties, compulsory for new properties.** When title registration was first introduced in Australia in 1858, existing properties could be converted to the title register through voluntary application while new properties were taken directly onto the title register. In most Australian states, a number of properties remain under the deeds registration system over 100 years after conversion began.
- (c) **Compulsory on transactions.** In England, compulsory registration of title began to be introduced in 1897. At that time, registration of title to land was made compulsory on sale within areas defined from time to time by an Order in Council. The sanction by means of which a purchaser was compelled to register his title was that failure to do so would deprive him of the legal estate and so render the property virtually unmarketable. Singapore followed the Australian model when introducing title registration in 1956, but added another conversion route of the Registrar selecting land already on the deeds register and requiring an application for conversion when transactions took place.
- (d) **Compulsory requirement by Government.** In a number of places, conversion to the title register has taken place through a legislative act, usually coupled with an administrative exercise. In Germany in 1900 and in Malaysia in the 1960s, existing land records were reviewed and converted to title registers by Government action. In New Zealand in 1924, the Registrar was empowered to deem an application for registration to have been made in respect of any parcel of unregistered land. The Registrar would examine the title and issue titles to be “limited as title” or “limited as to parcels” or “limited as to both title and parcels”. Since 1989 there have been provisions in Ontario for the Land Registries to extend title registration by reviewing titles on an area by area basis. Scotland is undertaking a similar exercise.

6. The conversion system set out in Clause 12 of the Land Titles Bill combines (b) and (c) above. New properties will have to be registered under the title registration system. Purchasers of existing properties will have to apply for conversion when a transaction takes place. Owners of existing properties can apply for voluntary conversion.

Effect of Title Registration

7. The effect of title registration is broadly similar under all systems:
- (a) the act of registration, not the execution of the assignment between parties, transfers ownership; and
 - (b) registration confers some warranty of title in the person registered as owner and bars adverse claims other than those specifically allowed for under the legislation.
8. There are differences in the range of overriding interests allowed and in the extent of protection given to a purchaser. In New South Wales and in Ontario, a bona fide purchaser for value will retain the property even in a case of fraud when the former owner is an innocent party. The latter has either to seek remedy through civil damages or claim against the indemnity fund. In England the purchaser will retain the property unless the Court decides to return the property to the innocent former owner. The innocent party who suffers loss is eligible to claim under the indemnity scheme.
9. Clause 81 of the Land Titles Bill follows the arrangement in England, allowing for the Courts to restore title to the former owner if it is considered just in the circumstances of the case.

Title Certificates

10. Most jurisdictions under study have issued title certificates under their title registration systems. However, these certificates are seen increasingly to be a risk if lost and unnecessary in practice. Ontario stopped issuing title certificates in the 1970s. New South Wales continues to issue title certificates but is considering making them voluntary. In England no title certificate will be issued under the new Land Registration Act 2002 which comes into effect in late 2003.
11. Clause 26 of the Land Titles Bill will allow for issue of title certificates upon voluntary application by the owner.

Power to Rectify the Register

12. Three different ways to rectify the register are found:-
- (a) By the court giving direction to the Registrar. This is found in all jurisdictions;

- (b) By the Registrar. Usually the Registrar's powers are limited to rectification of errors or omissions that do not have material effect on interests. This is allowed in New South Wales, Ontario and England; and
- (c) By the Registrar upon application by affected parties. This is allowed in all jurisdictions.

13. Clauses 80 and 81 of the Land Titles Bill provide for the register to be rectified by each of the routes noted above.

Criminal Liabilities

14. All jurisdictions make it a criminal offence to obtain changes to the register by fraud. In England it is an offence to conceal a title or claim, substantiate a false claim or suppress any document or fact.

Indemnity Provisions

15. Most common law jurisdictions have indemnity schemes as part of their title registration systems. Malaysia is an exception. Germany and Japan do not provide indemnity against loss of title due to fraud but - as in England and as proposed in the Land Titles Bill - they do allow for compensation if loss is due to errors or omissions on the part of the registry.

16. Indemnity schemes generally provide for compensation based on the value of the interest at the time the mistake or omission was made if the register is not rectified. When rectification has taken place, the indemnity does not exceed the value of the interest at the time of rectification. Where indemnity schemes exist, usually the Government (directly or through the Land Registry) is the compensator of first resort and has power to seek to recovery from the persons causing the loss. This is the case in England. In New South Wales the person suffering loss has to take action for recovery against the person causing the loss before application can be made to the indemnity fund.

17. New South Wales and Ontario maintain distinct indemnity funds. The fund in Ontario is maintained by regular appropriations from Government revenue while in New South Wales a levy imposed on each registration is paid into the fund. In England the Trading Fund under which the Land Registry operates is responsible for payments and a proportion of the annual revenue from registration is set aside to cover liabilities.

18. The scheme proposed for Hong Kong under the Land Titles Bill is for an indemnity fund to be set up to ensure accountable administration. It would be a free standing fund, maintained by a levy on registrations but with a Government standby loan to cover any claims before a reserve had been built up. The indemnity fund would be

administered by the Land Registry and would be a compensator of first resort. After paying out claims, the fund would take over actions against the parties causing the loss.

Treatment of Land Boundaries

19. In England a 'general boundaries' rule is used, under which the line shown on the map (usually the Ordnance Survey Map) is taken as representing the title boundary. The Land Registry does not give warranty as to where the legal boundary is. Applications for fixing land boundaries through survey and notice to adjoining owners are provided for but are discouraged due to the potential for protracted disputes. The 'general boundaries' approach is also taken in Ontario. In New South Wales, precise measurements are shown on title plans and the Government will undertake to re-establish boundaries with regard to adjacent parcels. This is possible since most land allocation in the state has followed from detailed survey. The actual dimensions of the lot are not guaranteed, nor is any discrepancy in area allowed as the basis for a claim under the Torrens Assurance Fund.

Overriding interests and adverse possession

20. A summary of the position in the three main jurisdictions under reference is contained in the Annex. The Annex also lists the overriding interests that apply in England and in Ontario. New South Wales allows for overriding interests but the legislation giving effect to this is complex and we are uncertain as to its effect. A note is also provided in the Annex on treatment of adverse possession in all three jurisdictions.

Chart of comparative overseas title registration systems

Country	(a) Issue Title Certificate	(b) Conversion	(c) Innocent Purchaser Retains Title under Fraud	(d) Power of Rectification	(e) Indemnity Fund	(f) State Fund/ Revenue for Compensation	(g) Land Boundaries
1. England	Have been issued in the past. No title certificate will be issued from late 2003.	Gradual by area and registration of certain transactions. Commenced in 1862. Conversion process not yet completed.	Yes, innocent purchaser in occupation of land retains property unless the Court considers it to be unjust.	The Land Registrar and the Court.	No	No. The Trading Fund sets aside a portion of the annual registration fee for the indemnity scheme.	Mapping of registered titles is usually based on published Ordnance Survey Maps. The 'general boundaries' rule is used, that is, the line shown on the map represents the title boundary, but the Land Registry does not specify where the exact legal boundary is. Precise details are left to the title deeds or to a court decision. Application for fixing of land boundary can be made with survey and notice given to the adjoining owners.

(h) Overriding Interest

1. England

All registered land is subject to

- (a) Rights of common, drainage rights, customary rights (until extinguished), public rights, profits à prendre, rights of sheep-walk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected by notice on the register;
- (b) Liability to repair highways by reason of tenure, quit-rents, crown rents, heriots, and other rents and charges (until extinguished) having their origin in tenure;
- (c) Liability to repair the chancel of any church;
- (d) Liability in respect of embankments, and sea and river walls;
- (e) Payments in lieu of tithe, and charges or annuities payable for the redemption of tithe rentcharges;
- (f) Rights acquired or in course of being acquired under the Limitation Acts;
- (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where enquiry is made of such person and the rights are not disclosed;
- (h) In the case of a possessory, qualified, or good leasehold title, all estates, rights, interests, and powers excepted from the effect of registration;
- (i) Rights under local land charges unless and until registered or protected on the register in the prescribed manner;

	(h) Overriding Interest
1. England	<p>(j) Rights of fishing and sporting, seignorial and manorial rights of all descriptions (until extinguished), and franchises;</p> <p>(k) Leases granted for a term not exceeding 21 years;</p> <p>(l) PPP leases;</p> <p>(m) In respect of land registered before 1925, rights to mines and minerals, and rights of entry, search, and user, and other rights and reservations incidental to or required for the purpose of giving full effect to the enjoyment of rights to mines and minerals or of property in mines or minerals, being rights which, where the title was first registered before the first day of January, 1898, were created before that date, and where the title was first registered after the 31st day of December, 1897, were created before the date of first registration;</p> <p>(n) any interest or right which is an overriding interest by virtue of paragraph 1 (1) of Schedule 9 to the Coal Industry Act 1994;</p> <p>Provided that, where it is proved to the satisfaction of the registrar that any land registered or about to be registered is exempt from land tax, or tithe rentcharge or payments in lieu of tithe, or from charges or annuities payable for the redemption of tithe rentcharge, the registrar may notify the fact on the register in the prescribed manner.</p> <p>(o) Where at the time of first registration any easement, right, privilege, or benefit created by an instrument and appearing on the title adversely affects the land, the registrar shall enter a note thereof on the register.</p> <p>(p) Rights, privileges and appurtenances appertaining to land.</p> <p>(q) All rights and title of the British Coal Corporation in coal, mines of coal and allied mineral substances with ancillary rights.</p> <p>(r) A long tenancy which is continued in favour of a tenant in occupation.</p>

	(i) Adverse Possession
1. England	<p>(a) <u>Present System</u></p> <p>(i) Any person who claims that he has acquired a title to unregistered land under the Limitation Act 1980, may apply to the Chief Land Registrar to be registered as first owner.</p> <p>(ii) An application founded on possession against a registered owner should take the form of an application for first registration.</p> <p>(iii) The Chief Land Registrar is required, on being satisfied as to the applicant's title, to enter him as owner either with an absolute, good leasehold, qualified or possessory title, as the case may require, but without prejudice to any estate or interest protected by an entry on the register which may not have been extinguished under the Limitation Act.</p> <p>(b) <u>Proposed Changes</u></p> <p>Under the Land Registration Act 2002 which will come into force in late 2003,</p> <p>(i) adverse possession of itself, for however long, will not bar the owner's title to a registered estate;</p> <p>(ii) a squatter will be entitled to apply to be registered as owner after 10 years' adverse possession, and the registered owner, any registered chargee, and certain other persons interested in the land will be notified of the application;</p> <p>(iii) if the application is not opposed by any of those notified the squatter will be registered as owner of the land;</p> <p>(iv) if any of those notified oppose, the application it will be refused, unless the adverse possessor can bring him or herself within one of three limited exceptions</p> <p>(v) if the application for registration is refused but the squatter remains in adverse possession for a further two years, he will be entitled to apply once again to be registered and will this time be registered as owner whether or not the registered owner objects;</p> <p>(vi) where the registered owner brings proceedings to recover possession from a squatter, the action will succeed unless the squatter can establish certain limited exceptions which are consistent with those in (iv) above.</p>

Country	(a) Issue Title Certificate	(b) Conversion	(c) Innocent Purchaser Retains Title under Fraud	(d) Power of Rectification	(e) Indemnity Fund	(f) State Fund/ Revenue for Compensation	(g) Land Boundaries
2. New South Wales, Australia	Yes, but considering to make it optional.	Gradual and optional. Conversion commenced in 1863. Still some land under old title system.	Yes. An innocent former owner has to claim against the fraudster before they can claim from the Assurance Fund	The Registrar General can cancel or correct an entry if it has been fraudulently obtained and when no complex issues of law or fact is involved. He may also rectify the register pursuant to a court order.	Yes. A Torrens Assurance Fund is established as a Special Deposits Account at Treasury. A levy is charged on registration of transactions.	No	It is guaranteed that the position of the boundaries with regard to the adjoining parcels can be re-established from survey marks if required. The actual dimensions shown in plans are not guaranteed under the Torrens Assurance Fund.

	(h) Overriding Interest
2. New South Wales, Australia	New South Wales allows for overriding interests but the legislation giving effect to this is complex and its effect is difficult to ascertain.

	(i) Adverse Possession
2. New South Wales, Australia	<p>(a) Where a person is in possession of land and the title of the registered owner of an estate or interest in the land would have been extinguished as against the person so in possession, and the statutes of limitation applied in respect of that land, that person may apply to the Registrar-General to be recorded in the Register as the owner of that estate or interest in the land.</p> <p>(b) The application is granted by recording the applicant in the Register as the owner of an estate in the land the subject of the application.</p>

Country	(a) Issue Title Certificate	(b) Conversion	(c) Innocent Purchaser Retains Title under Fraud	(d) Power of Rectification	(e) Indemnity Fund	(f) State Fund/ Revenue for Compensation	(g) Land Boundaries
3. Ontario, Canada	No. Title Certificate has not been issued for 25 years.	Gradual conversion on an area by area basis. Commenced in 1989 and anticipated to be completed by 2003.	Yes	The Land Registry and the Court.	Yes, there is a Land Titles Assurance Fund.	No	No guarantee of land boundary is given.

	(h) Overriding Interests
3. Ontario, Canada	<p>All registered land, is subject to</p> <p>(a) Provincial taxes and municipal taxes, charges, rates or assessments, and school or water rates.</p> <p>(b) Any right of way, watercourse, and right of water, and other easements.</p> <p>(c) Any title or lien that, by possession or improvements, the owner or person interested in any adjoining land has acquired to or in respect of the land.</p> <p>(d) Any lease or agreement for a lease, for a period yet to run that does not exceed three years, where there is actual occupation under it.</p> <p>(e) Any right under Part II of the <i>Family Law Act</i>, of the spouse of the person registered as owner.</p>

	(h) Overriding Interests
3. Ontario, Canada	<p>(f) A construction lien where the time limited for its registration has not expired.</p> <p>(g) Any right of expropriation, access or user, or any other right, conferred upon or reserved to or vested in the Crown by or under the authority of any statute of Canada or Ontario.</p> <p>(h) Any public highway.</p> <p>(i) Any liabilities, rights and interests created under section 38 of the Public Transportation and Highway Improvement Act.</p> <p>(j) Any by-law heretofore passed under section 34 of the Planning Act or a predecessor of that section, and any other municipal by-law heretofore or hereafter passed, affecting land that does not directly affect the title to land.</p> <p>(k) Where the registered owner is or a previous registered owner was a railway company, any interest that may be or may have been created by any instrument deposited in the office of the Secretary of State of Canada or the Registrar General of Canada, as the case may be, under section 81 of the Railway Act (Canada), or any predecessor thereof, but, where the previous registered owner was a railway company, this paragraph does not apply to a subsequent registered owner, except a railway company, unless a note of the previous ownership of the land by the railway company has been entered in the title register.</p> <p>(l) The rights of any person who would, but for the Land Titles Act, be entitled to the land or any part of it through length of adverse possession, prescription, misdescription or boundaries settled by convention.</p> <p>(m) Any lease to which subsection 70(2) of the <i>Registry Act</i> (unregistered lease of up to 7 years) applies.</p>

	(i) Adverse Possession
3. Ontario, Canada	<p>Where the land is originally registered under the Registry Act, the party claiming title to the land by adverse possession can make an application to the Land Registrar to bring the land under the provisions of Land Titles Act by way of a procedure called an application for first registration. The Land Registrar, if satisfied by evidence attached to the application that the applicant meets with all the criteria to support the title to the property by adverse possession, may grant the application and the title to that property will be declared as an absolute or possessory title under the Land Titles Act, depending on the circumstances. If the possession is for a period greater than 10 years but less than 20 years, then a possessory title may only be granted. If the 20 years has elapsed, an absolute title may be granted. Where the property is under the Land Titles Act, no one can claim possessory title to the property.</p>