

Bills Committee on Land Titles Bill

Summary of eight submissions

(Position as at 7 May 2003)

Eight submissions

	<u>LC Paper No.</u>
The Real Estate Developers Association of Hong Kong (REDA)	CB(1)1517/02-03(01)
Director, Hong Kong Institute of Asia-Pacific Studies, The Chinese University of Hong Kong (D/HKIAS/CU)	CB(1)1517/02-03(02)
Consumer Council (CC)	CB(1)1517/02-03(03)
The Law Society of Hong Kong (Law Soc)	CB(1)1517/02-03(04)
Hong Kong Society of Accountants (SA)	CB(1)1517/02-03(05)
The Hong Kong Institute of Surveyors (IS)	CB(1)1517/02-03(06)
Hong Kong Bar Association (The Bar)	CB(1)1517/02-03(07)
Heung Yee Kuk New Territories (HYK)	CB(1)1517/02-03(08)

	Views of organizations on major issues of the Bill	Name of Organization
<i>1. Certainty and security of title (including rectification of Title Register by Court of First Instance)</i>		
1.1	<ul style="list-style-type: none"> ● Since hardship is a relevant consideration for the Court in deciding whether the Title Register should be rectified, a party who is financially stronger will, more likely than not, lose out. This cannot be right and equitable. ● The Bill should be amended so that an innocent owner would always be entitled to have the Title Register rectified and his name restored to it. If the innocent owner is not to be so entitled, there should be no cap on the indemnity. 	REDA
1.2	Supports the indefeasibility of the title of the purchaser and the idea of giving the Court jurisdiction to rectify the Title Register when fraud occurs.	D/HKIAS/CU
1.3	<ul style="list-style-type: none"> ● The Court should only be given the discretion to order rectification of the Title Register in specific limited circumstances. ● Clause 81(3) should provide for applications by the owner of a registered charge. The drafting of this clause, particularly subclause (3)(c), seems overly convoluted and confusing and could be simplified and improved upon to achieve the desired result. 	Law Soc
1.4	<ul style="list-style-type: none"> ● The drafting of clause 81 (Rectification by Court of First Instance) is somewhat confusing. For example, clause 81(1) and 81(2) do not provide any particular procedures for rectification. Although clause 81(3) is the only one of the relevant provisions that specifies any procedures, clause 81(3) appears to conflict to some extent with clause 81(2) by providing that where fraud has occurred, the Court may order rectification in favour of a former registered owner or lessee of a registered long-term lease, even where the current registered owner or lessee has no knowledge of the fraud. 	SA
1.5	<ul style="list-style-type: none"> ● Agrees with the legislative approach of giving detailed statutory detailed guidelines for the Court to exercise its power and discretion. ● Certain provisions in clause 81 fail to achieve the right balance between the requirement of certainty of title and the justice of a particular case. 	The Bar

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	<ul style="list-style-type: none"> ● Has grave doubts as to whether a “knowledge test” in clause 81(2)(a) should be adopted as the statutory criterion in determining whether the Title Register is susceptible to the Court’s power of rectification. Mere knowledge of, as opposed to contribution or participation, to a fraud, mistake, omission or voidability of the instrument should not have the effect of depriving a person’s registered title. This would put a registered person’s title at a greater risk than that under the existing law. ● The exclusion of the right of a former registered owner or former registered lessee to apply for rectification merely because he might have knowledge of the fraud at some stage is also unsatisfactory (clause 81(3)(b)(i)). ● Even if the knowledge test is the appropriate test, the important question to be asked is knowledge at what time? Proposes that all reference to the knowledge test should be entirely removed from clause 81. 	
2. Conversion arrangement (including the issue of certificate of good title)		
2.1	Gradual conversion is preferable.	D/HKIAS/CU
2.2	<p>Supports gradual conversion and that automatic conversion be revisited after some time. Meanwhile, a timely review (preferably in three years’ time) covering the following should be conducted to perfect the new system:</p> <ul style="list-style-type: none"> ● Whether or not properties with certain defective title should be converted into the new system and implications of such conversion; ● Whether or not there are certain properties that have problems in conversion and if so, to address the problems; and ● Fraud cases, if any, undermining the new system which may justify revision of certain statutory provisions. 	CC
2.3	<ul style="list-style-type: none"> ● The advantage of mid-night conversion to the new system is the "at a stroke" removal of prior technical defects in title. The purely technical defects which unless removed in this way will affect the ability of solicitors to issue a certificate of good title. ● To ensure that consistent standards are applied uniformly where applications for first registration are made, it is suggested that the Land Registry should take on the task of confirming whether or not a title is suitable for first 	Law Soc

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	registration.	
2.4	It may be desirable to have a time frame for completing the conversion or at least, for reviewing the operation of the new system.	IS
2.5	Conversion should be allowed to take place as a gradual process. Automatic conversion should not be considered until after the new system has gained popular acceptance.	The Bar
3. Indemnity provisions		
3.1	<ul style="list-style-type: none"> ● The United Kingdom, Australia and Canada do not adopt a title registration system that places a limit on indemnity. ● The Bill, insofar as it attempts to deprive an innocent owner of his property without full compensation, is contrary to Articles 5, 6 and 105 of the Basic Law. ● The Bill should be amended as set out in paragraph 1.1 above. 	REDA
3.2	Welcomes the proposal of setting up a self-financing indemnity fund to back up the title guarantee under the new system.	D/HKIAS/CU
3.3	<ul style="list-style-type: none"> ● CC's proposal that the cap on the indemnity be raised to \$30 million has been reflected in the Bill. ● The cap on the indemnity should be reviewed from time to time to reflect changes in the property market so as to ensure adequate consumer protection at all times. ● Trusts that the Government would advance a loan to the indemnity fund in case of fund insufficiency and set out the provisions for the said loan in the indemnity fund regulations. 	CC
3.4	<ul style="list-style-type: none"> ● Under the Bill, no indemnity is payable for fraud affecting a registered charge. This should be amended. ● In view of the current proposals for rectification, it would seem that an indemnity should be available to any one who suffers loss as a result of dealing with the position on the Title Register which is then affected by a subsequent rectification, providing that he was not negligent or in some way contributed to any fraud or reasons for rectification. It is not clear that the provisions of the Bill as drafted reflect this position. ● The Bill provides that a person who suffers loss in 	Law Soc

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	<p>excess of the indemnity could pursue the person who caused the loss. At the same time, the Land Registry could also sue that person to reclaim the amount paid out under the indemnity fund. The Bill should be amended to make it clear that in those circumstances, the person who suffers the loss has a prior claim to the assets of the wrongdoer than the Land Registry so that in the event of a deficiency, the person who suffers the loss would be preferred over the Land Registry.</p> <ul style="list-style-type: none"> ● Is it appropriate to provide in clause 8 that where a loss arises as a result of the fault of a Government employee, the indemnity limit would still apply? 	
3.5	<ul style="list-style-type: none"> ● The availability of indemnity is severely restricted under the Bill. Under clause 82(1), indemnity is only available where there is fraud, or mistake or omission on the part of the Land Registrar or any public officer assisting him. "Fraud" is only defined as including dishonesty and forgery. It is not clear whether the term is confined to common law fraud, or whether it includes equitable fraud. Moreover, neither "mistake" nor "omission" is defined in the Bill. It is not clear whether unilateral mistake is included. ● Under clause 82(2)(a), no indemnity shall be payable to a person who has himself caused or substantially contributed to the loss by his fraud or negligence. Fails to see any justification for excluding indemnity in cases of "negligence" as opposed to "fraud". ● Fails to see any justification for clause 82(4)(c)(ii) which provides that no indemnity shall be payable in respect of any fraud, mistake or omission which occurred before the date of first registration of the lease as a long term lease and is discovered on or after that date. ● Remains unconvinced that there should be any upper limit on the indemnity. The failure to provide a full indemnity in all cases where an owner has had his interest extinguished through no fault of his own would be wrong in principle. ● Has strong doubts as to whether the expropriatory effects of the Bill are compatible with Articles 6 and 105 of the Basic Law. ● The procedure for claiming indemnity is governed by clause 84. However, it is unclear as to who should be the counter-party in this kind of proceedings. The Land Registrar or the Secretary for Justice? This ought to be made clear. 	The Bar

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	<ul style="list-style-type: none"> ● Clause 85 attempts to treat a claim for indemnity as a simple contract debt, i.e. subject to a limitation period of six years. The limitation period for recovery of land is 12 years. Claims for indemnity are akin to proceedings for the recovery of land and there is no reason for imposing a shorter limitation period. ● In accordance with the provisions in the Limitation Ordinance (Cap. 347), the words “might have known” in clause 85 should read “should have known”. 	
4. Overriding interests		
4.1	The Government should continue to examine how other jurisdictions deal with overriding interests and try to eliminate the uncertainty arising from unregistered overriding interests as far as possible.	D/HKIAS/CU
4.2	<ul style="list-style-type: none"> ● If the aim of the Bill is to bring certainty of title, then the issue of adverse possession should be addressed in the Bill. The proposals in the UK Law Reform Commission Report should be considered. ● There is no need for clause 24(1)(c)(i), (ii) and (iii) to be referred to separately. Rights of way and rights of water are easements. ● Does not believe that the provisions of clause 24(1)(d) correctly protect all “implied” easements. Instead of seeking to define when an easement is implied under the Ordinance, it might be easier to simply limit the operation of subclause (1)(d) to easements which are implied by the law on the disposal of any land and which are not expressly granted or reserved in any instrument. ● Clause 24(4) refers to an order of the Court of First Instance. On a strict reading of this, an order of any other court, e.g. the Court of Appeal, would not suffice. This apparent anomaly appears in a number of other clauses. 	Law Soc
4.3	<ul style="list-style-type: none"> ● Supports the proposal to subject registered titles to some well-defined categories of overriding interests. ● Occupiers’ interests have not been addressed in the Bill. ● Another notable omission is the absence of any provision to cater for the possibility that easements may be acquired by prescription. ● It is also important to clearly define whether the Government’s right of re-entry under the terms of a 	The Bar

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	Government lease for accrued breaches of the covenants in the Government lease should be treated as overriding interests.	
4.4	Overriding interests should not be retained. If the Administration insists that overriding interests be retained, they should be entered in the Title Register.	HYK
5. Land boundaries		
5.1	Under the proposed system, the Government should handle with care land lots where the boundaries are not clearly defined, particularly those in the New Territories.	D/HKIAS/CU
5.2	<ul style="list-style-type: none"> ● It is most important that the title registration system should provide reliable and adequate records about the particulars of the landed interest including plan showing the size, boundary and layout of the interests. Regrets to note that the new system as proposed under the Bill provides guarantee of ownership only. ● Clause 92(2)(b) states that the Director of Lands shall not determine the boundaries of a lot held under a block Government lease. Would it imply a defect in the land title for the old schedule lots? ● Clause 92(5) states that the Director of Lands may authorize “a person” to perform function, etc. under this clause. Since this function may include survey for boundary plans, it should be done by an Authorized Land Surveyor as described under the Land Survey Ordinance (Cap. 473) or by a Government Employee with professional capacity in land surveying. ● Clause 92(6) outlines the meaning of boundary “determination” in which a boundary survey has been explicitly excluded. In the process of updating the boundary, a land boundary survey plan should be prepared in accordance with the Code of Practice as referred to under the Land Survey Ordinance. ● Clause 49(1)(b) leaves it to the Land Registrar to specify the “particular part of the land” as the easement. To achieve this, there is a need for a well-prepared plan instead of an approximate one as specified in clause 19. 	IS
5.3	<ul style="list-style-type: none"> ● Agrees with the proposal that leaves boundary disputes to be dealt with outside the title registration system. ● It may not be just to the neighbouring owners for an owner to secure registration of a lot boundary plan 	The Bar

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	<p>behind the back of his neighbours. Suggests that a requirement be made as a condition for any application for registration of boundary plans that proper notice be given to neighbouring owners and a way be provided for these neighbouring owners to make any objection or submission to the Land Registrar within a specified period of time.</p> <ul style="list-style-type: none"> ● It is not clear what legal effect would follow from the registration of the boundary plans. ● The question of boundary and the question of title to any property are intertwined. If the boundary of the land is such that certain part of the land is occupied by a neighbour, then under the existing law, the title to the land cannot be said to be a good title. 	
5.4	<ul style="list-style-type: none"> ● HYK supports the proposal to allow the owner of registered land to make an application to the Director of Lands for a determination of lot boundaries. However, the relevant procedures as well as the respective roles of the Lands Department and the Government should be clearly stated. ● When the owner of registered land makes an application to the Director of Lands for a determination of lot boundaries, if the Director considers that the existing land boundary plan is acceptable for the purpose, he should verify the plan together with the relevant District Survey Office before causing the plan to be registered under clause 92(3)(c). ● If there is no existing land boundary plan or the existing plan is not acceptable, the Director of Lands should not solely rely on the land boundary plan prepared by the authorized land surveyor appointed by the owner of the lot under clause 92(3)(d) in determining the boundaries of a lot. The Director should ensure that there is concrete information and data relating to the boundaries of the lot. ● There is a need for the Government to establish a data base of the land boundary plans and relevant data of all lots to facilitate search by land owners and the public so as to reduce boundary disputes. 	HYK
6. Land Registrar		
6.1	The Land Registrar is given a number of quasi judicial functions under the Bill, but there is no requirement for the person holding the post to have any appropriate legal	Law Soc

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	qualification and experience. Recommends that this be addressed in the Bill.	
7. Registration of cautions		
7.1	It is not clear how clause 70(5), (6) and (7) will work in practice. Subclause (6) says the cautioner is the person who intends to effect the dealing, but it is not clear whether this means the donor or the donee or either. Moreover, subclause (7) says the Commissioner is the cautioner.	Law Soc
7.2	Clause 70(3), amongst other things, enables a person who has presented a winding-up petition against the owner of registered land or a registered charge, or registered long-term lease, to apply to the Land Registrar for registration of a non-consent caution in respect of the petition. Suggests that a person presenting a bankruptcy petition against the owner of registered land, etc. should also be able to apply to have a non-consent caution registered.	SA
7.3	The concerns about problems regarding consent cautions and non-consent cautions previously raised by the Bar have not been addressed in the Bill. A fertile ground for litigation is being created if these problems are not properly addressed and resolved in the Bill.	The Bar
8. Searches and retention of land titles records		
8.1	The provisions on searches and retention of land title records, e.g. clauses 27 and 60, seem to limit the requirement to retain records to records that relate directly to a current entry in the Title Register. At the same time, the regulation-making power in clause 100(1)(zc) makes a more general reference to the possibility of historical records being retained. The Government is requested to clarify its intention with regard to making available records of relevant transactions and documents prior to the first registration of any given plot of land on the Title Register.	SA
8.2	Destruction of certain old records must be considered very carefully. In many cases, original entries of figures in the area schedules and the plans are informative. Microfilming or any other form of imaging under clause 60 may not be able to retain such information.	IS

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<i>9. Protection of public interests</i>		
9.1	Public awareness of the changes to the present deeds registration system should be enhanced. Adequate safeguards should also be in place to protect the minors, the elderly and the illiterate who are particularly vulnerable to actions that may prejudice their interests under the new system.	CC

Council Business Division 1
Legislative Council Secretariat
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