

HPLB/LTB Paper 07/04

Revisions to the Land Titles Bill

Purpose

This paper provides a guide to the amendments proposed to the Land Titles Bill tabled by the Administration on 20th May 2004. Page references are to the copy of the marked up version of the Bill issued by the Legislative Council Secretariat as LC Paper No. CB(1) 1899/03-04(05).

General

2. The Administration has agreed to remove the 'gradual' conversion mechanism, contained in Clause 12 of the Bill and replace them with the 'daylight' conversion mechanism. Under this mechanism, only 'new land' will come under the Land Titles Ordinance (LTO) immediately after commencement. All other land will remain under the Land Registration Ordinance (LRO) until the end of a lead-in period, proposed to be 12 years. The new mechanism requires:

- (a) substantial amendment to the LRO to provide for 'caveats' and 'cautions against conversion' in the period before existing land is brought under the LTO. This is being done by way of a new Schedule 3 in the Bill, in which all amendments to the LRO have been placed. Amendments to the LRO related to the old 'gradual' conversion mechanism that were previously in Schedule 2 are removed;
- (b) amendments to the main Bill to provide for the new conversion mechanism. These are now contained in two places:-
 - (i) a new Schedule 1A, which contains the provision for the 12 year period before existing land comes under the LTO and the clause setting out when existing land will be converted and the exceptions to this;
 - (ii) in part 2 of the Bill, where there are clauses on transitional arrangements.

[Note: the draftsman is reviewing the arrangement of clauses between part 2 and Schedule 1A and may propose changes to provide a clearer structure]

- (c) amendments to the Bill to remove references to the old conversion mechanism.

3. The Administration has also undertaken to revise the rectification provisions and indemnity scheme.

4. Rectification will now be mandated in favour of an innocent former owner whose name has been removed from the register due to a void instrument or a false entry in the register. Clause 81 has been amended accordingly and a new Clause 81A is to be added to provide for a limitation period on applications for rectification in line with the Limitation Ordinance.

5. The indemnity scheme is to be amended to require the Registrar to take account of charges and co-ownership when making indemnity payments. Clause 83 has been amended to this end.

6. Apart from these major changes, which are described in greater detail below, various other amendments have been proposed. The annex contains a note of these.

Daylight Conversion Mechanism

7. Under the daylight conversion mechanism, after commencement of the LTO, all existing land held under a Government Lease, termed 'unregistered land', will remain under the LRO for a period of 12 years. This period is set out in Schedule 1A [Cl.2 (1); p.151].

8. The 12 year period may be varied by the Secretary for Housing Planning and Lands gazetting an amendment to Schedule 1A, which he is empowered to do under Clause 101 of the Bill. This power is subject to the approval of the Legislative Council (positive vetting).

9. Cl.2 (1) of Schedule 1A provides that, at the end of the period, all unregistered land will become registered land and all provisions of the LTO will apply to it, subject only to exceptions allowed by Cl.2(2).

The exceptions are:

- (i) any land for which instruments have been submitted for registration under the LRO and registration has not yet been completed. Cl.2(3)(a) provides that land falling into this category will become registered land as soon as the registration of the matter is completed or withdrawn under the LRO; and
- (ii) any land against which a 'caution against conversion' has been registered under the LRO. A 'caution against conversion' is a new instrument to be created under the LRO. A definition of 'caution against conversion' is

given in Clause 1 of the new Schedule 3 [p.155] while Clause 4 of Schedule 3 inserts new sections into the LRO to govern the operation of this instrument [see 21G to 21L on pp.163 to 169]. Its purpose is to allow a claimant to title or to a beneficial interest in land to prevent conversion to the title registration system until his claim has been settled under the existing law. Once that claim has been settled or withdrawn, the land will become registered land [Cl.2(3)(b) of Schedule 1A, p.151].

10. Upon unregistered land becoming registered land, the registers kept under the LRO shall become the title register under the LTO [new Cl.15A in the Bill, p.36. similar to Cl.11 of 1994 Bill].

11. The priority of interests in the title register will be determined in accordance with the provisions of the LRO [Cl.11(1), p.25]. An interest referred to as a *lis pendens* or charging order under the LRO will be deemed to be protected by a non-consent caution registered under the LTO [Cl.11(2), p.26] and an agreement for sale and purchase, nomination or equitable mortgage will be deemed to be protected by a consent caution registered under the LTO [Cl.11(3), pp.26-27]. Clause 11 has been modified only slightly as compared with the Bill.

12. Clause 14 [p.31] sets out the effect of first registration. The structure of the clause has been amended for clarity and to replace references needed for 'gradual' conversion with those needed under 'daylight' conversion. The effect remains the same. The first owner of registered land remains subject to unregistered interests affecting land that were enforceable against the land immediately before first registration [Cl.14(2)(d), p.34]. Those unregistered interests will not be enforceable against the land after a subsequent sale to a purchaser for value [Cl.14(3), pp.34-35].

Caveats

13. To provide a non-hostile way for anyone who has a claim to an interest that is unregistrable under the LRO to protect that claim against the effect of a subsequent sale to a bona fide purchaser after the land has been brought under the LTO, another new instrument, the 'caveat', is being introduced under the LRO by way of Schedule 3. Cl.1 (b) of Schedule 3 provides a definition of a caveat [p.155]. Cl.4 sets out new sections in the LRO [21A to 21F, pp158 – 162] governing their use. A caveat can be registered in respect of an interest that is unregistrable [21A]. It gives notice of a claim [21B(1)] but does not affect the validity of the claim [21B(2)] or confer any priority [21B(3),(4)]. Whether a registered instrument is subject to an interest claimed in a caveat is determined by the law at the time of the transaction [21C] and the priority among unregistrable interests affecting the same land remains to be settled in accordance with existing rules of law and equity, irrespective of a caveat being registered [21D].

14. A caveat may be withdrawn or removed [21E]. This section mirrors Cl.72 of the Bill [p.104] dealing with the withdrawal or removal of cautions under the LTO. Similar provisions for withdrawal or removal of cautions against conversion are contained in 21K [p.167]. [*Note: arising from discussion in Bills Committee on 25.5.04, all these clauses*

will be modified to ensure that the Registrar will not determine an application made to him if a parallel application is being considered by the Court and to allow the Registrar to refer an application for removal to the Court if the Registrar considers that the matter is better determined by the Court.]

15. A caveat that is registered without reasonable cause or maintained without reasonable cause after the ground on which it was registered has ceased to exist may be liable in a suit for damages [21F, p.162]. Again this provision mirrors that in Cl.73 of the Bill [p.107] for cautions and in 21L [p.169] for cautions against conversion.

16. Any caveat that remains registered against the land when it becomes registered land will become a non-consent caution on the title register by virtue of new Clause 11A in the Bill [p.28]

Cautions against Conversion

17. The provisions on cautions against conversion are similar to those for caveats except that the effect of a registered caution against conversion is to prevent the land becoming registered land [21H(1), p.163] and that they lapse automatically if action is not taken to assert the claim behind the caution within a defined period [21J]. *[Note: arising from discussion in the Bills Committee on 25.5.04 it has been agreed to amend 21J to allow for circumstances where, before the end of the 12 year period, a caution against conversion may have lapsed because it was not extended under subsection (2) and the claimant wishes to ask the Court to allow an application for 'extension' of the caution on exceptional grounds.]*

Long Term Leases

18. To allow for clarity in the operation of long term leases under the LTO, it has been agreed that such leases [defined in Cl.2(1) of the Bill, p.8] which are not at present separately dealt with under the LRO, should be dealt with as a special category under the LTO. Under the old gradual conversion mechanism, application for registration of the relevant leases then existing would have to be made. Under the daylight conversion mechanism, 'relevant leases', defined as leases under the LRO that meet the definition of long term lease under the LTB, will automatically become long term leases once the land from which they are derived becomes registered land [new Cl.10A in the Bill, p.25]. Clause 22 [p.44] has been amended consequentially.

Other amendments relating to daylight conversion

19. The old Clauses 12 and 13 in the Bill have been deleted and replaced by a short new Clause 12 [p.30] requiring the Registrar to open a register for new land when it is granted after commencement and allowing him to open registers in other cases.

20. The old Clause 15 on the date of first registration has been replaced by a new Clause 15 appropriate to the new mechanism [p.35].

Rectification and Indemnity

21. Clause 80 has been amended to allow the Registrar to alter the register where he is given proof that an error or omission is clerical [new subsection (1)(aa), p.114] and to remove a spent reference to a minor [new subsection (3) & (4)].

Clause 81 has been amended to:

- (a) clarify that the knowledge of fraud or voidness that a title owner in possession for valuable consideration must have for his title to be open to rectification by the Court is knowledge in relation to the transaction by which he became the title owner. [Clause 81(2)(a) & (b), p.115];
- (b) remove the wide discretion given to the Court under the old subsections (3) & (4), replacing them with a new subsection (3) [p.117] which requires rectification to an innocent former owner who has lost his title due to a fraud procured either by a void instrument or by a false entry in the register [Clause 81(3)(b)(i)&(ii)];
- (c) allow for costs and damages arising out of an action for rectification not involving a mistake or omission by the Registrar or his staff to be paid out of the indemnity fund in circumstances allowed for by regulations [new Clause 81(5A), p. 118]; and
- (d) make the clause subject to a new clause 81A [p.119] which limits the period within which an application may be made.

22. Clause 82 has been amended to:

- (a) make clear that no indemnity may be paid in respect of unregistered land [new subsection (4)(d), p.121]; and
- (b) allow for subrogation by professional indemnity insurers if they have paid out in a claim that is entitled to an indemnity payment in cases of mistake or omission by the Land Registrar [revision to subsection (5), p.122].

23. Clause 83 has been amended to:

- (a) require the Registrar to take account of any registered charges that cease to be registered due to a rectification order. When the chargor in such cases is entitled to an indemnity, the Registrar must apply the indemnity first to the

charge and only pay any remaining balance to the chargor [new subsection (2), p.123]; and

- (b) require the Registrar to apportion any indemnity payment between co-owners who cease to be registered due to rectification so as to reflect their respective interests in the land or lease before rectification [new subsection (2A), p.124].

Law Society Position

24. The draft amendments have been sent to the Law Society. The Law Society has not made any formal statement about the amendments. They have been considered by the Law Society's working party on title registration. It is our understanding that the working group believe that the amendments properly reflect the agreed daylight conversion mechanism. We are continuing to discuss aspects of the drafting with the working party.

Land Registry Procedures

25. When presented with an application for registration of a caveat under new section 21A, or a caution against conversion under new section 21G, the Land Registry will consider the application in the manner required for existing instruments submitted for registration under the LRO.

26. Regulation 15(1)(a) of the Land Registration Regulations requires the Registrar to withhold registration of any instrument where he is “not satisfied as to any of the matters specified in section 23 of the Ordinance”. With respect to caveats and cautions against conversion, subsection (1) of section 23 is relevant. This states:

“(1) [Subject to subsection (2)], the Land Registrar shall register, in the manner prescribed by or under this Ordinance, any deeds *etc...*if, but only if, he is satisfied that:-

- (a) the deed *etc...*may be, or is under any other Ordinance required to be, registered under this Ordinance;
- (b) the provisions of this Ordinance and of any regulations made thereunder, and of any other Ordinance relating to the registration of an instrument under this Ordinance have been complied with; and
- (c) the prescribed fees have been paid.”

27. The key provision of the LRO that is referred to when deciding whether an instrument is registrable or not is section 2, which requires the Registrar to register if the instrument presented is one “by which...any parcel of ground, tenements or premises in

Hong Kong may be affected". This is the main test that will be applied to any application for registration of a caveat or caution against conversion. If the application shows the claim to be a matter which may affect land or premises then, provided that all requirements as to fees and particulars have been met, the instrument will be registered. If not, the registration will be withheld and the applicant asked to withdraw it.

28. The new section 27A proposed by clause 5 in Schedule 3 of the Land Titles Bill will give the Registrar power to specify the form of document that must be used in certain applications. The new sections 21A and 21G require applications for caveats and cautions against conversion to be made in specified forms. If those forms are not completed properly, the registration will be withheld.

*Housing, Planning and Lands Bureau
May 2004*

ANNEX

Other amendments to LTB

<i>Clause & Page Reference</i>	<i>Brief Description</i>	<i>Annotation</i>
2(1), pp.1 – 14	New definitions for ‘caveat’, ‘Land Registry’, ‘new land’, ‘registered caveat’, ‘relevant lease’, ‘unregistered land’, ‘unregisterable interest’. Revised definition of ‘date of first registration’, ‘first registration’, ‘long term lease’, ‘registered land’	Needed for daylight conversion mechanism. Draftsman may move some to Schedule 1A.
2(1), pp.1 – 14	Revised definitions for ‘company’, ‘lease’, ‘lis pendens’, ‘register’.	Response to drafting comments from various parties.
3, p.15	New subsection (1A).	To provide link to Schedule 1A. May be replaced by Draftsman later.
4(c), p.17	‘of a court’ added	For clarity.
6A, p.21	Previously clause 88. Revised to narrow scope to questions of law.	Inappropriate location before.
10(3)(g), p. 24	‘long term’ deleted	Incorrect reference
11(4)(a), p. 27	‘or a building mortgage of an uncompleted building; and’ deleted.	Incorrect reference
20(5), p.39	Subsection deleted	Unnecessary
21, p.41	Revised format	Mirrors changes to Cl.14.
24(1)(d), p.47	Replaced by new subsection (d)	For clarity
24(1)(f) p.48	Reference to Government rights of re-entry added	For avoidance of doubt
24(4), p.51	Recast	For clarity.
25, p.52	Replaced by new clause 25.	To make clear that any person dealing with land does so with notice of all

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		relevant entries in the Title Register. Necessary because of the amendments to Cl.33 and 71 noted below.
26, p. 53	Subsection (7) revised	To cover all possibilities.
29. p.57	Revision to subsection (1) and replacement of subsection (2).	For clarity
30, p.58	Relocated to 69A.	For clarity
31, p.58	'matter' replaced by 'dealing'	To limit scope to important matters.
32(1), p.59	'through that person's wilful default' replaced by 'without reasonable excuse'	For consistency with other references.
33, pp.60 – 63	Subsections (4), (5) &(6) deleted, subsection (7) revised. Reference to s.71(b) deleted in subsection (1).	Deleted subsections not needed now that gradual conversion replaced by daylight mechanism. Revision to subsection (7) (and s.71) is to remove potentially confusing reference to 'relating back' and acquisition of priority from cautions. It is agreed with the Law Society that a person's priority can be adequately protected by the registration of a consent caution itself.
34, p.64	Revisions made for clarity in handling successive applications for re-registration of charging orders.	Similar changes made to S.17 of the LRO by way of Cl.3 of Schedule 3, p.157.
39, p.68	'Notwithstanding section 38' deleted	Not necessary and potentially confusing.
43, p.71	New subsections (2) and (3) added	To clarify how exclusion,

<i>Clause & Page Reference</i>	<i>Brief Description</i>	<i>Annotation</i>
		variation or extension of implied covenants are to be dealt with.
44, pp.72 – 74	Subsection (3) deleted and other lesser changes.	To reflect daylight conversion. New subsection (1)(a)(iv) reflects need to retain originals of certain documents for evidence in claims of fraud. Regulations under Cl.100 new subsection (ob) [p.146] to provide for this.
48, p.76	Deleted	Replaced by 10A under daylight conversion mechanism.
50, p.78	Bracketed part of subsection (1) deleted	Not needed.
51(4), p.80.	Replaced	For greater clarity
59, p.84	Subsection (1) revised and (2) replaced	For clarity.
61A, p.86	Relocated from old clause 68 and revised.	Clarifies how the Registrar is to deal with persons who have become entitled to be owners of registered land, charges or leases by operation of law, enactments or orders.
62(1), p.87	(b) and (c) deleted.	Unnecessary. 65(1)(a), 66(2)(a)(ii) 67(4)(b) and 69(3)(a) amended in similar fashion.
62(2)	Revised	For clarity
63, pp.88 - 89	Minor changes	For clarity. <i>Note: may be further revised. 'by transmission' may not be</i>

Clause & Page Reference	Brief Description	Annotation
		<i>needed (applies to 64,66 as well)</i>
65(2), p.90	Deleted	Unnecessary
69, pp.95 – 97	Revision to subsection (1), new subsection (2A)	For clarity.
69A, p.98	Relocated. Was old 30.	For clarity
70(1), pp 98 –99	Proposed revision.	<i>Note: revised version under review by draftsman. Does not properly reflect intent that a person intending to deal a) only need take account of consent cautions that are relevant to his intended dealing; and b) only needs the consent of one person, the owner or the prior cautioner if there is such a relevant caution.</i>
70(2), p.99	Various small changes	Reference to ‘a provisional agreement for sale and purchase’ not needed here (and in various other clauses). ‘Will be’ and ‘endorsement’ added to reflect actual practice, so as to ensure that consent cautions can be registered without delay so as to protect intended dealings.
70(5), p.100	Revised to limit application to transfers by natural persons inter vivos	So as not to affect company transactions that are not subject to estate duty.
70(6), p.101	Revised	To clarify who is to make the application.
70(14), p.102	New subsection added	For avoidance of doubt that: (a) a claim arising from an

<i>Clause & Page Reference</i>	<i>Brief Description</i>	<i>Annotation</i>
		unregisterable interest created before conversion can be protected by a non-consent caution after conversion if not protected by a caveat before; (b) a claim that is not protected by a non-consent caution is not enforceable against land after a sale for valuable consideration; (c) in personam rights or interests are not extinguished or prejudiced.
71(1), p.103	Amended to remove reference to S.33	See note on S.33 above.
71(2A), p.103	New subsection added	To clarify status of a consent caution, as is done by the existing subsection (3) for non-consent cautions
72(5), p.107	Revision	For clarity and removal of reference to priority.
73, pp.107-8	Revision	For clarity.
74(1), p.108	Revision	In line with UK Land Registration Act, to clarify purpose of action by the Court.
77, pp.110 – 111	Revision	To more tightly define scope of powers for Registrar, in line with UK provision.
88, p.128	Relocated to 6A	
95, p.135	'petition or' deleted	Redundant
96(g), p.136	Deleted	Not needed under daylight mechanism. Subsection (2) amended consequentially.

<i>Clause & Page Reference</i>	<i>Brief Description</i>	<i>Annotation</i>
98, pp140-2	Some revisions	<i>Note: further revision to clarify separate provisions for fees and levies may be made.</i>
100, pp143-9	New subsections (1)(oa)-(oc), revision to (x) and replacement of (zi) by new (zi) and (zia)	To reflect changes in main bill, except (zi) where purpose is to make clear that the Registrar cannot borrow from the indemnity fund. <i>Note: a new clause may be added to the Bill to allow the indemnity fund to be established and to support (zia).</i>