



SUBMISSIONS ON THE INDEMNITY PROVISIONS IN THE LAND TITLES BILL ("THE BILL")

1. Introduction

Part 9 of the Bill concerns rectification and indemnity.

The Law Society had previously expressed its views to the Administration on the draft provisions of the Bill, prior to the Bill being gazetted. A copy of the Law Society's submissions on the 14th draft of the Bill is attached. The Law Society's recommendations on the proposed indemnity arrangements included providing indemnity to all victims who suffer loss arising from the new system. The Government was urged to:

- Take responsibility for any act or default of the Land Registry's personnel; and
- Withdraw any ceiling on the level of compensation payable.

In addition, concerns were raised over the onerous duty the Bill would impose on solicitors, the inequality of the proposal whereby the Government would have a right to recover "any" indemnity paid from any person who caused or only "substantially" but not "wholly" contributed to the loss by his fraud or negligence, and the lack of reciprocal subrogation rights on the part of the Hong Kong Solicitors' Professional Indemnity Scheme ("the Scheme"). The Law Society also informed the Administration of the likelihood of the increase in reinsurance premium as solicitors' duties under the new registration system would be more onerous.

The Bill, gazetted on 6 December 2002, has now been considered by the Hong Kong Solicitors Indemnity Fund Ltd. ("the Company") and its Claims Committee.

The Company was set up by the Law Society to administer the Scheme. The Claims Committee was set up to assist the Company in handling all claims made against the Solicitors Indemnity Fund ("the Fund").

The concerns raised by the Company and the Claims Committee on the provisions in the Bill on indemnity are as follows:

2. Increased liabilities on solicitors

The Bill can facilitate the commitment of property fraud which can be perpetrated by a fraudster by various means:

- Pretending to be a potential tenant/buyer and obtains a photocopy of the property owner's Hong Kong identity card. On the strength of a forged identity card, the fraudster can falsely represent himself to be the property owner. He can then either obtain a down payment from an innocent buyer or the full price for the sale of the property.
- Obtaining financial details and a photocopy of the identity card of a property owner. He forges the identity card and obtains a mortgage loan from the financial institution.
- Fraudulently adding his name to the list of directors of a company which is a trustee of a property, then in the name of the trustee, the fraudster obtains a mortgage loan from a finance company.

Under the new registration system, solicitors do not have to examine the authenticity of title deeds and check the vendor's signature against the one appearing in the title deeds, thus, making the perpetration of fraud by impostors using forged identity cards theoretically easier, on the basis it is easier to forge an identity card than a bundle of title deeds. The impostor may also tend to wait to collect the full purchase price rather than running away after receiving only the deposit.

Further, solicitors will clearly have a more onerous duty placed upon them to ensure documentation is correct given the guarantee of title under the title registration system. Whilst the Government will provide compensation and have rights of subrogation against the Fund, the fact remains that this will not stop individuals who feel that they have been inadequately compensated to take further action against solicitors. Furthermore, once the Land Registrar/Court of First Instance has determined compensation is payable, any future court looking at the liability of solicitors may be reluctant to take a different view.

3. Increase in reinsurance premium for the Scheme

The increase in potential liability would mean greater risk for solicitors which will in turn be reflected in the premium payable for reinsurance. As the Government is aware, the contributions payable by solicitors under the Scheme had been substantially raised in 2001 due to an increase in the number and value of claims.

4. Subrogation Rights

- a. The definition of 'professional indemnity insurer' in s2 includes "an insurer, scheme or fund by or from which claims are payable, being claims made by persons suffering loss owing to fraud, mistake or omission of a person carrying on business in a particular profession, trade or calling." Even though the Company does not constitute an insurance company under the Insurance Companies Ordinance Cap. 41, it is likely it will be caught by the definition.

Under s82(5), a professional indemnity insurer is, notwithstanding any law, not entitled to be subrogated to the rights of any person against the Government as a result of fraud or otherwise, while there is no reciprocal restriction on the Government to be subrogated to the rights of any person against the insurer.

Further, under s86(1)(b), the Government may enforce any indemnity paid directly against any professional indemnity insurers pursuant to any insurance those persons who caused or substantially contributed to the loss may have. The end result is that all claims arising as a result of fraud or negligence will be met by the Fund and not by the Government under the Bill. **This provision is not acceptable to the Law Society.**

b. Flawed rationale for the provision.

The Government previously defended its position by asserting the position under s128 of the Real Property Act 1900 of New South Wales. An amendment was passed in New South Wales to abolish the professional indemnity insurers' rights of subrogation because New South Wales considered the government fund was not intended to be used for that purpose. It was said "the exclusion of professional indemnity insurers' rights would provide an incentive to the claimant to exercise care with his or her choice of an agent and that having regard to the principles of agency law, the negligence by an agent may be imputed to the claimant. Therefore, there is no reason to make the State responsible where a claimant's loss is totally attributable to his or her own negligence or the negligence of his or her agent."

In the case of New South Wales, it was said that "as the Solicitors' Fidelity Fund was established for the specific purpose of reimbursing persons who suffer loss by reason of misfeasance of their solicitor, any loss should be made good by that Fund, not by the State." The State of New South Wales believed this approach had the advantage of fostering confidence in the title registration system "by covering any gap in compensation rights in situations where there is no alternative source of compensation for the claimant or where there is a shortfall in the cover provided, such shortfall being caused by e.g. a limit on indemnity in the Solicitors' Fidelity Fund." By allowing claims and providing a right of subrogation to the State, it was considered "confidence in the system was strengthened rather than weakened."

The Law Society rejects the imposition of a similar approach in Hong Kong where the market is completely different. To prevent the Fund from exercising its rights of subrogation in order to "strengthen consumers' confidence in the new registration system" is not a viable premise. The system will pass the full responsibility for claims to the Scheme. It should also be noted the Scheme provides very limited indemnity in cases where fraud is involved.

5. Current Position of the Scheme

An independent review is currently being conducted. The Law Society will consider in 2005 whether the Scheme should be put into run-off, and introduce a qualified insurer scheme which will allow solicitors to take out professional indemnity insurance in the open market, or such other options as may be advised by the consultants. There is thus no assurance whether any future claims could be fully satisfied. It is submitted that instead of being the last resort for compensation, the Government should shoulder the primary and indeed full responsibility for any loss created under the new system.

6. Cumbersome Procedures

Moreover, as the Law Society had already pointed out in its previous submissions, there is no justification for preventing subrogation rights of professional indemnity insurers where fraud or negligence of the Registrar or his employees is also involved. The Government had previously argued that in such circumstances, the Scheme could still take out third party proceedings against the Government or seek contribution under the Civil Liability (Contribution) Ordinance Cap 377. It is respectfully submitted that such arguments only show the superficiality of withholding subrogation rights from professional indemnity insurers. These rights should be given to the insurers so that insurers and the Government would not be called upon to expend costs in unnecessary contribution and third party proceedings.

7. Constitutional Objections under Article 6

The Law Society reserves the right to challenge whether such deprivation would infringe the rights of its members under Article 6 of the Basic Law. The provision enables the Government to unilaterally shift its responsibilities onto the Company by prohibiting the Company from exercising any rights of subrogation and thus deprive solicitors of their property, namely, the Fund.

The Law Society of Hong Kong
27 June 2003
69048

THE LAW SOCIETY'S SUBMISSIONS ON THE LAND TITLES BILL (14TH DRAFT)

Introduction

The Government of the Hong Kong SAR proposes to introduce into the Legislative Council a Land Titles Bill ("the Bill"). The Bill is the result of many years of detailed discussion and consequential re-drafting.

The purpose of the Bill is to replace the existing system of land ownership in Hong Kong which relies upon the registration of title deeds affecting the land and substitute a new system of registration of the title to property and the legal interests subject to which the property is owned.

Whilst it supports the introduction of a title registration system in principle The Law Society is concerned that members of the public may regard the Bill only as a change to the form of conveyancing and a simplification of procedures. This is not correct.

The Bill effects a substantial change not only to conveyancing procedures but also to the way in which ownership rights in property are protected. Whilst the existing system protects an innocent vendor whose property is sold fraudulently the proposed system instead provides protection to the purchaser. On first registration the registered owner will enjoy a statutory title to the property which may with certain exceptions be better than that of the person from whom he acquired it and at the expense of those whose legal rights have not been registered. The Bill gives rise to a number of concerns and The Law Society takes the view that the members of the general public should not be lulled into a false sense of security. The Bill is not merely a simplification of procedures. It affects the rights of ownership of property owners in such a way that it merits very careful consideration and amendment before it is given legislative approval. We have endeavoured to address some of those concerns in this paper.

A. The position of an Innocent Vendor in the case of fraud

- A.1 Under the existing system of land ownership, a vendor's legal rights remain unaffected by any fraudulent transfer of his property. However, an innocent transferee for valuable consideration under such a fraudulent transfer would, under *Clause 19* of the Bill, substitute the original owner as the absolute owner of the property upon registration of the transfer.
- A.2 The Law Society realises that the new registration system is a purchaser protection system to create certainty in title and that in any event, one of the parties to a property transaction has to suffer in cases of fraud. However, the title registration system under the Bill can work unduly harshly on the vendor. An innocent vendor who probably will not be aware that fraud is taking place can take no protective measures to prevent any loss on his part. On the other hand, a purchaser who is legally represented can take reasonable steps to protect his interest.
- A.3 **The Law Society believes that the existing legal position should be maintained and in the event of fraud, an innocent owner should not be deprived of his property. An innocent purchaser should receive an indemnity.**
- A.4 **The Law Society also believes that the Government owes a duty to clearly publicise the effect of the new system to the public both in Hong Kong and abroad (on the premise that there are overseas owners of HK properties) and there should also be extensive consultation in this regard.**

B. Government Indemnity

- B.1 The Bill makes provisions under *Clauses 78 to 83 (inclusive)* for indemnification by the Government of persons suffering loss as a result of the new registration system in certain defined circumstances. Under *Clause 78(1)*, the Government indemnity will cover any person suffering loss by reason of an entry in the Land Register, any land title record or an application record where such entry has been obtained, made or omitted, as the case may be, by or as a result of firstly, fraud which affects the ownership of the land concerned; and secondly, any mistake or omission of the Land Registrar or its delegates.
- B.2 The compensation to be paid out of the Government indemnity as a result of fraud is provided in *Clause 78(1)(i)(B)*. Under the said Clause, such compensation would only be payable if an entry obtained, made or omitted by or as the result of fraud would "*affect the ownership of the land concerned or a long term lease*".

Accordingly, the Government indemnity would not compensate any fraud affecting the incumbrance side of the Register. For instance, a mortgagee who suffers as a result of registration of a forged Release would not be covered. The Law Society believes that this is an unsatisfactory arrangement and that the indemnity should be extended to cover all users of the system who may suffer loss under the system and not merely the owners of the land. **The Law Society recommends that appropriate provisions should be included in the Bill to cater for all other victims suffering under the new system.**

- B.3 It is noted further that the Government Indemnity under the Bill will not cover any person suffering as a result of the act and default of the Land Registry personnel under the old system. *Clause 78(1)(ii)*, states, inter alia, that persons suffering as a result of any entry or omission as a result of any mistake or omission on the part of any person referred to in *Clause 8(3)* would be entitled to Government indemnity. *Clause 8(3)* refers to the Registrar appointed under the Bill and any public officer assisting the former in the performance or purported performance of his function, or the exercise or purported exercise of any power under the Bill. Thus, it does not cover the act or default of the existing Land Registry personnel.
- B.4 Members of The Law Society observe that there are occasions when the Land Registration record under the existing system is rendered inaccurate due to an act or default of the existing Land Registry personnel. **The Law Society recommends that the government should also bear the responsibility for any act or default on the part of the existing Land Registry personnel and express provisions should be inserted in the Bill for that purpose.**
- B.5 The amount of indemnity payable is provided in *Clause 79*. In brief, in cases where an entry has been made as a result of fraud, the amount of indemnity may not exceed the *lesser* of the following:
- (a) the value of the interest in the registered land immediately before the discovery of the fraud; or
 - (b) an amount fixed by the Financial Secretary by notice in the Gazette before the discovery of the fraud.
- The Financial Secretary can thus impose a ceiling upon the amount of indemnity that a person can recover from the Government Indemnity Scheme.
- B.6 Although an innocent vendor has another means of redress in the form of rectification of the Register under *Clause 77*, Government indemnity remains as an important remedy to an innocent vendor. This is because in most cases, the subject land would have been transferred to an innocent purchaser for valuable consideration who has no knowledge of the fraud and the right to rectify the register will thus be rendered unavailable under *Clause 77(2)*.
- B.7 Depending on the amount fixed by the Financial Secretary under *Clause 79(1)(a)(ii)*, the amount of indemnity may not represent full compensation to an

innocent party. In view of the importance of the remedy of Government indemnity to an innocent vendor and the recent property fraud cases, **it is urged that the Government indemnity should not be subject to a ceiling. If any level of compensation is to be fixed by the Financial Secretary under *Clause 79(1)(a)(ii)* at all, it should be at a sum sufficient to compensate those owners who may suffer loss.**

C. Extent of Liability of Solicitors - Criminal Liability

- C.1 The Bill has imposed an onerous duty upon solicitors. Under the new registration system, as registration per se has the effect of vesting absolute title in the registered owner and removing defects in title, it can have the effect of removing interests or claims to interests which have not been protected by the entry of a caution. A system of this nature is open to abuse.
- C.2 The Bill seeks to avoid this potential for abuse under *Clause 2(2)* by requiring each application for the registration of any matter to be verified both as to the application and the matter by a solicitor. A heavy penalty is imposed for false and reckless verifications made. *Clause 91(7)* provides that a person who "*falsely*" verifies such application shall be liable on conviction to a fine of HK\$500,000 and to imprisonment for 12 months, and a person who "*recklessly*" verifies such application shall be liable on conviction to a fine at level 6 and to imprisonment for 12 months.
- C.3 It is thus important for solicitors to understand what sort of verification would be required of them under the Bill. However, except for Overriding Interests ("OI") particulars of which are expressly required under *Clause 41* to be included in an application for registration, subsidiary legislation has not yet been settled to give any idea of what other information would be required to be included in the specified form of application to be verified. Nor is there any clear definition of the term "*matter*", another item that the solicitors are required to verify under *Clause 2(2)*.
- C.4 Even for OI, the extent of the solicitors' verification obligation under the Bill is unclear. *Clause 41(2)(b)* expressly requires the vendor on the first sale of registered land or a registered long term lease after the appointed day to provide to the purchaser full particulars of the OI which the vendor has or ought to have knowledge and which might affect the land or lease. The Clause also requires the purchaser to include such particulars of OI in the application for registration of the transaction.
- C.5 Members of the profession have raised concerns about their obligation to list out O. I. under *Clause 41*. Although the Bill seeks to give an exhaustive list of OI in *Clause 21*, whether any OI exists at all in a particular case and if so what they are may not be fully apparent from the Register. More often than not, although

Clause 41 imposes an obligation on the "vendor" to list out the OI and the "purchaser" to include these in the application for registration, the public whether vendors or purchasers, would rely on their solicitors in the discharge of those duties. Worse still, *Clause 41(2)(b)* requires the particulars of the OI to be included in the application for registration which, as mentioned above, must be verified by a solicitor (in this respect, the purchaser's solicitor) under *Clause 2(2)*.

- C.6 The Bill remains obscure on the following points:
- (a) the extent of liability of a vendor's solicitor under *Clause 41* to disclose OI in accordance with his client's statutory duty;
 - (b) the extent of liability of a purchaser's solicitor to verify the list of OI; and
 - (c) the extent of the obligations of a solicitor in uncovering fraud.
- Depending on the answers to the above questions, the Bill may have a significant impact on The Law Society's Professional Insurance Scheme.
- C.7 While The Law Society accepts that solicitors should do their very best to ensure the accuracy of the system, the extent of a solicitor's role to uncover fraud is, as stated above, not clearly set out in the Bill. The Law Society believes that it would place too onerous a burden on the profession if they were to be made wholly responsible for uncovering fraud, a task which is outside the scope of the legal profession.
- C.8 **The Law Society takes the view that the Bill should clarify the extent of the liability of a solicitor under the new system. The Regulations to be enacted under the Bill including, inter alia, information to be included in an application for registration and the term "matter" both of which a solicitor would be required to verify, should be made known to the profession as soon as possible.**
- C.9 The Law Society observes that persons may suffer under the system not only because of the act of the solicitors but also the act of the Registrar or its delegates. Compared with the solicitors, Government officials are immune from personal liability under the Bill for negligent acts committed on their part in the registration process. Under *Clause 8*, the Registrar or his delegates *will not be personally liable* in damages for any act done or default made in the performance or purported performance of any function, or the exercise or purported exercise of any power so long as they are *acting in good faith*. The Government will only be liable for any such act or default of the Registrar or his delegates if such would give rise to payment of an indemnity under *Part IX* of the Bill.
- C.10 **The Law Society believes that parallel immunity should be afforded to the solicitors who should not be criminally sanctioned in the absence of any criminal intent on their part. It is recommended that the proposed criminal sanction under *Clause 91(7)* should be limited to cases of "fraudulent" as opposed to "false or reckless" verifications.**

D. Right of Subrogation by The Law Society's Professional Indemnity Insurers

- D.1 *Clause 82(1)(b)* provides that where the government has paid by way of an indemnity, it is entitled to recover that sum against a professional indemnity insurer. On the other hand, a professional indemnity insurer will not be entitled to be subrogated to any rights or remedies of any person against the Government under *Clause 78(4)*.
- D.2 The Law Society is concerned with the inequitable impact on its Professional Indemnity Scheme ("PIS") and the right of the Government to recover "*any amount paid*" from any person who substantially (as opposed to wholly) contributed to the loss by his fraud or negligence. In the latter case, **The Law Society believes that any person who contributes only partly to the loss should not be held wholly responsible for any amount of compensation paid.**
- D.3 The Law Society has consulted its brokers for the potential effect that this indemnity arrangement will have on The Law Society's PIS. Their preliminary view is that Solicitors will clearly have a greater onus placed upon them to ensure that documentation is correct given the guarantee of title expressed in the Bill. Whilst the Government will provide compensation and have rights of subrogation against the Solicitors Professional Indemnity Fund, this will not stop individuals who feel that they have been inadequately compensated to take further action against insured Solicitors. The mere fact that the Government has provided compensation will create a situation where courts will be loath to reconsider the issue of liability and Solicitors may find themselves in a situation where claims are being paid without good cause. The Law Society's insurance brokers further indicated that the premiums will have to rise to meet claims for compensation should the Bill be passed but that the amount of increase will have to be considered at length.
- D.4 **Pending the further response from its insurance brokers, The Law Society reserves its rights to comment on the proposed indemnity arrangement in the Bill**

E. Appointment Criteria for the post of Land Registrar and Land Registry personnel

- E.1 It can be seen that under the Bill, the Land Registrar is given extensive power for overseeing the general organisation and administration of the Land Registry and ensuring the due compliance of various provisions of the Bill. Some of the more important powers include the power to refuse to proceed with any registration in certain circumstances (*Clause 7(2)(d)*), the power to remove obsolete entries from the Register (*Clause 15*) and the power to refuse to register a caution (*Clause*

66(10)). In particular, the Registrar is given extensive powers under *Clause 95* to make regulations and to prescribe offences and penalties.

- E.2 Whilst The Law Society appreciates that the vesting of such power in the Land Registrar is necessary to facilitate the smooth functioning and most important of all, the accuracy of the system, the correct exercise of powers on the part of the Register is equally important since registration or non-registration per se has an important impact on property interest under the new system.
- E.3 Under *Clause 6(2)*, the Registrar may delegate any of his functions or powers save those mentioned in *Clause 6(3)* to any public officer. Neither the Registrar nor such public officer shall, under *Clause 8(1)*, be personally liable in damages for any act done or default made in the performance or purported performance of any function, or the exercise or purported exercise of any power, under the Bill provided they acted in good faith.
- E.4 Under the existing system, there are occasions when the Land Registry officers without good cause stopped instruments from registration. The Land Registry has been judicially criticised for refusing to register deeds (per Le Pichon J. in *On Tak Development Limited and Anor v. Ng Woon Tong and Anor* MP. No. 1004 of 1996). Ensuing arguments with Land Registry officers are often very costly and time consuming. If those same officers are to have powers to summon and interrogate solicitors and to make them pay the costs, the practice of conveyancing is likely to become frustrating. More costs will be incurred for the public.
- E.5 **In view of the Registrar's and his delegate's powers and functions under the Bill, which are in many instances quasi-judicial in nature, The Law Society believes that only those with legal competence and experience in the conveyancing law and practice should be qualified for appointment. The Law Society also requests that regulations to be made by the Land Registrar under *Clause 95* should only be made after consulting The Law Society and should be subject to supervision by some higher authority.**

F. The Appointed day

- F.1 Under *Clause 1(2)*, the Bill will come into operation on a day to be appointed by the Secretary for Planning, Environment and Lands by notice in the Gazette. In the case of land held under a Government Grant granted before the appointed day, the appointed day would be the date of first registration of land under *Clause 13*. Accordingly, the existing registration system will be converted to the new one on the stroke of midnight next preceding the appointed day.
- F.2 Given the tremendous changes that would be brought about to the land registration system under the Bill, The Law Society has made various

recommendations for implementation of the Bill by stages but they have not been accepted. The Law Society is given to understand that the Land Registry is not practically ready or capable of being able to run a dual system.

- F.3 The Law Society notes that the subsidiary legislation under the Bill and thus the proposed detailed procedures and forms for implementation of the new system have not yet been made available. **Pending perusal of the subsidiary legislation and in view of the impact that the Bill has on ownership of property interests in the territory generally, The Law Society believes that the appointed day should be a day allowing sufficient time after the enactment date to enable all parties concerned to get prepared for and familiarised with the new system.** Indeed, it would be disastrous for those persons whose interests may be affected under the new system to be caught by surprise and left with insufficient time to take the necessary steps to protect their interests by, for example, registering their interests by way of a caution.

G. The Land Register

- G.1 One of the main ideas behind the proposed change in the land registration system is to simplify the process of checking title. The intention is that under the new system, title would be proved through the Land Register and the need to go behind the Register should be reduced to a minimum.
- G.2 *Clause 5(2)* lists out the types of record that are to be kept in each Land Registry. Among all others, there is a requirement to keep "a register in the specified form of the site to each parcel of Land". *Clause 10* sets out in detail the kind of information to be contained in each register, namely, the title number, the lot number of the land held under the Government Lease to which the Register relates; the undivided shares, if any, in the Land; the location or address, if any, of the Land; the date of commencement of the terms of government lease; the name of the owner of land and the capacity in which he holds the land; all instruments which support a current entry in the Registers and the date of their respective registration and such other entries which are either required by the Bill to be or in the opinion of the Registrar, should be contained in the register.
- G.3 Under *Clause 13*, the date of first registration in respect of land held under a government lease granted before the appointed day, shall be the appointed day. To facilitate an instant switch from the old to the new registration system, the land register kept under the existing system is, under *Clause 11*, to be deemed as the register kept and maintained under *Clause 5(2)(6)*. Unfortunately, under the present system, there are defective titles and the Register in the form that it is kept contains many errors, inaccuracies and defects. There are many omissions from the register and, instruments capable of registration which, for one reason or another, have not been registered. After all, under the present system, registration is not compulsory even if instruments have created or disposed of an interest in

land. Nonetheless, this less than perfect register is to become the basis for the new system.

- G.4 It is envisaged that for first dealings after the appointed day, solicitors will still need to go through the various Registers affecting the land and the building involved (such as the Government Lease Register, the Section Register or the Subdivision Register) and the various title deeds to identify the nature of title of the property.
- G.5 However, except for the various provisions empowering the Land Registrar to tidy up and simplify the Land Register, there is no strict obligation imposed by the Bill on the part of the Registrar to do so. *Clause 15* states that the Registrar "may" remove an entry in the Land Register that in his opinion has ceased to have any effect. Under *Clause 16*, the Registrar "may" close a register and open a new edition of the closed register showing, or referring only to entries in the closed register which were current at the time it was closed and omitting all entries in the closed register that in his opinion have ceased to have any effect. Under *Clause 56(2)*, the Registrar "may" destroy or otherwise dispose of a prescribed document in respect of which a microfilm image or other record has been made and retained in the Land Registry.
- G.6 **Given that the intention behind the Bill is to simplify the Register, The Law Society believes that there is a need to impose a positive obligation on (as opposed to the mere giving of power to) the Registrar to tidy up the old register and transform it to the simplified version. The Land Register itself should suffice to show all interests affecting the unit and the land and building on which such unit stands without any need to go through the various Registers. On the other hand, to facilitate claims of interests affected by the system, there should be a positive obligation on the Land Registrar to maintain any closed Register or record of obsolete entries or documents.**

H. Missing Government Grant

- H1. Under the present system, a vendor is obliged under Section 13 of the Conveyancing and Property Ordinance (Cap.219) to produce to the purchaser the Government Grant in proof of his title unless the parties have agreed otherwise. To comply with that statutory duty, the vendor has to provide either the original or a certified copy of the Government Grant. However, the reality is that many Government Grants are lost and missing, thus rendering the owners' title defective under the present system.
- H2. Unfortunately, although under *Clause 13* of the Bill, Section 13 of Cap.219 is to be excluded from the application to land registered under the Bill, the Bill has failed to properly address the position with regard to missing Government Grants. Under *Clause 41*, a vendor would have to provide the purchaser with a copy of

the current entries in the Land Register and a copy, print or extract of or from any instrument referred to in such entry. Presumably, a vendor would have to provide a copy, print or extract of, or from, a Government Grant. Unlike *Section 13 of Cap.219*, the obligation under *Clause 41* cannot be contracted out so much so that the position for any owners with a missing Government Grant is worse under the Bill than at present.

- H3. On the other hand, the Registrar is under an obligation under *Clause 5(2)(a)* to keep and maintain in each land registry "the government lease of each parcel of land". The Government is well aware that there are thousands of missing Government Grants, and consideration is being given to introducing legislation to rectify the problem. However regardless of the outcome of such consideration, the Bill should not reintroduce the problem into the new system and make the lots involved unsaleable.
- H4. **It is clear that the problem of missing Government Grant has not been catered for in the Bill. The Law Society believes that it would not be fair for landowners to suffer as a result of the loss of a document through no fault of their own and a solution should be worked out and provided for in the Bill.**

I. Certificate of Title

11. The Bill does not provide for the issuance of a Certificate of Title as such by the Government. *Clause 23* only empowers the Registrar to issue "*a State of Title Certificate*". That is more likely to be similar to a search providing details of what is on the Register on a particular date.
12. Under the current conveyancing system, a vendor has to prove his identity to his solicitor by - (a) production of his Identity Card; (b) production of the title deeds; and (c) signing the Agreement and Assignment by using his signature similar to that which appeared in the former Assignment. Under the proposed new system, step (b) apparently will not be required and depending on the final form of transfer instrument to be stipulated under the Regulations, step (c) may also be dispensed with. The system will be less secure against fraud and is a retrograde step.
13. We appreciate that there are disadvantages in issuing Certificates of Title. They include:
- (a) After implementation of the Bill every owner will need to apply for a Certificate of Title before dealing with the property. This may involve delay particularly if large numbers of people apply immediately after implementation.
 - (b) A purchaser will not be able to deal with his property immediately after completion until a new Certificate of Title has been issued and this may cause inconvenience or delay.

- (c) The probable high cost and length of time taken to prepare economically & expeditiously a Certificate of Title which cannot be forged.
 - (d) If someone is determined to forge a certificate of Title he will do so irrespective of the difficulty.
 - (e) The existence of a certificate of Title might give rise to a false sense of security if it were, in fact, a forgery.
- I4. Conversely The Law Society is concerned at the potential for fraud under the proposed system which may be exacerbated by the absence of a Certificate of Title. The fact that an impostor has to incur the extra cost and trouble of forging a Certificate before selling the property fraudulently should have a deterrent effect and if one of the arguments advanced against the issue of a Certificate of Title is that certificates may be forged, then no document of identity or ownership is of value since it too may be forged.
- I5. The existence of a Certificate of Title could also be of crucial evidential value as proof of ownership if the Land Registry computer system were to fail. In view of the importance to Hong Kong socially and economically of the maintenance of confidence in the integrity of the land titles system, The Law Society questions whether the Government has undertaken a system audit or made an evaluation of the risk of computer failure and if so, whether the results of that audit or evaluation will be made public. Equally it is concerned as to whether any assessment has been made of the risk of internal fraud and whether such assessment will be made known.
- I6. Clearly there are arguments both for and against a Certificate of Title. Some jurisdictions have them whilst others do not. A balance has to be struck between the security of the system on the one hand and the need to avoid delay in the system adversely affecting property transactions and inconvenience to users on the other. Until such time as a person can be positively identified without documentary proof, **The Law Society believes that, in order to counter fraud, some kind of written evidence of ownership, with proper anti-forgery features, should be produced.**

J. Concerns on the drafting aspects of the Bill

The above are the fundamental concerns of The Law Society. Concerns on the drafting aspects of the Bill are as follows:

J.1 *Clause 2 - Definition of "charge"*

The Society proposed that the words in bracket should be substituted by "(other than a charging order)".

J.2 *Clause 2 - Definition of "matter"*

Throughout the Bill, important references are made to the word "*matter*". In particular, under *Clause 2(2)(c)*, the Solicitor is required to verify each application for the registration of any "*matter*" both as to the application and the "*matter*".

The Law Society believes that to avoid any confusion, the term "*matter*" should be clearly defined in *Clause 2(1)*.

J.3 *Clause 2(2)(c) - Verification by any Public Officer*

Clause 2(2)(c) provides that an application for registration may be verified by "*any public officer who has prepared the application acting in his capacity as a public officer*". As any clerk may prepare an application and the person verifying the application is in a position to transfer the property fraudulently, **The Law Society recommends that only "*the Land Registrar or such public officers as may be appointed by him in writing*" shall have the power to verify the application.**

J.4 *Clause 11(3)(f)(i)(A) - typos*

The Law Society believes that the term "*consent caution*" has been mistakenly typed as "*consent auction*"

J.5 *Clauses 2, 19 & 26 - Possibility of creation of ownership off the register*

The fundamental concept under a land title system is that it is only the act of registration that vests or divests an interest. However that point has not been made absolutely clear in the Bill. Under *Clause 19*, it is stated that "*immediately upon a person becoming the owner of registered land there shall vest in the person...*", subject to certain exceptions, absolute ownership and certain rights. *Clause 2* defines "*owner*" as "*owner named in the Land Register*" and *Clause 26* requires all depositions of registered land to be "*registered*" to gain effectiveness. Considering that the concept of "*ownership*" may be narrower than "*title*", The Law Society believes that the Bill has not made it clear that it is registration under the Bill that confers ownership. The way the Bill deals with such important concepts is unclear.

J.6 *Clause 15 - Removal of obsolete entries*

Clause 15 gives the Registrar a right to remove entries which, in his opinion, have ceased to have effect. If the Registrar makes any mistake, the person affected will be entitled to rectification under *clause 15* or compensation under *Part IX* of the Bill.

To safeguard the interest of any affected persons, The Law Society recommends that all parties affected by *Clause 15* should have the right to be informed and their consents sought before the Registrar can actually remove any particular entry.

J.7 *Clause 17 - Boundaries*

Clause 17 provides that plans are to be treated as only indicating the approximate situations of land and approximate boundaries. It is declared in the Bill that the

plans shall not constitute a warranty as to accuracy. This is unfortunate as there are **many plans, particularly those attached to Government Grants or perhaps plans prepared by authorised land surveyors under the Land Survey Ordinance 1995, which could be given greater weight and help in providing more certainty of title.**

J.8 ***Clause 18(7) - definition of "new building"***

Clause 18(1) empowers the Registrar, in the case of an application for combination of contiguous parcels of registered land, to combine the land by closing the registers relating to the parcels and opening a new register or registers in respect of the registered land resulting from the combination of the parcels. *Clause 18(2)* states that in respect of any "new building" which is or to be situated on any land consisting of 2 or more lots, no registration of any matter relating to an undivided share therein will be effected until an application for the combination of those lots has been registered.

The definition of "new building" is set out in *Clause 18(7)*. Under *Clause 18(7)(b)*, a "new building" means, inter alia, a building in respect of which, after the commencement of that clause, a certificate of exemption under the Buildings Ordinance (Application to the New Territories) Ordinance (Cap.121) may be issued. It is to be noted that a Certificate of Exemption is issued under section 5 of Cap.121 at the time when no building is yet in existence. The intention of the certificate of exemption is to exempt the building "to be erected" from the need to comply with the requirements of the Buildings Ordinance (Cap.123).

Under *Clause 18* in its existing draft, buildings with Certificates of Exemption issued before but which are actually completed after the commencement of *Clause 18* will not be caught by the requirement in *Clause 18(2)*. The Law Society is concerned whether that reflects the true intention of the Administration.

J.9 ***Clauses 19(2)(d), 19(4)(d)(iv) and 44(3)(d)***

In the original draft *Clause 19*, the owner is not subject to any unregistered interest. *Clause 19(2)(d)* is inserted as a result of The Law Society's objection that persons would be deprived of their rights in the land (i.e. rights in rem) simply through the implementation of the Bill. The Law Society's view is that so long as the registered owner on the appointed day remains so and has not disposed of his interest to a purchaser for valuable consideration, a person's unregistered interests can still be enforced against the owner.

The Law Society would like to raise two points on *Clause - 19(2)(d)*:

Firstly, *Clause 19(2)(d)* in its present draft refers to unregistered interests under the old system affecting the land which was immediately before the appointed day, enforceable against "*the person who is the owner of the land immediately upon the beginning of the appointed day*". The Law Society believes that the effect of the present draft would elevate a right in persona to one in rem. In this respect, **The Law Society recommends that *Clause 19(2)(d)(iv)* should be amended to read as "*which was, immediately before the appointed day, enforceable against***

the land". For the same reason, Clauses 19(4)(d)(iv) and 44(3) (d) dealing with long term leases should be amended accordingly.

Secondly, *Clause 26(4)* states that no court shall grant an order for specific performance of an unregistered interest. To give effect to *Clause 19(2)(d)* and *Clause 44(3)(d)*, ***The Law Society recommends that Clause 26(4) should be made subject to Clauses 19(2)(d) and 44 (3)(d).***

J.10 ***Clause 20(4) - typo***

It is believed that "Clause 20(4)" should be renumbered as "Clause 20(3)"

J.11 ***Clauses 21(1)(g)(i) and 21(7) - first charge under Section 18(1) of the Estate Duty Ordinance (Cap. 111)***

Clauses 21(1)(g)(i) and 21(7) set a 12-year period for estate duty charges to operate as "overriding interest" when the instruments giving rise to the charges were already registered before the appointed day. The Law Society is concerned with the possible adverse effect that the proposed 12-year period may have upon purchasers and solicitors. Under existing practice, solicitors would rely on the principles laid down in *Ample Treasure Ltd. v. Eight Gain Investments Ltd. [1992] 1 HKC 457* to pass title if a Deed of Gift was executed for more than three years earlier and there was no estate duty charge registered against the Property. If the proposed 12-year period is adopted, it may render all such title doubtful and practitioners by relying on the said case could be sued for negligence. As the Bill is not intended to have retrospective effect, to be fair to the purchasers, ***The Law Society recommends that the proposed 12-year period should be reduced to 3 years to accord with existing practice.***

J.12 ***Clauses 21 (1)(i)***

The intention of *Clause 21(1)(i)* is to preserve adverse possessory interests. The clause in its present draft states that registered land shall be subject to "*any rights acquired, or in the course of being acquired, in the land where, by virtue of the operation of an enactment relating to the limitation of actions, the title of the registered owner has been extinguished*", notwithstanding that the interests are not the subject of an entry in the Land Register. The Law Society is concerned that the clause has not dealt with the intention effectively **and recommends that a phrase "or will after the expiry of the appropriate period, be extinguished" be added at the end of the Clause.**

J.13. ***Clause 30 - Priority of Registered Matters***

Under *Clause 30* of the Bill, priority under the new system would depend, generally on the order in which applications for registration are presented. There would no longer be any one-month grace period as such for registration to be effected to gain priority as under the present system. The advantage is that there will be more certainty of the Land Register. However, The Law Society believes that to facilitate the rush to gain priority, there will be a tendency for more formal completions to take place that will entail more legal costs to the public.

J.14 ***Registered Long Term Lease***

The Law Society believes that the following amendments should be made to provide for the case of registered long-term lease:

- (a) the expression "*or registered long term lease*" should be inserted after "*registered land*" in the definitions of "*charging order*" and "*chargor*" in *Clause 2* and in *Clause 38(1)*;
- (b) the definition of "*owner*" in *Clause 2* needs to refer to the owner of a long term lease; and
- (c) *Clause 11(5)(b)* will require modification to deal with the situation of the register for existing long term lease.

J.15 ***Clause 44 - Registration of Long Term Leases existing under the old system***

The expression "*long term lease*" is defined in *Clause 2* as "*a bona fide lease granted on or after the appointed day by the owner of registered land of the right to exclusive possession of the land for a term of not less than 21 years, not at rack rent and in respect of which a premium has been paid*". The term however does not include "*any lease the unexpired term of which is less than 21 years at the time it is registered*". Under *Clause 19(3)*, upon registration of a long term lease, there shall vest in the lessee the absolute ownership of the lease and all rights attaching to the land which may be exercised thereto. The said two clauses deal with long term leases granted *after the appointed day*.

The concept of "*long term lease*" is introduced as a result of the concern previously expressed by The Law Society that these substantial interests in land should be guaranteed under the new system. For leases with the above characteristics granted *before* the appointed day which *Clause 44* defines as "*the relevant lease*" would have already been registered under the old system. However, *Clause 44* requires the relevant lease to be re-registered under the new system to get the benefit of its guarantee. The Law Society views such requirement as impractical and costly to the public. It will also not be possible to register leases which are granted before the appointed day are otherwise long term leases but for the fact that their residue terms may be less than 21 years by the time of re-registration under the new system.

The Law Society recommends that the definition of "*long term lease*" in *Clause 2* and *Clause 44* should be amended to the effect that any such leases which were already registered under the old system should be treated as any other dealings which existed on the Land Register on the appointed day (i.e. it should automatically get the benefit of the guarantee under the new system without any further action).

J.16 ***Clause 57(1) - registration of Chinese characters.***

The Bill refers to the making of entries of Chinese characters. The Law Society however understands that the present computer system of the Land Registry cannot make entries in Chinese and queries whether steps have been taken to ensure that the computer system will be able to cope with the requirements under the Bill on the appointed day.

J.17 ***Clause 80(b) - typo***

The Law Society believes that the word "*to*" in the 4th line of *Clause 80(b)* should be deleted.

J.18 ***Clause 98(b) - Binding Effect on the Government***

The Law Society recommends that *Clause 98(b)* should read "*this Ordinance binds the Government*".

J.19 ***Execution of documents abroad***

There has not been any existing legislation giving clear guidance on what is to be regarded as acceptable mode of execution of conveyancing documents abroad. As solicitors would be required to verify the application supporting the registration and the subject matter of the application, **The Law Society believes that the method of acceptable execution of instruments abroad must be clearly set out in the Bill.**

The Law Society of Hong Kong
5 May 1999.