

Bills Committee on Land Titles Bill

**Indemnity Scheme
Levy Rates and Miscellaneous Matters**

Purpose

This paper provides supplementary information as requested by Members at the 7th Bills Committee Meeting on 9 June 2003. It also responds to a few points outstanding from previous meetings.

Levy Rates : Assumptions

2. In preparing for the establishment of a levy to finance the Indemnity Fund, the following assumptions have been made.

- (a) The levy will need to raise sufficient revenue to cover –
 - (a) claims for loss of ownership in fraud cases;
 - (b) costs ordered to be paid from the fund by the Courts;
 - (c) repayment of loans made by Government; and
 - (d) expenses incurred in the examination of claims and administration of the Fund.
- (b) The levy would be imposed only on assignments, not on other matters submitted for registration.
- (c) Liability for payment in fraud cases would be capped at \$30 million in respect of each particular property registered.
- (d) While the Fund would be the mechanism through which compensation for loss arising from negligence or error on the part of Government would be paid, the levy would not need to cover these costs since these would be met through the Land Registry Trading Fund.

- (e) In the absence of any clear basis for estimating likely claims, assumptions about funding requirements in the early years should be geared towards minimizing the risks of large fluctuations in the levy rates. In addition, a stand-by loan would be made available for the Fund to call upon if claims exceed its immediate resources.
 - (f) The levy should not be a flat rate but should be graduated to reflect the value of the property involved.
3. The historical record of property fraud cases cannot be taken as a guide to the likely level of claims if an indemnity scheme is introduced. Not every property fraud case involves fraud with respect to registration affecting ownership. Only the latter would become the basis for a claim against the Indemnity Fund. But, we cannot be certain that the historical record provides a reliable indication of claims that might arise against the Indemnity Fund. A prudent approach that assumes a relatively high level of claims will be safer than expecting that claims will be few. Adjustment can easily be made if, after some time, the pattern of claims is lower than originally assumed. The Administration considers that the following estimates are a sensible, conservative estimate to use as the basis for planning the initial levy rates for the indemnity scheme -
- (a) each year there may be between 5 and 10, say 7.5, claims at an average of \$3 million a claim; and
 - (b) every other year there may be one claim up to the cap limit (\$30 million).
4. To meet this level of claims, the fund would require \$37.5 million a year.

Possible Levy Rates

5. We have examined two different approaches to the levy. The first is for a tiered structure, with a fixed levy for any property whose value falls within a specified range. The advantage of a tiered scheme is that the cost of the levy is immediately clear and does not have to be calculated by the applicant and rechecked on payment. Its drawback is that, within each tier, purchasers of properties below the mid point value pay slightly more in proportion to the value of the property than those buying at above the mid point value. The effect of this is reduced by having more tiers but not eliminated.
6. The second approach is to assess the levy as a percentage of the value of the property. The advantage is that this is more equitable than a tiered structure. The drawback is that each purchaser has to calculate the levy to be paid and the calculation needs to be checked on receipt.

7. At Annex A are estimates of the levy rates required to raise the level of funding noted in paragraph 4 under these different approaches. The calculation is based on the actual number of assignments registered in 2002/03. Fresh calculations will be done before the levy is introduced.

Scenarios

8. The following paragraphs outline the effects of the following scenarios -

- (a) the actual level of claims is significantly lower than assumed;
- (b) the actual level of claims is significantly higher than assumed; and
- (c) the cap on indemnity in fraud cases is removed.

Lower level of claims

9. If after five years, say, the number and value of claims being made on the Indemnity Fund has been significantly less than is assumed, there should be a reduction in the levy rates. For example, if the value of claims was half the level assumed, then the levy rates could be reduced by about 50%.

Higher level of claims

10. If the level of claims is greater than the assumed level, then –

- (a) the levy rates will have to be increased; and
- (b) the stand-by loan will need to be drawn down to cover any deficit between the income received by the Fund and the total value of claims approved. The levy rate adjustment will need to take into account the amount needed to repay the loan as well as meet a higher level of future claims.

11. For example, if in the first year of operation, valid claims made against the Indemnity Fund amounted to \$50 million rather than the assumed level of \$37.5 million, then, assuming that the \$12.5 million loan would need to be repaid over 10 years and an income of \$50 million a year maintained to meet future claims, the levy rates would need to be increased by about 30% to keep the Fund in balance.

No cap on payment in fraud cases

12. Removing the cap on payment in fraud cases would create considerable uncertainty for the levy rate. If the Fund had to accept a claim for \$500 million in one year, and the cost was to be recovered over 10 years, the levy rates would have to be raised by about 170% as compared with the rates set out in Annex A. However, given the uncertainty as to the size of possible claims, it would be very difficult to judge how to set the levy rates in the first instance.

Reserves

13. For an Indemnity Fund with a cap on liability in fraud cases, there is little point in continuing to accumulate reserve funds once a reasonable level has been built up. An assumption the Administration considers reasonable is to allow for a reserve of about \$150 million if the cap is set at \$30 million (i.e., the reserve would be sufficient to meet five simultaneous payments up to the cap limit). If reserves begin to approach this amount, a reduction in the levy rates so as to maintain the Fund with around this level of reserves will be considered.

14. If only the level of claims assumed in paragraph 3(a) is met in practice, a reserve of \$150 million will be built up in under 10 years.

15. If the claims assumed in paragraph 3(b) are experienced as well, the levy rate would need to be increased in order to build up a reserve. An increase in the levy rates set out in Annex A of about 25% would achieve a \$150 million reserve in 10 years even if the level of claims experienced is 3(a) and 3(b) combined.

16. If there were no cap on liability in fraud cases it would be reasonable to accumulate any surpluses as reserves for the Fund and not reduce the levy to reduce income once reserves reached a certain level. It would also be sensible to try to accumulate reserves rapidly in the early years of the scheme so as to provide a stronger hedge against a large claim. If a target of building up a reserve of \$500 million within 10 years were to be set, an increase on the levy rates in Annex A of between 110% and 120% would be needed to achieve this. However, as pointed out in paragraph 12, it would be very difficult to determine how to set the levy rates in the first instance.

Comparison with Stamp Duty

17. Annex B compares the amount that must be paid in stamp duty for transactions in property at various values and the estimated amounts of levy payable under both a tiered levy structure and a percentage based levy.

Protection if fraudster has absconded

18. It is not necessary to make specific direction in the Bill for the Courts to follow if criminal proceedings against a fraudster are not possible. The power of the Court of First Instance to give an order for rectification under Clause 81(1) or 81(3) is not dependent on criminal proceedings having been undertaken or completed. An application may be made to the Court under civil procedures and the Court may make such order as it thinks fit under Clause 81 (1) or 81 (3).

Costs

19. Under clause 84(2)(b), a successful claimant may be awarded costs and expenses incurred in relation to the claim by the Court. If such costs are awarded, they will be paid out of the Indemnity Fund. If they have been incurred defending a claim for loss arising from error or omission on the part of the Land Registry then the Land Registry Trading Fund will be liable to repay the Indemnity Fund.

Application

20. At the first meeting of the Bills Committee, members asked whether the proposed cap would be applied to a property or a lot and requested illustrative examples of the scenarios under Clause 83. The cap would be in respect of a loss arising from fraud affecting ownership in relation to “an entry in or omission from the Title Register” (Clause 82(1)). An entry, or omission, from the Title Register may relate to:

- (a) a lot, if no sections of the lot have been carved out and no undivided shares have been allocated to the individual units in any building on the lot;
- (b) a section or sub-section of a lot if the lot has been carved out into sections or sub-sections and no undivided shares have been allocated to the individual units in any building on the lot; and
- (c) a unit (i.e a flat) in the building if undivided shares have been allocated to that unit.

21. There are three scenarios under Clause 83. The first two relate to fraud cases, the other covers other cases.

Example A: Loss due to fraud. Amount of loss is less than the cap.

After a court order for rectification is given under Clause 81(1) or (3), the innocent party who loses the property is entitled to an indemnity equivalent to the

value of his interest immediately before the date of the Court Order (Clause 83(1)(a)(i)).

Example B: Loss due to fraud. Amount of loss exceeds the cap.

After a court order for rectification is given under Clause 81(1) or (3), the innocent party who loses the property is entitled to an indemnity equivalent to the cap set by the Financial Secretary prevailing at the time the fraud was discovered (Clause 83(1)(a)(ii)).

Example C: Loss due to mistakes or omissions by the LR.

The party suffering the loss is entitled to an indemnity equal to the value of his interest immediately before the discovery of the mistake or omission.

Arrangements in other jurisdictions

22. General arrangements for indemnity schemes in other jurisdictions were set out in paras. 15 to 17 of paper CB(1)1464/02-03(05). At Annex C is a table setting out the position in England, New South Wales and Ontario with respect to the upper limit of any indemnity, the types of losses eligible for indemnity, how the indemnity is financed and the procedures for making claims.

23. While these other jurisdictions did not impose a cap on indemnity, it should be noted that they took other measures to control their liability during the process of conversion from deeds to title registration. In New South Wales and in England, all applications in the early years were subjected to very stringent scrutiny which few passed. Less than 300 titles a year were converted in New South Wales during the nineteenth century. In England, 76 applications out of 45,000 were approved in the first three years after the 1897 Land Transfer Act. Ontario began compulsory conversion more recently and there has been concern at the time and cost involved in the conversion process.

Annex A. **Estimated levy rates under possible schemes.**

[The figures are calculated on the basis of obtaining \$37.5 million in funding from the actual number and value of assignments registered for 2002/03, and are for illustrative purposes only.]

| <i>Fixed \$ rate 5 value bands</i> | <i>Fixed % scheme 0.017%</i> |
|---|---|
| <\$750,000 \$90 | \$42.50 for a \$0.25 million property \$128 for a \$0.75 million property |
| <i>\$750,000 to \$3 million</i> \$340 | \$170 for a \$1 million property \$425 for a \$2.5 million property |
| <i>\$3 million to \$10 million</i> \$900 | \$595 for a \$3.5 million property \$1,275 for a \$7.5 million property |
| <i>\$10 million to \$20 million</i> \$2,200 | \$1,700 for a \$10 million property \$3,400 for a \$20 million property |
| <i>\$20 million to \$30 million</i> \$4,000 | \$5,100 for a \$30 million property |
| <i>Over \$30 million</i> \$4,000 | \$5,100 for a property over \$30 million |
| Explanatory Note: The same levy is charged on every property within each band. | Explanatory Note: The same % rate is levied on every property. The amount received varies with the value of each property. |

Annex B. Table to compare possible levy rates against Stamp Duty Rates

| <i>Value of Property</i> | <i>Stamp Duty</i> | <i>Levy Rate (5 Tier)</i> | <i>Levy Rate (0.017%)</i> |
|--------------------------|-------------------|-------------------------------|-------------------------------|
| \$750,000 | \$100 | \$90 | \$128 |
| \$1.5 million | \$11,250 | \$340 | \$255 |
| \$3 million | \$45,000 | \$900 | \$510 |
| \$5 million | \$150,000 | \$900 | \$850 |
| \$10 million | \$375,000 | \$2,200 | \$1,700 |
| \$20 million | \$750,000 | \$4,000 | \$3,400 |

Annex C : Comparison with other Jurisdictions

| Country | Upper limit of indemnity | Types of losses eligible for indemnity | Financing of indemnity scheme | Claim procedures and parties responsible for indemnity payment |
|-------------------|------------------------------|--|---|--|
| 1. England | No upper limit on each claim | Indemnity is payable for loss caused by – <ul style="list-style-type: none"> (a) an error in the register; (b) the rectification of an error in the register; (c) the loss or destruction of any document lodged at the registry for inspection or safe custody; (d) an error in an official search: and (f) an inaccuracy in an office copy of the register or a document filed in the Registry. | Indemnity is funded out of fees paid by users of the title registration system. | (1) There is no prescribed procedure for claiming indemnity. A claim is normally made in a letter written either by the claimant or his legal adviser. The Registrar has statutory power to settle claims by agreement. (2) A claimant can also commence proceedings for the Court to decide whether he is entitled to indemnity and the amount of indemnity. |

| Country | Upper limit of indemnity | Types of losses eligible for indemnity | Financing of indemnity scheme | Claim procedures and parties responsible for indemnity payment |
|-------------------------------|------------------------------|--|---|---|
| 2. New South Wales, Australia | No upper limit on each claim | <p>Compensation is payable for loss caused by –</p> <ul style="list-style-type: none"> (a) an act or omission of the Registrar General in the execution or performance of his statutory functions or duties in relation to the land; (b) the registration of some other person as proprietor of the land, or of any estate or interest in the land; (c) an error, misdescription or omission in the Register in relation to the land; (d) the land having been brought under the provisions of the Act; (e) the person having been deprived of the land or, of any estate or interest in the land, as a consequence of fraud; and | The scheme is financed by a levy on all dealings and caveats lodged for registration. | <ul style="list-style-type: none"> (1) The claimant has to file a claim in the specified form with the Land Registry. The claimant must also furnish full particulars of the alleged loss or damage. A statutory declaration is required in claims for loss as a result of fraud, mistake or negligence. (2) A certificate of a registered valuer may be required by the Registrar General. |

| Country | Upper limit of indemnity | Types of losses eligible for indemnity | Financing of indemnity scheme | Claim procedures and parties responsible for indemnity payment |
|--|------------------------------|--|---|---|
| 2. New South Wales, Australia (continued) | | (f) an error or omission in an official search in relation to the land. | | (3) Court proceedings cannot be commenced unless administrative proceedings by the Registrar General have been commenced and determined in relation to the alleged loss or more than 12 months after lodgement of the claim with the Registrar General except by leave of the Court or with the consent of the Registrar General. |
| 3. Ontario, Canada | No upper limit on each claim | A person, who has been wrongfully deprived of land or an interest in land, can make a claim against the Fund. This could occur by reason of the land being brought under the Land Titles Act, through an error or omission in the land registration records or be the result of fraudulent activity. | Financing is provided through the Ontario Government's Consolidated Revenue Fund. | The claims are made to the Directors of Titles in prescribed forms. A lawyer will review the claim. A hearing must be held if the claim cannot be paid. The outcome of the hearing may be appealed to Court. |