

20 October 2003

By fax & mail

Ms. Salumi Chan
Clerk to Bills Committee
The Legislative Council
Secretariat
3/F Citibank Tower
3 Garden Road
Central
Hong Kong

Dear Ms Chan

Land Titles Bill

Thank you for your letter of 30th September 2003 enclosing a copy of the Administration's paper of September 2003 (the "**Third Paper**").

We have the following observations thereon:-

1. In its Third Paper, the Administration seeks to rebut the submission made by us in our letter of 14th July 2003. However, it does not appear that any new points have been raised by the Administration in the Third Paper. Instead, the Administration repeats many of the points made in its First and Second Papers. The Administration also asserts that we have not, in our submission of 14th July 2003 ("**REDA's Second Submission**"), dealt with all the arguments advanced by the Administration in its Second Paper, and REDA's Second Submission is therefore not tenable.
2. We have not intended to approach the public consultation process of the Bill in the same way that pleadings are exchanged between opposing parties in litigation proceedings, nor do we consider that a useful purpose would be served for us to make a submission simply to traverse each paragraph and each point made in the Administration's paper(s).

3. At the risk of being seen to be repetitive, we wish to stress that, in our view, the objective of the Bill should be to set up a title registration system that has certainty and at the same time gives confidence to investors. We fear that the proper objective may be lost sight of amidst all the legal arguments on constitutionality.

3.1 **Certainty:**

In paragraph 17 of its Third Paper, the Administration asserts that there is no uncertainty regarding the constitutionality of the proposed scheme, as the Administration “*has carefully studied the opposing views of REDA and the Bar, and is of the considered view that the indemnity cap is consistent with the Basic Law.*” The assertion begs the question as to how the Bill creates certainty, if eminent Counsel representing the Bar are all of the opinion that the scheme under the Bill could be in breach of the Basic Law. At the end of the day, the construction and interpretation of the Basic Law does not lie with the Administration.

3.2 **Public Confidence:**

- (a) In paragraph 18 of its Third Paper, the Administration asserts that our submission regarding the risk of damage to public confidence are allegations made without reference to paragraph 17 of Annex A to the Administration’s Second Paper and are therefore untenable.
- (b) In the said paragraph 17, the Administration asserts that “*the interests of an innocent owner or a holder of an equitable interest are given very extensive protection, as set out in paragraph 30 of our First Paper*”. If one then refers to paragraph 30 of the Administration’s First Paper, the reader will only find the following statements which may be relevant, insofar as concern the protection of the innocent owner’s interests:-
- (i) in paragraph 30(b), that “*the proposed system will provide added security through the indemnity scheme in cases of fraud, mistake or omission*”;
 - (ii) in paragraph 30(c), that “*the proposed maximum amount of indemnity of HK\$30 million.... will be sufficient to provide full coverage to well over 99% of transactions*”;
 - (iii) in paragraph 30(d), that “*where the scheme is insufficient to meet the full extent of the loss it does not take away the right that individuals now have to seek personal remedy against the third party fraudster*”

and, by giving assurance of recovery of up to the cap amount puts the party taking the action in a stronger position to pursue it”;

(iv) in paragraph 30(f), that “*a cap is also reasonable given the greater capacity of owners of higher value property to take further steps to safeguard their interests if they think necessary*”.

(c) We respectfully submit that none of the above offers any real protection to the innocent owner. On the Administration’s own admission, the amount of the proposed indemnity will not provide full coverage in all cases. The proposed scheme does not provide any added security through the indemnity scheme, considering that, under existing law, an innocent owner will not be deprived of his property by reason of a fraud to which he is not a party. With the greatest respect, we cannot agree to the Administration’s assertion that owners of higher value property have a greater capacity to take further steps to safeguard their interests.

4. For the sake of completeness, we wish to quickly summarise the legal arguments on constitutionality:-

4.1 **Whether the scheme of the Bill amounts to “deprivation”/“徵用” within the meaning of Article 105 of the Basic Law:-**

(a) The Administration argued that the meaning of “徵用” is confined to an act by the state or the government to resume or acquire property for public purposes, and is close to the meaning of “expropriation”.

(b) In our submission, this point does not take the Administration’s argument any further. In paragraph 2.2 of our letter of 14th July 2003, we submitted that the scheme of the Bill in effect amounts to an expropriation of the property of an innocent owner, by virtue of the fact that the title of his property is taken away from him and conferred upon a third party.

(c) In its Third Paper, the Administration asserted that we have not dealt with the arguments advanced by the Administration on the construction of the word “徵用”, as set out in Annex A to its Second Paper.

(d) In Annex A to its Second Paper, the Administration argued that “徵用” or “expropriation” would require the State to acquire property or derive a benefit from the expropriation or acquisition in some way, and the scheme of the Bill does not operate to vest the property in the HKSAR Government or to confer any benefit on the HKSAR Government.

(e) We have taken legal advice on the construction of the expression “徵用” or “expropriation” and we are advised that:-

(i) “Taking” or “expropriation” of property may be effected by the transfer of title by law, as in the typical case of nationalisation;

(ii) However, as illustrated in the case of *Starett Housing Corp. v. Iran (Interlocutory Award) 4 Iran-U.S.C.T.R. 122 (1984) 23 I.C.M. 1090*, there can also be a taking of the effective use of the property or “constructive expropriation”;

(iii) In *Tippetts v. TAMS-ATTA (1985) 6 Iran-U.S.C.T.R. 219 at 225*, the Iran-U.S. Claims Tribunal suggested that “*constructive expropriation*” occurs when “*events demonstrate that the owner was deprived of fundamental rights of ownership...*”

(iv) “*Constructive expropriation*” is also considered in the Explanatory Note to the *1961 Harvard Draft Convention, Article 10*:

“There are a variety of methods by which an alien may have the use or enjoyment of his property limited by state action, even to the extent of the state forcing the alien to dispose of his property at a price representing only a fraction of what its value would be had not the alien’s use of it been subjected to interference by the state... Or, simply by forbidding an alien to sell his property, a government could effectively deprive that property of its value... whether an interference with the use, enjoyment, or disposal of property constitutes a “taking” will be dependent upon the duration of the interference.”

(v) In the context of Article 105, “deprivation”/ “徵用” could take the form of a constructive taking or constructive expropriation, as opposed to an actual expropriation.

4.2 **Whether the scheme proposed under the Bill is also contrary to Article 6 and/or the first sentence of Article 105 of the Basic Law.**

(a) It is our submission that the scheme under the Bill fails to protect the innocent owner’s right of private ownership of his property or his right to the use and disposal of his property, and is therefore in breach of Article 6 and the first sentence of Article 105 of Basic Law.

- (b) The Administration argued that the theme of continuity under the Joint Declaration as well as in the Basic Law does not require that all property rights which pre-date the reunification be kept intact after the reunification, and cited the judgment of the Court of Appeal in *Kowloon Poultry Laan Merchants Association v. Director of Agriculture Fisheries and Conservation* in support. The Administration further argued that, assuming Article 6 and Article 105 to be subject to the fair balance test, the scheme in the Bill would satisfy the test.
 - (c) We have pointed out, in our letter of 19th May 2003, that the decision of the Court of Appeal in *Kowloon Poultry Laan Merchants Association* is only authority for the proposition that regulations to the effect that water birds are required to be sold at a separate location from chicken are only regulations controlling the use of land, such that the appellants have not suffered any deprivation of property as it is understood in Article 105. That case was decided on its own facts, and does not lend support to the Administration's argument. More particularly, the Court of Appeal held that no deprivation has been made out in that case for the following reasons:-
 - (i) The appellants have not been deprived of the use of the land rented to them by the Government at the Cheung Sha Wan Temporary Poultry Market: they are still selling chicken there;
 - (ii) The appellants are prohibited by the new regulations to sell water birds there, but that is not deprivation but rather control of use of land;
 - (iii) Insofar as the appellant's business of selling water birds is concerned, they have not been deprived of that business by the new regulations and Government has in fact provided them with an alternative location namely the Western Wholesale Food Market from which to sell water birds.
 - (d) As for fair balance, we repeat our submission that it is neither fair nor just to penalise owners of higher value properties and we strongly disagree with any suggestion that these owners are better able to safeguard their own interests or (even assuming this to be true) that the law should discriminate against them.
5. In our opinion, if Hong Kong wishes to have a first world title registration system for land, then it must accept first world responsibilities and protect **all** landowners. We believe that Hong Kong's attraction to overseas investors will diminish if the proposed cap is adopted, when no similar cap exists for first world countries. We repeat paragraph 4.5 of our letter of 14th July 2003 namely, in order to restore confidence in investors, the Bill should be amended so that:-

- (a) An innocent owner should always be entitled to have the Register rectified and his name restored to the Register; or
- (b) If the innocent owner is not to be so entitled, then there should not be any cap on the indemnity.

Yours sincerely

Louis Loong
Secretary General