



Our Ref: EAA/DRA

12 March 2009

Clerk to Joint Subcommittee
Legislative Council Secretariat
3/F, Citibank Tower
3 Garden Road
Central
Hong Kong
(Attn.: Ms Christina SHIU)

By Fax :2869 6794 (19 pgs)
and By Hand

Dear Ms SHIU,

**Panel on Development and
Panel on Administration of Justice and Legal Services –
Joint Subcommittee on Amendments to Land Titles Ordinance**

Referring to your invitation for attendance at the Meeting of the captioned Joint Subcommittee on 19 March 2009, attached please find our letter dated 11 March 2009 to the Land Registry in response to its Consultation Paper on “Conversion of existing land and property to the Land Title Registration System”. Our position, as stated in the said letter, shall be our written submission at the Meeting.

Both Chinese and English versions of our written submission are enclosed. Should you require further information, please do not hesitate to contact me on 2151 2913.

Yours sincerely,

Margaret CHIU
Director of Regulatory Affairs
& General Counsel
Estate Agents Authority

c.c. Mr. Eugene Fung, Principal Assistant Secretary for Housing,
Transport & Housing Bureau

Mr. Kim Salkeld, Land Registrar (w/o encl.)

Encl.



Your Ref: LR/HQ/101/110/10
Our Ref: EAA/DRA

11 March 2009

Mr. Kim Salkeld,
Land Registrar,
Queensway Government Offices,
28/F., 66 Queensway,
Hong Kong.

Dear Mr. Salkeld,

Re: Land Titles Amendment Bill

Thank you for your letter dated 3 December 2008 enclosing two Consultation Papers. Of particular concern to the estate agency practice is the Consultation Paper proposing conversion of existing land and property to the land title registration system. The Licensing & Practice Committee of the Estate Agents Authority has discussed the subject and the views are set out below.

Currently, land search records made available from the Land Registry provides an official source of property information for the estate agent to ascertain the ownership history and encumbrances of a property. Such information is important in the ordinary discharge of the duties of the estate agents in giving proper advice to clients. The land title registration system and its changes will impact upon the operation of the estate agency businesses, especially in view of the following statutory duties and obligations to be performed or observed by the practitioners :

The Estate Agents Ordinance, regulation and Code of Ethics

Under section 36(1)(a) of the Estate Agents Ordinance, Cap 511 ("EAO"), every estate agent shall as regards the residential property to which he has entered into an estate agency agreement, have in his possession prescribed information of the property. The prescribed information includes particulars of ownership, any restrictions on user, the unexpired term of the Government lease, etc. (section 36(2) refers). Section 3 of the Estate Agents Practice (General Duties and Hong Kong Residential Properties) Regulation ("the Practice Regulation") has prescribed the forms, such as the Property Information Form and Estate Agency Agreements. In the Property Information Form, blanks have to be filled in with information obtained from prescribed sources and there is a

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specific section requiring subsisting encumbrances registered in the Land Registry to be stated.

An estate agent is also required under section 13(4) of the Practice Regulation to cause a land search to be carried out in the Land Registry immediately before an agreement for sale and purchase or lease of the property is entered into and to supply a copy of the land search to the purchaser of the property.

Apart from the statutory duties mentioned above, an estate agent is also required to observe and comply with the standards of practice set out in the Code of Ethics issued by the Estate Agents Authority (“the EAA”). Such standard of conduct includes competency in keeping up with any laws and developments in the real estate market in order to be in a position to advise his clients in a responsible manner. Due care and diligence have to be exercised in promoting and protecting the interest of clients.

The EAA, as a regulator of the trade, shall oversee the proper discharge of the duties of the estate agents in compliance with the requirements of the EAO to protect consumers’ interest.

Comments on the proposed conversion mechanism

(I) The clarity of ownership and subsisting encumbrances

You mention that the current system introduced by the Land Titles Ordinance (“LTO”) does not empower the Registrar to withhold conversion of title of the property in relation to those cases where it is not clear who the true owner is. This is unsatisfactory as prospective purchasers would rely on such conversion records as assurance of true ownership. We therefore agree that the issues concerning “indeterminate ownership” identified in point (a) of paragraph 5 of your Consultation Paper be resolved before commencement of the LTO. Since estate agents are required to provide to clients certain property information which includes particulars of current ownership and subsisting encumbrances registered in the Land Registry, it would greatly assist estate agents to fulfill this duty if the true owner and subsisting encumbrances can be correctly identified from a search of the land title register.

We are also concerned about the priority issue raised in point (e) of paragraph 5 that may lead to disputes and litigation over the priority among the unregistered interests, interests under a caveat registered prior to conversion and interests under a caution registered after conversion.

It is prudent to ensure that whatever conversion mechanism is adopted at the end of the day, incidents of unregistered interests should be reduced to the minimum and that all subsisting encumbrances can be clearly identified from the register.

(II) The creation of “converted land” and “upgraded title” may cause confusion

Under your proposed conversion mechanism, automatic conversion from the Land Registration Ordinance (“LRO”) registers to the land titles register would take place after about three years (“the converted land”). However, until the converted land has upon applications been upgraded to “full title”, the title of the converted land is to be deduced under the Conveyancing and Property Ordinance. It is only where property has been upgraded to full title would the title register provide an accurate statement of the title to a property which can be relied on by anyone who deals with the property.

The creation of these different classes of property title will render it difficult and confusing for the estate agents to understand and make distinctions between the two so as to advise clients properly. In addition, under the existing LTO and prior to automatic conversion, the land titles register deals with new land while the LRO register deals with other land in the interim. Since estate agents rely principally upon the land search records to ascertain ownership and encumbrances, a single and unified register without such complicated and fine distinctions is desirable for the easy following and understanding by the practitioners.

(III) The modification of prescribed forms under Practice Regulation necessitated by the proposed changes

If the modified conversion mechanism is adopted, corresponding amendments to the various prescribed forms under the Practice Regulations may have to be made to cater for the new changes. The prescribed forms on property information and estate agency agreement may need to incorporate items such as (i) whether title to property has been upgraded or not; (ii) whether there is any warning note on the land title register to give notice of unwritten equity; (iii) the costs of application for upgrading of the title to be borne by which party, etc.

To meet with these changes, the Government may need to introduce appropriate legislative amendments to the Practice Regulation.

(IV) The user friendliness of the land search records

Regardless of the conversion mechanism that is to be adopted, the land search records represent the direct means through which property information is obtained. Since these land search records are available for public inspection, estate agents and the general public alike should be able to easily access the same for the property details relevant for any intended transaction. It is therefore of paramount importance that these land search records be easily accessible at all times of the day and designed in such format and contents that are easily understood.

Hence, we suggest that corresponding administrative measures be taken into consideration, including the extension of service hours of the land title search service and the provision of Chinese translations to the land search records. These will serve to enhance the transparency and user friendliness of the land title registration system.

To conclude, in relation to the three questions raised in your Consultation Paper (i.e. (a), (b) and (c) in page 9 thereof) for which views are sought, our response, following the same alphabetical order, is as follows :

- (a) Please refer to our response in (I) above; and
- (b)&(c) In view of the significant and long term impact that any changes in the title conversion system will bring, careful assessment of the risks and benefits have to be undertaken. In making the assessment, we trust that our responses in (II) to (IV) above will be taken into consideration. Subject to the aforesaid, we have no particular preference over options (b) and (c) proposed by you.

Should you require clarification on the above, please do not hesitate to contact me on 2151 2913.

Yours sincerely,



Margaret CHIU
Director of Regulatory Affairs
& General Counsel
Estate Agents Authority

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c.c. Mr. Eugene Fung, Principal Assistant Secretary for Housing,
Transport & Housing Bureau

Internal

Chairman, EAA

Chairman, Licensing & Practice Committee, EAA

CEO

CONSULTATION ON AMENDMENTS TO THE LAND TITLES ORDINANCE

Conversion of Existing Land and Property To the Land Title Registration System

PURPOSE

This paper sets out the findings of the post enactment review of the Land Titles Ordinance (Cap. 585) (LTO) with respect to the conversion of existing land to the title registration system and seeks views on possible modifications.

BACKGROUND

2. It is intended that the LTO will apply to all leased land in Hong Kong. For new land that is granted after the commencement of the LTO the position is simple. It will be registered from the start under the LTO. No account needs to be taken of pre-existing matters. For land now dealt with under the Land Registration Ordinance (Cap. 128) (LRO), provisions are needed to govern how that land will be brought under the LTO and how rights and interests that may exist under the common law are to be handled during the conversion from the LRO registers to the land titles register under the LTO.

3. The conversion mechanism set out in the LTO enacted in 2004 contains the following features –

- (a) **The interim period:** After commencement of the LTO but before any conversion takes place there will be a period of time during which existing land will continue to be dealt with under the LRO. Conveyancing for this type of land will continue to have reference to the Conveyancing and Property Ordinance (Cap. 219) and conveyancing documents will continue to be registered under the LRO. The interim period was set as 12 years after the commencement of the LTO. There is provision to reduce or extend this period, subject to the approval of the Legislative Council;
- (b) **Caveats and Cautions against Conversion:** The LRO will be amended to introduce two new arrangements during the interim period to help prepare for the conversion –
 - (i) Registration of a notice of a claim to an interest in property that is created by the operation of the existing common law.

An example of this would be a claim by a spouse who has contributed to mortgage payments. Although these interests are recognized under the common law, there is no instrument that can be registered and the LRO does not at present allow for registration of any notice of a claim. Under the LTO, if no notice of an interest or claim to an interest is given on the land titles register then the interest or claim is not secured against the property. The new provision will allow an instrument called a caveat to be registered under the LRO to give notice of such claims. Registration of a caveat would not prevent conversion of the property or validate the claim. The caveat will be deemed as a caution on land titles register after conversion, so preserving notice of the claim for anyone intending to deal with the property.

- (ii) Registration of a caution against conversion. This would serve to prevent conversion taking place while an action to determine an interest was underway. A caution against conversion will have a limited validity period, lapsing after one year unless legal proceedings have commenced or the Court allows an extension. As soon as a caution against conversion lapses, or the Court makes a determination on the interest claimed, the affected register will be converted to the land titles register;
- (c) **Automatic Conversion:** At the end of the interim period, every property for which a register has been kept under the LRO would be transferred automatically to the LTO register except –
 - (i) property against which a caution against conversion that had not lapsed was registered;
 - (ii) property for which instruments had been submitted for registration before the conversion date but had not yet completed registration or been withdrawn; and
 - (iii) the subject matters of registers that had been kept under the LRO but which do not meet the definition of land that may be registered under the LTO.
- (d) Before a first transaction for valuable consideration under the LTO of a converted property, a registered owner remains subject to any unwritten interests or interests under unregistered instruments

enforceable against the property at the time of conversion. A claimant to such an interest who had not acted before conversion to register a caveat under the LRO may still, after conversion, apply to enter a caution on the land titles register under the LTO to protect his interest. But once the property is sold to a purchaser for value under the LTO, any interests not protected by a caution on the land titles register will not bind the purchaser. If no notice had been given to the purchaser through a caution, the claimant to any such interest would only be able to pursue his claim through action against the vendor.

4. These features were intended to address the following concerns and expectations –

- (a) **Notice and opportunity to act:** there should be sufficient notice to the public about the impending change and sufficient opportunity for interested parties to act to protect interests not at present registered under the LRO. The 12-year interim period gives substantial time within which to ensure that all reasonable measures to inform the public of the change can be given. The amendments to the LRO give interested parties simple and effective means to prevent loss of an interest that might otherwise happen if an owner were to sell a property immediately after conversion before a claimant had opportunity to enter a caution on the land titles register. The caveat provides a simple means to give notice of a claim before conversion. The caution against conversion allows interested parties to prevent conversion while a claim is determined so that the land titles register will give a proper reflection of the state of title;
- (b) **Certainty over conversion:** there should not be an indefinite period of parallel operation of the LRO and LTO with an uncertain timetable for conversion. The automatic conversion of almost all existing registers at the end of the specified interim period would leave the LRO with only vestigial effect; and
- (c) **Avoiding new liabilities:** the process of conversion should not impose additional liabilities on conveyancing solicitors beyond those currently assumed by them towards their clients in conveyancing transactions. The automatic conversion process would not create any new liabilities for solicitors.

QUESTIONS RAISED OVER THE ENACTED CONVERSION MECHANISM

5. During the post-enactment review of the LTO, the following issues have been found to present practical difficulties for the conversion exercise if the enacted legislation remains as it is –

- (a) **Indeterminate ownership:** Unless an LRO register falls within one of the specific categories for exclusion set out in paragraph 3(c) above, the Land Registrar (the Registrar) is obliged to keep a corresponding record in the land titles register, which involves stating who the registered owner is. Cases have been found where it is not clear who the true owner is. Either multiple registers exist that appear to refer to the same property or there are single registers that appear to contain more than one chain of title to the same property. Under the LRO, the Registrar is not empowered and ought not to be making a judgement as to who the owner in such cases should be. Nevertheless, under the land title registration regime, as the enacted LTO stands, the Registrar would be compelled to do so since there is no power either to withhold conversion of the property pending a Court finding or to give a special status to the converted titles that would not prejudice a subsequent determination of ownership by the Court. The number of such cases that have been identified so far is not large (less than 500 to date) but without a disproportionately resource-intensive and time consuming investigation of deeds behind each individual register it will remain uncertain whether all cases of indeterminate ownership have been found.
- (b) **Unknown liabilities:** The Land Registry (LR) is liable for any errors in the land title register that are due to the mistake or omission of public officers. Since there is no requirement to register instruments affecting land under the LRO, nor any requirement for the LR to investigate the validity of deeds before they are registered, there is a risk that upon conversion the land titles register will not be accurate due to the mistakes or omissions of other parties. There is no practical means of assessing the extent of such inaccuracies. As the public would rely on the land titles register to enter into transactions, the LR may owe a duty of care and be held liable to any party who suffers loss due to inaccuracy in the land titles register, whether or not the mistake or omission was that of a public officer or a private party.

- (c) **Impracticality of pre-conversion screening:** During the interim period the LR will prepare the existing LRO registers for conversion. This process is not an in-depth investigation of title for each of the 2.7 million registers, only a screening exercise to match the requirements of the LTO and ensure that the converted registers are as clear and straightforward to use as possible. Adding detailed title investigation to this process to try to address the issues noted in subparagraphs (a) and (b) above would be disproportionately resource-intensive to carry out within the time available. Investigation could only be based on information held by the LR, so finding could not be definite. The process would be seriously complicated by the registration of new documents during the interim period. Based on past records, around 8 million new documents can be expected to be registered over the 12-year period. The reliability of any investigation of title already carried out on a register affected by subsequent entries before conversion would be questionable;
- (d) **Mismatch between costs, possible liabilities and financing:** During the interim period income from transactions under the LTO will be very low. In the initial years it will not cover the cost of operating the system, nor over the whole period will it be able to contribute to the costs of preparation work or to providing a reserve to cover possible liabilities that may arise on conversion. Upon conversion the LR will have to be ready to address any liability for errors and omissions for claims that may arise under the LTO. The LTO revenue will increase after conversion as all transactions will be registered under the LTO but there will be a period of several years where the financial stability of the Trading Fund may be at risk due to the uncertainty over liabilities. Setting an equitable levy rate to finance the indemnity fund for fraud cases is also made difficult by the very low LTO transaction volumes during the interim period;
- (e) **Conversion of Caveats:** Before a first transaction for value under the LTO of a registered property, the property remains subject to any unregistered interests that are enforceable at the time of conversion. The review has found potential for disputes and litigation over the priority among these unregistered interests, interests under a caveat registered prior to conversion and interests under a caution registered after conversion. Complex transitional provisions will have to be added to the LTO to establish how the priority is to be determined among such interests.

6. Apart from the practical issues identified during the review, set out above, external commentators have continued to raise questions about the conversion mechanism. Property market analysts question the effect that the long period of dual running may have on the behaviour of the property market by giving advantage to the primary market – for which transactions will be under the new system – over the secondary market until conversion takes place. The Law Society remains concerned about having to operate under two systems for so long and would like to see earlier conversion. On the other hand, the Heung Yee Kuk continues to be doubtful about automatic compulsory conversion and would prefer a voluntary approach, at least in respect of land covered by Part II of the New Territories Ordinance.

7. There is no ideal solution that would address all of the practical issues or preferences of different parties. However, after considering the practical issues, in particular, the financial position and uncertainty over liabilities, the LR has assessed whether there are modifications to the conversion mechanism that would –

- (a) allow for cost effective reduction of risk of liabilities to public funds arising from the conversion; while
- (b) avoiding the imposition of new liabilities on solicitors.

SUGGESTIONS FOR MODIFICATION

8. The approach that the LR has identified that can give a high assurance of reducing liabilities, without imposing excessive cost on the public who pay for the system through registration fees, is to revert to a gradual approach in which conversion would take place on a case by case basis upon the first transaction in each property after commencement of the LTO. Since this gradual approach was rejected in 2003, the LR has suggested an alternative scheme for consideration instead.

9. The features of the alternative scheme would be –

- (a) **LTO on commencement applies only to new land:** this is the same as under the LTO enacted in 2004. The reason is to get the system for title registration into operation as quickly as possible and tested before conversion begins;
- (b) **Conversion of LRO land accelerated:** automatic conversion from LRO registers to the land titles register would take place after about

three years, rather than at the end of 12 years. The timing for conversion would be determined by how quickly the information technology system and process for managing the conversion of the registers could be put in place;

- (c) **New status for converted land:** transactions in converted land would remain subject to any subsisting interests and title would have to be deduced as required under the Conveyancing and Property Ordinance until title is upgraded;
- (d) **Upgrading of title:** at a specified time after conversion an application would be allowed for approval to upgrade the title. The approval would be given by the LR. No certificate of good title would be required from a solicitor in private practice. The application process would allow for the Registrar to undertake such screening as was appropriate for the title in question. The specified time suggested after which applications for upgrading would be allowed is 12 years after the conversion date. This would reduce the risk of there being any pre-conversion issues remaining to be dealt with ;
- (e) **No amendment to LRO:** the early conversion of all properties and the new status of converted land would remove the need for caveats or cautions against conversion. Converted land would remain subject to subsisting interests until upgrading. There would be no possibility of upgrading happening immediately after conversion, so a party having a claim under an unwritten equity would not be faced with an immediate risk of losing their interest if the property were sold directly after conversion. They would have time to put a warning note on the land title register to give notice of their claim before upgrading took place.

10. The benefits of an alternative scheme on these lines would be –

- (a) **Limited initial liability:** upon conversion, the LR would not immediately have the risk of uncertain liabilities, since all converted land would still be subject to pre-conversion interests. This removes the difficulty of determining what level of reserve is needed to guard against such risks and the cost of building up that reserve prior to conversion;
- (b) **Controlled cost of screening:** screening of titles need only be carried out upon applications for upgrading. Applications will be

limited to registers where there are transactions. The extent of examination required can be matched to the circumstances of each particular application;

- (c) **More balance between revenue and risk:** upon conversion the LR will start to receive substantial revenue for registration under the LTO. This will be before the full extent of any liabilities that may arise after upgrading is encountered. This will enable the LR to plan for the upgrading on the most efficient basis in terms of costs to the public, balancing the cost of any title investigation against the level of risk that might be incurred;
- (d) **Avoiding new provisions to exclude indeterminate titles from conversion:** with the upgrading process, the only requirement will be for a power for the Registrar to reject an application for upgrading if there is still uncertainty over the title at the time of application. Under the existing mechanism, exclusion from conversion will have to be provided for under the LRO, together with all necessary mechanisms for review, appeal and settlement of any claims that may arise ;
- (e) **Avoiding new transitional provisions:** As there will be no amendments to the LRO to introduce caveats, no complex transitional provisions to determine the priority of unwritten interests (whether registered under caveat or caution or not) after conversion will be required, reducing complexity of the legislation;
- (f) **Early benefit from indemnity provisions:** Although holders of converted land will not enjoy the full benefit of the title registration system until title is upgraded, any purchaser of converted land before upgrading will be safeguarded under the LTO in respect of transactions registered under the LTO.

11. Against the benefits set out in paragraph 10, it should be noted that the modified approach to conversion set out in paragraph 9 would have the following disadvantages when compared with the conversion scheme under the enacted LTO described in paragraph 3 –

- (a) **Indefinite timetable for upgrading:** there would be no certainty as to when upgrading of title for all properties would be completed;
- (b) **Dual system prior to upgrading:** transactions in converted land will be subject to different rules than those for new land. Solicitors

will need to deal with these differences until such time as a property is upgraded. The difference in treatment may affect perceptions of converted land prior to upgrading and affect the market for such properties;

- (c) **Separate fee for applications to upgrade title:** owners will have to pay separately for applications for upgrading. Under the conversion mechanism in the enacted LTO, all costs of preparing for conversion and dealing with any liabilities that are incurred by conversion will have to be met by increasing all registration fees.

VIEWS SOUGHT

12. We would like to invite your views on the following –

- (a) Do you agree that the issues identified in paragraph 5 are matters that should be resolved before commencement of the LTO?
- (b) Do you think that the suggestions for a modified conversion mechanism set out in paragraph 9 would be preferable to the mechanism under the enacted LTO described in paragraph 3 and what are your reasons for this view?
- (c) Would you prefer to see title registration commencing for new land only while further deliberation on how best to settle the conversion mechanism is carried out?