新界鄉議局
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遞交文件

檔案編號：三十二／三／二六一六號
日　　期：二〇一一年一月六日

立法會
研究《土地業權條例》修訂建議聯合小組委員會：

鄉議局就《土地業權(修訂)條例草案》
物歸原主規則及彌償計劃的意見書

自從政府自 1994 年推出《土地業權條例草案》以來，本局一直密切關注事件的進展，積極參與及作出回應。目前是修訂草案的關鍵時刻，政府是否容讓其它人忽然建議取消曾經已獲共識的物歸原主規則，作爲欺詐個案中保障業主可討回權益的一個平衡，是值得商榷的事情。

本局重申在欺詐行爲發生時保留物歸原主規則是保護業權人物業權益的重要原則，如果接受撤銷有關規則勢必損害業權人的權益及造成不公及冤屈。倘若政府貿然接納香港律師會的建議去推翻已落實之物歸原主規則的話，本局強烈要求政府在欺詐物業發生時將三千萬的彌償上限撤除，並在《收回土地條例》第 12(c)條不適用的情況下，照市價十足賠償受害業權人的所有損失。

不過，本局必須慎重提醒政府，現時香港的物業價值不菲，彌償基金的儲備隨時會因一宗大額索償申請而用清及破產。本局相信政府、以至全港市民不會希望這情況會發生。所以繼續保留物歸原主規則才是解決問題的根本辦法。

本局現呈上就《土地業權(修訂)條例草案》物歸原主規則及彌償計劃的意見書十一份予小組成員參考，希望政府三思而後行。專此奉達，敬祈　亮察。

新界鄉議局主　席：劉皇發
副主席：林偉強
張學明
（秘書處代行）

新界鄉議局 秘書處 HEUNG YEE KUK SECRETARY

新界鄉議局
就《土地業權(修訂)條例草案》
物歸原主規則及彌償計劃
意見書

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鄉議局就《土地業權(修訂)條例草案》物歸原主規則及彌償計劃的意見書

1. 土地業權條例督導委員會於 **2010 年 12 月 16** 日召開了第七次會議，本局亦有派代表出席。本局首先非常感謝土地註冊處在會議上提供了兩份文件(LTOSC Paper Nos. 10 & 11)(附件一和二)，詳細闡述物歸原主規則(Mandatory Rectification Rule)及彌償計劃(Indemnity Scheme)的發展過程和背景，以及分析評估如果撤銷物歸原主規則相應撤銷彌償上限後彌償基金可能承擔的風險和責任。

(A) 歷史背景

(I) 1994 年草案

2. 根據政府於 **1994** 年提交立法局的《土地業權條例草案》，爲絕對保障買家的業權不可廢除(Indefeasibility of Title)的原則下，政府曾經建議就算因爲物業轉易涉及欺詐而導致不知情的業權人喪失業權，業權人亦無法要求更正有關註冊紀錄及討回其物業的業權，而該業權人只可以從政府獲得上限港幣二千萬元的彌償。此建議

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引起社會及本局極大關注及批評，同時亦質疑該業權不可廢除的原則在香港是否可行及該原則是否公平對待業權人。

(II) 2002 年草案

3. 政府於 **2002 年 12 月**提交修改後的《土地業權條例草案》中建議，凡有欺詐情況，法庭可因應每宗個案的情況，命令更正土地業權註冊紀錄及將物業業權歸還受害的業權人。對於該修訂後的建議，本局與社會其它團體均強烈反對條例賦予法庭廣泛的酌情權，因爲此舉不但會使在欺詐發生時業權人的業權是否能物歸原主有不明確之處，同時亦引致當受損的業權人未能討回其物業，而其物業的價值又超越政府的彌償上限時，受損的業權人便會遭受實質的損失。基於這個情況，本局建議政府在接受業權不可廢除的原則下，條文要明文保障業權人在欺詐情況時可討回業權，以對業權人與買家的權益作出適當的平衡，方才切合香港獨有的環境及頻密物業買賣狀況。有見及此，本局遂向政府提出建議，在欺詐情況下，不知情的業權人可以討回其物業，而買家則可以獲得政府有上限的彌償。這就是本局建議的"物歸原主規則"，亦

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即條例中所述的強制更正規則(Mandatory Rectification Rule)。

(III)2004 年法案

4. 物歸原主規則在 **2004** 年終於在立法會法案委員會審議修訂後明文列出於由立法會通過的《土地業權條例》。該條例**第 82(3)條**規定如"前註冊擁有人"由於欺詐而喪失其業權，不論誰是當時的註冊擁有人，法庭亦須命令更正業權註冊紀錄，以恢復該前註冊擁有人的業權。

(IV)2008 年 12 月發展局諮詢文件

5. 發展局於 **2008 年 12 月**發出的諮詢文件中(附件三和四)，第 5 至 7 段闡述引入物歸原主規則的背景，現輯錄如下：

> "5. 在 2003 年審議《土地業權條例草案》期間，有意見指出，由於就欺詐個案設定了彌償上限，若擁有人因欺詐而致從土地業權註冊紀錄上除名，在新制度下他會面對的風險是：如果法庭沒有發出更正命令以恢復其擁有人身分，而且其失去物業的價值超逾彌償上限，其損失便不能獲得全數同等價值

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的補償。如果在發生欺詐後，有對該欺詐不知情的新買家購買並管有該物業，法庭可能拒絕作出更正。

6. 根據現行的普通法制度，在第 5 段所述的情況下，不知情買家必須交出物業，而且除非能夠成功向欺詐者索償，否則不會獲得賠償，前擁有人則可取回物業。

7. 擬定的港幣3,000萬元上限其實已超逾香港99%物業的價值。出現第 5 段所述個案的機會很低。不過，有意見反對存在前擁有人在新業權註冊制度下的處境(以金錢計)將較現行制度下遜色的任何風險。爲回應這些反對意見，當時同意限制法庭在欺詐個案中的更正權力。加入的限制爲：規定法庭如在欺詐個案中發現前擁有人並無參與該項欺詐及並無透過其本身的作爲及沒有因爲本身缺乏適當的謹慎而在相當程度上有份造成該項欺詐，便須發出更正命令，恢復該前擁有人的身分。這項規定稱爲"強制更正規則"。"

6. 本局指出，在確立物歸原主規則之下，政府進一步建議對物歸原

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主規則作出若干例外規定，建議的例外情況包括：

(I) 物業在欺詐發生後已被政府收回或已交還政府；或

(II) 物業已被分割及已售予多名新真誠買家，或已跟多名新真誠買家達成買賣協議令物業出現多個擁有權；或

(III) 現時管有物業的註冊擁有人並非發生欺詐後的首名註冊擁有人。他是付出有值代價的真誠買家，或是從付出有值代價的真誠買家取得業權的人。

(V) 2009 年 3 月

7. 除香港律師會外，本局和大部分有關團體均認同在上述(I)及(II)的例外情況下是不容易將業權物歸原主的，但就不接納情況(III)爲例外情況。本局於 **2009 年 3 月 18 日**致土地註冊處的信件中(附件五)向政府表明，如果土地或物業最終被政府收回或已交還政府，政府是有需要按收地價向業權人作出彌償；而所有經欺詐後出現還原困難的個案，當局亦應照市價十足賠償受害業權人的所

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有損失，這樣才會對業權人公平。

8. 本局現經進一步考慮後特此補充，本局不但要求政府在撤銷物歸原主規則時必須撤除彌償上限，政府更要在《土地業權條例》有關條文中清晰列明如果欺詐涉及新界土地，則政府須在《收回土地條例》第 12(c)條並不適用的情況下照市價十足賠償受害業權人的所有損失。

(VI) 2009 年 6 月

9. 政府在充分考慮過社會各團體的回應後，政府在 **2009 年 6 月**向立法會提交的文件中建議保留物歸原主規則及將上述情況(I)及(II)作爲物歸原主規則的例外情況。

(VII) 2009 年 9 月

10. 香港律師會於 **2009 年 9 月 21** 日致土地註冊處的信件中(附件六)提出建議撤銷物歸原主規則，本局感到震驚及遺憾。本局指出，物歸原主規則是經過社會各界詳細討論後，經由大部份有關團體贊成情況下獲得政府認許及落實，而本局亦已將有關決定通告所

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有新界業權人。在這處境下，如果政府再重新討論是否應該撤銷物歸原主規則，是會令致《土地業權條例》修訂的進度停滯不前及進退失據。此舉不但費時失事，同時，香港律師會亦未有尊重政府長時間諮詢本局及社會各團體所得出的成果及結論。

(VIII) 2009 年 10 月

11. 本局於 **2009 年 10 月 14 日**致土地註冊處的信件中(附件七)進一步就《土地業權條例》提出意見。

(IX) 2010 年 3 月

12. 本局非常認同政府於 **2010 年 3 月**的文件(LTOSC Paper No.9(附件八)中指出，物歸原主規則代表了行政、立法和有關團體經過深思熟慮所達成的共識，以尋求仔細平衡不知情買家和不知情的前業主之間的利益。

(X) 2010 年 4 月

13. 本局於 **2010 年 4 月 7 日**致土地註冊處的信件中(附件九)重申，本局強烈支持政府上述文件所述的立場，並敦促政府在保留物歸原

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主規則不變的情況下帶領本局及各團體繼續審議有關條例，以免費時失事及節外生枝。

14. 現附上香港律師會於 **2010 年 4 月 27** 日致立法會信件(附件十)及政府和香港律師會最近期的書信(附件十一至十四)作參考。

(B) <u>本局立場</u>

15. 最近，本局就物歸原主規則及彌償計劃作進一步的深入討論後，現特此重申本局的立場：

(I) <u>必須保留物歸原主規則</u>

16. 本局認爲政府不應爲推行土地業權註冊制度而損害業權人的現有權益。雖然《土地業權條例》立法原意旨在簡化物業交易程序及使土地業權更清晰明確，但如果新制度會剝奪業權人在現行普通法下享有的權益和保障的話，本局相信廣大業權人，包括新界業權人是不能接受的。普通法其中一項基本原則就是『不能給付自己沒有的東西』(nemo dat qui non habet)，即任何業權人不會因另一人的欺詐行爲而失去其財產擁有權，因爲詐騙者本身沒有業

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權，他也就無法把業權轉讓給買家。倘若《土地業權條例》內的物歸原主規則被撤銷的話，則詐騙者的欺詐行爲便會導致不知情的業權人的物業業權被活生生剝奪，這樣是完全違反上述的普通法原則。再者，**基本法第105條**指出"香港特別行政區依法保護私人和法人財產的取得、使用、處置和繼承的權利，以及依法徵用私人和法人財產時被徵用財產的所有人得到補償的權利"。在基本法的憲法保護私人產權的基礎大原則下，政府又怎能同意或推動制定任何新制度去剝奪及侵犯私人產權？

17. 相對處於被動一方的業權人，購買物業屬買家自己的主動商業決定，買家當然有責任承擔其決定的風險。在普通法『買方留心』(Caveat Emptor) 的法律原則下，買家及其律師有責任主動採取適當的步驟和應盡的努力(due diligence)去查核物業的業權以保障買家的權益。再者，如買家作出任何商業行爲的決定時想加強其保障的話，買家亦可自行購買保險。所以，撤銷物歸原主規則只會使條例一面倒地偏袒買家，完全妄顧業權人的利益。這樣對香港整體的公眾利益是沒有好處的。

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18. 另外，撤銷物歸原主規則會使條例對業權人和買家分別的保障變得極不合理及完全不合比例。現時在普通法下，業權人可入稟法庭討回因詐騙者的欺詐行爲所失去的業權及向詐騙者追討損失，但買家除可向詐騙者追討損失外，亦可以向所有曾代買家查核物業業權的專業人士追討因疏忽所導致的損失。相反，如果政府採納香港律師會的建議撤銷物歸原主規則的話，則在詐騙物業發生時買家會絕對性地得到不可廢除的業權，但無辜的業權人反而喪失現時在普通法下能討回物業業權的權利，而且除了渺茫地向詐騙者索償外就只能獲得政府不超過三千萬元有上限的彌償，除此之外就再沒有其他可行的渠道去追討彌償金額不足的損失。從另一角度看，保留物歸原主規則會令業權人繼續享有現時的保障可討回所失去的業權，但買家除繼續享有現時所有的追索權外，更可額外獲得政府不超過三千萬元有上限的彌償。因此，本局強調物歸原主規則的存在不但有保留業權人可討回物業權利的好處外，還不單止不會削弱現時保障買家的任何權益，更會對買家提供額外的彌償保障。

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19. 本局認爲政府改革任何現行制度時必須以民生爲出發點。任何建議的新制度除要保障廣大市民的利益外，亦要顧及社會當前的需要和實際的情況，切忌爲推行新制度而生硬地或一刀切地採納及引進外國的制度。否則新制度不但不便民，反而更有擾民之嫌。本局理解香港不少新法例在貫徹其宗旨的同時，亦會在條文中列明例外的情況，以平衡社會上有關的權益。例如《性別歧視條例》在確立男女平等的原則下，亦另有條文列明對新界土地的丁屋制度並不適用。因此，本局無從理解爲何《土地業權條例》在保障買家業權不可廢除的原則下，不可以引入物歸原主規則作爲例外情況，即在欺詐物業時，業權人可以討回因詐騙者的欺詐行爲所失去的業權，而買家則可以獲得政府的彌償。這安排其實是新制度爲買家提供更大保障的同時，對業主權益作出一個適當的平衡而已。相反，本局認爲如果撤銷物歸原主規則，勢必損害業權人的權益，造成不公及冤屈。基於上述理由，本局強烈敦促政府要按照已落實的物歸原主規則繼續審議《土地業權條例》的修訂。

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(II) 撤除彌償上限

20. 本局認爲倘若政府貿然考慮接納香港律師會的建議去推翻已落實之物歸原主規則的話，則本局除對此表示極度遺憾外，亦要強烈表達政府就欺詐物業發生時繼續應用彌償上限會對全港擁有物業價值超過三千萬元的業權人極不公平。本局認爲此舉不但使業權人產生惶恐及不安，同時亦無視香港社會現時的實際物業價格情況。因此，倘若物歸原主規則被撤銷的話，本局強烈要求政府在欺詐物業發生時將彌償上限撤除，而且政府更要在《土地業權條例》有關條文中列明如果欺詐涉及新界土地，則政府須在《收回土地條例》第 12(c)條不適用的情況下照市價十足賠償受害業權人的所有損失。

21. 本局亦藉此機會鄭重提醒政府當局現時香港的物業價值認真不菲，所以，彌償基金根本不能承受有任何大額物業被欺詐的情況發生。根據警方提供的統計數字，涉及土地的欺詐個案過去幾年顯著上升。由於蓄意的欺詐行爲防不勝防，因此如果政府考慮爲欺詐個案的受害業權人提供無上限的彌償必須要深思熟慮，因爲

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後果可能會不堪設想。土地註冊處的風險評估文件(LTOSC Paper No.11)(附件二)中指出，只要有一名擁有價值 4 億元土地的業權人因第三者作出欺詐行爲而喪失該土地的業權，而政府就其損失十足彌償的話，彌償基金的儲備便會一筆過用清，並導致彌償基金破產。在此，本局深信睿智的政府、廣大的業主及全港的市民都不希望這情況真的會出現。本局認爲最適當的方法惟有繼續保留物歸原主規則才不致陷政府的財政於無底深潭的地步，懇請政府三思而後行。

(III) 暫緩新界轉制建議

22. 最後，香港律師會亦曾向本局建議讓市區物業先行轉制，而新界則沿用舊制。本局要首先指出新界不單指 27 鄉，而是指整個新界，包括新市鎮的所有土地和物業。本局乃根據鄉議局條例(第 1097 章)所設立的一個法定諮詢機構，其中一個職能就是"爲新界區的人的福利及繁榮而就社會及經濟的發展向政府提供意見"。故此，本局認爲原則上根本不應探討香港律師會的建議，因爲有關建議不單不尊重本局及各團體就保留物歸原主規則所達成的共

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識，同時亦會拖慢整個條例修訂審議的進度，亦令全港及廣大新界業權人及市民對舊制及新制同時存在及實施無所適從，最後導致香港整個物業及土地交易市場變得雜亂無章及混亂不堪。

謹呈上述本局意見以供參考。專此奉達，敬祈　亮察。

新界鄉議局主　席：劉皇發
副主席：林偉強
張學明
（秘書處代行）

附件一至十四

附件一

2010 年 12 月土地業權條例督導委員會第 10 號文件

Land Titles Ordinance Steering Committee

The three core mechanisms under the LTO: conversion, rectification and indemnity

PURPOSE

This paper sets out for Members' information the background to the three core mechanisms under the Land Titles Ordinance (Cap. 585) (**LTO**), namely, conversion, rectification and indemnity and their inter-relationship.

BACKGROUND

2. At the last Steering Committee meeting on 11 May 2010 when discussing the Law Society's letter of 27 April 2010 to the LegCo Joint Subcommittee on Amendments to the LTO regarding the former's latest views on rectification and indemnity, Members noted that the three core mechanisms under the LTO, i.e. conversion, rectification and indemnity were closely inter-related.

3. As some Members have not followed the development of the land titles legislative exercise from the start, we consider it would be useful to set out the background for reference purpose. This might be useful in facilitating the formulation of viable options on the way forward.

Background on development of conversion mechanism

4. Since 1990, the Administration's objective has been to introduce a comprehensive system of title registration that deals both with new land leased after the LTO is commenced and with the conversion of all existing land to the new system. The objective is to improve the security and ease of property transaction in Hong Kong, bringing our legislation and systems in line with the best practices in comparable developed jurisdictions.

5. The Land Titles Bill was tabled in LegCo in 1994 (**1994 Bill**) putting forward a title registration system and conversion of existing properties to the title registration system. Automatic conversion after one year from the date of enactment was proposed in the Bill (**midnight conversion mechanism**). Objections were raised by

stakeholders against the Bill on, among other points, the short lead-in period and the extinguishment of unregistered interests.

6. There was worry at the time that if the 1994 Bill was enacted, it would extinguish the rights of those currently entitled under common law or equity unless the persons concerned were aware of these proposed changes and registered their interests at the Land Registry within a relatively short period of time after enactment. It was suggested that only the new property transactions be dealt with under the title registration system while the old property remained under the old system until the new property transactions took place over the course of time.

7. There was also comment that for so long as the registered owner on the date of the implementation of the Bill remained the registered owner and had not disposed of its interest to a purchaser for valuable consideration, there appeared to be no reason to deprive holders of unregistered interests of their rights which they might otherwise have had prior to the implementation of the Bill.

8. Owing to logistical reasons, in June 1995, the House Committee of the Legislative Council decided to curtail examination of the 1994 Bill in that legislative session.

9. Between 1996 and 2002 the Administration carried out extensive consultation among various stakeholders to try to develop an approach to conversion and rectification that would be acceptable to all parties.

10. There were concerns from some members of the legal professional over the effect of a "midnight conversion" from a system which had served Hong Kong well in the past to a totally different system overnight with no opportunity for a measured introduction of the new scheme.

11. There were also concerns that the midnight conversion was highly risky especially for persons having interests in land but whose names did not appear on the land registry records. It was pointed out that in other jurisdictions, conversion from one system to another was invariably a gradual one done by phases, e.g. voluntary registration system was in operation in the Ontario system in Canada and in England. They considered that perhaps the new system should initially be applied only in cases of new government grants, government housing schemes, etc. where the title of the land was simple and straight forward. Property owners might also

voluntarily get into the title registration system. As time went by and as drawbacks and flaws in the new system were being identified and addressed, title registration could then be gradually applied to other types of land.

12. A revised Land Titles Bill was put forward in 2002 (**2002 Bill**), under which conversion would have taken place gradually upon transactions or by voluntary application, subject to a solicitor issuing a certificate of good title.

13. The Law Society did not consider the requirement of the solicitor's certificate of good title viable. They pointed out that many titles were not absolutely good but were fundamentally sound. However without the removal of the technical defect, it would be difficult for solicitors to provide a good title certificate given the consequences under the Bill of their guaranteeing the title. The Law Society also mentioned the possibility of inconsistency within the profession in the issue of certificate of good title.

14. To address the divergent views of the stakeholders and allow the bill to proceed, an alternative was proposed in December 2003, i.e. Daylight Conversion system. The proposal was to make conversion automatic after an incubation period of 12 years, during which persons claiming interests in land would have opportunity to register caution against conversion prohibiting conversion to the LTO pending resolution of disputes. Subsequently, the Daylight Conversion system was modified by, among others, adding a mechanism allowing the holders of existing unwritten equities to register under the Land Registration Ordinance (Cap.128) a warning notice called "caveat" to constitute notice of their claim of interest to all persons.

Background on development of rectification and indemnity provisions

15. Rectification refers to how the legally authoritative title register can be put right if it is found to be in error. In the 1994 Bill, former owners, in fraud cases, were barred from rectification against bona fide purchasers for valuable consideration.

16. Indemnity is the compensation payable to person suffering loss by reason of an entry in the land register where such entry was obtained or made by or as the result of fraud. A cap on indemnity was imposed in the 1994 Bill. The indemnity fund scheme is self-financing and levies are payable to fund the scheme. In order to keep the indemnity fund financially viable and in order to keep the levy rate at a level reasonably acceptable to the general public, a cap on indemnity was imposed. The

cap should provide adequate protection to average property owners and will be reviewed by the Financial Secretary from time to time in light of the movements in property prices and experience of actual claims received as appropriate.

17. After the lapsing of the 1994 Bill, the Administration continued to consult the stakeholders. The Heung Yee Kuk doubted that the protection to an owner under existing law in fraud cases would be affected by the introduction of the title registration system. The Law Society was also of the view that the existing legal position should be maintained and in the event of fraud, an innocent (former) owner should not be deprived of his property. An innocent purchaser should receive an indemnity.

18. Under the 2002 Bill, in order to address the views of various stakeholders on the issue of indefeasibility, the Administration proposed that, in the case of fraud, the court be given discretion to decide whether or not it would be unjust not to rectify the title register in favour of an innocent former owner against a purchaser for value in possession of the relevant property. The provision is similar to the relevant provision in Land Registration Act 1925 of England and Wales.

19. Some stakeholders objected to giving discretion to the court in rectification matters and preferred clear statements on the legal position. They feared uncertainty over the outcome would undermine the certainty needed to make the new system operate efficiently. The Real Estate Developers Association of Hong Kong, the Bar Association and the Heung Yee Kuk also took the view that under a discretionary approach the existence of the cap gave no assurance to former owners that they would be fully compensated for loss if they failed to secure rectification. There was concern that non-rectification of the title register together with the cap on indemnity would render the innocent former owner worse off than his position under the existing common law. They doubted whether this might be in breach of Article 6 and Article 105 of the Basic Law.

20. During the last few months before the enactment of the LTO, substantial committee stage amendments were introduced to address the concerns of the stakeholders and to remove any doubt that the innocent former owner would be worse off under the new system.

21. Under the enacted LTO, any innocent owner removed from the register by fraud will, subject to the limitation period imposed, always be restored, irrespective of

the number of subsequent transactions or any developments affecting the land (**mandatory rectification rule**).

22. For post-conversion fraud cases, a capped indemnity may be paid to the suffering displaced current owner. For pre-conversion fraud cases, no indemnity shall be payable. That has been the Administration's position since the 1994 Bill.

Enactment of the LTO in 2004

23. After 15 months of scrutiny of the 2002 Bill by the Bills Committee, consensus was reached among the Members, the Government and the stakeholders on different issues including the conversion mechanism and rectification and indemnity provisions, balancing a wide variety of interests in the society. LegCo passed the LTO in June 2004 conditional on a commitment by the Administration to thoroughly review a list of issues before any notice to commence the legislation was given.

ISSUES IDENTIFIED DURING POST-ENACTMENT REVIEW

24. During the post-enactment review of the LTO, several difficulties were identified with the daylight conversion mechanism, mandatory rectification rule and indemnity provisions. The issues arising out of these 3 topics are interwoven and suitably to be considered as a whole. A diagram illustrating their interrelationship is given in paragraph 34 below.

Difficulties identified with the daylight conversion mechanism

25. The following are the major issues that have been found to present practical difficulties for the conversion exercise -

(a) Indeterminate ownership: Cases have been found where it is not clear who the true owner is. Multiple registers exist that appear to refer to the same parcel of land or different parcels of land with the same lot number as well as single registers that appear to contain more than one chains of title to the same property.

(b) 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 be sufficient to provide a reserve to cover possible liabilities that may arise on conversion. 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.

Difficulties identified with the mandatory rectification rule:

26. The following are the major difficulties identified with the mandatory rectification rule:

(a) No purchaser of registered property is absolutely protected by the title register against the effect of fraud prior to the transaction in which he is involved. This may undermine the security and ease of conveyancing that the LTO aims to achieve.

(b) There may be cases in which, before a claim for rectification is made, the lot or lots affected have been resumed or surrendered to Government. Rectification to a former owner is a practical impossibility in such circumstances.

(c) There may be cases in which, after the fraud, the property is divided up and sold on to several new owners or developed and undivided shares sold on to multiple new owners. Displacing and compensating multiple innocent parties in such cases is likely to cause greater disruption and incur greater cost to the indemnity fund than giving indemnity to the former owner.

2009 PUBLIC CONSULTATION

27. A 3-month public consultation was launched on 1st January 2009 putting forward the Administration's proposals to deal with the difficulties identified with the daylight conversion mechanism and mandatory rectification rule.

28. The results of the public consultation indicated that there was strong objection to the proposed modified conversion mechanism[1] and strong public support

[1] Details of the proposed modified conversion mechanism are stated in paragraph 9 of the Consultation Paper on Conversion of Existing Land and Property to Land Title Registration System.

(save and except the Law Society) to retaining the mandatory rectification rule.

29. In June 2009, the Administration submitted a paper to the Joint Subcommittee on the Amendments to the Land Titles Ordinance of LegCo reporting on the results of the public consultation. The Administration proposed to retain the daylight conversion mechanism and to put in place a mechanism known as "Land Registrar's Caution against Conversion" to deal with conversion of known problematic registers. The mandatory rectification rule is to be retained subject only to 2 exceptions i.e. (1) property was surrendered or resumed for public purposes or (2) property has been redeveloped and sold to multiple purchasers and it would be inequitable to restore title to the former registered owner.

30. In September 2009, the Law Society indicated it has grave reservation towards the mandatory rectification rule and put forward its proposal of indefeasibility of title (**Proposal of Indefeasibility**). The Law Society took the view that indefeasibility of title is the fundamental principle of title registration. With mandatory rectification in place and no indemnity for pre-conversion fraud, purchasers would be forced to go behind the Land Titles Register and to investigate historical transactions. This would defeat the whole purpose of introducing a system of title registration.

INTER-RELATIONSHIP AMONG CONVERSION, RECTIFICATION AND INDEMNITY MECHANISMS

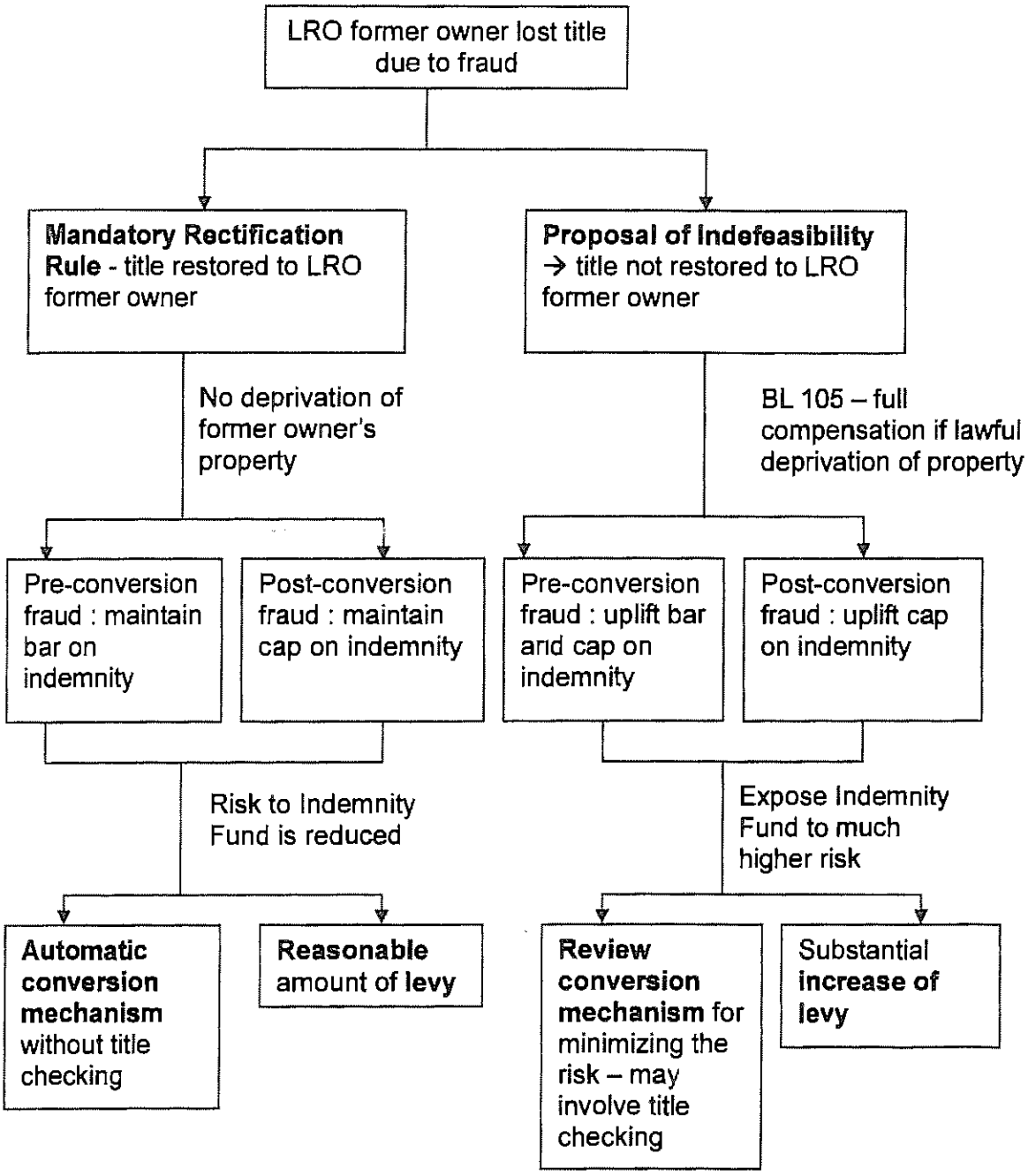
31. Under Article 105 of the Basic Law (**BL105**), HKSAR shall, in accordance with law, protect, inter alia the right of individuals and legal persons to compensation for lawful deprivation of their property. Such compensation shall correspond to the real value of the property concerned.

32. For complying with BL105, a former owner, who purchased the property prior to conversion (**LRO former owner**) and lost his title due to fraud, should be entitled to either mandatory rectification or full and fair compensation for his loss.

33. If the Proposal of Indefeasibility were to be adopted, the cap on indemnity and the bar on indemnity to pre-conversion fraud would have to be uplifted in case the former owner fails to recover his property due to the change of law. This would expose the indemnity fund to a much higher risk. Unless there are other means to manage the risk, the levy to be charged will have to be substantially increased. This would undermine the benefits of title registration and may not be considered

reasonable by the general public. For maintaining the levy to be charged to a reasonable level, conversion mechanism might have to be reviewed for managing and minimizing the risk.

34. The following diagram illustrates the inter-relationship among conversion, rectification and indemnity mechanisms.



35. Members are invited to note the paper and provide any comments they may have.

Land Registry
December 2010

附件二

2010 年 12 月土地業權條例督導委員會第 11 號文件

LTOSC Paper No.11

Land Titles Ordinance Steering Committee

Risks and Liabilities

PURPOSE

This paper sets out the assessment on risks and liabilities to public funds that may arise from the removal of mandatory rectification rule and compares them with the risks and liabilities arising from the provisions of the Land Titles Ordinance (Cap. 585) (LTO).

BACKGROUND

2. In September 2009, the Law Society of Hong Kong (the Law Society), through its Working Party on the Amendments to LTO, indicated that it had grave reservation towards the mandatory rectification rule and put forward its proposal of indefeasibility of title. The Law Society considers that the spirit of a title registration system lies in the conclusiveness of the title register, such that a purchaser relying upon the title register will have the assurance of acquiring a title that is warranted by the legislation to be good against the whole world, subject to only very limited exceptions. As a corollary, the Law Society requests that an innocent former owner that has been displaced from the title register should be entitled to full compensation, i.e. the cap on indemnity and the bar from indemnity for pre-conversion fraud should be lifted. This paper provides information on the findings of an actuarial consultancy study conducted in 2006 on the risk exposure to the Land Titles Indemnity Fund (the Indemnity Fund) to be created under Part 12 of the LTO, overseas experience on

property fraud claims, and an assessment of the impact on levy and the Indemnity Fund as a result of removal of the mandatory rectification rule.

ACTUARIAL CONSULTANCY STUDY

3. To obtain an independent professional assessment of the Government's risks under the operation of Part 12 of the LTO, an actuarial consultant was appointed in September 2006. The consultant was tasked to advise, based on the experience in overseas jurisdictions that operate title registration systems and the local market conditions, the level of risks that would be borne by the Indemnity Fund.

4. After examining the experience of selected overseas jurisdictions[1], it was concluded that each jurisdiction is unique and their claims experience could not be used for projecting the risk exposure in Hong Kong. It was also difficult to get even basic data on title fraud claims because the insurers or indemnity funds that were examined covered a broader definition of fraud and did not capture information on title fraud separately. Reference was thus made to the fraud cases reported to the Hong Kong Police Force in making the assessment.

5. Based on the provisions of the LTO, the consultant proposed a levy rate of 0.017% on property value (i.e. a levy of $680 for a property valued at $4 million; and a maximum levy of $5,100 for properties valued at $30 million and above). Given the significant uncertainty in the projections (see para 6 below), the consultant recommended that the Land Registry of Hong Kong (HKLR) should review the projection assumptions based on the latest available data

[1] The jurisdictions studied included England & Wales, Scotland, Canada (Ontario), Australia (Victoria), Singapore and the USA. The US experience was also studied because the consultant had first-hand data from title insurance companies in the USA.

closer to the implementation of the LTO, and re-examine the adequacy of the levy every three to five years after implementation.

6. The consultant further explained the difficulty in making the assessment because of significant uncertainty in the following areas:

(a) it was a 22-year projection (12-year incubation period plus 10 years in full operation after automatic conversion): any projections over such a long period would involve significant uncertainty;

(b) the income and claims in the 22-year projection would be linked to the Hong Kong property market, which in the past had been extremely volatile; and

(c) the Indemnity Fund is a start-up fund; there was no past local claims experience.

7. It should be noted that the study was based on a strict interpretation of the provisions of the LTO. Any further amendments to the relevant provisions in the LTO may warrant a review of the assumptions and if necessary a reassessment.

OVERSEAS EXPERIENCE

8. Fraud has been an area of concern for overseas jurisdictions. Fraud prevention is one of the standing agenda items in international conferences on title registration. Some jurisdictions have regular discussions with conveyancers, solicitors, bankers, surveyors and law enforcement agencies with a view to exchanging information on fraud cases and enhancing fraud prevention measures. Despite the attention and efforts to prevent fraud, there is a consensus among the jurisdictions that there was a marked increase in the number and magnitude of organised crime of property fraud in the past six to

seven years both in the UK and Australasian states. It was observed that, before 2005, most property fraud cases were family fraud involving single property. More recently, there is evidence of syndicates[2] involved, targeting multiple properties at a time.

9. We understand that, in England and Wales, the compensation for fraud and forgery claims settled in 2009/10 was 53 cases totaling £5 million. This represented 63.6% of all claims paid by Her Majesty's Land Registry (HMLR) in that year. An amount of £15.2 million was also noted in the accounts as claims pending under fraud and forgery (*source: HMLR Annual Report 2009/10*). This represented a large increase from the corresponding figures in 2000/01 of 9 cases, £0.25 million and 14% of total claims paid; and a contingent liability of £0.25 million of pending fraud and forgery claims.

10. As mentioned earlier, due to differences in the legislation, culture, property market conditions, circumstances under which claims are payable, etc.; indemnity payments of overseas jurisdictions cannot be used for the purpose of projecting the exposure of the Indemnity Fund under the LTO in Hong Kong. Nevertheless, the experiences of these jurisdictions serve as a useful reference in terms of the usual mode of operations adopted by fraudsters. They also seem to indicate a general increase in property fraud cases in recent years, which is an unsettling trend that we should particularly be mindful of.

LOCAL UPDATE

11. In 2008, the Hong Kong Police Force were requested to provide updated details of property fraud cases reported to them since the last Actuarial Consultancy Study (covering cases reported from 1996 to March 2006) up to

[2] Often involves collusion among professional advisers such as an intermediary, a valuer and /or a solicitor.

March 2008. It was found that the number of incidents increased significantly, in particular during 2006-07. In view of the apparent increase in property fraud cases in Hong Kong and other jurisdictions, we may need to further review the levy rate before the implementation of the LTO, having regard to the latest trend on property fraud in Hong Kong.

REMOVAL OF THE MANDATORY RECTIFICATION RULE

12. Automatic conversion mechanism, mandatory rectification rule and the cap on indemnity are the core and fundamental elements of the LTO and they are closely linked to one another. If the mandatory rectification rule is to be removed, it would be necessary to remove the cap on indemnity and the bar from indemnity for pre-conversion fraud in order to ensure that an innocent former owner would be fully compensated for loss of ownership.

13. With regard to the removal of the cap on indemnity, the actuarial consultant advised that the probability of insolvency of the Indemnity Fund would increase significantly (i.e. the Indemnity Fund could become bankrupt more easily if more high-valued claims were payable).

14. Regarding possible liabilities due to pre-conversion fraud, there is no realistic way to estimate or contain the risks. There is no effective means to identify property fraud cases out of the 2.8 million land registers maintained under the Land Registration Ordinance (Cap. 128). If the bar from pre-conversion fraud is to be lifted, the Indemnity Fund would be bound under the automatic conversion mechanism to compensate historical fraud cases that the HKLR has no power to address under the Land Registration Ordinance, as well as those perpetrated during the 12-year incubation period.

15. For the sake of illustration, it is assumed that for every million registers kept by the HKLR, there would be 25 successful claims due to pre-conversion fraud (0.0025%). With approximately 3 million registers (including registers created during the incubation period), there would be 75 (25 x 3) claims to be made within five years of automatic conversion[3] and payment will be effected one year after a claim. Under the circumstances, the levy rate will have to be increased from 0.017% to 0.16%. To an average home purchaser of a property valued at $4 million, the levy payable will be increased from $680 as originally proposed by the actuarial consultant to $6,400, representing a more than nine-fold increase. Due to removal of the cap, the levy payable on a $100-million property will become $160,000, instead of $5,100; i.e. 31 times the original amount proposed by the actuarial consultant. Notwithstanding this huge increase in levy, one single large claim involving a $400 million property could bankrupt the Indemnity Fund.

16. Since only a small number of properties will come under the LTO during the 12-year incubation period, the amount of levy collected for the Indemnity Fund would be limited. The balance of the Indemnity Fund at the commencement of automatic conversion will be small. If the cap on indemnity and the bar from indemnity for pre-conversion fraud were removed to accommodate immediate indefeasibility, the exposure to liabilities arising from loss of ownership due to fraud in converted land cases could be too much for the Indemnity Fund to bear, particularly in the years immediately after automatic conversion. In the event of insolvency of the Indemnity Fund, the HKLR will have to resort to financial assistance by obtaining a loan from the Loan Fund or the Capital Investment Fund[4] with the approval of the Finance Committee of

[3] It is assumed that cases will come out early in the period after automatic conversion to test the system. If the claims are successful, more claims will rush to be made to avoid the statutory limitation.

[4] Whether the loan is obtained from the Loan Fund or Capital Investment Fund will be decided by the Financial Services and the Treasury Bureau.

the Legislative Council. Subsequent levy rates will need to be increased (drastically) to cover both the repayment of loan with interest and future risk exposures. The probability/frequency of insolvency of the Indemnity Fund and drastic changes to the levy rates will undermine the confidence of the public on the property market of Hong Kong.

17. The Law Society recommended the HKLR to implement fraud prevention measures such as those practised by British Columbia, Canada. We fully support effective measures for fraud prevention, and would liaise closely with other jurisdictions and introduce appropriate measures in Hong Kong so as to uphold confidence in the title register. However, these preventive measures can only be applied to new transactions and will not relieve the HKLR from possible liabilities arising from pre-conversion fraud.

ADVICE SOUGHT

18. Members are requested to note the likely impact on the levy payable to the Indemnity Fund and the higher probability of insolvency of the Indemnity Fund if the mandatory rectification rule were to be removed.

Land Registry, Hong Kong
December 2010

附件三

2008 年 12 月發展局就《土地業權條例》的修訂進行諮詢 -

更正及彌償條文

就《土地業權條例》的修訂進行諮詢

更正及彌償條文

目的

本文件就釐清更正及彌償安排如何實際運作所建議的修訂及強制更正規則的建議修改徵詢意見。

背景

2. 業權註冊的基本原則是：土地業權註冊紀錄能提供物業業權的準確陳述，讓處理該物業的人士放心信賴。不過，當中存在的風險是：土地業權註冊紀錄會因蓄意欺詐、無效文書、錯誤或遺漏等因素而變得不準確。

3. 爲防止土地業權註冊紀錄因有不準確的內容而致不公正，便須制定程序以容許改正土地業權註冊紀錄。執行這些程序稱爲“更正”。

4. 另一個存在的風險是：信靠土地業權註冊紀錄的人可能會因土地業權註冊紀錄的某項不準確內容而蒙受損失。如無法以更正土地業權註冊紀錄的方式防止或補償有關損失，便須作出金錢補償，稱作“彌償”。如該不準確內容是由於公職人員在編製或維持土地業權註冊紀錄時出現的錯誤而造成，土地註冊處便須負責作出彌償，金額爲所受損失的全數。如該不準確內容是由欺詐造成，則會由一個特別基金(該基金以來自註冊申請的徵費成立)對因喪失擁有權而受的損失支付彌償。財政司司長可以對這類個案中的彌償金額設定限額(一般稱作“上限”)。

5. 在2003年審議《土地業權條例草案》期間，有意見指出，由於就欺詐個案設定了彌償上限，若擁有人因欺詐而致從土地業權註冊紀錄上除名，在新制度下他會面對的風險是：如果法庭沒有發出更正命令以恢復其擁有人身分，而且其失去物業的價值超逾彌償上限，其損失便不能獲得全數同等價值的補償。如果在發生

欺詐後，有對該欺詐不知情的新買家購買並管有該物業，法庭可能拒絕作出更正。

6. 根據現行的普通法制度，在第 5 段所述的情況下，不知情買家必須交出物業，而且除非能夠成功向欺詐者索償，否則不會獲得賠償，前擁有人則可取回物業。

7. 擬定的港幣 3,000 萬元上限其實已超逾香港 99%物業的價值。出現第 5 段所述個案的機會很低。不過，有意見反對存在前擁有人在新業權註冊制度下的處境(以金錢計)將較現行制度下遜色的任何風險。為回應這些反對意見，當時同意限制法庭在欺詐個案中的更正權力。加入的限制為：規定法庭如在欺詐個案中發現前擁有人並無參與該項欺詐及並無透過其本身的作為及沒有因為本身缺乏適當的謹慎而在相當程度上有份造成該項欺詐，便須發出更正命令，恢復該前擁有人的身分。這項規定稱為“強制更正規則”。

8. 《土地業權條例》(第 585 章)(《業權條例》)在 2004 年 7 月通過，條件是當局在擬推行新制度前，必須全面檢討該條例。其中的一項檢討工作是審視在 2004 年制定的更正和彌償條文，目的是評估該等條文是否充分清晰及一致，並能實際良好運作，以及其整體效果是否有助香港成功推行業權註冊。審視後得出的結論是：

(a) 須要釐清多項條文及加入新條文，以清除不明確情況及降低發生爭拗致拖慢申索彌償解決及增加法律訴訟費用的風險(詳情見第 9 至 18 段)；以及

(b) 強制更正規則可能會帶來一些非預期的效果：減低公眾對土地業權註冊紀錄的信心及新制度提升物業轉易效率的成效，故應藉此機會重新考慮在《業權條例》生效前，應否保留這項規則。下文第 19 至 28 段闡釋為何這項規則會引起關注，以及分述回應這些問題的各項修訂。

釐清事項

土地註冊處處長訟費的處理

9. 檢討發現，在更正法律程序中土地註冊處處長(處長)蒙受的訟費或法庭裁定由處長承擔的訟費方面，有兩點並不明確。《業權條例》未有對如何處理處長本身的訟費爲法庭提供指引，亦沒有說明裁定由處長承擔的更正法律程序的訟費是否計入彌償額，並可能受彌償上限限制。

10. 現擬加入條文，指明除非法庭另有指令，否則處長在更正法律程序中的訟費將由彌償基金支付。此舉可釐清支付費用的來源，亦清除由於法庭在處理某案件時沒有就這點作出命令而令處長須自行承擔訟費的可能。我們認爲由彌償基金支付處長的訟費是洽當的，因爲有關費用是處長在行使其職責確保基金不會被不當申索的過程中招致的。

11. 《業權條例》中訂明裁定由處長承擔的訟費將由彌償基金支付，但沒有訂明這些訟費是否包括在欺詐個案的彌償上限之內。現擬加入條文，澄清彌償上限並不適用於裁定由處長承擔的訟費。這跟彌償應以損失權益的價值計算的原意一致，因爲訟費並非該等價值的一部分。

12. 此外，亦擬加入條文，訂明處長有權出席法庭裁定訟費的訟費評定聆訊，這可保障彌償基金的利益，確保基金不會被裁定承擔不合理的訟費。

彌償的申請和費用

13. 檢討結果顯示，在《業權條例》第 85 條下，可能支付的彌償金額限於受損失者所持“權益的價值”。這在欺詐個案中是正確的，但卻爲政府須就公職人員出錯或遺漏造成的損失應負的法律責任設定了非預期的限制。因此，第 85 條擬作修訂，以表明政府因本身出錯或遺漏應負的法律責任應爲實際損失的全數。

14. 檢討發現，在誰人可申索彌償方面有含糊地方。現擬釐清，在欺詐個案中，有資格申索彌償的人士將包括受更正影響的擁有人，以及因爲更正命令或拒絕發出更正命令以致擁有人被取代而

蒙受損失的其他人士。在錯誤或遺漏的個案中，任何蒙受實際損失的人也可申索彌償。

15. 第 84(1)條以“影響擁有權”一語界定可就欺詐情況支付彌償的個案。檢討發現，這個用語的意思並不明確。現擬以“導致喪失擁有權”一語取代。建議的修訂可清晰訂明彌償基金無須爲欺詐但沒有導致喪失擁有權的個案的申索承擔法律責任。

16. 《業權條例》訂明應支付的彌償額是以有關權益在引致所受損失的記項作出當天的價值計算。檢討發現，這個計算方式在一些情況下並不適用，在遺漏的個案中，便沒有記項作出的日期，因此，計算損失的適當日期應爲被遺漏的記項的呈遞申請日期。在欺詐個案中，如受損失者是欺詐發生後的買家，計算損失的適當日期是令買家從土地業權註冊紀錄中被除名的更正命令的發出日期。現擬修訂第 85 條，以容許在這些情況下可使用不同日期評定損失的價值。

17. 檢討發現，《業權條例》並無訂明對於在欺詐個案中，當涉及多名申索人而申索總額超逾上限時，彌償金應如何攤分。爲免爭拗及爲解決這些問題提出訴訟而致延誤及付出訟費，現擬加入在這些情況下決定攤分的規則。建議的規則是：每名申索人會根據其損失的價值按比例獲得彌償。以下是說明這項規則如何運作的例子：假設某個案的申索總額爲 4,000 萬元，超逾了 3,000 萬元的上限。在這 4,000 萬元申索額中，被除名的擁有人申索 3,200 萬元，另因擁有人被除名而蒙受損失的兩名其他人士各自申索 400 萬元。被除名的擁有人的申索額佔總申索額的 80%，另外兩名申索人各佔 10%。根據建議的規則，被除名的擁有人會獲付 3,000 萬元中的 80%，即 2,400 萬元；另外兩名人士則各會獲償 3,000 萬元中的 10%，即 300 萬元。

18. 《業權條例》要求有利害關係者若申索彌償，須向處長提出申請。檢討發現，沒有條文訂明處長處理這類申請的費用應如何支付。現擬加入條文，以釐清處長處理這類申請的費用應由彌償基金支付；另亦建議訂明，除非法庭裁定須要支付，處長無須支付申請人向處長提出申請的費用，以及如須要支付，有關費用將由彌償基金支付。

強制更正

19. 上文第 5 至 7 段闡述引入強制更正規則的背景。當局於檢討期間亦仔細分析了該項規則可如何實際運作。已制定的《業權條例》中的相關條文計有：

> 第 82(1)條 - 容許法庭如信納業權註冊紀錄上的記項是透過或由於欺詐而取得、作出或遺漏，可藉指示刪除、更改或加入記項，而命令更正業權註冊紀錄。
>
> 第 82(3)條 - 規定如"前註冊擁有人"(不知情者)由於欺詐而喪失其業權，不論誰是當時的註冊擁有人，法庭亦須命令更正業權註冊紀錄，以恢復該前註冊擁有人的業權。這便是"強制更正"條文。
> 第 84(1)條 - 訂明因業權註冊紀錄所載的或遺漏的記項而蒙受損失的人，而該記項或遺漏是透過或由於欺詐(由依據第 82 條進行的更正聆訊所裁定)而取得、作出或遺漏，並影響註冊土地擁有權，應就有關損失獲得政府彌償。
>
> 第 85(1)(a)條 - 訂明欺詐個案中的彌償金額。如所損失的註冊土地權益在取得、作出或遺漏有關記項的日期的價值低於上限，彌償金額便是損失權益的價值。如損失的註冊土地權益高於訂明上限，金額便是上限金額。

已制定的法律如何運作

20. 下圖列出一項物業在多名接續擁有人之間的買賣流程（以→表示），以闡釋若欺詐是在受影響土地轉到《業權條例》後發生，現有的《業權條例》如何運作：

擁有人：	A → B → C → D → E
產權負擔：	A* B* C* D* E*

21. 在上圖中，如物業是透過欺詐轉讓給 C(C 爲欺詐者)，而 E 在成爲擁有人後才發現此欺詐，則 -

(a) 作爲不知情的前擁有人的 B 可根據第 82(3)條獲恢復其於業權註冊紀錄上的擁有人身分；

(b) 作爲 B 的產權負擔的 B*如仍續存，亦會獲得恢復；

(c) 作爲向 D 買入物業的不知情註冊擁有人的 E 會從業權註冊紀錄上除名，但有資格獲得彌償。向 C 買入物業的不知情買家 D 由於已出售其在該物業的權益，因此不涉及相關更正法律程序；

(d) 受 E 從業權註冊紀錄上除名影響的產權負擔 E*，如因此蒙受損失，可說應有資格獲得彌償(上文第 14 段的建議修訂將可澄清他們可以有資格獲得彌償）；以及

(e) 如 C 透過欺詐註冊成爲擁有人後還未把物業售予 D，C 便會從業權註冊紀錄中除名，B 則會恢復爲擁有人。C 不會獲得彌償。

22. 第 82(3)、84 及 85(1)(a)條的整體效力爲：

(a) 不知情的前擁有人可保持現行普通法下的地位，並可取回物業；以及

(b) 如一名前擁有人能證明其業權是因欺詐而喪失，而且其訴訟權仍未受時效禁制，則物業的註冊擁有人在其擁有物業期間，須面對隨時喪失物業的風險。如欺詐是在有關土地轉換到《業權條例》後才發生，而現時的註冊擁有人對該欺詐並不知情，便有資格獲得彌償。雖然彌償設有上限，但對他來說，情況總比在普通法下理想。按照現時規定，除非他能追溯欺詐者或其他須要負責的人並能成功向其索償，否則他不會得到任何補償。

爲何已制定的法律會對業權註冊制度的運作構成問題？

23. 現時有關更正的條文出現下述問題：

(a) 對於交易前的欺詐，任何已註冊物業的買家均不會受到業權註冊紀錄保障。這會損害《業權條例》提供保障及方便物業轉易的預期目標。謹慎的買家會希望查察業權註冊紀錄外的以往交易，以進一步確保不會承擔風險。這等於回復到目前契約註冊制度下查察業權的舊有模式；

(b) 可能在某些個案中，受影響的地段在更正申索提出前，已被政府收回或已交還政府。在這種情況下，便不可能爲前擁有人更正業權；

(c) 亦可能在一些個案中，物業在欺詐發生後已分割並售予數名新買家，或已重新發展而且不分割份數亦已售予多名新買家。對於這類個案，若把多名不知情者除名並給予補償，很可能造成更大干擾，亦會令彌償基金蒙受比彌償前擁有人更大的開支；以及

(d) 根據已制定的條文，強制更正規則適用於新土地及已轉換土地。不過，這樣的規定實無必要，因爲新土地並未受過普通法制約，因此不會出現新土地的前擁有人處於一個較他之前享有的地位遜色的問題。

24. 檢討發現，強制更正的條文，是在 2004 年以委員會審議階段修訂建議方式加入《業權條例》，以達致下列目的：

(a) 回應要求更正條文的運作必須清晰明確而不是交由法庭行使廣泛酌情權的強烈意見；以及

(b) 認同前擁有人除非獲更正恢復先前身分，否則彌償上限會令其在新制度下的處境遜於現行法律下。

25. 檢討認爲，在處理新土地時，上文第 24(b)段不應是考慮重點。此外，鑑於已發現強制更正規則可能帶來的其他問題，在《業權條例》生效前，理應考慮能否在行將提交的《土地業權(修訂)條例草案》中加入更好的處理方法。當局認爲任何替代方案均應盡量依循 2004 年協定的框架。強制更正應盡量保留，亦應爲法庭訂定清晰的規則。

對更正規則的建議修訂

26. 爲回應已發現的問題，當局根據上文所述的總則，擬對更正規則作出下列建議修訂：

(a) 保留第 82(3)條中的強制更正規則，但不適用於指定的例外情況；

(b) 建議的例外情況包括：

(i) 現時管有物業的註冊擁有人並非發生欺詐後的首名註冊擁有人。他是付出有值代價的真誠買家，或是從付出有值代價的真誠買家取得業權的人；或

(ii) 物業在欺詐發生後已被政府收回或已交還政府；或

(iii) 物業已被分割及已售予多名新真誠買家，或已跟多名新真誠買家達成買賣協議，令物業出現多個擁有權；以及

(c) 因任何一種例外情況而不獲恢復其於土地業權註冊紀錄上前擁有人身分的不知情前擁有人將有資格獲得彌償。

27. 為表述以上建議的效果，請參考上文第 20 段所用的同一圖示，比對在擬修訂規則下的新結果：

擁有人： A → B → C → D → E
產權負擔： A* B* C* D* E*

(a) 不知情的前擁有人 B 將可從 D 手上取回物業(除非物業已被分割而 D 代表有關物業的多於一名真誠新擁有人)；

(b) 前擁有人 B 不可從 E - 在欺詐發生後管有物業的第二名真誠擁有人 - 手上取回物業；

(c) 如物業已被政府收回或已交還政府，B 在任何情況下也不能取回物業；

(d) 如果 B 不能取回物業，將有資格獲得不超逾上限的彌償；以及

(e) 如果 B 從 D 手上取回物業，作為不知情者的 D 將有資格獲得不超逾上限的彌償。

28. 並非欺詐發生後首名處理有關物業的真誠買家或承繼其業權者應可享有不可推翻的業權的建議，會在《業權條例》中引入所謂"*延遲不可推翻*"的原則。這原則已在多個實施業權註冊制度的司法管轄區應用，以在土地業權註冊紀錄必須提供保障(如果要達成方便交易的預期目標)、被欺詐的擁有人提出的合理申索，及達致繼續鼓勵買家謹慎行事的目標三者之間取得平衡。透過保障欺詐發生後第二名的真誠註冊擁有人，各擁有人便可獲得保障，無須受一些他們沒有可行方法追查的以往事項影響。不過，準買家必須謹慎進行自己藉以成爲註冊擁有人的交易，因爲如果跟他們交易的是欺詐者，他們便不受保障，受欺詐影響的物業真正擁有人可獲更正回復擁有人身分。

對彌償條文的修改

29. 如果第 26 段的建議修訂獲得採納，對已轉換到土地業權註冊紀錄的土地，在轉換前發生欺詐但在轉換後被發現的個案，其處理亦須作出修改。目前《業權條例》中有一項條文（第 84(4)(c)條）禁止就轉換日前發生欺詐的個案支付彌償，目的是保障彌償基金無須就政府不知情和不能控制的轉換前狀況作出補償。如果在《業權條例》中加入延遲不可推翻原則，可能出現的情況是：前擁有人或不能取回物業；若令其從土地業權註冊紀錄中除名的欺詐是發生在轉換之前，他亦將不會得到彌償。相反地，如果保留強制更正規則，轉換後的買家即使在申請註冊爲擁有人時已向彌償基金繳付徵費，亦可能會因爲轉換前發生的欺詐而失去物業並得不到彌償。不論是何種情況，不給予彌償看來亦不公允。

徵詢意見

30. 當局現就以下各點徵詢意見：

(a) 應否採納第 26 段所建議對強制更正規則作出的全部修改；或

(b) 應否只採納就第 23(b)段(土地在欺詐發生後已交還政府或被收回)及第 23(d)段(延遲不可推翻的規則用以規管新土地)提出的問題而作出的修改；以及

(c) 第 9 至 18 段所列對多項條文的釐清建議。

發展局
2008 年 12 月

附件四

2008 年 12 月發展局就《土地業權條例》的修訂進行諮詢 -

轉換現有土地及物業至業權註冊制度

就《土地業權條例》的修訂進行諮詢

轉換現有土地及物業至土地業權註冊制度

目的

本文件闡述《土地業權條例》(第 585 章)(《業權條例》)在制定後進行的檢討期間，關於轉換現有土地及物業至土地業權註冊制度方面的檢討結果，並就可能作的修訂徵詢意見。

背景

2. 《業權條例》擬適用於香港所有已批租的土地。在《業權條例》生效後批出的土地的情況相對簡單。該等土地將從批出開始便根據《業權條例》註冊，無須考慮任何舊有事項。對於現時根據《土地註冊條例》(第 128 章)(《土註條例》)處理的土地，則有需要訂立條文，以規管土地將如何轉換到《業權條例》，以及在《土註條例》下的土地登記冊轉換到《業權條例》下的土地業權註冊紀錄時，應如何處理普通法下可能存在的權利和權益。

3. 2004 年制定的《業權條例》定出的轉換機制包含下述特點：

(a) 過渡期：在《業權條例》生效後及未開始轉換前，將有一段期間繼續以《土註條例》處理現有土地。這類土地會繼續依據《物業轉易及財產條例》(第 219 章)轉易，而轉易文件會繼續根據《土註條例》註冊。這段過渡期定爲《業權條例》生效後起計 12 年。若經立法會批准，可根據《業權條例》的條文縮短或延長該過渡期。

(b) 知會備忘及抗轉換警告書：《土註條例》將予修訂，從而在過渡期內引進兩套新安排以協助準備轉換：

(i) 註冊一份通知以知會聲稱擁有在現行普通法下產生的物業權益。例如配偶有提供按揭供款，便可作此聲稱。雖然這類權益獲普通法承認，但卻沒有任何文書可以註冊，而《土註條例》目前並不容許註冊任何聲稱通知。在《業權條例》下，如果沒有在

土地業權註冊紀錄內針對該物業記入權益通知或權益聲稱，則該權益或聲稱便不受保障。新規定將容許在《土註條例》下註冊一份稱爲“知會備忘”的文書，就此等聲稱作出知會。註冊知會備忘並不能阻止物業轉換，亦不表示所作的聲稱有效。在轉換後，知會備忘會被當作爲土地業權註冊紀錄內的警告書，目的是保留有關聲稱，讓任何有意處理該物業的人得知。

(ii) 註冊一份抗轉換警告書。此舉可防止在某項權益正以法律行動確認期間進行轉換。抗轉換警告書的生效期是有限制的，除非法律訴訟程序已經展開或獲法庭容許延期，否則抗轉換警告書會於一年後失效。一旦抗轉換警告書失效或法庭就聲稱權益作出裁決，受影響的土地登記冊便會轉換成土地業權註冊紀錄；

(c) 自動轉換：在過渡期結束時，除下述各項外，每個依據《土註條例》開立了登記冊的物業會自動轉至《業權條例》下的土地業權註冊紀錄：

(i) 物業已被註冊了抗轉換警告書，而該警告書尚未失效；

(ii) 物業的相關文書在轉換日之前已經遞交註冊，但註冊手續尚未完成或該文書之註冊尚未被撤回；以及

(ii) 根據《土註條例》開立的登記冊內的資產，並不符合可以根據《業權條例》註冊的土地定義。

(d) 已轉換的物業在根據《業權條例》進行首宗收取有值代價的交易之前，已註冊的擁有人仍然受制於任何在物業轉換時可以行使的非書面權益或沒有註冊文書下的權益。聲稱持有此類權益者如未有在物業轉換前根據《土註條例》註冊知會備忘，仍然可以在物業轉換後申請根據《業權條例》在土地業權註冊紀錄內記入一項警告書，以保障有關權益。不過，該等權益若沒有在土地業權註冊紀錄內註冊警告書來作保障，一旦物業根據《業權條例》售予付出有值代價的買家，買家將不受該等權

益制約。如果聲稱持有該等權益者沒有註冊警告書以知會買家，他只能透過向出售物業的一方興訟申索。

4. 上述特點旨在回應下列關注和期望：

(a) 知會及採取行動的機會：當局應把行將出現的修改充分知會公眾，並應讓有利害關係各方有充分機會採取行動以保障他們在現時《土註條例》下未有註冊的權益。12年的過渡期能提供充足時間，令當局可採取一切合理措施，確保把有關修改通知公眾。《土註條例》的修改能爲聲稱人提供簡單而有效的方法，防止物業擁有人在物業轉換後及聲稱人有機會在土地業權註冊紀錄註冊警告書前，即時出售物業，令聲稱人喪失所聲稱的權益。知會備忘提供一個簡單的方法讓聲稱人能在轉換前就其聲稱發出知會；抗轉換警告書則容許有利害關係各方在任何聲稱權益仍然待決時阻止轉換，令土地業權註冊紀錄能妥善反映有關業權的狀況；

(b) 轉換的明確性：《土註條例》和《業權條例》不應該沒有確實轉換時間表的情況下無了期並行運作。絕大部分現有土地登記冊會在指定過渡期結束後自動轉換，《土註條例》屆時只會剩下殘餘效力；以及

(c) 避免新的法律責任：處理轉易的律師目前須向客戶承擔一定的法律責任，轉換過程不應給他們帶來額外的法律責任。自動轉換程序將不會爲律師帶來新的法律責任。

有關已制定的轉換機制的問題

5. 在《業權條例》制定後檢討期間發現，已制定的條文對進行轉換有實質困難：

(a) 擁有權未能確定：除非《土註條例》下的土地登記冊是屬於上文第3(c)段所述的其中一種指定例外類別，否則土地註冊處處長(處長)有責任在業權註冊紀錄內備存一項相應紀錄，包括表明誰是註冊擁有人。當局已經發現若干真正擁有人不明確的個案。一是多於一份登記冊顯示涉及同一個物業，或是單一登記冊顯示包含多於一個

涉及同一個物業的業權鏈。在《土註條例》下，處長不獲授權判斷亦不應判斷在該等個案中誰是擁有人。不過，在土地業權註冊體制下，按已制定的《業權條例》所訂，處長會被迫就此作出判斷，因爲他無權因爲法庭未作判決而阻止物業轉換，或向已轉換的業權給予一個不損害法庭隨後就擁有權作出的裁決的特殊地位。現時已發現的該類個案爲數不多(至今少於 500 宗)，但如果不對每個登記冊內的契約逐一進行耗費和耗時不合乎比例的調查，便無法確定是否已經悉數找出擁有權不明確的個案。

(b) 法律責任未明確：如業權註冊紀錄內存有因公職人員出錯或遺漏而造成的任何錯誤，土地註冊處須負上責任。由於《土註條例》並無要求必須註冊影響土地的文書，亦無要求土地註冊處必須調查契約是否有效才可爲契約註冊，因而出現的風險是：在轉換後，土地業權註冊紀錄會因爲其他人士的出錯或遺漏而欠缺準確性。現時並無可行方法足以評估該等不準確情況的程度。由於公眾人士均信靠土地業權註冊紀錄進行交易，因此，土地註冊處可能要負上謹慎處理的責任，並可能須就任何一方因土地業權註冊紀錄不準確(不論有關錯誤或遺漏是由公職人員或是私人造成)而招致損失負責。

(c) 不可能在轉換前進行甄別：在過渡期內，土地註冊處會爲現有《土註條例》下的土地登記冊準備轉換。這個程序並非是對 280 萬份登記冊逐一深入調查業權，而只是爲登記冊內的紀錄事項進行甄別，以確定符合《業權條例》的規定，以及確保已轉換的登記冊盡量簡明清晰，方便使用。如要在這個過程內同時進行詳盡的業權調查，以期回應上文第(a)及(b)分段所述的問題，則會是一項在有限時間內，耗費將會不合乎比例。相關調查工作亦只能基於土地註冊處持有的資料進行，因此調查結果並不是絕對肯定的。調查過程會因爲在過渡期內有新文件註冊而變得更加複雜。根據以往紀錄推斷，在 12 年過渡期內可能註冊的新文件將約有 800 萬份。因此，如果對某個登記冊的業權調查工作已經完成，但該登記冊在轉換前有新記項加入，則調查結果的可信性頓成疑問；

(d) 成本、可能承擔的法律責任及經費之間的錯配：在過渡期內，根據《業權條例》收取的收入甚少。在最初幾年，收入將不足以應付業權制度的運作成本，在整段過渡期內亦不能收回籌備工作的成本，更不可能提供足夠儲備以應付因轉換而可能產生的法律責任。至轉換時，土地註冊處須準備應付任何在《業權條例》下關乎錯誤或遺漏而提出申索的法律責任。在《業權條例》下所收費用會在轉換後增加，因爲所有交易將會根據《業權條例》註冊，但營運基金的財政狀況會有數年時間可能因不能確定的法律責任而不穩定。過渡期內根據《業權條例》進行交易的宗數將會甚少，這亦令爲支持應付欺詐個案的彌償基金定出一個合理的徵費率變得困難。；

(e) 知會備忘的轉換：已註冊的物業在《業權條例》下進行首宗收取代價的交易前，物業仍然受任何在轉換時仍可行使的非註冊權益制約。我們在檢討期間發現，該等非註冊權益、轉換前已註冊的知會備忘下的權益，以及在轉換後註冊警告書下的權益之間的優先次序問題，可能會引起爭拗及訴訟，因此須在《業權條例》中加入繁複的過渡條文，以訂明該等權益之間的優先次序應如何決定。

6. 除了在檢討期間發現的上述實際問題外，外間論者亦繼續提出有關轉換機制的問題。物業市場分析員質疑，在進行轉換前，長時間並行兩套制度會令一手市場(以新制度進行交易)較二手市場更佔優勢，可能影響物業市場運作。香港律師會依然對長時間運作兩套制度表示關注，並希望可以提早轉換。另一方面，鄉議局仍然對自動強制轉換表示懷疑，希望採取自願參與的方式，最少對《新界條例》（第 97 章）第二部涵蓋的土地採取這個方式。

7. 沒有理想方案可以照顧所有上述實際問題或各方意願。不過，土地註冊處考慮有關實際問題，尤其是財政狀況及不明確法律責任後，已就能否修改轉換機制方面進行評估，以期：

(a) 按照成本效益的原則，降低轉換將爲公帑帶來法律責任的風險；而又能

(b) 避免爲律師帶來新的法律責任。

修改建議

8. 土地註冊處認爲回復採用漸進方式，在《業權條例》生效後，每個物業在首宗交易時才作轉換，可更能降低法律責任的風險，而公眾無須爲制度繳付高昂的註冊費用。由於這個漸進方式在2003年遭否決，土地註冊處於是提出一套替代機制以供考慮。

9. 該套替代機制的特點是：

(a) 《業權條例》實施時只適用於新土地：這點與2004年制定的《業權條例》一致。理由是可以在轉換開始前，盡快運作業權註冊制度並測試制度的成效；

(b) 加速轉換《土註條例》土地：《土註條例》下的登記冊將於約三年後而非12年後自動轉換成土地業權註冊紀錄。轉換的時間將取決於有關資訊科技系統及轉換登記冊的管理程序有多快完成；

(c) 給予已轉換土地新地位：已轉換土地的交易仍會受任何續存權益制約，追溯業權必須根據《物業轉易及財產條例》的規定，直至業權提升爲止；

(d) 業權提升：在轉換後的一段指定時間後，會容許提出業權提升申請，由土地註冊處決定是否批准。私人執業律師無須發出妥善業權證明書。申請程序將容許處長對有關業權進行適當甄別。當局建議容許申請提升的指定時間爲轉換日期起計12年。這樣能降低仍有轉換前未處理的問題的風險；

(e) 不修訂《土註條例》：提早轉換所有物業以及給予已轉換土地新地位，將無須註冊知會備忘或抗轉換警告書。已轉換的土地仍會受續存權益制約，直至提升爲止。由於在轉換之後不可能即時提升，因此任何聲稱擁有非書面權益的人士將不會因有關物業在轉換後即被出售而面對可能損失權益的風險。他們將有時間在土地業權註冊紀錄內加入警告備註，以於業權提升前就其申索作出知會。

10. 替代機制的優點是：

(a) 限制初期的法律責任：在轉換時，因爲所有已轉換土地仍然受轉換前的權益制約，土地註冊處無須即時面對不明確法律責任的風險，因此該處無須決定應預留多少儲備以應付該等風險，亦不必爲轉換前預備所需儲備而付出成本；

(b) 控制甄別工作的成本：甄別業權的程序只會在申請提升時才會進行。申請只限於土地業權註冊紀錄內有交易的物業。每宗申請的審查幅度可配合該宗申請的情況而定；

(c) 更能平衡收入和風險：在轉換後及在物業提升後可能帶來的法律責任達至最大程度之前，土地註冊處會開始根據《業權條例》進行註冊而獲得大量收入。這有助土地註冊處籌劃出一個對公眾最符合成本效益的提升方案，並在進行業權調查所需的成本與可能承擔的風險中取得平衡；

(d) 無須爲阻止未明確的業權進行轉換而制定新條文：由於有提升程序，處長只須獲賦權，在某業權尚未明確前，拒絕其提升申請。如沿用已制定的《業權條例》所訂的機制，則須在《土註條例》作出規定，以阻止某些土地的轉換，另外還要爲可能出現的申索進行覆檢、上訴及調解所需的各種機制制訂條文；

(e) 無須制定新的過渡條文：由於無須修訂《土註條例》以加入知會備忘，因此無須制定繁複的過渡條文，以決定在轉換後非書面權益(不論是否已就該權益註冊知會備忘或警告書)的優先次序，從而簡化有關法例；

(f) 可提早得享彌償條文的利益：雖然已轉換土地的持有人在業權提升前不能獲享業權註冊制度的所有好處，但只要交易是在《業權條例》下註冊，儘管業權尚未提升，購入已轉換土地者仍會受到《業權條例》保障。

11. 須注意的是，儘管第 9 段所述的修訂轉換機制會有第 10 段所列的優點，但相比第 3 段所載已制定的《業權條例》下的轉換機制，會有以下弊端：

(a) 欠缺明確提升的時間表：無法確定何時完成所有物業業權的提升；

(b) 提升之前須並行兩套制度：相對於新土地的交易，已轉換的土地的交易須受不同的規則制約。律師須依不同的規則處理，直至業權提升爲止。已轉換的土地在提升前須受不同的方式處理，可能會影響對該土地的觀感，以致影響有關物業的市場潛力；

(c) 須就業權提升申請另外收費：擁有人將要就提升申請另外繳費。唯根據已制定的《業權條例》下的轉換機制，爲轉換作準備及處理轉換引致的任何法律責任所需的一切成本，將會透過增加各種註冊收費收回。

徵詢意見

12. 當局現就下列各項徵詢意見：

(a) 第 5 段所述的事情應否在《業權條例》生效前解決？

(b) 第 9 段所載有關修訂轉換機制的建議，是否較第 3 段所述已制定的《業權條例》下的機制可取？

(c) 在進一步探討轉換機制最可行的模式期間，業權註冊先只用於新土地，是否較爲可取？

發展局
2008 年 12 月

附件五

2009 年 3 月 18 日新界鄉議局致土地註冊處信件

新　界　鄉　議　局
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郵遞及傳真

附件六

檔案編號：三十二／三／一二五〇號
日　　期：二〇〇九年三月十八日

土地註冊處
蘇啓龍處長：

鄉議局對《土地業權(修訂)條例草案》的意見

當局正就《土地業權條例》中「轉換現有土地及物業至土地業權註冊制度」及「更正及彌償條文」的修訂進行諮詢，鄉議局一向關注並配合條例的修訂工作，而本局經過內部會議磋商後，對於是次修訂有以下的意見。

有關「轉換現有土地及物業至土地業權註冊制度」的諮詢文件，第五頁第六段中最後一句“另一方面，鄉議局仍然對自動強制轉換表示懷疑，希望採取自願參與的方式，最少對《新界條例》（第97章）第二部涵蓋的土地採取這種方式。”本局認爲該段文字並不清晰，亦存有誤導。鄉議局從沒有對強制轉換表示懷疑，只是在強制轉換當中的若干環節如凌駕性權益、祖堂司理的安排、彌償問題、物歸原主等問題曾經表達不少意見。因此請　貴處澄清上述文字，以免引起誤會。

在「轉換現有土地及物業至土地業權註冊制度」方面，當局的新建議是在土地註冊條例下登記的土地及物業，三年後自動轉換至土地業權註冊紀錄。本局研究後認爲三年的過渡時間似乎並不足夠，原因是不少業權人僑居海外，在處理土地物業轉換上需要較多時間，相信現時十二年的過渡期安排會較爲恰當。另一方面新建議提出所有土地和物業可以向政府申請提升至新制度，但當所有土地和物業同一時間

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向政府申請提升至新制度時，當局需要處理的個案會十分多，政府方面的人手又是否能夠及時處理如此龐大數量的申請，若果造成混亂或拖延，則可能令業權人權益受損及引致訴訟而耗費社會資源。本局也十分關注政府處理每一宗物業提升的效率，如處理時間冗長，當土地/物業有買賣交易，更會妨礙交易的進行。此外，如果將業權提升工作外判予其他公司處理，其費用相信會十分高昂，業權人也不可能接受。綜合來說，本局認爲轉換制度的新建議不單止沒有顧及現實的情況及業權人的需要，並且有擾民之嫌，所以本局認爲新建議並不可取！

在「更正及彌償條文」方面，本局認爲被欺詐而失去土地或物業業權的人士，是當局最應該保障的一群。即使以往未訂立香港法例第585章《土地業權條例》前，亦是以原業主的權益爲最重要。因此本局認爲如果土地或物業最終被政府收回或已交還政府，政府是有需要按收地價向原業主作出賠償，即等同重新進行一次收地/樓；在現實環境中，政府誤中欺詐圈套的機會極微，因收地行爲會公佈周知，收取賠償亦需拖延甚長之時間。但除了土地或物業被政府收回外，所有經欺詐後出現還原困難的個案，當局亦應該依照市值價格全數賠償予原業主，這樣才會對業主公平。除了上述情況外，所有其他因欺詐而喪失業權的個案，政府應該明確立例將土地物業物歸原主，以保障原業主的利益。

本局認爲政府致力完善《土地業權條例》是好事，但條例仍存在很多問題，亦是鄉議局極度關注的事情，例如凌駕性權益問題、條例對新界地區祖堂運作的影響等等，雖然並非是次政府檢討的內容，但本局亦希望政府能考慮詳細檢討，讓條例更切合實際情況需要。

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鄉議局一直祈望政府正視凌駕性權益的問題。對此次檢討沒有將之包括在內，認爲是美中不足。在新制度下，買家購買物業後，一經註冊，有關業權便受到絕對保證。但土地業權條例卻列出多項凌駕性權益，而該權益可以不需在註冊處登記而有凌駕有關業權的地位。在這個原則下，鄉議局認爲物業業權並不會得到真正的保障。所以，應該把所有的凌駕性權益全部註冊，才是合適的，這樣可以讓買家清晰土地的狀況。這是鄉議局對整個土地註冊制度最大的擔憂。

鄉議局也非常擔心條例對新界地區祖堂的運作帶來不利的影響。包括司理註冊的安排，鄉議局擔心這是一個陷阱。對此而引申的責任問題，鄉議局是很難向新界鄉民、土地業權人交待的。所以，政府應認真考慮祖堂司理的註冊由新界條例監管即可。同時，現行祖堂只能賣出物業，而不能購買物業，本局亦希望政府考慮准許祖堂買賣物業，以示公平。

專此奉達，敬祈　察閱。

新界鄉議局主　席：劉皇發
副主席：林偉強
張學明
（秘書處代行）

附件六

2009 年 9 月 21 日香港律師會致土地註冊處信件

Annex 1

THE LAW SOCIETY OF HONG KONG
香港律師會

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BY FAX (28104561) AND BY POST

21 September 2009

Ms. Olivia Nip,
The Land Registrar
Queensway Government Offices
28th Floor, 66 Queensway
Hong Kong

Dear Ms. Nip,

Consultation on Land Titles (Amendment) Bill

We refer to the 2 letters respectively dated 13 and 14 July 2009 from Mr. Kim Salkeld, your predecessor-in-title, setting out the Government's proposed way forward after the last consultations on proposed amendments to the conversion mechanism and the rectification and indemnity provisions under the Land Titles Ordinance ("LTO").

As Mr. Andy Ngan, the Chairman of our Working Party on Land Titles Ordinance ("WP") has indicated to you, the WP has reviewed the latest proposals put forward by the Government and referred the proposals for further consideration by the Hong Kong Solicitors Indemnity Fund Limited ("HKSIF"). We understand that the HKSIF's views will be forthcoming by the end of October.

At your request and without prejudice to the Society's overall position on the Government's latest proposals, we now submit the WP's observations for your consideration:

1. The WP welcomes the Government's decision to retain the "daylight conversion" mechanism under the LTO. In particular, we are pleased to note that the Government has rightly accepted that it would be impossible to achieve a risk free conversion system and is prepared to shoulder some risks to secure the wider public benefit of achieving certainty in the conversion process. The success of any title registration system lies, to a great extent, in the Government's backing to the system.

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2. The WP noted the Government would put forward proposed amendments to deal with the priority of interests under caveats after conversion. It will be interested to know what these priority problems are and how the Government proposes to deal with them.

3. On the proposed LRCAC mechanism:
   (a) **the WP has grave concern on the issue of priority of different interests under double/multiple registers**, whether in respect of the same land or in respect of two or more parcels of land bearing the same lot number. The profession is at a loss to know how to advise clients properly on such priority issue under the Land Registration Ordinance ("LRO");
   (b) **the WP remains of the views that the Government has liabilities for maintaining such double/multiple registers;**
   (c) on the basis that the market desires the opportunity to make informed decisions and the Land Registrar has a duty to maintain a correct register under the LRO, **the WP believes that the problematic status of all the identified double/multiple registers should be noted on the register. On the same principles, it believes that the proposed Notice of Intention to register a LRCAC should also be registered.**
   (d) the WP supports in principle the LRCAC mechanism. However, in view of the quasi-judicial power given to the Land Registrar and the proposed limit on the liability of the Land Registrar in the decision on registration of a LRCAC, to ensure consistency in decisions and thus certainty, credibility and fairness of the system, **the WP submits:**
      (i) **the Land Registrar should be someone with the appropriate legal qualifications and experience, and preferably with the equivalent standing of a High Court judge; and**
      (ii) **the Government should produce a Manual and make this available to the legal profession, specifying clearly how the decisions on registration of LRCAC should be made.**

4. On the rectification and indemnity arrangements:
   (a) the WP's position has always been that "indefeasibility of title" is the cornerstone of any registered title system; and it has also been against the cap on indemnity;
   (b) as we have stated in our submissions in response to the Government's last consultation, the mandatory rectification rule under the LTO is an unfortunate political expediency arising out of the Government's lack of commitment in capping the indemnity payment, otherwise it should have no place in LTO;

(c) the Government proposed to introduce 3 exceptions to the mandatory rectification rule in the last consultation, and as a compromise, we submitted that deferred indefeasibility is the "very minimum" of any registered title system;

(d) the WP is pleased to note the Government is considering removing the cap on indemnity for the proposed exceptions to the mandatory rule but it is unclear whether it will go ahead with the deferred indefeasibility exception;

(e) the WP strongly feels that the nemo dat principle (and therefore the mandatory rectification rule) should give way to the indefeasibility of title concept under the title registration system. Otherwise, certainty and security of title which a title registration system strives to achieve will be greatly undermined by the nemo dat rule as to be non-existent. To achieve this, **the WP proposes that the cap on indemnity as well as the limitations on indemnity for the pre-fraud owner should be lifted**;

(f) indeed, the WP believes the system should go for "*immediate*" rather than "*deferred*" indefeasibility. For under "*deferred indefeasibility*", the title of the current registered owner will always be opened to attack and he would only really get indefeasibility upon his sale of the property to someone else;

(g) the WP however recognizes there will be difficulty to convince the majority of shareholders to accept the application of the "*immediate infeasibility*" concept under the LTO. As a compromise, **the WP proposes that deferred indefeasibility should only apply for the limited purpose of conversion; and thereafter there should be immediate indefeasibility**;

(h) the rationale behind the WP's proposal in 4(g) is that: whilst the nemo dat principle is supreme under the existing system, one should accept the change in the rules of the game upon moving onto title registration system. So, for the first transaction of registered ownership after conversion, deferred indefeasibility should apply for fairness to the original owner who has acquired the property under the LRO system where they would have the protection of the nemo dat principle. However, once the property has moved over to the registered title system, people should adopt a change of mindset and accept the different ball game i.e. the register is conclusive;

(i) the WP noted the Government has concern over the differences in views among the profession on the indefeasibility principle. In this regard, the WP has secured an informal understanding from the Chairman of the Hong Kong Conveyancing and Property Law Association Limited ("HKCPA") that the HKCPA is also supportive of the importance to have indefeasibility of title under the new system;

(j) whilst the WP has set out its position in paragraph 4(e)-(h) above, it noted other stakeholders' comments on the 2 other proposed exceptions to the mandatory rectification rule. To these comments, the WP would like to say

- where the land has been surrendered – the WP could see some force in the argument that this proposed exception should not apply for surrender unless it is for public purpose. An obvious example of surrender not being for public purpose is modification by way of surrender and regrant. In substance, the same piece of land is involved and the WP believes that under the equitable remedy of tracing, the innocent owner should be able to trace back and recover the property
- where the land has passed into multiple new ownerships – the WP fails to see the relevancy of redevelopment when the rationale behind this proposed exception is it will be too much a disturbance to restore the title of the original displaced owner when the ownership has been subdivided and passed into different hands. In this sense, whether the building has been demolished or not appears to be of little or no relevancy.

We would stress that the above views of the WP are subject to the further views of HKSIF and the Council and we would write further to confirm the Society's final position once we are in a position to do so.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

附件七

2009 年 10 月 14 日新界鄉議局致土地註冊處信件

新 界 鄉 議 局
HEUNG YEE KUK NEW TERRITORIES
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郵遞及傳真

檔案編號: 三十二／四／一六五八號
日　　期: 二〇〇九年十月十四日

土地註冊處處長
聶世蘭女士, 太平紳士：

鄉議局對《土地業權(修訂)條例草案》的意見

貴處 7 月 27 日關於土地註冊處處長的抗轉換警告書安排函件收悉。

本局理解當局建議處長可在《土地註冊條例》下註冊一項抗轉換警告書，目的是保障所註冊業權的正確和清晰，防止現有土地在《業權條例》生效 12 年後的一天（轉換日），已被註冊「處長的抗轉換警告書」的土地轉為《業權條例》土地。本局認為法例賦權予土地註冊處處長，可令《土地業權條例》下的轉換機制更為順暢以及保障業權人，但在有關操作的過程中，有幾個事項需要留意或作出改善:

（i）當局考慮發出的「處長抗轉換警告書」意向通知書，並給予註冊擁有人或其他有利害關係的人士 60 天時間作出反對，60 天反對期滿後處長便需根據法例要求強行註冊，本局擔心 60 天的反對期並未能充裕地讓有關人士提供或支持文件及證據，本局建議將原定 60 天的期限修改為 100 天更為適當，以免日後有關物業業權轉易因為「處長抗轉換警告書」的註冊而受到影響。

（ii）本局認為相關之「意向通知書」及「警告書」，均應披露處長作出決定之理由，以鄉業權人交代。

（iii）至於文件第 14 及 15 段處長以及受雇於土地註冊處的任何其他人士的免責權利，本局原則上表示同意，但認為當中工作甚為複雜，而類型也可能眾多，故建議當局不時就免責的細節安排作出檢討，以令受影響人士不會因為不合理的人為或疏忽而引致不公平的對待。

本局理解到，政府目前已經掌握擁有權不明確的登記冊的個案。本局希望貴處能告知有關的情況，特別是屬於新界區的個案，以令本局評估受「警告書」影響的程度。

本局認為政府致力完善《土地業權條例》是好事，但條例中不少鄉議局極度關注的事情，例如淩駕性權益問題、條例對新界地區祖堂運作的影響等等，均沒有得到妥善解決，影響了法例的實際可行性。

本局一直祈望政府正視淩駕性權益的問題。對此次檢討沒有將此重點事項包括在內，懸而未決，是美中不足。在新制度下，買家購買物業後，一經註冊，有關業權便受到保證。但土地業權條例卻列出多項淩駕性權益，而該權益可以不需在註冊處登記而有淩駕有關業權的地位。在這個原則下，本局認為物業業權並不會得到真正的保障，也違反了整個條例的精神。所以，本局認為應該把所有的淩駕性權益全部註冊，才是合適的做法，這樣可以讓買家清晰土地的狀況。這是本局對整個《土地業權條例》最大的擔憂。

本局也非常關注條例對新界地區祖堂的運作帶來不利的影響，包括司理註冊的安排。既然目前由《新界條例》規管，由民政事務總署執行的祖堂司理登記制度，一直以來運作暢順，則不應另生枝節，而應繼續維持有關制度不變；同時，現時《土地註冊條例》也沒有就新界祖堂司理註冊作出任何相關的條款，則《土地業權條例》也不應在不獲受影響人士支持的情況下貿然實施，以免對眾多司理人的工作引入沒有實質需要的負面限制。

專此奉達，敬祈　察閱。

新界鄉議局主　席：劉皇發

副主席：林偉強

張學明

土地業權條例小組召集人：林國昌

（秘書處代行）

HEUNG YEE KUK 新界鄉議局 秘書處 SECRETARY

附件八

2010 年 3 月土地業權條例督導委員會第 9 號文件

LTOSC Paper No. 9

Paper for the Land Titles Ordinance Steering Committee
Outcome of Consultation Exercise (2009) – Latest Developments

Purpose

This paper seeks Members' views on the written submissions made by the Law Society of Hong Kong (Law Society) in response to the public consultation conducted between January and March 2009 on proposed changes to the rectification and indemnity arrangement under the Land Titles Ordinance (Cap. 585) (LTO).

Consultation on Exceptions to the "Mandatory Rectification Rule"

2. In the consultation exercise, amongst other issues, three exceptions to the "mandatory rectification rule" were proposed, as follows:

(a) when the land affected had been surrendered or resumed prior to discovery of the fraud;

(b) when the land had passed into multiple new ownership prior to discovery of the fraud; and

(c) when the current owner was a bona fide purchaser who had not dealt with the fraudster.

3. At the last LTO Steering Committee Meeting held on 22.7.2009, Members noted that there was general understanding amongst respondents of the need for exceptions (a) & (b) in para. 2 above to be made when it was practically impossible to return the affected land to the original owner. As regards exception (c), based on views received at that point in time, almost all respondents were in favour of retaining the rule mandating recovery of the property by an innocent former owner, irrespective of the position of the current registered owner. At the meeting, the Law Society indicated their support for adopting "deferred indefeasibility", adding that its preference was to move towards" immediate indefeasibility". This stance was at variance with that of the Hong Kong Conveyancing and Property Law Association Limited (HKCPA) which rejected the idea of indefeasibility in fraud cases. The Law Society was requested to liaise with the HKCPA to see if a common position could be reached. It was agreed that the Administration would continue with the preparatory work for the Land Titles (Amendment) Bill pending formal advice from the Law Society.

Latest Developments

4. In its letter dated 21.9.2009 to the Land Registrar (refer to **Annex 1**), the Law Society's Working Party on LTO (the Working Party) reaffirmed its stance that that the nemo dat principle (and therefore the "mandatory rectification rule") should give way to the "indefeasibility of title" concept. It further suggested that the cap on indemnity and the bar on indemnity for pre-conversion fraud should be lifted. The Working Party advised that it had secured an informal understanding from the Chairman of the HKCPA that it was also supportive of the importance in having indefeasibility of title under the new system. The Law Society reaffirmed the views of the Working Party in its letter to the Land Registrar on 1.3.2010 (copy at **Annex 2**). The Law Society considered that the importance of the principle of "indefeasibility of title" to a title registration system and the adverse implications of the "mandatory rectification rule" on the new system had not been sufficiently made clear to stakeholders in the consultation exercise.

Considerations

5. In considering the way forward, we believe due regard has to be given to the following:

(a) the "mandatory rectification rule" in the enacted LTO represents the consensus reached after extensive deliberations amongst the Administration, major stakeholders and the Legislature. In arriving at this consensus, a fair and appropriate balance has been struck amongst a wide variety of interests in the society, with gives and takes by all parties concerned. We would not under-estimate the difficulties that may be encountered in the attempt to reach any new consensus if the issue is to be re-opened; and

(b) it follows that revisiting this fundamental issue would inevitably be a time-consuming exercise, which would significantly impact the legislative time-table and further delay the implementation of title registration.

Advice sought

6. Members are invited to consider the views expressed in the Law Society's submissions, having regard to the considerations set out in para. 5 above.

Land Registry
March 2010

附件九

2010 年 4 月 7 日新界鄉議局致土地註冊處信件

新界鄉議局
HEUNG YEE KUK NEW TERRITORIES
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傳真及郵寄

檔案編號：三十二／〇四／一九七一號
日　　期：二〇一〇年四月七日

急件

香港金鐘道 66 號
金鐘道政府合署 28 樓

土地註冊處處長
聶世蘭女士台鑒：

鄉議局對"物歸原主機制"的意見

貴處 2010 年 3 月 25 日來信，本局在去年得悉政府接納本局就"毫不知情業主因被欺騙業權法庭可以強制物歸原主"（"物歸原主機制"）的意見已知會廣大新界業權人有關機制及安排。 同時本局亦已就政府在物歸原主機制下提出的三個例外情況表達進一步意見。

現本局得悉香港律師會就物歸原主機制向政府重新提出不同的意見及方向。 本局表示十分遺憾。

本局認為政府或任何持份者在現時條例審議修訂進度下重新討論或改變物歸原主機制似乎費時失事及進退失據，亦對香港、九龍及新界現時眾多的樓宇及土地業權人影響深遠。

本局指出廣大新界土地業權人的權益，正如港島區及九龍區的業權人一樣，是需要得到法律公平地保護及保障的。

基本法第 105 條指出 "香港特別行政區依法保護私人和法人財產的取得、使用、處置和繼承的權利，以及依法徵用私人和法人財產時被徵用財產的所有人得到補償的權利…"。 在基本法的憲法大原則基礎下，政府怎能制定新法例去剝奪及侵犯私人產權？ 私人產權又怎能在業主毫不知情下因欺騙而無端被剝奪，而新法例竟然可以明文規定在這處境下買家是可以絕對性地得到有關業權而完全妄顧業主的利益？ 政府又怎能容讓無端喪失業權的業主只能獲得不超過 HK$3,000 萬元的補償呢？ 何況在物歸原主機制下業主被欺騙業權後可以取回業權而買家遭受金錢損失後亦可獲得政府給予金錢上的補償，這樣做法簡直是天公地道，各取所失，兩全其美；何樂而不為！ 在此，本局強調縱使政府同意付給受損的業主十足價錢，本局亦有所保留，因為業權人在有關土地的潛在發展價值未必會計算在內，更何況在新界有很多土地是屬於祖堂的風水土地，而該土地的價值是不能用金錢去衡量的。 所以，本局在此強調及敦促政府千萬維持物歸原主機制以避免引致業權人不安及惶恐及造成社會秩序的混亂。

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基於上述理由，本局強烈支持政府就有關條例諮詢文件第 9 號第 5 段所述的立場，亦即在維持物歸原主模制不變情況下總綱審議有關條例，以免貽時失事及節外生枝。

最後，本局亦會短期內就涉及祖堂及受益性權益的條文向政府表達意見。

專此奉達，敬祈跟進。

新界鄉議局主　席：劉皇發

副主席：林偉強

張學明

（秘書處代行）

新界鄉議局 秘書處 HEUNG YEE KUK SECRETARY

副本致：發展局局長；
新界二十七鄉鄉事委員會。

附件十

2010 年 4 月 27 日香港律師會致立法會信件

THE LAW SOCIETY OF HONG KONG
香港律師會

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Our Ref : LTO
Your Ref : CB1/PS/4/08
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BY FAX (21210420) AND BY POST

27 April 2010

Mr. Simon Cheung,
Clerk to Joint Subcommittee
on Amendments to LTO,
Legislative Council Building,
8 Jackson Road,
Central,
Hong Kong.

Dear Mr. Cheung,

Panel on Development and Panel on Administration of Justice and Legal Service – Joint Subcommittee on Amendments to Land Titles Ordinance ("*LTO*") – Meeting on 29 April 2010

We are pleased to attach the Law Society's submissions on "*Proposed Amendments to LTO - the Rectification and Indemnity Provisions*" for discussion at the above LegCo's Joint Subcommittee meeting.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

Encls.

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THE LAW SOCIETY OF HONG KONG
香港律師會

THE LAW SOCIETY'S SUBMISSIONS ON PROPOSED AMENDMENTS TO LAND TITLES ORDINANCE - THE RECTIFICATION AND INDEMNITY PROVISIONS

The Development Bureau issued a Consultation Paper in December 2008 to consult the views of stakeholders including The Law Society on its proposed amendments to the Land Titles Ordinance *("the LTO")* to subject the so-called *"Mandatory Rectification"* rule *("MR rule")* provided in S. 82(3) of the LTO to, inter alia, the following exception:

> *"where the current registered owner who is in possession of the property is not the first person to have been registered as owner since the fraud. He is a bona fide purchaser for value or a person deriving title from such bona fide purchaser"*

The Law Society noted that in response to the Government consultation, the majority of stakeholders have submitted in favour of retaining the MR rule in the LTO.

We are mindful of the Development Bureau's observations in paragraph 16 of its April 2010 paper to the LegCo's Joint Subcommittee on Amendments to the LTO (*"Joint Subcommittee"*) that:

(a) the MR rule represents the consensus reached after extensive deliberations amongst all parties and that one should not underestimate the difficulties for a new consensus to be reached if the issue is to be re-opened; and

(b) review of this fundamental issue will be time-consuming and significantly delay implementation of the legislation.

We would like to stress at the outset that The Law Society has strong objection to the MR rule. For reasons explained below, we do not think a title registration system with the MR rule would work at all nor do we think this is a *"title registration system"* that we can support. Rather, we believe that a decision on this very important issue which is so

fundamental to our new system should warrant a closer and more careful scrutiny by all concerned.

That the MR rule merits serious re-consideration is not lost to the Administration. In fact, despite the Development Bureau's misgivings about the Law Society raising this issue at this stage, it is to be noted that the Bureau has issued a consultation paper 4 years after the LTO was enacted to canvass views on the possibility of abolishing MR rule and replacing it with deferred indefeasibility.

The LTO was enacted in 2004 under a very tight schedule. The Bills Committee was convened in March 2003 and completed its deliberations on the Bill in 39 meetings over a period of 15 months. The Law Society was given the understanding by the Administration then that if the 2002 Land Titles Bill did not get enacted within the 2003-4 LegCo term, it would be very unlikely that the title registration legislation would be re-introduced to LegCo given there were other legislative priorities. At the request of the Administration, weekly meetings were held between representatives of the Administration and members of our Working Party in the period between 15 April and June 2004 to try to resolve issues of concern within that LegCo term.

When The Law Society was asked to endorse the bill, the then Secretary General of The Law Society wrote to the then Land Registrar on 18 June 2004 to give its support of the Bill, but expressing also its two concerns i.e. one, on the drafting of the Bill and two, given the large number of amendments to the Bill, the Law Society felt that a reasonable breathing space was needed to fully absorb the revised bill. The Administration assured The Law Society that it would continue to work with The Law Society "*to address any subsisting points of concern and any issues that emerge on further consideration of the drafting of the LTO before its implementation*". It was based, inter alia, on such undertaking by the Administration to the Law Society that LegCo has passed the 2002 Bill into law on 7 July 2004.

The MR rule was introduced at a very late stage in 2004. This was done against a background of a rushed through deliberation process, as a political expediency and as a recognition of the fact that due to the effect of the cap on indemnity and the Court being given a wide discretion to rectify, unless rectification was made in favour of the former innocent owner who had been defrauded and lost his property, he might find himself worse off under the new system (cf. for example, the Bar's submission dated 2nd March 2004). The Law Society understands fully the predicament the Administration was in when it introduced the MR rule.

In the end, the LTO as enacted, was a product of compromise. The Chairperson of the Bills Committee of the LegCo during the 2000-2004 session, the Hon. Margaret Ng, who is also now the Chairman of the LegCo's Subcommittee, when speaking on the passage of LTO, lamented that the MR rule in the LTO rendered the new system more of a "half-way house". Dissatisfaction with this product of political compromise is, therefore, not confined to the Law Society. Given the breathing space that was allowed to reflect on this compromise, the Law Society is firmly of the view that the MR rule renders unworthy the LTO to any claim of a title registration.

As the Administration has rightly pointed out in paragraph 8(b) of its Consultation Paper, the MR rule would have the unintended effect of "*reducing confidence in the title register*" and "*reducing the effectiveness of the new scheme in improving the efficiency with which conveyancing can be conducted*". The Law Society agrees with the Administration in paragraph 8(b) of the Consultation Paper that the "*opportunity should... be taken to reconsider whether the rule* should *be retained before the LTO is brought into operation*".

Why the MR rule *is* a problem?

Aims of Title Registration

Let us go back in time and ask ourselves the basic question: why do we want a title registration system for Hong Kong? What are the advantages of this new system as compared to our existing deeds registration system?

The answer is simple and clear. The main impetus for Hong Kong to introduce a title registration system is the desire to "*simplify*" the existing cumbersome conveyancing process. Our existing deeds registration system is just a record of transactions affecting the land, not a register of title so much so that title has to be investigated privately by the parties' solicitors perusing bundles of title documents going back to a certain period of time upon every purchase or mortgage of the land.

The object of title registration is to bring certainty to title and make it unnecessary for purchasers to go behind the register to investigate the chain of title. And how can this be achieved? This is, to a large extent, achieved by the concept of "*indefeasibility of title*".

Importance of the "Indefeasibility of Title" Concept

The raison d'etre of a title registration system is that the title register is the "conclusive" evidence of title so that a purchaser relying on the register will acquire a title that is warranted by the legislation to be good as against the

whole world, subject to only very limited exceptions. The title registration system speaks of the title being "*indefeasible*".

Conveyancing process can be simplified under the concept of "*title indefeasibility*", as a person dealing with the registered owner can safely rely on the register and can be saved from the trouble and expense of going behind the Register in order to investigate the history of the vendor's title and to satisfy of its validity.

Rectification as an Exception to "Title Indefeasibility"

However, title registration systems around the world do provide a procedure called "*rectification*", as an exception to the concept of "*indefeasibility of title*". This is in recognition of the fact that the "*indefeasibility of title*" concept could work harshly against innocent registered owner; for an innocent registered owner could find his title displaced as a result of fraud or a void or voidable instrument and his title lost in favour of a newly registered owner under the title indefeasibility concept.

Rectification will allow the register to be corrected in favour of the original displaced owner in appropriate circumstances. Where it is not possible to prevent or recompense for the loss occasioned by the title registration system or a reliance on the register by rectifying the register, financial compensation called indemnity may be paid.

The extent that rectification should be allowed in the case of fraud or forged document to revert the registered title to the original displaced owner vis-à-vis the current registered owner, and the kind of indefeasibility of title system to be adopted have been widely debated subjects in many jurisdictions. It is at the end of the day a balancing exercise between certainty of a transaction and justice in individual cases.

However, what is clear is that to ensure there will be certainty of title, the scope of rectification should be as limited as possible for the wider the scope of rectification allowed, the less certain the title register will be and the further the inroads into the indefeasibility of title concept thus undermining the basic advantages of title registration system.

The MR Rule

S. 82(3) is the "*MR*" provision in the LTO. It "mandates" the Court to make an order of rectification in favour of "*a former displaced registered owner*" (if innocent) if he lost his title by or as a result of fraud, *irrespective of whoever the current registered owner is* .

The problem with the MR rule is that under such rule, any purchaser of registered property will be subject to the risk of a rectification order being made against him as a result of any fraud involved in any transaction prior to the one in which he is involved. This would work to greatly undermine confidence in the title register and the security and ease of conveyancing that the LTO aims to achieve. ***A purchaser may want to go behind the title register to investigate previous transactions in order to obtain greater assurance that he will not be at risk. This would amount to a reversion to the old system of investigation of title as under the current deeds registration system; totally defeats the very purpose of title registration; and renders unworthy the LTO to any claim of a title registration system.***

As mentioned before, the MR rule was introduced in the 2004 legislation as a political expediency in recognition of the fact that due to the effect of the cap on indemnity and the court being given a wide discretion to rectify, unless rectification is made in favour of the former innocent owner who had been defrauded and lost his property, he might find himself worse off under the new system.

We believe that stakeholders are also in favour of retaining the MR rule, in part due to the thinking that the MR rule ensures "*ownership protection*". However, in terms of "*ownership protection*", the MR rule cuts both ways. It will always work to displace the ownership of the innocent current registered owner.

On the issue of doing justice between an innocent original displaced owner who is defrauded and an innocent current registered owner, MR is clearly not the best solution on every occasion. On the contrary, what is clear is that unless one should adopt a change of mindset and move away from the nemo dat principle, the new title registration system would not work.

What systems should HK adopt?

Legal systems around the world adopt either of 2 major principles of indefeasibility:

(a) *immediate indefeasibility* - under which a bona fide purchaser who relies on the register in dealing with the registered owner and registers a transfer, obtain a clear and valid title, even though the transfer instrument he relies on is void for fraud or forged, except in the case of fraud by the purchaser himself;

(b) *deferred indefeasibility* - where a purchaser becomes (innocently) the "*registered owner*" of land, relying on a document that is void for fraud or forged, such a registration can be defeated by the previous

registered owner, but only until such time as the land is on-sold to a bona fide purchaser for value.

Our Preferred Option 1 – Section 82(1) & (2) of the LTO

For Hong Kong, we believe that for the sake of certainty of title and ease of conveyancing transactions, the "*immediate indefeasibility*" principle should be followed as far as possible with only very limited discretion given to the court to rectify the register against the current registered owner in circumstances where he is at fault.

Under the LTO as enacted in 2004, the rectification provisions are contained in Sections 81 to 83.

(a) Section 82 provides for rectification of title by the court;

(b) Section 82(1) gives a general discretion to the Court to order rectification in, inter alia, cases of fraud, void or voidable instruments. Such discretion is, however, subject to the provisions in subsections (2) and (3);

(c) Subsection (2) specifies that no rectification order should be made under subsection (1) so as to affect the title of the owner of registered land who is in possession of the land and has acquired it for valuable consideration, unless he himself was a party to the fraud, caused a mistake or omission, or caused the instrument to be void or voidable; had knowledge of the fraud, mistake or omission or that the instrument was void or voidable; or had, by his act or lack of proper care, caused or substantially contributed to that fraud, mistake or omission or to making the instrument void or voidable.

(d) Subsection (3) contains the mandatory rectification provisions.

A copy of Section 82 is attached at Annex A.

The Law Society proposed to remove the MR provision in S. 82(3). Our proposal to remove S. 82(3) does not necessarily mean that the original displaced registered owner could not recover the property; for the court will have the discretion under S. 82(1) and (2) to rectify the land register and apply the nemo dat rule in the "*unless*" situations mentioned in Section 82(2).

Option 2 – UK 2002 position

If, however, S. 82(1) and (2) of the LTO are not considered good enough to do justice to the original displaced registered owner, we would alternatively suggest adopting the UK 2002 position. In this regard, Schedule 4 of the Land Registration Act 2002 is attached at Annex B for consideration. The relevant part of Schedule 4 of the Land Registration Act 2002 reads as follows:

"Schedule 4 – Alteration of the Register

Introductory

1. In this Schedule, references to rectification, in relation to alteration of the register, are to alteration which-

(a) involves the correction of a mistake, and

(b) prejudicially affects the title of a registered proprietor.

Alteration pursuant to a court order

2. (1) The court may make an order for alteration of the register for the purpose of –

(a) correcting a mistake,

(b) bringing the register up to date, or

(c) giving effect to any estate, right or interest excepted from the effect of registration.

(2) ....

3. (1) This paragraph applies to the power under paragraph 2, so far as relating to rectification.

(2) If alteration affects the title of the proprietor of a registered estate in land, no order may be made under paragraph 2 without the proprietor's consent in relation to land in his possession unless-

(a) he has by fraud or lack of proper care caused or substantially contributed to the mistake; or

(b) it would for any other reason be unjust for the alteration not to be made.

(3) If in any proceedings the court has power to make an order under paragraph 2, it must do so, unless there are exceptional circumstances which justify its not doing so...."

Compared to S. 82 of the LTO in HK where the court has the "*discretion*" to order rectification in the "*unless*" situation mentioned in S. 82(2), the UK 2002 legislation slanted more towards mandatory rectification in so far as the immediate parties to the fraudulent transactions are concerned. Paragraph 3(3) of Schedule 4 "*mandates*" the court to make a rectification order in favour of the original displaced owner in the "*unless*" situations mentioned in paragraph 3(2) "*unless there are exceptional circumstances which justify its not doing so*".

<u>Options 1 & 2 vs. the MR rule</u>

As opposed to the MR rule, under either Options 1 or 2 above, any new purchaser would only have to make sure that he has not by fraud or by his act or lack of proper care caused or substantially contributed to the mistake on the

register when he purchased the property. He would only be at risk of a rectification order being made against him where there has been some fault on his part in the "*immediate transaction*" to which he is a party but not when there was fraud in a previous transaction to which he is not an immediate party or as a result of lack of care on the previous owners. As such, in either of these options, the purchaser is made responsible for his own fraud and lack of care. There will be no need for any purchaser to go behind the register and investigate the whole chain of title. The spirit of title registration and thus the benefit of simplicity of conveyancing process can be attained.

Further Protections to the Displaced Registered Owners

To enhance the position of the original displaced registered owner, we have the following suggestions:

(1) Cap on Indemnity

We noted that the need for the MR rule stemmed from the cap on indemnity and have made submissions that the cap should be uplifted.

The Government indicated its concern on unlimited exposure to claims if the cap was removed and cited the problem of scams in other jurisdictions where fraudsters posed as victims in order to claim Government indemnity. In this regard, we believe the Administration should justify the need to retain the cap on indemnity by disclosing information and statistics from the Hong Kong and overseas jurisdictions on the incidences of fraud claims on the indemnity fund under these title registration systems and/or fraud cases in property transactions generally but the Administration's reply is still awaited.

If, however, the final decision is to maintain the cap on indemnity, we believe there should be a mechanism in the legislation to ensure that the cap would be reviewed upwards from time to time to ensure it will cover the majority (say, not less than 99%) of HK properties.

Likewise, the limitations on indemnity for the pre-conversion defrauded owner under Section 84(4)(c) of the LTO should be removed.

(2) Measures to Minimize Fraud

We believe retaining the MR rule in fear of fraud is putting the horse before the cart. Efforts should better be spent on minimizing fraud. In this regard, we would like to refer to British Columbia experience in which, inter alia, the following safeguards are provided in the system to combat ID theft:

(a) rules requiring estate agents, solicitors and financial institutions to verify clients' identities following specific guidelines and to keep clients' information record for every purchase or sale of real estate; and

(b) procedure whereby applications could be made for email notifications to be sent to the registered owner, his agent and lawyer whenever there is an application for registration which would affect the title; and

(c) procedure for registered owner to apply for a duplicate certificate of title which must be presented before there can registration for change of ownership and making the duplicate certificate very difficult to be forged and replaced.

An article entitled "Title Securing in British Columbia" at Annex C is attached for consideration.

Lands held by Indigenous Villagers

We appreciate the Heung Yee Kuk ("*HYK*")'s wish to retain the MR rule, in view that many indigenous villager owners "*resided overseas and it is important that they can get back the land in case of fraud*".

We believe that this concern of HYK can be addressed by the Government conducting worldwide public education on the change of law. But in order for the title registration legislation to move forward, if HYK is not comfortable with our above proposals, we recommend giving an option to HYK to consider whether to have all those NT lands held by indigenous villagers remain out of the title registration system at the initial stage and for a mechanism to be put in place whereby the owners of these lands could opt into the new system at a later stage upon title being proved to the Land Registry at their own expense. One benefit of this option is that as these lands will continually be governed by the Land Registration Ordinance, the HYK and the indigenous villager owners could have some leading time to observe the experiences of the operation of the new system upon other lands before deciding whether to opt into the new system. In this regard, we propose the relevant NT lands be identified by reference to Section 4 of the Government Rent (Assessment and Collection) Ordinance.

The Law Society's Positions

To recap, the Law Society's positions are:

(1) the aim of title registration legislation being to bring certainty to title and "*simplify*" conveyancing process, a title registration system with the MR rule defeats the very purpose for which a title registration system seeks to achieve and as such S. 82(3) has to be deleted from

the LTO;

(2) to uphold certainty of title as far as possible, the HK system should go for immediate indefeasibility with discretion being given to the court to rectify the register in favour of an innocent displaced owner in very limited circumstances. We recommend the court's discretion in S. 82(1) & (2) be retained;

(3) alternatively, if our preferred option in (2) is not considered sufficient, we suggest the UK 2002 legislation (i.e. Schedule 4 of the UK Land Registration Act 2002) be adopted;

(4) to safeguard the position of innocent displaced owners, we propose:

(a) the cap on indemnity be uplifted or as a minimum, a mechanism should be in place to enable periodic review of the cap to ensure it will cover the majority (99%) of properties in HK;

(b) the exclusion of indemnity for pre-conversion fraud to the innocent former owner under S. 84(4)(c) should be removed;

(c) adequate safeguards be introduced into the system to minimize the instances of fraud; and

(5) an option be given to HYK to consider whether lands held by indigenous villagers should remain out of the title registration system on daylight conversion and for such lands to opt into the system at a later stage.

The Law Society of Hong Kong
27 April 2010

附件十一

2010 年 3 月 1 日香港律師會致土地註冊處信件

Annex 2

THE LAW SOCIETY OF HONG KONG
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BY FAX (28104561) AND BY POST

1 March 2010

Ms. Olivia Nip,
The Land Registrar
Queensway Government Offices
28th Floor, 66 Queensway
Hong Kong.

Dear Ms. Nip,

Consultation on Land Titles (Amendment) Bill - Rectification and Indemnity Provisions

The Development Bureau issued a Consultation Paper in December 2008 to consult the views of stakeholders including The Law Society on its proposed amendments to the Land Titles Ordinance *("the LTO")* to subject the so-called "*Mandatory Rectification*" rule *("MR rule")* provided in Section 82(3) to, inter alia, the following exception:

> *"where the current registered owner who is in possession of the property is not the first person to have been registered as owner since the fraud. He is a bona fide purchaser for value or a person deriving title from such bona fide purchaser"*

The Law Society has carefully reviewed the rectification and indemnity provisions under Part 11 of the LTO and agrees with the Administration that there are grave concerns with the existing arrangements with the MR rule being incorporated into the title registration system.

As the Administration has rightly pointed out in paragraph 8(b) of its Consultation Paper, the MR rule would have the unintended effect of "*reducing confidence in the*

../P.2

title register" and "*reducing the effectiveness of the new scheme in improving the efficiency with which conveyancing can be conducted*". The Law Society agrees with the Administration in paragraph 8(b) of the Consultation Paper that the "*opportunity should... be taken to reconsider whether the rule* should *be retained before the LTO is brought into operation*".

The LTO was enacted in 2004 under a very tight schedule. The Bills Committee was convened in March 2003 and completed its deliberations on the Bill in 39 meetings over a period of 15 months. The Law Society was given the understanding by the Administration then that if the 2002 Land Titles Bill did not get enacted within the 2003-4 LegCo term, it would be very unlikely that the title registration legislation would be re-introduced to LegCo given there were other legislative priorities. At the request of the Administration, weekly meetings were held between representatives of the Administration and members of our Working Party in the period between 15 April and June 2004 to try to resolve issues of concern within that LegCo term. When the Law Society was asked to endorse the bill, the then Secretary General of the Law Society wrote to the then Land Registrar on 18 June 2004 to give its support of the Bill, but expressing also its two concerns i.e. one, on the drafting of the Bill and two, given the large number of amendments to the Bill, the Law Society felt that a reasonable breathing space was needed to fully absorb the revised bill. The Administration assured the Law Society that it would continue to work with the Law Society "*to address any subsisting points of concern and any issues that emerge on further consideration of the drafting of the LTO before its implementation*". It was based, inter alia, on such undertaking by the Administration to the Law Society that LegCo has passed the 2002 Bill into law on 7 July 2004. Indeed, the Administration has rightly pointed out in paragraph 8 of its Consultation Paper that the LTO was passed in July 2004 on condition that a comprehensive review was carried out before the Administration sought to bring the new system into operation and the rectification and indemnity provisions enacted in 2004 have been examined as part of that review.

The MR rule was introduced at a very late stage in 2004. This was done against a background of a rushed through deliberation process, as a political expediency and as a recognition of the fact that due to the effect of the cap on indemnity and the Court being given a wide discretion to rectify, unless rectification was made in favour of the former innocent owner who had been defrauded and lost his property, he might find himself worse off under the new system (cf. for example, the Bar's submission dated 2nd March 2004). The Law Society understands fully the predicament the Administration was in when it introduced the MR rule.

The Law Society of Hong Kong

In the end, the LTO as enacted, was a product of compromise. The Chairperson of the Bills Committee of the Legco, the Hon. Margaret Ng, when speaking on the passage of LTO, lamented that the MR rule in the LTO rendered the new system more of a "half-way house". Dissatisfaction with this product of political compromise is, therefore, not confined to the Law Society. Given the breathing space that was allowed to reflect on this compromise, the Law Society is firmly of the view that the MR rule renders unworthy the LTO to any claim of a title registration.

The raison d'etre of a title registration system is that the title register is conclusive evidence of title so that a purchaser relying on the register will acquire a title that is warranted by the legislation to be good as against the whole world, subject to only very limited exceptions. The title registration system speaks of the title being "*indefeasible*". The advantage of title indefeasibility is that this will simplify conveyancing in the sense that a person dealing with the registered owner can safely rely on the register and be saved from the trouble and expense of going behind the register in order to investigate the history of the vendor's title, and to be satisfied of its validity.

The problem with the MR rule, as the Government rightly pointed out in paragraph 23(a) of its Consultation Paper, is that no purchaser of registered property is protected by the title register against the effect of fraud prior to the transaction in which he is involved. This would work to greatly undermine confidence in the title register and the security and ease of conveyancing that the LTO aims to achieve. A purchaser may want to go behind the title register to investigate previous transactions in order to obtain greater assurance that he will not be at risk. This would amount to a reversion to the old system of investigation of title as under the current deeds registration system.

The Law Society has to commend the Administration for bringing up this very important subject for further review after the enactment of the 2004 legislation. We submit that:

(1) a title registration system with the MR rule is unworkable and Section 82(3) of the LTO should be deleted;

(2) the cap on indemnity should be lifted but, were it to be retained, there should be a mechanism in the legislation to ensure that the cap would be reviewed upwards from time to time to ensure it would cover the majority (say, not less than 99%) of HK properties. To justify the need to retain the cap on indemnity, the Government should disclose information and statistics from Hong Kong

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and overseas jurisdictions such as UK, Australia, New Zealand and Canada on the incidence of fraud claims on the indemnity fund under these title registration systems and/or fraud cases in property transactions generally; and

(3) the exclusion of indemnity for pre-conversion fraud to the innocent former owner under Section 84(4)(c) of the LTO should be removed.

We, however, regret to note the Administration's indication that the majority of responses to the Consultation are in favour of retaining the MR rule. We have concern whether, with the emphasis of the Government's Consultation Paper being on the MR rule and on introducing "*deferred indefeasibility*" as *an "exception to the MR rule"*, the consultation process has really brought home to the mind of the stakeholders the importance of the principle of indefeasibility of title to a title registration system and the adverse implications the MR rule would have on our new system. Indeed, rectification and MR rule are in substance exceptions rather than the rule, and this has led to confusion by creation of exceptions upon exceptions, hence losing sight of the ultimate objective of title registration.

Given the importance of this subject, we feel obliged to copy this letter for the attention of the LegCo's Joint Subcommittee on Amendments to the Land Titles Ordinance and would recommend that our proposed removal of the MR rule from the LTO should merit very serious consideration.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

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附件十二

2010 年 6 月 29 日香港律師會致土地註冊處信件

THE LAW SOCIETY OF HONG KONG
香港律師會

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BY FAX (28104561) AND BY POST

29 June 2010

Ms. Olivia Nip,
The Land Registrar
Queensway Government Offices
28th Floor, 66 Queensway
Hong Kong

Dear Ms. Nip,

Proposed Amendments to the Land Titles Ordinance ("*LTO*") – the Rectification and Indemnity Provisions

Thank you for your letter dated 20 May 2010. Our Working Party on Land Titles Ordinance has discussed the question posed by you on page 2 of your said letter, namely:

> "*When compared to a title registration system without mandatory rectification, what are the additional conveyancing procedures and steps envisaged that would need to be undertaken by Solicitors acting for purchasers if mandatory rectification rule is adopted?*"

The Working Party has reviewed Section 82(3) of the LTO, which provides for the Mandatory Rectification rule ("*MR rule*"). The subsection reads:

> "*(3) Subject to section 83, on an application made under subsection (1) by a former registered owner of registered land or a former registered lessee of a registered long term lease to restore his title to the land or lease on the ground*

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The Law Society of Hong Kong

> *that he lost his title by or as a result of fraud, the Court shall order the rectification of the Title Register to so restore the title of the applicant (and irrespective of whoever is currently the registered owner or registered lessee of the land or lease concerned), if the Court is satisfied that –*
>
> *(a) the entry in the Title Register by or as result of which the applicant lost his title was procure, whether in whole or in part, by or as a result of-*
>
> *(i) a void instrument; or*
>
> *(ii) a false entry in the Title Register;*
>
> *(b) the applicant was not a party to the fraud; and*
>
> *(c) the applicant did not, by his act or by lack of proper care, substantially contribute to the fraud.*

The subsection first talks about someone who has lost his title (1) as a result of fraud; and then that (2) the court is satisfied that the entry was procured as a result of (a) a void entry or (b) a false entry in the title register.

S. 82(3) could be a troublesome area in that the exact scope of application of the MR rule is not entirely clear. "*Fraud*" is a very difficult concept to begin with. The term is only defined to "*include dishonesty and forgery*" in Section 2 of the LTO and the court has not laid down any exhaustive definition of the term.

Fraud is obviously not confined to forgery and should not be confused with forgery. At common law, a forged instrument is null and void and of no effect. It is a different concept from fraud and could be used by the fraudulent forger or by an innocent party who has no knowledge of the forgery.

"*Void instrument*" refers to an instrument which is "*inherently*" bad not because there was forgery or fraud but because, for example, the instrument is illegal or the executing party lacked capacity. These include assignment of flat in violation of

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The Law Society of Hong Kong

the Housing Ordinance and execution by a minor. In talking about a document which is "*void*", solicitors may need to investigate into the background leading to the transaction. Apparent examples of concern include self-dealing by an attorney under a Power of Attorney; self-dealing by directors although there could be reasons to support the transaction such as ratification by the principal.

The court has at times also construed "*void instrument*" to be "*voidable instrument*". There could be instances where there was nothing wrong with the documents but the circumstances of the transaction raise suspicion. Solicitors would have to, in these circumstances, raise queries, such as: is the person under undue influence? Is there something going on behind the scene?

Accordingly, apart from the obvious identity issues as to whether there has been forgery, there could be void instrument or void transactions like the Housing Ordinance case which is illegal as against the statutory law or the against the public policy sort of transactions; and there could be cases which may lead to transactions being void, e.g. self-dealing by people occupying fiduciary position, the O'Brien type of situation, etc. Given the uncertainty of the scope of the MR rule, instead of considering in every case whether the document involved is a void, voidable or unenforceable instrument and where it should sit in the scheme, solicitors would adopt a prudent approach.

At the end of the day, there would not be much saving in terms of what solicitors need to do if the MR rule was in place under S. 82(3): (1) Solicitors would in essence be still doing more or less the same things as they have been doing now i.e. checking old title documents and try to, by way of requisitions, find out if any fraud and/or void or false entry in the title register is involved; and (2) someone would still need to keep the old title documents. If the aim of title registration is to simplify conveyancing process, the aim would not have been achieved.

We would like to further point out that for whatever indefeasibility concept to be adopted under the new system, it is highly undesirable for title indefeasibility to be based on solicitors' checking of title. Although solicitors may be able to feel

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The Law Society of Hong Kong

uneasy about certain documents or situation given their experiences, they are not trained to detect fraud. There are obscure instances that obviously would not be something solicitors could uncover, e.g. self-dealing by people occupying fiduciary position, statutory bodies to which the ultra vires rule apply; mortgagee sale which may be set aside as a result of undue influence, etc.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

附件十三

2010 年 9 月 28 日土地註冊處致香港律師會信件

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Our Ref : LR/HQ/101/110/3 Pt.3
Your Ref : LTO

28 September 2010

The Law Society of Hong Kong
3/F., Wing On House,
71 Des Voeux Road
Central, Hong Kong

Attn: Ms. Christine Chu

Dear Christine,

Re : **Consultation on Land Titles (Amendment) Bill – rectification and indemnity provisions**

Thank you for your letter of 29 June 2010.

Section 82(3) of the LTO

Background

Section 82(3) of the LTO (the "mandatory rectification rule") was introduced as a Committee Stage Amendment in 2004 during the passage of the LTO. It was introduced into the LTO to address the concerns raised by stakeholders that indefeasibility of title of the purchaser together with cap on indemnity payable to the former owner in case of fraud may amount to deprivation of property of the former owner without full and fair compensation which is might contravene Articles 6 and 105 of the Basic Law.

The purpose of introducing the mandatory rectification rule is therefore to address the concern raised by stakeholders relating to Basic Law and to maintain the common law *nemo dat* principle so that the common law rights of the innocent former owners are preserved.

Application of the mandatory rectification rule

The mandatory rectification rule only applies where:

(1) there is a former registered owner who lost his title by or as a result of fraud; and

(2) the entry in the Title Register by or as a result of which the applicant lost his title was procured by or as a result of a void instrument or a false entry in the Title Register.

The mandatory rectification rule would only apply if all of the aforesaid requirements are satisfied.

Regarding some of the points raised in your letter, we would like to provide the following clarifications.

Definition of "fraud"

We agree that fraud is not confined to forgery. This explains why the definition of "fraud" is neither exhaustive nor codified under the LTO. We consider that the meaning of "fraud" should be determined according to case law. In this regard, reference may be made to the definition of fraud as clearly established by the House of Lords decision in *Derry v Peek*.

"Void instrument"

Regarding your comments on what is meant by "void instrument", we agree that it refers to an instrument which is "inherently" bad such as an instrument which is void under enactment. However, in our view some of the examples mentioned in your said letter, such as self-dealing by an attorney under a power of attorney, self-dealing by directors or the executing party lacked capacity, would only create voidable as opposed to void instrument and in such event, the mandatory rectification rule would not be invoked.

We note your concern on situation where the court may construe "void instrument" to be "voidable instrument" but in such event, where no void instrument is involved, the mandatory rectification rule would not apply. Your attention is drawn to the fact that the mandatory rectification rule under s.82(3) only covers "void instrument" as opposed to s.82(1) which covers both "void or voidable instrument".

Risk arising out of abolition of the mandatory rectification rule

No indemnity shall be payable for pre-conversion fraud cases under s.84(4) of the LTO. In such cases, the protection of the rights of the innocent former owner under the Basic Law as mentioned aforesaid by the mandatory rectification rule is considered necessary. If the mandatory rectification rule were to be abolished in fraud

cases and that the purchaser were to be vested with indefeasible title, the innocent former owner would need to be compensated fully and fairly for his loss in order to avoid possible breach of the Basic Law. To achieve this, the bar to indemnity in pre-conversion fraud cases and the cap to indemnity would have to be uplifted. There would be significant financial implications associated with this.

Nevertheless, with the automatic conversion mechanism under the LTO which does not involve any scrutiny of title before conversion, it could be irresponsible for the Administration to uplift the bar to indemnity for pre-conversion fraud cases, because this would mean that the indemnity fund could be exposed to huge risks and it would be impossible to maintain the financial stability of the indemnity fund. The impact on the levy rate would also be substantial. We do not see any viable way to offset these risks unless the three core elements, namely "conversion" "rectification" and "indemnity" were to be revisited in a comprehensive manner.

Having made the aforesaid clarifications, we should be grateful if the Law Society can re-consider the matter We do appreciate the Law Society's concern on the requisite title checking arising out of the mandatory rectification rule, we would therefore be happy to discuss with you (together with other stakeholders as appropriate) on any proposal that the Law Society may have regarding re-positioning of the said three core elements of the LTO so as to address the concerns of different stakeholders and to balance the interest of the general public.

Yours sincerely,

(Ms Olivia Nip)
Land Registrar

附件十四

2010 年 12 月 7 日香港律師會致土地註冊處信件

THE
LAW SOCIETY
OF HONG KONG
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BY FAX (28104561) AND BY POST

7 December 2010

Ms. Olivia Nip,
The Land Registrar,
Queensway Government Offices,
28th Floor, 66 Queensway,
Hong Kong.

Dear Olivia,

Consultation on Land Titles (Amendment) Bill – Rectification and Indemnity provisions

Thank you for your letter dated 28 September 2010, inviting the Law Society to re-consider the 3 core elements of the proposed title registration system (i.e. conversion, rectification and indemnity) and put forward alternative proposals with a view to "*address the concern of different stakeholders*" and "*balance the interest of the public*".

The 3 Core Elements

Our Working Party on Land Titles Ordinance ("*WP*") has since seriously reviewed its position on the 3 core elements. The WP noted, however, that the Law Society has already given its concession on the 3 cornerstones of the system as far as it can; and that any further compromise cannot be made without greatly undermining the fundamental principles and benefits of a title registration system. To summarize, the Law Society's positions on the 3 core elements are:

1. **Conversion Mechanism**
   We have highlighted our concerns on many occasions to the Government on the Government's proposal to have some form of title approval process involving scrutiny of individual registers within the Government for conversion to the new title registration system and do not wish to repeat

.../P.2

ourselves here. Our concerns are indeed shared by the majority of stakeholders. To deal with the Government's concern on the existence of problematic registers, it is now agreed that the Conversion Mechanism under the 2004 Ordinance will be modified to introduce a mechanism known as "*Land Registrar's Caution Against Conversion*" to enable the Land Registrar to withhold conversion of problematic registers to the new registration system on the automatic conversion day.

2. **Rectification**

We remain strongly opposed to the inclusion of the Mandatory Rectification rule ("*MR rule*") in the new registration system.

As we have repeatedly pointed out, to include the MR rule will greatly undermine the very benefits that a title registration system is set to achieve: i.e certainty of title and simplification of the conveyancing process. Again, we do not want to repeat our grounds of objection to the MR rule here. Whilst our preferred option is "*immediate indefeasibility*", we have put forward in our paper dated 27 April 2010 two compromised alternatives for the Government's consideration:

Option 1: to delete the MR rule in S. 82(3) of the LTO but to retain the limited discretion given to the court under S. 82(1) and (2) to rectify the register against the "*current*" registered owner in circumstances where he is at fault

Option 2: to follow the UK 2002 position as per Schedule 4 of the Land Registration Act 2002

And in view that the MR rule was introduced in fear of fraud, we have further proposed that the Government should refer to the British Columbia experience to introduce relevant safeguard measures in the new system to minimize the instances of fraud.

3. **Indemnity**

The Government indicated its concern on unlimited exposure to claim if the cap was removed but has so far failed to justify the need to retain the cap by

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disclosing information and statistics from Hong Kong and overseas jurisdictions on the evidences of fraud and indemnity fraud under their title registration systems and/or fraud cases in property transactions generally despite repeated requests by the Law Society.

As a profession, we believe we have the closest relation to conveyancing. We have repeatedly pointed out that it is not our experience that defects in title will, in any notable number of cases, result in titles being disturbed.

The recent English experience of surge in claims against indemnity, that you alluded to, would appear to be a result of problems peculiar to their system i.e. no physical certificate of titles and lenders not legally represented in the discharge of mortgages and signing receipts through attorneys.

Whilst our position remains that the cap on indemnity should be uplifted, we have indicated that if the final decision were to maintain the cap, our position is that there should at least be a mechanism in the legislation to ensure that the cap would be reviewed upwards from time to time to ensure it will cover the majority (say, not less than 99%) of the properties in Hong Kong.

The WP noted your suggestion in the final paragraph of your letter for it to propose alternative proposals to "*address the concerns of different stakeholders*" and "*balance the interest of the general public*". The WP would like to highlight the following points in this regard for the Government's consideration:

A. **Address the Concerns of Stakeholders**
The WP noted from the Development Bureau's June 2010 Paper to the LegCo's Joint Subcommittee on Amendments to Land Title Ordinance that the majority of the main stakeholders on this piece of legislation now share the Law Society's view that "*indefeasibility of title*" is an important cornerstone of a title registration system and that the MR rule should be removed. Heung Yee Kuk ("*HYK*") appears to be the only stakeholder who is adamant that the MR rule should be retained.

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In this regard, we have proposed an option in our 27 April 2010 paper for HYK to consider if it is not comfortable with our proposals. As you may recall, we proposed that the Government should give an option to HYK to consider whether to have NT lands held by indigenous villages remain out of the title registration system at the initial stage and to put in place a mechanism whereby the owners of these lands could opt into the new system at a later stage upon title being proved to the Land Registry at their own expenses. The benefit of this option, as we have explained in our paper, is that as these lands will continue to be governed by the Land Registration Ordinance, the HYK and the indigenous villager owners would have some leading time to observe the experiences of the operation of the new system upon other lands and the benefit of the new system before deciding whether to opt into the new system. We have yet to hear from the Government and the HYK on this suggested option of ours.

B. **Balance the Interests of the Public**

Whilst the Government has repeatedly stressed its concern over the costs of providing the indemnity fund for the new system, we have yet to be apprised of the basis for such concern. For example, is such concern supported by any actuarial study? The Government should bear in mind that there are great economic benefits that the community could derive from a system with certainty of title, and this could actually far outweigh the costs of providing the indemnity fund.

Quite frankly, we believe the ball is in the Government's court to demonstrate that it has achieved a balance of interests of the public in the new system that it proposed.

Yours sincerely,

Christine W. S. Chu
Assistant Director of Practitioners Affairs

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