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LTO

BY FAX (28696794) AND BY POST

10 December 2010

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Dr. Hon. Margaret Ng,
 Chairman of the Joint Subcommittee on
 Amendments to LTO,
 Legislative Council Building,
 8 Jackson Road,
 Central,
 Hong Kong.

Dear *Margaret*,

**CONSULTATION ON LAND TITLES (AMENDMENTS) BILL -
 RECTIFICATION AND INDEMNITY PROVISIONS**

As you are aware, the Law Society has been in discussion with the Land Registrar on the rectification and indemnity arrangements under the Land Titles Ordinance. We attach a copy of our recent letter dated 7 December 2010 to the Land Registrar, contents of which are self-explanatory, for your information.

Yours sincerely,

Christine W. S. Chu
 Assistant Director of Practitioners Affairs

Encls.

c.c. Mr. Huen Wong, the President
 Mr. Andy Ngan, Chairman of the WP on LTO

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7 December 2010

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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

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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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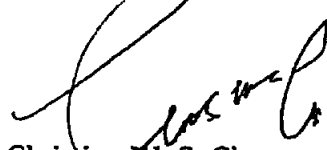
In this regard, we have proposed an option in our 27 April 2010 paper for HYK to consider if it is not comfortable with our proposals. As you may recall, we proposed that the Government should give an option to HYK to consider whether to have NT lands held by indigenous villages remain out of the title 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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