

Hong Kong Bar Association's comments on
the Land Titles Amendment Bill

1. By letter dated 31 July 2008 from the Land Registrar, the Hong Kong Bar Association is asked to comment on two particular matters in relation to the Land Titles Amendment Bill (the "**Amendment Bill**"), namely:
 - (1) The proposed amendments to the conversion mechanism as enacted in the Land Titles Ordinance ("**LTO**").
 - (2) The proposed amendments to the rectification and indemnity provisions as enacted in the LTO.
2. The Bar has previously submitted its comments on the Land Titles Bill prior to the enactment of the LTO and on the proposed amendments to the LTO after enactment, including comments on the conversion mechanism and the rectification and indemnity provisions.
3. The Bar does not wish to repeat the comments previously made, and insofar as those comments have not been addressed in the Amendment Bill, the Bar should not be taken to have changed the position previously taken.

Proposed amendments to the conversion mechanism

4. The Bar agrees that there are some benefits in the proposed conversion of existing land to an interim status of "converted land" after 3 years and

upgrading to full title after a further period of 12 years (as set out in the first paper).

5. It is noted that under this proposal, a converted title will be subject to all subsisting interests, until the title has been upgraded to a full title which will take place after a further period of at least 12 years from the date of conversion. There would be no conversion for as long as a warning note is recorded against the property. This may mean that some land in Hong Kong will not be brought under the new land titles system for many years in future if, for any reason, no one bothers to apply for the withdrawal or removal of a warning note which has been registered against that land in the Converted Title Register.
6. The Bar has 2 further comments on the proposed conversion mechanism. First, it is not clear from the first paper as to how the conversion period of “3 years” has been determined. Has this period of 3 years been fixed solely for the purpose of giving the public and all those who are concerned with property transactions some time to prepare for the operation of the new system?
7. Second, it is noted that under the LTO (as currently enacted), protection is given to unwritten equities by the registration of caveats throughout the 12 years before automatic conversion. However, under the proposed conversion mechanism, there is no provision for the registration of unwritten equities prior to the conversion, but the holders of the unwritten equities may protect their interests by recording a warning note in the Converted Title Register after conversion. It is not clear why, during the period up to conversion, this measure of protection afforded to unwritten equities is proposed to be removed. It seems to the Bar that there is much

to be said in favour of retaining the protection afforded to the unwritten equities even under the proposed conversion mechanism.

Proposed amendments to the rectification and indemnity provisions

8. The Bar's views on the rectification and indemnity provisions have been set out at length in its previous submissions. In particular, whilst recognizing the practical considerations of the Indemnity Fund, the Bar has expressed its strong objection to there being an upper limit on indemnity payable to an innocent owner whose interest is extinguished by reason of the rectification provisions under the LTO. As a matter of principle (and under Article 105 of the Basic Law), a person deprived of his property ought to be given adequate compensation.

9. As regards the proposed amendments to the mandatory rectification provisions, namely, that mandatory rectification should be made subject to 3 exceptions (as stated in Paper A), the Bar has the following comments:
 - (1) The proposed exception that mandatory rectification should not apply where the current registered owner is (i) in possession of the property; (ii) is not the first registered owner since the fraud; and (iii) is a bona fide purchaser appears to be rather arbitrary. For example, why should the second registered owner be in a more favourable position than the first registered owner just because he did not directly deal with the fraudster? Although it is accepted that this proposed exception would somewhat reduce the uncertainty and insecurity faced by future purchasers as a result of the mandatory rectification provisions, the different treatment of the first registered

owner after the fraud and subsequent registered owners (albeit that they are equally innocent) may be perceived as unfair or arbitrary.

- (2) Whereas the proposed exception that mandatory rectification should not apply where property has been divided up and sold to new bona fide owners resulting in multiple ownership of the property would avoid the complication and disruption of having to compensate multiple owners, it is difficult to justify this exception as a matter of principle. For example, it would seem unfair that a defrauded former owner whose property has been sold to a single purchaser will have his title restored whereas a defrauded former owner whose property has been divided and sold to two purchasers will not, just because administratively it may be more expedient to give him monetary compensation than to restore ownership of the property to him.

10. As regards the currently proposed indemnity provisions concerning “converted land” (set out Sections G and H of the Paper A), they can be summarized as follows:

- (1) Where fraud is committed before conversion (i.e. during the 3-year period after commencement of the LTO) (“**Pre-Conversion Fraud**”), the mandatory rectification rule and the indemnity provisions would not apply *before upgrading to registered title*, and common law principles would apply as if the property had not been converted.
- (2) However, *after upgrading to registered title*, the mandatory rectification rule and the indemnity provisions would apply to Pre-

Conversion Fraud in the same manner as fraud committed after conversion (subject to the proposed exceptions to mandatory rectification).

11. The above distinction could lead to anomalies. Take the case of a registered owner who purchased the property after conversion but before upgrading of title. His title will be displaced in favour of the innocent former LRO owner who was the victim of a pre-conversion fraud. If the claim of the innocent former LRO owner is made/established before upgrading, the registered owner will end up with nothing. However, if the claim is made/established after upgrading, it seems that he will be able to take advantage of the indemnity provisions. In other words, the right of the registered owner to claim indemnity will depend entirely on the date that the claim of the innocent former LRO is made/established. The rationale behind this distinction is not immediately apparent.

12. The Bar has previously commented in its Report dated 4 June 2007 that there is no reason for limiting the right of indemnity to “loss of ownership”, and that loss of other kinds of interests especially encumbrances (such as interests under a mortgage) ought similarly to give rise to a right of indemnity. It also commented on the effects of section 84(4)(c) and 85. The same position is still maintained.

Hong Kong Bar Association

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