

( 中文譯本 )

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金鐘道政府合署 28 樓  
土地註冊處處長  
蘇啓龍先生

蘇啓龍先生：

關於：《土地業權修訂條例草案》

感謝 閣下於 2008 年 12 月 3 日來函，並夾附兩份諮詢文件。其中有關建議轉換現有土地及物業至土地業權註冊制度的諮詢文件，尤其對地產代理業的執業有所關注。地產代理監管局的牌照及執業委員會曾就上述議題作出討論，其意見如下。

目前，從土地註冊處取得的土地查冊紀錄，可為地產代理提供物業的官方資料來源，以核實某項物業的過往的擁有權及產權負擔。有關資料對於地產代理在履行日常職責時向客戶提供適當意見至關重要。土地業權註冊制度及其任何更改，將對地產代理業的運作產生影響，鑒於從業員須履行或遵守以下職責及責任，其影響更甚：

《地產代理條例》、規例及《操守守則》

根據香港法例第 511 章《地產代理條例》(《地產代理條例》)第 36(1)(a) 條，每名地產代理須已就其訂立地產代理協議的住宅物業，管有為該物業而訂明的資料。訂明的資料包括擁有權詳情、用途的任何限制、政府租契的未滿年期等（參閱第 36(2)條）。《地產代理常規(一般責任及香港住宅物業)規例》(《常規規例》)第 3 條已訂明各表格，如物業資料表格及地產代理協議。物業資料表格的欄目須填上從訂明來源獲取的資料，另有特別條款規定須說明於土地註冊處註冊的有效產權負擔。

根據《常規規例》第 13(4)條，地產代理亦須在緊接該物業的買賣協議或租契訂立之前，就該物業安排在土地註冊處進行土地查冊，並向該物業的買方提供一份該土地查冊結果的文本。

除上述法定職責外，地產代理亦須奉行及遵守地產代理監管局（「監管局」）頒佈的《操守守則》所載的執業準則。有關行為準則包括能夠掌握任何法律和地產市場的發展，以便能盡責地向客戶提供意見。地產代理在促進和保障客戶的利益時，須盡量小心和盡一切應盡的努力。

監管局作為行業的監管機構，須監督地產代理遵照《地產代理條例》的規定妥善地履行職責，以保障消費者的利益。

#### 有關轉換機制建議的意見

##### (I) 擁有權及有效產權負擔的清晰程度

閣下提及，在當前由《土地業權條例》（《業權條例》）引入的制度下，處長無權阻止在真正擁有人不明確個案中的物業業權轉換。這方面確實令人失望，因為準買方將依賴有關轉換紀錄，作為真正的擁有權的保證。因此我們同意，閣下諮詢文件第五段(a)點所指「擁有權未能確定」的相關事宜應於《業權條例》生效前解決。由於地產代理須向客戶提供若干物業資料，包括於土地註冊處註冊的當時擁有權及有效產權負擔的詳情，若查詢土地業權註冊紀錄後可正確識別真正擁有人及有效產權負擔，則可大大有助地產代理履行該職責。

我們亦關注第五段第(e)點所提出的優先次序問題，而該問題可能會導致在非註冊權益、轉換前已註冊的知會備忘下的權益及在轉換後註冊警告書下的權益之間，因優先次序問題而引起爭拗及訴訟。為謹慎起見，應確保最終採取的轉換機制，是將非註冊權益事件的發生次數減至最低，以及可從註冊紀錄中明確確定所有有效產權負擔。

##### (II) 創立「已轉換土地」及「提升業權」可能造成混亂

根據閣下的轉換機制建議，由《土地註冊條例》（《土註條例》）下的登記冊自動轉換成土地業權註冊紀錄可望於三年後完成（「已轉換土地」）。但是，在「已轉換土地」經申請後獲提升致完滿業權之前，

追溯業權仍須根據《物業轉易及財產條例》的規定。業權只有在獲提升致完滿之後，業權註冊紀錄才可準確地說明物業的業權，供買賣有關物業的任何人士以此為據。

創立這些不同的業權將令地產代理感到困難及有所混淆，難以明白兩者的區別，令其無法為客戶提供適當意見。此外，在過渡期內，根據現行的《業權條例》及在自動轉換土地之前，土地業權註冊紀錄機制只適用於新土地而《土註條例》下的登記冊則適用於其他土地。由於地產代理主要依賴土地查冊紀錄以確定物業擁有權及產權負擔，從業員均希望採用單獨及統一且不存在任何複雜問題及微細區分的註冊紀錄以便易於遵守及理解。

### (III) 更改建議令根據常規規例填寫的指定表格必須作出修訂

倘若經修訂轉換機制獲採納，則根據常規規例填寫的各類指定表格或須作相應修改以配合更改建議。有關物業資料及地產代理協議的指定表格或須加入以下各項：(i)物業業權是否已獲提升；(ii)土地業權註冊紀錄內是否有任何警告備註，以便就非書面權益作出知會；(iii)申請業權提升的費用將由哪一方承擔等。

政府或須對常規規例進行適當的法例修改，以配合這些更改。

### (IV) 土地查冊紀錄更為方便使用

不論何種轉換機制將會獲得採納，土地查冊紀錄都是獲取物業資料的直接渠道。由於這些土地查冊紀錄可供公眾查閱，因此，地產代理及一般公眾應可輕易查證這些紀錄，以獲得有關任何擬進行交易的物業詳情。因此，最重要的是，這些土地查冊紀錄可在任何時間均輕易查閱，且須以易於理解的格式及內容編製。

因此，我們建議一併考慮相應的行政措施，包括延長土地業權查冊服務的服務時間，以及提供土地查冊紀錄的中文翻譯本。這些措施將有助於提升土地業權註冊制度的透明度及更為方便使用。

最後，就閣下於諮詢文件中提出並徵詢意見的三個問題（即諮詢文件第9頁的(a)、(b)及(c)），我們作出如下回應（按相同字母順序列出）：

- (a) 請參閱我們於上文(I)中所作出的回應；及
- (b)及(c) 鑒於業權轉換制度的任何更改均會帶來重要及長遠的影響，因此，必須審慎評估其中承擔的風險及獲得的裨益。於作出評估時，相信我們於上文(II)至(IV)中所作的回應將獲考慮。有鑑於此，我們對閣下所提出的(b)和(c)項並無特定優先選擇的立場。

倘若閣下需要就以上內容作出澄清，歡迎致電 2151 2913 聯絡本人。

( 簽署 )  
地產代理監管局  
規管及法律總監  
趙世芳女士  
謹啓

抄送：運輸及房屋局首席助理秘書長（私營房屋）馮建業先生

內部

地產代理監管局主席  
地產代理監管局牌照及執業委員會主席  
行政總裁

2009年3月11日

# CONSULTATION ON AMENDMENTS TO THE LAND TITLES ORDINANCE

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

### PURPOSE

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

### BACKGROUND

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

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

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

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

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

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

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

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

## QUESTIONS RAISED OVER THE ENACTED CONVERSION MECHANISM

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

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



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

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

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

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

## **SUGGESTIONS FOR MODIFICATION**

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

9. The features of the alternative scheme would be –

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

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

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

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

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

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

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

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

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

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

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

## **VIEWS SOUGHT**

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

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