



消費者委員會 CONSUMER COUNCIL

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來函編號 YOUR REF.

本函編號 OUR REF.

14 April 2009

Mr. Kim Anthony SALKELD, JP
Land Registrar
Land Registry
28th floor, Queensway Government Offices
66 Queensway
Hong Kong

Re: Consultation on Amendments to the
Land Titles Ordinance

Thank you for your letter of 2 December 2008 inviting the Council's views on the captioned Ordinance.

Attached please find the Council's submission for your consideration.

Yours Sincerely,

Connie LAU

Chief Executive
Consumer Council

**Consumer Council Submission to the Land Registrar on
the Consultation Papers on proposed Amendments to the
(i) Conversion Mechanism; and (ii) Rectification and Indemnity Provisions
under the Land Titles Ordinance (the "LTO")**

Introduction

1. The Consumer Council is pleased to present its views on the latest proposals in the two Consultation Papers.

1st Consultation Paper – Conversion of Existing Land and Property to the Land Title Registration System

Proposed replacement of the 2004 daylight conversion mechanism by a modified gradual conversion mechanism

2. Having considered the proposal, the Council has the following concerns:-

Shifting costs to owners

- (a) The 2004 LTO was a consensus reached by the community after consultation. Any substantial amendments to the 2004 conversion mechanism will inevitably cause further delay to the implementation of the LTO. The Council doubts whether there is convincing justification for such amendments. It appears that many of the problems identified in paragraph 5 of the Consultation Paper relate to resources and time. According to the Consultation Paper, it is hoped that the early conversion under the modified gradual conversion mechanism (the "**modified gradual mechanism**") would allow the Registrar to collect more fund at an early stage so as to build up a reserve for covering potential liabilities and initial operation costs of the title registration system.
- (b) The Council opines that the new mechanism will shift, at least partly, the costs and time needed for conversion onto the owners by requiring them to pay application fees (for upgrading) to cover the Registrar's costs for title investigation and to hold the less favourable converted title until the completion of the title investigation and the granting of the upgraded title.
- (c) Although no estimate is provided, it is understood that the fee would probably be determined on the basis of the time and costs spent for processing the applications (including title investigation). This could be a serious concern since under the 2004 daylight conversion mechanism, all costs for preparing for conversion will be met by the registration fees and levy. No extra fee is payable by existing owners. Nonetheless, the modified gradual mechanism now requires an owner who holds a good

title to the property (as confirmed by the solicitors acting for him in the purchase) to pay the application fee if he wants to get a "confirmation" of title from the Registrar and to avoid a sudden drop in value of his property merely because his title is an "unconfirmed" one.

Uncertainty as to the time needed for processing an application to upgrade

- (d) The Consultation Paper does not give any indication as to the time needed for processing an application. One has to bear in mind that there are around 2.8 million registers under the Land Registration Ordinance ("LRO") now. All these registers will eventually be transferred to the title registration system under the LTO. The task of processing the upgrading application for each of these 2.8 million registers, on top of other routine works, will certainly be a great challenge to the Land Registry. As such, the time needed for upgrading is clearly another area of concern.
- (e) Further, an appeal mechanism against the Registrar's rejection of an application to upgrade is also needed. Such appeal process further increases the uncertainty in the time needed for a title to be upgraded.

Open-ended Conversion process

- (f) The modified gradual mechanism is clearly an open-ended process. In England, it took over 100 years for the title conversion process to be completed. Although Hong Kong is much smaller in size, the fact that most buildings in Hong Kong are multi-storey buildings comprising of hundreds of flats will definitely increase the time needed for the whole conversion process (including upgrading). At this stage, there is no definite timetable.
- (g) Article 5 of the Basic Law provides that "*the previous capitalist system and way of life [in the HKSAR] shall remain unchanged for 50 years*". Given the experience in England, it is very unlikely that the whole modified gradual conversion process (including upgrading) will be completed before 2047. The 2047 time limit should also be taken into account in considering the appropriate conversion mechanism.

Three-tier legal regime and property market

- (h) As pointed out in the Consultation Paper, there are criticisms that the long period of dual running of both LTO and LRO systems under the 2004 daylight conversion mechanism will give advantage to the primary market over the secondary market until automatic conversion takes place 12 years later.
- (i) However, instead of providing a resolution, the modified gradual mechanism will further intensify the problem. If the modified approach is

adopted, the property market will inevitably be divided into three tiers until all existing titles have been upgraded and sold to purchasers for value at an unknown date in the future.

- (j) Firstly, there is still a distinction in the rules applicable to and protection enjoyed by the new land in the primary market and existing land in the secondary market. For new land granted after the commencement of the LTO, all owners will immediately acquire the fully protected registered title. On the other hand, after the LTO takes effect, an owner of existing land will remain under the LRO regime for 3 years. Thereafter, his land will be transferred to the title register. He will then hold a converted title and enjoy limited protection under the LTO until the land is upgraded at any time not earlier than 15 years from the commencement of the LTO. Such difference will certainly be reflected in the value of the properties in these two markets.
- (k) In addition, the modified gradual mechanism will further divide the existing properties in the secondary market into two tiers namely, converted title properties and upgraded title properties, which will again be subjected to different rules and protection. Such difference will also lead to disparities in the market prices of the two properties. As a result, an owner who purchased a flat before the commencement of the LTO might subsequently find his flat less valuable than an adjacent flat with comparable title just because his neighbour had paid the fees for upgrading and spent several months in obtaining an upgraded title. Presumably, before the purchase, the 1st owner had obtained a confirmation of good title from his solicitors. As such, he will simply find the whole mechanism unfair.
- (l) Further, before an upgraded title property is sold to a purchaser for value, the protection enjoyed by it under the modified gradual mechanism is also different from (and indeed not as comprehensive as) a registered title property (i.e. a new land).
- (m) All these will inevitably cause serious disruption to the property market and result in fluctuations in the value of different types of properties. Further, as mentioned above, unlike the 2004 daylight conversion mechanism, the modified gradual mechanism is indeed an open-ended process and as a result, such disruption will simply continue for an indefinite period until all existing properties have been upgraded and sold to purchasers for value.

Complexity of the modified gradual mechanism

- (n) Under the modified gradual mechanism, all new transactions of converted

title properties will be handled in accordance with the LTO until upgrading takes place at any time not earlier than 15 years after the commencement of the LTO. Yet, before such upgrading, the priority of any subsisting pre-transfer interests will be determined in accordance with the old laws (i.e. the LRO and the Conveyancing and Property Ordinance). On the other hand, the rules applicable to new land and upgraded land are different. The public may find this complicated and difficult to understand.

No registration of unwritten equities before transfer to title registers

- (o) There is no provision under the modified gradual mechanism for registration of unwritten equities at any time before the expiration of 3 years from the commencement of the LTO. In view of the implementation of the title registration system, it is important for claimants of unwritten equities to act promptly by filing warning notes at the land registers to protect their interests. The Council fails to see why they should not be allowed to take such action during the 3 years' period (i.e. before the property is transferred to the title register). The public may have difficulties in understanding such time restriction and complying with the complicated rules.

Additional burden on owners

- (p) Under the modified gradual mechanism, after the end of 15 years from the commencement of the LTO, an owner of a converted title property will have to submit an application to the Registrar for upgrading his converted title (though a good holding title) to an upgraded title recognized under the new system. Apart from the fees for upgrading, this procedure will also be an additional burden for the owners (in particular, vulnerable owners).
 - (q) Further, if lawyers are required to be involved in the upgrading application, the costs to be borne by owners will be further increased.
3. In the light of the above concerns, unless there is concrete evidence showing problems in a large number of LRO registers, the Council considers that the 2004 daylight conversion mechanism, although not a perfect one, is **more preferable** than the modified gradual mechanism. Nonetheless, the Council would also like to reiterate the concerns set out in its earlier letters to the Land Registrar dated 1 March 2004 and 15 June 2004.
 4. The Council also **opposes** the suggestion of commencing title registration for new land while further deliberation is given to the appropriate conversion mechanism for existing land. This proposal will simply divide the property market into two tiers (i.e. new land and existing land) which are governed by completely different legal regimes.

5. With regard to the problematic registers identified during the pre-conversion screening and the resources problems (under the 2004 daylight conversion mechanism) alleged in the Consultation Paper, the Council **supports** the following measures:-
- (a) amendments may be introduced to the LRO/LTO to give the Registrar a power to withhold the conversion (pursuant to the daylight conversion mechanism) of these problematic registers to the LTO registers until the title problems have been resolved;
 - (b) to resolve the financial problems, the Land Registrar may consider obtaining further funding from the Government for the conversion process, in particular, for building up a reserve for the Indemnity Fund to cover possible liabilities that may arise on conversion. The necessary funding may be obtained from the income generated by the Government from stamp duty or land auction proceeds.

2nd Consultation Paper – Rectification and Indemnity Provisions under the LTO

Proposed changes to the Mandatory Rectification Rule

6. With regard to the 3 proposed exceptions to the "mandatory rectification rule", the Council's views are as follows:-
- (a) **Deferred indefeasibility:** The Council fails to see any justification for treating the 1st bona fide purchaser and 2nd bona fide purchaser after fraud differently in the rectification proceedings. Further, this exception may also be abused by procuring the property to be assigned firstly to a controlled company and then to the purchaser himself. Therefore, if the concept of indefeasible title is to be introduced, it seems that all bona fide purchasers for value after fraud should enjoy similar protection.
 - (b) **Property resumed or surrendered to Government:** The Council has no objection in principle to this exception. However, it is worried that if the fraud occurred before conversion, the innocent former owner may face the risk of losing the property and at the same time, has no right to claim for indemnity under the LTO (unless the indemnity provisions are extended to pre-conversion fraud).
 - (c) **Multiple owners:** It is understood that the idea is to avoid mandatory restoration of title to former owner in case where the property has been redeveloped, divided up and sold to multiple new owners, since such

restoration may cause great disruption to the new owners. However, the exception, as proposed in the Consultation Paper, is not limited to cases of redevelopment only. The term "multiple" owners may apply to two or more owners. Assuming that in a case, the vendor has, upon the purchaser's request, divided a property into two parts (e.g. the flat and its roof) and assigned the same to the purchaser and his nominee respectively, the case will be considered as falling under this exception and the former owner will not be protected by the mandatory rectification rule. As one can see, this exception could well be abused.

7. With regard to the proposal of applying the rule of deferred indefeasibility to new land, the Council fails to see the justification of applying different rectification rules to converted/upgraded properties and new properties. Such difference will lead to unintended disruption to the value of these two types of properties.

Proposed extension of indemnity provisions to cover pre-conversion fraud

8. The Council proposed in 1999 that the indemnity provisions be extended to cover all or at least some of the pre-conversion fraud. This proposal was however rejected at that time.
9. The Council welcomes the reconsideration of this issue in the 2nd Consultation Paper and supports the proposal of extending the indemnity provisions under the LTO to cover pre-conversion fraud. The Council further suggests that such extension should apply to all land under the LTO so as to avoid any difference in the level of protection.

Proposed amendment to s.84(1) under paragraph 15 of the 2nd Consultation Paper

10. Under s.84(1), in fraud cases, only those persons who suffer "loss of ownership" are entitled to claim indemnity. Although no definition of "ownership" can be found in the LTO, the term "owner" is defined in s.2 as the person named in the title register as the owner, lessee or holder of a Government lease of or an undivided share in the land, and the chargee of the land.
11. It is noted that, apart from ownership, a person may suffer loss of other kinds of rights or interests in the land (e.g. equitable interest) as a result of the fraud. The provisions of s.84(1) may not be wide enough to allow a claim for indemnity by such person.

Consumer Council
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