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<th>Coming! Ready or Not! - the Land Titles Bill; 業權草案: 如箭在弦! 一切就緒?</th>
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<tr>
<td><strong>Author(s)</strong></td>
<td>Sihombing, JE</td>
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<tr>
<td><strong>Citation</strong></td>
<td>Hong Kong Lawyer, 1999, v. May, p. 50-56; 香港律師, 1999, v. May, p. 50-56</td>
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<tr>
<td><strong>Issued Date</strong></td>
<td>1999</td>
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<tr>
<td><strong>URL</strong></td>
<td><a href="http://hdl.handle.net/10722/44894">http://hdl.handle.net/10722/44894</a></td>
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<tr>
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Introduction
In 1989 the Registrar General, now the Land Registrar, set up a working party to consider the conversion of the deeds system prevailing under the Land Registration Ordinance (Cap 128) into a system of title registration. Thereafter, the Law Society and other interested bodies studied these proposals and a series of draft bills. A bill was presented to LegCo in 1994 but later withdrawn. It is now presumed that another draft of a Land Titles Bill will be presented to LegCo during the current 1998-1999 session. The comments below are made on the 14th draft, dated 18 November 1998.

The Existing System
The existing system of land dealings is that of a deeds system under which legal title to land, or to an interest in land, is derived not from the registration of a dealing, but from the execution of the appropriate instrument. Subject to the terms of the Ordinance, registration of instruments provides priority, notice and a record of transactions with land.

Section 4 of the Ordinance abrogates the doctrine of notice so that although registration is not mandatory, in practice it has become so. Until 1991, conflicting unwritten interests could be ignored by a party dealing with land; but after Wong Chinn Ying v Cheng Kam Wing [1991] 2 HKLR 253, priority for such interests were governed by common law principles.

The Torrens System
The ‘registration of titles system’ sought to be introduced by the Land Titles Bill is probably synonymous with ‘the Torrens system’, a scheme for the registration of titles introduced in South Australia in 1857. The aim of that system was to provide for certainty and simplicity in land dealings and to avoid the complex, cumbersome, expensive and uncertain aspects of the deeds system. The Torrens scheme was quickly adopted in the other Australian States, Fiji, New Zealand, early Malaysian States, as well as by African States. While there are other hybrid schemes under which registration effects title, the Torrens system provides the most extensive regulation of land dealings and would seem to be the model for us in Hong Kong (although early attempts to introduce Torrens into the New Territories in 1902, and generally through Hong Kong in 1920, did not come to fruition).

If the Bill does not seek to provide for Torrens, but is some hybrid form of registration of title system, then a great chance has been lost to introduce a clear, workable system that gives an indefeasible and certain title.

Characteristics of the Torrens System
There are probably nine characteristics that define the Torrens system and distinguish it from the deeds system. These are title, indefeasibility, the caveat system, the noting of interests, the position of trusts, the role of ‘conscientious obligations’, the compensation scheme, antagonism to equity and paramount interests.

Under the Torrens system, title to, or to an interest in, land comes from the registration of an instrument in statutory form. Thus registration of a statutory transfer will vest the legal or statutory title to the land in the new registered proprietor.

Pending perfection, a registrable interest can be caveated for priority and protection; in common law terms the interest would be considered to be equitable.

On registration this title becomes indefeasible, and is guaranteed by the State. Indefeasibility is the cornerstone of Torrens and makes title ‘unimpeachable or unexaminable’, ‘conclusive’, and one which has ‘immunity from attack.’ Assets Co v Mere Rohi [1905] AC 176; Temenggong Securities Ltd v Registrar of Titles [1974] 2 MLJ 45. There are two forms of indefeasibility: immediate indefeasibility, under which registration cures any defect in the instrument and makes title immune from attack other than for the registered proprietor’s fraud; or that of deferred indefeasibility, where the title is subject to attack from a variety of interests and really only becomes indefeasible when title is passed onto...
The question of the date of conversion will not be discussed. That is more a matter of policy than of substance. However, in light of the experience in another jurisdiction, namely Penang, where conversion has been delayed due to local problems, the writer must indicate a bias in favour of immediate or midnight conversion.

**Title and the Bill: Clause 2(1) definitions, and Clause 19(1)**

In most Torrens jurisdictions, registration vests an indefeasible title in the registered proprietor which is 'good against the world' subject to any statutory exceptions, but without express mention of 'ownership' of the land or interest.

However, in providing for the effect of registration, Clause 19(1) refers to ownership rather than title. Further, in its current form, whilst it provides that 'immediately upon a person becoming the owner of registered land there shall vest in that person' various rights, there is no indication how this ownership has been obtained. The definition of 'owner' in Clause 2(1) 'means the person named in the Land Registrar', so presumably registration, which complies with Clause 4, is necessary to make one an owner. But there is no definitive statement linking the rights given by Clause 19(1) with the need to register to procure these rights.

The owner will hold subject to Clauses 20 and 77, and to various restrictions including covenants in the Government lease, the inherent benefits and burdens of ownership of a unit in a multi-storey building, and overriding interests. Again the emphasis here is on ownership rather than on restrictions to which the registered title is subject. It remains to be seen whether this distinction means that the Bill is altering the basic structure of Torrens.

Throughout the Bill, 'ownership' is used in lieu of the more traditional 'title' with some strange results; thus for example a 'chargee' is defined as 'the owner of a charge'. More usually, the term, were definition needed, would refer to the chargee as the registered proprietor of a charge. Stress on ownership as the source of rights, rather than title given by registration, is equivocal and echoes the deeds system. Hopefully this is merely a semantic problem!

**Indefeasibility and the Bill: Clause 19(1) and Clause 78**

There is no reference to indefeasibility in the Bill, although Clause 27 refers to possible defeasibility in certain circumstances. Clause 19(1), in vesting certain rights in the owner, does not make a definitive statement about the owner's title being indefeasible. But that interpretation can be derived from an understanding of Torrens principles, assuming that the framework of the Bill is to provide for Torrens rather than a hybrid system. The indefeasibility formula also enables classification of the title, or as here 'ownership', as immediate or deferred. Fraud will affect 'ownership', but in the context of either rectification by the court (Clause 77) or the indemnity provisions (Clause 78). Clause 77 enables the court to order rectification where registration was obtained by fraud or use of a void or voidable instrument. If there is indefeasibility under the Bill, then this Clause looks like providing for deferred indefeasibility. Fraser v Walker [1967] 1 All ER 169. Clause 77(2) does refer to the factors that will affect the title of the owner of registered land; this is probably the closest the Bill gets to treating title, rather than ownership, as the fulcrum of Torrens.

Clause 78 also provides that fraud can be a matter for payment of compensation where a person suffers loss in various cases.

**Cautions and Definitions: Clauses 2, 30, and 66 to 75**

The Bill provides for two forms of cautions as the equivalent to the
Torrens caveat. Briefly, Clause 66(1) and (2) refer to the right of certain parties dealing with land to register a consent caution, with the consent of the other party to the transaction, and Clause 66(3) enables a non-consent caution to be registered by a claimant to an interest. The non-consent caution would seem to apply where the owner disputes the rights of the cautioner. It is not clear whether the caution process will function as the Torrens caveat, which does inhibit registration of adverse transactions without consultation of the caveator. It remains to be seen how the system will function in practice.

The terminology is again a matter of concern. A caution is ‘registered’. The inherent meaning of ‘registration’ in a Torrens system is that it ‘vests and divests title’; a caveat should thus be entered on title as it creates nothing and merely acts to protect for priority purposes. By reference to the definitions in Clause 2(1) of ‘entry’ and ‘register’, it seems that there is no distinction between them. This seems to continue the form of registration under the current Land Registration Ordinance, which does not discriminate between claims to interests in land and a record of title.

Provision is also made for registration of a judicial inhibition, which prevents registration of inconsistent dealings (Clauses 70 to 72) and for a registrar’s caution, although called a restriction (Clauses 73 to 75).

Conscientious Obligations: Equity and Trusts

Clauses 26, 65 and 77

Clauses 26 and 65 have the effect of restricting the role of Equity. Clause 26(1) provides that ‘dealings’, ie those transactions in land effected by the owner and another, are not effective until registered and that an unregistered dealing will operate only as a contract. Dealings include charges (Clause 31ff), transfers (Clause 38ff) and leases (Clause 43). However Clause 26(4) proscribes the right to specific performance for such a contract. Thus no equitable relief is available for the owner’s breach of contract and common law damages only would be available. This represents a major change in the law by removing one of the most valuable aspects of relief for land contracts.

Further, the proscription against specific performance tends to classify indefeasibility as being immediate, but as noted, Clause 77 seems to provide for deferred indefeasibility. This is another example of the ambivalence found in many of the clauses in the Bill.

Equity is further limited by proscribing the use of the register to create a trust. Where a trust has been created off the register, then Clause 65 permits the trustee to be described as trustee’, but details of the trust cannot be registered.

Compensation:

Clauses 78 to 83

In general the Bill provides for a limited indemnity to be paid where a person suffers loss by reason of ‘an entry in or omission from’ the Land Register, title records, or applications record due to certain instances of fraud or mistake of another (Clause 77). Generally if the indemnity is paid, then the rights of the recipient against the defaulting party must be subrogated to the Government (Clause 82). Errors in survey are not the subject of possible indemnity (Clause 83).

Overriding Interests:

Clauses 19(2) and 21

Overriding interests are those interests which are not registered, entered or noted on the title but to which the owner takes subject (Clause 19(2)). They are varied and include customary rights over land subject to Part II of the New Territories Ordinance (Cap 97), certain easements, certain first charges such as those under s 18(1) of the Estate Duty Ordinance (Cap 111), certain leases for terms not exceeding 3 years and certain public rights. In other words these rights automatically run with the land, regardless of whether they are identified at the time of the dealing and without the need for their registration. Clause 21(2), (3) and (9) do provide for their registration and subsequent removal from the register.

Overriding interests do not detract from an indefeasible title. All Torrens systems acknowledge the existence and enforceability of these interests.

Some Additional Features:

Clauses 2(2), 23 to 25, 41 and 91

Clause 2(2) requires a solicitor to verify the application for registration of any matter. This casts a heavy burden on the solicitor because Clause 91(7) provides for criminal sanctions where the statement is made ‘falsely or recklessly’ (see Davison, supra).

No document of title will issue in respect of registered titles. Instead, the owner of land can apply to the Registrar for the issuance of a ‘state of title certificate’ to show all current entries in the Land Register, subject to overriding interests and subsequent entries (Clause 23).

On the sale of land, the vendor is required to provide the purchaser with a copy of the state of the title as well as details of dealings which have been entered or registered on that title. Details of overriding interests must also be provided (Clause 41). While Clause 24 allows the purchaser to search the register, Clause 23 is mandatory against the vendor.

Conclusion

The writer is looking forward to the implementation of a Torrens system in Hong Kong. Hopefully any problems with the Bill will be ‘ironed out’ in its passage through LegCo.

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業權草案：如箭在弦！
一切就緒？

《土地業權條例草案》中所建議的大規模改革，勢必使得香港物業
業主利益重回一個新紀元。這篇文章分析了法律體系中《草案》將
要面對的一些主要變革，而筆者則將探討《草案》內對律師們涉及
刑事懲罰的條文。

引言

於 1989 年，資深律師黃氏（即現在的《土地業權條例草案》（第 128
章））下的業權註冊制度轉變為一個業權註冊制度的可行性。後
來，香港律師會及其他有識之士紛紛對業權註冊制度的可行性
進行了深入研究。一份包含業權改革建議的條例草案曾於 1994 年呈
交當時的立法局，但後來被撤回。一般估計，新的《
土地業權條例草案》（以下簡稱《草案》）將於本立法年度（1998 至 1999 年）
呈交立法會。本文旨在就《草案》的第十四
版（1998 年 11 月 18 日）提出若干意見。

現行制度

現行的土地交易制度乃一個業權註冊制度，在這制度下，業權業
者享有業權的權利，常隨創設業權的書面而成立，而非基於交易的
書面。在《土地業權條例草案》規定下，業權書的註冊為土地交易提供
優先權，通知及記錄。

《土地業權條例草案》第 4 條剔除了有關通知
的原則。因此，業權業者在業權成立時並非
對業權業者有害，但實際上已成為必然作成的步驟。其
自 1991 年起，進行土地交易的人士可對
有書面的業權業者之旨不整，反之，自
從 Wong Chim Ying v Cheng Kam Wing
[1991] 2 HKLR 253 案的判決後，關於業權
業權的優先次序，便要根據普通法原則
而予以認定。

「Torrens 制度」

《草案》建議引入的「業權註冊制度」，
很可能與澳洲於 1857 年引進的業權註冊
制度相同。澳洲的制度稱為「Torrens 制
度」，它被引進的目的是要讓土地交易變
得簡單明瞭，以及免除業權註冊制度的各
項弊端——即複雜、麻煩、昂貴和不明瞭。

「Torrens 制度」很快便被澳洲各州、
英屬、新南威爾士、馬來西亞等各省以及非
洲各省採用，縱使有著其他業權註冊制度而
未能業權的「混合」制度存在，但「Torrens 制
度」為土地交易提供的一種便利，似乎是最適合香港採用的一套模式
（順便一提，早於 1902 年和 1920 年，已
曾有人建議把「Torrens 制度」分別引入新
界區及整個香港，但兩次嘗試都沒有任何
成果）。

香港現在可說是有一個黃金機會引進一套
合適可行而又賦予明瞭和不容廢除的業
權的制度。但倘若《草案》建議引入的並
非「Torrens 制度」而是某種「混合式」的
業權註冊制度的話，那麼這個黃金機會便
會付諸流水了。

「Torrens 制度」的特徵

「Torrens 制度」有九項特徵——業權、不
容廢除性、登記備忘制度、業權的注意、
債權的受讓人、「負債之上的責任」的角
色、補償計，及與普通法的對立，以及主
要權益。這些特徵也構成「Torrens 制度」
與業權註冊制度不同的地方。

在《Torrens 制度》下，土業業權或土
地業權業權乃源自業權的書面予以
註冊。因此，決定土地業權的註冊，將把
土地的法律或業權歸於新的業權所有人。

在某可注冊的業權的轉讓有待完成時，
在業權可注冊的業權提出時會發
生，取得業權業者及所保存的業權。從普通法角
度去看，業權乃屬無法區分。

註冊一經完成，業權便會變成不可
廢除（indefeasible），並得到業權的保障。不可
廢除性可說是「Torrens 制度」的基石，它
使業權業者「不容質疑或強迫」，「不可
廢除」，以及「免受攻擊」。（另見 Assets Co v Mere Rallies [1905] AC 176 及
Clause 91(7) of the Land Titles Bill

Solicitors with a sense of history will wonder whether the Government is reaching back into its earliest historical memories in the heavy criminal sanctions imposed on solicitors in Clause 91(7) of the Land Titles Bill.

The penalty in the Van Diemen’s Land Act (the grandfather of our original Land Registration Ordinance) for wilfully destroying, embezzling, secreting, or forging, etc any memorial with intent to defraud was death without benefit of clergy (see article by W K Thomson in (1974) 4 HKLJ 242 at 245). Our ordinance (originally s 24 of Ordinance No 1 of 1844) had a penalty of up to 14 years imprisonment for this.

The punishment for solicitors who transgress Clause 91(7) of the Bill is not as physically abhorrent but the effect is equivalent to professional death.

Clause 91 is a greatly expanded version of s 24 of the present Land Registration Ordinance (Cap 128) with some new offences added. The greater part of Clause 91 is unobjectionable.