

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 A bill was presented to LegCo in 1994 but later withdrawn.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 Chim 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 Roihi* [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

a bona fide purchaser for value. A negative aspect of indefeasibility is that fraud can render a title defeasible and it is subject to specific, statutory interests. Despite this, the indefeasible title is the most sound of titles, especially because it is usually backed by the State so that **compensation** can be paid through an Assurance Fund.

Some unregistrable interests may be caveated, whilst others may be **noted on title**. **Equity** has no place in the Torrens scheme and the register cannot be used to create a **trust**. However, a trust created outside the registrar can be acknowledged in several ways, such as enabling the beneficiary to caveat.

Some **rights usually contractual**, referred to as 'conscientious' or 'in personam' obligations, created by or otherwise binding on the registered proprietor, can affect his indefeasible title by making him liable to various remedies, including specific performance. *Barry v Heider* (1914) 19 CLR 197; *Hon Ho Wah v UMBC* [1994] 2 MLJ 385.

Certain unregistered and unnoted interests automatically affect title, such as easements, regardless of the registered proprietor's knowledge of them or involvement in their creation. These **paramount interests** in general law terms are those which 'run with the land'. In the Bill these are called 'overriding interests'.

What are the Main Features of the Land Titles Bill?

Does the Land Titles Bill function as a Torrens system? The answer to this is yes, although with some hesitancy because several features of the Bill do not mirror general Torrens principles. It must be said that the Bill, in its present form, is not easy to read and comprehend. Some of the problems relate to definitions but there are also inconsistencies that hinder interpretation. To analyse the Bill, the nine characteristics of Torrens will be used as a guideline.

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 'charge' 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 (Clause 78) 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).

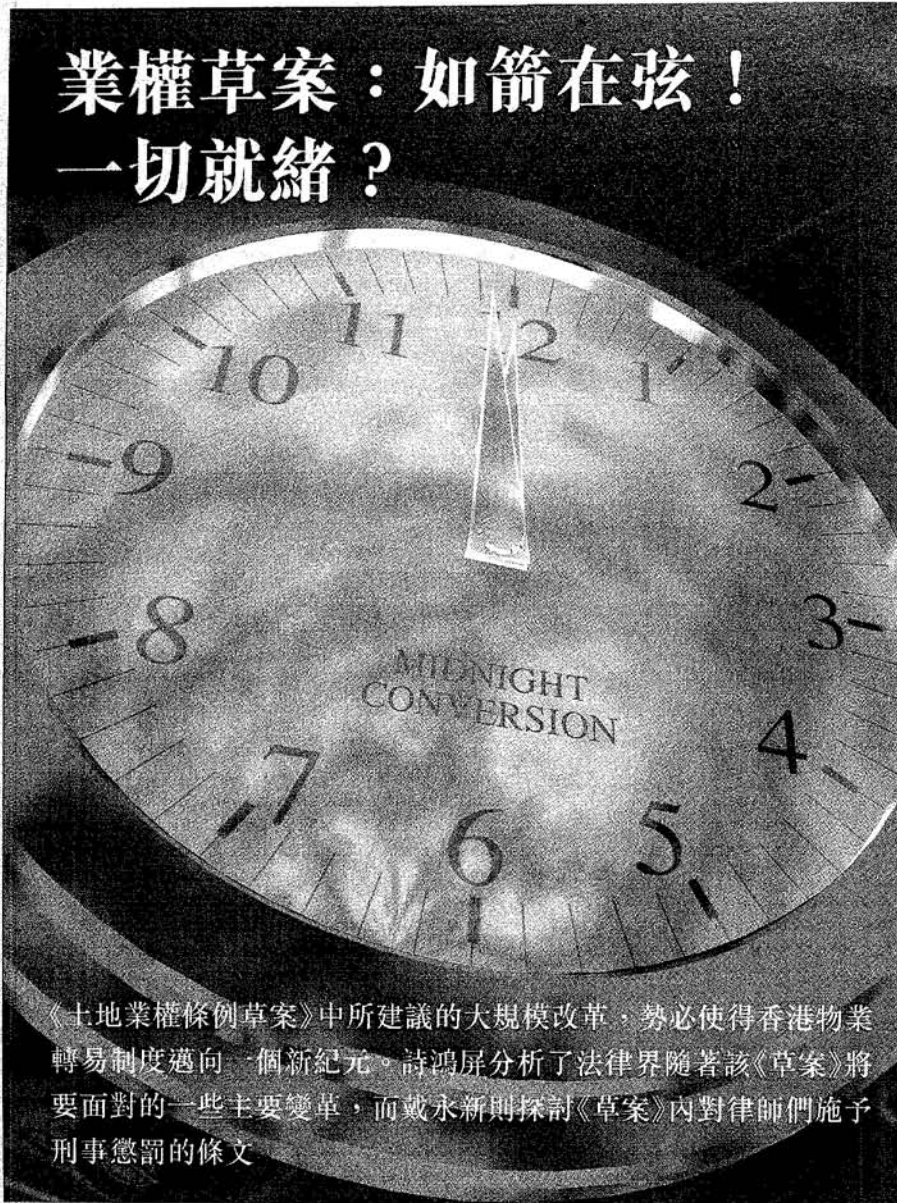
On the sale of land, the vendor is required to provide the purchaser with a copy of the state of the title as well as details of dealings which have been entered or registered on that title. Details of overriding interests must also be provided (Clause 41). While Clause 24 allows the purchaser to search 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，勢必使得香港物業轉易制度邁向一個新紀元。詩鴻屏分析了法律界隨著該《草案》將要面對的一些主要變革，而戴永新則探討《草案》內對律師們施予刑事懲罰的條文

引言

於 1989 年，註冊總署署長（即現在的土地註冊處處長）成立了一個工作小組，專責探討把現行《土地註冊條例》（第 128 章）下的契據註冊制度轉變成為一個業權註冊制度的可行性。隨後，香港律師會及其他有關團體紛紛對各項建議和一系列的草案進行了深入研究。一份包含各項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，新的一份《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契據註冊制度，在這制度下，就土地或附屬於土地中的權益，其擁有並非創設自交易的註冊，而是自適當文書的簽立。在《土地註冊條例》規範下，文書的註冊為土地交易提供優先權、通知及紀錄。

《土地註冊條例》第 4 條廢除了有關通知的原則。因此，儘管註冊並不是強制性，但實際上已成了必然作成的步驟。直至 1991 年以前，進行土地交易的人士可對有衝突的非書面權益置之不理。然而，自從 *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253 案的判決後，關於非書

面權益的優先次序，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」，很可能與南澳洲於 1857 年引進的業權註冊制度相同。南澳洲的制度稱為「Torrens 制度」，它被引進的目的是要讓土地交易變得簡單明確，以及免除契據註冊制度的各項弊端——即複雜、麻煩、昂貴和不明確。「Torrens 制度」很快便被澳洲其他省份、斐濟、新西蘭、馬來西亞早期各省以及非洲省份採用。縱使有著其他藉著註冊而得到業權的「混合」制度存在，但「Torrens 制度」為土地交易提供的監管至為廣泛完備，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，已曾有人嘗試把「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切實可行而可賦予明確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、知會備忘制度、權益的注意、信託安排的地位、「良知上的責任」的角色、補償計劃、與衡平法的對立，以及首要權益。這些特徵也構成「Torrens 制度」與契據註冊制度不同的地方。

在「Torrens 制度」下，土地業權或土地權益業權乃源自把法定格式的文書予以註冊。因此，法定土地轉易的註冊，將把土地的法律或法定業權歸予新的註冊所有人。

在某可予註冊的權益的轉歸有待完成時，有關人士可替該權益提出知會備忘，以取得優先權及所需的保護。從普通法角度去看，該權益乃屬衡平法權益。

註冊一經完成，業權便會變成不容廢除 (indefeasible)，並得到國家保障。不容廢除性可說是「Torrens 制度」的基石，它使業權變得「不容質疑或查問」、「不可推翻」，以及「免受攻擊」。（另見 *Assets Co v Mere Roihi* [1905] AC 176 及

冊」。在「Torrens 制度」下，「註冊」的固有意義是「業權之歸屬及除權」，而知會備忘的用途只是為了保護優先權而不是創設任何業權。因此，知會備忘應是附記入業權內。從《草案》第 2(1) 條內「記項」及「註冊」的定義去看，兩者之間似乎並不存在著分別。這似乎是延續現行《土地註冊條例》下的註冊方式，當中並沒有在土地權益的聲稱與業權紀錄兩者之間作出區分。

《草案》第 70 至 72 條為司法制止令 (inhibition) 的註冊作出規定，該等制止令的用意是防止不一致交易的註冊。第 73 至 75 條則為處長的警告書 (條文稱之為「限制令」(restriction)) 的註冊作出規定。

良知上的責任：衡平法與信託

第 26 條、第 65 條及第 77 條

第 26 條和第 65 條的影響，是限制衡平法擔當的角色。第 26(1) 條規定，所有「交易」(意即由擁有人與另一人進行的土地交易) 須經註冊方告有效，而未經註冊的交易只能作為合約般發生作用。「交易」包括押記 (見第 31 條起)、轉讓 (見第 38 條起) 及租契 (見第 43 條)。但第 26(4) 條摒棄了就此等合約聲請強制履行的權利之存在。故此，若擁有人違反合約，另一方只能主張普通法損害賠償，而不能得到衡平法濟助。這即是把土地合約享有最寶貴的濟助之一移走，實在是一個重大的法律改變。

此外，對強制履行的禁止，傾向於把不容廢除性分類為「即時不容廢除性」。可是，正如上文提到，第 77 條似乎是為「後

時不容廢除性」作出規定。這是另外一個例子，顯示在《草案》不少條文中出現的模稜兩可之處。

《草案》禁止使用註冊紀錄冊去創設信託，藉以進一步限制衡平法的作用。若信託在紀錄冊以外產生，第 65 條容許受託人被描述為「作為受託人」，但有關係的詳情，不得記入紀錄冊上。

補償：第 78 至 83 條

整體而言，根據《草案》，若土地註冊紀錄冊、業權紀錄或申請紀錄內出現「所載或遺漏的記項」而該記項是由於另一人的欺詐或某種錯誤而構成的話 (見第 77 條)，因而蒙受損失的人便有權得到有限額 (見第 78 條) 的彌償。一般來說，政府付出了彌償款額後，便有權代收款人之位而取得針對犯錯者的權利 (見第 82 條)。測量上的錯誤不能成為申索彌償的原因 (見第 83 條)。

凌駕權益：第 19(2) 條及第 21 條

凌駕權益指那些未經註冊、記項或以附錄形式記入業權上的，但擁有人須受其規限的權益 (見第 19(2) 條)。凌駕權益的種類繁多，包括影響土地的傳統權益 (在《新界條例》(第 97 章) 第 II 部適用的情況下)、某些地役權、某些第一押記 (例如根據《遺產稅條例》(第 111 章) 第 18(1) 條設定的第一押記)、某些租期不超過三年的租契，以及某些公眾權利。換句話說，這些權益自動隨土地轉移，毋須事先註冊，不論它們有否在土地交易進行時被識別出來。但第 21(2)、(3) 及 (9) 條確為該

些權益的註冊及隨後從註冊紀錄冊移去等事宜作出規定。

凌駕權益並不減損業權的不容廢除性。所有「Torrens 制度」均確認該些權益的存在及可強制執行性。

其他附加特點：第 2(2) 條、第 23 至 25 條、第 41 條及第 91 條

第 2(2) 條規定，就任何事項作出的註冊申請，須由律師核實。這對律師來說是相當沉重的負擔，原因是第 91(7) 條規定任何「虛假地或罔顧後果地」核實申請的人須接受刑事處罰 (另見戴永新之撰文)。

土地註冊處不會就註冊業權發出業權文件。但土地擁有人可向處長申請取得一份「業權狀況證明書」(state of title certificate)，以顯示土地註冊紀錄冊上的所有當時有效的記項。該證明書受凌駕權益及其後記入的記項所規限 (見第 23 條)。

賣方在出售註冊土地時，須向買方提供業權狀況文件的副本，以及曾在該業權上記項或註冊的交易的詳情。賣方亦須提供凌駕權益的詳情 (第 41 條)。雖然第 24 條容許買方有權向註冊紀錄冊進行查冊，但第 23 條對賣方而言是具強制性的。

結語

筆者期待香港引進及實行「Torrens 制度」，也盼望《草案》內出現的任何問題可在立法會審議過程中得到解決。

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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.

The present s 24 refers to destruction and tampering, etc of memorials, deeds, etc deposited in the Land Registry and registers, books, etc