

**LAND TITLES BILL**

**DRAFTING COMMENTS**

1. Paragraph (b) of the definition of "Charge" seems to exclude a building mortgage. This needs to be amended. A possible solution is to simply exclude a mortgage of the interest under a sale and purchase agreement or alternatively a mortgage of any interest which is protected by a caution.
2. "instrument" - What is the purpose of paragraph (b). Wills are not registerable currently in the sense they do not affect an interest in land. Is it intended to refer to the Grant of Administration to which a will might be annexed, or is this a reference to the pre 1992 ability to "register" a will at the Land Registry - although this was not for the purpose of registering an interest relating to land.  
  
In any event (b) would appear to be redundant and should be deleted.
3. "land" - for the purposes of the Bill it is considered that a comprehensive definition of land would be appropriate.
4. In the definition of "long term lease" why is there is a need to refer to it as a "bona fide" lease. It seems these words should be deleted. They are unnecessary. In addition a "long term lease" for a term greater than 21 years should be capable of negotiation notwithstanding that at the time of first registration less than 21 years remains of the term. Otherwise for a development such as Robinson Place it would depend on when a dealing took place whether first registration could be applied for.
5. "record" - does the latter part of this definition refer to electronic records? If not, what does it mean? If it does why not say so?
6. "wording day" - the definition should refer to Section 71 of Interpretation and General Clauses Ordinance, not Section 71(2).
7. Section 2(2)(a) - should this provision be deleted in view of the provisions of Clause 4. In any event we believe the words "whether or not" should be deleted from the opening part of this Section.

8. Section 2(2)(b) - should this provision be deleted to prevent any conflict with the definition of "registered land" and Section 13 of the Bill.
9. Section 3(2) and (3) - we remain unconvinced as to why the provisions of the Land Titles Bill should be subservient to conflicting provisions in other ordinances. Should it not be the other way round. For example, under the Trustee Ordinance the appointment of a new trustee has the effect to vesting title in land from the retiring trustees to the new trustees. Surely that vesting should only take effect when the new appointment has been registered. The provisions of Part 7 of the Bill deal with the registration of transmissions by operation of law or enactment.
10. Section 4(c)(ii) - should it be a requirement that an order has to be made for the purposes of enforcing a judgment before it is capable of being registered. What about interim injunctions or "freezing" orders. Note also that there is no definition of "order" therefore the relevant sub-section should be amended to refer to an order of the court.
11. In Section 8 is it appropriate that where a loss arises as a result of the fault of a government employee the indemnity limit would still apply.
12. Section 10(3)(g) - the reference should not be to "long term lessee" but simply "lessee".
13. Section 11(3)(a), (b) and (c), Section 70(2) and any other sections where this phraseology has been used - there is no need to refer to the various types of sale and purchase agreement, a generic reference to sale and purchase agreement is sufficient.  
  
The last word of the opening paragraph of Section 11(3) should not be "as" but should be "pursuant to".
14. Section 11(4)(a) - a building mortgage should not be treated in this way.
15. Section 12(1)(a)(ii) - in fact registration of government leases is carried out by government not the lessee, i.e. the government lease is first registered before it is returned to the lessee.  
  
Section 12(1)(b) - "applications" and "owners" in the first line should be in the singular.
16. The definition of "land" in Section 12(4) should be deleted. As suggested there should be one comprehensive definition in Section 2.
17. Section 12(5) - it should be made clear that the lessee is able to apply for first registration of his long term lease.

18. Section 13(1)(b) - in the last line - the reference should not be "the first owner of the land" but should be "the owner of the land".
19. Section 14(1) - delete reference to "first owner" and replace with "owner" in the second line.
20. Section 14(2)(d)(iv) - this should say "enforceable against the owner of the land".
21. Section 14(3) - should the section be amended to refer to interests which have not been subsequently protected by registration prior to the sale to the subsequent purchaser.
22. Clause 17 - there does not seem to be any requirement that the Registrar should first contact the party affected by the removal of the entry.
23. Section 24(1)(c)(i), (ii) and (iii) - there is no need for these to be referred to separately. Rights of way and rights of water are easements.
24. Section 24(1)(d) - we do not believe the provisions of this sub-section correctly protect all "implied" easements. There appear to be 3 types of implied easements, namely easement of necessity, intended easements and continuous and apparent easements. The first two types of implied easements are capable of implication for the benefit of land retained by vendor over land sold by him as well as over the land retained in favour of the land sold. Continuous and apparent easements only arise in favour of land sold over the land retained. It might be easier rather than to seek to define when an easement is implied under the Ordinance to simply limit the operation of sub-clause (d) to easements which are implied by the law on the disposal of any land and which are not expressly granted or reserved in any instrument.
25. Section 24(4) refers to an order of the Court of First Instance. On a strict reading of this an order of any other court e.g. the Court of Appeal would not suffice. We presume this is not intended. This apparent anomaly appears in a number of other Sections of the Bill.
26. Clause 25 - does "acquisition" refer to the time of contract or time of registration. This should be amended to read "A person on becoming registered as the owner of....".
27. Section 29(2) - this Section would seem to prevent any transaction or dealing with land, which would be classified as unregistrable under the Bill, from operating as a contract. As it reads only a registrable transaction can so operate (subject to para (b) in that sub-clause).
28. Was it the intention to make all other agreements null and void as contracts? Or was the intention the reverse in that all contracts dealing with land could continue to have effect as contracts (remedy by common law damages if not in accordance

with the terms of the Bill) but that only those contracts producing interests recognised by the Bill could culminate in registration?

If this is what Clause 29(2) seeks to achieve it does not do so.

29. Section 33(4), (5) and (6) - the word "concerned" in the opening paragraph of each sub-section should be deleted.
30. Section 33(7)(b) - do we still need these provisions now that it is possible to defer stamp duty for sale and purchase agreement. If so, should this section differentiate between agreement for sale and purchase relating to residential property and non-residential property. The references in this section to provisional sale and purchase agreement and sale and purchase agreement are superfluous they should just refer to the generic sale and purchase agreement.
31. Section 42 - this provision needs to be amended so as to cater for divisions of a new building into flats and undivided shares where land boundary plans will not be appropriate.
32. Section 44(1) - in the opening paragraph there seems to be no need to refer to "lessee or chargee". This simply confuses a sale.
33. Section 47(1) - in the second line the reference to "first lessee" should simply be "lessee". Ditto re sections 47(2)(a) and (b).
34. Section 70(5), (6) and (7) - it is not clear how this will work in practice. Sub-section (6) says the cautioner is the person who intends to effect the dealing. Does this mean the donor or the donee or either. Sub-section (7) says that the Commissioner is the cautioner.
35. Section 81(3) - this should provide for applications by the owner of a registered charge. The drafting of this Section, particularly sub-section (c) seems overly convoluted and confusing and could be simplified and improved upon to achieve the desired result.

Dated 22 April 2003

The Law Society of Hong Kong