



THE LAW SOCIETY'S SUBMISSIONS ON THE ADMINISTRATION'S LATEST PROPOSAL ON AMENDMENTS TO THE LAND TITLES ORDINANCE – RECTIFICATION AND INDEMNITY ARRANGEMENTS

The Law Society has the following comments on the proposals put forward by the Development Bureau in its December 2008 paper ("*Consultation Paper*") on amendments to the "*Rectification and Indemnity Provisions*" in the Land Titles Ordinance ("*LTO*"):

Exceptions to Mandatory Rectification Rule

1. The Government has concern that the mandatory rectification rule will work to undermine confidence in the title register and the security and ease of conveyancing that the LTO aims to achieve.
2. The Law Society shares the concerns of the Government and believes that indefeasibility of title is an important feature of a title registration system. We support in principle the introduction of the proposed exceptions to the rule as set out in paragraph 26 of the Consultation Paper subject to review of the legislative provisions and introduction of further legislative changes to the Indemnity Provisions as set out in the succeeding paragraphs 3 & 4.
3. The mandatory rectification rule was introduced in the 2004 legislation in recognition of the fact that due to the effect of the cap on indemnity, unless rectification was made in favour of the former innocent owner being defrauded and lost his property, he might find himself worse off under the new

system. The Law Society is of the view that the Mandatory Rectification is an unfortunate political expediency arising out of the Administration's lack of commitment in capping the indemnity payment, otherwise it should have no place in our Land Titles Ordinance. The Law Society is strongly of the view that this deferred indefeasibility is the very minimum of any registered title system. The Law Society further believes that the cap on indemnity to the innocent former owner should be lifted in the proposed exceptional scenarios to the mandatory rectification rule.

4. Further, as the Administration has rightly pointed out in paragraph 29 of the Consultation Paper, the exclusion of indemnity for pre-conversion fraud to the innocent former owner under Section 84(4)(c) of the Land Titles Ordinance in the proposed exceptional scenarios should also be lifted as otherwise, a former innocent owner may be barred both from recovering the property or any indemnity if the fraud that removed him from the register occurred before conversion.

Other Proposed Amendments

5. The Law Society noted the Government has proposed other amendments with the view to clarify the ambiguities in the existing provisions and to ensure that the arrangements will work effectively.
6. The Law Society would like to reserve its overall comments on these other proposals upon sight of the draft legislative provisions. We would, however, highlight for the Administration's consideration the following observations:

- (a) **Identity of the Persons Eligible to Claim Indemnity**

Section 84(1) of the LTO states that "...a person suffering loss by reason of an entry in the register or omitted from the register, where such entry has obtained, made or omitted,... as a result of (a) fraud...(ii) which affects the ownership of registered land... shall be indemnified by Government in respect of that loss."

The Administration was concerned there is some uncertainty over the

meaning of the term “*which affects ownership*” and proposed to replace it with “*which results in the loss of ownership*”. The intention is to make clear that the indemnity fund will not be liable for claims in cases where there has not been any loss of ownership due to fraud.

The Law Society believes it is important to ensure all persons suffering loss as a result of fraud will be able to claim indemnity but noted the Section 84(1) has limited such claims to cases where there has been a “*loss of ownership*”.

The Law Society also believes that the proposal should refer to “*title*” rather than “ownership” and has concern with the proposal as there are occasions or possibilities that someone having an interest in the registered land could suffer loss although the title of the owner has not been lost.

The Law Society noted with encouragement that similar stance was taken by the Hong Kong Association of Banks and the Consumer Council.

(b) **Proposed Apportionment where there are Multiple Claimants**

The Administration noted that where there are multiple claimants and the total value of their claims exceeds the cap, no provision exists now as to how the amount is to be apportioned among the various claimants.

The proposal is thus to include a provision to the effect that each claimant would be paid from the cap amount in proportion of the value of their loss.

The Law Society believes the proposal on the apportionment of the indemnity amount should be subject to any contrary intention expressed by the parties, particularly when in a Charge situation, the Chargee would probably wish to get everything up to the amount of the outstanding loan.

The Law Society of Hong Kong
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