Eastern Caribbean Central Bank

Eastern Caribbean Currency Union

E-Conveyancing Project Report

Submission by Professor S.A.A. Cooper

Introduction

This is a response to the ECCB / ECCU E-Conveyancing Project consultation which invited observations on the Charles Juris Chambers Consultancy Report 2018 and its draft Harmonised ECCU Registered Land Bill.

This response is prepared by Professor Simon Cooper, LLB, LLM, MPhil, PhD, Dip LP, Attorney-at-Law, Fellow of the Royal Society of Arts. I am Professor of Property Law at Aston University (UK), a Fellow of the Cambridge University Centre for Property Law, Academic Member of the Property Litigation Association (UK), and Honorary Academic Member of the Property Bar Association (UK). For more info, my website is: www.professorsimoncooper.co.uk

I am enthusiastic to support the project and to assist in making it effective and appropriate for the islands.

The following are some of my summary notes on specific aspects of the draft Bill. If you find them useful, I would be happy to offer my consultancy services to work in supporting the ECCB on the next phase of the land registration law reform project.

Due to time pressure, these notes are just short highlights covering only a selection of important issues - there are many more that I left out, in particular around the rules for converting from unregistered to registered title.

- Some of the issues stem from the underlying legislation which was used as the foundation for the draft Bill - the Registered Land Act of Anguilla. These issues may not have led to actual disputes in Anguilla, they have led to litigation elsewhere in the Caribbean in other countries which use the same legislation, notably the Cayman Islands, the Turks & Caicos Islands, and the British Virgin Islands. I rely on my familiarity with the case law there to point out problems. The current draft Bill repeats many of those problems. It will cause of citizens becoming wrapped up in unnecessary litigation, which could be avoided by reworking the draft Bill.
- Some of the issues stem from the fact that the draft Bill has rules which originate in several different laws that have been forced together - and sometimes the rules in these different do not integrate properly. This, too, will be a cause of citizens becoming wrapped up in unnecessary litigation which could be avoided by reworking the draft Bill.
- Some of the issues stem from the new reforms proposed - particularly the new rules relating to charges, electronic conveyancing, and the international registry. There is a particular need to understand how electronic conveyancing and the international registry are likely to impact on the risk profile of land registration, and how they change the rights and responsibilities of government, the registries, the lawyers, and

the parties. This has been an issue for other countries and there are lessons to be drawn. Elsewhere it has been abandoned as a massive fraud risk and a massive financial risk on government through indemnity payment. This goes hand in hand with the question of whether governments should have indemnity liabilities for actions taken via the regional registry.

In preparing the notes, I draw on my experience of working with Caribbean land registries, advising Caribbean land registries on procedural reform, advising Caribbean Attorney Generals and land registrars on land law disputes. I have a background in law reform: I led the UK academic community's input into the recent property law reforms in UK, I work with solicitors and barristers professional organisations on property law reform; I have drafted Caribbean property legislation, prepared instructions for Caribbean legislative counsel, and supported government and law commission projects in the Caribbean.

I have thirty years of experience in this specific area. I was awarded a PhD for my analysis of registered land law in the Caribbean, concentrating on the Anguilla law. I have written widely on land registration reform in the Caribbean, including the Caribbean Law Review, the West Indies Law Journal, and the Cayman Islands Law Review. I am the specialist reviewer in Caribbean property law for the Caribbean Law Review. My textbook has been cited in Caribbean courts. I have published papers on the land registration systems not only in the Caribbean jurisdictions, but also England, Ireland, Canada, Australia, New Zealand, Kenya, Nigeria, Tanzania, Holland, Germany, and elsewhere.

Observations on the Draft Bill

Clause 2

The definition of 'easement' includes a restrictive agreement, which is unsatisfactory since restrictive agreements are separately regulated in the Bill.

The definition of 'easement' goes far beyond the definition of easements in common law and it would allow all sorts of undesirable rights which would not comply with the sensible common law rules of propinquity, accommodation, excessive usage, etc.

The definition of 'land' is defective because it confuses the physical asset with the legal right in the physical asset.

The definition of 'land' refers to 'estates' which are not defined in the Bill and do not form part of the Bill's structuring of rights.

The definition of 'lease' fails to mention the requirement for a limited duration, and so it could include absolute ownership.

The definition of 'licence' excludes a 'conservation easement' which is not defined in the Bill and which has no independent existence in common law.

The definition of 'register' as a verb, means to make an entry, note or record in the register; but this is inconsistent with later provisions in the Bill which treat registering as separate from recording and noting.

Clause 4

This clause has a chequered history in predecessor legislation and its scope is ambiguous. Subclause (2) appears to be capable of derogating from indefeasibility. It should be redrafted to remove any ambiguity.

Clause 6

This comes from predecessor legislation and has the ability to jeopardise indefeasibility of title if not carefully controlled. It has already led to litigation in St Vincent that could be avoided by a better balancing of the competing policies of Crown protection and indefeasible title.

Clause 9

Subclause (2) should add the power to demand proof of the legal capacity of any party to a disposition.

Clause 13

Refers to the Land Register being held 'in whole or in part' - unsatisfactory.

Refers to a strata lot 'to be registered' - unexplained.

Identifies a strata lot as separate from land or a lease – the only time the Bill does so and it is not misleading when read with the definition clauses; this is an illustration of the problem in the Bill with the structuring of rights.

The clause refers to provisional title. But the basis on which a title is to be adjudicated as either provisional or absolute is not specified in the Bill. This is a matter which is crucial to the success and acceptance of the registration project.

Clause 26

Refers to a duty on the registrar to provide for 'automatic registration'. It is not clear what this is. If it implies a process of registration without registry staff intervention, then experience elsewhere shows that it is a major opening for fraud and error, it is likely to have an impact on indemnity payments, and justifies considering the distribution of responsibilities between the parties, their lawyers and the registry.

Clause 33

Incorrectly refers to the entry of a 'notice'.

Refers to the concept of ‘registered estate’ which is not part of the Bill’s structuring of rights.

Clause 34

This clause needs to explain how the attribution of signature and its binding effect integrates with the rectification and indemnity regimes.

The effect of the clause is to take away the protection of vulnerable occupiers who are normally protected by cl.63(1)(f). That does not seem to be satisfactory policy here.

What is ‘un-signing’ an electronic document and when is it permitted?

Refers to the concept of ‘registered estate’ which is not part of the Bill’s structuring of rights.

Clause 36

Incorrectly refers to the entry of a ‘notice’.

Clause 41

Refers to ‘owners’ in a way that is contrary to the definition of ‘owner’ in the definitions clause.

Refers to a ‘parcel’ that is vested in a person without specifying the nature of the relevant legal right in the parcel.

Refers to rentcharges. They are not discussed elsewhere in the Bill. If rentcharges are to be recognised then further work needs to be done to integrate them. It is likely that earlier predecessor versions of this legislation were intended to preclude the recognition of rentcharges and probably subsume them within the concept of charges.

Refers to a lease of an estate in land, which does not reflect the structuring of interests under the Bill.

Clause 45

Refers to land vested in a person as chargee. This does not work with the definition of chargee. First, the definition of chargee refers to the owner of a charge, and owner is limited to the registered proprietor of a charge, which is impossible before first registration. Second, the reference should be to chargees and mortgagees, since only the latter will normally have land vested in them.

Clause 50

Refers to an estate in land, which does not reflect the structuring of interests under the Bill.

There are three important clerical errors in this clause.

Clause 51

Cross reference is incorrect.

Clause 52

Cross reference is incorrect.

Refers to the owner of the ‘estate’ and the ‘title’ - which do not reflect the structuring of interests under the Bill.

Refers to Crown as registered owner, but the Crown is not registered owner under the scheme laid out in the Bill.

Clause 53

There is an important clerical error in this clause.

Refers to Crown as registered owner, but the Crown is not registered owner under the scheme laid out in the Bill.

Refers to ‘owners’ in a way that is contrary to the definition of ‘owner’ in the definitions clause.

Clause 55

This fails in its purpose. It stops the acquisition of title by adverse possession ‘under any written law’. But that is misguided. Property law in common law countries differentiates between the acquisition of title and the extinguishment of title. The written laws deal with the extinguishment. What is important is to stop the acquisition of title by adverse possession under common law, which this clause omits.

Clause 58

This introduces a novelty which is to exclude fraud cases from title by registration. That approach is found in the Australian legislative versions, some of which are predecessors of the laws found in Dominica, Trinidad and Jamaica. But they are very different in the structure of their indefeasibility rules. The draft Bill is structured on the Anguilla legislation which has a quite different approach to indefeasibility. Excluding cases of fraud is unnecessary in the draft Bill (fraudsters cannot gain any benefit anyway), and excluding cases of fraud would seriously disrupt the draft Bill’s rules about indefeasibility, the protection of third parties, rectification of the register, and the payment of indemnity to innocent parties.

Clauses 58 and 60 ensure the registered proprietor of the ownership or a lease gets a guaranteed title. But there is no equivalent provision for charges. It means that a bank buying another bank’s portfolio of charges gets no assurance that the portfolio is valid. This requires a policy reassessment. It is also causes a problem with its interaction with the registrar’s correction power and the court’s rectification power.

Clause 62

Unless restrictively interpreted, this clause is inconsistent with clause 72. Unregistered claims need to be properly integrated into the structure of the Bill.

Clause 63

Paragraph (e) leads to problems for future lending against land and for people buying land without being able to discover unregistered charges. Its operation has been problematic in Australia where it has been criticised. It should be removed in order to enhance the policy of a guaranteed title.

Paragraph (g) does not state when the inquiry is to be made and it does not allow for circumstances when the occupier could not have been expected to respond. This problem has been fixed in other countries.

Unless restrictively interpreted, para. (g) is inconsistent with clause 72. This has been the cause of litigation in Antigua and St Lucia.

Paragraph (h) leads to problems for owners, lenders and buyers. It comes from Australian legislation where old Crown grants can generally be located by a search in the relevant office. That is not generally true in the Caribbean islands. The clause should be removed.

Paragraph (i) contains a clerical error.

Clause 72

This clause is deeply problematic. It clashes with various other provisions of the draft Bill. In predecessor legislation, it has led to major problems with the integrity of the legislation. This has repeatedly forced property owners into extensive litigation. It has not been taken at face value by the courts in many countries, including courts in the Caribbean. It needs to be re-thought. Unregistered claims need to be properly integrated into the structure of the Bill.

There is an important clerical error in this clause.

Clause 73

This is another deeply problematic clause. It comes from predecessor legislation where it has led to all sorts of incorrect assumptions about the structuring of rights in the legislation. It does not fit well with other clauses in the draft Bill about trusts and the indefeasibility scheme. This has led to a unnecessary litigation for property owners. The draftsman of the predecessor legislation doubted its usefulness, and later expressed regret at having included it, saying it was ‘unnecessary’ and ‘clearly needed rethinking’.

Subclause(2): The effect of this is to enable a single trustee to overreach the interests of a beneficiary. In a number of other countries, this effect is permitted only where two trustees agree to do so, in order to limit the opportunity for fraud.

Clause 77

Experience in other Caribbean countries has shown that there are issues with the operation of this provision. It is doubtful that it protects derivative claimants such as the bank which offers secured lending to the buyer. It is doubtful that it can protect the assignee on a subsale. It does not appear possible to extend the suspension period if a delay becomes necessary, only to apply for a fresh stay, which can lead to problems if a third party right has been created in the meantime. The period of 14 days is too short in those countries where the standard conveyancing practice is for attorneys to make a contract to buy, lodge the stay immediately following contract, and then take time to arrange finance and prepare for transfer. It has been increased to 30 days in some countries (e.g. Antigua).

Subclause (3): There is a fundamental error here. The opening word 'notwithstanding' robs the preceding subclause of all effect, and must be replaced by 'subject to'.

Clause 96

clause 96(1)(b): There is an important clerical error in this clause.

Clause 99

Much of the new mortgage consumer protection would be better done via a Banking Code or Pre-Action Protocol, and some of the provisions would be better situated in a Consumer Protection Act.

99(1)(b) This has no value at all in practice. It merely adds another line and signature to the paperwork, without increasing the customer's understanding or ability to secure different terms.

99(2) The new obligations imposed on the chargee are unreasonable. The chargee must 'fully inform' of the consequences of the transaction - to do that 'fully' would probably involve a lecture lasting several days! The chargee then has to fully inform the chargee not just of the obligations, but of the implications of the obligations and options on default. That would be a gigantic task. It requires working through hypothetical scenarios which may never materialise. And it appears that it applies not just to a group of primary important obligations, but all of them, even ones which are trivial and unimportant.

No sanction is stated in the event of breach of the clause. Is the supposed charge not a charge at all? Is it unenforceable by action? Is it void and the sums loaned repayable on demand? Is it a breach of duty by the chargee?

Clause 103

There does not seem to be any good reason for giving subclause (1) and (2) different legal treatment. Both should be entered on the register and the signatures verified.

Clause 105

There is an error in cross-referencing.

Subclause 3 refers to auction sales only and not to sales by private treaty.

There is no special rule about loss of the right to redeem when the successful buyer is the chargee itself. In many countries this would be treated as a disguised foreclosure and the chargor's right to redeem could still be exercised with the court's consent. This seems desirable due to the major conflict of interest which the chargee has when buying.

The subclause 6 power to redeem by paying the Registrar is affected by operational problems. The registrar will not know what sums are due and will not be keen to get involved in those discussions which are likely to be the source of dispute. If the registrar accepts the payment in discharge then there will be an indemnity claim by the chargee if it transpires that the registrar erred. There are better options.

Subclause 7 extinguishes the chargee's right to recover the redemption sum after 6 years. It appears that there is inconsistent policy in the Bill over limitation periods. The Bill imposes a limitation period for the chargee's entitlement, but seeks to remove the limitation period for an owner's entitlement to possession.

Clause 111

The advertising requirements are stated too broadly. They require notice to 'all potential purchasers'. That is unlikely to be a practical standard.

In order to maximise a property's appeal at auction, and to prevent the chargor from dissuading potential purchasers, and to prevent possession disputes after auction, it should be possible for the chargee to obtain possession after default but before auction. This could be made conditional on a court order (e.g. for property occupied by the chargor as a home).

Clause 112

Should also apply to leased land.

Very dubious policy of allowing a chargee to buy at auction - the price required is not an abstract definition of market value but simply that which wins the particular auction at the chargee's bid. Because of the great conflict of interest here, it needs to be better regulated.

Clause 113

A report in the last year is conclusive as to 'market price'. Does that mean conclusive as to the best price reasonably obtainable in accordance with the required advertising at the time it was sold? It would be better to state that it is deemed to satisfy the requirements of clause 111.

Clause 115

Appears to indicate that the right of redemption in clause 105(2) is variable. Any attempt to exclude redemption must be rejected; but attempts to impose certain delays or prepayment penalties may be acceptable. That is an important policy issue which is already well regulated by clause 105(4) and (5).

Appears to allow variation of the rule in clause 105(3). This should not be permitted by agreement between chargor and chargee because is designed to protect third parties.

Clause 116

Heading contains an important clerical error

Clause 119

Contains a fundamental error as to the recipient of the notice of subsequent charge.

Clause 122

Imposes special regulations on a financial institutions but they are not properly defined - there is only an inclusive list.

The justification by reference to 'efficiency benefits' is not a practical solution. The registered land statute is not the ideal place to deal with an isolated aspect of competition law.

Clause 132

Implied easements are neither expressly permitted nor expressly prohibited, although there is a general consensus that they are implicitly prohibited in the predecessor legislation. This is a dangerous state of affairs because there are many circumstances in which property owners rely on rights (e.g. pipes, cables, drainage, support) without knowing it or without realising that they are easements that should be granted and registered. The policy towards implied easements should be reconsidered and the draft Bill should address the point expressly.

Subclause (4) refers to completion of the easement by entry in the registers for both the burdened and benefitted land. This requires clarification. It serves the purpose of instructing the registry what to do. Whether it also serves the purpose of declaring the minimum criteria before the easement can be valid and binding is questionable. This has already led to litigation in the British Virgin Islands when the easement was recorded in only one of the registers. The point should be resolved to avoid litigation.

Clause 133

Needs to specify what happens to original party liability under a Restrictive Agreement after the owner transfers. Ideally all liability relinquished or else lawyers will encourage a practice of off-register indemnity chains which is undesirable for society and the land market as a whole.

The lack of registration is not a good enough reason for it not still taking effect between the original contracting parties.

Clause 137

This declares that the draft Bill does not derogate from certain natural rights. But there are no natural rights of light, air or highway access in the Caribbean islands with a common law heritage. If these so-called natural rights are desired, they need to be created expressly and defined fully.

Clause 138

This is wrong. It was originally proposed in predecessor legislation as a response to an incorrect court decision that has since been overruled.

Even if it is retained, subclause (2) should not refer to 'bona fide' which is counterproductive in a registration system. And there should be no reference to 'interest' since a licence itself cannot be an interest.

Clause 139

Subclause (2) follows predecessor legislation in failing to state whether some only of the owners may seek to be registered in order to comply with para (a), and in failing to state what rights are held by the unregistered owners. This has led to litigation in Kenya.

Subclause (3) is unclear as to what it is meant to achieve, and it is not consistent with other parts of the Bill.

Clause 140

Needs rewriting because it fundamentally confuses severance with partition.

Form 27 is inappropriate because it is not directed at severance but at the transfer of a severed share.

Clause 142

If a partition application is made without agreement or a court order, then this clause should require the registrar to undertake due process as with cautions and restrictions.

It is not clear whether the registrar takes on all the powers of courts at common law to establish easement or other rights between the co-owners, to make owelty awards, or to impose charges.

It is not clear whether partition extends to leasehold land, and if so whether it could be blocked by a covenant against assignment or parting with possession.

It is not clear whether partition extends to charged land, and if so whether it could be blocked by a covenant against assignment or parting with possession.

Clause 143

The test of 'incapable' sets too strict a standard for sale - there might be other compelling reasons for ordering sale.

The test of 'the proper use of land' is meaningless and does not give sufficient guidance to the registrar.

Clause 147

Not clear what is and what is not a credible witness. Is it a factual inquiry into trustworthiness? Is it a disability because of connected relationships? Does it follow the ancient common law rules of eligibility to appear as a witness in proceedings?

Clause 150

Unhelpfully differentiates ‘land’ and an ‘interest in land’ in a way that does not sit well with the definition of land and the structuring of rights in the Bill.

Subclause (3) should not refer to disclosure to the registrar. That is irrelevant. The clause should protect the third party acquirer only where there was no restriction in the register (and possibly also where the acquirer was unaware of the minority).

Clause 154

Unhelpfully refers to ‘interests in land’ in a way that does not sit well with the definition of land and the structuring of rights in the Bill.

Clause 160

Refers to Crown as registered owner, but the Crown is not registered owner under the scheme laid out in the Bill.

Clause 161

Refers to Crown as registered owner, but the Crown is not registered owner under the scheme laid out in the Bill.

Refers to ‘owner of parcel’, which does not reflect the structuring of interests under the Bill.

Clause 162

By subclause (3), a person in good faith without notice is deemed not to have notice. This is a pernicious clause. It does not fit well with other clauses in the draft Bill about trusts and the indefeasibility scheme. It comes from predecessor legislation where it has led to all sorts of incorrect assumptions about the structuring of rights in the legislation. It implies that other people might have notice, and that notice is relevant. This has led to unnecessary litigation for property owners. References to notice should be entirely removed from the draft Bill.

Even if it is retained, it should delete the reference to good faith which is counterproductive in a registration system.

Subclause (4) refers to 'file' which is not consistent with the terminology in the draft Bill.

Subclause (4) enables the registrar to insist on evidence that the trustee may make 'any dealing', but there is no reason to require evidence of any power other than to make the proposed dealing in question.

Subclause (5): it is not clear whether the registrar must refuse only if the registrar had demanded it? There may be circumstances when the registrar might assume the dealing is within the trustee's power and need not require evidence to that effect.

Clause 167

There is serious doubt as to what is included in the category of 'unregistrable interests'. There is an argument that the phrase is meaningless, it is entirely unnecessary, it is highly misleading, and should therefore be removed.

The idea of 'unregistrable interests' conflicts with clause 72. This issue has been raised in other countries using the same legislation. It is likely to be a cause of litigation, which could be avoided by ensuring that unregistered claims are properly integrated into the structure of the Bill.

There is a question over whether the caution should only be available to protect only those claims that would ultimately lead to the claimant becoming registered in respect of land, a lease, a charge, an easement, a restrictive agreement; or whether it can be used as a means to protect a claim to any type of interest. In the latter case, it would be a totally ineffective device, because it blocks all disposals till it is either entered properly or warned off. This issue has already led to litigation elsewhere which could be avoided by ensuring that unregistered claims are properly integrated into the structure of the Bill.

If unregistrable interests are to be recognised, then it would be necessary to create a new form of protective entry on the register that does not block disposals.

Despite referring to licences, the clause requires a cautioner to state his 'interest', which is not a suitable description of the licensee's rights. Licences should not in any event be permitted to be protected on the register by any means. The history of its legislative predecessors shows that this part was based on erroneous court decisions that have subsequently been overruled. This subclause should be deleted.

Clause 175

The registrar's power to correct the register should be reconsidered. This clause comes from predecessor legislation which does not sufficiently clearly demarcate what the registrar can and cannot do to change a registered title. This is fundamental to indefeasible title. The poor drafting of predecessor legislation has forced property owner into litigation on the point. A new clause should identify exactly the scope of the registrar's powers, and should use terminology that integrates with the other provisions in the draft Bill about the structuring of indefeasibility of register entries.

The registrar's power to correct the register is expressed as discretionary in the draft Bill, but it should be mandatory if the applicant could have simply lodged an application to achieve the same result. There is no justification in allowing the registrar to refuse a correction claim, unless he would have the power to refuse an equivalent application to register an instrument.

Clause 176

The power to rectify the register does not extend to rectifying the filed plan or registry map, so this needs to be conferred - with the same protections as for rectifying the register.

Clauses 176 and 175 are inconsistent in relation to charges. Charges were not properly worked into the predecessor legislation and this has affected the draft Bill. Charges could be corrected under clause 175 or rectified under clause 176, but the effect is entirely different in each case. Charges must be allocated to one or the other but not both.

Reconsider rectification and indemnity for errors/omissions at first registration under the new regimes of sporadic adjudication. Certain systems elsewhere provide a comprehensive appeal process and, in the interests of finality, do not allow rectification claims for errors/omissions at first registration. This should be tied in with a policy decision whether to suspend any litigation over title pending the adjudication of title at first registration.

Clause 177

Refers to indemnity for 'damage'. The history of this clause in predecessor legislation shows that it is based on an old misunderstanding of indefeasibility. It must be changed to 'loss'. This is crucial to the state guarantee of title.

Indemnity is made available where the error cannot be rectified - this must be changed to cases where the court has jurisdiction to rectify the error but has decided not to rectify the error (or the point has been conceded). This is crucial to the state guarantee of title.

No indemnity is available if rectification occurs. This creates a gap, because the land restored by rectification might have been devalued in the meantime by the acts of the person erroneously registered as owner. For a full state guarantee of title, it is necessary for indemnity to include losses caused by such devaluation.

The clause refers to negligence. This is inappropriate because it appears restricted to cases where there is a free-standing duty of care owed by the applicant. There are better terms to use for the purpose of excluding careless applicants.

Indemnity is totally barred by negligence, no matter how trivial or insignificant. Consideration should be given to a proportionate reduction relative to the degree of fault.

Indemnity is barred by the negligence of the applicant 'himself'. It raises the question whether it is barred by the negligence of the applicant's agent such as an attorney. The point has been raised elsewhere. It raises complex policy choices. It would be better to avoid litigation by specifying the answer in the Bill.

Clause 178

Indemnity is valued at a historic figure based on the time of the error. For a full state guarantee of title, it is necessary for indemnity to be quantified at the time of discovering the error. Land value inflation may have far outstripped the interest which may be payable under the Bill.

Clause 179

Creates a dual process: an application to the registrar and a case stated for the court. This is an unnecessary complication: the application should simply go to one forum or the other.

Clause 180

Subclause (1)(b) wrongly uses 'that' instead of 'which'.

Subclause (2) does not integrate with subclause (1).

Subclause (2)(c) mentions certificates of legal effect. These are not explained. They are an artefact from Australia and New Zealand practice, but have not been integrated into the draft Bill. The provision does not identify who certifies what. It does not confer any power on the registrar to insist on one, or to refuse a dealing that is not accompanied by one.

Clause 181

Subclause (2) should be abandoned. If a buyer is able to see the parcel boundaries on the registry map and filed plan, then he knows what he is getting and there is no need to provide any indemnity for mismeasurements.

Clause 182

Is entirely unnecessary and should be removed. The failure to protect rights on the register in time is not an 'error or omission' for the purpose of the rectification and indemnity clauses - and even if it was, it would be amply covered by the bars to rectification and indemnity based on 'neglect' and 'negligence'.

If it is retained, it needs complete redrafting. It is not about damages, it is about indemnity. It would only be required if the competing interest takes priority. There should be a much broader statement of principle - that deferred priority due to failure to procure an entry on the register will block any rectification or indemnity claim. There is no need to have a reference to any state of mind.

Clause 183

Should refer to indemnity not damages.

Under this clause, the limitation period can expire before the applicant discovers it. This is because limitation laws in the Caribbean often are tolled only for fraud, concealment or mistake (and not simply because it was reasonable to not discover). This has been a problem in other countries and amendments have extended the period to allow for it.

Clause 184

Subclause (1)(b) is a legacy from nineteenth century Australian legislation designed to deal with low mapping standards in a regime of sporadic adjudication. Modern registration systems do not suffer the same problems. The clause represents a major derogation from indefeasible title and should be deleted.

Subclause (2) is misguided and should be deleted. Even in these exceptional cases, no indemnity should be payable. These exceptional cases are a legacy from Australian legislation, where they were used in a very different context and for a different purpose that has no relevance to the draft Bill. If this clause is allowed to remain, it leads to the implication that an innocent registered owner might have a personal liability in damages to a purchaser simply because the land register misdescribes the parcels. That would defeat the idea of indefeasible title and the state guarantee of title.

Clause 185

The drafting is convoluted and it does not use terminology which reflects the structuring of rights under the draft Bill.

Refers to Crown as registered owner, but the Crown is not registered owner under the scheme laid out in the Bill.

The cross-referencing is incorrect.

Subclauses (3)(b) and (4) are problematic and need to be integrated.

Subclause (6)(b) might invite a constitutional challenge if the Crown / State has taken somebody's property, and still has its value, but keeps 50% on the basis of the citizen's administrative oversight.

Clause 191

The alternative time limits do not make sense - the first one is subject to the second one, but the second one only applies if the first one doesn't.

Clause 195

This refers to 'the principle of indefeasibility of title and other fundamental principles of the Torrens system of land title as incorporated in the land titles legislation of each ECCU Member State'.

The principles in this phrase are extremely nebulous and therefore do not significantly constrain the powers of the regional land registry. 'Indefeasibility' is infinitely variable and it is never absolute - it simply describes an immunity of one claim from another particular type of claim, without specifying what types. Referring to the legislation of each member state does not assist in identifying the principle as the extent of indefeasibility varies significantly between them (especially the systems in Dominica, St Vincent and the Grenadines and St Kitts and Nevis, when compared to all the other jurisdictions). Adding the 'Torrens' label is unhelpful as there is dispute over what this means. If it intended to mean compulsory regime of title by registration, then it covers the same ground as indefeasibility. If it indicates a common heritage with Sir Robert Torrens' Real Property Act 1858 in South Australia, then it is not really applicable to the systems in Anguilla, Antigua and Barbuda, Montserrat and St Lucia which derive from England's Land Transfer Act 1897.

The clause is designed to set up a system for lodging applications and to confer limited processing capacity, so it should not derogate from those principles anyway. The simpler approach might be to confer power to issue rules of 'practice and procedure'.

Subclause (1)(b) mentions advisory powers but it is not clear what advice. Does it mean rule-making powers?

If the regional land registry is intended to be an electronic hub for collection and forwarding of applications, then it would be sufficient to confer on it the power to do the same things as a registrar may do domestically under the draft Bill, but by electronic means and through the agency of the offshore hub. On the other hand, if the regional land registry is intended to do more than serve as a hub for collection and forwarding of applications, then there are grave policy questions to be addressed. If it takes over control of the procedures which determine whether an application is admitted to a register, then it will fundamentally determine the degree of accuracy of the register and the number of errors and omissions getting onto the register. That is inevitable if the regional land registry determines the rules about digital signing and qualifications of subscribers. It means that the regional land registry will decide the error profile of the registers, and consequently the number of rectification and indemnity claims against a national government. This requires fuller assessment in policy planning.

Clause 196

The reference to ‘the land burdened’ is wrong because the provision assumes that the land is not burdened.

The exclusion of prescription in cases where the owner might by reasonable diligence have become aware is difficult to justify - it would mean that prescription is restricted to cases of secrecy, which has been rejected since Roman times.

The exclusion of prescription in cases where the owner ‘might have prevented’ it seems to set an impossible threshold - in all cases the owner might have prevented it by force or by court action.

There are simpler ways of achieving a balanced basis for prescription claims.

Clause 199

An erroneous reference to 'charge' has crept in.

Clause 200

Experience might suggest that the service of notices in the modern age is best done by e-mail where that is available (and it would save non-residents from having to maintain a mail collection service on the island).

Subclause (c) refers to the last known postal address in the island or elsewhere - surely this could simply be a reference to the address on file in the registry, and then as an extra any other 'known' postal address.

Clause 202

Refers to an instrument ‘in the register’ which is not a phrase that works with the definition of ‘register’.

Clause 207

Refers to land passing as bona vacantia - but there is also still the possibility of the land passing by escheat that needs to be catered for. The draftsman of the predecessor legislation omitted to deal with escheat, under the mistaken belief that it had been abolished. That was incorrect and it has caused problems for property owners, including recent litigation in the British Virgin Islands.

Refers to 'interest in freehold land' and ‘interest held... in the freehold land register’ and ‘freehold land register’. None of these is consistent with the draft Bill’s structuring of rights.

Clause 209

Refers to 'bringing land under the Act'. That is an Australian import and is not consistent with the terminology used in the draft Bill - 'first registration of the land'.

Subclause (2)(b) omits the ‘deposit of lease’ which is mentioned in subclause(1).

The Forms

Generally refer to ‘the proprietor’. This is not the terminology used in the draft Bill, which refers to the owner.

Form 3

Contains technical specifications for computers that will need constant updating and should not be in primary legislation.

Refers to a ‘qualified IT person’ without any definition

Refers to ‘approved service provider’ without any definition.

Imposes ‘responsibility’ on an individual in the final clause 3, without saying how that responsibility is given effect, and without supporting legislative mandate for imposing any legal consequences.

Form 4

Difficult to understand. Should be redrafted in plain English.

Form 5

Refers to 'the said hereditaments'. The reference to hereditaments is not consistent with the structuring of rights in the draft Bill. The earlier reference is actually to land.

Form 6

Ditto.

Form 9

Refers to 'the leasehold interest' This is not consistent with the structuring of rights in the draft Bill.

Form 21

Not easy to read. It would help if the clause ‘the proprietor of the interest comprised in the above title’ were placed in brackets.

Form 29

Refers to a ‘certificate of rectification’ which should be a ‘certificate of verification’.

Form 32

The heading should specify that it is by transmission on appointment of personal representative

Forms 32 and 34

Footnote includes a warning which refers to loss of protection. This warning is actually appropriate to all forms, but it does not explain what sort of protection is lost. It refers to ‘lack of proper care’ when the relevant terms used in the draft Bill is ‘neglect’, ‘default’ and ‘negligence’.

Omissions from the Draft Bill

The draft Bill does not seek to meet the requirements of various international conventions which may affect land dealings.

The draft Bill does little to safeguard those who have possession without formal title, particularly in the rules about evidence at first registration and in the rules about adverse possession.

The draft Bill does not specify how roads are to be dealt with. This has led to litigation in Anguilla and the Cayman Islands.

The draft Bill does not specify what to do about registering land reclaimed from seabed. This has led to problems for registrars in Antigua and the Cayman Islands.

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