

Land Registration, Conveyancing and Property Markets: The Edwards Report, June 2001

by Andrew Edwards

A Report published by the Lord Chancellor on 26 June makes far-reaching proposals for completing the Land Register, registration of leases, electronic property searches, certificates, deeds, transfers and settlements, re-engineering of the national processes for buying and selling houses, promoting transparent property markets, independent adjudication of property disputes, new specialist advisory services and reform of the national bankruptcy index. The Government's new Land Registration Bill offers a basis for implementing many of the proposals. In this article the Report's author, Andrew Edwards, formerly a Deputy Secretary at HM Treasury (and author of the 1998 Report on Financial Regulation in the Crown Dependencies), discusses some of the main issues.

INTRODUCTION

The Lord Chancellor's Office and the Land Registry published, on 26 June 2001, my Report on the Quinquennial Review of the Land Registry. The Report was completed in April 2001 but publication was delayed as a result of the General Election campaign.

on the internet

<http://www.landreg.gov.uk/qqr/>

The Report is available from the Land Registry and on the Internet

The Report formed part of the Government's on-going programme of Quinquennial Reviews of smaller Government Departments and Agencies. It was, however, more fundamental and far-reaching than most such reviews. Although it considered in some depth various options for restructuring and privatising the Land Registry's services, its principal focus was on what the services themselves should be, how they should be developed over the present decade and what accompanying changes might be made in national systems, especially for property transfers and market transparency.

THE GOVERNMENT'S INTERIM RESPONSE

In publishing the Report, the Lord Chancellor explicitly endorsed the recommendation that the Land Registry

should remain in the public sector as a Government Department with executive agency and trading fund status, while continuing to work in many areas in partnership with the private sector.

The Report argued that public confidence in land and property ownership (and mortgaging) is a precious possession, which depends on the Registry's unquestioned ability to guarantee titles and make indemnity payments on a no-fault basis. Similarly, resolution of the many disputes surrounding property depends on the Registry's visible impartiality. No private sector organisation would realistically, the Report argued, be able to command similar trust and confidence. In addition, privatisation of the whole or parts of the Registry would be such a demanding and controversial project that the Government's new legislation and the Registry's strategic programme could be set back by years.

With regard to the other recommendations, the Lord Chancellor noted that while some of them were consistent with programmes of reform already under way, others were more radical and wide-ranging. He has therefore asked officials from the Lord Chancellor's Department, the Land Registry and other interested Government Departments to examine the recommendations carefully with a view to publishing a detailed plan in the autumn on how best to take them forward.

NEW LEGISLATION

At about the same time as the Report was published, the Government introduced a new Land Registration Bill to replace the *Land Registration Act 1925*. The House of Lords gave the Bill a second reading on 3 July.

This important Bill will modernise, improve and clarify the law on land registration and ownership. It will also open the way for implementing electronic conveyancing and, if the Government so decides, many of the other reforms discussed in the Report.

STRATEGIC OBJECTIVE

The Report congratulates the Land Registry for having developed over many years a robust and trusted national system for land registration, ownership and transfers. The Registry has, it suggests, successfully brought together some of the best traditions of public service, disputes resolution and adjudication.

The strategic objective, it suggests, should be to develop, promote and maintain world-class systems for guaranteeing ownership of land, for buying, selling, leasing and mortgaging of property in England and Wales, and for resolution of disputes, within a framework of transparent land and property markets.

In my opinion, the new Bill and the Report, between them, provide an exciting opportunity to achieve just this.

A PROGRAMME FOR THE DECADE

The Report proposes a challenging strategic programme for the Registry with other Departments over the present decade, built around seven main strategic objectives or 'pillars' (see figure 1 at end of article):

- (1) *A new Bill*, in place of the *Land Registration Act 1925*, to prepare the way for ownership and transfers by registration and to strengthen the legal framework in various areas.
- (2) *Completion by 2010* of the Register's geographical coverage, registration from 2003 of new and assigned leases above three years, enhanced information on ownership, mortgages and financial transactions, and enhanced mapping.
- (3) *A fully electronic Register*, enabling instant electronic access to up to date property information, including one-stop comprehensive searches through the National Land Information System, NLIS.
- (4) *E-conveyancing*, including electronic lodgement of applications, electronic certificates and deeds, electronic settlement (if possible) of payments due on completion, and re-engineering by Government and practitioner bodies in a new *Joint Property Market Charter Forum* of the national processes for buying and selling houses, designed to reduce delays between handshake and contract from eight weeks to around

three and eliminate delays between completion and registration.

- (5) Promoting *transparent property and mortgage markets* through publication, with the Valuation Office and others, of much enhanced market information.
- (6) *An independent Land Registry Adjudicator* to deal with issues such as boundary and adverse possession disputes.
- (7) A new self-financing *Advisory Service* largely staffed by part-time former employees and working with the private sector, for international consultancy, specialist issues of registration and title, preparation of title plans, advice for lay e-conveyancers, and historical research.

TIMETABLE

The proposed programme includes provisional target dates for delivery of each of the main elements as follows:

- *Delivery by 2003* of a fully electronic Register, many elements in e-conveyancing, a Joint Property Market Charter, coverage of all new and assigned leases above three years, enhanced mapping facilities, new property market publications, an independent adjudication service and new advisory services.
- *Delivery by 2005* of full e-conveyancing accompanied by re-engineering of the national property market transaction processes as discussed above.
- *Deliveries by 2010* of a Register with complete national coverage and title plans mostly digitised.

With the delay in publication of the Report, some of the target dates for the earlier part of the programme may now need to be revisited.

RESOURCES

The Report estimates that on present projections the Registry should be able to deliver the suggested programme within existing levels of around 7,800 permanent full-time-equivalent staff excluding overtime.

MAIN ELEMENTS OF THE PROGRAMME

The following paragraphs discuss the main elements of the programme and some related proposals. I hope this may facilitate public discussion of these important matters.

NEW LAND REGISTRATION BILL (PILLAR 1)

As discussed above, the Government has already now introduced a new Land Registration Bill to replace the present Birkenhead Statute, dating from 1925.

The new Bill seems substantially to fulfil the hope expressed in the Report that the Government should introduce new world-class legislation, with increased rule-making powers, covering the important points on registration, adverse possession, overriding interests and notices discussed in the 1998 Consultative Paper, *Land Registration for the Twenty First Century*, and to the extent possible the other statutory requirements identified in the Review.

COMPLETING AND EXTENDING THE REGISTER (PILLAR 2)

The Report proposes for the first time a timetable for completing the geographical coverage of the Land Register. It sets out the reasons why this should receive considerable priority.

The target of achieving complete geographical coverage by spring 2010 is likely to require deployment of around 600 extra staff on average over a period of eight years in addition to those who already work on first registrations.

Some 17 million titles are now registered. Those unregistered may be five million or more (that is, some 20 to 25 per cent of the total). These are believed to consist predominantly of property owned by big landowners, public and private, including housing stocks still owned by local authorities.

Although the vast majority of owners will probably wish to register, the Report notes that an extension of present compulsory powers will probably be needed in due course to ensure complete coverage.

LEASES (PILLAR 2)

The Report proposes registration from June 2003 of all new and assigned leases with over three years to run. The present cut-off period of 21 years for registration of leases has the effect of excluding a high proportion of commercial leases from the Land Register.

The proposed regime would be in effect a comprehensive programme for registration of new leases. The three-year cut-off corresponds to the provisions in the *Law of Property Act 1925* (another Birkenhead statute) under which leases for terms of three years or less do not have to be the subject of a deed.

The proposal to extend registration of leases will make a decisive contribution to the longstanding objective to reduce the number and scope of 'overriding interests' not recorded in the Register.

OWNERSHIP (PILLAR 2)

The Report suggests that there is a case for noting the true or beneficial owners of property on the Register where these differ from the nominal or legal owners.

This would accord with Parliament's wish, reflected in earlier statutes, that the Register should record the owners of properties, and with the increasing emphasis in other statutes on transparency so as to combat money laundering. Criminals and money-launderers benefit more than anyone else from the options that true or beneficial owners of property presently have for hiding rather than disclosing who they are.

The Register would continue to record legal ownership (thus avoiding wider implications for land, property, trust and company law). But the Registry would add a notice

stating what the legal owners have declared about true or beneficial ownership where this differs from legal ownership. Where the law enforcement or other relevant authorities advise that there are compelling reasons for confidentiality, the Registry would normally hold such information in confidence instead of placing it on the Register.

The Report emphasises that the form of the notices and the handling of the change would require careful consideration and consultation. The Registry would not, it suggests, guarantee the truth of such declarations.

If the Government decides to pursue this course, statutory provisions would be needed. The Report sees a case for considering the issue alongside any international initiatives in this area and alongside the Regulatory Impact Assessment, which the Government has already commissioned, of the costs and benefits of requiring private companies to declare beneficial ownership in confidence to the company registration authorities.

ELECTRONIC REGISTER AND SEARCHES (PILLAR 3)

The Report commends the LR Direct facility for searching the Land Register and the incipient NLIS facilities for one-stop electronic access to comprehensive up to date information about properties, including information held by local authorities and others as well as by the Land Registry. The Land Register texts and title plans should be fully accessible online by July 2003.

The Report notes that the NLIS model has the potential greatly to improve, simplify and accelerate conveyancing searches. It suggests that the Registry should be part of the governance of NLIS and that the Government could help NLIS by setting a firm target within the Best Value programme for local authorities to organise their searches data in electronically accessible Register form, like the Land Registry's, by 2005. The Report also discusses plans for major improvements in title plans and index maps, including electronic access.

E-CONVEYANCING (PILLAR 4)

The Report includes an extended discussion of e-conveyancing and related reforms. It suggests that an e-conveyancing system should be seen as comprising four main elements:

- i. *E-lodgement* (and e-confirmation) of applications for changes in the Register;
- ii. *E-certificates and e-deeds*: replacement of paper Certificates and Deeds, held by owners or practitioners, with electronic versions held by the Land Registry;
- iii. *Electronic settlements* between all the parties concerned in property transactions, especially on completion; and
- iv. Accompanying improvements in the wider national systems for property transactions.

The Report's suggestions closely follow and develop proposals already drawn up by the Land Registry, which the Registry's specialist team is now able to demonstrate in a specially constructed electronic simulator or demonstrator.

(a) E-lodgement

The Report notes that e-lodgement of applications for changes in the Register should greatly reduce work, errors and costs. To prevent fraud, authorised e-signatures and authentication will need to be developed.

There have been suggestions that the Registry might need to license or contract conveyances. The Report suggests, however, that the Registry would do better to ask the regulatory bodies for professional conveyancers to look after their requirements. It would be necessary to ensure that the Law Society, as being also a professional association, could realistically discharge this function with appropriate enforcement. A single, dedicated Regulatory body, not doubling as a Professional Association, could alternatively be established to regulate all the activities of all professional conveyancers. This clearly, however, raises wider issues.

(b) E-certificates and deeds

Replacing paper land and charge certificates and deeds with readily available electronic versions held by the Land Registry would enable conveyancing transactions to be paperless. This would bring considerable benefits. It would reduce anxieties for owners, storage for lenders and conveyancers, and costs for lenders, conveyancers and customers.

(c) Electronic settlements at completion

The Report notes that a CREST-style system for electronic settlements at completion, if practicable, would enable all parties to a property transaction to make and/or receive payments electronically and with immediate effect, probably with the help of a clearing house and associated trust, at completion.

Such a system could in principle reduce the role of conveyancers' client accounts, transaction costs, fraud and insurance costs. The system should also largely prevent errors (presently common and a source of considerable expense) in stamp duty and Registry fees.

The Report suggests that the Registry should explore with lenders, conveyancers, the Inland Revenue, the Financial Services Authority and others the case for setting up a joint corporate vehicle to contract a private sector consortium to operate on their behalf a clearing house and associated trust facility to operate a settlements system of this kind or some alternative system.

(d) Re-engineering of buying and selling processes

The Report suggests that with the help of e-conveyancing and associated reforms there is scope for further substantial improvement in the accompanying national processes for buying and selling houses. It should

be possible to reduce delays and costs and the associated strains and stresses.

There are three main areas, it suggests, where such improvement should be possible:

- (a) *Reduced delays between handshake and contract.* A re-engineered system as set out in the Report should reduce the delays in present processes. With instant electronic access to comprehensive and up to date property 'searches' (pillar 3 above) and suitable commitments by lenders and conveyancers (see below), there should be scope for reducing the average interval between acceptance of offer (handshake) and contract from about 8 weeks to perhaps about 3 weeks as in most other countries (see figure 2 at end of article). The length of this interval is a source of strain and stress to many who buy and sell houses. It encourages vexing practices such as 'gazumping' and 'gazundering' when there is movement in housing market prices.
- (b) *Transparency of housing market 'chains'.* While the interval between contract and completion would possibly remain much as now, the new system and associated reforms should make the 'chains' of housing transactions, which are such a prominent feature of housing transactions in England and Wales, more transparent. These 'chains' result from the tradition in England and Wales of same-day completion of sales and purchases. Same-day completions are a positive element in the national system: they enable buyers and sellers to avoid the stress and expense of having to move temporarily to rented accommodation or take out bridging loans. The links in 'chains' tend, however, to be obscure. Chains can, therefore, become a source of considerable stress to conveyancers, buyers and sellers alike. The greater transparency of 'chains', which should be achievable with the new systems, could do much to reduce these problems. The Land Registry's electronic 'demonstrator' helpfully illustrates how the system might work.
- (c) *Completion through registration.* Completion would be achieved through registration within a system of transfers by registration rather than registration of transfers. The present delays between completion and registration would be eliminated. The problems, occasionally serious, from registration after completion would be removed either totally or in large part. Issues arising on registration, for example in relation to title or boundaries, would be resolved at the right time – before and not after completion. The requirement for deeds of transfer would also be removed. Administrative burdens, risks, surprises, errors and costs would all be reduced.

The former DETR's parallel initiative for a Seller's Pack would oblige sellers to, among other things, obtain a home condition report before marketing and make it available to would-be buyers. The Homes Bill providing for this new

obligation was lost when the General Election was called but DTLR, the successor Department, has said that the legislation will be re-introduced as soon as Parliamentary time allows. The former DETR made clear that in implementing such an initiative they would be determined not to re-introduce delays that e-conveyancing and the associated reforms should be able to eliminate.

A JOINT PROPERTY MARKET CHARTER (PILLAR 4)

The Report suggests that Government Departments and service providers in both public and private sectors should work closely together on re-engineering of the national systems for buying and selling houses with a view to making the new systems as good as possible. As implied above, success will depend importantly on such co-operation.

The Report suggests that Ministers might set up a Joint Forum with service providers for this purpose. The Forum would preferably develop an agreed Property Market Charter, in the form of a Joint Statement of Service Targets and Standards. The Forum might become a continuing body for improving property market transaction processes.

The proposed service standards would preferably be monitored by an independent outside source, such as the Audit Commission.

PROPERTY MARKET TRANSPARENCY (PILLAR 5)

The Report emphasises the need to increase the transparency of the national property markets. The Land Registry, it suggests, has an important part to play in this, along with the Inland Revenue's Valuation Office. Both bodies need to elevate this into a major strategic objective.

There is at present no satisfactory house prices index (though the Office of National Statistics and DTLR have made considerable progress towards one and the re-introduction of sale prices information on the Register from 1 April 2000 was an important step in the right direction). Information on commercial, leasing and other property markets is still more deficient.

The Report notes that comprehensive registration of new leases above three years, together with new proposals for the Registry and the Inland Revenue's Valuation Office to collect the necessary data jointly at the time of registration of all major transactions, will enable the Registry and the Valuation Office to publish valuable data on the markets for both leasing and sales of commercial and domestic properties.

Publication of such data should make both the property markets themselves and the Valuation Office's assessments for business rates and council tax much more transparent than at present without increasing compliance burdens.

The Report suggests that the Registry should establish a small but expert Statistics Unit to carry this forward in close co-operation with the Valuation Office and others.

INDEPENDENT ADJUDICATION (PILLAR 6)

The Report notes that Land Registry staff provides an invaluable service in helping owners of land and property to settle disputes, especially boundary disputes and adverse possession cases. Where agreement cannot be reached, the Solicitor to the Land Registry hears cases in the capacity of Adjudicator. This too is an invaluable service.

The Registry's conciliation and adjudication services, taken together, enable the vast majority of boundary and adverse possession disputes in England and Wales to be resolved expertly, sympathetically and cheaply, and without recourse to the courts. In most other jurisdictions the courts generally become involved in any significant such disputes.

The Solicitor and his deputies in the role of adjudicator could, however, be perceived as facing conflicts of interest. Their own staff have almost always been involved in cases earlier, in the role of conciliators. They themselves bear a major responsibility for the Registry's systems and practices. The Government body they serve has an interest in limiting calls on the guarantee.

The Report therefore recommends the appointment of an independent Land Registry Chief Adjudicator alongside the Chief Land Registrar and the Solicitor to the Land Registry. The Chief Adjudicator's supporting unit would likewise be independent of the rest of the Registry, except for pay and rations. The Land Registration Bill now before Parliament includes provisions, which will give effect to this recommendation.

LAND REGISTRY ADVISORY SERVICES: LRAS (PILLAR 7)

The Report suggests that the Registry could do much to help practitioners and the public in England and Wales, and governments in certain other countries, by setting up a new service, Land Registry Advisory Services (LRAS), to give advice and assistance in areas where Registry staff have special expertise and experience not readily available elsewhere.

The new Service would be in effect a subsidiary of the Land Registry. It would not form part of the Land Registry's core operations. The staff would mainly be part-time former Registry staff. It would be required to operate on a self-financing basis.

The main specialist units within the LRAS might be as follows:

- An International Consultancy Unit.
- An Advisory Unit on specialist issues of registration and title, especially in relation to unregistered land.
- A title-plan advice and preparation service.
- An Advisory Unit for lay-conveyancers in the age of electronic conveyancing.
- A Historical and Genealogical Research Service.

These units would be well placed to work in partnership with other public and private sector bodies.

LAND CHARGES AND BANKRUPTCY INDEX

Somewhat outside the core business, the Registry's Land Charges Department at Plymouth maintains an Index of persons named in bankruptcy petitions and orders. With invaluable help from Guy Sears, the Review looked quite closely at this area.

The Report suggests that the Registry, the Insolvency Service and the Court Service need to work together to upgrade the quality and processes surrounding this important national Index. There are compelling needs to improve the identification of debtors, minimise the number of incorrect attributions in the Land Registers, remove names promptly from the bankruptcy index, remove or amend Land Registry entries when appropriate, and improve customer service.

The Report suggests that the Insolvency Service should probably take over responsibility for the bankruptcy index.

MANAGEMENT ISSUES

The second half of the Report includes some proposals for strengthening the co-ordination of policy inside Whitehall and beyond and for further strengthening the Registry's internal management. These proposals, however, are less likely to be of interest to readers of *Amicus Curiae*.

CONCLUSION

Publication of the Report attracted no press coverage. The Report does, however, deal with important issues that touch the lives of many. I hope that these may be the subject of public discussion before the autumn, when the Lord Chancellor is due to announce the Government's decisions on the way ahead. ☪

Andrew Edwards
Former Deputy Secretary at HM Treasury

Figure 1
THE SEVEN PILLARS

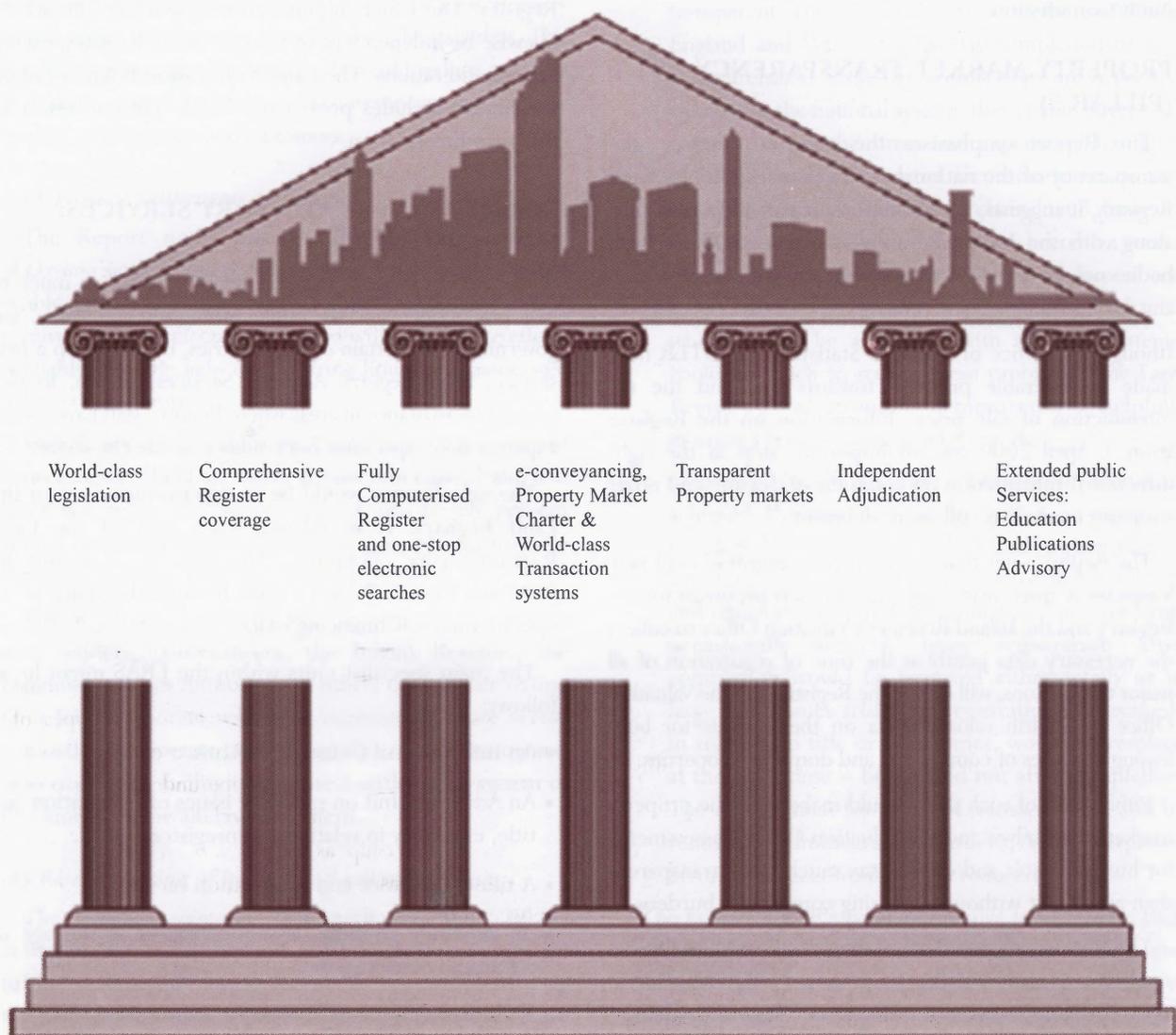
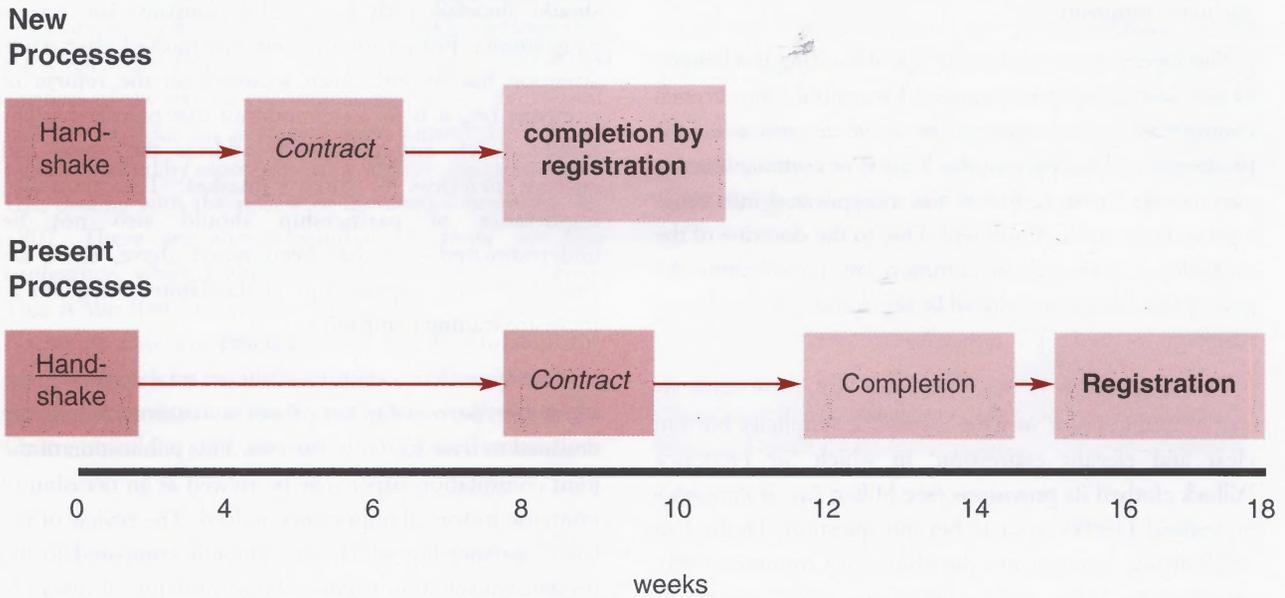


Figure 2
RE-ENGINEERED HOUSE BUYING AND SELLING PROCESSES



Partnership law for the new millennium

by Professor Johan Henning

This article is taken from the introduction given by Professor Henning at the conference on partnership law reform staged on 4 June by the Centre for Corporate Law and Practice at the IALS, the Law Commission for England and Wales, and the Scottish Law Commission.

Partnership is of great antiquity. Some of its primitive non-commercial forms have obvious origins in family arrangements and clan activities of the most ancient and elementary kind. As a profit-seeking and sharing device it must be as old as co-operative economic endeavour, starting with the first feeble stirrings of a rudimentary capitalistic system. Its use in various guises and forms was recorded long before the time of the Romans, pointing to the very remote origins of some of its underlying concepts. Thus, for instance, an essential element of modern partnership, the sharing of profits, appears in the agricultural portion of the Code of Hammurabi, compiled circa 1700 BC. Historically its course can be traced from the ancient Near Eastern civilisations to classical Greece and Rome and hence onward through medieval commercial practices and usury-evading devices, the Italian trading communities and far-reaching enterprises of the Renaissance to its present day position as one of the three most important

forms of enterprise in the business world. Indeed some of the basic principles of partnership as a business organisation seem to have changed astonishingly little in a period spanning more than four thousand years.

Whatever the respective merits of the numerous and conflicting theories on the origin and development of various partnership concepts may be, it seems sufficient to note that the Roman *societas*, the medieval *commenda* and the *lex mercatoria* left their imprint on the several types of partnership of modern law. The massive contribution of Roman partnership law can hardly be underestimated. Its contribution is especially marked, both in so far as the basic concept of partnership as a consensual contract of the utmost good faith as well as the relationship constituted by it between the partners *inter se* are concerned.

Developments occasioned by the *lex mercatoria* include the acceptance of the doctrines of mutual agency and solitary liability for partnership obligations. Equally