

THE LAW REFORM COMMISSION OF HONG KONG

**SUB-COMMITTEE ON
DESCRIPTION OF FLATS ON SALE**

CONSULTATION PAPER

**THE SALES DESCRIPTIONS OF OVERSEAS
UNCOMPLETED RESIDENTIAL PROPERTIES**

September 1996

This Consultation Paper has been prepared by the Sub-committee on Description of Flats on Sale of the Law Reform Commission. It does not represent the final views of either the sub-committee or the Commission, and is circulated for comment and criticism only.

The sub-committee would welcome submissions on the proposals contained in this Consultation Paper. You are invited to make your views known to the sub-committee, in writing, by 18 November 1996.

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It may be helpful for the Commission or the sub-committee, either in discussion with others or in any subsequent report, to be able to refer to and attribute comments submitted in response to this Consultation Paper. Any request to treat all or part of a response in confidence will, of course, be respected, but if no such request is made, it will be assumed that the response is not intended to be confidential.

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CONTENTS

Chapter

Introduction and Overview

Background
Terms of Reference
Sub-committee membership
Meetings
Complaints relating to the sale of overseas properties
Existing controls over advertisements for overseas properties
 on television and radio
Failings of the television and radio codes on advertising standards
Lack of controls over contents of sales brochures and
 newspaper advertisements
Insufficient controls over sales descriptions
Scope of deliberations
Consultative document

1. The General Approach

Difficulties of controls over sales descriptions of
 overseas properties
Regulation of local estate agents
The Government's Working Group on Regulation of
 Estate Agents
Estate agent's responsibility for provision of
 basic sales information
Our recommendations on estate agent's responsibility
 for provision of basic sales information
Focus on local advertisements and publicity on overseas properties
All sales must be handled by licensed estate agents in Hong Kong
Language ambiguities
Our recommendations on the general approach of regulating
 sales descriptions and advertisements

The availability of sales brochure
Our recommendations on the availability of sales brochures

2. Date of Completion and Date of being Ready for Occupation

Delay or total project failure
Reasons for delay or project failure
Extension of date of completion
Measures to ensure development on schedule and to prevent project failure
Date of being ready for occupation
Our recommendations on the date of completion and the date of property being ready for occupation

3. Fittings and Finishes

Introduction
Problems with descriptions of fittings and finishes
A reasonable level of disclosure is sufficient
Mock-up flats
Our recommendations on fittings and finishes

4. Utilities

Introduction
Properties without water and electricity supplies
Lack of descriptions of utilities supplies in sales brochures
Costs of connection
Our recommendations on utilities

5. Location of Property and Transport Facilities

Importance of location of property and transport facilities
Misleading descriptions of location of property
Misleading descriptions of transport facilities
Information to be provided in sales brochure
Pictorial representation
Car-ports and car parks
Our recommendations on location of property, transport facilities, and pictorial representation

6. Gifts and Benefits

Gifts and benefits for purchasers
Sufficient if promises of gifts and benefits are accurate
Our recommendations on gifts and benefits

7. Financing Arrangements

Availability of mortgage facilities
Misconception held by purchasers
Costs of setting up mortgage facilities being passed onto purchasers
Our recommendations on financing

8. Price of Property

Misleading indication of prices
Full information on price necessary
Cooling-off period
Our recommendations on price of property

9. Restrictions on Sale of Property to Foreigners

Restrictions on sale of property to non-residents or foreigners
Restrictions as to ownership
Problems with descriptions on restrictions as to ownership
Restrictions on tenure and mortgage arrangements
Our recommendations on restrictions on sale of property to foreigners

10. Miscellaneous Information

Transaction fees
Our recommendations on transaction fees
Supplementary charges upon taking possession
Our recommendations on supplementary charges
Liability for taxes
Our recommendations on liability for taxes
Tax implications
Foreign exchange control
Our recommendations on tax implications and foreign exchange control
Date of printing of sales brochure
Our recommendation on date of printing of sales brochure
Saleable areas
Our recommendations on saleable area
Fees charged by government authorities
Our recommendation on fees charged by government authorities
The tenure of the property
Our recommendation on tenure of the property
Access and rights of way

Our recommendation on access and rights of way

11. Enforcement of the Recommendations

Means of enforcement

Self-regulation

Administrative measures

Legislation

Penalties

Civil remedies

The enforcement body

Our recommendations on enforcement

12. Summary of Recommendations

Summary of Recommendations

The General Approach

Date of Completion and Date of being Ready for Occupation

Fittings and Finishes

Utilities

Location of Property and Transport Facilities

Gifts and Benefits

Financing Arrangements

Price of Property

Restrictions on Sale of Property to Foreigners

Miscellaneous Information

Enforcement of the Recommendations

Annex 1

Specimen List of Fittings and Finishes in Sales brochure

Introduction and Overview

Background

1. In recent years, many overseas uncompleted residential properties have been put up for sale or advertised in Hong Kong. Overseas properties in this sense include those situated in Australia, Canada, New Zealand, Macau, Malaysia, the People's Republic of China ("PRC"), Singapore, United Kingdom, United States, Taiwan and Thailand.
2. There are a large number of overseas properties being put up for sale in Hong Kong and the value of these transactions is great. The PRC is the most significant source of overseas properties. For example, during the month of December 1995, there were a total of 1,111 units of PRC properties being put up for sale in Hong Kong and their total value exceeded HK\$1,007 million.¹
3. Hong Kong residents have shown growing interest in buying overseas uncompleted residential properties. There are a number of reasons for this phenomenon. Firstly, for those Hong Kong people who are planning to emigrate, it is usual to buy in advance uncompleted units in foreign countries some time before their scheduled date for settlement overseas.
4. Overseas properties are also bought for investment or sometimes speculative purposes. This is so particularly in the case of properties in the PRC. Nowadays, small investors find it difficult to raise enough capital to invest in the local property market because the price of local properties is relatively high. PRC properties, however, provide an investment alternative. The prices of PRC properties range from HK\$100,000 to over HK\$500,000, with most in the region of HK\$300,000.
5. Some prudent local investors may buy overseas properties to diversify their investment portfolio. In order to avoid putting all their investment in the local property market, prudent investors naturally look to the overseas market for investment opportunities.
6. Overseas properties are sometimes bought in contemplation of retirement. Some elderly people in Hong Kong buy properties in their native places in the PRC for use after retirement. They will sell their properties in Hong Kong and use the proceeds partly for living expenses after retirement and partly for the purchase of the PRC properties which are usually much cheaper than local properties.
7. Expatriates who contemplate leaving Hong Kong in due course may also buy overseas properties which are put up for sale locally. Even those expatriates who do not have immediate plans to return to their home countries may buy overseas properties for investment purposes because they have better knowledge about the property market back in their homeland than about the local market.

¹ Sing Tao Yat Pao, 29 December 1995.

8. Despite the growing importance of overseas properties to the average Hong Kong buyer, prospective purchasers are sometimes given inaccurate, insufficient or even misleading sales information. The problem is particularly acute in the sale of overseas uncompleted residential properties. In such cases, a purchaser does not have the chance to see the actual unit when he/she make the purchase. Moreover, because the building sites are situated overseas, few purchasers, if any, can afford the time and expense to monitor the progress of construction.

9. The problems of inadequate and misleading sales information in the sale of overseas uncompleted units are many-fold. Most sales brochures and advertisements do not give a definite date of the property being ready for occupation. Purchasers do not, therefore, know when they can expect to move into occupancy and live in the property. Failure to complete construction on time is, therefore, one of the most serious problems. Few advertisements and sales brochures give details of any restrictions on sale of property to foreign purchasers or purchasers who are nationals but reside outside the country. There have been cases of PRC properties being sold to Hong Kong residents when in fact the properties can be legally sold to purchasers resident in the PRC only.

10. Some advertisements for overseas properties contain sham promises of gifts or other benefits for purchasers. In many cases, the gifts are in fact subject to some conditions or lucky draws which are not mentioned anywhere in the sales brochure. The gifts in some other cases are deliberately couched in vague terms to mislead prospective purchasers. In order to boost purchasers' confidence in the developments, some advertisements and sales brochures state that mortgage facilities are provided by banks in Hong Kong or overseas. But there have been instances in which the bank mortgage facilities claimed do not materialise. Most sales brochures do not give any descriptions of the utilities supplies such as water, electricity and gas. Many Hong Kong purchasers have taken for granted the availability of such essential utilities. There have been instances of a few overseas developments which are without water and electricity supplies when vacant possession is delivered to purchasers.

11. These are but some of the many problems facing purchasers of overseas uncompleted residential properties. In view of the great number of such properties being put up for sale in Hong Kong and the great monetary value involved in the transactions, we consider that purchasers should be given better protection by getting adequate and accurate sales information, albeit at the expense of added costs and inconvenience to developers and estate agents and eventually to the purchasers themselves.

Terms of Reference

12. In June 1992, the then Acting Attorney General and the Acting Chief Justice made the following reference to the Law Reform Commission:

“Should the law governing the protection of prospective purchasers and purchasers of uncompleted residential property in relation to inadequate or misleading sales information or particulars be changed and, if so, in what way?”

13. In November 1992 the Law Reform Commission appointed a sub-committee under the chairmanship of Professor Derek Roebuck to consider the above terms of reference and to make proposals to the Law Reform Commission for reform. In September 1994, the sub-committee completed their study on the first part of the reference relating to local uncompleted flats and made their proposals for reform to the Commission.

14. The sub-committee's proposals were largely adopted by the Commission and formed the basis of the Commission report published in April 1995 on the sales descriptions of local uncompleted residential property entitled, *Report on Description of Flats on Sale, The Law Reform Commission of Hong Kong (Topic 32)*.

15. The present report covers the second part of our study under the above terms of reference, namely, the sales descriptions of overseas uncompleted residential property.

Sub-committee membership

16. On 24 April 1995, the sub-committee commenced to consider the second part of the reference relating to the sales descriptions of overseas uncompleted residential properties put up for sale or advertised in Hong Kong.

17. The membership of the sub-committee (in respect of the second part of the reference) is :

Professor Derek Roebuck (Chairman)	Professor of Comparative Law, City University of Hong Kong Solicitor
Mr Tom Berry	Principal Solicitor, Lands Department
Ms Audrey EU Yuet-mee, QC	Barrister
Mr Andrew LEE King-fun	Principal Partner, Andrew LEE King-fun and Associates, Architects
Mr LIU Sing-cheong (since 27.1. 1995)	Managing Director, Hang Cheong Surveyors Ltd Surveyor
Mr Patrick Sheehan	Lecturer in Law, University of Hong Kong Solicitor
Mr William SHIU Wai-chuen (since 19.11.1993)	Principal Assistant Secretary, Housing Branch, Government Secretariat

Mr Kennedy WONG Ying-ho	Managing Partner, Philip K H Wong, Kennedy Y H Wong & Co, Solicitors
Mr Martin WONG Kwai-poon (since 27.1.1995)	Chief Complaints & Advice Officer Consumer Council
Mr Marco WU Moon-hoi	Senior Assistant Director of Housing Department

18. Mr Thomas LEUNG Moon-keung, Senior Crown Counsel, acted as the Secretary to the sub-committee.

Meetings

19. The sub-committee commenced their study of the second part of the reference on 24 April 1995 and, between then and 28 May 1996, held a total of 20 meetings.

Complaints relating to the sale of overseas properties

20. The problem of inadequate and misleading sales descriptions is borne out by the increasing number of complaints involving overseas properties. According to statistics provided to us by the Consumer Council, from January 1990 to December 1995, there were 891 complaints against development projects mostly relating to the sale of PRC properties. The following is the breakdown of the complaint figures:-

Complaints relating to the sale of overseas property

	<u>1990</u>	<u>1991</u>	<u>1992</u>	<u>1993</u>	<u>1994</u>	<u>1995</u>
1. Disputes over the information provided by the vendor, e.g. dimensions, materials, mortgages, etc.	6	3	15	17	23	25
2. Disputes arising out of conveyancing, e.g. the terms of the Agreement for Sale and Purchase, miscellaneous charges by the developer, etc.	2	1	3	3	6	21
3. Disputes arising out of the performance of the Agreement for Sale and Purchase, e.g. delayed completion	1	0	2	66	238	334
4. Disputes arising out of the quality of finish and defects	1	0	1	2	4	12

5.	Complaints against solicitors in relation to the conveyancing	0	0	1	4	8	12
6.	Complaints against building management	0	0	2	1	12	15
7.	Miscellaneous	2	1	5	10	15	17
		-----	-----	-----	-----	-----	-----
		12	5	29	103	306	436

21. In the middle of 1994, the Consumer Council made a survey of the local newspaper advertisements of 153 overseas developments. The survey revealed many cases of misleading or inadequate information in the advertisements. The survey results were published on 15 March 1995 in the Consumer Council's *Choice Magazine (221 Edition)* (the "Choice Magazine"). The survey results have provided useful factual background for this report.

Existing controls over advertisements for overseas properties on television and radio

22. There was previously a ban on advertisements of overseas properties on television and radio. However, the Broadcasting Authority decided to lift the ban with effect from 1 April 1993. When the ban was lifted, two codes of practice were introduced with regard to such advertisements. The two codes are the Television Code of Practice on Advertising Standards and the Radio Code of Practice on Advertising Standards (the "two codes").

23. The two codes, which are identical in contents, provide that:

"No advertisement offering for sale to Hong Kong residents any flat, shop, office or other unit of accommodation in a building or proposed building or any land or any sub-division, share or interest thereof or therein situated outside Hong Kong shall be accepted unless the developer or vendor is able to produce the following:-

(i) *a **letter** from a firm of solicitors/attorneys registered and recognized in the country where the property or land is situated confirming that*

(1) *all the requirements imposed by the local government relating to the development and sale of the property or land to be advertised have been properly complied with by the developer or vendor; and*

(2) *the developer or vendor has obtained the requisite consent (if necessary under the local laws) from the local government for the sale of the property or land to non-residents; and*

(3) *housing loan is available to prospective purchasers from a licensed financial institution, either locally or elsewhere, and*

(ii) *a letter from a firm of solicitors in Hong Kong confirming that, to the best of their knowledge and belief, the local firm of solicitors/attorneys providing the confirmation in (i) above is registered in the country where the property or land is situated for the provision of legal advice within that jurisdiction.”*

24. In other words, with effect from 1 April 1993, where overseas properties are to be advertised for sale on television and radio, the licensees of television and radio stations must require the advertiser to comply with the requirements set out in the codes.

Failings of the television and radio codes on advertising standards

25. The two codes cannot, in our view, provide sufficient protection to prospective purchasers for several reasons. In the first place, the whole scheme of control puts the responsibility of verifying the authenticity of the overseas property entirely upon a foreign solicitor or attorney who is not subject to controls in Hong Kong. The involvement of the Hong Kong solicitors is limited to confirming that the foreign solicitors/attorneys are registered in the overseas country concerned. The fact that the foreign solicitors/attorneys are duly registered does not necessarily mean that they always give correct legal advice. Hong Kong lawyers are not in a position to verify the advice given by their foreign counterparts.

26. Advertisers are not required under the two codes to state in the television or radio commercials that there are only three matters which have been verified by the foreign solicitors/attorneys. Prospective purchasers may get the wrong impression that whatever is said in the television or radio commercials has already been verified. Many recent television or radio commercials on overseas properties contain a lot of “puffs” which are not subject to controls under the two codes.

27. The mere fact that the requirements of the foreign government relating to the development and sale of the property have been complied with is not sufficient to protect purchasers. There may not be any legal requirement in the foreign country for developers to disclose such essential sales information as saleable area, fittings and finishes, date of the property being ready for occupation and transport facilities. The availability of housing loans to prospective purchasers is not an absolute guarantee of reliability of the development. Finances may, for example, be provided by the developer’s own subsidiary company which may not question the developer’s reliability.

28. Finally, the licensees of television and radio stations cannot be held liable for false claims in a property advertisement. Section 3(1) of the Protection of Investors Ordinance (Cap 335) makes it an offence if a person, by fraudulent or reckless misrepresentation, induces another person to take part in an “investment arrangement” in respect of property other than securities. The licensees are not liable for an offence under section 3(1) unless they have actual knowledge of the misrepresentation contained in the advertisement. It is seldom, if ever, that the licensees would

have such actual knowledge. The same principle applies to the local estate agent who handles the sale in Hong Kong. On the other hand, the developers, which are likely to be overseas companies, are not necessarily subject to the laws of Hong Kong.

Lack of controls over contents of sales brochures and newspaper advertisements

29. There are at present no controls, statutory or administrative, over the contents of sales brochures and advertisements for overseas properties in newspapers, handouts or pamphlets. The two codes apply only to those advertisements appearing on television and radio. It is therefore common to find newspaper advertisements for overseas properties which are full of puffs and misleading sales particulars. In some instances, photographs of attractive bungalows appearing in newspaper advertisements for overseas properties are, in fact, not of the actual completed properties, but are photographs of bungalows of another development elsewhere.

Insufficient controls over sales descriptions

30. In conclusion, there are at present insufficient controls over sales descriptions of overseas properties. We therefore consider that advertisements and sales descriptions of uncompleted overseas residential properties should be subject to regulation and, accordingly, we have made recommendations to this effect in this paper.

Scope of deliberations

31. Our discussion in this paper is confined to the regulation of sales descriptions of overseas uncompleted residential properties. That is to say, any uncompleted residential property situated outside the boundaries of Hong Kong is within the scope of our deliberations.

32. **It is worth noting that all our recommendations in this paper are applicable to overseas uncompleted residential properties only.**

Consultative document

33. This is a consultation paper which contains the sub-committee's interim report. It also sets out the sub-committee's interim recommendations.

34. The purpose of circulating this consultation paper is to invite property developers, estate agents, lawyers, members of the public and other interested parties to express their views on the matters raised and the interim recommendations made. The sub-committee shall present their final report to the Law Reform Commission after taking into account views on consultation.

CHAPTER 1

The General Approach

Difficulties of controls over sales descriptions of overseas properties

Developers overseas

1.1 Developers of overseas properties are mostly foreign companies which are not subject to Hong Kong laws. Any piece of Hong Kong legislation is unlikely to be binding on overseas developers. Moreover, it is difficult, if not impossible, to enforce any penalties against overseas developers who infringe the requirements under the new legislation.

Advertisements in foreign newspapers or magazines circulated in Hong Kong

1.2 Advertisements for overseas properties often appear in foreign newspapers or magazines which are circulated in Hong Kong. It is difficult to control the contents of these advertisements.

Guided tour to foreign building sites

1.3 Local estate agents sometimes organise guided tours for potential purchasers to the building sites in the foreign country. Mock-up flats are sometimes provided at the site. Such guided tours are quite common to PRC properties because of the developments' geographical proximity to Hong Kong. It is difficult for Hong Kong authorities to control the quality of sales information provided at the site in the foreign country.

Regulation of local estate agents

1.4 Many overseas uncompleted residential properties offered for sale in Hong Kong are handled by local estate agents acting as intermediaries between the overseas developer and local purchasers. Many local estate agents merely act as sales agents. Some local estate agents, however, also participate in the development of the overseas projects. The latter group of estate agents usually own a minority interest in the overseas projects. Their role is both sales agents and co-developer.

1.5 The local estate agent is usually responsible for arranging for the sales exhibitions held in Hong Kong. Very often, the local estate agent compiles the sales brochure from information provided by the overseas developer. The estate agent is frequently the purchasers' only source of information on the overseas project as the developer seldom has a local representative office.

The Government's Working Group on Regulation of Estate Agents

1.6 It is therefore necessary to also consider regulation of estate agents in Hong Kong in parallel with the study on sales descriptions on overseas properties. The regulation of estate agents has already been taken up by Government. In November 1993, Government set up a Working Group on Regulation of Estate Agents ("the working group") to study the need for a regulatory

system for estate agents in Hong Kong. As a result of the working group's recommendations, Government introduced the Estate Agents Bill into the Legislative Council on 17 November 1995. The Bill aims at legislating for the formation of an Estate Agents Authority, the licensing and regulation of estate agents. Under the Bill, the proposed Estate Agents Authority shall be empowered to, *inter alia*, regulate a licensed estate agent's advertisement to ensure its accuracy and compliance with client's instructions. The regulations under the Bill will apply to estate agents handling both local and overseas properties. The Estate Agents Bill 1995 had not been enacted at the time of preparation of this report. We have, however, taken into consideration the effects of the proposals contained in the Bill (in its original form) in formulating our recommendations.

Estate agent's responsibility for provision of basic sales information

1.7 Since licensed estate agents will be regulated by law in future, we consider them the ideal persons to be entrusted with the task of providing basic sales information to prospective purchasers. Making licensed estate agents primarily responsible for providing sales information will overcome many of the enforcement problems involved in regulating sales descriptions of overseas property, because all estate agents handling overseas property are either situated in Hong Kong or, under the Estate Agent Bill 1995, must be licensed in Hong Kong.

1.8 Furthermore, as estate agents are often the purchasers' only source of information on the overseas project, it is, in our view, not unreasonable to expect estate agents to ensure that the sales information provided to prospective purchasers is accurate.

Our recommendations on estate agent's responsibility for provision of basic sales information

1.9 **We recommend that any licensed estate agent in Hong Kong handling overseas uncompleted residential property must provide prospective purchasers with some basic sales information in sales brochures and price lists.**

Focus on local advertisements and publicity on overseas properties

1.10 We consider it unrealistic to try to regulate all forms of publicity on overseas properties. For instance, it is impossible, to control an advertisement for overseas property contained in an internationally circulated newspaper, or magazine, journal or periodical which is not printed or produced in Hong Kong. We intend to concentrate on the regulation of sales brochures and advertisements that are done or produced or broadcast in Hong Kong.

1.11. The Government has adopted a similar approach in controlling advertisements for overseas lotteries. Under section 12 of the Gambling Ordinance (Cap 148), it is an offence to advertise in Hong Kong for overseas lotteries unless the advertisement is contained in an "internationally circulated newspaper, or magazine, journal or periodical which is *not* printed or produced in Hong Kong".

1.12 This approach is, however, not entirely satisfactory. People can still see advertisements contained in international publications imported into Hong Kong. But one must

accept the fact that it is impossible to control the contents of imported materials not published in Hong Kong. Moreover, Hong Kong laws do not, in general, have extraterritorial effect. That is to say, Hong Kong laws do not have binding effect on acts done outside the territory.

All sales must be handled by licensed estate agents in Hong Kong

1.13 We propose that all sales of overseas uncompleted residential property in Hong Kong must be handled by a licensed estate agent. In this connection, we propose that all advertisements for overseas uncompleted residential property must refer to a licensed estate agent in Hong Kong.

1.14 This proposal has the advantage of giving purchasers the redress channels for damage suffered as a result of inaccurate or misleading sales descriptions. Purchasers can always turn to the licensed agents for remedies as estate agents will be regulated by proposed legislation under the Estate Agents Bill 1995. By making it compulsory to require all sales to be handled by licensed estate agents in Hong Kong, they will be given the incentive to take on the task of providing sufficient and accurate sales information to purchasers. In other words, licensed estate agents in Hong Kong will, under our proposal, be given a monopoly over the sale of overseas uncompleted residential property in exchange for the responsibility for the provision of sufficient and accurate sales descriptions to purchasers.

1.15 We have taken care to ensure that our proposal does not violate Hong Kong's international obligation for fair trading. Our proposal should apply to all vendors of overseas uncompleted residential property, whether they are from Hong Kong or overseas. Thus both Hong Kong and overseas vendors will be required to hire the services of a Hong Kong estate agent. As the same restriction will apply to both local and overseas vendors alike, Hong Kong's international obligation for fair trading will not be violated.

1.16 We do not intend that the proposed restriction should apply to private individuals selling one single dwelling. It would be too onerous to require private individuals selling a single dwelling to do it through a Hong Kong estate agent each and every time. In any case, we do not want to unduly regulate the economic activities of individuals.

Language ambiguities

1.17 There are cases in which language ambiguities are used in the sales brochure or advertisement to mislead purchasers. We therefore take the view that any ambiguity in any term used in the sales brochure or advertisement shall be construed in favour of the purchaser.

Our recommendations on the general approach of regulating sales descriptions and advertisements

1.18 **We recommend that any vendor of overseas uncompleted residential property must engage a licensed estate agent in Hong Kong. However, this requirement shall not apply to the sale of a single dwelling.**

1.19 **We recommend that no media in Hong Kong (including television, radio and printed media) shall publish an advertisement for sale of overseas uncompleted residential property unless it refers to a licensed estate agent in Hong Kong, together with the estate agent's licence number. However, the requirements mentioned in this paragraph shall not apply to advertisements for the sale of a single dwelling, nor to advertisements of overseas property not put up for sale in Hong Kong.**

1.20 **“Sale” shall include all transactions whereby a vendor's interest is transferred and shall also include the meaning of the term as defined in the Stamp Duty (Amendment) Ordinance (Ord No 8 of 1992).**

1.21 **We recommend that the estate agent who is referred to in the advertisement shall be liable for all false or misleading information in the advertisement and in all sales brochures not forming part of the advertisement.**

1.22 **We recommend that any ambiguity in any term used in any advertisement or sales brochure shall be construed in favour of the purchaser.**

1.23 **We recommend that anything in any advertisement or sales brochure which is false or misleading should constitute a breach of the proposed legislation (mentioned in chapter 11).**

The availability of sales brochure

1.24 It is difficult to give prospective purchasers full and complete sales information in a typical advertisement in newspapers, radio and television. It is impossible to squeeze all necessary sales information into a radio or television commercial which may only last for a few minutes or even seconds. Likewise, it is difficult to have all the necessary information contained in a newspaper advertisement of normal size.

1.25 We therefore consider that sales brochures should be made available to purchasers. A sales brochure can contain as much necessary sales information as possible for purchasers. We also hold the view that licensed estate agents should have the responsibility to make the sales brochure available. This is in line with our general approach which puts primary responsibility for supplying sales information on licensed estate agents.

1.26 We are of the view that the sales brochure must be available in Chinese. This will ensure that the sales brochure is intelligible to the average person in Hong Kong. If there are discrepancies between the Chinese and any other version of the sales brochure, purchasers should, in our view, be able to choose which version or part thereof is applicable.

1.27 In order to be of use to prospective purchasers, sales brochures should be available as early as possible. We think that sales brochure should be available from the time the property is first advertised for sale. Moreover, any invitation to buy property, in our view, can only be made if sales brochures are available to prospective purchasers at that stage.

Our recommendations on the availability of sales brochures

1.28 We recommend that up-to-date sales brochures must be made available to prospective purchasers. It should be the licensed estate agent's responsibility to make available the sales brochure. If the developer does not compile the sales brochure, it will be the licensed estate agent's responsibility to prepare the sales brochure.

1.29 We recommend that the sales brochure must be available in Chinese. If there are discrepancies between the Chinese and any other version of the sales brochure, purchasers can choose which version or part thereof is applicable.

1.30 We recommend that sales brochure must be available from the time the property is first advertised for sale. Moreover, any invitation to buy property, can only be made if sales brochures are available to prospective purchasers at that stage.

CHAPTER 2

Date of Completion and Date of being Ready for Occupation

Delay or total project failure

2.1 A common complaint by purchasers of uncompleted overseas properties is that the development is delayed or worse still the project fails altogether.

2.2 There is currently a local term called “lan mei” properties, which literally means “broken tail”. This term refers to those developments which have failed to be completed for various reasons. The “tails” of the developments have broken and purchasers can never expect to see the property come into being.

Reasons for delay or project failure

2.3 Because of the haste to cash in on the property boom during the early 90’ s, some PRC developments commenced without thorough site investigation studies. Some developments therefore were built on land not suitable for erecting houses or block of flats. The soil was, for example, too soft or there was extensive underground water. Thus, much more additional construction works were needed to stabilize the base of the building sites, resulting in additional costs and delay of the developments.

2.4 A frequent reason for the failure of some overseas projects is that the developers in such cases have tried to finance the development costs by proceeds from pre-sale of flats. When the pre-sale turns out to be unsatisfactory, the developer will have insufficient funds to proceed with the development and the project will grind to a halt.

Extension of date of completion

2.5 Many sale and purchase agreements of overseas properties contain clauses allowing the extension of the date of completion in specified situations. For example, in some agreements of overseas properties, it is provided that the developers may delay development without compensation to the purchasers if there are “special reasons” certified by the “relevant authorities”. Such special reasons, which are very much in the developer’ s favour, include:

- (1) Exceptionally difficult and major technological problems not amenable to immediate solutions;
- (2) Need to amend the building plans for technical reasons;
- (3) The authorities’ delay in approving relevant documents;

- (4) Delay of local authorities in approving the development's facilities;
- (5) Changes in State planning or the executive orders of State functional departments;
- (6) Delay caused by the contractors;
- (7) Other matters beyond the vendors' control.

2.6 We consider that purchasers should have the right to know beforehand in the sales brochure the grounds on which the date of completion can be extended.

Measures to ensure development on schedule and to prevent project failure

2.7 In our view, nothing can really ensure a development progressing on schedule because there are many factors affecting the progress of construction which may be outside the developer's control.

2.8 We consider that what purchasers need are some financial measures to protect the deposits and instalments paid by them in the event of delayed completion or project failure. In this connection, we have reviewed various options including stakeholding, trust account, insurance and bonds put up by developers.

2.9 We do not consider stakeholding of the purchase deposits and instalments a viable solution in the case of overseas property. In order to give real protection to purchasers, it is important to ensure that progress payments are released to developers in accordance with the actual progress of construction. It is difficult to exercise actual control over the release of progress payments to developers if stakeheld funds are held overseas. It is necessary to appoint local solicitors as the stakeholders in order to keep the stakeheld funds in Hong Kong. However, it is difficult for local solicitors to ensure that the certificates for progress payments issued by overseas architects are in order. It is also too onerous on local solicitors to expect them to continuously monitor the progress of an overseas project which in many cases may last 3 or 4 years. Similar arguments also work against appointing estate agents as stakeholders. Moreover, it is the policy behind the Estate Agents Bill 1995 that purchaser's money should not be left in the hands of estate agents for extended periods. The arguments against stakeholding are also applicable to trust accounts. In fact, stakeholding is a kind of trust account.

2.10 We consider insurance is a possible alternative. However, the value involved in property transactions is enormous. It will require a substantial insurer to take on the insurance. Owing to the reasons mentioned in the last paragraph, the premium can be very high. In any event, not too many Hong Kong insurers will be prepared to take on the risk of ensuring the success of overseas developments.

2.11 Bonds put up by the developer appears, in our view, to be a more favourable option than the others. However, we do not anticipate that too many local banks will be keen on providing bonds to cover the risk of overseas developments which are not subject to controls from Hong

Kong. The bond should, in our view, be available to meet purchasers' claim in the event of delay or project failure. The amount of the bond should therefore cover all deposits and instalments paid by purchasers plus interests thereon at reasonable rates.

2.12 Although each of above options has some shortcomings of its own, it is our view that one or more of these options should be adopted to meet purchasers' claims in the event of delayed vacant possession or project failure. However it is not within our terms of reference to recommend a particular option.

2.13 **We would make the observation that Government should undertake study to find out the appropriate financial measures (including stakeholding, trust account, insurance, bonds put up by developers) to protect all deposits and instalments paid by purchasers in the event of delayed completion or project failure.**

2.14 We consider that the sales brochure should state whether there are any mechanisms to protect all deposits and instalments paid by purchasers in the event of delayed completion or project failure.

Date of being ready for occupation

2.15 In our view, what really matters to the purchaser is the date by which the property will be ready for occupation. We take the view that such a date should be stated in the sales brochure.

2.16 We consider that the property is ready for occupation only when all fittings and finishes applicable to the property have been installed (unless they are stated to be excluded in the sales brochure); there is reasonable access to the property; the utilities stated to be available in the sales brochure have been connected; and all local permission needed for occupation has been obtained.

Our recommendations on the date of completion and the date of property being ready for occupation

2.17 **We recommend that the sales brochure must state the date of the property being ready for occupation. The term "ready for occupation" shall mean:**

- (i) all fittings and finishes which are specified in the list in paragraph 3.13 and which are applicable to the property concerned have been installed, unless they are stated to be excluded in the sales brochure; and**
- (ii) there is reasonable access to the property; and**
- (iii) the utilities stated to be available in the sales brochure have been connected; and**

(iv) **all local permission needed for occupation has been obtained.**

2.18 **We recommend that the sales brochure must state the grounds on which the date of completion can be extended.**

2.19 **We recommend that the sales brochure must state whether there are any mechanisms for protecting all deposits and instalments paid by purchasers in the event of delayed completion or project failure.**

CHAPTER 3

Fittings and Finishes

Introduction

3.1 The quality of fittings and finishes of the property is of vital importance to purchasers of overseas properties. Many people in Hong Kong purchase overseas properties for investment purposes. Low quality fittings and finishes reduce the resale value of the property. For those who purchase for self use, they mean considerable money has to be spent on maintenance and renovation.

3.2 Purchasers of uncompleted overseas properties cannot see for themselves the quality of fittings and finishes. A few developers of overseas property put up mock-up flats in Hong Kong. These mock-up flats are of little use to purchasers because it is difficult to ascertain the difference in standard between the mock-up units and the actual units in the foreign country. Other developers would put up mock-up flats at the building sites in the foreign country. Few Hong Kong purchasers can afford the time and trouble to visit these mock-up flats in the foreign country. Some local estate agents organise tours for potential Hong Kong purchasers to see the mock-up flats at the building sites. But these tours are usually organised for developments situated in the nearby Guangdong province only, in view of their relatively short distance from Hong Kong.

3.3 Prospective purchasers therefore rely on the descriptions of fittings and finishes contained in the sales brochures. However, sales brochures do not contain uniform descriptions of fittings and finishes. Some sales brochures even fail to give any description of the fittings and finishes.

Problems with descriptions of fittings and finishes

3.4 Vague descriptions are often used in sales brochures. The exact types of fittings and finishes used are seldom specified. There are, for example, such vague descriptions as “in accordance with government standards”, “good quality”, “pretty”, “deluxe”, “high class” and “imported”.

3.5 The word “imported” can be quite misleading, especially in the case of PRC properties. In the PRC, imported materials can mean those imported into China from Hong Kong. This concept of imported materials is different from that usually held by Hong Kong purchasers. In Hong Kong, people tend to think of imported goods in terms of those from Europe, United States, Japan, etc.

3.6 The brands and countries of origin of the fittings and finishes are seldom specified in the sales brochures. There have been cases in which developers have substituted materials of inferior quality because of unforeseen rises in the prices of the intended materials. Purchasers could not complain in such cases as the brands and countries of origin of the intended materials were not mentioned in the sales brochures or in the purchase agreements.

A reasonable level of disclosure is sufficient

3.7 We do not consider it desirable to pitch the level of disclosure too high in the case of overseas property. It will create practical problems if too detailed specifications of fittings and finishes are required to be disclosed. Firstly, it will be difficult to ascertain the quality and standard of certain brands of fittings and finishes if they are not commonly used in Hong Kong. Secondly, it will be difficult to take any action against the Authorized Person who erroneously certifies the substitute materials. As the Authorized Person may be in say, USA or Canada, any action taken in Hong Kong against him may be difficult.

3.8 We therefore take the view that a reasonable level of disclosure or description of the quality of fittings and finishes will suffice. The sales brochure should contain a list of fittings and finishes and state the types of materials intended for the fittings and finishes. If the intended materials become unavailable, developers should be allowed to substitute other materials provided that the substitute materials are of comparable quality and standard to the intended materials.

3.9 The developer may of course and often will provide more than the minimum disclosure required. Any descriptions of the fittings and finishes in the sales brochure must be accurate.

3.10 We have drawn up at Annex I a specimen description of fittings and finishes.

Mock-up flats

3.11 Mock-up or sample flats are sometimes put up to show the quality of the fittings and finishes. The main problem with mock-up flats is that they are often pulled down before completion of the actual units. It is therefore difficult to ascertain any differences in the standard between mock-up flats and actual units.

3.12 We consider that the standard of fittings and finishes in the mock-up flats, if any, must be consistent with that stated in the sales brochure and that of the actual units.

Our recommendations on fittings and finishes

3.13 **We recommend that if the sales brochure states that certain fittings and finishes will be provided, it must also state the types of materials intended for the fittings and finishes. Moreover, the sales brochure must at least contain details of the following list of fittings and finishes:**

Exterior finishes

External walls, windows, verandah/balcony.

Interior finishes

Main entrance lobby, typical lift lobby, internal walls and ceilings, floors, bathroom, kitchen.

Interior fittings

Doors, bathroom, kitchen, bedrooms, telephone and aerials, electricity, gas/electricity supply, water supply and pipes.

Miscellaneous

Lifts, letter box, refuse collection, water/electricity/gas meters.

3.14 **We recommend that if the intended materials become unavailable, developers should be allowed to use substitute materials provided that the substitute materials are of comparable quality and standard to the intended materials.**

3.15 **We recommend that any description of the fittings and finishes in the sales brochure must be accurate.**

3.16 **We recommend that the standard of fittings and finishes in the mock-up flats, if any, must be consistent with that stated in the sales brochure and that of the actual units.**

CHAPTER 4

Utilities

Introduction

4.1 The availability of essential utilities such as water, electricity and gas supplies is of utmost importance to purchasers of residential properties. It is hard to imagine modern living without water from the tap or with an electricity supply which is frequently suspended. Even those who buy overseas properties for investment purposes would not want to buy properties which lack essential utilities supplies. Properties without adequate utilities supplies are not of much re-sale value and are unlikely to have good investment potential.

4.2 Hong Kong people live in a modern society in which essential utilities supplies are a matter of course in residential properties. So many purchasers of overseas properties will assume that there will be no significant charges for, or disruptions to, these essential services. However, the Consumer Council has received complaints from time to time in respect of extra connection fees for utilities, delay in connections or disruptions in the supply.

Properties without water and electricity supplies

4.3 Because of the sudden property boom in the early 90' s, many developments were started in some overseas countries. Even small counties in the province joined in the property development boom. These small counties were, however, once farming economies with only small-scale water and electricity supply networks. Developments of over 1,000 units were put up in these small counties without the corresponding investment in public utilities to meet the increased demand for water, electricity, etc.

4.4 There were some instances of a few overseas developments which were without water and electricity supplies when vacant possession was handed over to purchasers.

Lack of descriptions of utilities supplies in sales brochures

4.5 Most sales brochures of uncompleted overseas properties do not give any description of the utilities supplies, such as water, electricity, drainage and gas. Many Hong Kong purchasers have proceeded to buy overseas properties even though the sales brochure does not give them an idea about the utilities supplies. Hong Kong purchasers take for granted such essential utilities as water and electricity supplies. We therefore consider it desirable to require all sales brochures to describe the essential utilities including water, sewage and drainage, electricity, fuel.

Costs of connection

4.6 According to the Consumer Council, most developers of overseas property nowadays would absorb the costs of connecting water and electricity to the premises. However, there have been past cases of developers charging purchasers fees under the heading of "water

connection fee” or “electricity connection fee”. The developers explained that the service providers in these cases were not very consistent in their pricing policies, and sometimes the costs of connection would be increased time after time and eventually greatly exceeded the originally expected level. Some developers therefore required purchasers to bear the costs of such connection.

4.7 There have been complaints from purchasers that they were unaware that connection fees for water and electricity were to be charged. In some cases, although purchasers knew of such charges, they were surprised with the level of the charges which amounted to several thousand dollars.

4.8 We take the view that the sales brochure should state the current estimate of costs of connection to utilities, if any, at the time of sale. Moreover, there should, in our view, be where applicable a general warning advising purchasers that the costs of connection may change. We consider that unless the sales brochure has stated that the costs of connection are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.

Our recommendations on utilities

Water, sewage and drainage

4.9 **We recommend that the sales brochure must state whether connection to water, sewage and drainage will be available upon the completion of the property. Unless water, sewage and drainage are provided by a public system, the type of water, sewage and drainage systems must be specified in the sales brochure.**

Electricity

4.10 **We recommend that the sales brochure must state the source of electricity supply, its voltage and ampage.**

Fuels (other than electricity)

4.11 **We recommend that if fuel (other than electricity) is provided to the property, its sources and uses must be stated in the sales brochure.**

Costs of connection

4.12 **We recommend that the sales brochure must state the current estimate of costs of connection, if any, to utilities at the time of sale together with a general warning that the costs may change. Unless the sales brochure has stated that the costs of connection are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.**

CHAPTER 5

Location of Property and Transport Facilities

Importance of location of property and transport facilities

5.1 In any purchase of property, the most important considerations include its location, in particular, proximity to city centres and the availability of major transport facilities such as airport, highways, trains and buses. Information on the location of property and transport facilities is of vital concern to purchasers of overseas properties. As purchasers seldom visit the overseas property before making a purchase, they can only rely on the descriptions that may be contained in the sales brochure and advertisements.

5.2 It is therefore important to ensure that descriptions of location and transport facilities are accurate and informative. At present, the quality of the descriptions in sales brochures varies substantially and vague, misleading or even incorrect descriptions are often found.

Misleading descriptions of location of property

5.3 Advertisements and sales brochures of overseas properties may give a misleading impression of the location of the property. The proximity of the property to city centres and highways may be exaggerated. Location plans are sometimes provided in the sales brochures but without measurement scales. Purchasers thus form misleading impressions of the proximity of the property to city centres.

5.4 Vague descriptions of distance from city centres are often used to mislead purchasers. In one case, an advertisement stated that a development in Britain was “only 30 minutes by train” from London. That British development is in fact some 120 kilometres away from London. Also, there are only a few trains that take half an hour and the journey takes about two hours by car.

5.5 The development’s proximity to Hong Kong is also sometimes exaggerated. It was stated in the advertisement for a development in Shenzhen that the development was “close to Hong Kong”. Although Shenzhen is just on the other side of the border, that development is not close to Hong Kong as it is situated at the outskirts of Shenzhen.

Misleading descriptions of transport facilities

5.6 Advertisements and sales brochures sometimes contain misleading descriptions of the availability of transport facilities. They state that the developments are close to major transport facilities and highways. But the transport facilities and highways are being planned or still under construction.

5.7 For example, an advertisement in 1994 for a development in Guangzhou stated that the development was close to the Guangzhou/Zhuhai Highway. At that time, the highway was still

under construction and was not due to be completed before 1996. An advertisement for another Guangzhou development referred to it as being “development along the routes of underground railway, light-rail system and railway”. The fact is that the underground railway in Guangzhou is still under construction. Moreover, the advertisement failed to state the distance between the development and those transport facilities.

5.8 In another advertisement for a development in Zhuhai, it was stated that it would take half an hour by car to reach Hong Kong from the development by using the Zhuhai/Hong Kong Bridge. The bridge is in fact at a very preliminary stage of planning. It is still unsure whether it will be built at all.

5.9 The location plan in advertisements and sales brochure is often used to give a misleading impression of the availability of public transport facilities. For example, the underground railway station is shown in the location plan to be in the vicinity of the development or just at the other end of the road. However, as the measurement scale is invariably not provided in the location plan, the underground railway station can well be miles away from the development, although it looks as if just an inch away on the location map.

Information to be provided in sales brochure

5.10 In order to ensure that purchasers are given accurate descriptions of the location of property and the availability of transport facilities, we take the view that the sales brochure should contain a map/location plan which is accurate and drawn to scale and shows the orientation. Purchasers can ascertain the exact whereabouts of the property by reference to the map/location plan.

5.11 We have considered whether or not a positive duty should be imposed to require actual travelling time and travel distance to be given. We have come to the view that it should be left optional whether such details are given or not. It is, in our view, difficult to give exact travelling time given different traffic conditions at different times of the day. But we take the view that if developers or estate agents of their own accord give any details of the travelling time, travel distance, and ground distance, such details must be true and not misleading.

Pictorial representation

5.12 The sales brochure sometimes contains a misleading artist’s impression of the surroundings of the development. We have come across cases in which the artist’s impression shows that the development is surrounded by trees but in fact it turns out to be among blocks of buildings. We take the view that any pictorial representation of the surroundings should not be misleading.

Car-ports and car parks

5.13 We have considered whether or not the sales brochure should state the location of the car-ports and car parks. We have come to the view that in the case of overseas developments, it may be difficult for developers to state the whereabouts of the car-ports and car parks. We prefer *not* to make any recommendation on car-ports and car parks.

Our recommendations on location of property, transport facilities, and pictorial representation

5.14 **We recommend that the sales brochure must contain a map/location plan which is accurate and drawn to scale and shows the orientation. Any statements about the travelling time, travel distance, and ground distance must be true and not misleading.**

5.15 **We recommend that any pictorial representation of the location and surroundings of the development must be accurate and not misleading.**

CHAPTER 6

Gifts and Benefits

Gifts and benefits for purchasers

Furniture and other gifts

6.1 In order to promote sales, some advertisements for overseas properties contain promises for gifts or benefits for purchasers. Furniture items are the common promised gifts. In some extreme examples, the value of the promised furniture items could match the price of the property.

6.2 The Consumer Council has found some examples of misleading promises of gifts or benefits contained in advertisements for overseas properties. It was stated in the advertisements of a development in Guangzhou and of another development at Zhongshan that certain quantities of furniture and electrical appliances would be given as gifts to purchasers. In fact, the actual quantities of gifts varied from unit to unit, depending on the sizes and prices of the units bought.² The promised quantities of gifts were not available to every purchaser.

Waiver of fees and charges

6.3 Some advertisements said certain fees and charges would be waived. The waiver covered legal fees, estate agent's handling charges, electricity deposits, etc. The waiver could amount to several thousand dollars. But the advertisements did not mention that such a waiver was subject to conditions. In the case of a development in Dongguan, the waiver of estate agent's handling charges was subject to the purchase being made during the sales promotion period.³

Club membership

6.4 Club membership is another form of gift promised in some advertisements for overseas properties. But such a promise of club membership to purchasers is sometimes misleading. The advertisement of a development in Zhongshan said club membership costing \$10,000 would be given. The club membership would in fact only be available to purchasers of bungalows in the development.⁴ Purchasers of apartments would not be entitled to such a club membership.

Rental or buy-back guarantees

6.5 In order to attract purchasers, especially those who buy overseas properties for investment purposes, some advertisements stated the property's expected rental returns. However, the advertisements did not mention that the figures were for indication only and had no

² *Choice Magazine*, p 19.

³ Ditto.

⁴ Ditto.

binding effect.⁵ Such advertisements, unless authorised by the Securities and Futures Commission (“SFC”), are in breach of section 4 of the Protection of Investors Ordinance (Cap 335). Under section 4, it is an offence for anyone, unless authorised by the SFC, to issue an advertisement to invite the public to take part in any investment arrangements in respect of property other than securities.

6.6 Some other advertisements stated that certain rental returns were guaranteed by developers. Such guarantee would be a great inducement to purchasers, but it could be illusory. In the advertisement for a development in Guangzhou, it was stated that the developers would guarantee rental returns up to 15 percent per annum for a period of two years. However, the guarantee was in fact subject to the condition that a request had to be made to the developers for leasing of the property within 14 days of its vacant possession being handed over to purchasers.⁶ If the completion of the development were delayed for whatever reasons, the guaranteed rentals would also be postponed.

6.7 In order to enhance purchasers’ confidence in the investment, some advertisements contained the developers’ guarantee that the price of the property would rise by a certain percentage after a specified period. The developers also undertook to buy back the property at increased price after the specified period. But such buy back guarantee was subject to some conditions which were not mentioned in the advertisements. For example, the buy back guarantee of a development in Huiyang was subject to the condition that 90 percent of the purchase price was paid up within 6 months of purchase of the property.⁷ Again, such buy-back guarantee in advertisements is in fact an offence under section 4 of the Protection of Investors Ordinance (Cap 335). A local estate agent was prosecuted and fined \$100,000 for issuing an advertisement offering units in Zhuhai for sale. The offer included a buy-back guarantee that purchasers not seeing an 80 percent investment appreciation could sell the units back for 180 percent of the original price to the developer.

Other gifts and benefits

6.8 There are other forms of gifts and benefits being advertised. They include vehicle licences, cash coupons, air tickets, car park spaces or even another flat. But these gifts are usually given subject to conditions, such as participation in lucky draws, which are not stated in the advertisements. In the case of a development in Zhongshan, whilst the advertisement stated that a lucky draw would be held for the gift of a free flat, it did not state the important condition that the lucky draw would only be held upon the sale of the whole development.⁸ Presumably if any of the units remained unsold, the lucky draw would be deferred indefinitely.

Nationality schemes

6.9 To some purchasers, the most attractive form of benefit is that purchasers of property under the scheme will get foreign passports. The problem with some of these promises of

⁵ Ditto.

⁶ *Choice Magazine*, p 20.

⁷ Ditto.

⁸ *Choice Magazine*, p 20.

passports is that the nationality scheme may be true at the time of the advertisement but fails to materialise later because of changes in conditions. For example, at the time of the advertisement, it may be true that one may obtain a foreign passport by investing a sum in the property of the overseas country. But after the time of the advertisement, there may be changes in the laws of that country which renders the passport deal invalid.

6.10 Experience shows that things said in advertisements about passports through investment may not materialise. For instance, at one time the New Zealand Commission in Hong Kong approved an investment scheme through which New Zealand passports could be obtained. The New Zealand Government, however, later cancelled the investment scheme.

Sufficient if promises of gifts and benefits are accurate

6.11 As there are numerous different types of gifts and benefits given by developers, we do not consider it feasible to impose any minimum disclosure requirements for gifts and benefits. We take the view that it will suffice if any statement about gifts and benefits are accurate and not misleading.

6.12 Since it is difficult to cover all nationality schemes in the sales brochure, we are of the view that the best that can be done will be to require a general warning advising purchasers to consult the relevant consulates on the validity of the nationality scheme.

Our recommendations on gifts and benefits

6.13 **We recommend that anything stated in advertisements or sales brochures about gifts and benefits including nationality schemes must be accurate and not misleading.**

6.14 **We recommend that if the advertisement or sales brochure states that nationality or right of residence can be acquired by buying the property, it must contain a general warning advising prospective purchasers to consult the relevant consulates on the validity of the nationality scheme and that the granting of nationality and residence or otherwise will depend on the individual's background.**

CHAPTER 7

Financing Arrangements

Availability of mortgage facilities

7.1 In general, purchasers have more confidence in those overseas developments with mortgage facilities from banks. Purchasers tend to believe that banks will only provide mortgage facilities for developments which are financially sound. In fact, some commentators have advised Hong Kong purchasers to choose only those overseas developments with mortgage facilities from banks, to avoid risky developments.

7.2 In order to boost purchasers' confidence in the developments, some advertisements and sales brochures state that mortgage facilities are provided by banks in Hong Kong or overseas. Most of these advertisements and sales brochures, however, do not provide the mortgage details such as the name of the banks, mortgage ceilings, interest rates, maximum duration of loan. Moreover, the claim of availability of mortgage facilities is not substantiated by any documentary evidence such as a copy of the banks' written undertaking to provide mortgage facilities for the developments.

Misconception held by purchasers

7.3 It is a common misconception held by many purchasers that they will always be able to obtain the maximum mortgage as advertised. To correct such misconceptions, we take the view that prospective purchasers should be advised that the granting of mortgage facilities or otherwise will depend on the individual's credit and other background. Moreover, we are of the view that purchasers should be advised to find out the exact details of the mortgage facilities.

7.4 It is also our view that where an advertisement or the sales brochure states that mortgage facilities are available, the banks or other institutions providing such facilities must be identified.

Costs of setting up mortgage facilities being passed onto purchasers

7.5 Some banks have been willing to grant end-user finance only if the developer gives a buy-back guarantee. The bank will charge the developer for setting up such finance because the bank must set aside money for the end-users. The end-users, of course, also have to pay the arrangement fees for the mortgage. The problem is that sometimes purchasers are required to pay also the developers' costs of setting up the end-user finance. These extra fees can be quite high in some cases. The developer has to pay set-up fees of 1 to 2 percent to the bank for setting up mortgage facilities. Few purchasers are aware of these high extra fees before they go to the solicitors' firm to sign a formal contract.

7.6 We take the view that such additional costs must be stated in the sales brochure. We consider that unless the sales brochure has stated that such costs are to be borne by purchasers,

purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.

Our recommendations on financing

7.7 We recommend that where an advertisement or the sales brochure states that mortgage facilities are available, it must carry a general warning advising prospective purchasers to find out from banks or other financial institutions the exact details of the mortgage facilities and that the granting of mortgage facilities or otherwise will depend on the individual's credit and other background.

7.8 We recommend that where the developer arranges mortgage facilities for prospective purchasers and intends to pass on to purchasers the costs of setting up such facilities, the amount of such costs must be stated in the sales brochure. Unless the sales brochure has stated that such costs are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.

7.9 We recommend that where an advertisement or the sales brochure states that mortgage facilities are available, the banks or other institutions providing such facilities must be identified.

CHAPTER 8

Price of Property

Misleading indication of prices

8.1 In order to attract purchasers, many advertisements for overseas properties give a false impression that the properties are cheap. There have been examples of such statements as “\$100 per square foot”, “from HK\$60,000”. But there may in fact be only one or two units put up for sale at the advertised “cheap” prices. Moreover, the advertised price may be the discounted price payable under the cash payment method. In some cases, the prices quoted in the advertisements did not match those in the price list.⁹

8.2 The Consumer Council found that the prices indicated in the advertisement for a development in Shenzhen were in fact those prices intended for purchasers resident in PRC.¹⁰ The prices of PRC properties for sale to non-residents are much higher than those for sale to residents because a premium is payable to the authorities in the former case.

Full information on price necessary

8.3 To make an informed choice of whether to buy any property, the purchaser must be able to ascertain the price. There is, however, evidence that not all information given to prospective purchasers is reliable. We take the view that purchasers should be informed of the prices of all units put up for sale. Although a misleading impression of the prices is sometimes given in advertisements, we do not consider it feasible to require the prices of all units be put in an advertisement, because most advertisements are either small in size or short in duration. We are of the view that it will be sufficient if the prices of all units are given in the price list.

8.4 The prices shown in sales brochure should, in our view, be the actual prices to be paid by purchasers. Hence, we consider that if the price will vary or some premium be charged according to some characteristics of the purchaser, then that difference or premium should be stated in the sales brochure or price list.

Cooling-off period

8.5 Some purchasers buy overseas property on the spur of the moment because of cheap prices (relative to local property) quoted in the advertisement or price list. Before committing themselves to the transactions, they may not have thoroughly considered relevant factors such as financial arrangements and location of the property. We take the view that purchasers should be given a chance to reconsider the transaction within a reasonable period after the preliminary agreement. In those countries such as Australia where cooling-off period is available, vendors are usually entitled to forfeit a small percentage of the deposit paid by purchasers upon the latter's withdrawal from the purchase at the expiry of the cooling-off period. The estate agents

⁹ *Choice Magazine*, p 13.

¹⁰ Ditto.

handling the transaction can also demand commission from the purchasers. In our view, such right to forfeit part of the purchase deposits is desirable because it provides safeguard against possible abuses of cooling-off period.

8.6 We think it desirable to have a 3-day cooling-off period after signing of the preliminary agreement (which includes reservation agreement, memorandum of sale etc). If purchasers do not purchase the property after signing the preliminary agreement, they may have to pay such administrative fees as may be fixed by the appropriate authority. Licensed estate agents will be entitled to the administration fees.

Our recommendations on price of property

8.7 We recommend that the price list must state the price of all flats put up for sale. Moreover, if the price will vary or some premium be charged according to some characteristics of the purchaser, rather than the qualities of the property, then that difference or the premium must be stated in the sales brochure or price list.

CHAPTER 9

Restrictions on Sale of Property to Foreigners

Restrictions on sale of property to non-residents or foreigners

9.1 As there are no legal or other restrictions on the sale of Hong Kong properties to foreigners or non-residents, purchasers of overseas properties may be unaware that some overseas countries have imposed restrictions on land ownership by non-residents or foreigners. Few advertisements and sales brochures give details of such restrictions.

9.2 There are various restrictions on sale of property to foreigners or nationals resident outside a country. Broadly speaking, there are restrictions as to ownership, the tenure of the property and mortgage arrangements. Apart from these restrictions, a foreign purchaser is often faced with foreign exchange controls and special tax implications arising from the sale and purchase of property.

Restrictions as to ownership

9.3 We have come across the following examples of restrictions as to ownership. These restrictions are, however, subject to change.

The PRC

9.4 In the PRC, some developments are for sale to PRC residents only. If units in these developments are sold to non-residents, a premium on top of the listed price is payable by purchasers.

Singapore

9.5 In Singapore, there are restrictions on the kind of residential flats which foreigners may buy.

Malaysia

9.6 Foreigners need to obtain the approval of the Foreign Investment Commission before they can purchase properties in Malaysia. Certain conditions will be attached to the approval if the value of the property exceeds a specified value. The usual condition is that if the property is bought for self-use, the foreign purchaser cannot transfer the property to other people within a specific period, which ranges from 3 to 5 years. The length of that period depends on the type of property bought.

Australia

9.7 In Australia, developers need to obtain approval from the government's Foreign Investment Review Board before they can sell properties to non-Australian citizens.

Taiwan

9.8 Non-Taiwanese cannot purchase property unless they fall into one of two categories of people. The first category are holders of an overseas Chinese identity card issued and certified by the Overseas Chinese Commission. Applicants for such an identity card need to have resided in Hong Kong or Macau for at least 5 years. The second category are citizens of countries having reciprocal agreements with Taiwan for purchase of property, such as Britain.

Problems with descriptions on restrictions as to ownership

9.9 The sales brochures seldom give details of the restrictions on the sale of overseas properties to foreigners or non-residents. When there are in fact such restrictions, the sales brochure will usually only state that the property can be sold to "foreigners", "non-citizens", or "people outside the country". But the sales brochure invariably fails to mention that the sale is subject to some forms of government approval.

9.10 Purchasers of local property can seek legal advice from their solicitors in Hong Kong on any legal restrictions before committing themselves to a purchase decision. This is not the case for purchasers of overseas property. It will often be difficult for a purchaser of overseas property to insist upon seeking advice from overseas lawyers or accountants before signing the agreement.

9.11 Purchasers of overseas property are therefore likely to rely on the developer or estate agents for information on any legal restrictions on the sale. We therefore take the view that it is neither too onerous nor unfair to expect the sales brochure to state all legal restrictions on foreign purchasers to purchase property.

Restrictions on tenure and mortgage arrangements

9.12 There are sometimes restrictions on the duration of the tenure which foreign purchasers or purchasers who are nationals but resident outside a country can acquire; alternatively, the provision of mortgage facilities to foreign purchasers. As it is difficult for purchasers of overseas property to find out for themselves such restrictions, we consider that the sales brochure must contain information on any restrictions as to tenure and mortgage facilities.

Our recommendations on restrictions on sale of property to foreigners

9.13 **We recommend that the sales brochure must contain the following information:**

- (i) **all legal restrictions on the eligibility of foreign purchasers or purchasers who are nationals but reside outside the country to purchase property and the legal nature and classification of such property in that country (for**

example, residential, farmland) and any restrictions on tenure which foreigners can acquire;

- (ii) any restrictions on mortgage arrangements for foreign purchasers or purchasers who are nationals but reside outside the country; and**
- (iii) the tenure of the property (for example, whether it is freehold or otherwise).**

CHAPTER 10

Miscellaneous Information

Transaction fees

10.1 Transaction fees are legal costs and other fees arising in respect of the property transaction. These include costs of legal documentation (preparation, engrossment, execution and registration), plans, attestation fees, stamp duty, registration fees, any additional duties and sundry charges. The kinds and the amount of transaction fees vary from country to country and even may differ among various regions in the same country.

10.2 Although the transaction fees may be quite a significant sum when compared with the value of the property, advertisements and sales brochures seldom state the responsibility for, and the amount of, transaction fees. As the transaction fees are usually borne by purchasers, we consider that purchasers should be informed of the amounts of such fees and their responsibility for the fees. We take the view that unless the sales brochure has stated that such transaction fees are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.

10.3 We take the view that details of estate agents' commission must also be provided. Estate agents' commission is part of the costs of the transaction and invariably is the purchaser's responsibility to pay. It is, in our view, only fair that purchasers be given a right to obtain details of any commission to be paid by them.

Our recommendations on transaction fees

10.4 **We recommend that the sales brochure must state with whom the responsibility for legal costs, stamp duty and other transaction fees lies. Unless the sales brochure has stated that such legal costs, stamp duty and other fees arising in respect of the property transaction are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer. Information on the scales of legal costs, stamp duty and other fees arising in respect of the property transaction must be provided by estate agents to prospective purchasers and there must be a note to this effect in the sales brochure.**

10.5 **We recommend that details of any estate agents' commission payable by purchasers must be provided by the estate agents.**

Supplementary charges upon taking possession

10.6 Upon taking possession of the property, purchasers are often faced with various charges, including deposits for water, electricity and gas supplies. These supplementary charges are seldom stated in the sales brochure. As purchasers are obliged to pay for these charges, we take

the view that purchaser's liability for and the amounts of such charges, so far as the developer is aware of them, be set out by way of itemised list in the sales brochure. We also consider that unless the sales brochure has stated that such supplementary charges are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.

Our recommendations on supplementary charges

10.7 **We recommend that the sales brochure must provide an itemised list of supplementary charges payable by purchasers upon taking possession of the property. If the exact amounts of such charges are unknown, the fact that they are unknown and the obligation to pay them must be disclosed in the sales brochure. Unless the sales brochure has stated that such supplementary charges are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.**

Liability for taxes

10.8 Purchasers of overseas property may face various taxes which are seldom, if ever, disclosed in the sales brochure. For instance, there is a 10 percent land tax payable by a foreign purchaser of Portuguese property. In our view, the sales brochure should state the purchasers' liability for any tax arising from the purchase together with categories of the taxes liable.

Our recommendation on liability for taxes

10.9 **We recommend that the sales brochure must state the purchasers' liability for any tax which may arise from the purchase of the property together with categories of the taxes liable.**

Tax implications

10.10 In some countries there are special tax rates applicable to foreign buyers of property. For example, in buying PRC property foreigners have to pay a deed levy at 6 percent of the purchase price, whilst it will be 3 percent of the purchase price for purchasers who are Hong Kong, Macau or Taiwan residents.

10.11 In some countries, the liability for taxes on property transactions is stipulated by law or regulations. For example, according to PRC laws and regulations, the Transaction Management Fee and Stamp Duty are to be equally borne by vendor and purchaser while the Deed Levy is to be borne solely by purchaser.

10.12 As Hong Kong does not have a system of capital gains tax, few purchasers are aware of the possibility of such tax when they buy overseas properties. In some countries such as the PRC and UK, on resale of property, any chargeable gains are subject to capital gains tax. The sales brochure rarely gives any warning of capital gains tax. Capital gains tax can be very high in some countries. As purchasers may sometimes buy overseas property with a view to profit, they

may not want to buy it in the first instance if they know that there will be high tax on the sales proceeds upon future sale.

10.13 As the tax implications to a foreign purchasers are many and varied, it is impossible to spell them all out in the sales brochure. We therefore think it sufficient to have a general warning in the sales brochure that there may be taxes arising from the sale and purchase.

Foreign exchange control

10.14 Foreign purchasers may regard the acquisition of overseas properties as an investment and will expect to transfer the sales proceeds back to their home country or elsewhere after disposal of the property. However, in certain countries such as the PRC and Spain, there are exchange controls pursuant to which outward remittance requires prior government approval.

10.15 We appreciate that it is impossible to give full details of foreign exchange controls within the bounds of the sales brochure. Hence, we consider it sufficient to have a general warning in the sales brochure of the possibility of exchange controls.

Our recommendations on tax implications and foreign exchange control

10.16 **We recommend that the sales brochure must contain a warning that there may be exchange controls and taxes arising from the sale and purchase.**

Date of printing of sales brochure

10.17 As there could be a time lapse between their preparation and publication, we consider that all sales brochures should state their date of printing. Purchasers can also determine whether the information in the sales brochure is outdated or not by reference to the date of printing.

Our recommendation on date of printing of sales brochure

10.18 **We recommend that the date of printing of the sales brochure must be clearly set out.**

Saleable areas

10.19 In our view, it should be mandatory to disclose the saleable area in the sales brochures because saleable area represents the actual floor space that purchasers can enjoy exclusively. However, there may not be a uniform definition of saleable areas among all overseas countries.

10.20 There are two ways to deal with possible differences in definitions. The first is to make it mandatory to adopt the definition used in Hong Kong. In Hong Kong, saleable area means¹¹:-

- (1) *in relation to a unit enclosed by walls, the floor area of such unit (which shall include the floor area of any balconies and verandahs), measured from the exterior of the enclosing walls of such unit except where such enclosing walls separate two adjoining units in which case the measurement shall be taken from the middle of those walls, and shall include the internal partitions and columns within such unit; but shall exclude the common parts outside the enclosing walls of such unit. Provided that if any of the enclosing walls abut onto a common area, then the whole thickness of the enclosing walls which so abut shall be included;*
- (2) *in relation to any cockloft, the floor area of such cockloft measured from the interior of the enclosing walls of such cockloft;*
- (3) *in relation to any bay window which does not extend to the floor level of a unit, the area of such bay window measured from the exterior of the enclosing walls or glass windows of such bay window and from the point where the bay window meets the wall dropping to the floor level of a unit but excluding the thickness of such wall;*
- (4) *in relation to any carparking space, the area of such carparking space measured from the interior of its demarcating lines or enclosing walls, as the case may be;*
- (5) *in relation to any yard, terrace, garden, flat roof or roof, the area of such yard, terrace, garden, flat roof or roof measured from the interior of their boundary lines, and where the boundary consists of a wall, then it shall be measured from the interior of such wall.*

10.21 The second approach is to require the developers to adopt the definition of saleable area which is commonly used in the overseas country concerned.

10.22 The first approach has the advantages of being certain and familiar to local purchasers. But the definition may not be applicable to the special circumstances of overseas countries. Developers may have to re-calculate the saleable area to fit the Hong Kong definition. The second approach covers the situation in all countries. But the foreign definition is of no or little use to Hong Kong purchasers and in any event there is no certainty that it is satisfactory.

¹¹ This is the standard definition of saleable area for all Hong Kong uncompleted residential properties in the Consent Scheme. We have recommended that this definition be extended to all uncompleted residential properties in Hong Kong (see paras 1.22 and 1.25 of *Report on Description of Flats on Sale, The Law Reform Commission of Hong Kong (Topic 32), April 1995.*)

10.23 We take the view that the paramount consideration is that the definition can provide accurate measurement and purchasers in Hong Kong know what it will mean. We do not consider it will impose a major burden on overseas developers to re-calculate the saleable area to fit the Hong Kong definition, given the resources available to the developers. In our view, the Hong Kong definition should be adopted in all sales brochure and advertisements .

Our recommendations on saleable area

10.24 **We recommend that the Hong Kong definition of saleable area (as reproduced in this chapter) must be adopted in all sales brochures and advertisements of overseas uncompleted residential property. The saleable area must be disclosed in the sales brochure.**

Fees charged by government authorities

10.25 Purchasers are sometimes required to bear the fees payable by developers to government authorities. These fees are usually in respect of utilities supplies such as electricity. In these cases, the authorities want to charge the developer extra fees upon completion of the development because of additional electricity requirements. The developer will then try to pass on these extra charges to purchasers. We have also come across another case in which purchasers have to pay extra money because the actual area of the property is bigger than that shown in the sales brochure.

10.26 These extra fees are not disclosed anywhere in the sales brochure. We take the view that the developer must not pass on the extra fees to purchasers unless the sales brochure has stated that the extra fees are to be borne by purchasers. It is also our view that if purchasers are required to pay under the general law any such extra fees not stated in the sales brochure to be payable by purchasers, purchasers shall be entitled to reimbursement from the developer.

Our recommendation on fees charged by government authorities

10.27 **We recommend that unless the sales brochure has stated that any extra fees or charges payable by developers are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.**

The tenure of the property

10.28 The tenure of the property refers to the duration of the interest in land which purchasers will take. There are, in general, two main types of tenure, namely, freehold and leasehold. Freehold tenure lasts for ever, whereas leasehold is for a limited period. The tenure of the property is of interest to purchasers of overseas property because a freehold property is usually more valuable than a leasehold property. Moreover, a premium is usually payable to the authorities upon the expiry of the tenure of a leasehold property. We therefore consider that the sales brochure must state the nature and duration of the interests that purchasers will take in the property.

Our recommendation on tenure of the property

10.29 **We recommend that the sales brochure must state the nature and duration of the interests that purchasers will take in the property.**

Access and rights of way

10.30 We consider that details of any restrictions on access or rights of way should be given to purchasers in the sales brochure. The value of a property will certainly be reduced if there is no proper access to it or access is subject to restrictions. Purchasers should, in our view, have the right to know these restrictions before making a purchase decision.

Our recommendation on access and rights of way

10.31 **We recommend that where there are restrictions on the use of access or rights of way to the property or the site where the property is situated, the sales brochure must give details of the access and rights of way as well as the restrictions.**

CHAPTER 11

Enforcement of the Recommendations

Means of enforcement

11.1 We have made a number of recommendations in preceding chapters for the protection of purchasers of overseas uncompleted residential units. The next question for us is the means of enforcing these recommendations. There are basically three means of enforcing them, as follows:

- (1) self-regulation;
- (2) administrative measures; and
- (3) legislation.

Self-regulation

11.2 This would require developers and estate agents to observe the requirements voluntarily, probably on the basis of a “code of practice”. Such an approach has the advantage of being flexible and quick to implement. However, as most developers of overseas properties are foreign companies, it would be difficult to control those who choose not to observe the requirements. On the other hand, as a code of practice does not have the force of law, it cannot be expected to be an effective tool of regulation.

Administrative measures

11.3 The Government could incorporate our recommendations in the Television Code of Practice on Advertising Standards and the Radio Code of Practice on Advertising Standards (the “two codes”). These two codes, however, apply only to television and radio advertisements for sale of overseas properties. They do not cover sales descriptions contained in other media such as newspapers and sales brochures. Moreover, the main shortcoming of the two codes is that they put the responsibility of verifying the authenticity of the overseas property upon a foreign lawyer who is not subject to Hong Kong control.

Legislation

11.4 Legislation is, in our view, the most effective way to enforce our recommendations. We propose that there should be new legislation giving effect to our recommendations in the preceding chapters.

Penalties

11.5 We consider that the proposed legislation should carry the usual statutory sanctions of imprisonment and fines. In addition, there should, in our view, be statutory powers for the authorities to suspend, revoke or restrict an estate agent’s licence.

(a) *Intentionally or recklessly*

11.6 In our view, a breach of the proposed legislation should carry a criminal sanction only if the breach is committed intentionally or recklessly. This will avoid developers or estate agents being penalised for unintentional errors or honest mistakes.

(b) *Fines be the usual sanction*

11.7 We take the view that fines should be the usual form of sanction. The maximum fine for an offence under our proposed legislation has to be very substantial to have sufficient deterrent effect.

(c) *Imprisonment be available where fines not thought adequate*

11.8 The use of imprisonment as a penalty in the proposed legislation has generated much argument among ourselves. The argument against imprisonment is that its use will be unfair to estate agents as they must rely on second-hand information. However, the majority of us take the view that as estate agents are the purchasers' major source of information, they should ensure that the sales information is reasonably accurate and take proper advice in case of doubt. Moreover, imprisonment will be available only if the breach is committed intentionally or recklessly. Estate agents acting honestly on second-hand information will not be subject to a prison sentence. What is more, the due diligence defence mentioned below can always come to the aid of estate agents if they can show that it was reasonable for them to have relied on information supplied by another. A further argument against imprisonment is that it is unenforceable against overseas developers. Whilst it is difficult to enforce such a penalty against overseas developers, we must not overlook the possibility of enforcement against local developers of overseas developments.

11.9 There may be instances in which fines alone are not an adequate deterrent and imprisonment may be necessary. For instance, the financial incentive to unscrupulous developers or estate agents to provide false or misleading sales information may sometimes be so great that fines of conceivable levels may not be an adequate deterrent. The majority of us have therefore come to the view that imprisonment should be available as a penalty *only* where fines are not thought adequate in all the circumstances of the case. It is the majority members' view that it is unlikely the Court will impose a prison sentence in most cases, but the fact that there is such a penalty available will serve as a deterrent.

(d) *Suspension, revocation and restriction of licence*

11.10 We consider that the appropriate body should have power to suspend, revoke or restrict the licence of an estate agent found in breach of the provisions of the proposed legislation. This sanction should, in our view, be available in addition to any other penalty that may be imposed by the Court.

(e) *"Due diligence" defence*

11.11 However, a defendant to a charge or an enquiry by the appropriate body under the proposed legislation should, in our view, be able to invoke the “due diligence” defence if he can show that he has taken all reasonable steps and exercised all due diligence to avoid committing the offence. Moreover, we consider that a defendant may also invoke the “due diligence” defence by showing his reliance on information given by another, provided he can show that it was reasonable for him to have relied on the information.

Civil remedies

(a) Damages

11.12 We take the view that the proposed legislation should provide for civil remedies which enable purchasers and sub-purchasers who buy before the time of completion to claim damages for loss suffered as a result of a breach of the proposed legislation. We also take the view that a breach of the proposed legislation should be a statutory tort.

11.13 We consider that both the developer and estate agents should be liable in damages to purchasers who have suffered loss. Whilst the developer may meet any such claims out of the purchase deposits, estate agents should, in our view, be covered by the bond put up by the developer (which we have suggested by way of an observation.) Under the Estate Agents Bill 1995, there will be a statutory requirement that an estate agency agreement must be signed between an estate agent and the purchaser. Thus, there is a close contractual relationship between an estate agent and the purchaser. We see no good reason why purchasers should not have the usual remedies in contract and tort against estate agents.

11.14 In order to avoid a flood of claims against the developer or the estate agent, we take the view that this remedy of damages for breach of the proposed legislation should only be available to purchasers and sub-purchasers who buy before the time of completion but *not* potential purchasers even if they can show that they have suffered loss.

(b) Relationship between the proposed reform and the existing remedies under Agreement for Sale and Purchase

11.15 We would make it clear that all our recommendations, including the new remedies under the proposed legislation, are *not* intended to disturb or reduce the existing remedies under the Agreement for Sale and Purchase (“ASP”). We only intend to give purchasers additional remedies for breach of the proposed legislation.

11.16 We therefore propose that there should be clear provisions in the new legislation that nothing in the legislation will detract from the rights of the purchaser under the ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation.

The enforcement body

11.17 We will leave to Government to decide if the Estate Agents Authority, or indeed any other existing statutory body or one to be created, is the appropriate body for enforcing the proposed legislation.

Our recommendations on enforcement

11.18 **We recommend that our recommendations should be enforced by legislation.**

11.19 **We recommend that a breach of the proposed legislation will carry criminal or other sanctions only if the breach is committed intentionally or recklessly.**

11.20 **We recommend that the proposed legislation should carry the usual statutory sanctions of imprisonment and fines.**

11.21 **We recommend that fines should be the usual form of sanction. The maximum fine for an offence under our proposed legislation should be very substantial to have sufficient deterrent effect.**

11.22 **We recommend that imprisonment should be available as a penalty only where fines are not thought adequate in all the circumstances of the case.**

11.23 **We recommend that there should be statutory powers for the appropriate body to suspend, revoke or restrict an estate agent's licence for acts or omissions in breach of the proposed legislation. This sanction should be available in addition to any other penalty that may be imposed by the Court.**

11.24 **We recommend that a defendant to a charge or an enquiry by the appropriate body under the proposed legislation can invoke the "due diligence" defence if he can show that he has taken all reasonable steps and exercised all due diligence to avoid committing the offence, or has relied on information given by another, provided he can show that it was reasonable for him to have relied on the information.**

11.25 **We recommend that there should be civil remedies which enable purchasers, and sub-purchasers who buy before the time of completion to claim damages against the developer or the estate agent for loss suffered as a result of a breach of the proposed legislation. A breach of the proposed legislation should be a statutory tort. This remedy of damages for breach of the proposed legislation should only be available to purchasers, and sub-purchasers who buy before the time of completion but *not* potential purchasers even if they can show that they have suffered loss.**

11.26 **We recommend that there should be clear provisions in the new legislation that nothing in the legislation will detract from the rights of the purchaser under the ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation.**

CHAPTER 12

Summary of Recommendations

12.1 In this final chapter, we summarize all the recommendations. It must be emphasized that all our recommendations are intended to apply only to overseas uncompleted residential property.

Summary of recommendations

12.2 Our recommendations are summarized below:

The General Approach

12.3 Any licensed estate agent in Hong Kong handling overseas uncompleted residential property must provide prospective purchasers with some basic sales information in sales brochures and price lists. (*Paragraph 1.9*)

12.4 Any vendor of overseas uncompleted residential property must engage a licensed estate agent in Hong Kong. However, this requirement shall not apply to the sale of a single dwelling. (*Paragraph 1.18*)

12.5 No media in Hong Kong (including television, radio and printed media) shall publish an advertisement for sale of overseas uncompleted residential property unless it refers to a licensed estate agent in Hong Kong, together with the estate agent's licence number. However, the requirements mentioned in this paragraph shall not apply to advertisements for the sale of a single dwelling, nor to advertisements of overseas property not put up for sale in Hong Kong. (*Paragraph 1.19*)

12.6 "Sale" shall include all transactions whereby a vendor's interest is transferred and shall also include the meaning of the term as defined in the Stamp Duty (Amendment) Ordinance (Ord No 8 of 1992). (*Paragraph 1.20*)

12.7 The estate agent who is referred to in the advertisement shall be liable for all false or misleading information in the advertisement and in all sales brochures not forming part of the advertisement. (*Paragraph 1.21*)

12.8 Any ambiguity in any term used in any advertisement or sales brochure shall be construed in favour of the purchaser. (*Paragraph 1.22*)

12.9 Anything in any advertisement or sales brochure which is false or misleading should constitute a breach of the proposed legislation (mentioned in chapter 11). (*Paragraph 1.23*)

12.10 Up-to-date sales brochures must be made available to prospective purchasers. It should be the licensed estate agent's responsibility to make available the sales brochure. If the

developer does not compile the sales brochure, it will be the licensed estate agent's responsibility to prepare the sales brochure. (*Paragraph 1.28*)

12.11 The sales brochure must be available in Chinese. If there are discrepancies between the Chinese and any other version of the sales brochure, purchasers can choose which version or part thereof is applicable. (*Paragraph 1.29*)

12.12 Sales brochure must be available from the time the property is first advertised for sale. Moreover, any invitation to buy property, can only be made if sales brochures are available to prospective purchasers at that stage. (*Paragraph 1.30*)

Date of Completion and Date of being Ready for Occupation

12.13 The observation that Government should undertake study to find out the appropriate financial measures (including stakeholding, trust account, insurance, bonds put up by developers) to protect all deposits and instalments paid by purchasers in the event of delayed completion or project failure. (*Paragraph 2.13*)

12.14 The sales brochure must state the date of the property being ready for occupation. The term "ready for occupation" shall mean:

- (i) all fittings and finishes which are specified in the list in paragraph 3.13 and which are applicable to the property concerned have been installed, unless they are stated to be excluded in the sales brochure; and
- (ii) there is reasonable access to the property; and
- (iii) the utilities stated to be available in the sales brochure have been connected; and
- (iv) all local permission needed for occupation has been obtained.
(*Paragraph 2.17*)

12.15 The sales brochure must state the grounds on which the date of completion can be extended. (*Paragraph 2.18*)

12.16 The sales brochure must state whether there are any mechanisms for protecting all deposits and instalments paid by purchasers in the event of delayed completion or project failure. (*Paragraph 2.19*)

Fittings and Finishes

12.17 If the sales brochure states that certain fittings and finishes will be provided, it must also state the types of materials intended for the fittings and finishes. Moreover, the sales brochure must at least contain details of the following list of fittings and finishes:

Exterior finishes

External walls, windows, verandah/balcony.

Interior finishes

Main entrance lobby, typical lift lobby, internal walls and ceilings, floors, bathroom, kitchen.

Interior fittings

Doors, bathroom, kitchen, bedrooms, telephone and aerials, electricity, gas/electricity supply, water supply and pipes.

Miscellaneous

Lifts, letter box, refuse collection, water/electricity/gas meters. (Paragraph 3.13)

12.18 If the intended materials become unavailable, developers should be allowed to use substitute materials provided that the substitute materials are of comparable quality and standard to the intended materials. (Paragraph 3.14)

12.19 Any description of the fittings and finishes in the sales brochure must be accurate. (Paragraph 3.15)

12.20 The standard of fittings and finishes in the mock-up flats, if any, must be consistent with that stated in the sales brochure and that of the actual units. (Paragraph 3.16)

Utilities

12.21 The sales brochure must state whether connection to water, sewage and drainage will be available upon the completion of the property. Unless water, sewage and drainage are provided by a public system, type of water, sewage and drainage systems must be specified in the sales brochure. (Paragraph 4.9)

12.22 The sales brochure must state the source of electricity supply, its voltage and ampage. (Paragraph 4.10)

12.23 If fuel (other than electricity) is provided to the property, its sources and uses must be stated in the sales brochure. (Paragraph 4.11)

12.24 The sales brochure must state the current estimate of costs of connection, if any, to utilities at the time of sale together with a general warning that the costs may change. Unless the sales brochure has stated that the costs of connection are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer. (Paragraph 4.12)

Location of Property and Transport Facilities

12.25 The sales brochure must contain a map/location plan which is accurate and drawn to scale and shows the orientation. Any statements about the travelling time, travel distance, and ground distance must be true and not misleading. (*Paragraph 5.14*)

12.26 Any pictorial representation of the location and surroundings of the development must be accurate and not misleading. (*Paragraph 5.15*)

Gifts and Benefits

12.27 Anything stated in advertisements or sales brochures about gifts and benefits including nationality schemes must be accurate and not misleading. (*Paragraph 6.13*)

12.28 If the advertisement or sales brochure states that nationality or right of residence can be acquired by buying the property, it must contain a general warning advising prospective purchasers to consult the relevant consulates on the validity of the nationality scheme and that the granting of nationality and residence or otherwise will depend on the individual's background. (*Paragraph 6.14*)

Financing Arrangements

12.29 Where an advertisement or the sales brochure states that mortgage facilities are available, it must carry a general warning advising prospective purchasers to find out from banks or other financial institutions the exact details of the mortgage facilities and that the granting of mortgage facilities or otherwise will depend on the individual's credit and other background. (*Paragraph 7.7*)

12.30 Where the developer arranges mortgage facilities for prospective purchasers and intends to pass on to purchasers the costs of setting up such facilities, the amount of such costs must be stated in the sales brochure. Unless the sales brochure has stated that such costs are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer. (*Paragraph 7.8*)

12.31 Where an advertisement or the sales brochure states that mortgage facilities are available, the banks or other institutions providing such facilities must be identified. (*Paragraph 7.9*)

Price of Property

12.32 We think it desirable to have a 3-day cooling-off period after signing of the preliminary agreement (which includes reservation agreement, memorandum of sale etc). If purchasers do not purchase the property after signing the preliminary agreement, they may have to pay such administrative fees as may be fixed by the appropriate authority. Licensed estate agents will be entitled to the administration fees. (*Paragraph 8.6*)

12.33 The price list must state the price of all flats put up for sale. Moreover, if the price will vary or some premium be charged according to some characteristics of the purchaser, rather than the qualities of the property, then that difference or the premium must be stated in the sales brochure or price list. (*Paragraph 8.7*)

Restrictions on Sale of Property to Foreigners

- 12.34 The sales brochure must contain the following information:
- (i) all legal restrictions on the eligibility of foreign purchasers or purchasers who are nationals but reside outside the country to purchase property and the legal nature and classification of such property in that country (for example, residential, farmland) and any restrictions on tenure which foreigners can acquire;
 - (ii) any restrictions on mortgage arrangements for foreign purchasers or purchasers who are nationals but reside outside the country; and
 - (iii) the tenure of the property (for example, whether it is freehold or otherwise).
(*Paragraph 9.13*)

Miscellaneous Information

12.35 The sales brochure must state with whom the responsibility for legal costs, stamp duty and other transaction fees lies. Unless the sales brochure has stated that such legal costs, stamp duty and other fees arising in respect of the property transaction are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer. Information on the scales of legal costs, stamp duty and other fees arising in respect of the property transaction must be provided by estate agents to prospective purchasers and there must be a note to this effect in the sales brochure. (*Paragraph 10.4*)

12.36 Details of any estate agents' commission payable by purchasers must be provided by the estate agents. (*Paragraph 10.5*)

12.37 The sales brochure must provide an itemised list of supplementary charges payable by purchasers upon taking possession of the property. If the exact amounts of such charges are unknown, the fact that they are unknown and the obligation to pay them must be disclosed in the sales brochure. Unless the sales brochure has stated that such supplementary charges are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer. (*Paragraph 10.7*)

12.38 The sales brochure must state the purchasers' liability for any tax which may arise from the purchase of the property together with categories of the taxes liable. (*Paragraph 10.9*)

12.39 The sales brochure must contain a warning that there may be exchange controls and taxes arising from the sale and purchase. (*Paragraph 10.16*)

12.40 The date of printing of the sales brochure must be clearly set out. (*Paragraph 10.18*)

12.41 The Hong Kong definition of saleable area (as reproduced in chapter 10) must be adopted in all sales brochures and advertisements of overseas uncompleted residential property. The saleable area must be disclosed in the sales brochure. (*Paragraph 10.24*)

12.42 Unless the sales brochure has stated that any extra fees or charges payable by developers are to be borne by purchasers, purchasers cannot be required to pay for them, or if purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer. (*Paragraph 10.27*)

12.43 The sales brochure must state the nature and duration of the interests that purchasers will take in the property. (*Paragraph 10.29*)

12.44 Where there are restrictions on the use of access or rights of way to the property or the site where the property is situated, the sales brochure must give details of the access and rights of way as well as the restrictions. (*Paragraph 10.31*)

Enforcement of the Recommendations

12.45 Our recommendations should be enforced by legislation. (*Paragraph 11.18*)

12.46 A breach of the proposed legislation will carry criminal or other sanctions only if the breach is committed intentionally or recklessly. (*Paragraph 11.19*)

12.47 The proposed legislation should carry the usual statutory sanctions of imprisonment and fines. (*Paragraph 11.20*)

12.48 Fines should be the usual form of sanction. The maximum fine for an offence under our proposed legislation should be very substantial to have sufficient deterrent effect. (*Paragraph 11.21*)

12.49 Imprisonment should be available as a penalty only where fines are not thought adequate in all the circumstances of the case. (*Paragraph 11.22*)

12.50 There should be statutory powers for the appropriate body to suspend, revoke or restrict an estate agent's licence for acts or omissions in breach of the proposed legislation. This sanction should be available in addition to any other penalty that may be imposed by the Court. (*Paragraph 11.23*)

12.51 A defendant to a charge or an enquiry by the appropriate body under the proposed legislation can invoke the "due diligence" defence if he can show that he has taken all reasonable steps and exercised all due diligence to avoid committing the offence, or has relied on information given by another, provided he can show that it was reasonable for him to have relied on the information. (*Paragraph 11.24*)

12.52 There should be civil remedies which enable purchasers, and sub-purchasers who buy before the time of completion to claim damages against the developer or the estate agent for loss suffered as a result of a breach of the proposed legislation. A breach of the proposed legislation should be a statutory tort. This remedy of damages for breach of the proposed legislation should only be available to purchasers, and sub-purchasers who buy before the time of completion but *not* potential purchasers even if they can show that they have suffered loss. (*Paragraph 11.25*)

12.53 There should be clear provisions in the new legislation that nothing in the legislation will detract from the rights of the purchaser under the ASP, and that no clauses in the ASP will detract from the statutory remedies in the legislation. (*Paragraph 11.26*)

Specimen List of Fittings and Finishes in Sales brochure

(For Overseas Property)

FITTINGS & FINISHES

1. Exterior

(a) External Walls

Finished with glazed ceramic tiles and acrylic paint.

(b) Windows

All units fitted with XX (country) XX (brand) aluminium frames together with glass/double glazing.

(c) Bay Windows

Bay window sills are finished with granite slab.

(d) Verandah/balcony

Verandah/balcony with granite flooring.

2. Interior Finishes

(a) Main Entrance Lobby

The floor and walls at the entrance of G/F lobby are finished with marble. Steel false ceiling is also installed.

(b) Typical Lift Lobby

The floor is finished with ceramic tiles. The walls and ceilings are finished with emulsion paint/wallpaper.

(c) Internal walls and ceilings

The internal walls and ceilings are finished with emulsion paint.

(d) Floors

Living dining room and bedroom floors are finished with teak parquet carpet and teak skirting.

(e) Bathroom

Walls are finished with ceramic tiles running up to the ceiling. The ceiling is plastered and painted with emulsion paint. The floor is finished with ceramic tiles.

(f) Kitchen

Walls are finished with ceramic tiles running up to the ceiling. The ceiling is plastered and painted with emulsion paint. The floor is finished with ceramic tiles.

3. Interior Fittings

(a) Doors

The doors of the entrance and kitchen of each unit are of solid-core teak veneered plywood. The entrance door is fitted with door lock and viewer. Other doors are made of veneered plywood.

(b) Bathroom

XX (country) XX (brand) washbasin;
XX (country) XX (brand) toilet;
XX (country) XX (brand) bath tub (1000 mm x 700 mm);
XX (country) XX (brand) shower;
XX (country) XX (brand) hot and cold water taps;
towel rail, shower curtain rail, soap holder and toilet-paper holder are provided.

(c) Kitchen

XX (country) XX (brand) stainless steel sink;
gas supply hose;
XX (country) XX (brand) kitchen cabinets with plastic laminate finish;
XX (country) XX (brand) hot and cold water taps.

(d) Bedrooms

One built-in wardrobe in the master bedroom and each bedroom.

(e) Telephone and Aerials

A telephone outlet in the living room, bedrooms and kitchen. A TV socket in the living room and master bedroom.

(f) Electricity

XX (country) XX (brand) conceal conduit wiring; XX (country) XX (brand) power points (2 for living room, 1 for each bedroom); all power points with safety devices against electricity leakage.

(g) Gas/Electricity Supply

Gas and electricity supply mains at kitchen.

(h) Washing Machine Connection Point

Water supply point and drainage point for washing machine in the laundry room.

(i) Water supply & Pipes

Exposed copper cold water pipes and concealed copper hot water pipes.

(j) Air-conditioners/Heating System

Every unit is fitted with 4 XX (country) XX (brand) air-conditioners, located respectively in the master bedrooms and living room or
A XX (country) XX (brand) central heating system/central air-conditioning system is provided in the building.

4. Security Facilities

(a) Security point at the main entrance/entrance lobby of each block.

(b) Entrance lobby access door at G/F is operated by door-phone system and secret code entry panel.

(c) Closed circuit TV cameras are inside all lifts.

5. Miscellaneous

(a) Lifts

6 XX (country) XX (brand) lifts for each block. The lifts serve all floors.

(b) Letter Box

Stainless steel letter boxes at G/F entrance lobby.

(c) Refuse Collection

Refuse collection room and refuse chute on each floor. Central refuse collection room on G/F.

(d) Water/Electricity/Gas Meters

The water, electricity and gas meters are installed in the mechanical rooms of the building.

Note : If the intended materials become unavailable, the developers can use substitute materials provided that the substitute materials are of comparable quality and standard to the intended materials.