

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

**SALES DESCRIPTIONS OF
OVERSEAS UNCOMPLETED RESIDENTIAL PROPERTIES**

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September 1997

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Introduction and Overview

Background

1. In recent years, many overseas uncompleted residential properties have been put up for sale or advertised in Hong Kong. For the purpose of this report, by “overseas properties” are meant any properties outside Hong Kong, including properties not only in Australia, Canada, New Zealand, Macau, Malaysia, Singapore, United Kingdom, United States, Taiwan and Thailand, but also those in Mainland China.

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. Despite the increasing volume of sales of overseas properties in Hong Kong in recent years, 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, purchasers do not have the chance to see the actual property prior to 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.

4. The problems of inadequate and misleading sales information in the sale of overseas uncompleted units are manifold. 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 overseas properties being sold to Hong Kong residents when in fact the properties can only be legally sold to purchasers resident in that country.

5. 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 advertisements or sales brochures. The gifts in some other

¹ Sing Tao Yat Pao, 29 December 1995.

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 utility 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.

6. 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

7. 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?”

8. 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.

9. 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)*.

10. The present report covers the second part of the sub-committee's study under the above terms of reference, namely, the sales descriptions of overseas uncompleted residential property.

Sub-committee membership

11. 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.

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

Professor Derek Roebuck (Chairman)	Formerly Professor of Comparative Law, City University of Hong Kong
Mr Tom Berry	Principal Solicitor, Lands Department
Ms Audrey EU Yuet-mee, SC	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	Consultant, Clarke & Liu, Solicitors
Mr William SHIU Wai-chuen (from 19.11.1993 to 30.1.1997)	Principal Assistant Secretary, Housing Branch, Government Secretariat
Ms Eva TO Hau-yin (since 30.1.1997)	Principal Assistant Secretary, Housing Bureau, Government Secretariat
Mr Kennedy WONG Ying-ho (since 27.1.1995)	Managing Partner, Philip K H Wong, Kennedy Y H Wong & Co Solicitor
Mr Martin WONG Kwai-poon (since 27.1.1995)	Chief Complaints & Advice Officer Consumer Council
Mr Marco WU Moon-hoi	Deputy Director of Housing Department

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

Meetings

14. The sub-committee commenced their study of the second part of the reference on 24 April 1995 and, between then and 21 February 1997, held a total of 21 meetings.

Consultation

15. On 12 September 1996, the sub-committee issued their interim report in the form of a consultative document ("the Consultative Document"). In it the sub-committee set out their interim recommendations relating to the sales descriptions of overseas uncompleted residential properties sold or advertised in Hong Kong. The purpose of circulating the Consultative Document was to invite property developers, agents, lawyers, members of the public and other interested parties, both in Hong Kong and overseas, to express their views on the matters raised and interim recommendations made.

16. The consultation period ended on 18 November 1996. The sub-committee however relaxed the deadline in answer to requests for extension from some respondents. A list of those who commented is at Annex II. The sub-committee considered all these comments and made a number of adjustments to their interim recommendations. The sub-committee endeavoured to balance the views of conflicting interests in arriving at its final recommendations, but its overriding objective was consumer protection. Although only some of the comments are highlighted or incorporated in this report, the sub-committee gave all comments due and thorough consideration.

Complaints relating to the sale of uncompleted overseas residential properties

17. The problem of inadequate and misleading sales descriptions is borne out by the increasing number of complaints involving overseas properties. According to statistics provided by the Consumer Council, from January 1990 to December 1995, there were 891 complaints arising from on sales of uncompleted overseas residential properties. The following is the breakdown of the complaints:-

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 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

18. In the middle of 1994, the Consumer Council made a survey of 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

19. 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").

20. 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.”

21. 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.

Inadequacies of the television and radio codes on advertising standards

22. Whilst the two codes are some positive measures to regulate advertisements for overseas properties on television and radio, they 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.

23. 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.

24. 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.

Lack of control over contents of sales brochures and newspaper advertisements

25. 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 contain inaccuracies 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 control over sales descriptions

26. In conclusion, there are at present insufficient control 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 report.

Scope of deliberations

27. Our discussion in this report is confined to the regulation in Hong Kong of sales descriptions of overseas uncompleted residential properties. That is to say, any uncompleted residential property situated outside the

boundaries of Hong Kong which is advertised for sale in Hong Kong is within the scope of our deliberations.

28. It is worth noting that all our recommendations in this report are applicable only to overseas uncompleted residential properties advertised for sale in Hong Kong.

Chapter 1

The General Approach

Difficulties of control 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. 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 overseas properties which are close 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 overseas developers and local purchasers. Many local estate agents merely act as sales agents. Some local estate agents, however, also participate in the development of overseas projects. The latter group of estate agents usually own a minority interest in the overseas projects. They act as both sales agents and co-developer of the overseas properties.

1.5 The local estate agent is usually responsible for arranging 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 consider also 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. At the time of the sub-committee's deliberations, the Estate Agents Bill 1995 had not yet been enacted. They have, however, taken into consideration the effects of the proposals contained in the Bill (in its original form) in formulating their recommendations.

1.7 The original Bill with some amendments was eventually enacted by the Legislative Council on 21 May 1997. One major amendment was to remove the criminal sanctions originally proposed for estate agents who supply false or misleading property particulars in relation to properties which they have executed an estate agency agreement. These property particulars are current ownership, floor area, age of property, user restrictions, unexpired term of the land lease, structural alterations and repairs or improvements. Estate agents who supply false or misleading property particulars will, however, still be liable to disciplinary sanctions such as suspension and revocation of licences. Notwithstanding the said amendment to the Bill, we still take the view that criminal sanctions are necessary for enforcing our recommendations. It is because the duties which we propose to impose on estate agents are of much greater scope than the said six categories of property particulars. Disciplinary proceedings alone cannot, in our view, provide sufficient deterrent for estate agents. Criminal sanctions are necessary to ensure compliance with our recommendations. Moreover, both the working group and the Bill (in its original form) took the line that criminal sanctions were necessary for ensuring compliance by estate agents.

Estate agent's responsibility for provision of basic sales information

1.8 Since licensed estate agents are now regulated by law with the enactment of the Estate Agents Bill, we consider them the appropriate 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 properties, because all estate agents handling overseas properties are either situated in Hong Kong or, under the newly enacted Estate Agents Ordinance, must be licensed in Hong Kong.

1.9 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.

1.10 Views were divided on our proposal to hold estate agents responsible for the provision of accurate sales information. Those who supported our proposal took the view that estate agents would in future exercise more care in handling the sales information in order to comply with the new requirements. On the other hand, some respondents, who belonged mainly to the estate agency trade, considered that estate agents should not be held liable for false or misleading sales information. The reason given was that estate agents, except those who also take part in the development of the projects, have to rely on information provided by developers.

1.11 We take the view that there would be a benefit and a cost to estate agents. The cost will be the liability for the accuracy of the sales information. The benefit will be a monopoly given to estate agents in handling overseas uncompleted residential properties (which we propose in the latter part of this chapter). Estate agents are not forced to undertake the responsibility. They should take on the job only if they are confident of doing it adequately. Moreover, the innocent estate agents will have the protection of the due diligence defence which we propose in chapter 11.

Recommendations on estate agents' responsibility for provision of basic sales information

1.12 We recommend that all licensed estate agents in Hong Kong handling overseas uncompleted residential properties must provide prospective purchasers with some basic sales information in sales brochures and price lists.

Focus on local advertisements and publicity on overseas properties

1.13 We consider it unrealistic to try to regulate all forms of publicity on overseas properties. For instance, it is impossible to control advertisements for overseas properties contained in internationally circulated newspapers, magazines, journals or periodicals which are not printed or produced in Hong Kong. We intend to concentrate on the regulation of sales brochures and advertisements that are produced or broadcast in Hong Kong.

1.14 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, magazine, journal or periodical which is *not* printed or produced in Hong Kong”.

1.15 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

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

1.17 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 are now regulated by the newly enacted Estate Agents Ordinance. 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 properties in exchange for the responsibility of providing sufficient and accurate sales descriptions to purchasers.

1.18 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 properties, whether they are from Hong Kong or overseas. Thus, both Hong Kong and overseas

vendors will be required to hire the services of Hong Kong estate agents. 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.

1.19 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.

1.20 There was a public comment that the future Estate Agents Authority should be empowered to regulate advertisements of licensed estate agents to ensure provision of accurate sales information. We consider that there is no way in which the Estate Agents Authority can take on the task of vetting all advertisements for overseas properties. We understand that the Estate Agents Authority would adopt the reactive approach, meaning that they will investigate only if complaints are made to them. Moreover, positive vetting of advertisements by the Estate Agents Authority is, in our view, not feasible because there are large numbers of uncompleted overseas residential properties sold or advertised in Hong Kong.

Language ambiguities

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

Recommendations on the general approach of regulating sales descriptions and advertisements

1.22 **We recommend that: all vendors of overseas uncompleted residential properties must engage licensed estate agents in Hong Kong. However, this requirement shall not apply to the sale of a single dwelling by a private individual.**

1.23 **All media in Hong Kong (including television, radio and printed media) should be prohibited from publishing advertisements for sale of overseas uncompleted residential properties unless they refer to licensed estate agents in Hong Kong, together with the estate agents' licence number. However, the requirements mentioned in this paragraph shall not apply to advertisements for the sale of a single dwelling by a private individual, nor to advertisements for overseas property not put up for sale in Hong Kong.**

1.24 **“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).**

1.25 **The estate agent 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.**

1.26 **Any ambiguity in the terms used in any advertisement or sales brochure shall be construed in favour of the purchaser.**

1.27 **Anything in the advertisements or sales brochures which is false or misleading should constitute a breach of the proposed legislation (mentioned in chapter 11).**

The availability of sales brochure

1.28 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 incorporate all necessary sales information into a radio or television commercial which may only last for a few minutes or seconds. Likewise, it is difficult to have all the necessary information contained in a standard newspaper advertisement.

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

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

1.31 In order to be of use to prospective purchasers, sales brochures should be available as early as possible. We think that sales brochures 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. We also take the view that all information in the sales brochure should be accurate at the time the property is first advertised for sale. To ensure that purchasers can obtain up-to-date information, we are of the view that if there have been any material changes in the information in the sales brochure between the date of its printing and the time the property is first advertised for

sale, a note to that effect should be attached to the sales brochure or the price list.

Recommendations on the availability of sales brochures

1.32 **We recommend that it should be the licensed estate agent's responsibility to make available up-to-date sales brochures to prospective purchasers. If sales brochures are not compiled by developers, it will be the licensed estate agent's responsibility to prepare the sales brochure.**

1.33 **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 whichever version or part thereof is applicable.**

1.34 **The sales brochures 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. All information in the sales brochure must be accurate at the time the property is first advertised for sale. If there have been any material changes in the information in the sales brochure between the date of its printing and the time the property is first advertised for sale, a note to that effect must be attached to the sales brochure or the price list.**

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 residential properties is that of delayed development or project failure.

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 materialise.

Reasons for project delay or failure

2.3 Because of the haste to cash in on the property boom during the early 90’s, some overseas residential developments commenced without thorough site investigation studies. Some developments were therefore built on land unsuitable for construction of residential properties. The soil was, for example, too soft or there was extensive underground water. Thus, additional construction works were needed to stabilize building site foundations, resulting in additional costs and delays.

2.4 Another common reason for the failure of some overseas residential projects is the reliance of developers on financing development costs by proceeds from pre-sale of properties. With unsatisfactory pre-sales, there would not be sufficient funds for developers to proceed with project development.

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 overseas property agreements, 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 completion of residential development on schedule and to prevent project failure

2.7 In our view, there is no effective way to ensure a residential development progresses on schedule because of the many factors affecting the progress of construction which may be outside the developer's control.

2.8 We consider that financial measures are needed to protect the deposits and instalments paid by purchasers 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 purchase deposits and instalments a viable solution in the case of uncompleted 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 overseas projects 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 purchasers' money should not be left in the hands of estate agents for extended periods. The arguments against stakeholding are also applicable to trust accounts since stakeholding is a kind of trust account.

2.10 We consider insurance a possible alternative. However, the value involved in property transactions is enormous. It will require a substantial insurer to take on the insurance. For 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 residential property developments.

2.11 Bonds put up by the developer appear, in our view, to be a more favoured 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 bonds should, in our view, be available to meet purchasers' claims in the event of project delay or failure. The amount of the bond should therefore cover all deposits and instalments paid by purchasers plus interest thereon at reasonable rates.

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

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

2.14 A respondent to the Consultative Document suggested that the developers' financial standing should be examined by the Securities and Futures Commission. We do not think that this suggestion is a realistic alternative. As there are large numbers of overseas residential properties developments sold or advertised in Hong Kong, the work involved in vetting the financial background of all developers would be formidable for any public body including the Securities and Futures Commission.

2.15 Another respondent suggested that some sort of compensation funds along the line of the travel agency trade should be established to deal with the problem of compensation to purchasers. In our view, as the value of property transactions is great, it would require a very large compensation fund in order to for it to be viable. Such a compensation fund for uncompleted overseas properties would require a high levy on consumers and we do not think too many purchasers would be willing to pay for it.

2.16 We consider that the sales brochure should state whether there are mechanisms to protect all deposits and instalments paid by purchasers in the event of project delay or failure. There was a suggestion from a respondent that where there is no mechanism to protect purchasers' deposits or instalments, the sales brochure should carry a prominent warning to this effect. We think this is a good suggestion and have incorporated it into our final recommendations.

Ready date for occupation

2.17 In our view, what really matters to purchasers 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 brochures.

2.18 We consider that a property is ready for occupation only when all fittings and finishes applicable to the property have been properly 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.

Recommendations on the completion date and ready date of property for occupation

2.19 **We recommend that: the sales brochure must state the date that the property will be ready for occupation. The term "ready for occupation" shall mean:**

- (i) all fittings and finishes which are specified in the list in paragraph 3.12 and which are applicable to the property concerned have been installed, unless 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.**

2.20 **The sales brochure must state the grounds on which the date of completion can be extended.**

2.21 **We recommend that the sales brochure must state whether there are mechanisms for protecting all deposits and instalments paid by purchasers in the event of project delay or failure. Where no**

mechanism is in place to protect purchasers' deposits or instalments, the sales brochure should carry a prominent warning to this effect.

Chapter 3

Fittings and Finishes

Introduction

3.1 The quality of fittings and finishes of the property is of vital importance to purchasers of uncompleted overseas properties for investment purposes. Low quality fittings and finishes reduce the resale value of the property for those who purchase for investment purposes and incur considerable expenses on maintenance and renovation for self use.

3.2 Not all purchasers of uncompleted overseas properties can see the quality of fittings and finishes. A few developers of overseas properties 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 overseas. Other developers put up mock-up flats at the building sites overseas but the Hong Kong purchasers can afford the time and trouble to visit such mock-up flats. Some local estate agents organise tours for prospective purchasers to see the mock-up flats at the building sites. But these tours are usually organised for overseas developments situated within a 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 of fittings and finishes of uncompleted overseas properties are often used in sales brochures. The exact types of fittings and finishes used are seldom specified. Vague descriptions such as “in accordance with government standards”, “good quality”, “pretty”, “deluxe”, “high class” and “imported” have been used in sales brochures.

3.5 The brands and countries of origin of the fittings and finishes used for uncompleted overseas properties 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 situations as the brands and countries of origin of the intended materials were not mentioned in the sales brochures or purchase agreements.

A reasonable level of disclosure is sufficient

3.6 We do not consider it desirable to require detailed disclosure in the case of uncompleted overseas property as it may create practical problems if disclosure of detailed specifications of fittings and finishes is required. Firstly, it will be difficult to ascertain the quality and standard of certain brands of fittings and finishes if not commonly used in Hong Kong. Secondly, it will be difficult to take action in Hong Kong against Authorized Persons in overseas countries who erroneously certify the substitute materials.

3.7 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 intended materials used for the fittings and finishes. If the intended materials become unavailable, developers should be allowed to substitute other materials provided that the substitutes are of comparable quality and standard to the intended materials.

3.8 There is nothing to preclude the developers from providing more than the minimum disclosure required provided that all descriptions of the fittings and finishes stated in the sales brochure must be accurate.

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

Mock-up flats

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

3.11 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 properties.

Recommendations on fittings and finishes

3.12 **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.

3.13 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.

3.14 Any description of the fittings and finishes in the sales brochure must be accurate.

3.15 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 properties.

Chapter 4

Utilities

Introduction

4.1 The availability of essential utilities such as water, electricity and gas supplies, sewage and drainage are of utmost importance to purchasers of residential properties. It is hard to imagine modern living without tap water or uninterrupted electricity supply. Properties which lack essential or adequate utilities supplies are not of much re-sale value and are unlikely to have good investment potential for prospective purchasers of overseas properties for investment purposes.

4.2 Hong Kong people are used to having essential utilities supplies as a matter of course in residential properties. Most purchasers of overseas properties will assume that there will be any significant charges for, or disruptions to, these essential utilities. 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 property boom in Hong Kong in the early 90's, many overseas property developments were started with the intention of offering them for sale in Hong Kong. Even rural communities joined in the property development boom. These areas 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 areas without the corresponding investment in public utilities to meet the increased demand for water, electricity, etc.

4.4 There were some instances of 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. Despite this, many Hong Kong purchasers have proceeded to buy overseas properties. We therefore consider it desirable to

require all sales brochures to describe the essential utilities, including water, sewage and drainage, electricity and fuel.

Costs of connection of utilities

4.6 According to the Consumer Council, most developers of overseas properties nowadays would absorb the costs of connecting water and electricity to the premises. However, there have been cases of developers charging purchasers fees under the heading of “water connection fee” or “electricity connection fee” on the pretext that the service providers in these cases were not very consistent in their pricing policies. There were also instances in which the costs of connection would be increased time after time and eventually greatly exceeded original expectation. Some developers in such instances 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 dissatisfied with the substantial charges levied.

4.8 We take the view that the sales brochures should state the current estimate of costs of connection to utilities, if any, at the time of sale. Moreover, in our view, there should 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 developers.

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 otherwise provided by a public system, the type of water, sewage and drainage systems must be specified in the sales brochures.**

Electricity

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

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 One of the most important considerations in the purchase of property is its location, in particular, proximity to city centres and the accessibility and availability of major transport facilities such as airport, highways, trains and buses. Information on the location of the property and transport facilities is of vital concern to purchasers of overseas properties. As purchasers seldom visit overseas properties prior to purchase, they can only rely on the descriptions contained in the sales brochures or 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 uncompleted 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, thereby creating misleading impressions to purchasers 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 was “only 30 minutes by train” from the capital city, but in fact was some 120 kilometers away. Moreover, there were only a few trains that would take half an hour and the journey would otherwise take 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 was not close to Hong Kong as it was 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 to the uncompleted overseas properties. The reality is that some of these transport facilities and highways are still in the planning stage or 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 It was stated in another advertisement for a development in Zhuhai 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 was in fact at a very preliminary stage of planning. It was still uncertain whether it would be built at all.

5.9 The location plan in advertisements and sales brochures is often used to give a misleading impression of the availability of public transport facilities. For example, an 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 was not provided in the location plan, the station could well be miles away from the development, albeit 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 sales brochures 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 to impose a requirement to state actual travel time and distance in sales brochures. We have come to the view that such a requirement should be left optional since it is 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 accurate and not misleading.

Pictorial representation

5.12 Sales brochures sometimes contain 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, rather than the reality of other buildings. We take the view that any pictorial representation of the surroundings should be accurate and not misleading.

Car-ports and car parks

5.13 We have considered whether or not sales brochures 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.

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 accurate 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 sales brochures or advertisements for uncompleted overseas properties contain promises of gifts or benefits for purchasers. Furniture items are 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 sales brochures or advertisements for uncompleted overseas properties. It was stated in advertisements for some overseas developments 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.¹ The promised quantities of gifts were not offered to all purchasers.

Waiver of fees and charges

6.3 Some sales brochures or advertisements state that certain fees and charges would be waived, including legal fees, estate agent's handling charges, electricity deposits, etc., but without mentioning that such waivers were subject to conditions. In the case of one overseas development, the waiver of estate agent's handling charges was subject to the purchase being made during the sales promotion period.²

Club membership

6.4 Club membership is another form of promised gift mentioned in some advertisements for overseas properties. But such a promise of club membership to purchasers is sometimes misleading. The advertisement for one overseas development stated that club membership costing \$10,000 would be offered. The club membership would in fact be available only to purchasers of bungalows and not apartments in the development.³

¹ *Choice Magazine*, p 19.

² Ditto.

³ Ditto.

Rental or buy-back guarantees

6.5 To entice prospective 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 only indicative with no binding effect.⁴ 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 Other advertisements stated that certain rental returns were guaranteed by developers. Such guarantee would be a great but illusory inducement to prospective purchasers. In the advertisement for one overseas development, 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.⁵ Should the completion of the development be delayed for whatever reasons, the guaranteed rentals would likewise be deferred.

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 a higher price after the specified period. But such buy back guarantee was subject to conditions not mentioned in the advertisements. For example, the buy back guarantee of one overseas development was subject to the condition that 90 percent of the purchase price had to be paid up within 6 months of purchase of the property.⁶ 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 which offered a buy-back guarantee that purchasers not realising an 80 percent investment appreciation could sell back their properties 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

⁴ Ditto.

⁵ *Choice Magazine*, p 20.

⁶ Ditto.

the case of one overseas development, whilst the advertisement stated that a lucky draw would be held for the gift of a free flat, it did not state the overriding condition that the lucky draw would only be held upon the sale of the whole development.⁷ Presumably, the lucky draw would be deferred indefinitely if any of the units remained unsold.

Nationality schemes

6.9 To some purchasers, the most attractive form of benefit is the offer of a foreign passport with the purchase of an overseas property. The problem with some of these promises of passports is that the scheme may be valid at the time of the advertisement but fail to materialise later because of changing conditions. At the time of the advertisement, it may be correct that one may obtain a foreign passport by investing in a property in the particular overseas country. However, subsequent changes in the laws of that country may render the passport deal invalid.

Disclosure requirement on promises of gifts and benefits

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

6.11 Since it is difficult to cover all nationality schemes in sales brochures, 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.

Recommendations on gifts and benefits

6.12 **We recommend that references in advertisements or sales brochures to gifts and benefits (including nationality schemes) must be accurate and not misleading.**

6.13 **We recommend that if the advertisements or sales brochures state that nationality or right of residence can be acquired by the purchase of property, they must contain a general warning advising prospective purchasers to consult the relevant consulates on the validity of the nationality schemes, particularly when the granting of nationality and residence or otherwise will depend on the individual's background.**

⁷ *Choice Magazine*, p 20.

Chapter 7

Financing Arrangements

Availability of mortgage facilities

7.1 In general, purchasers of uncompleted overseas properties 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. Hong Kong purchasers have been advised to choose only those overseas developments with mortgage facilities from banks, to avoid risky developments.

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

Misconception on mortgage facilities

7.3 It is a common misconception of many prospective purchasers that they will always be able to obtain the maximum mortgage as advertised. To dispel such misconceptions, we take the view that prospective purchasers should be advised that approval 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 advertisements or sales brochures state the availability of mortgage facilities, the banks or other financial institutions providing such facilities must be identified.

Costs of setting up mortgage facilities borne by purchasers

7.5 Some banks would only be willing to grant end-user finance to prospective purchasers for developers offering buy-back guarantees. In such situations, banks will charge developers for setting up such finance because they would need to 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 for the developers' costs of setting up the end-user finance. These extra costs can be substantial as developers have to pay set-up fees of 1 to 2 percent to the bank for mortgage facilities. Few purchasers are aware of these extra costs to be borne before proceeding to sign a formal contract with solicitors' firms.

7.6 We take the view that such additional costs must be stated in the advertisement or sales brochures. 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 required to pay under the general law, they shall be entitled to reimbursement from the developer.

Recommendations on financing

7.7 **We recommend that where advertisements or sales brochures state that mortgage facilities are available, they 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 approval of mortgage facilities or otherwise will depend on the individual's credit and other background.**

7.8 **We recommend that where the developers arrange mortgage facilities for prospective purchasers and intend to pass on to purchasers the costs of setting up such facilities, the amount of such costs must be stated in the advertisements or sales brochures. 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 required to pay under the general law, they shall be entitled to reimbursement from the developer.**

7.9 **We recommend that where advertisements or the sales brochures state that mortgage facilities are available, the banks or other financial 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 or sales brochures for uncompleted overseas properties give a false impression that the properties are inexpensive. Examples of advertised cheap prices of “\$100 per square foot” or “from HK\$60,000” may in fact mean that only one or two units are put up for sale at the prices advertised. Moreover, the advertised prices may be the discounted prices payable under the cash payment method. In some cases, the prices quoted in the advertisements did not match those in the price list.¹

8.2 The Consumer Council found that the prices advertised for one overseas development were in fact those prices intended for purchasers resident in the country and non-residents had to pay much more because of a premium payable to the authorities.

Full information on price necessary

8.3 To make an informed choice on property purchase, purchasers must be able to ascertain the prices. 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 can sometimes be imparted in advertisements, we consider it infeasible to require advertisements to state the prices of all units, 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 of uncompleted overseas properties are given in the price list.

8.4 A comment on the Consultative Document pointed out that as some flats may be reserved for sale in overseas countries, it should be clearly stated that “the price of all flats put up for sale” refers to flats put up for sale in Hong Kong. We think this is a valid comment and have decided to make the suggested change.

8.5 The prices shown in the sales brochures or price lists should, in our view, be the actual prices to be paid by purchasers. Hence, we consider that should there be price variations or some premium be charged according

¹ *Choice Magazine*, p 13.

to purchasers' characteristics, differences or any additional premium should be stated in the sales brochures or price lists.

Cooling-off period

8.6 Some purchasers buy uncompleted overseas properties impulsively because of cheap prices (relative to local property) quoted in advertisements or price list. Before committing to 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 countries where a 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 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 a safeguard against possible abuses of the cooling-off period. It was pointed out to us by some respondents that a cooling-off period may encourage speculation or may induce purchasers to make hasty buying decisions. We take the view that the right to forfeit part of the deposits by way of administrative fees will be sufficient deterrent for potential speculators or hasty purchasers.

8.7 One respondent suggested that it is necessary to spell out a cooling-off period of three working days. Otherwise, purchasers might encounter practical difficulties when they wish to inform the vendors or their representatives of the intention to rescind the preliminary agreement. We agree with the comment and have adopted the suggestion in our final recommendations.

8.8 **We think it desirable to have a cooling-off period of three working days 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 administration fees.**

Recommendations on property prices

8.9 **We recommend that the price of all uncompleted overseas properties put up for sale in Hong Kong should be stated in the brochures or price lists. Should there be price variations or a premium be charged according to purchasers' characteristics, rather than the qualities of the property, the price differences or additional premium must be stated in the sales brochures or price lists.**

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 may impose restrictions on land ownership by non-residents or foreigners. Few advertisements or sales brochures give details of such restrictions.

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

Restrictions to ownership

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

Mainland China

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

Singapore

9.5 In Singapore, there are restrictions on the kind of residential properties 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. The approval is subject to certain conditions 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 specified 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 the following two categories: 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); or 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. Even where there are restrictions, the sales brochures often only state that the property can be sold to "foreigners", "non-citizens", or "people outside the country" without mentioning that the sale is subject to some form of government approval.

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

9.11 Purchasers of overseas properties 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 should not be too onerous or unfair to expect the sales brochures to state all legal restrictions on foreign purchasers to purchase overseas properties.

Restrictions on tenure and mortgage arrangements

9.12 There are sometimes restrictions on the duration of the tenure which foreign purchasers who are nationals but resident outside a country can

acquire; the restrictions can sometime be on 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 brochures should contain information on restrictions pertaining to the duration of tenure and mortgage facilities for overseas properties.

Recommendations on restrictions on sale of overseas properties to foreigners

9.13 We recommend that the sales brochures of overseas properties 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 amount of transaction fees vary from country to country and may differ among various regions in the same country.

10.2 Although transaction fees may be substantial when compared with the value of overseas properties, advertisements and sales brochures seldom state the responsibility for, and the amount of, transaction fees. As transaction fees are usually borne by purchasers, we consider that purchasers should be informed of the amounts of such fees and their responsibility for them. 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 transaction costs to be borne invariably by purchasers. It is, in our view, only fair that purchasers be given a right to obtain details of any commission to be paid by them.

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 properties, various charges are often levied on purchasers, including deposits for water, electricity and gas supplies. These supplementary charges are seldom stated in the sales brochures. As purchasers are obliged to pay for these charges, we take the view that purchasers' liability for and the amounts of such charges, so far as the developers are 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 purchasers are required to pay under the general law, they shall be entitled to reimbursement from the developer.

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 properties may face various taxes which are seldom, if ever, disclosed in the sales brochures. For instance, there is a 10 percent land tax payable by a foreign purchaser of an overseas 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.

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 property buyers. For example, in buying PRC property, foreigners have to pay a deed levy at 6 percent of the purchase price, whilst purchasers who are Hong Kong, Macau or Taiwan residents pay 3 percent.

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 vendors and purchasers while the Deed Levy is to be borne solely by purchasers.

10.12 As Hong Kong does not have a system of capital gains tax, few purchasers are aware of the existence of such tax when they buy overseas properties. In some countries such as the PRC and UK, resales of properties, are subject to capital gains tax. The sales brochure rarely gives any information on capital gains tax. Capital gains tax can be very high in some countries. As purchasers may sometimes buy overseas property for profit, they may decide otherwise if they are aware beforehand that there will be high capital gains tax on the sales proceeds.

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

Foreign exchange control

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

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

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 preparation and publication, we consider that all sales brochures should state their date of printing. This would enable purchasers to determine whether the information in the sales brochure is outdated or not by reference to the date of printing.

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 areas represent 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 means¹:-

- (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;*

¹ 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.*)

- (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.

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 brochures and advertisements.

10.24 We also take the view that where the unit includes any incorporated item in the definition (such as cockloft, bay window, carparking space, yards, terrace, garden or flat roof), the saleable area of each of them should be specified and described separately in the sales brochures. This will give purchasers a better idea of the actual space which they get in respect of each of the items.

Recommendations on saleable area

10.25 **We recommend that the Hong Kong definition of saleable area (as set out in this chapter) must be adopted and disclosed in all sales brochures and advertisements of overseas uncompleted residential property. Where the unit includes any incorporated item in the definition (such as cockloft, bay window, carparking space, yards,**

terrace, garden or flat roof), the saleable area of each of them should be specified and described separately in the sales brochures.

Fees charged by government authorities

10.26 Purchasers of uncompleted overseas properties 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 where the authorities would charge the developers extra costs upon completion of the development for additional electricity requirements. The developers would then try to pass on these extra charges to purchasers. We have also come across a case in which purchasers have to pay extra because the actual area of the property is bigger than that shown in the sales brochure.

10.27 These extra fees are not disclosed 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, purchasers shall be entitled to reimbursement from the developer.

Recommendation on fees charged by government authorities

10.28 **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

10.29 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 indefinitely, 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.

Recommendation on tenure of the property

10.30 **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

10.31 We consider that details of any restrictions on access or rights of way should be related to purchasers in the sales brochures. The value of a property would 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.

Recommendation on access and rights of way

10.32 **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.**

Role of solicitors appointed by developers

10.33 It was suggested by a respondent to the Consultative Document that the role of solicitors appointed by overseas developers, whether acting as witness or attorney to transactions, should be clearly stated in the sales brochures. In our view, that suggestion was made because purchasers are often unaware that the solicitors appointed by overseas developers may sometimes act only as witnesses attesting the parties' signatures and not as purchasers' legal adviser. We take the view that it is better to leave it to the Law Society or the solicitors concerned to explain their role to purchasers rather than to explain such matters in the sales brochures.

Defect Liability Period

10.34 There are two Defect Liability Periods, namely, (i) that between the developer and his contractor and (ii) that between the developer and the purchaser. It is the second of these which concerns us. Within the Defect Liability Period (between the developer and the purchaser) the purchaser may request the developer to make good any defects in the property and its installations. The Consultative Document did not make any recommendation on the Defect Liability Period. It is our view that the duration of the Defect Liability Period between the developer and the purchaser is of great concern to purchasers and should be included in our recommendations.

Recommendation on Defect Liability Period

10.35 **We recommend that the Defect Liability Period (between the developer and the purchaser) should be stated in all sales brochures.**

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 prospective purchasers of overseas uncompleted residential properties. The next critical issue 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 It was suggested in the Consultative Document that a breach of the proposed legislation should carry a criminal sanction only if the breach is committed intentionally or recklessly. The intention was to prevent developers or estate agents from being penalised for unintentional errors or honest mistakes. Whilst we agree that intention or recklessness should be the *mens rea* for estate agents, we take the view that developers should be subject to strict liability. Unlike estate agents who must rely on second-hand information, developers should in most cases have with them first-hand property particulars. Any chance of developers making unintentional errors or honest mistakes is relatively remote. Even if developers have to rely on information supplied by others, they may invoke the due diligence defence mentioned below.

11.7 A respondent pointed out that mere failure to supply the necessary sales information would not be an offence under our proposal in the Consultative Document. It is because the offence will require *mens rea*, viz., intention or recklessness. It is often difficult to prove that the failure to supply necessary information has been intentional as the omission may arise from oversight. It is equally difficult to prove that the failure to supply information has been reckless. To establish recklessness it is necessary to show that an unjustifiable risk has been taken. Mere oversight may not amount to taking an unjustifiable risk. We therefore take the view that mere failure to supply the necessary information should be a strict liability offence but still with the due diligence defence mentioned later in this chapter.

(b) *Fines be the usual sanction*

11.8 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

11.9 The use of imprisonment as a penalty in the proposed legislation has generated much argument among ourselves. Likewise, the responses collected during consultation were equally divided on the imposition of a prison sentence. 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, otherwise a mere failure to supply the necessary sales information 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.

11.10 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

11.11 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

11.12 However, defendants 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 they can show that they have taken all reasonable steps and exercised all due diligence to avoid committing the offence. Moreover, we consider that defendants should also be able to invoke the "due diligence" defence by showing reliance on information given by another, provided they can show that it was reasonable for them to have relied on the information.

Civil remedies

(a) Damages

11.13 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 of overseas properties 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.

11.14 We consider that both developers and estate agents should be liable in damages to purchasers who have suffered loss. Whilst developers 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 newly enacted Estate Agents Ordinance, there is 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.

11.15 In order to avoid a flood of claims against the developers or the estate agents, 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

11.16 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.

11.17 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

11.18 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.

Recommendations on enforcement

11.19 We recommend that our recommendations should be enforced by legislation.

11.20 We recommend that a breach of the proposed legislation by estate agents carry criminal or other sanctions only if the breach is committed intentionally or recklessly. However, a breach of the proposed legislation by developers should be a strict liability offence (but with a due diligence defence). Moreover, mere failure to supply the necessary sales information as recommended in this report should also be a strict liability offence (but with a due diligence defence).

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

11.22 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.

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

11.24 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.

11.25 We recommend that defendants to a charge or an enquiry by the appropriate body under the proposed legislation should be able to invoke the "due diligence" defence if they can show that they have taken all reasonable steps and exercised all due diligence to avoid committing the offence, or have relied on information given by another, provided they can show that it was reasonable for them to have relied on the information.

11.26 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 developers or the estate agents 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.

11.27 **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 our 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 All licensed estate agents in Hong Kong handling overseas uncompleted residential properties must provide prospective purchasers with some basic sales information in sales brochures and price lists. (*Paragraph 1.12*)

12.4 All vendors of overseas uncompleted residential properties must engage licensed estate agents in Hong Kong. However, this requirement shall not apply to the sale of a single dwelling by a private individual. (*Paragraph 1.22*)

12.5 All media in Hong Kong (including television, radio and printed media) should be prohibited from publishing advertisements for sale of overseas uncompleted residential properties unless they refer to licensed estate agents in Hong Kong, together with the estate agents' licence number. However, the requirements mentioned in this paragraph shall not apply to advertisements for the sale of a single dwelling by a private individual, nor to advertisements for overseas property not put up for sale in Hong Kong. (*Paragraph 1.23*)

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 1.24*)

12.7 The estate agent 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 1.25*)

12.8 Any ambiguity in the terms used in any advertisement or sales brochure shall be construed in favour of the purchaser. (*Paragraph 1.26*)

12.9 Anything in the advertisements or sales brochures which is false or misleading should constitute a breach of the proposed legislations (mentioned in chapter 11). *(Paragraph 1.27)*

12.10 It should be the licensed estate agent's responsibility to make available up-to-date sales brochures to prospective purchasers. If sales brochures are not compiled by developers, it will be the licensed estate agent's responsibility to prepare the sales brochure. *(Paragraph 1.32)*

12.11 The sales brochures must be available in Chinese. If there are discrepancies between the Chinese and any other version of the sales brochures, purchasers can choose whichever version or part thereof applicable. *(Paragraph 1.33)*

12.12 Sales brochures 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. All information in the sales brochure must be accurate at the time the property is first advertised for sale. If there have been any material changes in the information in the sales brochure between the date of its printing and the time the property is first advertised for sale, a note to that effect must be attached to the sales brochure or the price list. *(Paragraph 1.34)*

Date of Completion and Date of being Ready for Occupation

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

12.14 The sales brochure must state the date that the property will be ready for occupation. The term "ready for occupation" shall mean:

- (i) all fittings and finishes which are specified in the list in paragraph 3.12 and which are applicable to the property concerned have been installed, unless 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 2.19)*

12.15 The sales brochure must state the grounds on which the date of completion can be extended. (*Paragraph 2.20*)

12.16 The sales brochure must state whether there are mechanisms for protecting all deposits and instalments paid by purchasers in the event of project delay or failure. Where no mechanism is in place to protect purchasers' deposits or instalments, the sales brochure should carry a prominent warning to this effect. (*Paragraph 2.21*)

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 3.12*)

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 3.13*)

12.19 Any description of the fittings and finishes in the sales brochure must be accurate. (*Paragraph 3.14*)

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 properties. (*Paragraph 3.15*)

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 otherwise provided by a public system, the type of water, sewage and drainage systems must be specified in the sales brochures. *(Paragraph 4.9)*

12.22 The sales brochure must state the source, voltage and ampage of the electricity supply. *(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 accurate 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 References in advertisements or sales brochures to gifts and benefits (including nationality schemes) must be accurate and not misleading. *(Paragraph 6.12)*

12.28 If the advertisements or sales brochures state that nationality or right of residence can be acquired by the purchase of the property, they must contain a general warning advising prospective purchasers to consult the relevant consulates on the validity of the nationality schemes, particularly when granting of nationality and residence will depend on the individual's background. *(Paragraph 6.13)*

Financing Arrangements

12.29 Where advertisements or sales brochures state that mortgage facilities are available, they 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 approval of mortgage facilities or

otherwise will depend on the individual's credit and other background. *(Paragraph 7.7)*

12.30 Where the developers arrange mortgage facilities for prospective purchasers and intend to pass on to purchasers the costs of setting up such facilities, the amount of such costs must be stated in the advertisements or sales brochures. 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 required to pay under the general law, they shall be entitled to reimbursement from the developer. *(Paragraph 7.8)*

12.31 Where advertisements or the sales brochures state that mortgage facilities are available, the banks or other financial institutions providing such facilities must be identified. *(Paragraph 7.9)*

Price of Property

12.32 We think it desirable to have a cooling-off period of three working days 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 8.8)*

12.33 The price of all uncompleted overseas properties put up for sale in Hong Kong should be stated in the brochures or price lists. Should there be price variations or a premium be charged according to purchasers' characteristics, rather than the qualities of the property, the price differences or additional premium must be stated in the sales brochures or price lists. *(Paragraph 8.9)*

Restrictions on Sale of Property to Foreigners

12.34 The sales brochures of overseas properties 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 set out in chapter 10) must be adopted and disclosed in all sales brochures and advertisements of overseas uncompleted residential property. Where the unit includes any incorporated item in the definition (such as cockloft, bay window, carparking space, yards, terrace, garden or flat roof), the saleable area of each of them should be specified and described separately in the sales brochures. (*Paragraph 10.25*)

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 10.28)*

12.43 The sales brochure must state the nature and duration of the interests that purchasers will take in the property. *(Paragraph 10.30)*

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 10.32)*

12.45 The Defect Liability Period (between the developer and the purchaser) should be stated in all sales brochures. *(Paragraph 10.35)*

Enforcement of the Recommendations

12.46 Our recommendations should be enforced by legislation. *(Paragraph 11.19)*

12.47 A breach of the proposed legislation by estate agents should carry criminal or other sanctions only if the breach is committed intentionally or recklessly. However, a breach of the proposed legislation by developers should be a strict liability offence (but with a due diligence defence). Moreover, mere failure to supply the necessary sales information as recommended in this report should also be a strict liability offence (but with a due diligence defence). *(Paragraph 11.20)*

12.48 The proposed legislation should carry the usual statutory sanctions of imprisonment and fines. *(Paragraph 11.21)*

12.49 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 11.22)*

12.50 Imprisonment should be available as a penalty only where fines are not thought adequate in all the circumstances of the case. *(Paragraph 11.23)*

12.51 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 11.24)*

12.52 Defendants to a charge or an enquiry by the appropriate body under the proposed legislation should be able to invoke the "due diligence"

defence if they can show that they have taken all reasonable steps and exercised all due diligence to avoid committing the offence, or have relied on information given by another, provided they can show that it was reasonable for them to have relied on the information. (*Paragraph 11.25*)

12.53 There should be civil remedies which enable purchasers, and sub-purchasers who buy before the time of completion to claim damages against the developers or the estate agents 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 11.26*)

12.54 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 11.27*)

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.

**List of Persons/Bodies Making Comments
on the Consultative Document**

Brooke Hillier Parker, Chartered Surveyors & International Property Consultants

Canada Land Ltd

Chartered Institute of Housing Hong Kong Branch

Chinese General Chamber of Commerce

Chinese University of Hong Kong (Faculty of Business Administration)

Chinese University of Hong Kong (Vice-Chancellor)

City University of Hong Kong (Department of Building and Construction)

City University of Hong Kong (Faculty of Law)

Consumer Council

Crown Solicitor, Attorney General's Chambers

Director of Housing

Director of Lands

Government Property Administrator

Hong Kong Association of Banks

Hong Kong Coalition of Service Industries

Hong Kong General Chamber of Commerce

Hong Kong Housing Society

Hong Kong Institute of Real Estate Administration

Hong Kong Institute of Surveyors

Hong Kong Polytechnic University (Department of Business Studies)

Hong Kong Polytechnic University (Department of Building and Real Estate)

The Honourable J D McGregor, OBE ISO JP, Executive Councillor

Kwun Tong District Board

Law Society of Hong Kong

Legislative Council Panel on Housing

Messrs Forsyte Saunders Kerman, Solicitors, United Kingdom

Midland Realty

Mr Paul S Kent

Mr Frankie F L Leung, California

Regalian Group of Companies, United Kingdom

Secretary for Broadcasting, Culture and Sport

Wanchai District Board